

# 2016 Family Law Midyear Meeting and Conference

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Friday, June 24 - Sunday, June 26, 2016 Vancouver, WA

*Presented by WSBA CLE*

*in partnership with the WSBA Family Law Section*

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Tell us what you think: [www.surveymonkey.com/r/16529VAN](http://www.surveymonkey.com/r/16529VAN)



# Co-Chairs and Faculty

## A Special Thank You to Our Program Co-Chairs and Faculty!

Those who have planned and will present at this WSBA CLE seminar are volunteers. Their generous contributions of time, talent, and energy have made this program possible. We appreciate their work and their service to the legal profession.

### Program Co-Chairs

Elizabeth Christy — *Elizabeth Christy Law Firm PLLC, Vancouver, WA*

Jean A. Cotton — *Cotton Law Offices, Elma, WA*

### Program Faculty

Richard L. Bartholomew — *Attorney at Law, Olympia, WA*

Robert V. Boeshaar — *Attorney at Law, Seattle, WA*

Anne M. Bremner — *Frey Buck PS, Seattle, WA; Ann Bremner, PC, Seattle, WA*

Kurt M. Bulmer — *Attorney at Law, Seattle, WA*

Larry J. Couture — *L.J. Couture PS, Tacoma, WA*

Kim O. Dales — *Windermere, Seattle, WA*

Ruth L. Edlund — *Wechsler Becker LLP, Seattle, WA*

Rachel L. Felbeck — *Law Office of Rachel L. Felbeck, Kirkland, WA*

Casey Granston — *Caliber Home Loans, Bellevue, WA*

Scott Horenstein — *The Scott Horenstein Law Firm PLLC, Vancouver, WA*

N. Joseph Lynch — *Lynch Law Offices, Olympia, WA*

Paula M. Martin — *Marla Heikkala & Associates, Vancouver, WA*

Christina A. Meserve — *Connolly Tacon & Meserve, Olympia, WA*

Landon E. Poppleton, PhD — *NW Family Psychology, Vancouver, WA*

Rhea J. Rolfe — *Gilson-Moreau & Associates PS, Bellevue, WA*

Judge James E. Rulli — *Clark County Superior Court, Vancouver, WA*

Kevin G. Rundle — *Lutz Law Offices PS, Tacoma, WA*

Charles E. Szurszewski — *Connolly Tacon & Meserve, Olympia, WA*

Anne van Leynseele — *NWMJ Law PLLC, Seattle, WA*

Valerie A. Villacin — *Smith Goodfriend PS, Seattle, WA*

J. Mark Weiss — *Law Office of J. Mark Weiss PS, Seattle, WA*

Juliana U. Wong — *Frey Buck PS, Seattle, WA*

Catherine Wright Smith — *Smith Goodfriend PS, Seattle, WA*

Nicole Zenger, PhD — *NW Family Psychology, Vancouver, WA*

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# Program Schedule

## 2016 Family Law Midyear Meeting and Conference

**Friday, June 24 - Sunday, June 26, 2016**

**- Day 1 -**

- 10:00 a.m.** **Check-in • Registration and Brunch on Your Own • Exhibits Open**
- 11:50 a.m.** **Welcome and Opening Remarks by Program Co-Chairs**  
*Elizabeth Christy, Elizabeth Christy Law Firm PLLC, Vancouver  
Jean A. Cotton, Cotton Law Offices, Elma*
- 12:00 p.m.** **Current Issues in Ethics**  
*Kurt M. Bulmer, Attorney at Law, Seattle*
- 1:00 p.m.** **Enforcing Judgments, Collecting Attorneys Fees**  
*N. Joseph Lynch, Lynch Law Offices, Olympia*
- 2:00 p.m.** **BREAK - Exhibits**
- 2:15 p.m.** **Prenuptial Agreements: To Do or Not To Do**  
*Judge James E. Rulli, Clark County Superior Court, Vancouver  
Scott Horenstein, The Scott Horenstein Law Firm PLLC, Vancouver*
- 3:15 p.m.** **Five Things You Should Know About Taxes and Divorce**  
*Robert V. Boeshaar, Attorney at Law, Seattle*
- 4:15 p.m.** **BREAK - Exhibits**
- 4:30 p.m.** **Domestic Violence Restraining Orders**  
*Anne M. Bremner, Frey Buck PS, Seattle; Ann Bremner, PC, Seattle  
Juliana U. Wong, Frey Buck PS, Seattle*
- 5:30 p.m.** **Legislative Updates**  
*Kevin G. Rundle, Lutz Law Offices PS, Tacoma  
Richard L. Bartholomew, Attorney at Law, Olympia*

*Schedule continued on next page*

*Program Schedule (cont.)***6:30 p.m.****Adjourn Day One****6:45 p.m.****No-host Section Reception and Hors D'oeuvres**

Entertainment with Pat Cashman and other surprises

Guest tickets: \$20

**- Day 2 -****7:00 a.m.****Late Check-in • Walk-in Registration • Coffee and Pastry Service • Exhibits Open****7:55 a.m.****Welcome and Introduction by Program Co-Chairs***Elizabeth Christy, Elizabeth Christy Law Firm PLLC, Vancouver**Jean A. Cotton, Cotton Law Offices, Elma***8:00 a.m.****Determining Jurisdiction for Interstate Families***Larry J. Couture, L.J. Couture PS, Tacoma**Rhea J. Rolfe, Gilson-Moreau & Associates PS, Bellevue***9:00 a.m.****Approaches for Disarming Hardball Negotiation Tactics***J. Mark Weiss – Law Office of J. Mark Weiss PS, Seattle***10:00 a.m.****BREAK - Exhibits****10:15 a.m.****Why Can't We Be Friends?****The Use and Abuse of Social Media in Family Law Cases***Ruth L. Edlund, Wechsler Becker LLP, Seattle***11:15 a.m.****Recreational Marijuana and Impact on Family Law**

Chapter Description

*Rachel L. Felbeck, Law Office of Rachel L. Felbeck, Kirkland**Anne van Leynseele, NWMJ Law PLLC, Seattle***12:00 p.m.****SECTION SPONSORED LUNCHEON (included in tuition) - Exhibits****1:00 p.m.****Elections/Awards/Annual Section Meeting****1:30 p.m.****Social Security Changes Affecting Divorce***Paula M. Martin, Marla Heikkala & Associates, Vancouver***2:30 p.m.****Shared Parenting Plans and Parenting Plans for Children Based on Age***Landon E. Poppleton, PhD, NW Family Psychology, Vancouver**Nicole Zenger, PhD, NW Family Psychology, Vancouver***3:15 p.m.****Adjourn Day Two**

Bike Tour, Historical Iking Tour and Other Fun Stuff – Dinner on your own

*Schedule continued on next page*

*Program Schedule (cont.)***- Day3 -**

- 7:00 a.m.**      **Coffee and Pastry Service • Exhibits Open**
- 7:55 a.m.**      **Welcome and Introduction by Program Co-Chairs**  
*Elizabeth Christy, Elizabeth Christy Law Firm PLLC, Vancouver  
Jean A. Cotton, Cotton Law Offices, Elma*
- 8:00 a.m.**      **Appeals and Family Law**  
*Catherine Wright Smith, Smith Goodfriend PS, Seattle  
Valerie A. Villacin, Smith Goodfirend PS, Seattle*
- 9:00 a.m.**      **Residential Real Estate Challenges in a Divorce**  
*Kim O. Dales, Windermere, Seattle  
Casey Granston, Caliber Home Loans, Bellevue*
- 10:00 a.m.**      **BREAK - Exhibits**
- 10:15 a.m.**      **Case Law Update**  
*Charles E. Szurszewski, Connolly Tacon & Meserve, Olympia  
Christina A. Meserve, Connolly Tacon & Meserve, Olympia*
- 12:15 p.m.**      **Adjourn Conference • Complete Evaluation Forms**

# Co-Chair Biographies

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## **Elizabeth Christy**

Elizabeth Christy practices family law exclusively. She has had her own practice, Elizabeth Christy Law Firm PLLC, for almost nine years. Prior to starting her firm, Elizabeth was an extern for the Honorable Marjorie Slabach in the Unified Family Court for the county of San Francisco. Elizabeth has enjoyed serving as the Washington State Bar Association's Family Law Executive Committee's Secretary for the past two years. She served the Clark County Bar Associations Family Law Section as Secretary for one year and President for two years and has acted as a Pro Tempore Commissioner presiding over family law matters.

## **Jean A. Cotton**

Jean A. Cotton is a solo practitioner doing business as Cotton Law Offices in Elma, Washington. She obtained her J.D. from Seattle University School of Law. A substantial portion of her practice consists of Family Law issues where she serves as an attorney as well as a guardian ad litem in Title 4, 11, 13, and 26 RCW cases. She has been a Court Commissioner and Judge Pro Tem for the Grays Harbor Superior and District Courts since 1995. She has served on the Executive Committee of the WSBA Family Law Section since 2001 and is currently the FLEC Liaison to the WSBA Board of Governors. Jean served as chair of FLEC in 2007-8 and has been a program chair or co-chair for five Family Law Mid-Year Conferences. She was the 2008 Family Law Section Attorney of the Year. Jean has been active in several community and professional organizations including not limited to the WSBA Local Court Rules Task Force and the Supreme Court Dissolution Task Force and as a Washington delegate to the 2006 Council of Community Property States. Jean and her husband, Tony, enjoy traveling and playing golf in their spare time.

Under MCLE Rules, we report hours of course attendance. Our report is based on you confirming your attendance with our CLE representative as you arrive, and the receipt of the form below from anyone who chooses to attend only part of the seminar.

We ask that you complete this form and turn-in to our representative if you leave before the end of the program.

Thank you, WSBA-CLE

**The purpose of this form is to notify the sponsor listed below if you have earned less than the available credits while attending this CLE course.** You can fax your completed form to WSBA-CLE: (206) 727-8324.

*Under Washington State MCLE Rules (APR 11(j)(3)), sponsors must report attendance at each CLE course. The sponsor's report is based on confirming your attendance as you arrive and the receipt of this form as you leave if you choose to attend only part of the CLE course.*

- If this form is not returned, the sponsor will presume that you have attended the entire CLE course and earned full credit.
- If you did not attend the full CLE course, this form must be returned to the sponsor.

**How to calculate L&LP/Ethics/Other credits:**

One credit is equivalent to one hour (60 minutes) of instruction time at an approved CLE course. Credits can be obtained in quarter-hour increments: 15 minutes of instruction equal .25 credits. No credit is given for breaks. Contact the sponsor if you have questions about which sections of the program, if any, have been approved for ethics credit.

For information, see the following website or contact the WSBA Service Center.

<http://www.wsba.org/Licensing-and-Lawyer-Conduct/MCLE/Members/Member-Online-MCLE-FAQs> - [questions@wsba.org](mailto:questions@wsba.org)

Seminar Sponsor:	<u>WSBA-CLE</u>												
Seminar Name:	2016 Family Law Midyear Meeting and Conference (16529VAN)												
Seminar Date:	June 24 - 26, 2016												
Approved Credits:	<b>14.75 CLE Credits for Washington Attorneys</b> ( <u>13.75</u> Law & Legal Procedure, <u>1.0</u> Ethics and <u>0.0</u> Other)												
Hours of Attendance:	<table border="1"> <thead> <tr> <th>TIME OF ARRIVAL</th> <th>TIME OF DEPARTURE</th> </tr> </thead> <tbody> <tr><td> </td><td> </td></tr> <tr><td> </td><td> </td></tr> <tr><td> </td><td> </td></tr> <tr><td> </td><td> </td></tr> </tbody> </table>			TIME OF ARRIVAL	TIME OF DEPARTURE								
TIME OF ARRIVAL	TIME OF DEPARTURE												
Credits Earned:	L&LP	Ethics	Other										
Printed Name:	Bar #: _____												
I hereby certify that I have earned the number of L&LP/Ethics/Other credits inserted above on the Credits Earned line.													
Signature:	Date:												

## CHAPTER ONE

### CURRENT ISSUES IN ETHICS

June 2016

**Kurt M. Bulmer  
Attorney at Law**

Phone: (206) 325-9949  
Email: [kbulmer@comcast.net](mailto:kbulmer@comcast.net)

**KURT M. BULMER** attended Willamette University School of Law graduating in 1974 and was admitted to the practice of law that same year. Before entering private practice in 1982 he was an attorney for the Washington State Bar Association including serving as General Counsel. His private practice is limited to the representation of attorneys, law firms, judges and other members of the legal community on professional responsibility, ethical and disciplinary matters. He has represented hundreds of lawyers and judges in disciplinary settings, court proceedings and on a consulting basis. He has argued professional responsibility issues before the State Supreme Court on over 25 cases. He has served on local and national committees and task forces on professional responsibility issues as well as having extensively lectured and testified as an expert on the subject.

ISSUES IN LEGAL ETHICS

BAR GRIEVANCES AND OTHER ISSUES

**CURRENT AND RECURRING ISSUES**

- a. Trust account problems
- b. Fee agreement problems when secured by real property
- c. Unreported IRS Form 8300 Cash
- d. Mx. Report

**RESPONDING TO BAR GRIEVANCES**

- a. I am never getting one so why are you boring me with this?
- b. So I get one, what will it be about?
- c. Bulmer FAQs on Lawyer Discipline

1-2

**Report of Cash Payments Over \$10,000  
Received in a Trade or Business**

► See instructions for definition of cash.

► Use this form for transactions occurring after August 29, 2014. Do not use prior versions after this date.

For Privacy Act and Paperwork Reduction Act Notice, see the last page.

1 Check appropriate box(es) if: a  Amends prior report; b  Suspicious transaction.**Part I Identity of Individual From Whom the Cash Was Received**

2 If more than one individual is involved, check here and see instructions . . . . .		► <input type="checkbox"/>	
3 Last name		4 First name	5 M.I.
7 Address (number, street, and apt. or suite no.)		8 Date of birth . . . (see instructions)	M M D D Y Y Y Y
9 City		10 State	11 ZIP code
14 Identifying document (ID)	a Describe ID ►	b Issued by ►	
	c Number ►		

**Part II Person on Whose Behalf This Transaction Was Conducted**

15 If this transaction was conducted on behalf of more than one person, check here and see instructions . . . . .		► <input type="checkbox"/>	
16 Individual's last name or organization's name		17 First name	18 M.I.
20 Doing business as (DBA) name (see instructions)		Employer identification number	
21 Address (number, street, and apt. or suite no.)		22 Occupation, profession, or business	
23 City		24 State	25 ZIP code
27 Alien identification (ID)	a Describe ID ►	b Issued by ►	
	c Number ►		

**Part III Description of Transaction and Method of Payment**

M M D D Y Y Y Y	29 Total cash received \$ .00	30 If cash was received in more than one payment, check here . . . . .	31 Total price if different from item 29 \$ .00
		<input type="checkbox"/>	
32 Amount of cash received (in U.S. dollar equivalent) (must equal item 29) (see instructions):			
a U.S. currency \$ .00	(Amount in \$100 bills or higher \$ .00 )		
b Foreign currency \$ .00	(Country ► )		
c Cashier's check(s) \$ .00	Issuer's name(s) and serial number(s) of the monetary instrument(s) ►		
d Money order(s) \$ .00			
e Bank draft(s) \$ .00			
f Traveler's check(s) \$ .00			

33 Type of transaction	34 Specific description of property or service shown in 33. Give serial or registration number, address, docket number, etc. ►
a <input type="checkbox"/> Personal property purchased	f <input type="checkbox"/> Debt obligations paid
b <input type="checkbox"/> Real property purchased	g <input type="checkbox"/> Exchange of cash
c <input type="checkbox"/> Personal services provided	h <input type="checkbox"/> Escrow or trust funds
d <input type="checkbox"/> Business services provided	i <input type="checkbox"/> Bail received by court clerks
e <input type="checkbox"/> Intangible property purchased	j <input type="checkbox"/> Other (specify in item 34) ►

**Part IV Business That Received Cash**

35 Name of business that received cash		36 Employer identification number	
37 Address (number, street, and apt. or suite no.)		Social security number	
38 City		39 State	40 ZIP code
41 Nature of your business			
42 Under penalties of perjury, I declare that to the best of my knowledge the information I have furnished above is true, correct, and complete.			

Signature



Authorized official

Title



43 Date of signature	M M D D Y Y Y Y	44 Type or print name of contact person	45 Contact telephone number

1-3

**Multiple Parties**

(Complete applicable parts below if box 2 or 15 on page 1 is checked.)

**Part I Continued—Complete if box 2 on page 1 is checked**

3 Last name	4 First name			5 M.I.	6 Taxpayer identification number									
7 Address (number, street, and apt. or suite no.)				8 Date of birth . . . ► (see instructions)			M	M	D	D	Y	Y	Y	Y
9 City		10 State	11 ZIP code	12 Country (if not U.S.)			13 Occupation, profession, or business							
14 Identifying document (ID)		a Describe ID ► c Number ►						b Issued by ►						
3 Last name				4 First name			5 M.I.	6 Taxpayer identification number						
7 Address (number, street, and apt. or suite no.)				8 Date of birth . . . ► (see instructions)			M	M	D	D	Y	Y	Y	Y
9 City		10 State	11 ZIP code	12 Country (if not U.S.)			13 Occupation, profession, or business							
14 Identifying document (ID)		a Describe ID ► c Number ►						b Issued by ►						

**Part II Continued—Complete if box 15 on page 1 is checked**

16 Individual's last name or organization's name			17 First name			18 M.I.	19 Taxpayer identification number								
20 Doing business as (DBA) name (see instructions)							Employer identification number								
21 Address (number, street, and apt. or suite no.)							22 Occupation, profession, or business								
23 City		24 State	25 ZIP code	26 Country (if not U.S.)											
27 Alien identification (ID)		a Describe ID ► c Number ►						b Issued by ►							
16 Individual's last name or organization's name			17 First name			18 M.I.	19 Taxpayer identification number								
20 Doing business as (DBA) name (see instructions)							Employer identification number								
21 Address (number, street, and apt. or suite no.)							22 Occupation, profession, or business								
23 City		24 State	25 ZIP code	26 Country (if not U.S.)											
27 Alien identification (ID)		a Describe ID ► c Number ►						b Issued by ►							

Comments – Please use the lines provided below to comment on or clarify any information you entered on any line in Parts I, II, III, and IV

1-4

## **Definitions**

**Cash.** The term "cash" means the following.

- U.S. and foreign coin and currency received in any transaction; or
- A cashier's check, money order, bank draft, or traveler's check having a face amount of \$10,000 or less that is received in a designated reporting transaction (defined below), or that is received in any transaction in which the recipient knows that the instrument is being used in an attempt to avoid the reporting of the transaction under either section 6050I or 31 U.S.C. 5331.

**Note.** Cash does not include a check drawn on the payer's own account, such as a personal check, regardless of the amount.

**Multiple payments.** If you receive more than one cash payment for a single transaction or for related transactions, you must report the multiple payments any time you receive a total amount that exceeds \$10,000 within any 12-month period. Submit the report within 15 days of the date you receive the payment that causes the total amount to exceed \$10,000. If more than one report is required within 15 days, you may file a combined report. File the combined report no later than the date the earliest report, if filed separately, would have to be filed.

1-5

The gender-neutral *Mx.* is used as a title for those who do not identify as being of a particular gender, or for people who simply don't want to be identified by gender.

Mx. Mx.

'Mx.' is a gender-neutral honorific for those who don't wish to be identified by gender. Though the earliest print evidence dates to 1977, the word has only recently become popular. Pronounced to sound like *mix* or *mar*, the title *Mx.* (which, like other honorifics, is styled without the period in British English) is used increasingly on various official forms in the UK, including driver's licenses and banking documents.

Although the earliest print evidence of *Mx.* is from a 1977 issue of an American magazine called *Single Parent*, the title has not seen much official or published use in the US. It did, however, appear twice recently in *The New York Times*: a June 4th article noted *Mx.* as someone's preferred honorific, and a June 5th article all about *Mx.* made it clear that the June 4th use was an exception. The title simply isn't familiar enough to the newspaper's readers to be fully adopted.

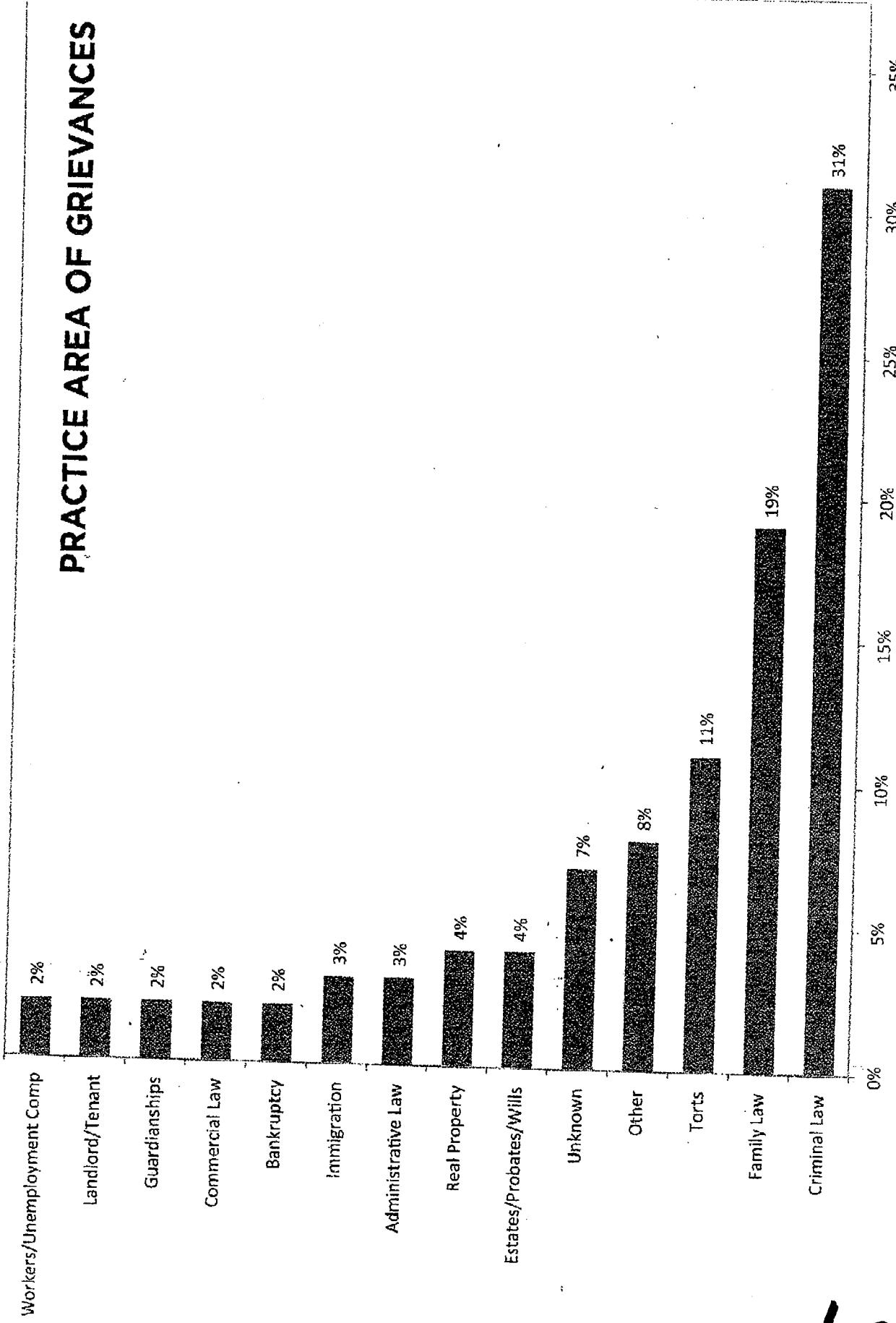
It's not clear whether or when *Mx.* will catch on in the US. The timeline for such developments can be long, as the title *Ms.* taught us not all that long ago. Coined in 1901, the now-commonplace *Ms.* wasn't fully adopted by *The New York Times* until 1986. *Mx.* seems to be moving more rapidly—it was added to Merriam-Webster's *Unabridged* in April 2016.

1-6

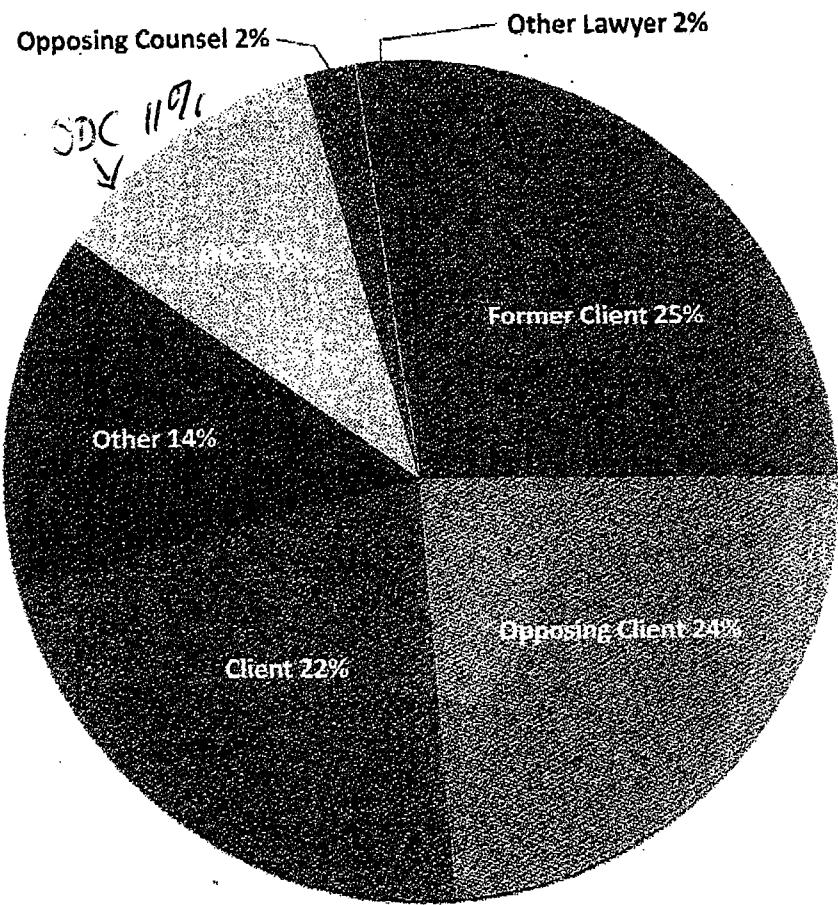
## **RESPONDING TO BAR GRIEVANCES**

- a. I am never getting one so why are you boring me with this?**
- b. So I get one, what will it be about?**
- c. Bulmer FAQs on Lawyer Discipline**

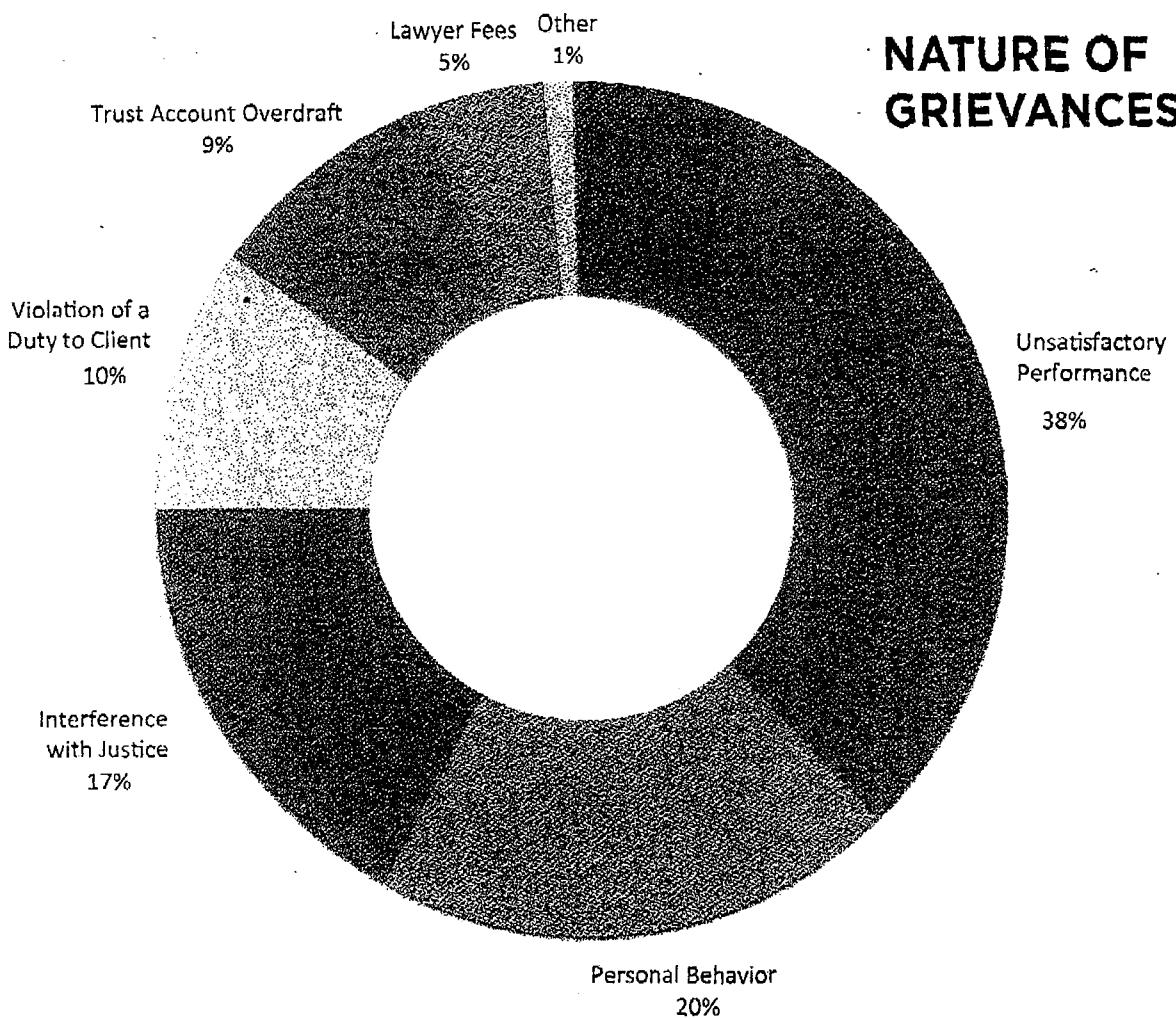
## PRACTICE AREA OF GRIEVANCES



## **SOURCES OF GRIEVANCES FILED**



## NATURE OF GRIEVANCES



1-10

## **AREAS OF COMMON GRIEVANCES IN FAMILY LAW**

### **1. Opposing party allegations:**

- a. Lawyer lied or helped client lie**
- b. Lawyer is having sex with soon to be ex**
- c. Lawyer was unfair to pro se opposing party**

### **2. Former client allegations:**

- a. Lawyer charged too much**
- b. Lawyer had poor communications and/or did not explain what was happening so client agreed to bad deal**
- c. Rarer than from opposing party but lawyer had sex or propositioned sex**

### **3. Third party allegations – outside persons such as judges or more often Bar Association based on information in a grievance but which the grievant did not specifically complain about or learned by the Bar during investigation:**

- a. Unreasonable behavior**
- b. Trust account problems**
- c. Fee agreement problems when secured by real property**
- d. Unreported IRS Form 8300 Cash**

1-11

[Please note, this is a draft of a document I am in the process of developing so it is a bit rough. Also I am always seeking input on questions to include so any suggestions are welcome.]

## LAWYER DISCIPLINE FAQS

1. Who are the players? The person who complains is the grievant. The Bar is the Office of Disciplinary Counsel (ODC). You are the respondent.
2. What happens in short order? You get a grievance in the mail which asks for a response, usually within a month. This will come from the intake department at the ODC. You are asked to self-identify the potential professional ethics issues which may be very self-evident from the grievance or maybe very hard to pick out because there is none or the grievance is very complex. No matter which, you will need to provide a response. Unless you specifically seek confidentiality, everything you send goes to the grievant so your response will generally be sent to the grievant who then has a chance to reply. You are not entitled to the reply but it will generally be sent to you. Once the information go around has been completed the intake department does a review and either dismisses or sends to investigating counsel. Eventually what is called an analysis letter is prepared. It will either dismiss or ask that the grievance be ordered to hearing.
3. What if I don't reply in time? The period set by the ODC to reply was established by the ODC based on a court rule that requires a timely response. The initial period is not set by court rule and a failure to comply is not a per se rule violation. Nonetheless, it will generally be to your advantage to reply within the timeframe since the intake department has broad powers to dismiss so the matter could be wrapped up relatively quickly. If you do not reply within the ODC time schedule you will be sent a "ten-day" letter. This requires a response within ten days. This is a court rule ordered deadline and negative things can happen if you do not reply within the ten days.
4. What does it mean if I get a notice that the case has been reassigned to investigating counsel? All this means is that the grievance has "timed out" at the intake department; they have a relatively rigid time-based workflow schedule and move grievances, both with merit and without merit, downstream when they get to the end of the intake time schedule. No negative conclusions are to be reached just because the grievance is assigned to investigating counsel.
5. Do I need a lawyer? If you know or suspect you have a problem, then you need a lawyer from the beginning. It can make a significant difference in the end result. If

you feel confident that you do not have a problem, you can go *pro se* and the majority of respondents do so. However, remember the ODC specializes in professionally responsibility and may see problems you do not so do not be quick to assume you do not have a problem. It is always best to have a lawyer with experience in the field even if you are sure you are “innocent” but at a minimum at least have another lawyer look over your response, even if it is one of your buddies, since that second set of eyes is important.

6. If I get a lawyer won't the ODC see that as an admission that I have problems? No, the ODC recognizes that respondents hire lawyers for all sorts of reasons and, in fact, believe that given the complexities of discipline law, that the wise lawyer hires counsel no matter what the merits of the grievance and it is the foolish one who does not.
7. Do I need to tell my malpractice carrier about the grievance? This will be driven by what your policy says. Most have a requirement of notice once you are aware that an action may be filed against you. The analysis will be different if the grievant is a client or a former client or if the grievant is an opposing party or someone else. However, you will probably be required to disclose the grievance on your renewal application so often there is little to be gained by failing to notify the insurance company. See discussion below about defense cost payments by the insurance company.
8. Should I attempt to negotiate resolution with the grievant outside the Bar process? This is a complex issue depending on the exact circumstances. There is a risk that you can be accused of obstructing the Bar's investigation if you do contact the grievant but on-the-other-hand resolution, as long as it is not conditioned on the grievant withdrawing the grievance, can often go a long way to resolving the grievance in your favor. For example, suppose the allegation is that you failed to provide full billing to the former client. A direct response to the former client saying you are sorry and did not realize that was an issue enclosing the billings with a cc to the Bar could lead to the grievance being dismissed. General advice in this area is not possible as it will be circumstance driven but be cautious about direct contact with the grievant. If in doubt ask the ODC if they have any objection.
9. Will the grievance go away if the grievant withdraws it? No. The Supreme Court has enacted a rule that says a grievance is not closed just because the grievant no longer wishes to pursue it. While this can be a factor in the ODC's consideration, withdrawal of the grievance in and of itself will not result in dismissal.
10. The grievant is a current client or could be considered one, what do I do? As a general rule in civil cases withdraw and/or send notice to the putative client that you are no longer their attorney. Timing of the withdrawal may depend on the status of any litigation and may need to be done under CR 71 but usually filing a complaint against your attorney is considered constructive discharge at a minimum. But, sometimes the client truly does not appreciate what they have done or maybe impaired and they

think complaining to the Bar is sort of like just going to a higher up. In rare occasions, a respondent may continue to represent the grievant with appropriate waivers. Private counsel in criminal cases are in a similar situation and will generally seek to withdraw under the criminal rules. Appointed counsel in criminal cases will have a more complex decision in which the appointing court will almost certainly have a role and say.

11. What does it cost to be represented? Like any area of the law there is a broad range of fees but most experienced counsel in professional responsibility have fees of \$300 an hour and up. It would be unusual for a reasonable reply to be prepared, after review of the grievance, in less than 3-4 hours. After that the fees will depend on where the case goes.
12. Is there insurance to pay for my discipline defense? Most malpractice policies now have a clause covering defending grievances at the Bar. There are a wide range of coverage amounts and what triggers the coverage so you need to check the specifics of the policy but as a general rule policies tend to start with the initial response onward. On most policies, this is additional coverage to the malpractice coverage so any payments by the insurance company do not apply to the limits and most do not require any deductible to be paid.
13. I don't want to alert my insurance company to the potential problem so should I just cover the costs, even if I have coverage? You will probably have to disclose the grievance when you renew unless you lie on the renewal application, always a very bad thing to do, so you might as well get the coverage if it is available.
14. Is the ODC my pal or my enemy? Neither, they are good lawyers who see themselves as being in the consumer protection business so feel they are neutral at the start of any grievance. Some respondents make the mistake of assuming that since the ODC is part of the respondent's Bar Association that there is at least some initial inclination to see it from the lawyer's perspective or at least to accept the lawyer's word on matters. That is not so but neither does the ODC believe that grievants are mostly right and lawyers are mostly wrong. The best way to look at the ODC is to see them as investigating prosecutors who will go where their investigation takes them so need to be dealt with with respect but caution. While it should be obvious a remarkable number of respondent's attack the ODC lawyers, question their personal integrity and allege the ODC lawyer cannot possibly understand what it is like to practice in the "real world." This is more than counter-productive – the Bar lawyers are thick skinned so they do not retaliate but it makes you look like you have problems so need to blow smoke to hide them.
15. What should be in my response? The ODC is not limited to just the issues in the grievance so responses need to be crafted to be candid and direct but to not provide unnecessary information that might open up new avenues of inquiry. Generally, you will not just copy the file and send it in with a "Here, this shows I did nothing wrong" reply. Most *pro se* lawyers tend to over reply. Remember when replying to a

grievance you need to keep in mind possible admissions which could be used in a malpractice action and to consider if there potential criminal, civil, tax, employee/employer and other issues.

16. What about my privileges when responding? This is different than the client's or former client's privileges. See below. You too have privileges and rights. When responding be sure that you have given carefully considered whether you want too or perhaps are unintentionally waiving such things as your attorney-client privilege with your own attorney, your spousal privilege, your physician-patient privilege or your 5<sup>th</sup> Amendment rights.
17. What about my client's attorney-client privilege? In order to respond it is often necessary to reveal client confidences. The Supreme Court has enacted a rule that says you may not assert your client's privilege as a reason not to provide information. This is true even where an opposing party is the grievant. If the grievant is your client or a former client, you need not take special steps to preserve the confidences when responding. If, however, the grievant is someone else and in order to respond you need to reveal client confidences, you must take the affirmative step of indicating what information is privileged within the response and the ODC is required by court rule to preserve that information. In a few unique criminal cases there is an exception to the requirement to provide privileged information such as where the information has been requested but the information is essentially a confession by your client. To get this exception requires a motion.
18. The grievance is totally bogus and the grievant is just scum motivated by evil intentions so why don't I tell the ODC that so they will know what kind of person the grievant is? The character and motives of the grievant are rarely relevant as to whether or not you did something bad so stay on point as to what you did or did not do and do not attack the grievant. Attacking the grievant can make you look like you are seeking to divert attention from your conduct. The only time the grievant's character or motive is relevant is if it is your word against theirs where there is no secondary source of confirmation. Even then it is generally advisable to make such arguments as low key as possible.
19. After the totally bogus grievance is dismissed, I want to sue the grievant, how do I do that? You cannot. The Supreme Court has enacted a court rule that provides immunity to grievants no matter how outrageous, scurrilous and untrue the allegations may be. However, this is true only as long as the grievant keeps the allegations within the Court's disciplinary framework so if the grievant sends a copy of the outrageous, scurrilous and untrue allegations to some other place whatever rights you have are not affected just because they were also sent to the ODC.
20. What can happen to me? The vast majority of grievances are dismissed. If not then the process can result in non-disciplinary actions including warning letters and diversion or disciplinary actions. Disciplinary actions include reprimands for which you do not lose the right to practice, suspensions of up to three years and disbarment.

21. Besides the obvious, what are the consequences of a disciplinary action? For a reprimand and even for those who are suspended, the most significant consequence will often be the posting of the notice of action on the Bar's website and in the lawyer directory. As of now that never goes away and searches on the lawyer's name will generate this negative information. This apparently permeant public shaming can be the greatest barrier to settlement of matters with the ODC.
22. Any other consequences? You may be responsible for the ODC's costs. Depending on when the matter is resolved these can range from a few hundred dollars into the tens of thousands.
23. If I win a contested matter can I get my costs from the Bar? No, the Supreme Court has enacted a rule that provides for a one-way cost rule. If the Bar "wins" they get costs; if you "win" you do not. You have to bear the defense costs if you cannot get your insurance to pay for it.
24. Can I charge my client for what it costs me to defend? No. Irrespective of whether the grievant is a client, former-client, opposing party or anyone else, the Supreme Court has enacted a rule that prohibits a lawyer from charging a client or seeking an award for the costs of responding to a grievance.
25. Do I need to tell my client about the grievance? Assuming the allegations are about a specific case and the assertions are not being made by a client or a former client, you need to advise your client of the allegations since the allegations relate to the client's case.
26. How long will it take? Dismissals with simple investigations consisting of gathering information strictly from the respondent and the grievant, can be a matter of weeks but generally it will be several months so be patient. Time passing does not mean the ODC is giving credence to the grievance. They get 2,000 plus grievances every year and yours will be someplace in the queue. If the matter moves into a more complex investigation or toward disciplinary action, it will be several months, mostly likely at least six or so, to get a determination of where you are.

## CHAPTER TWO

**ENFORCING JUDGMENTS, COLLECTING ATTORNEYS FEES**

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**N. JOSEPH LYNCH** is an attorney in private practice in Olympia, Washington, who has been practicing law since his graduation from Gonzaga Law School in 1977. A significant part of his practice relates to family law issues, but he also has an extensive practice in collection of judgments/debts. This includes all facets of collection matters/foreclosures, which he has undertaken on behalf of a large credit union since 1982. Mr. Lynch's general practice also includes the areas of real estate, estate planning, probate and guardianship, corporate and LLC's, personal injury plaintiff work and defense. Prior to joining his family's law firm in 1977, Mr. Lynch attended Santa Clara University in Santa Clara, California, where he received a BS in Political Science in 1973 and then attended law school at Gonzaga University School of Law, graduating in 1977. He is a member of the Washington State Bar Association, Thurston County Bar Association, a former member of WSTLA, as well as volunteering in the area of historic preservation for many years. Mr. Lynch has acted as a mediator, arbitrator, pro tem judge/court commissioner in the past.

## **ENFORCING JUDGMENTS: COLLECTING ATTORNEY FEES**

This presentation is divided into two (2) different components, although there will be overlap between them. The first portion of the presentation, both today as well as in your material, focuses on your relationship with your client. That relationship will discuss fee agreements, methods of security, attorney liens, collection of unpaid fees and the like.

The second part of the presentation will provide information for your use in enforcement of provisions of Divorce Decrees or other court orders. The enforcement provisions that will be discussed include contempt, enforcement of Decree by specific order, separate suits for conversion, foreclosure of liens, foreclosure of other security instruments, as well as replevins, receivership, and issues surrounding posting a bond. This paper will also touch on filing a Creditor's Claim in probate matters, fraudulent conveyance proceedings, filing of a Lis Pendens, and other miscellaneous (and sometimes peculiar) possible avenues to accomplish your goal.

Whereas it is possible to identify the majority of possible collection avenues in this type of paper, it is impossible to discuss them all in sufficient detail. An entire law school class covering a complete semester would be needed to do so.

### **FEE AGREEMENTS/COLLECTION OF FEES**

The topic of attorney fees and fee agreements is covered generally by RPC 1.5. A fee agreement needs to be written clearly and cleanly without a lot of "legalese". Most fee agreements will require an advanced fee deposit, and contain provisions regarding payments to be made either on a monthly/periodic basis or as needed to replenish the original fee deposit. The fee agreement may include a deposit for a trial, which should require the deposit of funds by a certain number of days prior to a scheduled trial. Contingent fees in family law matters for any purpose are not allowed. It is possible to draft a fee agreement that charges a flat fee for specified legal services, but also converts into a more standard fee agreement requiring an advanced fee

deposit if services go beyond the definition of those specified for the flat fee. Specific reference can be made to RPC 1.5(f)(2), which is,

(2) A lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and is paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt, in which case the fee shall not be deposited into a trust account under Rule 1.15A. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of services to be provided; (ii) the total amount of the fee and terms of payment; (iii) that the fee is the lawyer's property immediately on receipt and will not be placed into a trust account; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed. A statement in substantially the following form satisfies this requirement:

"[Lawyer/law firm] agrees to provide for a flat fee of \$\_\_\_\_\_ the following services: \_\_\_\_\_. The flat fee shall be paid as follows: \_\_\_\_\_. Upon [lawyer's/law firm's] receipt of all or any portion of the flat fee, the funds are the property of the [lawyer/law firm] and will not be placed in a trust account. The fact that you have paid your fee in advance does not affect your right to terminate the client-lawyer relationship. In the event our relationship is terminated before the agreed-upon legal services have been completed, you may or may not have a right to a refund of the portion of the fee."

A number of attorneys with whom I am familiar either have a standard practice of requesting some sort of security for the payment of their fees in any significant case, or elect to do so from time-to-time, depending upon the amount of fees owed but not yet paid. Common methods of providing such security include execution of a Security Agreement covering some type of personal property, including cars or boats, as well as execution of a Deed of Trust on real estate owned by the client. Whereas a Promissory Note can be utilized to identify an outstanding debt, it will give you no additional benefit,

versus a standard fee agreement with payment provisions and interest rate. However, a trap lays in wait if you do not handle the acquisition of a security interest in a proper manner.

RPC 1.8 "*Conflict of Interest*": current clients: specific rules requires the lawyer to undertake certain actions in acquiring a security interest in any type of assets. These actions are set forth in subparagraph (a) of Rule 1.8 and state the following:

- (a) 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 an independent lawyer 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.

Other than the execution of a Promissory Note, any attempt to acquire an additional type of security interest either at the beginning of or during the course of representation of a client should **always** result in your providing written notice to the client that you are seeking this type of security instrument, what the intent of your action is, and that the client is being provided with at least ten (10) days to seek advice of an independent lawyer on the matter. Even if you create the security document correctly, it may be considered to be over-reaching if you do not follow the terms of RPC 1.8.

At the conclusion of your representation of a client, whether that be at the end of the case, or upon your withdrawal, you may assert an attorney lien pursuant to RCW 60.40.010. That lien may be asserted upon papers of the client which have come into your possession; money in your hand belonging to the client; money in the hands of an adverse party from the time of giving the notice; upon an action and its proceeds to the

extent of value of any services performed by the attorney; or upon a judgment to the extent of the value of any services performed by the attorney in the action. The attorney lien has priority upon a judgment over all other liens.

However, the practical application of the Attorney Lien Statute, unless you are holding funds belonging to your client or the opposing side has funds or owes funds owing to your client, is of limited assistance in being able to collect fees owed down the line. RCW 60.40.030, whereas recognizing the attorney lien upon papers in your possession, will result in a judge ordering you to turn over the papers to your client if the action is still pending. However, the court may impose as a condition of making the order, that the client give security in some form to satisfy the lien. From a practical standpoint, this allows you to hold your client's file as a "hostage" pending receipt of some sort of security to pay your fees.

As an aside, if you have a client who requests a copy of his/her file, you may **not** charge the client for the copy of the file. The file belongs to the client, and whereas you may certainly run a copy of all or part of it to retain, you may not pass that copy cost onto the client.

If your representation of a client in a case is concluded and you are still owed attorney fees, you have the option of filing a separate civil suit against the client if the client does not otherwise agree to make payment on the balance due to you. Potential results of that civil suit include the entry of a judgment against the client, the execution of a Stipulation between you and your client, setting forth payment terms, without entry of a judgment, or the client filing a counterclaim for malpractice against you. Whether or not you file the lawsuit against your client individually, or through another attorney, or even if you refer the matter to a collection agency, the potential black cloud of a malpractice counterclaim always exists. Therefore, always evaluate how much is owed, what your deductible is on your malpractice policy, whether or not there are any feasible accusations the client can make other than simply blowing smoke, and whether it is worth the potential of a nightmare of a malpractice claim being on your record, whether you win or not.

If you file a civil suit against the client, it may be possible to come to a resolution, which can result in the execution of a written Stipulation between you and your client. This Stipulation can be drafted to set forth an agreement that a certain sum of money is owed and that if that sum is paid at regular intervals, and if the amount is eventually paid off in conformance with the terms of the agreement, then the lawsuit will be dismissed with prejudice. The terms should include an interest rate and the usual default provisions contained in a Promissory Note should the client not maintain the payment arrangement. The advantage to you is that you eventually get paid. The advantage to the client is that they are allowed periodic payments with the benefit that no judgment is ever entered against them if they comply with the agreement.

If a judgment is entered against the client, then standard collection procedures, including garnishment, attachment, supplemental proceedings and other civil remedies which will be discussed later, may all be utilized in collecting that judgment.

Always assess whether or not any judgment that may be entered is actually going to be collectible. If the client has no significant assets other than ones that are judgment-proof, it may not be worth your time and effort to pursue a judgment. A bankruptcy will wipe out all the debt that your client owes you, unless the client reaffirms any obligation to you in a bankruptcy proceeding, which is not a common occurrence.

### **ENFORCEMENT OF JUDGMENTS**

Depending upon whether you are collecting a money judgment or enforcing the terms of a Decree, there are different avenues open to you. The following is a list of possible actions to take with citations to certain statutes or case cites.

1. Contempt. Contempt is used for a number of things related to support, child support, maintenance, payment of bills, and other topics relating to the support of the moving party. There are two types of contempt, civil contempt and criminal contempt. In family law matters, it is most common to invoke the civil contempt provisions. A paper, found in the Washington State Bar Association Family Law Deskbook provides a comprehensive analysis of contempt power in the domestic relations arena. Statutory reference can be made to RCW 7.21, which codifies both civil

and criminal contempt. Contempt may be used under various circumstances in order to enforce or coerce obedience of a court order or to punish for disobedience thereof.

A contempt motion may not be used to obtain a money judgment for the retention of personal property (Doctrine of conversion; failure to pay certain bills or anything else related to a money judgment). Please see the case of *Mickens v. Mickens, 62 Wn.2d 876 (1963)*.

2. Habeas Corpus. Although more frequently noted in the appellate courts by prisoners in an attempt to obtain release, a Writ of Habeas Corpus may be used in a child custody proceeding in the event that a child is being restrained or hidden in what is alleged to be an unlawful situation. Issuance of the Writ will require the person having physical custody of a child to produce said child and physically bring that child or children to court on a specific date at a specific time. See RCW 7.36.

3. Ne Exeat. Whereas you may have been under the impression that debtor's prison no longer exists, it may exist under certain circumstances explained here. Ne Exeat is an equitable remedy which may be viable when there is a desire to restrain a person from going beyond the limits of the jurisdiction of the court prior to satisfaction of a claim or performance of a component of a contract, e.g., a written separation contract. An action may be commenced upon any agreement in writing before the time for performance of the contract expires when the plaintiff files the appropriate documents with the court asserting that the defendant is about to abscond from the state without performing or making provisions for performance of a contract or undertaking, taking with him property otherwise subject to execution with an intent to defraud the plaintiff. The result of a Complaint for Ne Exeat is that an Order of Arrest and Bail, directed to the Sheriff, will be issued with the defendant being arrested and detained pending hearing. See RCW 7.44.

4. Receivership. A receiver is a person appointed by a court to take charge of property during the pendency of a proceeding or after a judgment is entered, and to manage and dispose of it as the court may direct. There are several grounds for appointment of a receiver, including the following:

- A. To vacate a fraudulent purchase of property or subject to a piece of property to a creditor's claim.
- B. In an action between partners or other persons jointly interested in property or fund.
- C. In the case where it is shown that the property or fund is in danger of being lost, removed or materially injured.
- D. In such other cases as may be provided by law in the discretion of the court when it may be necessary to secure ample justice to the parties.

Receivership is within the discretion of the court and the burden of proof is on the applicant. Receivership has been approved in marital proceedings in the State of Washington. **Mosher v. Mosher, 25 Wn.2d 778, 172 P.2d 259 (1946)**. There are several special rules in relation to receiverships that may be found in Civil Rule 66. Receivership law is codified at RCW 7.60.

5. **Replevin.** A replevin action may be used to recover the possession of personal property, including use of a Show Cause Order to obtain immediate delivery of such property, after a hearing. The required showing to allow for a Writ of Replevin to issue includes the following:

- A. That plaintiff is the owner of the property or is lawfully entitled to possession of it by a special property interest, including a security interest.
- B. The property is wrongfully detained by the defendant.
- C. The property has not been taken for a tax assessment or fine pursuant to statute, and has not been seized under execution or attachment.
- D. The approximate value of the property.

The various rules and procedures for replevin are set forth in RCW 7.64. This is particularly helpful if, following entry of the Decree of Dissolution in which an award of personal property is made to one party, the other party does not turn over the item - - in fact, hides it. A Writ of Replevin can include a "Break and

Enter Order" allowing the Sheriff to search the premises to find whatever is missing.

6. Execution. A monetary judgment may be enforced by execution.

Execution may be issued against personal property and against real property, including the residence of the defendant. However there are a myriad of different rules concerning executions that are found in the following chapters:

RCW 6.13 -- Homesteads

RCW 6.15 -- Personal Property Exemptions

RCW 6.19 -- Adverse Claims

RCW 6.21 -- Sales Under Execution

RCW 6.23 -- Redemption

The general statute is found at RCW 6.17. Attempting to execute on property subject to homestead is a complex and at times frustrating procedure. Any execution against real estate will need to address the issue of redemption rights. The author suggests that unless you intend to pursue the remedy of execution against real estate with more than isolated frequency, that you defer this type of a collection remedy to a fellow attorney who understands the inter-relationship of these various statutes.

8. Attachment. Attachment is a remedy that may be pursued at any time during or following completion of the action. The plaintiff may, at the time of commencing an action, request that the property of the defendant be attached in the manner prescribed by statute as security for the satisfaction of any judgment that may enter. There are numerous rules for issuance of Pre-Judgment Writs of Attachment. The rules basically boil down to irreparable harm to be suffered by the moving party. A Pre-Judgment Writ will require a bond or other security. If the Writ of Attachment is wrongfully sued out, the defendant may recover actual damages sustained and reasonable attorney's fees. There are several grounds for issuance of a Writ of Attachment, including the following:

Defendant is not a resident of the state.

Defendant has concealed himself so that he is not subject to service of process.

Defendant has absconded from his usual place of abode.

Defendant has removed or is about to remove property from the state with the intent to delay or defraud a creditor.

Defendant has assigned, secreted or disposed of or is about to do so with any of his property with intent to delay or defraud creditors.

Defendant is about to convert his property for the purpose of placing it beyond the reach of creditors.

Defendant has been found guilty of fraud in contracting a debt or incurring an obligation for which the action is brought.

The damages for which the action is brought or for injuries arising from the commission of a felony, gross misdemeanor or

That the object for which the action is brought is to recover on a contract, express or implied.

A threat made by an ex-spouse that he or she is intending to leave the state or ship significant items of property out of state could fall under the attachment statute. Additionally, if there has been a physical assault for which damages are sought by one spouse from another, attachment of an asset, not otherwise exempt, may be allowed in order to protect from having the defendant be judgment proof at the time of entry of a judgment. Finally, a separation contract, not otherwise converted into a Divorce Decree, may allow for attachment should one of the parties to the contract breach same and cause damage to the other party. The attachment statute is found at RCW 6.25.

9. Garnishment. A monetary judgment may be enforced by garnishment.

Although the most commonly used Writ of Garnishment is against earnings, garnishment may also issue against any individual or entity that is indebted to the defendant in an amount exceeding those exempted from garnishment by any state or federal law, or in the event that the garnishee has possession or control of personal property or effects belonging to the defendant which are not exempt from garnishment by state or federal law. A Writ of Garnishment may issue against earnings, bank accounts, rental payments, contract payments, or anything similar where the defendant is owed money for whatever reason by a third party. Garnishment rules and provisions are found at RCW 6.27.

10. Appointment of a Commissioner. The court may order the execution of documents necessary to carry out its decree, including execution of documents to convey real estate. In relation to execution of documents unrelated to real estate, execution of same may be enforced pursuant to the court's contempt powers.

**Robinson v. Robinson, 37 Wn.2d 511, 225 P.2d 411 (1950).** In relation to execution of real estate documents, contempt powers may be used, as well as provisions of RCW 6.28.

11. Supplemental Proceedings. Supplemental proceedings allow a creditor to require a debtor to appear in court on a date certain to answer any and all questions in relation to assets available to satisfy a judgment that has been previously entered. A debtor may be required, pursuant to subpoena, to bring with him/her any and all relevant documents. If the defendant does not live in the county, you may issue execution interrogatories containing the same questions as you would ask at court and requiring the production of documents. Should a debtor either refuse or fail to appear at a time set for the inquiry, a Bench Warrant may be issued for the debtor's arrest. Procedures in relation to supplemental proceedings are set forth in RCW 6.32.

12. Unlawful Detainer. The remedy of unlawful detainer may be used in a situation where a tenant or an individual with an interest in real property for less than life occupies said real property either without permission of the owner or for longer than the agreed upon period of time. There are several different potential scenarios set forth in the statute. In a family law setting, in addition to dealing with a potential tenancy issue in a rental property, and in addition to other potential enforcement remedies within the dissolution proceeding, unlawful detainer could be used to oust the ex-spouse from a home in which that spouse had temporary use following entry of the Decree of Dissolution. It is probable that this remedy would be faster and more efficient than a show cause and contempt hearing. Unlawful detainer proceedings have special rules, special forms, and special requirements. These are set forth in RCW 59.12.

13. Lien Foreclosure. There are a variety of different types of liens that may be filed pursuant to RCW 60. The most common is the Mechanic or Materialmen's Liens, which are found at RCW 60.04. Each particular chapter referencing a different

type of lien has its own foreclosure or collection provisions. Although foreclosure of liens pursuant to Title 60 provisions would be unlikely to apply as between spouses or ex-spouses, the provisions of Title 60 may be applicable to assets acquired or debts undertaken in relation to unrelated third parties. Generally, in relation to Mechanic's and Materialmen's Liens, there is a 90-day filing period following completion of work within which to file a lien. Under some circumstances, prior notice of the intent to do so is required. There is also an 8-month statute of limitations applicable in circumstances in order to allow actual foreclosure of the lien (this does not affect the statute of limitations on the debt itself -- only on the lien foreclosure).

14. Foreclosure of Mortgages, Deeds of Trust and Real Estate Contracts. RCW 61 has separate chapters for foreclosure of the identified real estate security documents. Mortgage foreclosures are discussed in RCW 61.12; Deed of Trust foreclosures are discussed in RCW 61.24; and Real Estate Contract forfeiture proceedings are discussed at RCW 61.30. Although the processes have some similarity, particularly Real Estate Contract forfeitures and Deed of Trust foreclosures, each statute must be read carefully. Over the past several years, there has been a tendency by courts generally, to give the benefit of the doubt to the debtor when creditors make relatively minor mistakes in the foreclosure process. Although that mistake is generally not fatal to the creditor's security interest, it does require the creditor to start over in the foreclosure process, which is costly. Mortgages are required to be foreclosed judicially. As a result, the rules surrounding redemption as previously discussed herein, and which are found at RCW 6.23, apply to the mortgage foreclosure. Although Deeds of Trust and Real Estate Contracts may be foreclosed judicially (in which case they are treated similar to mortgages), they may also be foreclosed non-judicially by service and recordation of the appropriate notices as required by each of the particular statutes.

Foreclosure of Deeds of Trust will be the most commonly used remedy in a dissolution setting. Although there are forms available and the procedure is fairly straightforward, there are time frames and time limits, as well as notice requirements that need to be carefully followed. Although foreclosure of Deeds of Trust generally relate to third parties, if a Deed of Trust is given from one spouse to the other, either by agreement

or by court order within a Decree of Dissolution, and should the obligor spouse then default, that Deed of Trust may be foreclosed non-judicially and the obligor spouse will receive no special treatment as a result of the prior marital relationship. This procedure may also be used if your client has given you a Deed of Trust.

15. Civil Rules 64-71 Provisional and Final Remedies. The aforementioned Civil Rules operate in conjunction with some of the previously noted remedies. Rules are entitled as follows:

Rule 64 -- Seizure of person or property (applies to remedies including arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies)

Rule 65 -- Injunctions

Rule 65.1 - Security - proceedings against sureties

Rule 66 -- Receivership proceedings

Rule 67 -- Deposit in court

Rule 68 -- Offer of judgment

Rule 69 -- Execution

Rule 70 -- Judgment for specific acts; vesting title

Rule 71 -- Withdrawal by Attorney

Since the dissolution statute contains its own provisions for injunctive relief/restraining orders, it will be uncommon to use Rule 65 in that regard. We have previously discussed Rule 66 and rule 69. Rule 67 and Rule 68 are self-explanatory. Rule 71 simply sets forth provisions for withdrawal and substitution of counsel.

Civil Rule 70 is a rule that the author has never used or referred to (primarily because he did not know it existed and never bothered to read it). It states the following:

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall

issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

In addition to allowing the appointment of a special commissioner to execute documents or finding the non-compliant party in contempt, the rule allows the court to enter an order divesting title to any real or personal property and vesting it in other individuals. Although at first blush it would appear that this is probably more trouble than simply appointing a commissioner to execute a real estate conveyance document or sign a release of title on a vehicle, it could be argued that the order divesting title could apply to a piece of property, other than the piece of personal or real property which had not previously been properly conveyed. Although it would appear that that might be a stretch, there are virtually no decisions or annotations to this rule.

Finally, if you have a somewhat unique situation and you wish to fashion a remedy that does not neatly fit into any other pigeonhole, you might try using Rule 70 in that the editorial comment in my version of the annotated rules states that:

Likewise, under Rule 70, the court will have broad discretion to fashion an appropriate mechanism to enforce its judgments.

16. RCW 26.18.150 Bond or Other Security. This particular provision has been used by the author on a couple of different occasions to request that a property bond be required to secure payment of otherwise delinquent support. This statute allows the court to require the obligor parent to post a bond or other security in the amount of support or spousal maintenance due for a two-year period. If the obligor then fails to make payments following posting of the bond or security, the person entitled to receive the payment may recover on the bond or the other security. The amount of the bond may be

modified if necessary. This is a potentially useful remedy for persons who have property but for some reason feel morally that they should not be required to pay support.

17. Specific Performance. Although a written separation contract may be incorporated into a decree, it is also "enforceable as contract terms". RCW 26.09.070(b). Hence, contract remedies, including specific performance, are available in appropriate cases. For example, see *In Re Marriage of Olsen*, 24 Wn.App. 292, 600 P.2d 690 (1979).

18. Conversion. Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the rightful owner or the alteration of the condition of the item to the extent that the condition differs substantially from what it was at the time of the exchange of possession. The deprivation of the item from the owner is either permanent or for an indefinite time. In the event that an ex-spouse refuses to turn over a piece of personal property following entry of a divorce decree, it is possible for the injured spouse to initiate an action based upon the doctrine of conversion. As you may recall, an action for replevin would be available to retrieve the item itself. Conversion, on the other hand, would allow the petitioner to obtain the value of the item on the date of the conversion as monetary damages. It is unlikely in such a circumstance that an order of contempt would be available, since contempt does not generally lie for enforcement of a court order in relation to property division. Hence, if the item has either been substantially reduced in value or destroyed, conversion would be the appropriate remedy.

19. Claim of Spousal Interest. RCW 26.16.100 states that husband or wife having an interest in real estate by virtue of the marriage relationship, the legal title of record to which is held by the other spouse, may protect such interest from disposition by recording in the Auditor's Office a document setting forth that the claimant is the spouse of the titled owner and that said spouse claims a community property interest in the property. By recording same, the document becomes notice to the world of the interest. Although similar in some respects to a Lis Pendens, it is not the same document. Provisions of this particular statute should be reviewed in relation to filing requirements and content of the form.

20. Lis Pendens. RCW 4.28.320 authorizes the filing of a notice called a "Lis Pendens" in actions affecting the title to real estate. This notice may be filed at the time of filing the complaint, or at any time afterwards. It may also be filed by the defendant at the time that an affirmative cause of action is set forth in an answer. This statute sets forth provisions regarding other uses of the Lis Pendens, as well as notice and contents requirements. A Lis Pendens differs primarily from the previously mentioned claim of spousal interest in that the claim of spousal interest may be filed with or without a lawsuit pending, whereas a Lis Pendens, by its very nature and definition ("a pending suit") requires the existence of litigation which may affect the title to real estate.

21. Constructive Trust. A constructive trust is the formula through which the conscience of equity finds expression and when property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. It is an equitable device to compel parties who are unfairly holding a property interest, attained or retained by them through unjust or unconscionable means, to convey such interest to or hold it for another, to whom it justly belongs. It is created regardless of the parties' intention. Such a situation may occur if one spouse in a marital relationship or dissolution proceeding conveys all interest in a piece of community realty to a third party, e.g., the in-laws of the non-conveying spouse. Such conveyance could be accomplished either by Power of Attorney, fraud, or potentially in the event that title to a piece of property is held only by the conveying spouse. Although the dissolution court would not necessarily have jurisdiction over the piece of property had it been conveyed prior to the filing of the Petition for Dissolution, such a court, given the proper factual situation, would most likely entertain a motion to allow the addition of the "trustee in-laws" to be added as a party, thus bringing the party within the jurisdiction of the court. The in-laws would be considered to hold the property as constructive trustees.

22. Resulting Trust. The doctrine of resulting trust is founded upon the principle of a presumed intention to create a trust (versus the opposite in a constructive trust situation), and where facts and circumstances are such as reasonably indicates an absence of such

intention or indicate a contrary intention, the principle should not be applied. A resulting trust, as distinguished from a constructive trust, is a trust raised by implication of law and presumably contemplated by parties from the nature of the transaction itself, even though it is not expressed in deed or an instrument of conveyance. A resulting trust has also been known as a presumptive trust. Hence, if the parties, prior to petitioning for dissolution, jointly convey a piece of property to an unrelated third party, said conveyance being for a legitimate reason without any significant consideration, it is possible that the third party holds that property as a resulting trustee and the same process could be used to bring the third party before the court as is used for a constructive trust.

23. Uniform Fraudulent Transfer Act. This Act is found at RCW 19.40 and allows for the filing of a separate lawsuit if a transfer is made which is fraudulent as to a creditor, whether the Creditor's Claim arose before or after the transfer was made or the obligation incurred. This Act applies if the debtor makes a transfer with the actual intent to hinder, delay or defraud any creditor, or without receiving a reasonably equivalent value in exchange for the transfer. The statute includes a laundry list of various actions which would be determinative of whether or not actual intent exists. The perfect example of this would be in a circumstance when the debtor had not made maintenance payments for some period of time and a Motion for Contempt and Entry of Judgment was filed by the aggrieved spouse. Prior to entry of a judgment, the debtor executes a Quit Claim Deed to his or her child, quit claiming 100% of the ownership of a piece of real estate to that child. Upon entry of the judgment, the judgment will not attach to that real estate since it is not in the name of the debtor at the time of entry of the judgment. Other than for a conceivable excuse regarding some type of estate planning arrangement, this type of conveyance is subject to being reversed as a result of the actual intent of the debtor to defraud the moving party. Suit initiated under RCW 19.40 will accomplish that result and then make the equity in the property again available for payment of the judgment under proper circumstances.

24. Monies Owed Pursuant to either a Decree of Dissolution or a subsequent judgment for unpaid child support or maintenance may be subject to collection either by

the use of a Creditor's Claim or something similar. A Creditor's Claim is filed in the estate of a decedent from whom money is owed to a pre-existing creditor. Hence, if an ex-spouse owes money to your client, and that ex-spouse dies, a Creditor's Claim can be filed on behalf of your client in that probate.

Another option which is more likely to occur is that if the ex-spouse owes your client a sum of money for unpaid child support or maintenance the ex-spouse is either judgment proof or does not have sufficient income to garnish. However, if a parent (or other person for that matter) of the debtor spouse dies leaving an estate to which the debtor is at least a partial beneficiary, a Writ of Garnishment or Attachment may be issued to the personal representative of that estate in order to require that personal representative to pay the amount owed to your client. It is similar to the IRS diverting a tax refund from a debtor in favor of the child support creditor.

## **MISCELLANEOUS THOUGHTS**

1. One concept I have found useful recently when involved in a relatively long-term marriage which includes a business buy-out and maintenance provisions, is to write the Decree to where the maintenance provision and the business buy-out are clearly separate obligations. However, I have included a provision that in the event that the other spouse discontinues making business buy-out payments pursuant to the terms of the Decree, that an election may be made by the receiving spouse that converts the business buy-out provisions into maintenance payments. I have included provisions stating that such an election must be made in writing with a grace period allowing the non-paying spouse to catch up the delinquent payments. If the payments are not caught up by the time referred to in the notice, then a motion is filed with the court with the appropriate supporting declaration, requesting that the court enter a new order, which effectively converts the business buy-out payments to maintenance, which is then a court-ordered payment of maintenance which has priority over other debts. There are obvious advantages to the payment being maintenance versus a business buy-out such as avoidance of bankruptcy and priority of the obligation.
2. Depending upon what type of practice you have, you may be able to offer your client additional services upon conclusion of representation in the dissolution. If you have a practice such as mine that includes estate planning, my closing letter always includes a provision advising the client that he or she needs to obtain a new Will and Power of Attorney (if applicable), as the terms of any wills executed during the marriage will have become useless as a result of the divorce. You may also be able to offer the client assistance, if desired, in the areas of business advice for real estate acquisition, depending upon your practice. The bottom line is to be sure that your client understands that you not only practice family law, but that you are able to do other things as well. You never know what kind of case might fall in your lap.

## **CONCLUSION**

Although we are all generally familiar with the use of some of these remedial measures, such as contempt, garnishment, restraining orders and wage assignments, the more obtuse or obscure remedial measures are handy to at least know of as potential options. As a general practitioner, I have found it valuable to be familiar with these potential remedies, both as they relate specifically to domestic relations matters, as well as other types of cases. The ability to identify different options for the client order to achieve the desired result, as well as to suggest new ideas that the client may not have even thought of, allows us to complete the job that we start, rather than being faced with telling a client "gee, there is nothing else I can do for you", leaving the client with a paper judgment and a bill for attorney fees.

It is hoped that this paper will allow you to become more familiar with the various possibilities that exist. If you find that you are faced with a situation that you have not been involved in before, it may be wise to refer that matter to an attorney who is experienced in the area because some of these remedies require strict adherence to statutory requirements in order to be valid.

## CHAPTER THREE

**PRENUPTIAL AGREEMENTS: TO DO OR NOT TO DO**

June 2016

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Clark County Superior Court

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**JUDGE JAMES E. RULLI** was appointed to the Superior Court bench in 1996. He is currently the Presiding Judge and the Senior Family Law Judge of the Clark County bench. He has presided over hundreds of dissolutions of marriage, child custody, parenting plans, support, visitation rights, domestic violence, paternity and third party actions and adoptions. Judge Rulli established the adult drug court program and the juvenile drug court program which he currently presides over. He has served on the Superior Court Judges Association Board of Trustees, and the Association's Family, Criminal and Therapeutic Courts Committees. In June 2010 Judge Rulli was honored by the Washington State Bar Association as the Washington State Family Law Judge of the Year. In 2014 he was also honored by Washington State Association of Drug Court Professionals as Drug Court Practitioner of the Year.

**SCOTT J. HORENSTEIN** is a family law lawyer practicing in Vancouver, Washington. He is the current editor of and author for the Thomson Reuters three volume series on Washington and Family and Community Property Law, with forms, 2nd Edition, published in January, 2016. He was an author for the Washington State Bar Association Family Law Desk Book. He is a past member and chairperson of the Washington State Bar Association Family Law Executive Committee and a former recipient of its outstanding attorney of the year award. He is a member and past chairperson of the Washington Chapter of The American Academy of Matrimonial Lawyers and a co-recipient of its first outstanding member of the year award. He is a former adjunct professor of community property law at Willamette Law School and Lewis and Clark Law School. He has written for and spoken at many continuing legal education programs on a national, state and local level.

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**Resources.** The Thomson Reuters (formerly West Publishing Company) three volume work on Washington Family and Community Property Law 2<sup>nd</sup> Edition (volumes 19-21) was published in December, 2015. Chapter 16 written by Washington Chapter AAML member Kenneth Brewe is an excellent resource for a detailed discussion of Prenuptial Agreements. Drafting Prenuptial Agreements from Aspen Publishers, is an excellent book providing draft provisions for prenuptial agreements. Lexis Nexis also publishes a good book entitled Separation Agreements and Ante-Nuptial Agreements with forms.

**Uniform Premarital Agreement Act.** Washington has not adopted the Uniform Premarital Agreement Act (Act). Twenty seven states have. Thus, the law in Washington regarding premarital agreements has developed by case law, albeit a rather tortured and inconsistent pattern of cases that have caused many, many practitioners to no longer draft such agreements. The authors are unaware of any legislative attempts to enact the Uniform Premarital Agreement Act, however, a copy of the act is attached as an appendix to this paper because if an attempt is made to enact the Act it will be important for experienced family lay practitioners to weigh in, because it should not be assumed that replacing our stare decisis history of the cases with the Act will improve the law regarding premarital agreements.

This paper and the accompanying talk are designed to help you decide if you want to start/continue to draft or consult about such agreements.

**Favored under the law.** Prenuptial agreements are favored under the theory that parties are encouraged to and are free to contract for their rights in any circumstance. See Friedlander v. Friedlander, 80, Wn. 2d 293, 494 P.2d 208 (1972) and DewBerry v. George, 115 Wn. App. 351, 62 P.3d 525 (Div. 1 2003). However, because of the close

fiduciary relationship between spouses, they are strictly scrutinized.

Prenuptial agreements differ from other contracts in three main ways:

1. **The subject matter.** The agreement typically deals with one of, or a combination of, three things: property and maintenance rights during and after marriage, the personal rights and obligations of the spouses during marriage, or the education, care, and rearing of children who may be born to the contracting parties. These subjects are of greater public interest than the subjects of ordinary contracts, and the State has enacted numerous laws which would otherwise govern the affairs of the parties.

2. **The relationship of the parties.** The parties stand in a confidential relationship, often with the parties being unevenly matched in terms of bargaining power. There is an inherent amount of trust (and even dependence) between the parties as a result of their relationship and anticipated marriage.

3. **Future performance.** The prenuptial agreement is to be performed in the future, in the context of a relationship which the parties have not yet begun and which may continue for many years after it is executed and before it is enforced. There is a possibility that later events will make the prenuptial agreement unwise, unfair, or otherwise undesirable to enforce. Because of these three distinctions, not only are normal contract laws applicable to the agreements but also special rules have been developed to test the validity of them.

There is a two pronged test to determine if a prenuptial agreement is enforceable:

a. **Substantive Fairness.** The first prong requires the court to decide whether the agreement provides a fair and reasonable provision for the party not

seeking enforcement of the agreement. If the court finds that it does, the analysis ends and the agreement may be validated at the time of execution. Fair and reasonableness is measured at the time the agreement is signed, not when enforcement is sought. Left open here, of course, is the court's view of what is fair and reasonable under the circumstances. See *In re Marriage of Fox*, 58 Wn. App. 935, 795 P.2d 1170 (1990) (however, the agreement was invalidated by subsequent rescission). *Matter of Marriage of Matson*, 107 Wn. 2d 479, 730 P.2d 668 (1986).

**b. Procedural Fairness.** Even economically unfair prenuptial agreements will be enforced if entered voluntarily and with sufficient procedural safeguards to satisfy the court. The second prong of the analysis involves two tests: (a) whether full disclosure has been made by the parties of the amount, character, and value of the property involved; and (b) whether the agreement was entered into fully and voluntarily on independent advice from competent counsel and with full knowledge by both spouses of their rights. *In re Marriage of Fox*, 58 Wn. App. 935, 795 P.2d 1170 (1990) (however, the agreement was invalidated by subsequent rescission), *Matter of Marriage of Matson*, 107 Wn. 2d 479, 730 P.2d 668 (1986), *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 291 P.3d 906 (2012), review denied, 178 Wn. 2d 1025, 312 P.3d 652 (2013), *Matter of Estate of Crawford*, 107 Wn. 2d 493, 496-97, 730 P.2d 675 (1986), *In re Marriage of Zier*, 136 Wn. App. 40, 147 P.3d 624 (2006). All of these cases present different iterations of the need for competent, independent counsel who are versed in the subjects necessary to advise regarding prenuptial agreements (dissolution, estate planning, tax, etc.). However, it is the opinion of these authors that one should not be involved in drafting or advising about prenuptial agreements unless

each side is represented at all stages (including amendments) by counsel competent to advise in these areas. Anything less opens the agreement up to being unenforceable.

A prenuptial agreement that is substantively and procedurally unfair is **void**. See *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 291 P.3d 906 (2012), review denied, 178 Wn. 2d 1025, 312 P.3d 652 (2013) and cases cited therein.

There are three things that must be done in order to reduce the risk that a prenuptial agreement will not be enforced:

- a. Both parties must be represented by counsel competent in this area of the law (meaning family law, estate planning law and tax). That may mean engaging more than one lawyer for a client if other expertise is needed.
- b. There must be full disclosure of the nature and extent of all assets and liabilities by both parties.
- c. There must be sufficient time to negotiate the agreement before the date of marriage.

### **Eighteen tips when drafting prenuptial agreements.**

#### **TIP 1 Disclosure.**

A frequent attack on a prenuptial agreement is that the assets and liabilities of the parties to the agreement, and their respective cash positions, were not disclosed. Rather than to merely recite that their parties had a disclosure, it is absolutely essential to make the disclosure, including the value of assets, in the document itself. In most instances, the document won't be public unless there is litigation, so there is no harm in making a full disclosure within the document.

## **TIP 2 Estimates Are Okay.**

Although the parties to a prenuptial agreement are required to furnish dollar amounts of values and debts, accuracy is often not possible, especially in respect to assets. To avoid the risk of an attack upon the document on the basis that values and amounts were misstated, the document should state that the amounts are estimates but still satisfactory to the parties. The right to appraisals should be offered. The offer is most unlikely to be accepted, but it is hard for a person who agreed to accept estimates to attack an agreement on the basis that a good faith estimate was incorrect.

## **TIP 3 Separate Counsel.**

Separate legal counsel is an absolute necessity in a prenuptial agreement. Do not represent both parties. Advise your client that you would not participate in preparing and executing the agreement unless the other person has consulted with separate legal counsel and separate legal counsel has executed the document stating (a) that legal counsel has advised the other party about the contents of the agreement and its legal effect; (b) that the other party has acknowledged an understanding of the agreement, And; (c) that the other party has acknowledged a free and voluntary execution of the agreement. There is a risk of waiver of the attorney-client privilege by doing this, but the benefit gained is worth it in most cases. Prudence, and now case law dictates that each party have independent counsel knowledgeable in the subject matter(s) of the agreement. Often our own clients don't wish to have the other party have independent counsel. Explain to them that it is for the client's benefit that the other party have counsel to better insure the agreement is ultimately valid and enforceable. See *In re Marriage of Bernard*, 165 Wn. 2d 895, 204 P.3d 907 (2009). The Court of Appeals,

Division 1, appeared to rest its decision to affirm the trial court's refusal to enforce a prenuptial agreement, in part on a holding that reviewing counsel must advise a party where an agreement is unfair and whether or not to sign the agreement as drafted (adequacy of counsel). The Supreme Court, while affirming the decision finding the agreement unenforceable, did not base its decision on inadequacy of counsel because it was not raised by the wife at any level of the proceedings and it was not necessary to a decision to find the agreement unenforceable. However, see *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 291 P.3d 906 (2012), review denied, 178 Wn. 2d 1025, 312 P.3d 652 (2013) where Division One of the Court of Appeals declined to follow its own decision in *In re Marriage of Bernard*, 165 Wn. 2d 895, 204 P.3d 907 (2009) that seemed to require that not only must the challenging party have counsel but he or she also must have competent counsel. The court in *Kellar* held that while counsel not competent to advise on prenuptial agreements may be subject to a malpractice claim by the client, that incompetency does not create a basis to not enforce the agreement. The Washington Supreme Court declined to accept review of the Court of Appeal decision.

Where the court discussed the need for independent counsel for both parties for an "item specific" property status agreement executed during the marriage. In this case, the parties each received, in their own name, some corporate stock of a company owned by the wife's family. They also received some stock in both names. The corporate attorney drafted an agreement providing that all of the stock was community property. The court divided the stock such that they each received half of all of the stock they initially received. The wife claimed the agreement was not enforceable as they did not have independent counsel. The court held that the requirement for independent

counsel does not necessarily apply where the parties execute an “item specific” property status agreement during the course of the marriage. See also Matter of Estate of Crawford, 107 Wn. 2d 493, 496-97, 730 P.2d 675, 678 (1986), which held that while there is no absolute requirement of independent counsel as prerequisite to the validity of prenuptial agreement generally, if the prenuptial agreement does not make a fair and reasonable provision for the spouse not seeking the enforcement of the agreement, independent counsel is required to support the validity of the agreement. **Prudence suggests that both counsels must be competent in the areas of law covered by the agreement. Waiting for a malpractice case to make a “damaged” person whole does no one any good.**

It is common that the disadvantaged party seeks advice about the agreement drafted by the other spouse and the attorney advises the client that the agreement is not fair, but approves it anyway with a certification that either says he or she advised the client that it was not fair or a certification that simply says that the client was advised of his or her rights and chose to sign it. Either way, does the fact that the client was advised the agreement was not fair, mean it can later be challenged?

#### **TIP 4 The Last Minute.**

A prenuptial agreement is often attacked on the basis of lack of voluntariness in its execution. A person who, on the wedding day, is suddenly presented with a prenuptial agreement is placed in the position of signing or being embarrassed by calling off the wedding at the last minute. When this occurs the agreement will almost always, if not always, be voided by the court. A prenuptial agreement should be signed well in advance off the wedding date—at least one week should be the minimum, and a

period of two to eight weeks is desirable. In fact, if your client comes to you early enough, have the agreement completed before the wedding invitations or "save the date" cards are sent, to avoid the argument that "I had to sign, the invitations were already sent and it would be too embarrassing to call it off now." When counsel is contacted shortly before the wedding and asked to prepare a prenuptial agreement, these are at least some of the options:

- a. Do not prepare the agreement.
- b. Explain the risk of the late execution of the document to the client. Do this in writing to reduce the risk of misunderstanding and also to provide a record of your advice if there is a later problem and you are being blamed for it. If the client insists, prepare the document and repeat your advice when the document is delivered to the client for signature.
- c. Explain the risk of late execution of the document to the client. Do this in writing to reduce the risk of misunderstanding.

Suggest that the client and the new spouse execute a post nuptial document which contains the same basic provisions as would have been included in the prenuptial agreement had it been prepared. The risk, of course, is that the new spouse will then refuse to sign. However, if that occurs the marriage is probably not going to last long enough to vest the new spouse with any rights in the property of your client. Also, if this occurs, the question of consideration must be addressed. The consideration for some prenuptial agreements is the marriage itself. Once the parties are married, a different consideration is necessary. Sometimes, the mutual agreement of rights may be sufficient, but a payment of funds or property transfer is better. If the invitations are out

and the wedding is set suggest going through a ceremony but not actually completing the license process, then execute the agreement after the ceremony. However, keep in mind, that for the purposes of the agreement, the court will likely consider the parties ‘married’ anyway. And, failure to procure a license is a misdemeanor pursuant to RCW 26.04.200. The risk if the agreement is not signed before the ceremony is, of course, that the agreement would not be signed at all and the tension will mount. If the marriage is cancelled and the parties later decide to marry, the previously drawn prenuptial agreement may not be placed into effect by the marriage. A new agreement, or an affirmation of the validity of the existing agreement, is desirable.

#### **TIP 5 “How Do I Get it Back?”**

If the agreement is of the type where the promise to marry is the consideration for the agreement instead of the type where the marriage itself is the consideration, thought should be given to the remedy of the promise to marry should that promise be breached.

#### **TIP 6 Deeds.**

It is desirable to obtain quit claim deeds to parcels of real estate which are to remain separate property, or which are to be converted to community property. The inclusion of an “after acquired property clause” in a deed is important to deal with subsequent issues about whether a community interest was later obtained in the property. An “after-acquired property clause” is the recitation in a quit claim deed that the grantor is also deeding any interest acquired by the grantor in the property after the execution of the deed.

### **TIP 7 Commingling.**

To avoid commingling questions, provide in the prenuptial agreement for a waiver of commingling. Discuss the specific acts which otherwise constitute commingling if they occur and state that they shall not be deemed to be commingling. However, the best protection against commingling is to not have it occur. The client must be advised about commingling and how to avoid it.

### **TIP 8 Reimbursement and Equitable Liens.**

To avoid questions of rights of reimbursement or equitable liens, waive these in the document. Discuss the specific acts which are not to be considered to give a right to reimbursement. The client should be made aware of the types of conduct which give rise to claims of reimbursement and counseled to avoid them. Without a waiver, a court can uphold the separate character of an asset as agreed in the prenuptial agreement but still find a right of reimbursements and to impress an equitable lien to secure payment.

### **TIP 9 Maintenance Waiver.**

If maintenance is being waived, it is important to recognize that in Washington, the issue is not resolved and the question is whether a maintenance waiver provision violates public policy. Some states hold it does and some hold it does not. If the agreement contains a maintenance waiver clause it should also contain a clause that the parties recognize that Washington has not resolved the issue but that the parties agree it is not against public policy to have such a clause in their agreement. The parties should also be advised that if the spouses move to another state, the waiver of maintenance might not be enforceable, unless the agreement contains a forum

selection clause citing Washington law will apply to disputes. Depending on the financial circumstances of the parties, it may be prudent to at least provide that some maintenance be paid.

#### **TIP 10 Moving Away.**

To avoid interpretation problems caused by the relocation of the parties to another state, provide for a choice of law in the document. Advise the client that a change of residence to another state may impact the validity of the document and suggest that if this occurs, consultation with legal counsel in the new state of residence is advisable in case the agreement should be modified in that state. To avoid this dispute provide that Washington Law shall apply to the interpretation and enforcement of the agreement.

#### **TIP 11 What Does the Future Hold?**

Despite cases to the contrary, it is tempting for a court, and this writer has seen this done, to judge the validity of a prenuptial agreement at the time enforcement is sought. This writer has even heard a judge say "If I uphold this agreement, it takes away all of my discretion." If the agreement was appropriately executed and not rescinded by subsequent conduct, the agreement has been held to be valid, no matter how harsh its effect on a spouse many years later when the marriage is terminated. A primary reason to execute a prenuptial agreement is to set the parameters for the division of property and debts at the beginning and not rely on the court's discretion at a later time. It is appropriate to put a clause in the agreement to that effect that the parties wish to remove the court's discretion and wish to have the agreement enforced. There is a temptation to judge the validity of prenuptial agreements prospectively at the time that

the agreement is requested to be applied to control the rights and interest of the spouses/domestic partners. Since the temptation is to judge a document many years after it is drawn, it is advisable to discuss with your client the desirability of amending the document from time to time by mutual agreement to take into consideration changed circumstances in the health, economic status, and other facts concerning parties and the marriage. It may also be advisable to file a Declaratory Judgment during the course to the marriage to have the court declare the agreement valid.

**TIP 12 Fair Compensation.**

In Washington, a spouse who devotes substantial time to the management of separate assets, such as the operation of a separately owned business, is required to fairly compensate the community estate for the labor of that spouse. If inadequate compensation is paid, commingling occurs between the profits of the business and earnings of the community. To avoid arguments that the compensation was inadequate, the agreement should provide a method to permit the parties to agree upon what is fair compensation. It is important that the agreement be continually updated in light of the changes in the time and value of the services of a spouse and inflation.

**TIP 13 Oops! Contracts Implied in Fact.**

One way the courts avoid having to enforce a prenuptial agreement is to find that it has been abandoned by the conduct of the parties. The courts decree rescission implied in fact even though the participants may not actually have intended to rescind the agreement. For example, if the agreement provides that the earnings of a spouse are to be separate property, the court may say that the use of earnings for community purposes at any time shows an intent to abandon the document. The agreement may

require that some earnings be placed into a common account. By doing this, the use of separate funds for common purposes is actually the performance of the agreement and therefore cannot constitute the abandonment of the agreement. The agreement should expressly permit a spouse to make additional separate property contributions into the common account or in the form of payments for the benefit of the family without having all compensation be considered community. The agreement should recite that these contributions are agreed to be a gift.

**TIP 14 Waiving Pension Rights.**

A waiver of pension rights controlled by the Retirement Equity Act in a prenuptial agreement is probably not effective. Therefore, the agreement should provide for the parties to, at a later time, execute the necessary document required by federal law to waive pension rights. Further, in recognition that a spouse may later refuse to perform the contractual obligation, the agreement can provide a mechanism for the court to order the document to be executed or for the court to appoint an attorney in fact to execute the document. It should also provide that in the event an unintended beneficiary receives retirement benefits, that individual holds them in constructive trust for the intended beneficiary (spouse). State pension plans and some others are not within the Retirement Equity Act. In dealing with one of these, estate law and plan rules need to be considered.

**TIP 15 Severability.**

A clause in the prenuptial agreement which preserves the remainder of the agreement if one portion of it becomes unenforceable (referred to as a "severability clause") can be valuable to protect the remainder of the agreement if the court does

invalidate one or more sections.

**TIP 16 Do Not Do Without Experience.**

Prenuptial agreements should not be done unless the practitioner has the experience necessary to do them correctly. The risk of mistakes is too great and the consequences to the client and the attorney (malpractice) are too monumental. Often prenuptial agreements are entered into when one spouse has significant separate assets that he or she wants to protect. That often means that the estate to be protected is greater than the amount of malpractice insurance the attorney has. Whether one is experienced in drafting prenuptial agreements or not avoid the temptation to use a "form" or template for fear of not appropriately individualizing the agreement. There is nothing wrong with using forms or templates in order to capture the "standard" clauses that are usually necessary in most agreements, but care should be taken to draft each agreement individual to the particular needs of the parties. The best way to learn how to do prenuptial agreements is to work with experienced counsel who have done them. Borrow from their experience and their drafting but always with an eye toward making sure the agreement lists the specific needs of the client and does not just contain general clauses that have no applicability, or may even be harmful to the intent of the agreement. Imitation is the sincerest form of flattery. However, that is not necessarily the case in drafting of prenuptial agreements. At least not when one is using a form without adequately thinking through the specifics of the parties needs and desires. Certainly there are many "boilerplate" provisions that likely go in most prenuptial agreements, but even those should be reviewed for each agreement to make sure they fit the facts. It is certainly appropriate to "borrow" portions of agreements drafted by

other attorneys if you think they are good, or more thoroughly express the party's intent on a given portion of the agreement.

**TIP 17 Remember the Three Keys to a Prenuptial Agreement.**

1. Do not do the agreement unless both sides fully disclose the nature and extent of their respective estates.

2. Do not do the agreement unless each party has counsel competent in drafting and advising about prenuptial agreements.

3. Do not do the agreement unless there is sufficient time to negotiate for the agreement and save all drafts of the agreement, including files notes, letters, etc. so that it can be proven that negotiating took place. Never destroy a prenuptial agreement file. If possible, have the other attorney provide his or her requested revisions by commenting directly on your draft so that you can save his or her work and prove later on exactly what was requested.

**TIP 18 Send an Opening and Closing Letter.**

Send a letter to a client at the beginning of the case explaining what a prenuptial agreement is and what their rights are with and without an agreement. Attach that letter, in generic form to the signed agreement. After the agreement is executed, send the client a letter explaining the pertinent parts of the agreement and emphasizing the need to follow the agreement and change it only by subsequent written agreement and not commingling separate assets with community assets and the importance of making estate planning consistent with the prenuptial agreement. Make sure that the comments you make to the client during the course of negotiating are put in writing so you can

prove the advice given at a later time if need be.

**Statute of Limitations.** The six year statute of limitations for written contracts is applied to prenuptial agreements. However, the statute is tolled until a party seeks to assert rights under the agreement (essentially tolled during the marriage). See *In re Estate of Crawford*, 107 Wn. 2d 493, 730 P. 2nd 675 (1986) and RCW 4.16.040. The lesson here is to assume that the statute of limitations between the parties is tolled for a potentially long, long time. It is essential to buy tail insurance so that if a claim is made after retirement you will be covered.

Although divorce cases are solely within the province of judge, not a jury, malpractice cases related to prenuptial agreements can be tried to a jury because it then becomes a breach of contract or negligence case, not a family law case so the jury can actually decide what relief a party would have received in the divorce case had the negligence in drafting the agreement not occurred. See *Burst v. Newton*, 70 Wn. App. 286, 852 P. 3<sup>rd</sup> 1092 (1993).

### **Other important issues.**

**Formalities of execution.** The signatures should be acknowledged, particularly if real estate is the subject of the agreement. Oral Agreements are valid (but not recommended) but only if there is part performance which takes it out of the Statute of Frauds, RCW 19.36.010. There should be an attorney certification acknowledging that the client understand the agreement and has been advised of its effect.

**Consideration.** The marriage is not only adequate but the best consideration. See *Friedlander v. Friedlander*, 80 Wn.2d 293, 300, 494 P.2d 208(1972). An **agreement** based on mutual promises to marry is not effective if the parties do not marry within a

reasonable period of time. See *In Hurt v. Hurt*, 16 Va. App. 792, 433 S.E.2d 493 (1993).

On the other hand, if the agreement is made upon mutual promises to marry and if property is exchanged pursuant to the agreement, if the parties subsequently don't marry the transferred property may be recoverable by the transferor. See *Spinnell v. Quigley*, 56 Wn. App. 799, 785 P.2d 1149 (1990).

**Subjects of the Agreement.** The agreement may be the subject of any number of subjects so long as they are not illegal or against public policy, such as the continued ownership and management of existing assets; the acquisition, ownership and management of future assets; adequacy of compensation for management of separate assets; the maintenance of the spouse during the marriage; the support and care of children; the waiver of rights of reimbursement; the distribution of assets upon termination of the marriage by marital proceeding; the maintenance of a spouse upon termination of the marriage; the disposition of assets upon death of a spouse; and any other number of subjects.

**Use in Marital Proceedings.** The burden to prove the validity and enforceability of a prenuptial agreement, like all spousal agreements, is on the party seeking enforcement. See RCW 26.16.210 and *Estate of Madden*, 176 Wash. 51, 28 P. 2d 280 (1934). Once determined to be fair at the time of execution, the agreement is enforceable in marital proceedings, including temporary orders. However, it is not enforceable at the temporary stage unless it is proven to be fair. Thus, if the party not seeking enforcement claims it to be unfair the agreement is not enforced until approved by the court. There are a number of ways to attempt to determine fairness prior to trial. If enforcement of the agreement is requested in the Petition and the Respondent admits the fairness of the

agreement then it can be enforced immediately. The objecting party can be deposed and if he or she admits the fairness of the agreement it can be enforced. A party can move for summary judgment to determine fairness. Even if a motion for summary judgment is not granted, the information gleaned from the summary judgment pleadings can be useful in further discovery and trial.

**Modification, rescission or ratification of the agreement.** Because these agreements are contracts, they are subject to the general rules regarding contracts. They can be modified in writing or by conduct. See *In re Marriage of Fox*, 58 Wn. App. 935, 795 P.2d 1170 (1990). Clearly it is better to modify in writing and anything less than that will likely be the subject of litigation. A prenuptial agreement may be rescinded so long as there is a mutual and communicated attempt to do so. See *In re Wittman's Estate*, 58 Wn.2d 841, 365 P.2d 17 (1961) and *Knapp v. Hoerner*, 22 Wn. App. 925, 591 P.2d 1276 (1979).

**Ratification.** It is advisable to periodically ratify the agreement. If the agreement is amended in part, the amendment should recite that the agreement in its entirety is ratified so there is no question that the original agreement, as amended, is validated by the parties. One can seek summary judgment during the marriage to confirm the fairness of the agreement. Acting in conformance with the agreement during the marriage is not necessarily considered ratification and a procedurally and substantively unfair agreement is incapable of ratification. See *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 291 P.3d 906 (2012), review denied, 178 Wn. 2d 1025, 312 P.3d 652 (2013) and cases cited therein.

## UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

The purpose of this act is to bring clarity and consistency across a range of agreements between spouses and those who are about to become spouses. The focus is on agreements that purport to modify or waive rights that would otherwise arise at the time of the dissolution of the marriage or the death of one of the spouses.

Forty years ago, state courts generally refused to enforce premarital agreements that altered the parties' right at divorce, on the basis that such agreements were attempts to alter the terms of a status (marriage) or because they had the effect of encouraging divorce (at least for the party who would have to pay less in alimony or give up less in the division of property). Over the course of the 1970s and 1980s, nearly every state changed its law, and currently every state allows at least some divorce-focused premarital agreements to be enforced, though the standards for regulating those agreements vary greatly from state to state. The law relating to premarital agreements affecting the parties' rights at the death of a spouse had historically been less hostile than the treatment of such agreements affecting the right of the parties at divorce. The ability of a wife to waive her dower rights goes back to the 16th century English Statute of Uses. 27 Hen. VIII, c. 10, § 6 (1535). Other countries have also moved towards greater legal recognition of premarital agreements and marital agreements, though there remains a great diversity of approaches internationally. See Jens M. Scherpe (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing, 2012); see also Katharina Boele-Woelki, Jo Miles and Jens M. Scherpe (eds.), *The Future of Family Property in Europe* (Intersentia, 2011).

The Uniform Premarital Agreement Act was promulgated in 1983. Since then it has been adopted by 26 jurisdictions, with roughly half of those jurisdictions making significant amendments, either at the time of enactment or at a later date. See Amberlynn Curry, Comment, "The Uniform Premarital Agreement Act and Its Variations throughout the States," 23 *Journal of the American Academy of Matrimonial Lawyers* 355 (2010). Over the years, commentators have offered a variety of criticisms of that Act, many arguing that it was weighted too strongly in favor of enforcement, and was insufficiently protective of vulnerable parties. E.g., Barbara Ann Atwood, "Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act," 19 *Journal of Legislation* 127 (1993); Gail Frommer Brod, "Premarital Agreements and Gender Justice," 9 *Yale Journal of Law & Feminism* 229 (1994); J. Thomas Oldham, "With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades," 19 *Duke Journal of Gender and the Law* 83 (2011). Whatever its faults, the Uniform Premarital Agreement Act has brought some consistency to the legal treatment of premarital agreements, especially as concerns rights at dissolution of marriage. The situation regarding marital agreements has been far less settled and consistent. Some states have neither case law nor legislation, while the remaining states have created a wide range of approaches. Additionally, other legal standards relating to the waiver of rights at the death of the other spouse, by either premarital agreements or marital agreements, seem to impose somewhat different requirements. See, e.g., *Uniform Probate Code*, Section 2-213; *Restatement (Third) of Property*, Section 9.4 (2003); *Model Marital Property Act*, Section 10 (1983); and *Internal Revenue Code*, Sections 401 and 417 (stating when a surviving spouse's waiver of rights to a qualified plan would be valid).

The general approach of this act is that parties should be free, within broad limits, to choose the financial terms of their marriage. The limits are those of due process in formation, on the one hand, and certain minimal standards of substantive fairness, on the other. Because a significant minority of states authorizes some form of fairness review based on the parties' circumstances at the time the agreement is to be enforced, a bracketed provision in Section 9(f) offers the option of refusing enforcement based on a finding of substantial hardship at the time of enforcement. And because a few states put the burden of proof on the party seeking enforcement of marital (and, more rarely, premarital) agreements, a Legislative Note after Section 9 suggests alternative language to reflect that burden of proof.

This act chooses to treat premarital agreements and marital agreements under the same set of principles and requirements. A number of states currently treat premarital agreements and marital agreements under different legal standards, with higher burdens on those who wish to enforce marital

agreements. See, e.g., Sean Hannon Williams, "Postnuptial Agreements," 2007 *Wisconsin Law Review* 827, 838-845; Brian H. Bix, "The ALI Principles and Agreements: Seeking a Balance Between Status and Contract," in *Reconceiving the Family: Critical Reflections on the American Law Institute's Principles of the Law of Family Dissolution* (Robin Fretwell Wilson, ed., Cambridge University Press, 2006), pp. 372-391, at pp. 382-387; Barbara A. Atwood, "Marital Contracts and the Meaning of Marriage," 54 *Arizona Law Review* 11 (2012). However, this act follows the American Law Institute, in its *Principles of the Law of Family Dissolution* (2002), in treating the two types of agreements under the same set of standards. While this act, like the American Law Institute's *Principles* before it, recognizes that different sorts of risks may predominate in the different transaction types – risks of unfairness based on bounded rationality and changed circumstances for premarital agreements, and risks of duress and undue influence for marital agreements (*Principles of the Law of Family Dissolution*, Section 7.01, comment e, at pp. 953-954) – this act shares the American Law Institute's view that the resources available through this act and common law principles are sufficient to deal with the likely problems related to either type of transaction.

## UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

**SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Premarital and Marital Agreements Act.

**SECTION 2. DEFINITIONS.** In this [act]:

- (1) "Amendment" means a modification or revocation of a premarital agreement or marital agreement.
- (2) "Marital agreement" means an agreement between spouses who intend to remain married which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed after the spouses marry, of a premarital agreement or marital agreement.
- (3) "Marital dissolution" means the ending of a marriage by court decree. The term includes a divorce, dissolution, and annulment.
- (4) "Marital right or obligation" means any of the following rights or obligations arising between spouses because of their marital status:
  - (A) spousal support;
  - (B) a right to property, including characterization, management, and ownership;
  - (C) responsibility for a liability;
  - (D) a right to property and responsibility for liabilities at separation, marital dissolution, or death of a spouse; or
  - (E) award and allocation of attorney's fees and costs.
- (5) "Premarital agreement" means an agreement between individuals who intend to marry which affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence of any other event. The term includes an amendment, signed before the individuals marry, of a premarital agreement.
- (6) "Property" means anything that may be the subject of ownership, whether real or personal, tangible or intangible, legal or equitable, or any interest therein.
- (7) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (8) "Sign" means with present intent to authenticate or adopt a record:
  - (A) to execute or adopt a tangible symbol; or
  - (B) to attach to or logically associate with the record an electronic symbol, sound, or process.
- (9) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

**Legislative Note:** If your state recognizes non-marital relationships, such as civil unions and domestic partnerships, consider whether these definitions need to be amended.

### **Comment**

The definition of “amendment” includes “amendments” of agreements, narrowly understood, and also revocations.

The definitions of “premarital agreement” and “marital agreement” are part of the effort to clarify that this act is not intended to cover cohabitation agreements, separation agreements, or conventional day-to-day commercial transactions between spouses. Marital agreements and separation agreements (sometimes called “marital settlement agreements”) are usually distinguished based on whether the couple at the time of the agreement intends for their marriage to continue, on the one hand, or whether a court-decreed separation, permanent physical separation or dissolution of the marriage is imminent or planned, on the other. To avoid deception of the other party or the court regarding intentions, one jurisdiction refuses to enforce a marital agreement if it is quickly followed by an action for legal separation or dissolution of the marriage. See *Minnesota Statutes* § 519.11, subd. 1a(d)(marital agreement presumed to be unenforceable if separation or dissolution sought within two years; in such a case, enforcement is allowed only if the spouse seeking enforcement proves that the agreement was fair and equitable).

While most premarital agreements and marital agreements will be stand-alone documents, a fragment of a writing that deals primarily with other topics could also constitute a premarital agreement or marital agreement for the purpose of this act.

With premarital agreements, the nature and timing of the agreement (between parties who are about to marry) reduces the danger that the act’s language will accidentally include types of transactions that are not thought of as premarital agreements and should not be treated as premarital agreements (but see the discussion of *Mahr* agreements, below). There is a greater concern with marital agreements, since (a) spouses enter many otherwise enforceable financial transactions, most of which are not problematic and should not be made subject to special procedural or substantive constraints; and (b) there are significant questions about how to deal with agreements whose primary intention may not be to waive one spouse’s rights at dissolution of the marriage or the other spouse’s death, but where the agreement nonetheless has that effect. In the terms of another uniform act, the purpose of the definition of “marital agreement” is to exclude from coverage “acts and events that have significance apart from their effect” upon rights at dissolution of the marriage or at the death of one of the spouses. See *Uniform Probate Code*, Section 2-512 (“Events of Independent Significance”). Such transactions might include the creation of joint and several liability through real estate mortgages, motor vehicle financing agreements, joint lines of credit, overdraft protection, loan guaranties, joint income tax returns, creation of joint property ownership with a right of survivorship, joint property with payment-on death provisions or transfer-on-death provisions, durable power of attorney or medical power of attorney, buy-sell agreements, agreements regarding the valuation of property, the placing of marital property into an irrevocable trust for a child, etc.

The shorter definition of “premarital agreement” used by the Uniform Premarital Agreement Act (in its Section 1(1): “an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage”) had the disadvantage of encompassing agreements that were entered by couples about to marry but that were not intended to affect the parties’ existing legal rights and obligations upon divorce or death, e.g., Islamic marriage contracts, with their deferred *Mahr* payment provisions. See Nathan B. Oman, “Bargaining in the Shadow of God’s Law: Islamic *Mahr* Contracts and the Perils of Legal Specialization,” 45 *Wake Forest Law Review* 579 (2010); Brian H. Bix, “*Mahr* Agreements: Contracting in the Shadow of Family Law (and Religious Law) – A Comment on Oman,” 1 *Wake Forest Law Review Online* 61 (2011), available at <http://wakeforestlawreview.com/>.

The definition of “property” is adapted from the *Uniform Trust Code*, Section 103(12).

This act does not define “separation agreement,” leaving this to the understanding, rules, and practices of the states, noting that the practices do vary from state to state (e.g., that in many states separation agreements require judicial approval while in other states they can be valid without judicial approval).

A premarital agreement or marital agreement may include terms not in violation of public policy of this state, including terms relating to: (1) rights of either or both spouses to interests in a trust, inheritance, devise, gift, and expectancy created by a third party; (2) appointment of fiduciary, guardian, conservator, personal representative, or agent for person or property; (3) a tax matter; (4) the method for resolving a dispute arising under the agreement; (5) choice of law governing validity, enforceability, interpretation, and construction of the agreement; or (6) formalities required to amend the agreement in addition to those required by this act.

### **SECTION 3. SCOPE.**

(a) This [act] applies to a premarital agreement or marital agreement signed on or after [the effective date of this [act]].

(b) This [act] does not affect any right, obligation, or liability arising under a premarital agreement or marital agreement signed before [the effective date of this [act]].

(c) This [act] does not apply to:

- (1) an agreement between spouses which affirms, modifies, or waives a marital right or obligation and requires court approval to become effective; or
- (2) an agreement between spouses who intend to obtain a marital dissolution or court-decreed separation which resolves their marital rights or obligations and is signed when a proceeding for marital dissolution or court-decreed separation is anticipated or pending.

(d) This [act] does not affect adversely the rights of a bona fide purchaser for value to the extent that this [act] applies to a waiver of a marital right or obligation in a transfer or conveyance of property by a spouse to a third party.

#### **Comment**

This section distinguishes marital agreements, which are subject to this act, both from agreements that parties might enter at a time when they intend to obtain a divorce or legal separation or to live permanently apart, and also from the conventional transfers of property in which state law requires one or both spouses waive rights that would otherwise accrue at the death of the other spouse.

Subsection (c) is meant to exclude "separation agreements" and "marital settlement agreements" from the scope of the act. These tend to have their own established standards for enforcement. The reference to "a waiver of a marital right or obligation" in Subsection (d) would include the release of dower, courtesy, or homestead rights that often accompanies the conveyance of real property. In general, the enforceability of agreements in Subsections (b), (c) and (d) is left to other law in the state.

This section is not meant to restrict third-party beneficiary standing where it would otherwise apply.

### **SECTION 4. GOVERNING LAW.** The validity, enforceability, interpretation, and construction of a premarital agreement or marital agreement are determined:

(1) by the law of the jurisdiction designated in the agreement if the jurisdiction has a significant relationship to the agreement or either party and the designated law is not contrary to a fundamental public policy of this state; or

(2) absent an effective designation described in paragraph (1), by the law of this state, including the choice-of-law rules of this state.

#### **Comment**

This section is adapted from the *Uniform Trust Code*, Section 107. It is consistent with *Uniform Premarital Agreement Act*, Section 3(a)(7), but is broader in scope. The section reflects traditional conflict of laws

and choice of law principles relating to the enforcement of contracts. See *Restatement (Second) of Conflict of Laws*, Sections 186-188 (1971). Section 187(2)(a) of that *Restatement* expressly states that the parties' choice of law is not to be enforced if "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice...." Section 187(2)(b) of the same *Restatement* holds that the parties' choice of law is not to be enforced if "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue ...." The limitation of choice of law provisions to jurisdictions having some connection with the parties or the transaction tracks a similar restriction in the *Uniform Commercial Code*, which restricts choice of law provisions to states with a reasonable relation to the transaction (this was Section 1-105 under the UCC before the 2001 revisions; and Section 1-301 in the (2001) Revised UCC Article 1).

"Significant relation" and "fundamental public policy" are to be understood under existing state principles relating to conflict of laws, and "contrary to ... fundamental public policy" means something more than that the law of the other jurisdiction differs from that of the forum state. See, e.g., *International Hotels Corporation v. Golden*, 15 N.Y.2d 9, 14, 254 N.Y.S.2d 527, 530, 203 N.E.2d 210, 212-13 (1964); *Capital One Bank v. Fort*, 255 P.3d 508, 510-513 (Or. App. 2011) (court refused to apply law under choice of law provision because contrary to "fundamental public policy" of forum state); Russell J. Weintraub, *Commentary on the Conflict of Laws* 118-125 (6th ed., Foundation Press, 2010).

For examples of choice of law and conflict of law principles operating in this area, see, e.g., *Bradley v. Bradley*, 164 P.3d 537, 540-544 (Wyo. 2007) (premarital agreement had choice of law provision selecting Minnesota law; amendment to agreement held invalid because it did not comply with Minnesota law for modifying agreements); *Gamache v. Smurro*, 904 A.2d 91, 95-96 (Vt. 2006) (applying California law to prenuptial agreement signed in California); *Black v. Powers*, 628 S.E.2d 546, 553-556 (Va. App. 2006) (Virginia couple drafted agreement in Virginia, but signed it during short stay in the Virgin Islands before their wedding there; the agreement was held to be covered by Virgin Islands law because there was no clear party intention that Virginia law apply and because Virgin Island law was not contrary to the forum state's public policy); cf. *Davis v. Miller*, 7 P.3d 1223, 1229-1230 (Kan. 2000) (parties can use choice of law provision to choose the state version of the Uniform Premarital Agreement Act to apply to a marital agreement, even though that Act would otherwise not apply).

## **SECTION 5. PRINCIPLES OF LAW AND EQUITY.** Unless displaced by a provision of this [act], principles of law and equity supplement this [act].

### **Comment**

This section is similar to Section 106 of the *Uniform Trust Code* and Section 1-103(b) of the *Uniform Commercial Code*, and incorporates the case-law that has developed to interpret and apply those provisions. Because this act contains broad, amorphous defenses to enforcement like "voluntariness" and "unconscionability" (Section 9), there is a significant risk that parties, and even some courts, might assume that other conventional doctrinal contract law defenses are not available because preempted. This section is intended to make clear that common law contract doctrines and principles of equity continue to apply where this act does not displace them. Thus, it is open to parties, e.g., to resist enforcement of premarital agreements and marital agreements based on legal incompetency, misrepresentation, duress, undue influence, unconscionability, abandonment, waiver, etc. For example, a premarital agreement presented to one of the parties for the first time hours before a marriage (where financial commitments have been made and guests have arrived from far away) clearly raises issues of duress, and might be voidable on that ground. Cf. *In re Marriage of Balcof*, 141 Cal.App.4th 1509, 1519-1527, 47 Cal.Rptr.3d 183, 190-196 (2006) (marital agreement held unenforceable on the basis of undue influence and duress); *Bakos v. Bakos*, 950 So.2d 1257, 1259 (Fla. App. 2007) (affirming trial court conclusion that premarital agreement was voidable for undue influence).

The application of doctrines like duress varies greatly from jurisdiction to jurisdiction: e.g., on whether duress can be shown even in the absence of an illegal act, e.g. *Farm Credit Services of Michigan's Heartland v. Weldon*, 591 N.W.2d 438, 447 (Mich. App. 1998) (illegal act required for claim of duress under Michigan law), and whether the standard of duress should be applied differently in the

context of domestic agreements compared to commercial agreements. This act is not intended to change state law and principles relating to these matters.

Rules of construction, including rules of severability of provisions, are also to be taken from state rules and principles. *Cf. Rivera v. Rivera*, 243 P.3d 1148, 1155 (N.M. App. 2010), *cert. denied*, 243 P.3d 1146 (N.M. 2010) (premarital agreement that improperly waived the right to alimony and that contained no severability clause deemed invalid in its entirety); *Sanford v. Sanford*, 694 N.W.2d 283, 291-294 (S.D. 2005) (applying state principles of severability to conclude that invalid alimony waiver in premarital agreement severable from valid provisions relating to property division); *Bratton v. Bratton*, 136 S.W.3d 595, 602 (Tenn. 2004) (property division provision in marital agreement not severable from provision waiving alimony). Additionally, state rules and principles will govern the ability of parties to include elevated formalities for the revocation or amendment of their agreements.

**SECTION 6. FORMATION REQUIREMENTS.** A premarital agreement or marital agreement must be in a record and signed by both parties. The agreement is enforceable without consideration.

#### **Comment**

This section is adapted from *Uniform Premarital Agreement Act*, Section 2. Almost all jurisdictions currently require premarital agreements to be in writing. A small number of courts have indicated that an oral premarital agreement might be enforced based on partial performance, e.g., *In re Marriage of Benson*, 7 Cal. Rptr. 3d 905 (App. 2003), *rev'd*, 36 Cal.4th 1096, 116 P.3d 1152 (Cal. 2005) (ultimately holding that the partial performance exception to statute of frauds did not apply to transmutation agreement), and at least one jurisdiction has held that a premarital agreement could be amended or rescinded by actions alone. *Marriage of Baxter*, 911 P.2d 343, 345-346 (Or. App. 1996), review denied, 918 P.2d 847 (Or. 1996). One court, in an unpublished opinion, enforced an oral agreement that a written premarital agreement would become void upon the birth of a child to the couple. *Ehlert v. Ehlert*, No. 354292, 1997 WL 53346 (Conn. Super. 1997). While this act affirms the traditional rule that formation, amendment, and revocation of premarital agreements and marital agreements need to be done through signed written documents, states may obviously construe their own equitable doctrines (application through Section 5) to warrant enforcement or modification without a writing in exceptional cases.

It is the consensus view of jurisdictions and commentators that premarital agreements are or should be enforceable without (additional) consideration (the agreement to marry or the act of marrying is often treated as sufficient consideration). Additionally, most modern approaches to premarital agreements have by-passed the consideration requirement entirely: e.g., *Uniform Premarital Agreement Act*, Section 2; American Law Institute, *Principles of the Law of Family Dissolution*, Section 7.01(4) (2002); *Restatement (Third) of Property*, Section 9.4(a) (2003).

In some states, courts have raised concerns relating to the consideration for marital agreements. The view of this act is that marital agreements, otherwise valid, should not be made unenforceable on the basis of lack of consideration. As the American Law Institute wrote on the distinction (not requiring additional consideration for enforcing premarital agreements, but requiring it for marital agreements): "This distinction is not persuasive in the context of a legal regime of no-fault divorce in which either spouse is legally entitled to end the marriage at any time." *Principles of the Law of Family Dissolution*, Section 7.01, Comment c, at 947-948 (2002). The consideration doctrine is sometimes used as an indirect way to ensure minimal fairness in the agreement, and the seriousness of the parties. See, e.g., Lon L. Fuller, "Consideration and Form," 41 *Columbia Law Review* 799 (1941). Those concerns for marital agreements are met in this act directly by other provisions. On the conclusion that consideration should not be required for marital agreements, see also *Restatement (Third) of Property*, Section 9.4(a) (2003), and *Model Marital Property Act*, Section 10 (1983).

**SECTION 7. WHEN AGREEMENT EFFECTIVE.** A premarital agreement is effective on marriage. A marital agreement is effective on signing by both parties.

**Comment**

This section is adapted from *Uniform Premarital Agreement Act*, Section 4. The effective date of an agreement (premarital agreement at marriage, marital agreement at signing) does not foreclose the parties from agreeing that certain provisions within the agreement will not go into force until a later time, or will go out of force at that later time. For example, a premarital agreement may grant a spouse additional rights should the marriage last a specified number of years.

Parties sometimes enter agreements that are part cohabitation agreement and part premarital agreement. This act deals only with the provisions triggered by marriage, without undermining whatever enforceability the cohabitation agreement has during the period of cohabitation.

**SECTION 8. VOID MARRIAGE.** If a marriage is determined to be void, a premarital agreement or marital agreement is enforceable to the extent necessary to avoid an inequitable result.

**Comment**

This section is adapted from *Uniform Premarital Agreement Act*, Section 7. For example, if John and Joan went through a marriage ceremony, preceded by a premarital agreement, but, unknown to Joan, John was still legally married to Martha, the marriage between John and Joan would be void, and whether their premarital agreement should be enforced would be left to the discretion of the court, taking into account whether enforcement in whole or in part would be required to avoid an inequitable result.

This section is intended to apply primarily to cases where a marriage is void due to the pre-existing marriage of one of the partners. Situations where one partner is seeking a civil annulment (see Section 2(3)) relating to some claims of misrepresentation or mutual mistake would usually be better left to the main enforcement provisions of Sections 9 and 10.

**SECTION 9. ENFORCEMENT.**

(a) A premarital agreement or marital agreement is unenforceable if a party against whom enforcement is sought proves:

- (1) the party's consent to the agreement was involuntary or the result of duress;
- (2) the party did not have access to independent legal representation under subsection (b);
- (3) unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights under subsection (c) or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; or
- (4) before signing the agreement, the party did not receive adequate financial disclosure under subsection (d).

(b) A party has access to independent legal representation if:

- (1) before signing a premarital or marital agreement, the party has a reasonable time to:
  - (A) decide whether to retain a lawyer to provide independent legal representation; and
  - (B) locate a lawyer to provide independent legal representation, obtain the lawyer's advice, and consider the advice provided; and

(2) the other party is represented by a lawyer and the party has the financial ability to retain a lawyer or the other party agrees to pay the reasonable fees and expenses of independent legal representation.

(c) A notice of waiver of rights under this section requires language, conspicuously displayed, substantially similar to the following, as applicable to the premarital agreement or marital agreement:

“If you sign this agreement, you may be:

Giving up your right to be supported by the person you are marrying or to whom you are married.

Giving up your right to ownership or control of money and property.

Agreeing to pay bills and debts of the person you are marrying or to whom you are married.

Giving up your right to money and property if your marriage ends or the person to whom you are married dies.

Giving up your right to have your legal fees paid.”

(d) A party has adequate financial disclosure under this section if the party:

(1) receives a reasonably accurate description and good-faith estimate of value of the property, liabilities, and income of the other party;

(2) expressly waives, in a separate signed record, the right to financial disclosure beyond the disclosure provided; or

(3) has adequate knowledge or a reasonable basis for having adequate knowledge of the information described in paragraph (1).

(e) If a premarital agreement or marital agreement modifies or eliminates spousal support and the modification or elimination causes a party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, on request of that party, may require the other party to provide support to the extent necessary to avoid that eligibility.

(f) A court may refuse to enforce a term of a premarital agreement or marital agreement if, in the context of the agreement taken as a whole[:]

[(1)] the term was unconscionable at the time of signing[; or

(2) enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed].

(g) The court shall decide a question of unconscionability [or substantial hardship] under subsection (f) as a matter of law.

**Legislative Note:** Section 9(a) places the burden of proof on the party challenging a premarital agreement or a marital agreement. Amendments are required if your state wants to (1) differentiate between the two categories of agreements and place the burden of proof on a party seeking to enforce a marital agreement, or (2) place the burden of proof on a party seeking to enforce either a premarital agreement or marital agreement.

*If your state wants to permit review for “substantial hardship” caused by a premarital agreement or marital agreement at the time of enforcement, Section 9(f), including the bracketed language, should be enacted.*

#### **Comment**

This section is adapted from *Uniform Premarital Agreement Act*, Section 6. While this section gives a number of defenses to the enforcement of premarital agreements and marital agreements, other defenses grounded in the principles of law and equity also are available. See Section 5.

The use of the phrase “involuntary or the result of duress” in Subsection (a)(1) is not meant to change the law. There is significant and quite divergent caselaw that has developed under the “voluntariness” standard of the Uniform Premarital Agreement Act and related law – e.g., compare *Marriage of Bernard*, 204 P.3d 907, 910-913 (Wash. 2009) (finding agreement “involuntary” when significantly revised version of premarital agreement was presented three days before the wedding) and *Peters-Riemers v. Riemers*, 644 N.W.2d 197, 205-207 (N.D. 2002) (agreement presented three days before wedding found to be “involuntary”; court also emphasized absence of independent counsel and adequate financial disclosure) with *Brown v. Brown*, No. 2050748, 19 So.3d 920 (Table) (Ala. App. 2007) (agreement presented day before wedding; court held assent to be “voluntary”), aff’d sub. nom *Ex parte Brown*, 26 So.3d 1222, 1225-1228 (Ala. 2009) and *Binek v. Binek*, 673 N.W.2d 594, 597-598 (N.D. 2004) (agreement sufficiently “voluntary” to be enforceable despite being presented two days before the wedding); see also *Mamot v. Mamot*, 813 N.W.2d 440, 447 (Neb. 2012) (summarizing five-factor test many courts use to evaluate “voluntariness” under the UPA); see generally Judith T. Younger, “Lovers’ Contracts in the Courts: Forsaking the Minimal Decencies,” 13 *William & Mary Journal of Women and the Law* 349, 359-400 (2007) (summarizing the divergent interpretations of “voluntary” and related concepts under the UPA); Oldham, “With All My Worldly Goods,” *supra*, at 88-99 (same). This act is not intended either to endorse or override any of those decisions. One factor that courts should certainly consider: the presence of domestic violence would be of obvious relevance to any conclusion about whether a party’s consent to an agreement was “involuntary or the result of duress.”

The requirement of “access to independent counsel” in Subsections (a)(2) and (b) represents the view that representation by independent counsel is crucial for a party waiving important legal rights. The act stops short of requiring representation for an agreement to be enforceable, cf. *California Family Code* § 1612(c) (restrictions on spousal support allowed only if the party waiving rights consulted with independent counsel); *California Probate Code* §143(a) (waiver of rights at death of other spouse unenforceable unless the party waiving was represented by independent counsel); *Ware v. Ware*, 687 S.E.2d 382, 387-391 (W. Va. 2009) (access to independent counsel required, and *presumption of validity* for premarital agreement available only where party challenging the agreement actually consulted with independent counsel). When a party has an obligation to make funds available for the other party to retain a lawyer, under Subsection (b)(2), this refers to the cost of a lawyer competent in this area of law, not necessarily the funds needed to retain as good or as many lawyers as the first party may have.

The notice of waiver of rights of Subsections (a)(3) and (c) is adapted from the *Restatement (Third) of Property*, Section 9.4(c)(3) (2003), and it is also similar in purpose to *California Family Code* §1615(c)(3). It creates a safe harbor when dealing with unrepresented parties by use of the applicable designated warning language of Subsection (c), or language substantially similar, but also allows enforcement where there has been an explanation in plain language of the rights and duties being modified or waived by the agreement.

The requirement of reasonable financial disclosure of Subsection (a)(4) and (d) pertains only to assets of which the party knows or reasonably should know. There will be occasions where the valuation of an asset can only be approximate, or may be entirely unknown, and this can and should be noted as part of a reasonable disclosure. Disclosure will qualify as “reasonably accurate” even if a value is approximate or difficult to determine, and even if there are minor inaccuracies. As the Connecticut Supreme Court stated, after reviewing cases from many jurisdictions on the comparable standard of “fair and reasonable disclosure,” “[t]he overwhelming majority of jurisdictions that apply this standard do not require financial disclosure to be exact or precise. ... [The standard] requires each contracting party to provide the other with a general approximation of their income, assets and liabilities....” *Friezo v. Friezo*,

914 A.2d 533, 549, 550 (Conn. 2007). Under Subsection (d)(1), an estimate of value of property, liabilities, and income made in good faith would satisfy this act even if it were later found to be inaccurate.

Some commentators have urged that a waiver of the right of financial disclosure (or the right of financial disclosure beyond what has already been disclosed) be valid only if the waiver were signed after receiving legal advice. The argument is that it is too easy to persuade an unrepresented party to sign or initial a waiver provision, and that the party waiving that right would then likely be ignorant of the magnitude of what was being given up. Even when notified in the abstract of the rights being given up, it would make a great deal of difference if the party thinks that what was being given up was a claim to a portion of \$80,000, when in fact what was being given up was a claim to a portion of \$80,000,000. However, this act follows the current consensus among the states in not requiring legal representation for a waiver. One reason for not requiring legal advice is that this might effectively require legal representation for all premarital agreements and marital agreements. Under a requirement of legal representation, parties entering agreements might reasonably worry that even if there were significant disclosure, it would always be open to the other party at the time of enforcement to challenge the agreement on the basis that the disclosure was not sufficient, and that any waiver of disclosure beyond the amount given was invalid because of a lack of legal representation. In general, there was a concern that a requirement of legal representation would create an invitation to strategic behavior and unnecessary litigation.

“Conspicuously displayed” in Subsection (c) follows the language and standard of Uniform Commercial Code § 1-201(10), and incorporates the case-law regarding what counts as “conspicuous.”

Reference in Subsection (d)(3) to “adequate knowledge” includes at least approximate knowledge of the value of the property, liabilities, and income in question.

Subsection (e) as adapted from the *Uniform Premarital Agreement Act*, Section 6(b). Other jurisdictions have in the past chosen even more significant protections for vulnerable parties. See, e.g., *N.M. Stat. § 40-3A-4(B)* (premarital agreement may not affect spouse’s right to support); *Matter of Estate of Spurgeon*, 572 N.W.2d 595, 599 (Iowa 1998) (widow’s spousal allowance could be awarded, even in the face of express provision in premarital agreement waiving that right); *In re Estate of Thompson*, No. 11-0940, 812 N.W.2d 726 (Table), 2012 WL 469985 (Iowa App. 2012) (same); *Hall v. Hall*, 4 So.3d 254, 256-257 (La. App. 2009), writ denied, 9 So.3d 166 (La. 2009) (waiver of interim support in premarital agreement unenforceable as contrary to public policy). This act attempts to give vulnerable parties significant procedural and substantive protections (protections far beyond what was given in the original *Uniform Premarital Agreement Act*), while maintaining an appropriate balance between such protection and freedom of contract.

The reference in Subsection (f) to the unconscionability of (or substantial hardship caused by) a term is meant to allow a court to strike particular provisions of the agreement while enforcing the remainder of the agreement – consistent with the normal principles of severability in that state (see Section 5 and its commentary). However, this language is not meant to prevent a court from concluding that the agreement was unconscionable as a whole, and to refuse enforcement to the entire agreement.

Subsection (f) includes a bracketed provision for states that wish to include a “second look,” considering the fairness of enforcing an agreement relative to the time of enforcement. The suggested standard is one of whether “enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed.” This language broadly reflects the standard applied in a number of states. E.g., *Connecticut Code § 46b-36g(2)* (whether premarital agreement was “unconscionable . . . when enforcement is sought”); *New Jersey Statutes § 37:2-38(b)* (whether premarital agreements was “unconscionable at the time enforcement is sought”); *North Dakota Code § 14-03.1-07* “enforcement of a premarital agreement would be clearly unconscionable”); *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 964 (Mass. 2010) (“the terms of the [marital] agreement are fair and reasonable . . . at the time of divorce”); *Bedrick v. Bedrick*, 17 A.3d 17, 27 (Conn. 2011) (“the terms of the [marital] agreement are . . . not unconscionable at the time of dissolution”).

However, it should be noted that even in such “second look” states, case law invalidating premarital agreements and marital agreements at the time of enforcement almost universally concerns rights at divorce. There is little case law invalidating waivers of rights arising at the death of the other spouse grounded on the unfairness at the time of enforcement.

Among the states that allow challenges based on the circumstances at the time of enforcement, the terminology and the application vary greatly from state to state. Courts characterize the inquiry differently, referring variously to “fairness,” “hardship,” “undue burden,” “substantial injustice” (the term used by the American Law Institute’s *Principles of the Law of Family Dissolution* § 7.05 (2002)), or just “unconscionability” at the time of enforcement. In determining whether to enforce the agreement or not under this sort of review, courts generally look to a variety of factors, including the duration of the marriage, the purpose of the agreement, the current income and earning capacity of the parties, the parties’ current obligations to children of the marriage and children from prior marriages, the age and health of the parties, the parties’ standard of living during the marriage, each party’s financial and homemaking contributions during the marriage, and the disparity between what the parties would receive under the agreement and what they would likely have received under state law in the absence of an agreement. See Brett R. Turner & Laura W. Morgan, *Attacking and Defending Marital Agreements* (2nd ed., ABA Section of Family Law, 2012), p. 417. The American Law Institute argued that courts generally were (and should be) more receptive to claims when the marriage had lasted a long time, children had been born to or adopted by the couple, or there had been “a change of circumstances that has a substantial impact on the parties … [and that] the parties probably did not anticipate either the change, or its impact” at the time the agreement was signed. American Law Institute, *Principles of the Law of Family Dissolution* § 7.05(2) (2002). One court listed the type of circumstances under which enforcement might be refused as including: “an extreme health problem requiring considerable care and expense; change in employability of the spouse; additional burdens placed upon a spouse by way of responsibility to children of the parties; marked changes in the cost of providing the necessary maintenance of the spouse; and changed circumstance of the standards of living occasioned by the marriage, where a return to the prior living standard would work a hardship upon a spouse.” *Gross v. Gross*, 464 N.E.2d 500, 509-510 n.11 (Ohio 1984).

Subsection (g) characterizes questions of unconscionability (or substantial hardship) as questions of law for the court. This follows the treatment of unconscionability in conventional commercial contracts. See UCC § 2-302(1) & Comment 3; *Restatement (Second) of Contracts* §208, comment f (1981). This subsection is not intended to establish or modify the standards of review under which such conclusions are considered on appeal under state law.

Waiver or modification of claims relating to a spouse’s pension is subject to the constraints of applicable state and federal law, including ERISA (Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*). See, e.g., *Robins v. Geisel*, 666 F.Supp.2d 463, 467-468 (D. N.J. 2009) (wife’s premarital agreement waiving her right to any of her husband’s separate property did not qualify as a waiver of her spousal rights as beneficiary under ERISA); *Strong v. Dubin*, 901 N.Y.S.2d 214, 217-220 (N.Y. App. Div. 2010) (waiver in premarital agreement conforms with ERISA waiver requirement and is enforceable).

In contrast to the approach of the act, some jurisdictions put the burden of proof on the party seeking enforcement of an agreement. See, e.g., *Randolph v. Randolph*, 937 S.W.2d 815, 820-821 (Tenn. 1996) (party seeking to enforce premarital agreement had burden of showing, in general, that other party entered agreement “knowledgeably”: in particular, that a full and fair disclosure of assets was given or that it was not necessary due to the other party’s independent knowledge); *Stancil v. Stancil*, No. E2011-00099-COA-R3-CV, 2012 WL 112600 (Tenn. Ct. App., Jan. 13, 2012) (same); *In re Estate of Cassidy*, 356 S.W.3d 339, 345 (Mo. App. 2011) (parties seeking to enforce waivers of rights at the death of the other spouse have the burden of proving that procedural and substantive requirements were met). The Legislative Note directs a state to amend Subsection (a) appropriately if the state wants to place the burden of proof on the party seeking enforcement of a marital agreement, a premarital agreement, or both. In those jurisdictions, Subsection (a) should provide that the agreement is unenforceable unless the party seeking to enforce the agreement proves each of the required elements.

Many jurisdictions impose greater scrutiny or higher procedural safeguards for marital agreements as compared to premarital agreements. See, e.g., *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 961-964 (Mass. 2010); *Bedrick v. Bedrick*, 17 A.3d 17, 23-25 (Conn. 2011). Those jurisdictions view agreements in the midst of marriage as being especially at risk of coercion (the analogue of a “hold up” in a commercial arrangement) or overreaching. Additionally, these conclusions are sometimes based on the view that parties already married are in a fiduciary relationship in a way that parties about to marry, and considering a premarital agreement, are not. Linda J. Ravdin, *Premarital Agreements: Drafting and Negotiation* (American Bar Association, 2011), pp. 16-18. Also, some jurisdictions have distinguished “reconciliation agreements” entered during marriage with other marital agreements, giving more favorable treatment to reconciliation agreements. See, e.g., *Bratton v. Bratton*, 136 S.W.3d 595, 599-600 (Tenn. 2004) (summarizing the prior law in Tennessee under which reconciliation agreements were enforceable but other marital agreements were void). Many other jurisdictions and The American Law Institute (in its *Principles of the Law of Family Dissolution*, Section 7.01(3) & Comment b (2002)) treat marital agreements under the same standards as premarital agreements.

This is the approach adopted by this act.

## SECTION 10. UNENFORCEABLE TERMS.

(a) In this section, “custodial responsibility” means physical or legal custody, parenting time, access, visitation, or other custodial right or duty with respect to a child.

(b) A term in a premarital agreement or marital agreement is not enforceable to the extent that it:

(1) adversely affects a child’s right to support;

(2) limits or restricts a remedy available to a victim of domestic violence under law of this state other than this [act];

(3) purports to modify the grounds for a court-decreed separation or marital dissolution available under law of this state other than this [act]; or

(4) penalizes a party for initiating a legal proceeding leading to a court-decreed separation or marital dissolution.

(c) A term in a premarital agreement or marital agreement which defines the rights or duties of the parties regarding custodial responsibility is not binding on the court.

**Legislative Note:** A state may vary the terminology of “custodial responsibility” to reflect the terminology used in the law of this state other than this act.

### Comment

This section lists provisions that are not binding on a court (this contrasts with the agreements mentioned in Section 3, where the point was to distinguish agreements whose regulation fell outside this act). They include some provisions (e.g., regarding the parents’ preferences regarding custodial responsibility) that, even though not binding on a court, a court might consider by way of guidance.

There is a long-standing consensus that premarital agreements may not bind a court on matters relating to children: agreements cannot determine custody or visitation, and cannot limit the amount of child support (though an agreed *increase* of child support may be enforceable). E.g., *In re Marriage of Best*, 901 N.E.2d 967, 970 (Ill. App. 2009) (“Premarital agreements limiting child support are ... improper”), appeal denied, 910 N.E.2d 1126 (Ill. 2009); cf. *Pursley v. Pursley*, 144 S.W.3d 820, 823-826 (Ky. 2004) (agreement by parties in a separation agreement to child support well in excess of guideline amounts is enforceable; it is not unconscionable or contrary to public policy). The basic point is that parents and prospective parents do not have the power to waive the rights of third parties (their current or future children), and do not have the power to remove the jurisdiction or duty of the courts to protect the

best interests of minor children. Subsection (b)(1) applies also to step-children, to whatever extent the state imposes child-support obligation on step-parents.

There is a general consensus in the caselaw that courts will not enforce premarital agreement provisions relating to topics beyond the parties' financial obligations *inter se*. And while some courts have refused to enforce provisions in premarital agreements and marital agreements that regulate (or attach financial penalties to) conduct during the marriage, e.g., *Diosdado v. Diosdado*, 118 Cal. Rptr.2d 494, 496-497 (Cal. App. 2002) (refusing to enforce provision in agreement imposing financial penalty for infidelity); In re *Marriage of Mehren & Dargan*, 118 Cal.App.4th 1167, 13 Cal.Rptr.3d 522 (Cal. App. 2004) (refusing to enforce provision that penalized husband's drug use by transfer of property); see also Brett R. Turner and Laura W. Morgan, *Attacking and Defending Marital Agreements* 379 (2nd ed., ABA Section on Family Law, 2012) ("It has been generally held that antenuptial agreements attempting to set the terms of behavior during the marriage are not enforceable" (footnote omitted)), this act does not expressly deal with such provisions, in part because a few courts have chosen to enforce premarital agreements relating to one type of marital conduct: parties' cooperating in obtaining religious divorces or agreeing to appear before a religious arbitration board. E.g., *Avitzur v. Avitzur*, 446 N.E.2d 136, 138-139 (N.Y. 1983) (holding enforceable religious premarital agreement term requiring parties to appear before religious tribunal and accept its decision regarding a religious divorce). Also, while there appear to be scattered cases in the distinctly different context of separation agreements where a court has enforced the parties' agreement to avoid fault grounds for divorce, e.g., *Massar v. Massar*, 652 A.2d 219, 221-223 (N.J. App. Div. 1994); cf. *Eason v. Eason*, 682 S.E.2d 804, 806-808 (S.C. 2009) (agreement not to use adultery as defense to alimony claim enforceable); see generally Linda J. Ravdin, *Premarital Agreements: Drafting and Negotiation* (ABA, 2011), p. 111 ("In some fault states, courts may enforce a provision [in a premarital agreement] that waives fault"), there appears to be no case law enforcing an agreement to avoid *no-fault* grounds. This act follows the position of the American Law Institute (*Principles of the Law of Family Dissolution*, Section 7.08(1) (2002)), that agreements affecting divorce grounds in any way should not be enforceable.

It is common to include escalator clauses and sunset provision in premarital agreements and marital agreements, making parties' property rights vary with the length of the marriage. Cf. *Peterson v. Sykes-Peterson*, 37 A.3d 173, 177-178 (Conn. App. 2012), cert. denied, 42 A.3d 390 (Conn. 2012) (rejecting argument that sunset provision in premarital agreement is unenforceable because contrary to public policy). Subsection (b)(4), which makes provisions unenforceable that penalize one party's initiating an action that leads to the dissolution of a marriage, does not cover such escalator clauses. Additionally, nothing in this provision is intended to affect the rights of parties who enter valid covenant marriages in states that make that alternative form of marriage available.

Section 10 does not purport to list all the types of provisions that are unenforceable.

Other provisions which are contrary to public policy would also be unenforceable. See Section 5.

**SECTION 11. LIMITATION OF ACTION.** A statute of limitations applicable to an action asserting a claim for relief under a premarital agreement or marital agreement is tolled during the marriage of the parties to the agreement, but equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.

#### **Comment**

This Section is adapted from *Uniform Premarital Agreement Act*, Section 8. As the Comment to that Section stated: "In order to avoid the potentially disruptive effect of compelling litigation between the spouses in order to escape the running of an applicable statute of limitations, Section 8 tolls any applicable statute during the marriage of the parties .... However, a party is not completely free to sit on his or her rights because the section does preserve certain equitable defenses."

**SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

**[SECTION 14. REPEALS; CONFORMING AMENDMENTS.]**

(a) [Uniform Premarital Agreement Act] is repealed.

(b) [Uniform Probate Code Section 2-213 (Waiver of Right to Elect and of Other Rights)] is repealed.

(c) [...]

**SECTION 15. EFFECTIVE DATE.** This [act] takes effect ....

172 Wash.App. 562  
Court of Appeals of Washington,  
Division 1.

Donna M. KELLAR, Appellant/Cross Respondent,  
v.

The ESTATE OF Kenneth L. KELLAR,  
Respondent/Cross Appellant.

No. 66828-5-I.

|  
Dec. 31, 2012.

**Synopsis**

**Background:** After husband's death, wife brought action against estate challenging validity of prenuptial agreement. The Superior Court, Whatcom County, Steven J. Mura, J., entered summary judgment in part in favor of wife and in part in favor of estate. Wife and estate appealed.

**Holdings:** The Court of Appeals, Appelwick, J., held that:

[1] wife's testimony that husband asked her to quit her job and fly to another state to get married and that husband informed wife that they should meet with mediator regarding prenuptial agreement was barred by the dead man's statute;

[2] wife's testimony that she did not receive certain financial documents from husband was barred by the dead man's statute;

[3] position taken by wife in previous administrative proceeding was not clearly inconsistent with instant position, and thus judicial estoppel did not bar instant position;

[4] as a matter of first impression, a prenuptial agreement that is substantively and procedurally unfair is void from inception and is incapable of ratification;

[5] prenuptial agreement initially prepared by husband's attorney was procedurally fair and thus valid and enforceable; and

[6] wife's action did not trigger no-contest clause of husband's will.

Affirmed in part and reversed in part.

West Headnotes (29)

[1] **Witnesses**

🔑 Nature and grounds of exclusion in general

The purpose of the dead man's statute is to prevent interested parties from giving self-serving testimony regarding conversations and transactions with the deceased because the dead cannot respond to unfavorable testimony. West's RCWA 5.60.030.

Cases that cite this headnote

[2] **Witnesses**

🔑 What constitutes transaction in general

The test to determine whether the testimony concerns a transaction covered by the dead man's statute is whether the deceased, if living, could contradict the witness of his own knowledge, but an interested party can testify as to her own acts. West's RCWA 5.60.030.

Cases that cite this headnote

[3] **Witnesses**

🔑 Nature of testimony in general

Under the dead man's statute, an interested party may testify as to her own feelings or impressions, so long as they do not concern a specific transaction or reveal a statement made by the decedent. West's RCWA 5.60.030.

Cases that cite this headnote

[4] **Witnesses**

↳ Communications or Instruments in Writing

Documentary evidence is not barred by the dead man's statute; testimony regarding the intended meaning of those documents may, however, be prohibited. West's RCWA 5.60.030.

Cases that cite this headnote

[5] **Appeal and Error**

↳ Cases Triable in Appellate Court

Appellate court reviews evidentiary decisions made in conjunction with an order on summary judgment de novo.

2 Cases that cite this headnote

[6] **Witnesses**

↳ Nature of testimony in general

Wife's testimony that husband asked her to quit her job and fly to another state to get married and that husband informed wife that they should meet with mediator regarding prenuptial agreement was barred by the dead man's statute, in wife's action against husband's estate seeking to invalidate prenuptial agreement; testimony was not mere recitations of wife's acts but rather statements of what husband said, which husband could have rebutted if he were alive. West's RCWA 5.60.030.

Cases that cite this headnote

[7] **Witnesses**

↳ Nature of testimony in general

Wife's testimony that she did not receive certain financial documents from husband was barred by the dead man's statute, in wife's action against husband's estate seeking to invalidate prenuptial agreement; husband could have

rebutted the assertion that she did not receive the financial information if untrue. West's RCWA 5.60.030.

Cases that cite this headnote

[8]

**Witnesses**

↳ Nature of testimony in general

The dead man's statute does not prohibit an interested party from testifying about her own impressions, because the deceased could not rebut the witness's personal beliefs. West's RCWA 5.60.030.

Cases that cite this headnote

[9]

**Witnesses**

↳ Nature of testimony in general

Wife's testimony that husband asked her to quit her job and fly to another state to get married was not admissible under own impressions exception to dead man's statute, in wife's action against husband's estate seeking to invalidate prenuptial agreement; testimony included husband's specific statements that apparently led to pressure wife felt to sign agreement and thus these were statements about transactions with husband, not statements regarding wife's own impressions. West's RCWA 5.60.030.

Cases that cite this headnote

[10]

**Witnesses**

↳ Effect of Admission or Availability of Evidence on Behalf of Adverse Party in General

**Witnesses**

↳ Cross-examination by adverse party after direct examination

**Witnesses**

↳ Waiver of objections

The protections of the dead man's statute may

be waived by failure to object, cross-examination that is not within the scope of direct examination, or testimony favorable to the estate about transactions or communications with the decedent. West's RCWA 5.60.030.

Cases that cite this headnote

[11] **Appeal and Error**  
    ➡ Judgment

Wife failed to preserve for appeal argument that husband's estate waived the dead man's statute by attaching evidence of wife's transactions with husband to estate's motion for summary judgment, in wife's action against estate seeking to invalidate prenuptial agreement, where only basis for waiver asserted by wife in trial court was that estate had necessarily waived statute by asserting disclosure by husband, and wife did not raise theory that estate waived statute by attaching specific excerpts of testimony to its motions when they were heard. West's RCWA 5.60.030.

Cases that cite this headnote

[12] **Estoppel**  
    ➡ Claim inconsistent with previous claim or position in general

"Judicial estoppel" is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.

3 Cases that cite this headnote

[13] **Estoppel**  
    ➡ Claim inconsistent with previous claim or position in general

In determining whether the doctrine of judicial

estoppel applies, court looks at three primary considerations: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped; these factors are not an exhaustive formula and additional considerations may guide a court's decision.

4 Cases that cite this headnote

[14] **Estoppel**  
    ➡ Claim inconsistent with previous claim or position in general

Judicial estoppel does not apply unless there are two judicial proceedings.

2 Cases that cite this headnote

[15] **Estoppel**  
    ➡ Claim inconsistent with previous claim or position in general

Position previously taken by wife in administrative licensing proceeding for obtaining casino license was not clearly inconsistent with wife's position in instant judicial proceeding challenging validity of prenuptial agreement, and thus judicial estoppel did not bar wife's position in instant proceeding, even though wife had asserted in licensing proceeding that she and husband kept their assets separate but asserted in instant action that prenuptial agreement separating assets was invalid; administrative agency had no authority to adjudicate validity of prenuptial agreement.

1 Cases that cite this headnote

[16] **Husband and Wife**

🔑 Validity of settlement in general

A prenuptial agreement that is substantively and procedurally unfair is void from inception and is incapable of ratification.

1 Cases that cite this headnote

[17] **Contracts**

🔑 What constitutes ratification

A party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, the party remains silent or continues to accept the contract's benefits.

1 Cases that cite this headnote

[18] **Contracts**

🔑 Estoppel and Ratification

**Contracts**

🔑 Effect of invalidity

A contract that is void at its inception, as opposed to merely voidable, is an absolute nullity and is incapable of ratification.

Cases that cite this headnote

[19] **Husband and Wife**

🔑 Construction and operation in general

Prenuptial agreements are contracts subject to contract law, but also subject to special rules formulated by the legislature and the courts.

Cases that cite this headnote

[20]

**Husband and Wife**

🔑 Validity of settlement in general

The validity of a prenuptial agreement is based on the circumstances surrounding the execution of the agreement.

Cases that cite this headnote

[21]

**Husband and Wife**

🔑 Validity of settlement in general

A prenuptial agreement is substantively fair and thus enforceable if it provides a fair and reasonable provision for the party not seeking enforcement of the agreement.

Cases that cite this headnote

[22]

**Husband and Wife**

🔑 Validity of settlement in general

If a prenuptial agreement is substantively fair, the court's inquiry into enforceability ends, but, if it is substantively unfair, then the court considers whether it is nevertheless procedurally fair.

Cases that cite this headnote

[23]

**Husband and Wife**

🔑 Validity of settlement in general

To determine whether a prenuptial agreement is procedurally fair and thus enforceable, court considers: (1) whether there was full disclosure by the parties of the amount, character, and value of the property, and (2) whether the agreement was entered into freely and voluntarily, upon independent advice, and with full knowledge by both spouses of their rights.

1 Cases that cite this headnote

1 Cases that cite this headnote

[24] **Husband and Wife**

🔑 Validity of settlement in general

A prenuptial agreement is valid if it is either substantively fair or procedurally fair.

Cases that cite this headnote

[25] **Husband and Wife**

🔑 Evidence

The party seeking to enforce a prenuptial agreement has the burden of proving its validity.

Cases that cite this headnote

[26] **Husband and Wife**

🔑 Validity of settlement in general

Prenuptial agreement initially prepared by husband's attorney was procedurally fair and thus valid and enforceable, even though agreement was signed only five days before wedding, where agreement included an initialed representation and warranty that there was full financial disclosure, wife obtained independent counsel, wife's attorney had communicated with husband's attorney and negotiated a revision in agreement, and wife's attorney did not testify that he needed more time to review agreement.

Cases that cite this headnote

[27] **Husband and Wife**

🔑 Validity of settlement in general

The procedural fairness test for validity of a prenuptial agreement does not require effective counsel.

[28]

**Wills**

🔑 Contest of will or other litigation

Wife's action against husband's estate, challenging validity of prenuptial agreement, did not trigger no-contest clause of husband's will, which provided that any person bringing claim against estate "which requests a resolution that would, if successful, increase the share of the claimant" in husband's estate; wife's success in action could have decreased size of estate but would not necessarily have increased wife's share of estate.

Cases that cite this headnote

[29]

**Executors and Administrators**

🔑 Costs

Attorney fee award of \$259,862 in favor of husband's estate was reasonable, in wife's action against estate challenging validity of prenuptial agreement, where trial court granted estate fees for 685 hours of work.

1 Cases that cite this headnote

### Attorneys and Law Firms

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### Opinion

APPELWICK, J.

\***567 ¶ 1** After her husband's death, Donna Kellar challenged the validity of their prenuptial agreement. The trial court properly struck portions of her declaration made in violation of the dead man's statute, RCW 5.60.030, and properly concluded that the Estate had not waived the protections of the dead man's statute. We affirm denial of summary judgment to Donna on the fairness of the prenuptial agreement. We reverse the grant of the Estate's summary judgment motion on the theories of judicial estoppel and ratification. We reverse the denial of the Estate's summary judgment motion to find the prenuptial agreement procedurally fair and therefore valid. We affirm the trial court determination that Donna's challenge to the prenuptial agreement did not trigger a no-contest clause in her husband's will. We affirm the award of attorney's fees by the trial court.

## FACTS

¶ 2 Ken and Donna Kellar<sup>1</sup> began dating in October 2000. Ken proposed in June 2001 and again at the beginning \***568** of September 2001. Less than three weeks later, they flew to South Dakota and were married on September 19, 2001. At the time, Donna was working as a waitress and earning approximately \$20–25,000 per year. She also owned and managed approximately six pieces of real \*\***910** property. In contrast, Ken was worth between \$15 and \$93 million.

### *Prenuptial Agreement*

¶ 3 Prior to the wedding, Ken and Donna signed a prenuptial agreement. The agreement was initially drafted by Ken's attorney, Mark Packer. Packer sent Ken his first draft in June 2001. In a letter to Ken, Packer wrote that a "key element would be complete disclosure of the financial status of each party to the other before signing and proof thereof," and that Donna "needs to consult her own lawyer separately before signing anything." The draft prenuptial included a blank financial disclosure sheet.

¶ 4 On September 6, Ken and Donna met with mediator Ron Morgan. Neither party had counsel present. Donna is certain the draft prenuptial agreement was not in front of them at the mediation, and Morgan stated that he could not recall a prenuptial agreement being used at mediation. Morgan did not remember any specific financial documents being used at mediation, and did not recall any discussion of Ken's net worth, or any list of assets or properties. He also stated that, although he did not give

legal advice, if he thought one party was being taken advantage he would have pulled them aside and told them to get an attorney. After the mediation, Morgan memorialized Ken and Donna's agreement:

[T]he parties agree that in the event they separate and/or file for divorce within four years of the date of their marriage, Wife shall receive from Husband the sum of \$25,000 for each full year of marriage prior to said separation and/or filing. In the event they separate and/or file for divorce any time after four years of marriage, Wife shall receive from Husband the sum of \***569** \$500,000. In the event of Husband's death while they are married and living together, Wife shall receive \$500,000 from Husband's estate or from such other fund that Husband may choose to create.

¶ 5 On September 11, Packer sent the draft agreement to Donna's attorney, Matt Peach. Donna claims she did not discuss Ken's assets with Peach, and Peach could not recall ever seeing a list of assets. Peach did not tell Donna what disclosures should be made prior to entering a prenuptial agreement. But, he did communicate with Packer after the mediation. He requested that the agreement be edited to accurately reflect that Donna would get \$25,000 per year of marriage, regardless of how long they were married. Peach further told Packer:

Donna also understood that anything acquired after the marriage was going to be community property and the prenuptial does not reflect that. If Ken wants to keep property he acquires in his name as separate property after the marriage Donna would accept that change in their agreement as outlined in the prenuptial because she loves him and does not wish to quibble. Anything that is put in both their names would be community property after the marriage occurs.

¶ 6 The agreement was revised, and Peach confirmed that the revised version reflected his client's intent. Ken and Donna signed the revised agreement on September 14,

five days before the wedding. At the time they signed the agreement, Donna was unsure if they would actually get married.

¶ 7 The agreement provided that in the event of divorce or Ken's death, Donna would receive \$25,000 for each year of marriage and an additional amount of \$500,000 if they were married for at least four years before divorce or Ken's death. The \$500,000 sum was to be paid out in 20 annual payments. The agreement also included reciprocal restrictions on spousal and community property rights. Specifically, they each waived their interest in community property, the right to pursue spousal maintenance and the right \*570 to statutory benefits such as spousal inheritance. Each spouse's separate property was to remain separate, and new assets acquired during the marriage were to remain separate property.

¶ 8 Ken and Donna each initialed a representation in the prenuptial agreement that:

Each of the parties individually own certain property, the full nature and extent of which has been disclosed by each to the other, and the parties by affixing their initials to this paragraph represent and \*\*911 warrant that they have satisfied themselves as to the fullness and accuracy of the disclosure of said assets each to the other and the respective values thereof.

Despite this representation, the agreement does not include any lists or descriptions of assets. But, it is the only provision of the agreement that required their initials.

#### *South Dakota Gaming Licenses*

¶ 9 Ken's business dealings included operating a number of casinos in South Dakota. Under South Dakota law, an individual could only hold licenses to operate three casinos. Ken used trusted employees and relatives to obtain licenses to operate casinos beyond his individual quota.

¶ 10 In 2004, Ken's attorney Richard Pluimer applied for licenses on Donna's behalf. In January 2005, the South Dakota Gaming Commission (Gaming Commission) recommended denial of the application, because her marital community already owned the maximum number

of licenses. Donna then sought declaratory relief. At a subsequent hearing, the Gaming Commission's primary concern was whether granting licenses to Donna could inure to the financial benefit of Ken. Pluimer and Donna sought to persuade the Gaming Commission that Ken and Donna kept separate assets.

¶ 11 The prenuptial agreement was presented, and Donna asserted she signed the agreement "because of a prior marriage, I had financial problems and I didn't want \*571 that to happen again, and because Ken had a substantial amount of money, I'm sure he wanted to protect his assets as well. So we've always kept our assets and everything, our financials separate." Pluimer claimed that, in entering a prenuptial agreement, "[e]ach recognized the separate property and the separate estate from the other, relinquished any financial claim or financial interest in the estate of the other, which would have included Donna relinquishing any claim against Ken's properties, whether they were gaming or otherwise." Donna further claimed that she had continued to own and develop a real estate business that was kept separate from Ken. She asserted that Ken had no right to control any of her bank accounts and that they did not have joint bank accounts. She stated that she did not intend to make any claim against any of Ken's separate properties and could not do so under the terms of the prenuptial agreement.

¶ 12 But, she conceded that she and Ken did jointly own one home together. Ken also gifted her money to purchase some of the properties in her real estate portfolio. The Gaming Commission's questioning focused on whether Ken's gifts to Donna clouded their separate and distinct financials, and made it inappropriate to grant Donna any licenses. Donna conceded that when she applied for the licenses, she did so for Ken so that he would have extra licenses at his disposal. Pluimer argued that the Gaming Commission could condition licenses on keeping any proceeds derived from the licenses totally segregated from Ken's interests. And, although Pluimer agreed there would be situations in which Ken could financially benefit from Donna's licenses, he argued those situations were subject to the Gaming Commission's future approval and consent.

¶ 13 The Gaming Commission ultimately awarded Donna the licenses. It stated that the parties had separate assets and that they are "protected and separated from the others by a valid prenuptial agreement."

#### *\*572 Ken's Will*

¶ 14 In 2003, Ken signed a will that included a no-contest clause. The clause provided, "If anyone contests the

provisions of this will, I leave said person the sum of \$1.00 only." In 2007, he executed a new will, which included a broader no-contest clause:

If any person brings any action, lawsuit, or claim against my estate, my Personal Representative, or any other beneficiary under my Will, which requests a resolution that would, if successful, increase the share of the claimant of my estate, then I direct that the claimant shall forfeit all interest in my estate, and the share that such person would have received under my Will shall be distributed as if he or she had died before me, leaving no descendants.

¶ 15 The new will also made significant gifts to Donna, including a house in her own name, the right to live in Ken's home for three years without paying expenses, and personal property. It changed the lump sum she was entitled to under the prenuptial agreement from \$500,000 to \$750,000, and stated that it would be paid out at \$50,000 per year, instead of \$25,000 per year. Finally, it provided for her to receive 5 percent of a charitable remainder trust each year, from a trust funded with \$1 million.

#### *Trial Court Proceedings*

¶ 16 Ken died in December 2009. Donna filed multiple petitions against the "Estate" in Whatcom County. As relevant to this appeal, one of those petitions challenged the validity of the prenuptial agreement.

¶ 17 Donna filed a motion for partial summary judgment, alleging that the prenuptial agreement was substantively and procedurally unfair as a matter of law. The Estate filed two motions for partial summary judgment, alleging that the agreement was procedurally fair, and that Donna's claim was barred under theories of judicial estoppel and ratification. The trial court denied both motions regarding \*573 fairness, but granted the Estate's motion to dismiss Donna's claim on estoppel grounds. In doing so, the trial court also struck portions of Donna's declaration that it determined violated the dead man's statute.

¶ 18 The parties then filed competing motions for summary judgment concerning the no-contest clause in Ken's will. The Estate also filed a motion for attorney

fees, seeking to recover all costs it incurred in defending the validity of the prenuptial agreement. The trial court granted Donna's motion for summary judgment, determining that the no-contest clause was not triggered by her challenge to the prenuptial agreement. It granted the Estate's motion for attorney fees pursuant to the prenuptial agreement. It is unclear if the fee award includes fees incurred in the Estate's unsuccessful attempt to enforce the will's no-contest clause.

¶ 19 Both parties appeal. Donna claims that the trial court erred in denying her motion for summary judgment regarding fairness, and in granting the Estate's motion for summary judgment on estoppel grounds. She also challenges the trial court's decisions to strike portions of her declaration and to award the Estate its attorney fees. The Estate argues that the trial court erred by denying its motion for summary judgment regarding procedural fairness, and granting Donna's motion for summary judgment regarding the no-contest clause in Ken's will.

## DISCUSSION

¶ 20 We review summary judgment orders de novo. *Hadley v. Maxwell*, 144 Wash.2d 306, 310–11, 27 P.3d 600 (2001). Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Peterson v. Groves*, 111 Wash.App. 306, 310, 44 P.3d 894 (2002). We review the facts, and reasonable inferences drawn from the facts, in the light most favorable to the nonmoving party. \*574 *CTVC of Haw. Co. v. Shinawatra*, 82 Wash.App. 699, 708, 919 P.2d 1243, 932 P.2d 664 (1996).

#### I. Dead Man's Statute

¶ 21 The dead man's statute provides:

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased

person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED     **\*\*913**  
FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

RCW 5.60.030.

[1] [2] [3] [4] ¶ 22 The purpose of the statute is to prevent interested parties from giving self-serving testimony regarding conversations and transactions with the deceased because the dead cannot respond to unfavorable testimony. *In re Estate of Cordero*, 127 Wash.App. 783, 789, 113 P.3d 16 (2005). The test to determine whether the testimony concerns a transaction covered by the statute is whether the deceased, if living, could contradict the witness of his own knowledge. *Estate of Lennon v. Lennon*, 108 Wash.App. 167, 178, 29 P.3d 1258 (2001). This is not, however, to say that an interested party cannot testify at all. For instance, an interested party can testify as to her own acts. See, e.g., *Slavin v. Ackman*, 119 Wash. 48, 50–51, 204 P. 816 (1922). Likewise, an \*575 interested party may testify as to her own feelings or impressions, so long as they do not concern a specific transaction or reveal a statement made by the decedent. *Jacobs v. Brock*, 73 Wash.2d 234, 237–38, 437 P.2d 920 (1968). Finally, documents are not barred. *Thor v. McDearmid*, 63 Wash.App. 193, 202, 817 P.2d 1380 (1991). Testimony regarding the intended meaning of those documents may, however, be prohibited. See *Wildman v. Taylor*, 46 Wash.App. 546, 550–51, 731 P.2d 541 (1987).

¶ 23 In addition to the facts described above, the trial court struck the following portions of Donna's amended declaration:

Ken asked me to quit my job and fly to South Dakota to get married. It was not until after Ken proposed in September 2001 that I first learned that he wanted me to sign a prenuptial agreement before getting married.

.... Ken informed me that his long-time attorney, Mark Packer, suggested to him that we should meet with Ron Morgan to mediate the prenuptial agreement.... After mediation, Ken told me that I had to meet with my own attorney....

....

.... Before signing the agreement, although I was generally aware that Ken was wealthy, I had no idea of the details of his businesses or his properties, including their nature (such as partnerships, corporations, etc.) or their values. Nor did I have any knowledge of his debts. At all times prior to signing the final prenuptial agreement, I was unaware of the full nature and extent of Ken's worth. He just told me we would get married in Deadwood, SD [South Dakota], and that I wasn't allowed to tell anyone we were getting married or that we had a prenuptial agreement.... Ken determined when we would get married and it seemed he was in a rush to get married as soon as possible. I still do not know why.

.... I was never provided with any financial statement showing Ken's assets and liabilities before signing the prenuptial agreement. It wasn't until 2005 that I learned that in December 2001, Ken had assets of approximately \$93,000,000, approximately \$16,000,000 in liabilities, and approximately \$77,000,000 in equity.

[5] \*576 ¶ 24 Donna argues that either the trial court erred in striking these portions of her declaration, or the Estate waived its protections by asserting that full disclosure of Ken's assets was made. We review evidentiary decisions made in conjunction with an order on summary judgment de novo. *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998).

#### A. Own Acts Exception and Documents Exception

[6] ¶ 25 Donna first argues that she "can testify as to her own acts and what she did and why she did it when the prenuptial agreement was signed." What she did and why she did it, however, is directly related to transactions with Ken. For instance, the trial court struck Donna's statements that "Ken asked me to quit my job and fly to

South Dakota to get married,” “Ken informed me that ... we should meet with Ron Morgan to mediate the prenuptial agreement,” and “he just told me we would get married in Deadwood, SD, and that I wasn’t allowed to tell \*\*\*914 anyone.” These are not mere recitations of Donna’s acts. Rather, they are statements of what Ken said, and Ken could rebut them if he were alive.

[7] ¶ 26 Donna also argues that she can testify she did not receive financial information, because not receiving information was her own act and documents are not barred by the dead man’s statute. Donna claims that if it is permissible to testify regarding a document that was actually received, then it is also permissible to testify about a document that was not received. Her argument is flawed. She relies on *Slavin*, in which the deceased’s daughter was allowed to testify about her own actions after receiving a letter from her mother. 119 Wash. at 51, 204 P. 816. *Slavin* involved a letter that was in evidence and spoke for itself. *Id.* at 49, 204 P. 816. The deceased could not have rebutted the letter’s existence. The absence of a document is a fundamentally different issue, because the deceased could assert that he did provide the information. Ken could have rebutted the assertion that she \*577 did not receive the financial information if untrue. Further, in an analogous case where there was an issue regarding whether a deed was delivered, an interested party was prohibited from testifying that the deed was not delivered. *Martin v. Shaen*, 26 Wash.2d 346, 349–51, 173 P.2d 968 (1946).

#### B. Own Impressions Exception

[8] [9] ¶ 27 Donna asserts that some of the stricken portions of her declaration were merely her own impressions. The dead man’s statute does not prohibit an interested party from testifying about her own impressions, because the deceased could not rebut the witness’s personal beliefs. *Jacobs*, 73 Wash.2d at 237–38, 437 P.2d 920. From this, Donna argues that she was permitted to testify about her “impressions and feelings surrounding the signing of the prenuptial agreement, including the short time frame and pressure to get the agreement signed before the wedding.” Had Donna’s declaration included a generic statement that she felt pressured to sign the agreement, this may be a closer issue. But, there is no such statement in her declaration. Rather, the stricken portions of her declaration include Ken’s specific statements that apparently led to the pressure Donna felt. For instance, she stated that “Ken asked me to quit my job and fly to South Dakota,” and “Ken determined when we would get married and it seemed he was in a rush to get married as

soon as possible.” These are statements about transactions with Ken, not statements regarding her own impressions.

#### C. Waiver

[10] [11] ¶ 28 The protections of the dead man’s statute may be waived by failure to object, cross-examination that is not within the scope of direct examination, or testimony favorable to the estate about transactions or communications with the decedent. *Thor*, 63 Wash.App. at 202, 817 P.2d 1380. In response to the Estate’s motion to strike portions of Donna’s declaration for violating the dead man’s statute, Donna asserted \*578 that the Estate waived its protections under the dead man’s statute by asserting that Ken had made financial disclosure. On appeal, she reiterates the same argument.

¶ 29 In order to establish procedural fairness the Estate must prove that there was financial disclosure. *Friedlander v. Friedlander*, 80 Wash.2d 293, 302, 494 P.2d 208 (1972). Based on that requirement, under Donna’s argument an estate necessarily waives the protections of the dead man’s statute in every case in which procedural fairness is at issue. But, it is possible to establish disclosure without relying on evidence that waives the statute. For instance, the introduction of documentary evidence does not waive the Estate’s protections. See, e.g., *Erickson v. Robert F. Kerr, M.D. P.S.*, 125 Wash.2d 183, 188–89, 883 P.2d 313 (1994). The Estate was entitled to rely on documents such as the prenuptial agreement, which included Donna’s initialed representation that full disclosure was made, to establish that there was disclosure. The Estate did not automatically waive its protections by doing so. The trial court correctly rejected that argument and properly struck offending portions of Donna’s declaration.

¶ 30 Donna raises a different theory of waiver in her reply brief. She claims that \*\*\*915 the Estate waived the dead man’s statute by attaching evidence of Donna’s transactions with Ken to its motions for summary judgment, which were heard at the same time as its motion to strike and Donna’s motion for summary judgment. Specifically, the Estate attached her testimony before the Gaming Commission, testimony from her depositions, and testimony from Morgan’s deposition. The Estate argues that it did not waive the statute, because all the evidence Donna cites can be sorted into four permissible categories: (1) testimony that was not actually offered or relied upon, (2) testimony that was offered only in the context of explaining what testimony should be struck under the dead man’s statute, (3) testimony about

matters that are not transactions between Donna and Ken, or (4) testimony about transactions \*579 between Donna and Ken that did not concern disclosure of Ken's statements and actions leading up to the wedding.

¶ 31 But, the only basis for waiver Donna raised below was whether the Estate necessarily waived the statute by asserting that there was disclosure. She did not raise the theory that the Estate waived the statute by attaching specific excerpts of testimony to its motions when they were heard.<sup>2</sup> After the Estate's motions were heard, Donna did not file a motion for reconsideration of the prior ruling on that basis. On appeal, she did not assign error to the trial court's failure to find error on that basis and did not articulate the argument until her reply brief. Because she did not raise her argument below, the trial court did not rule on it and the issue is not properly before us. We will not consider it for the first time on appeal. RAP 2.5(a), *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wash.2d 432, 441, 191 P.3d 879 (2008).

## II. Judicial Estoppel and Ratification

¶ 32 The trial court granted the Estate's motion for partial summary judgment regarding estoppel and ratification, determining that "based on Petitioner Donna M. Kellar['s] submissions and sworn testimony to the South Dakota Commission on Gaming in December 2005, she is estopped from arguing that the prenuptial agreement she entered into with Kenneth L. Kellar on September 14, 2001 is invalid." Because the trial court did not specify whether the decision was based on judicial estoppel or ratification, we consider both theories.

### A. Judicial Estoppel

[12] [13] ¶ 33 Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court \*580 proceeding and later seeking an advantage by taking a clearly inconsistent position.<sup>3</sup> *Arkison v. Ethan Allen, Inc.*, 160 Wash.2d 535, 538, 160 P.3d 13 (2007). The purpose of the rule is to protect the integrity of the judicial process. *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). In determining whether the doctrine applies, we look at three primary considerations: (1) whether a party's later position is clearly inconsistent with its earlier position, (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled, and (3) whether the party seeking to assert an inconsistent position would

derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Arkison*, 160 Wash.2d at 538–39, 160 P.3d 13. These factors are not an exhaustive formula and additional considerations may guide a court's decision. *Id.* at 539, 160 P.3d 13. These include:

- (1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed \*\*916 his position; (6) it must appear unjust to one party to permit the other to change.

*Markley v. Markley*, 31 Wash.2d 605, 614–15, 198 P.2d 486 (1948); *see also Arkison*, 160 Wash.2d at 539, 160 P.3d 13. We review a trial court's decision to apply the equitable doctrine of judicial estoppel for abuse of discretion. *Arkison*, 160 Wash.2d at 538, 160 P.3d 13.

[14] ¶ 34 Because judicial estoppel does not apply unless there are two judicial proceedings, Donna argues that the Gaming Commission is an administrative, rather than judicial, body. But, some jurisdictions have recognized that judicial estoppel applies equally to proceedings before an administrative body sitting in a quasi-judicial capacity. *See*, \*581 *e.g.*, *White Tiger Graphics, Inc. v. Clemons*, 88 So.3d 908, 911 (Ala.Civ.App.2012); *People v. Voit*, 200 Cal.App.4th 1353, 1371, 133 Cal.Rptr.3d 431 (2011); *Maniez v. Citibank, F.S.B.*, 404 Ill.App.3d 941, 948–49, 344 Ill.Dec. 531, 937 N.E.2d 237 (2010). Quasi-judicial proceedings include an agency's official adjudicative acts, and are subject to review by the judiciary. BLACK'S LAW DICTIONARY 1364 (9th ed. 2009). In Washington, adjudicative proceedings include proceedings before an agency in which an opportunity for the hearing is required by statute or constitution, and also in all cases concerning licensing and rate making. RCW 34.05.010(1). Thus, licensing decisions made by the Washington State Gambling Commission are quasi-judicial adjudicative proceedings subject to judicial review. RCW 9.46.095; RCW 34.05.570. The Estate has not, however, cited any Washington authority which has previously applied judicial estoppel to a position taken in an earlier quasi-judicial proceeding. Further, the Estate has not briefed South Dakota law and has not established that the Gaming Commission was acting in a quasi-judicial capacity under South Dakota law. We hold that judicial estoppel does not apply absent a prior judicial proceeding in which the alleged inconsistent position was taken.

[15] ¶ 35 But, we also determine that the position Donna took in the licensing proceeding is not clearly inconsistent

with her position here. The positions taken must be diametrically opposed to one another. *See, e.g., Seattle-First Nat. Bank v. Marshall*, 31 Wash.App. 339, 343–44, 641 P.2d 1194 (1982). The parties to the proceeding were Donna and the Gaming Commission. Ken and Donna were not adversaries. Rather, she applied for the licenses at his urging. He was implicitly aligned with her position that she was entitled to the licenses. The ultimate issue was whether Donna kept her assets sufficiently separate from Ken’s assets such that Ken would not financially benefit if Donna’s application for licenses was granted. Donna and Pluimer stated that Donna was party to a prenuptial \*582 agreement that restricted the creation of community property, that Donna had in fact kept their assets separate, and that she intended to keep their assets separate. The prenuptial agreement, which was admitted and spoke for itself, was merely evidence that she satisfied the requirements to obtain a license.

¶ 36 The Gaming Commission stated in its ruling that the prenuptial agreement was valid and undoubtedly relied on that conclusion when issuing the licenses. But, the Gaming Commission had no authority to actually adjudicate the validity of the prenuptial agreement as between Ken and Donna. It could only determine what action it would take based on the existence of the document. The Gaming Commission was a third party evaluating whether it would rely on the prenuptial agreement of the marital community when conducting its business, not a court adjudicating the validity of that agreement. The trial court here was not concerned with the question of whether Donna was eligible for a gaming license or whether the Gaming Commission properly relied on the prenuptial agreement or Donna’s testimony in issuing the licenses. The issue here is whether the prenuptial agreement is void and unenforceable from its inception. This is a matter for the judiciary alone. The one court involved here, the Washington Superior Court, will not be misled by virtue of the position taken at the Gaming Commission.<sup>4</sup>

\*\*917 ¶ 37 Finally, the Estate has not shown that accepting Donna’s current position would allow her to obtain an unfair advantage or impose an unfair detriment on the \*583 Estate.<sup>5</sup> The Estate first argues that Donna benefited by obtaining licenses from perjured or disavowed testimony. Ken urged Donna to obtain the licenses so he would have more of them under his control. Implicitly, he saw a benefit to himself, not just her. If the prenuptial agreement were set aside, those licenses and the benefits would become part of the marital estate to be divided. The Estate has not shown that the receipt of the licenses was an unfair advantage to Donna. Second, the

Estate contends that Donna would benefit by obtaining gifts in Ken’s will that he made based on a presumption that the prenuptial agreement was valid. That argument is purely speculative. Even if the statement was factually supported, the Estate’s argument is totally detached from the licensing proceeding. Any unfairness to Ken would flow from Donna successfully demonstrating that the prenuptial agreement is invalid from the inception, not from Ken’s reliance on Donna’s position before the Gaming Commission or any other time during their marriage.

¶ 38 The trial court abused its discretion to the extent it determined that judicial estoppel precludes Donna from arguing that the prenuptial agreement is invalid.

#### B. Ratification

[16] ¶ 39 The Estate also argues that at the latest Donna had financial disclosure prior to her testimony before the Gaming Commission, and that she therefore ratified the prenuptial agreement by testifying to its existence and terms and her conformity to its existence and terms.

\*584 [17] [18] ¶ 40 A party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, the party remains silent or continues to accept the contract’s benefits. *Ebel v. Fairwood Park II Homeowners’ Ass’n*, 136 Wash.App. 787, 793–94, 150 P.3d 1163 (2007). But, a contract that is void at its inception, as opposed to merely voidable, is an absolute nullity and is incapable of ratification. *See, e.g., In re Estate of Romano*, 40 Wash.2d 796, 803, 246 P.2d 501 (1952).

[19] [20] ¶ 41 Prenuptial agreements are contracts subject to contract law, but also subject to special rules formulated by the legislature and the courts. *In re Marriage of Burke*, 96 Wash.App. 474, 477, 980 P.2d 265 (1999). The parties to a prenuptial agreement are unique, because they do not deal with each other at arm’s length. *Friedlander*, 80 Wash.2d at 301, 494 P.2d 208. Their relationship is one of mutual confidence and trust which calls for the exercise of good faith, candor and sincerity in all matters bearing upon the proposed agreement. *Id.* The validity of a prenuptial agreement is based on the circumstances surrounding the execution of the agreement. *In re Marriage of Bernard*, 165 Wash.2d 895, 904, 204 P.3d 907 (2009).

¶ 42 Washington courts have not considered whether the doctrine of ratification can be applied to prenuptial

agreements. But, the Washington Supreme Court has held that the passing of time during a marriage cannot support a laches defense to a post-death challenge to a prenuptial agreement. *In re Estate of Crawford*, 107 Wash.2d 493, 501, 730 P.2d 675 (1986). It reasoned that an “economically \*\*918 subservient spouse could not be expected to challenge the dominant spouse during his lifetime.” *Id.* at 501, 730 P.2d 675 (citing *In re Estate of Flannery*, 315 Pa. 576, 173 A. 303 (1934)). To say that acting in conformance with or in reliance on the prenuptial agreement rather than challenging it amounts to ratification would accomplish what the parties in those cases sought through their laches argument. It is untenable. Indeed, the New Hampshire Supreme Court adopted the same rule \*585 precluding ratification, reasoning that considering a wife’s delay in challenging a prenuptial agreement as evidence of ratification would penalize the wife for choosing not to disrupt her marriage. *In re Estate of Hollett*, 150 N.H. 39, 44–45, 834 A.2d 348 (2003).

¶43 We rely on the reasoning in *Flannery*, *Crawford*, and *Hollett* in holding that a prenuptial agreement that is substantively and procedurally unfair is void from the inception and is incapable of ratification. The trial court erred to the extent it granted summary judgment on the basis that Donna had ratified the prenuptial agreement.

### III. Fairness

[21] [22] [23] [24] [25] [26] ¶ 44 A prenuptial agreement is substantively fair if it provides a fair and reasonable provision for the party not seeking enforcement of the agreement. *In re Marriage of Matson*, 107 Wash.2d 479, 482, 730 P.2d 668 (1986). If it is substantively fair, the inquiry ends. *Id.* If it is substantively unfair, then the court considers whether it is nevertheless procedurally fair. *Id.* at 482–83, 730 P.2d 668. To determine whether a prenuptial agreement is procedurally fair, we consider (1) whether there was full disclosure by the parties of the amount, character, and value of the property, and (2) whether the agreement was entered into freely and voluntarily, upon independent advice, and with full knowledge by both spouses of their rights. *Id.* at 483, 730 P.2d 668. Thus, a prenuptial agreement is valid if it is either substantively fair or procedurally fair. The party seeking to enforce the agreement has the burden of proving its validity. *Crawford*, 107 Wash.2d at 496, 730 P.2d 675.

¶45 Donna appeals the denial of her motion for summary judgment alleging that the agreement is both substantively and procedurally unfair. With regard to procedural fairness, she argues that there was not full financial

disclosure, that there was insufficient time to allow her to \*586 freely and voluntarily enter the agreement, and that she received ineffective assistance. The Estate cross-appeals the denial of its motion for summary judgment alleging that the agreement is procedurally fair and therefore valid. Because we determine that the agreement is procedurally fair, we need not consider whether it is substantively unfair.

#### A. Disclosure

¶ 46 The prenuptial agreement itself included an initialed representation and warranty that there was full financial disclosure. Thus, there is strong evidence that disclosure was made. In contrast, Donna’s statements that there was no disclosure were properly stricken pursuant to the dead man’s statute. There is no remaining direct evidence that disclosure was not made. Rather, Donna relies on statements from her attorney and the mediator that they could not recall seeing a list. She also argues that because Ken’s attorney recommended that the prenuptial agreement explicitly list assets, the fact that the agreement did not explicitly do so suggests that no disclosure was made. These statements are insufficient to raise a genuine issue of material fact regarding disclosure.

#### B. Timing

¶ 47 Donna claims that the negotiation process was “wholly inequitable and per se fatal to the agreement,” because of the short period of time that passed between the date of the proposal, the date the prenuptial agreement was signed, and the date of the wedding. Specifically, she asserts that she and Ken married 17 days after Ken’s proposal, 13 days after the mediation, 8 days after Donna first saw the prenuptial agreement, and 5 days after she signed the prenuptial agreement. But, issues of timing are relevant only to the extent they inform whether the agreement was entered into freely and voluntarily, upon independent advice, and with full \*\*919 knowledge by both spouses of their rights. There is nothing inherently fatal about signing a prenuptial agreement five days before the wedding.

\*587 ¶ 48 Donna relies on cases in which the shortness of time was a factor in setting aside the prenuptial agreement. In *Bernard*, the challenging spouse’s attorney testified that he did not have sufficient time to conduct a full review of the agreement or draft a counteragreement.

165 Wash.2d at 899, 204 P.3d 907. In *In re Marriage of Foran*, a spouse established that she was under a great deal of pressure and did not have time to actually obtain her own counsel. 67 Wash.App. 242, 246, 834 P.2d 1081 (1992). In *Crawford*, a spouse did not have an opportunity to seek independent counsel because she saw the agreement for the first time three days before the scheduled wedding and signed it that day. 107 Wash.2d at 497–98, 730 P.2d 675.

¶ 49 Those cases are readily distinguishable. Donna obtained independent counsel. Her attorney actually communicated with Ken’s attorney and negotiated a revision in the prenuptial agreement. Her attorney did not testify that he needed more time to review the agreement. And, Donna testified that when she left for South Dakota she was unsure if she and Ken would get married. She never suggested that the wedding was too soon. Her claim that she signed the agreement under pressure, because of the approaching wedding date, is not supported by the record.

### C. Ineffective Assistance

[27] ¶ 50 Donna claims that Peach did not provide effective legal counsel, and that prior to entering the agreement she did not understand her rights or the concept of separate and community property.<sup>6</sup> We reject her contention that the procedural fairness test requires “effective counsel.”

\*588 ¶ 51 In *In re Marriage of Bernard*, the Court of Appeals determined that a prenuptial agreement was procedurally unfair because the challenging spouse’s attorney was not party to the negotiations and the attorney did not accurately advise her of her rights. 137 Wash.App. 827, 835–36, 155 P.3d 171 (2007). The Washington Supreme Court explicitly declined to consider whether inadequate counsel can be a basis for finding a prenuptial agreement procedurally unfair, and stated that the challenging spouse did not make that argument before the Court of Appeals or the Supreme Court. 165 Wash.2d at 907 n. 8, 204 P.3d 907.

¶ 52 Donna relies on the Court of Appeals decision in *Bernard* for her argument Peach did not fully inform her of her rights, and that there is no representation by counsel when a spouse is merely advised by counsel and not fully represented during the negotiations. She also claims that Peach did not fully inform her of her legal rights.

¶ 53 First, we cannot say that effective independent

counsel is required when independent counsel is not even required in all cases. *Matson*, 107 Wash.2d at 483, 730 P.2d 668. The Washington Supreme Court has stated that, in some circumstances, a requirement for independent counsel would be arbitrary and unnecessary. *Id.* The precise standard should be applied on a case-by-case basis. *Id.* Likewise, counsel’s presence at any mediation or negotiation is not a prerequisite to procedural fairness. Here, the parties to the prenuptial agreement decided to negotiate the terms of the agreement with a professional mediator without the presence of counsel. They negotiated further with the benefit of independent counsel and revised the agreement after the mediation. The fact that counsel was not present at the mediation is not a valid basis to find that the prenuptial agreement is procedurally unfair.

¶ 54 Second, Donna’s proposed subjective test for effective assistance is untenable. \*\*920 The procedural fairness test directs us to consider “ ‘whether the agreement was entered into fully and voluntarily, upon independent advice, and \*589 with full knowledge by [both spouses of their] rights.’ ” *Id.* at 483, 730 P.2d 668 (alteration in original) (quoting *Whitney v. Seattle–First Nat’l Bank*, 90 Wash.2d 105, 110, 579 P.2d 937 (1978)). Accepting Donna’s argument would require us to separately consider whether there was competent independent advice and whether there was full understanding of those legal rights. A prospective spouse could not have confidence that an agreement was valid without inquiring into, weighing, and evaluating the adequacy of the other spouse’s independent counsel. To do so would eliminate the independence of that independent counsel and require an invasion of attorney-client privilege. In addition to evaluating the independent counsel’s performance, the prospective spouse would have to inquire into the other spouse’s actual understanding of the legal issues. Otherwise, in any subsequent challenge, the challenging spouse would only have to assert that her counsel failed to mention a legal right or that she lacked full understanding of her legal rights to defeat an assertion of procedural fairness.

¶ 55 Knowledge of one’s legal rights is a conclusion that flows from the opportunity to obtain independent counsel. Donna had that opportunity in this case. She obtained independent counsel, participated in a mediation in which counsel was not present for either side, and her attorney negotiated on her behalf for revisions after the mediation. It is not a requirement that she attain a lawyer’s understanding of the nuance of family law. Our inquiry is not whether she failed to understand her rights or whether her counsel failed to adequately inform her. It is sufficient that she had adequate opportunity to consult independent

legal counsel.

¶ 56 A spouse who receives ineffective assistance during prenuptial negotiations and is not made fully aware of her legal rights may have a claim against her attorney, but she does not have a basis to invalidate the prenuptial agreement itself. To the extent that our decision in *Bernard* conflicts with this conclusion, we decline to follow it.

¶ 57 Donna failed to raise a material question of fact regarding whether the necessary disclosure of assets was \*590 made or whether she entered the prenuptial agreement freely and voluntarily, upon independent advice, and with full knowledge of her rights. The Estate met its burden to prove procedural fairness, and the trial court erred by denying the Estate's motion for summary judgment on that basis.

#### IV. No-Contest Clause

[28] ¶ 58 The no-contest clause in Ken's will provided:

If any person brings any action, lawsuit, or claim against my estate, my Personal Representative, or any other beneficiary under my Will, which requests a resolution that would, if successful, increase the share of the claimant of my estate, then I direct that the claimant shall forfeit all interest in my estate, and the share that such person would have received under my Will shall be distributed as if he or she had died before me, leaving no descendants.

¶ 59 No-contest provisions have been upheld by Washington courts, but their breadth depends on the specific provision's language. For instance, in *Boettcher v. Busse* a creditor's claim did not trigger a no-contest clause that stated that any challenger to the will would not take under the will. 45 Wash.2d 579, 585, 277 P.2d 368 (1954). The court reasoned that the creditor's claim was not a claim against the will. *Id.*

¶ 60 We have not been asked to consider whether such a clause violates public policy by chilling the right to challenge the prenuptial agreement as void. We are asked only whether such a challenge in this case triggered forfeiture. The clause in Ken's will does not limit itself to challenges to the will. Rather, it refers to any challenge

that would increase the claimants share in Ken's estate. But, by challenging the prenuptial agreement, Donna challenges the validity of the inventory of property to be included in the estate. If she prevails, then certain property may be removed from the inventory and flow to her by statute as opposed to through the estate. Though her success could \*591 decrease \*\*921 the size of the estate, it would not necessarily increase Donna's share of the estate.

¶ 61 The trial court correctly concluded that the challenge to the prenuptial agreement was not a challenge to the estate that triggered the forfeiture clause.

#### V. Attorney Fees Below

[29] ¶ 62 Donna argues that the trial court abused its discretion both in awarding fees at all and in determining that the fees requested were reasonable. We review an attorney fee award for an abuse of discretion. *Emmerson v. Weilep*, 126 Wash.App. 930, 940, 110 P.3d 214 (2005).

¶ 63 After extensive briefing and oral argument, the trial court granted the Estate's motion for attorney fees and costs in the amount of \$259,862. Referring to the will's no-contest clause, at oral argument the trial court stated that it could carry out Ken's intent "so long as no loss is realized to the estate, and that can be done in this case by the award of attorney fees expended by the estate in defending the prenuptial agreement." Donna claims it was improper to base attorney fees on the no-contest clause. The trial court's order granting attorney fees and its subsequent findings of fact and conclusions of law, however, do not justify the fees on that basis. Rather, the fees were based on a provision for fees in the prenuptial agreement itself, RCW 4.84.330, and RCW 11.96A.150(1). Donna has not argued that the findings are not supported by the facts of the case, or that the findings do not support the conclusions of law.

¶ 64 The presiding judge further stated at oral argument that he thought he could have performed the work in approximately 120 hours, and that 120 hours of work was reasonable. But, in his actual award he granted the Estate fees for 685 hours of work. Donna claims that this change of heart was per se an abuse of discretion. Again, however, Donna does not offer any challenge to the trial court's actual findings of fact and conclusions of law. She is not challenging individual time entries or billing rates used in the \*592 lodestar calculation, only the gross award. She is not arguing the fees awarded were not based upon the prenuptial claims. Further, there was a second hearing on fees that occurred between the presiding judge's statement that 120 hours was reasonable

and the actual order granting fees. At that second hearing, Donna's counsel reminded the judge of his previous statement. He shrugged it off, responding, "I was in practice a long time ago."

¶ 65 Donna has not shown that the trial court committed an abuse of discretion by awarding fees and finding that the Estate's fees were reasonable.

#### VI. Attorney Fees on Appeal

¶ 66 Donna requests fees on appeal pursuant to RAP 18.1, RCW 11.96A.150(1), and RCW 4.84.330. The Estate requests fees pursuant to RAP 18.1, RCW 11.96A.150(1), and the attorney fee provision in the prenuptial agreement.<sup>7</sup> We award Donna fees on appeal solely on the issue of Estate's cross-appeal of the will no-contest

clause. We award the Estate its reasonable fees and costs on the remaining issues.

¶ 67 We affirm in part and reverse in part.

WE CONCUR: SPEARMAN A.C.J., and SCHINDLER, J.

#### All Citations

172 Wash.App. 562, 291 P.3d 906

#### Footnotes

- 1 To avoid confusion, we refer to Ken and Donna by their first names. No disrespect is intended.
- 2 Donna does not claim on appeal that she raised this argument below, and it is apparent that she did not raise it in her briefs in opposition to the Estate's motion to strike, motion for summary judgment on procedural fairness, or motion for summary judgment on judicial estoppel and ratification.
- 3 The Washington Supreme Court recently held judicial estoppel applies to both questions of fact and questions of law. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wash.2d 851, 865–66, 281 P.3d 289 (2012).
- 4 We need not be concerned with whether the Gaming Commission was misled since judicial estoppel is concerned with the integrity of the courts. When a prenuptial agreement is set aside or a marriage declared invalid nunc pro tunc anyone who relied on the existence of the agreement or the marriage may in retrospect believe they were misled or in fact have been misled. However, whatever claims these third parties have against the parties to the marriage, those claims are not a basis to refuse the exercise of the right of the parties to the marriage to challenge the agreement or the marriage itself.
- 5 Donna argued below that an affidavit from Pluimer constituted new evidence that justified reconsideration. She claims the affidavit shows that Donna was merely a tool to be used by Ken to obtain additional gaming licenses, and that the licenses were for the sole benefit of Ken. The affidavit could have been used to show that the Gaming Commission's decision was to Ken's, as opposed to Donna's, benefit. Because the trial court erred by dismissing on the basis of judicial estoppel, we need not consider her argument. We note, however, that it appears the affidavit was filed in an ancillary proceeding to which Donna was a party. The affidavit was not a newly discovered document that could not have been discovered and produced by Donna. CR 59. It did not justify reconsideration. CR 59.
- 6 We note that the prenuptial agreement contained an independent counsel provision:  
Both parties acknowledge that they have received the advice of independent counsel with regard to this Agreement. Both parties acknowledge that they have been advised of the entire estate of the other, that they have been advised of and understand their rights hereunder and of their marital rights and that after seeking such advice as they deem necessary, each have independently, freely and voluntarily signed this agreement.
- 7 The Estate did not include a request for fees in its opening brief, but filed a motion for leave to correct its brief by adding a request for attorney fees. The motion is granted.

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165 Wash.2d 895

Supreme Court of Washington, En Banc.

In re the Matter of the Marriage of Gloria BERNARD, Respondent,  
And Thomas Bernard, Petitioner.

Argued May 27, 2008.Decided April 9, 2009.

Synopsis

Background: Wife filed action against husband for divorce. The Superior Court, King County, Helen L. Halpert, J., declared prenuptial agreement unenforceable. Husband appealed. The Court of Appeals, 155 P.3d 171, Baker, J., affirmed. Husband petitioned for review.

Holdings: The Supreme Court, Stephens, J., held that:

1 prenuptial agreement as amended was substantively unfair and unreasonable, and  
2 substantial evidence supported trial court's finding that the agreement was procedurally unfair.

Affirmed.

Sanders, J. dissented and filed opinion, in which Fairhurst, J., and J.M. Johnson, J., joined.

1Husband and Wife



Evidence

Burden of proving the enforceability of a prenuptial agreement lies with the spouse seeking enforcement.

1 Case that cites this headnote



205Husband and Wife

205IIMarriage Settlements

205k34Evidence

2Husband and Wife



Adequacy of provision for spouse

If a prenuptial agreement makes reasonable provision for spouse not seeking to enforce it, the agreement is substantially fair and enforceable.

3 Cases that cite this headnote



205Husband and Wife

205IIMarriage Settlements

205k28Requisites and Validity

205k29Antenuptial Settlements

205k29(6)Adequacy of provision for spouse

3Husband and Wife



### Validity of settlement in general

A prenuptial agreement is procedurally fair, and an otherwise unfair distribution of property is valid and binding, if (1) spouses made a full disclosure of amount, character, and value of the property involved and (2) agreement was freely entered into on independent advice from counsel with full knowledge by both spouses of their rights.

2 Cases that cite this headnote



205Husband and Wife

205IIMarriage Settlements

205k28Requisites and Validity

205k29Antenuptial Settlements

205k29(9)Validity of settlement in general

4Husband and Wife



### Construction and operation in general

Determination of whether a prenuptial agreement is substantively fair is a question of law unless there are factual disputes that must be resolved in order for a court to interpret the meaning of the contract.

1 Case that cites this headnote



205Husband and Wife

205IIMarriage Settlements

205k31Construction and Operation

205k31(2)Construction and operation in general

5Husband and Wife



### Appeal and error

Analysis of whether a prenuptial agreement is procedurally fair involves mixed issues of policy and fact and, accordingly, appellate review is de novo but undertaken in light of the trial court's resolution of the facts.

0 Case that cites this headnote



205Husband and Wife

205VIActions

205k243Appeal and error

6Appeal and Error



### Substantial evidence

On appeal, a trial court's findings of fact will be upheld if supported by substantial evidence; "substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the declared premise.

6 Cases that cite this headnote



30Appeal and Error

30XVI(I)Questions of Fact, Verdicts, and Findings

30XVI(I)3Findings of Court

30k1010Sufficiency of Evidence in Support

30k1010.1In General

30k1010.1(6)Substantial evidence

7Husband and Wife



Adequacy of provision for spouse

Prenuptial agreement as amended by side letter was substantively unfair to wife; agreement made provisions for wife disproportionate to the means of husband, and limited wife's ability to accumulate her separate property while precluding her common law or statutory claims on husband's property.

3 Cases that cite this headnote



205Husband and Wife

205IIMarriage Settlements

205k28Requisites and Validity

205k29Antenuptial Settlements

205k29(6)Adequacy of provision for spouse

8Husband and Wife



Validity of settlement in general

The validity of prenuptial agreements is based on circumstances surrounding the execution of the agreement.

2 Cases that cite this headnote



205Husband and Wife

205IIMarriage Settlements

205k28Requisites and Validity

205k29Antenuptial Settlements

205k29(9)Validity of settlement in general

9Husband and Wife



Rents, profits, and products of separate property

Husband's substantial labor in managing his separate assets that produced revenue was community property.

0 Case that cites this headnote



205Husband and Wife

205VIICommunity Property

205k257Rents, profits, and products of separate property

10Husband and Wife



Release of husband's rights in property

Husband and Wife



Release of wife's rights in property

## Husband and Wife



### Adequacy of provision for spouse

While there is nothing unfair about two well-educated working professionals agreeing to preserve the fruits of their labor for their individual benefit, a prenuptial agreement disproportionate to the respective means of each spouse, which also limits the accumulation of one spouse's separate property while precluding any claim to the other spouse's separate property, is substantively unfair.

5 Cases that cite this headnote



205Husband and Wife

205IIMarriage Settlements

205k28Requisites and Validity

205k29Antenuptial Settlements

205k29(4.5)Release of husband's rights in property



205Husband and Wife

205IIMarriage Settlements

205k28Requisites and Validity

205k29Antenuptial Settlements

205k29(5)Release of wife's rights in property



205Husband and Wife

205IIMarriage Settlements

205k28Requisites and Validity

205k29Antenuptial Settlements

205k29(6)Adequacy of provision for spouse

11Husband and Wife



### Validity of settlement in general

Substantial evidence supported trial court's findings that prenuptial agreement was procedurally unfair to wife; wife's attorney lacked sufficient time to review final draft of agreement that was not provided to wife until few days before wedding, and wife was busy with guests, wedding details, and honeymoon preparations.

2 Cases that cite this headnote



205Husband and Wife

205IIMarriage Settlements

205k28Requisites and Validity

205k29Antenuptial Settlements

205k29(9)Validity of settlement in general

12Husband and Wife



### Appeal and error

Trial court's factual finding that parties' prenuptial agreement lacked procedural fairness would be upheld by Supreme Court if supported by substantial evidence.

0 Case that cites this headnote



205Husband and Wife

205VIActions

205k243Appeal and error

13Husband and Wife



Validity of settlement in general

Substantial evidence supported trial court's finding that scope of parties' negotiation in formulating amendment to their prenuptial agreement was too limited to cure defects of the agreement, and, thus, agreement was procedurally unfair; while trial court observed that the agreement as amended ultimately contained a matter outside terms of the side letter, which prompted the amendment, wife and her attorney testified that they understood negotiations were limited to five areas of concern set forth in side letter.

0 Case that cites this headnote



205Husband and Wife

205IIMarriage Settlements

205k28Requisites and Validity

205k29Antenuptial Settlements

205k29(9)Validity of settlement in general

14Divorce



Briefs

Whether wife was entitled to attorney fees at trial, and in advance of appeal, as found by trial court would not be considered on appellate review of parties' divorce proceedings by Supreme Court, where issue was raised by husband for first time in reply brief.

2 Cases that cite this headnote



134Divorce

134VSpousal Support, Allowances, and Disposition of Property

134V(I)Appeal

134k1251Briefs

(Formerly 134k278.1)

Attorneys and Law Firms

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Opinion

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STEPHENS, J.

\*898 ¶ 1 Gloria Bernard filed for dissolution from Thomas Bernard.<sup>1</sup> We are asked to determine the enforceability of their prenuptial agreement. We hold the agreement is not

enforceable because it is substantively and procedurally unfair. We affirm Gloria's award of attorney fees and costs.

## FACTS AND PROCEDURAL HISTORY

¶ 2 In 1995 Thomas hired Gloria to be the operations manager for Bernard Development Company. In late 1998, after the death of Thomas's first spouse, Thomas and Gloria began dating. Thomas asked Gloria to marry him but informed her he would require a prenuptial agreement because of the disparity in their relative wealth. At the time of their engagement, Thomas was 55 and a successful real estate developer with a net worth of approximately \$25 million; Gloria was 49, held undergraduate and master's degrees in business administration, and had a net worth of approximately \$8,000. The events surrounding the signing of the prenuptial agreement and its amendment are the subject of this litigation.

¶ 3 In January 2000, Thomas and his long-time attorney, Richard Keefe, began working on the prenuptial agreement. \*899 Thomas and Keefe repeatedly advised Gloria to obtain independent counsel but did not provide her with a draft of the proposed agreement. Lacking a draft, Gloria took no action to obtain representation. On May 24, Keefe prepared a prenuptial checklist for Thomas and Gloria and encouraged Gloria to obtain counsel. He provided her with the names of three attorneys but did not provide her with a draft agreement. On June 8, Keefe again encouraged Gloria to obtain independent representation, resending the prenuptial checklist. Gloria still did not have a draft of the agreement, however, and did not consult counsel at that time. Not until June 20, 18 days before the wedding, did Gloria receive a draft of the prenuptial agreement.

¶ 4 On July 5, Gloria met with Marshall Gehring, an attorney experienced in prenuptial negotiations. That evening Gehring received a working draft of the prenuptial agreement from Keefe. It was substantially different from the draft Keefe gave to Gloria on June 20.

¶ 5 Gehring testified at trial that he did not have sufficient time to conduct a full review of the agreement or draft a counteragreement. Instead, in a letter to Gloria dated July 7, the day before the wedding, he identified five areas of major concern with the prenuptial agreement. He indicated in his letter that he had additional minor concerns but did not specify what those were. Gehring's letter recommended that Gloria negotiate some kind of additional written instrument to address the concerns he outlined. \*\*910 In testimony, Gehring agreed that he had time to only "hit the high points" in his letter and said he would have reviewed the agreement "page by page" if he had been given more time. He further testified that during the short time he had to review the agreement, it was very difficult to talk directly with Gloria, as she was busy with guests, wedding details, and honeymoon preparations.

¶ 6 In addition, Thomas testified that he would have called off the wedding on its eve, or even the day of, had Gloria not signed the prenuptial agreement. Gloria testified \*900 that she believed Thomas would not have married her if she had refused to sign the agreement.

¶ 7 Gloria signed the prenuptial agreement the day before the wedding, on July 7, with the understanding that it would be amended. Thomas and Gloria's wedding took place

at the Seattle Tennis Club on July 8 and included approximately 200 guests, some of whom had come from out of town.

¶ 8 Gloria and Thomas signed a “side letter” on the day of the wedding, agreeing to renegotiate the five areas of major concern Gehring noted in his July 7 letter. Both Gloria and Gehring testified that they believed the negotiations that followed the side letter were limited to the five areas identified by Gehring. Report of Proceedings (RP) (Sept. 6, 2005) at 112;2 RP (Sept. 12, 2005) at 17.3 The side letter required the anticipated amendment to be finalized no later than October 7, 2000, but the amendment would not be finalized until August 28, 2001. When it was eventually finalized, the amendment ratified the original prenuptial agreement and altered several provisions in accordance with each of Gehring's concerns.

¶ 9 Gloria filed for dissolution on February 4, 2005. Thomas demanded arbitration under the terms of the prenuptial agreement. Gloria moved for summary judgment, challenging the enforceability of the prenuptial agreement.<sup>4</sup> The trial court bifurcated its analysis of the enforceability of the prenuptial agreement.

\*901 ¶ 10 The court determined that the prenuptial agreement, as amended, was substantively unfair as a matter of law. The court directed a trial on the question of procedural fairness. After a four day trial, the court found the prenuptial agreement, as amended, was procedurally unfair. First, the court found that the draft sent to Gehring on July 5 was substantially different from the version Gloria received on June 20. The court further found that Gloria and Gehring received the revised draft of the agreement only a few days before the wedding, “too late to provide time for meaningful negotiation and full advise [sic].” Clerk's Papers (CP) at 1814. The trial court also found that “[b]ecause of the impending wedding [Gloria] was faced with the choice of the humiliation of calling off a wedding or signing a substantively unfair document.” CP at 1816. Next, the court found the subsequent amendment did not cure the procedural defects of the original agreement because the terms of the side letter restricted the scope of renegotiation. Id. Accordingly, “[a]s the scope of the negotiations allowed by the ‘side letter’ were so specifically limited, the fact that there was sufficient time for independent review and for the advice of counsel was insufficient to cure the defects of the first agreement.” Id. The trial court concluded that the agreement lacked procedural fairness.

\*\*911 ¶ 11 Division One of the Court of Appeals affirmed. *In re Marriage of Bernard*, 137 Wash.App. 827, 155 P.3d 171 (2007). The Court of Appeals first held the agreement, as amended, was substantively unfair. Id. at 834–35, 155 P.3d 171. The court then held the agreement, as amended, was procedurally unfair. Id. at 835, 155 P.3d 171. The Court of Appeals reasoned that Gloria did not have the benefit of independent counsel, that her bargaining position was grossly imbalanced, and “at no time did [she] have full knowledge of her legal rights.” Id. Moreover, the court observed that because Gloria and Gehring believed the side letter dictated the subsequent \*902 amendment and because the side letter was entered into within 24 hours of the wedding, the subsequent

amendment did not remedy the agreement's procedural unfairness. *Id.* at 837, 155 P.3d 171.

¶ 12 We granted review. *In re Marriage of Bernard*, 163 Wash.2d 1011, 180 P.3d 1290 (2008).

## ANALYSIS

123 ¶ 13 To determine the enforceability of a prenuptial agreement, this court undertakes a two-prong analysis. *In re Marriage of Matson*, 107 Wash.2d 479, 482–83, 730 P.2d 668 (1986); see also *In re Estate of Crawford*, 107 Wash.2d 493, 730 P.2d 675 (1986); *In re Marriage of Hadley*, 88 Wash.2d 649, 565 P.2d 790 (1977); *Friedlander v. Friedlander*, 80 Wash.2d 293, 494 P.2d 208 (1972); *Hamlin v. Merlino*, 44 Wash.2d 851, 272 P.2d 125 (1954). The burden of proof lies with the spouse seeking enforcement. *Friedlander*, 80 Wash.2d at 300, 494 P.2d 208.

4 ¶ 14 Under the first prong, the court determines whether the agreement is substantively fair, specifically whether it makes reasonable provision for the spouse not seeking to enforce it. *Matson*, 107 Wash.2d at 482, 730 P.2d 668. If the agreement makes a fair and reasonable provision for the spouse not seeking its enforcement, the analysis ends; the agreement is enforceable. This is entirely a question of law unless there are factual disputes that must be resolved in order for a court to interpret the meaning of the contract. *In re Marriage of Foran*, 67 Wash.App. 242, 251 n. 7, 834 P.2d 1081 (1992).

¶ 15 If, however, the agreement is substantively unfair to the spouse not seeking enforcement, the court proceeds to the second prong. Under the second prong, the court determines whether the agreement is procedurally fair by asking two questions: (1) whether the spouses made a full disclosure of the amount, character, and value of the property involved and (2) whether the agreement was freely entered into on independent advice from counsel with full knowledge \*903 by both spouses of their rights. *Matson*, 107 Wash.2d at 483, 730 P.2d 668. If the court determines the second prong is satisfied, then an otherwise unfair distribution of property is valid and binding. *Id.* at 482, 730 P.2d 668.

56 ¶ 16 Analysis under this second prong involves mixed issues of policy and fact, and accordingly review is *de novo* but undertaken in light of the trial court's resolution of the facts. See *Foran*, 67 Wash.App. at 251, 834 P.2d 1081. On appeal, a trial court's findings of fact will be upheld if supported by substantial evidence. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 879, 73 P.3d 369 (2003). "Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise." *In re Marriage of Hall*, 103 Wash.2d 236, 246, 692 P.2d 175 (1984).

¶ 17 We note as an initial matter that both parties request this court reconsider the above two-prong analysis, which was expressly set out in *Matson* and has characterized our analysis for over 50 years. See *Hamlin*, 44 Wash.2d 851, 272 P.2d 125. Gloria argues that this court should undertake an approach that requires both substantive and procedural fairness; that is, she argues that a substantively unfair

agreement should not be saved by procedural fairness. On the other hand, Thomas argues the substantive fairness prong should be abandoned altogether because RCW 26.09.080 already directs courts to make a “just and equitable” distribution of property. We find it unnecessary to entertain these arguments because the \*\*912 prenuptial agreement at issue is both substantively and procedurally unfair, and the application of a different analysis would not alter the outcome here.

### The Agreement

¶ 18 Turning to the agreement at issue, we apply the two-prong analysis to the prenuptial agreement as signed on the eve of marriage and subsequently amended 14 \*904 months later.<sup>5</sup> Thomas concedes the prenuptial agreement as originally executed on the eve of marriage was substantively and procedurally unfair; therefore, we must determine whether the later amendment cured the substantive or procedural deficiencies.

¶ 19 Under the first prong of our analysis, the agreement is enforceable if it is substantively fair. Here, the trial court concluded the agreement as amended was substantively unfair to Gloria. The Court of Appeals affirmed, reasoning that the amended agreement severely restricted the creation of community property, eliminating community property rights in the short term while permitting Thomas to enrich his separate property at the expense of the community. *Bernard*, 137 Wash.App. at 834, 155 P.3d 171. The Court of Appeals observed that the amended agreement provided nothing for Gloria from Thomas's separate property, nor reimbursed her for her contributions to Thomas's separate property, nor permitted maintenance, and it precluded any inheritance. *Id.* at 834–35, 155 P.3d 171.

78 ¶ 20 Thomas argues that because this was a short-term marriage there was no time to accumulate community property. He urges us to alter our analysis and evaluate substantive fairness at the time of enforcement, as opposed to at the time of execution, of an agreement. We refuse. To do so would change the test from one of fairness to fortuity. We adhere to the settled rule that “[t]he validity of prenuptial agreements in this state is based on the circumstances surrounding the execution of the agreement.” *In re Marriage of Zier*, 136 Wash.App. 40, 47, 147 P.3d 624 (2006) (citing *Matson*, 107 Wash.2d at 484, 730 P.2d 668).

9 ¶ 21 Moreover, Thomas's substantial labor in managing his separate assets produced revenue that is considered community property. See *Hamlin*, 44 Wash.2d at 858, 272 P.2d 125; see also 19 KENNETH W. WEBER, WASHINGTON PRACTICE: FAMILY AND \*905 COMMUNITY PROPERTY LAW § 11. 14, at 161–62 (1997). Thus, the premise of Thomas's argument is incorrect; community property accumulated during the marriage.

10 ¶ 22 To be sure, “[t]here is nothing unfair about two well-educated working professionals agreeing to preserve the fruits of their labor for their individual benefit.” *In re Marriage of DewBerry*, 115 Wash.App. 351, 365, 62 P.3d 525 (2003). However, an agreement disproportionate to the respective means of each spouse, which also limits

the accumulation of one spouse's separate property while precluding any claim to the other spouse's separate property, is substantively unfair. See Matson, 107 Wash.2d at 486, 730 P.2d 668; Friedlander, 80 Wash.2d at 301, 494 P.2d 208.

¶ 23 Here, the community property consisted of half of Gloria's salary, which was controlled by Thomas, and in effect \$100,000 of Thomas's earnings per year. In addition, the prenuptial agreement limited Gloria's inheritance rights, prevented Gloria from seeking spousal maintenance, prevented Gloria from using community property to assist her children, and sheltered Thomas from liability for any debts incurred by Gloria. CP at 1201–19. The prenuptial agreement as amended remedied some of these problems, but overall made provisions for Gloria disproportionate to the means of Thomas, and limited Gloria's ability to accumulate her separate property while precluding her common law or statutory claims on Thomas's property. CP at 1248–51. The agreement as amended is substantively unfair. It can be enforced only if it was executed fairly, the second prong of our analysis.

\*\*913 ¶ 24 Under the second prong of our analysis, we ask whether the spouses fully disclosed the amount, character, and value of the property involved and whether the agreement was entered into voluntarily and intelligently. The trial court found Gloria had full knowledge of the amount, character, and value of Thomas's assets, and Gloria does not dispute this finding. However, the trial court found that, given the timing of Gloria's receipt of the working agreement draft in relation to the wedding and her \*906 discussions with her attorney, the agreement was not entered into voluntarily or intelligently. The court further found that the subsequent side letter and amendment did not cure this defect, given the limited scope of negotiations.

1112 ¶ 25 Because the trial court made findings of fact about the agreement's lack of procedural fairness, we will uphold its findings if they are supported by substantial evidence. Dickie, 149 Wash.2d at 879, 73 P.3d 369. Here, substantial evidence supports the trial court's findings of fact regarding procedural unfairness. There was not enough time for Gloria or her attorney to adequately review the prenuptial agreement as evidenced by the late date at which a working draft was provided and the several distractions present for Gloria in the few days before the wedding. The evidence supports the trial court's finding that Gloria did not sign the July 7 prenuptial agreement "after receiving independent advice and with full knowledge of its legal consequences." CP at 1816.

13 ¶ 26 The trial court then considered whether the amendment to the agreement executed by Gloria and Thomas, contemplated by the July 8 "side letter," cured the deficiencies of the July 7 agreement. The trial court found that the scope of negotiation was so limited that the amendment did not cure the defects of the agreement. Substantial evidence supports this conclusion, as demonstrated by the testimony of Gloria and Gehring, who both understood that the terms of the amendment were limited to the five areas of concern set forth in Gehring's July 7 letter to Gloria. And the wording of the side letter is additional evidence that any amendment was limited to the matters set forth in the "side letter," CP at 1256,6 supporting the trial court's finding that the terms of the side letter limited renegotiation. CP at 1816 (Finding of Fact 27).

\*907 ¶ 27 The trial court observed that the side letter did not expressly limit the terms of the amendment to only the five areas of concern noted by Gehring and that the agreement as amended ultimately contained a matter outside the terms of the “side letter.”<sup>7</sup> Id. Additionally, the deadline for renegotiation was abandoned. Id. But these observations do not negate the substantial evidence upon which the trial court based its finding regarding the limits of the amendment. Especially considering the trial court’s ability to judge the weight and credibility of testimony, including Gloria’s and her attorney’s testimony that they understood the negotiations were limited, a fair-minded person would be persuaded that the side letter did not give Gloria a right to amend the prenuptial agreement beyond the few matters specified in the “side letter.” The trial court’s findings of fact in this regard are amply supported, and we will not disturb them on review. See Dickie, 149 Wash.2d at 879–80, 73 P.3d 369. We hold the agreement, as amended, was procedurally unfair.<sup>8</sup>

\*\*914 ¶ 28 Because the prenuptial agreement was both substantively and procedurally unfair, it is unenforceable. We affirm the lower court’s invalidation of the agreement.

#### Attorney Fees

14 ¶ 29 The trial court awarded Gloria attorney fees and costs pursuant to RCW 26.09.140. In addition, the trial court awarded Gloria fees in advance of this appeal pursuant to *Stringfellow v. Stringfellow*, 53 Wash.2d 359, 333 P.2d 936 (1959).

\*908 ¶ 30 In Thomas’s second amended notice of appeal, he appeals both fee awards. However, he provides no supporting argument in his initial brief to the Court of Appeals or in his supplemental brief to this court. Instead, in his reply brief, Thomas argues that the prenuptial agreement, if valid, precludes an award of attorney fees and costs outside the context of arbitration. Gloria, on the other hand, consistently asked the Court of Appeals and this court to uphold both awards under RCW 26.09.140 and RAP 18.1(c).

¶ 31 “This court does not consider issues raised for the first time in a reply brief.” *Sacco v. Sacco*, 114 Wash.2d 1, 5, 784 P.2d 1266 (1990). We affirm the trial court’s award of attorney fees and costs to Gloria and confirm the advance award of fees on appeal.

#### CONCLUSION

¶ 32 We hold the prenuptial agreement, as amended, was substantively and procedurally unfair. We affirm the Court of Appeals. In addition, we affirm Gloria’s award of attorney fees and costs, both at trial and on appeal.

WE CONCUR: GERRY L. ALEXANDER, C.J., SUSAN OWENS, CHARLES W. JOHNSON, BARBARA A. MADSEN, TOM CHAMBERS, JJ.

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SANDERS, J. (dissenting).

¶ 33 I agree with the majority that the prenuptial agreement, as amended, is substantively unfair and “can be enforced only if it was executed fairly, the second prong of our analysis.” Majority at 912–13. However I disagree with the majority’s conclusion that the amended agreement is also procedurally unfair (majority at 913)

under the second prong. I would hold that the amended agreement is procedurally fair and thus enforceable. Therefore I dissent.

¶ 34 Under the second prong of our analysis we must determine whether a prenuptial agreement is procedurally fair by looking at (1) whether the spouses made a full disclosure of the amount, character, and value of the \*909 property involved and (2) whether the agreement was freely entered into on independent advice from counsel with full knowledge by both spouses of their rights. *In re Marriage of Matson*, 107 Wash.2d 479, 483, 730 P.2d 668 (1986). If the second prong is satisfied then a prenuptial agreement is valid and binding. *Id.* at 482, 730 P.2d 668. I agree, as does the majority, with the trial court's finding, "Gloria had full knowledge of the amount, character, and value of Thomas's assets." Majority at 913. However, I disagree with the majority's assertion that the trial court's finding that Gloria did not voluntarily and intelligently enter into the prenuptial agreement is supported by substantial evidence. *Id.*

¶ 35 We review the totality of the circumstances to determine whether the spouse was "in a fair position to sign the agreement freely and intelligently." *Matson*, 107 Wash.2d at 485, 730 P.2d 668. Instructive to our inquiry is *In re Marriage of Knoll*, 65 Or.App. 484, 671 P.2d 718 (1983), which Matson presented as an exemplar of the procedural fairness analysis. *Matson*, 107 Wash.2d at 484, 730 P.2d 668.

In *Knoll*, the wife challenged the validity of the prenuptial agreement. The court found the agreement valid judged in light of the circumstances in the case and the wife's range of experience. Important facts in the court's decision were: (1) the wife was advised of the necessity of a prenuptial agreement at least 9 months before the wedding and knew and understood the purpose of the agreement; (2) she had been given a copy of the agreement at least 7 months before the wedding; (3) she was advised on numerous occasions by her husband's attorney to seek independent counsel; (4) she had an excellent understanding of her husband's \*\*915 assets because she handled the bookkeeping and payroll for her husband's businesses and was in charge of 10 of his business checking accounts; and (5) both parties had to reaffirm and sign the agreement 3 years later because they had lost the original document. The court decided that the failure to provide the wife with a detailed explanation of the agreement and her failure to follow advice and seek out independent counsel was offset by her knowledge and the procedural fairness provided her.  
*Id.* at 484–85, 730 P.2d 668.

\*910 ¶ 36 Similar substantive facts are present here: (1) Gloria was advised of the necessity of a prenuptial agreement from the outset of her betrothal to Thomas, (2) she had 14 months to renegotiate the agreement, (3) she was repeatedly advised to seek the advice of independent counsel and had independent counsel during the renegotiation period, (4) she had an excellent understanding of Thomas's assets because she worked for him, and (5) she reaffirmed the prenuptial agreement 14 months later. The only distinction is that in *Knoll* the spouse was given a copy of the agreement 7 months before the wedding, whereas Gloria had 14 months to renegotiate the agreement after the wedding. But this is a distinction without a difference because

the entire prenuptial agreement was open to renegotiation. In sum that Gloria voluntarily and intelligently entered into the prenuptial agreement is supported by these facts.

¶ 37 Still the trial court found Gloria did not enter into the prenuptial agreement voluntarily or intelligently and that the amendment did not cure the defects of the agreement because the scope of the negotiation of the side letter was too limited. Clerk's Papers (CP) at 1815–16. The majority asserts these findings are supported by substantial evidence. Majority at 913. However, the majority concedes that the trial court found “the side letter did not expressly limit the terms of the amendment to only the five areas of concern noted by Gehring and that the agreement as amended ultimately contained a matter outside the terms of the ‘side letter.’ ” Id. at 913. Additionally the deadline of the “side letter” was entirely abandoned. Id. The majority concludes, “a fair-minded person would be persuaded that the side letter did not give Gloria a right to amend the prenuptial agreement beyond the few matters specified in the ‘side letter.’ ” Id. at 913.

¶ 38 However the side letter provided Gloria and Thomas would “use their best efforts to negotiate in good faith and execute an amendment to the Agreement covering the \*911 following matters” but did not limit negotiation to only those matters.<sup>1</sup> CP at 249. In fact the amendment to the agreement contained a matter outside the terms of the “side letter,” which benefited Thomas.<sup>2</sup> Gloria and her attorney should have realized that if Thomas amended the prenuptial agreement to contain a matter outside of the terms of the “side letter,” then Gloria could have done so as well. That is what a fair-minded person would have surmised. The entire purpose of the “side letter” was to address Gloria’s concerns with the prenuptial agreement, so substantial evidence does not support the trial court’s finding that renegotiation was limited to the terms of the side letter.

¶ 39 Gloria did not use her best efforts to negotiate an amendment to the prenuptial agreement. A party to a prenuptial agreement must not keep back his or her reservations about the agreement. *In re Marriage of Cohn*, 18 Wash.App. 502, 569 P.2d 79 (1977). “Parties to a prenuptial agreement do not deal with each other at arm’s length. Their relationship is one of mutual confidence and trust which calls for the exercise of good faith, candor and sincerity in all matters bearing upon the proposed agreement.” *Friedlander v. Friedlander*, 80 Wash.2d 293, 301, 494 P.2d 208 (1972) (citing \*\*916 *Bauer v. Bauer*, 1 Or.App. 504, 464 P.2d 710 (1970)).

¶ 40 In Cohn spouses executed a prenuptial agreement and a settlement agreement. 18 Wash.App. at 503, 569 P.2d 79. Later the wife challenged the enforceability of both agreements “on the grounds that [she] did not sign them on independent advice and with full knowledge of her rights, and that a full disclosure had not been made to her of the amount, character and value of the property involved.” Id. Rejecting the \*912 wife’s challenge, the court observed the spouses had discussed the prenuptial agreement months prior to their wedding, and “[a]lthough [the wife] testified that she felt rushed into signing the agreement, ... she did not at any point indicate to the lawyer who had drafted it that she felt she was being rushed or that she was signing anything that she

did not fully intend to sign." Id. at 506, 569 P.2d 79. The court reasoned if the wife did not understand the provisions or effect of the agreements "there [was] no evidence that she ever let her husband or the attorney know of her lack of knowledge.... [I]t would be unfair to penalize [the husband] for [the wife's] omission to request further information." Id. at 510, 569 P.2d 79 (citing *In re Marriage of Hadley*, 88 Wash.2d 649, 654, 565 P.2d 790 (1977)).

¶ 41 Similarly Gloria could have discussed her concerns about the prenuptial agreement while negotiating the terms of the amendment. But she did not. It is extremely unfair to Thomas to be penalized for Gloria's omission and failure to negotiate.

¶ 42 The prenuptial agreement, as amended, was substantively unfair but procedurally fair. As such I would hold the prenuptial agreement is enforceable and reverse the Court of Appeals.

¶ 43 Therefore, I dissent.

WE CONCUR: MARY E. FAIRHURST and JAMES M. JOHNSON, JJ.

All Citations

165 Wash.2d 895, 204 P.3d 907

Footnotes

1

For ease of reference this opinion will refer to the parties by first name.

2

Gehring testified regarding the postnuptial agreement: "My job was [to] tell her don't sign the [prenuptial] agreement. She signed it. Now we're going to fix it. Well, okay. The agreement was that the—the agreement she made, we were going to limit it to certain items."

3

Gloria testified regarding the postnuptial agreement: "[w]hat [Gehring] told me is ... these are the only points that we're able to amend, and I'm trying to do the best I can to have this wording changed or whatever on these five points...."

4

The issue of whether the trial court should have analyzed the arbitration clause prior to determining the enforceability of the entire prenuptial agreement is not raised in this appeal. Thomas concedes the enforceability of the arbitration clause is dependent on the enforceability of the prenuptial agreement as a whole. See *In re Marriage of Bernard*, 137 Wash.App. 827, 833, 155 P.3d 171 (2007) (observing "[n]o court has yet determined the effect of Pinkis [v. Network Cinema Corp., 9 Wash.App. 337, 512 P.2d 751 (1973) ] in the context of a prenuptial agreement").

5

That this case involves a prenuptial agreement, amended postnuptially, does not alter our analysis. See *In re Marriage of Hadley*, 88 Wash.2d 649, 654, 565 P.2d 790 (1977) (analyzing three post nuptial agreements under the established two-prong approach).

6

The letter stated in pertinent part: “we and our attorneys will use their best efforts to negotiate in good faith and execute an amendment to the Agreement covering the following matters ...” and then went on to discuss the five areas outlined in Gehring’s letter. CP at 1256. It did not reference any other substantive changes to the prenuptial agreement.

7

The amendment included a provision not contained in the “side letter” that further isolated Thomas’s earnings from the marital community. Br. of Resp’t at 21.

8

The Court of Appeals appeared to rest at least some of its determination that there was procedural unfairness on a belief that Gloria’s counsel was inadequate. Bernard, 137 Wash.App. at 836, 155 P.3d 171. Gloria did not make such an argument before this court or any court below. A discussion of counsel’s adequacy is unnecessary to the resolution of this case because the trial court’s findings are supported by substantial evidence without resort to consideration of the adequacy of counsel. We decline to entertain that question here.

1

Words in a written agreement are given their “ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” Hearst Commc’ns, Inc. v. Seattle Times Co., 154 Wash.2d 493, 504, 115 P.3d 262 (2005).

2

That this benefited Thomas does not defeat its logical consequence: the “side letter” did not preclude renegotiation of the prenuptial agreement.

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## CHAPTER FOUR

### FIVE THINGS YOU SHOULD KNOW ABOUT TAXES AND DIVORCE

June 2016

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**ROBERT V. BOEShaar** is committed to helping individuals and small businesses who are facing problems with the Internal Revenue Service. He has a Master of Laws in Taxation degree (LL.M.) from the University of Washington and fourteen years of experience as an attorney with the IRS Office of Chief Counsel. He represented the IRS in over 40 litigated cases in the United States Tax Court. Robert is active in the legal community and has served as President of the Washington State Bar Association Taxation Section. He volunteers with the University of Washington Low-Income Federal Tax Clinic and is an active member of Seattle Rotary #4.

## **I. Introduction**

### **A. Five Things You Should Know About Taxes and Divorce**

1. Joint and Several Liability is imposed when spouses file a joint tax return.
2. When spouses are divorced, unless certain criteria are met, only the custodial parent will be able to claim their children as dependents on their tax return.
3. If a payment qualifies as alimony, the payor spouse may claim a tax deduction for it and the payee spouse must include it in taxable income.
4. Transfers made pursuant to a divorce may be tax free and attorney's fees for tax advice in connection with a divorce may be deductible.
5. A spouse may be able to obtain relief from joint and several liability ("Innocent Spouse Relief") if they have filed a joint tax return.

### **B. Hypothetical – David and Diane**

David and Diane were married for ten years and have two young children. David worked at an architectural firm and Diane works for a large construction company. Two years ago Diane found out that David had been embezzling money from his employer and did not include this income on their federal tax returns. She also found out that David had been having an affair. They separated, and after a few months, in September of 2014, Diane filed for divorce. The divorce was final in April of 2015. Diane has just received a notice from the Internal Revenue Service stating that their 2012 and 2013 joint income tax returns are under audit.

## **II. Joint and Several Liability for Taxes**

### **A. Who is Responsible for the Taxes after a Divorce?**

When two spouses file a joint income tax return, the general rule is that they are jointly and severally liable for any tax that is due for that year. I.R.C. § 6013(d)(3).

Even after a divorce, each spouse remains responsible for the tax due (plus interest and penalties) for any year for which they have filed a joint tax return. The Internal Revenue Service will hold a taxpayer liable for these taxes even though a divorce decree may state that the other spouse will be responsible for any federal taxes that are owed for the years during which they were married. In the hypothetical above, both David and Diane are jointly and severally liable for the 2012 and 2013 taxes because they filed joint tax returns for those years.

### **B. Filing Status Determined as of Last Day of Tax Year**

When filing a tax return, a taxpayer must choose a filing status such as single, head of household, qualifying widow(er); or if married, married filing a joint return or married filing a separate return.

Whether a taxpayer is married or unmarried is determined as of the last day of the year. I.R.C. § 7703(a). When a couple is divorced, their filing status for the year is determined by the status of their marriage under state law on the last day of the year. I.R.C. § 7703(a). If a person is divorced under state law as of the last day of the year, the IRS treats them as being unmarried for that whole year. I.R.C. § 7703(a)(2). However, a married person will be considered to be unmarried if he or she files as married-filing-separately, lives in a separate household for which he or she provides more than half of the cost of maintaining, supports a child who lives there during more

than one-half of the year, and his or her spouse does not live there during the last six months of the year. I.R.C. § 7703(b).

If spouses file as married filing separately, each is entitled to half the basic standard deduction allowed on a joint return. If one spouse itemizes deductions, the other spouse cannot claim the standard deduction. I.R.C. § 63(c)(6)(A).

### **C. May You File an Amended Return to Change your Filing Status?**

If spouses file separate returns, they may later file a 1040X amended joint return within three years after the due date of the tax returns. I.R.C. § 6013(b). But if spouses file a joint return, and wish to later file separate amended returns, the amended returns must be filed before the due date of the joint return. After the due date of the filed joint tax return, spouses cannot file amended separate returns. Treas. Reg. § 1.6013-1(a)(1). However, if one spouse dies, the surviving spouse may, within one year of the due date of the return, elect to file a separate return for the decedent. Treas. Reg. § 1.6013-1(d)(5).

## **III. Children of Divorced or Separated Parents (or Parents Who Live Apart)**

### **A. Who Can Claim the Children as Dependents on their Tax Return?**

To claim a child as a dependent, the child must be a “qualifying child” or “qualifying relative.” A “qualifying child” must have the same principal place of abode as the taxpayer for more than one-half of the year. I.R.C. § 152(c)(1)(B). The parent with whom the child lived for the greater number of nights during the year is the custodial parent. The other parent is the noncustodial parent.

A child of divorced or separated parents is generally the qualifying child of the custodial parent. However, the noncustodial parent is allowed to claim a child as a

dependent if they meet three preliminary requirements and one of three statutory exceptions. I.R.C. § 152(e). The preliminary requirements are:

- (1) The parents are divorced or legally separated under a decree of divorce or separate maintenance, or are separated under a written separation agreement, or lived apart at all times during the last 6 months of the year;
- (2) The child received over half of his or her support for the year from the parents; and
- (3) The child is in the custody of one or both parents for more than half of the year.

If the above requirements are met, the noncustodial parent may claim a child as their dependent only if one of the following statutory exceptions is also met:

- (1) The custodial parent must sign a written declaration that such custodial parent will not claim such child as a dependent, and the noncustodial parent must attach such written declaration to the noncustodial parent's return for the taxable year. I.R.C. § 152(e)(2). If the decree or agreement went into effect after 2008, a noncustodial parent claiming an exemption for a child must sign either a Form 8332 or a similar statement. He or she cannot attach pages from a divorce decree or separation agreement instead of Form 8332. Treas. Reg. § 1.152-4(e)(1)(ii).
- (2) There is a multiple support agreement between the parties as provided in I.R.C. § 153(c). I.R.C. § 152(e) (3); or
- (3) There is a qualified pre-1985 instrument that provides that the noncustodial parent shall be entitled to any deduction allowable under section 151, and the

noncustodial parent provides at least \$600 for the support of the child during the calendar year.

I.R.C. § 152(e).

Assume that David and Diane, in the above scenario, have one child who is now living with Diane. If the parties agreed, the divorce decree could allow David to claim the child on his tax returns in the odd years if Diane signed Form 8332 or a similar written declaration that Diane, the custodial parent, would not claim the child as a dependent in those years. David, the noncustodial parent, would also need to attach the Form 8332 to his tax returns for those years. (See <https://www.irs.gov/pub/irs-pdf/f8332.pdf> for Form 8332.)

#### **IV. Alimony**

##### **A. What is Alimony?**

A payment to a spouse or former spouse is alimony if the following four requirements are met:

- (1) It is a payment to or for a spouse or former spouse that is paid pursuant to a divorce or separation instrument;
- (2) The instrument does not designate the payment as not alimony;
- (3) The spouses are not members of the same household at the time the payments are made and are legally separated under a decree of divorce or separate maintenance; and
- (4) There is no liability to make any payment (in cash or property) after the death of the recipient spouse.

I.R.C. § 71(b).

Also, to qualify as alimony, the payment must not be for child support. I.R.C. § 71(c)(1). A payment will be treated as child support if it is to be made upon the occurrence of a contingency such as a child attaining a specific age, getting married, or being accepted to college. I.R.C. § 71(c)(2).

### **B. What are the Tax Consequences of Paying or Receiving Alimony?**

The spouse who pays alimony may claim a tax deduction for it and the spouse who receives it must include it in income. I.R.C. §§ 71(a), 215(a).

## **V. Transfers Between Spouses and Attorney's Fees Incurred in a Divorce**

### **A. Tax Consequences**

Generally, no gain or loss is recognized on a transfer of property from a taxpayer to (or in trust for the benefit of) their spouse, or former spouse if the transfer is incident to their divorce. I.R.C. § 1041(a). A transfer is incident to the divorce if it occurs within one year after the date on which the marriage ceases, or is related to the cessation of the marriage. I.R.C. § 1041(b). This rule applies even if the transfer was in exchange for cash, the release of marital rights, the assumption of liabilities, or other consideration. I.R.C. § 1041(e); Temp. Treas. Reg. § 1.1041-1T(d), Q&A 10.

Legal fees and court costs for obtaining a divorce are considered personal and are not deductible. However, legal fees paid for tax advice in connection with a divorce and legal fees to arrange for tax deductible spousal support may be deductible. I.R.C. § 212. Fees paid to appraisers, actuaries, and accountants for services rendered to determine one's correct tax liabilities or to obtain alimony may also be deductible. Id.

## **VI. Relief from Joint and Several Liability**

### **A. Joint and Several Liability**

Since 1918, married couples have been able to file one joint return and compute their tax on their aggregate income. However, in 1938 spouses became jointly and severally liable for the tax owed on a joint return. I.R.C. § 6013. Joint and several liability means that the IRS may collect the entire liability from either spouse, or may collect a portion of the liability from each spouse.

Your client may have been unfairly stuck with a tax bill from a failed marriage. Perhaps your client, like Diane in the above hypothetical, found out that their former spouse was embezzling money from their business and did not report this income on the tax returns. Or, your client's former spouse used the money that was to pay the joint tax liabilities for themselves and told your client that the taxes had been paid. After the divorce, your client may find themselves with large tax bills for prior years. In these situations, you should consider whether your client could qualify for innocent spouse relief.

### **B. What Kinds of Relief Are Available?**

There are four kinds of relief from joint and several liability that are available. The relief available depends on whether or not a joint tax return has been filed by the spouses. The kinds of relief are:

- (1) Innocent Spouse Relief under I.R.C. section 6015(b)
- (2) Allocation of Liability Relief under I.R.C. section 6015(c) and (d)
- (3) Equitable Relief under I.R.C. section 6015(f)
- (4) Community Property Income Tax Relief under I.R.C. section 66(c)

If a joint tax return has been filed by spouses, a spouse may elect to seek relief from joint and several liability on such return under Internal Revenue Code section 6015. Relief is available if the IRS has determined that the tax was understated on the tax return, the spouse did not know, or have reason to know, of the understatement, and it is inequitable to hold the spouse liable for the tax.

If spouses are no longer married, legally separated, or have not been members of the same household for the last twelve months, it may be possible to obtain an allocation of an understatement of tax attributable to one of spouse's incomes.

If spouses have filed a joint return but relief is not available under I.R.C. section 6015(b) or (c) because the IRS has not determined that there is an understatement of tax, equitable relief may be available under I.R.C. section 6015(f). Relief is available from an item attributable to a spouse or former spouse if the tax liability is understated or if the tax is not paid and taking into account all the facts and circumstances, it would be unfair to hold the spouse liable for the understatement of tax.

If spouses did not file a joint tax return, relief may still be available. Under Internal Revenue Code section 66(c), an individual who lives in a community property state, such as Washington State, may be able to obtain relief if he or she did not know about the income attributable to the other spouse.

### **C. Innocent Spouse Relief under Section 6015**

I.R.C. section 6015 was enacted as part of the IRS Restructuring and Reform Act of 1998. As previously discussed, when spouses file a joint tax return, they become jointly and severally liable for the tax owed for that tax year.

To be eligible for relief from joint and several liability under section 6015, spouses must file a joint income tax return for the year in issue. Generally, a joint income tax return must be signed by both spouses to be valid. However, an income tax return may qualify as a joint return if the spouses intended to file a joint return. For instance, the fact that spouses have a history of filing jointly for many years may show an intent to file a joint return. Federbush v. Commissioner, 34 T.C. 740, 757 (1960), aff'd, 325 F.2d 1 (2<sup>nd</sup> Cir. 1963); Estate of Campbell v. Commissioner, 56 T.C. 1 (1971).

When spouses have filed a joint return, there are three kinds of relief that are potentially available to a spouse under I.R.C. section 6015:

### **1. Innocent Spouse Relief**

The first kind of relief is generic innocent spouse relief and provides relief from additional tax the Internal Revenue Service has determined that a person owes that is attributable to their spouse (from whom they are separated) or their former spouse. I.R.C. § 6015(b). There are three requirements to qualify for this relief:

First, a spouse must have filed a joint tax return

Second, the IRS must determine that the tax return understated their joint tax liability. An understatement of tax is generally the difference between the total amount of tax that should have been shown and the amount of tax actually shown on the return. I.R.C. § 6211(a). For instance, if there is \$2,500 total tax reported and the IRS later determines in an audit that the total tax is actually \$3,000, this results in a \$500 understatement. This understatement must be due to an erroneous item of a spouse or former spouse. An "erroneous item" can be income the spouse received and failed to

report on the joint return, or any deductions or credits that were incorrectly reported on the joint return. I.R.C. § 6015(b).

Third, a spouse must establish that at the time he or she signed the joint return they did not know, or have reason to know, of the understatement of tax.

Fourth, in light of all the facts and circumstances it would be unfair to hold the spouse liable for the understatement of tax.

Finally, in order to obtain relief, you must file a Form 8857, Request for Innocent Spouse Relief, with the IRS within two years after the IRS takes collection action.

I.R.C. § 6015(b).

Collection action for the purposes of I.R.C. section 6015(b) and 6015(c) is defined as (1) the issuance by the IRS of a Collection Due Process levy notice under I.R.C. section 6330, (2) the offset of an overpayment of the requesting spouse against a tax liability (See McGee v. Commissioner, 123 T.C. 314 (2004)), (3) the filing of a lawsuit against the requesting spouse by the United States to collect the joint liability, or (4) the filing of a claim by the United States in a court proceeding in which the requesting spouse is a party or which involves the requesting spouse's property, such as a bankruptcy case. Treas. Reg. § 1.6015-5(b)(2). Collection action does not include a mere demand for payment of the tax, the issuance of a notice of deficiency by the IRS, or the filing of a Notice of Federal Tax Lien. Id.

## **2. Separation of Liability Relief**

The second kind of relief is separation of liability relief and provides for an allocation of the additional tax owed because an item attributable to a spouse or former spouse was not properly reported on the joint return. I.R.C. § 6015(c).

There are four requirements to qualify for separation of liability relief.

First, a spouse must have filed a joint tax return which the IRS has determined understated their joint tax liability.

Second, at the time of requesting relief, the spouses must be divorced, legally separated, or have not been members of the same household for the past twelve months.

Third, the spouse must not have had actual knowledge of the item causing the understatement of tax when they signed the joint tax return.

Fourth, the spouse must elect relief within two years after the IRS has begun collection activities against the spouse.

I.R.C. § 6015(c).

### **3. Equitable Relief**

The third kind of relief is equitable relief and provides for relief from an item attributable to a spouse or former spouse if the tax liability is understated or if the tax is not paid, and taking into account all the facts and circumstances, it would be unfair to hold the spouse liable for the understatement of tax. I.R.C. § 6015(f). Requests for equitable innocent spouse relief are evaluated by the IRS under IRS Revenue Procedure 2013-34; 2013-2 C.B. 397 (See <https://www.irs.gov/pub/irs-drop/rp-13-34.pdf> for a copy of this Revenue Procedure).

#### **Threshold Requirements**

To qualify for equitable relief, a spouse can have either an understatement of tax (the IRS has imposed a deficiency) or an underpayment of tax (the tax reported on the tax return has not been paid). Seven threshold requirements must first be met. Rev.

Proc. 2013-34; Section 4.01. A spouse must (1) file a joint tax return, (2) not qualify for “Innocent Spouse Relief” or “Separation of Liability Relief,” (3) timely file a claim for relief before the expiration of the collection statute or the period for credit or refund, (4) not transfer assets to their spouse as part of a fraudulent scheme, (5) not transfer assets to their spouse to avoid taxes, (6) not knowingly participate in filing a fraudulent tax return, and (7) (with a few exceptions) the tax liability must be attributable to the other spouse’s unreported income or erroneous deduction. If a portion of the tax liability is attributable to the requesting spouse’s income, the IRS may only grant partial relief – for the portion of the liability attributable to the other spouse’s income.

**Streamlined Determinations** (Rev. Proc. 2013-34, Section 4.02)

The IRS will ordinarily make a streamlined determination granting equitable relief under I.R.C. sections 66(c) and 6015(f) if the requesting spouse meets three criteria:

First they must be no longer married to the requesting spouse, which means they are (a) divorced, (b) legally separated, (c) a widow or widower and not an heir to the nonrequesting spouse’s estate which has sufficient assets to pay the liability, or (d) not a member of the same household as the nonrequesting spouse at any time for 12 months before requesting relief;

Second, they would suffer economic hardship if relief were not granted.

Third, they did not know or have reason to know that there was an understatement on the joint return or that the nonrequesting spouse would or could not pay the tax liability when the joint return was signed. However, if the nonrequesting spouse abused the requesting spouse or maintained exclusive control over the household finances so that the requesting spouse was not able to challenge the

treatment of any items on the joint return or to question the payment of the taxes, then this factor will be satisfied even if the requesting spouse had knowledge or reason to know of the items giving rise to the understatement or that the nonrequesting spouse would not pay the tax liability.

### **Equitable Factors**

The IRS looks at a number of factors when determining whether or not to grant equitable relief. These factors are listed in IRS Revenue Procedure 2013-34. The factors are:

1. The spouses' marital status. The spouses must be:
  - a. Divorced;
  - b. Legally Separated;
  - c. The spouse is a widow or widower and not an heir to the other spouse's estate and this estate has sufficient assets to pay the liability; or
  - d. The spouses are not members of the same household at any time during the 12 months before requesting relief;
2. Whether the spouse requesting relief will suffer economic hardship so as to be unable to pay his or her reasonable living expenses if relief is not granted;
  - a. The IRS will compares the requesting spouses' income to the Federal poverty guidelines in making this determination.
  - b. If the denial of equitable relief will cause an economic hardship, this factor will favor relief, but it will not weigh against relief if denying relief will not cause the requesting spouse to suffer economic hardship.

3. Whether the spouse had knowledge or reason to know of the unreported income or the erroneous deduction or that the other spouse would not pay the liability on the tax return. This factor will weigh in favor of relief even if the requesting spouse knew or had reason to know of the item or nonpayment if:

- a. The other spouse abused the requesting spouse or maintained control over the household finances by restricting access to financial information, and
- b. this caused the requesting spouse to be unable to challenge the treatment of any items on the joint return, or to question the assurance that the taxes were paid for fear of retaliation.

4. Whether a divorce decree makes the requesting spouse or the nonrequesting spouse liable to pay the outstanding tax liability;

- a. The IRS is not bound by any written agreements between the spouses, but a spouse who is not to be held responsible pursuant to a court agreement can sue the former spouse in state court.
- b. The IRS can collect from either spouse since they are jointly and severally liable for the tax.

5. Whether the spouse significantly benefited by not paying the tax;

- a. A significant benefit is something beyond normal support, such as owning luxury assets and taking expensive vacations.

- b. The presence of abuse will mitigate this factor so that it is neutral.

6. Whether the spouse has made a good faith effort to comply with Federal income tax laws in later years; and

7. Whether the spouse was in poor mental or physical health when he or she signed the tax return.

The IRS also considers whether or not the spouse requesting relief was abused by the other spouse or denied access to the couple's finances when evaluating these factors. In addition, the IRS may look at other factors it considers to be relevant to a specific case.

#### **D. Relief from Tax on Community Property Income**

In community property states, such as Washington State, a spouse is taxable on half of the community income, including the other spouse's income. However, a spouse may be relieved of liability for taxes on their spouse's income if (1) they did not file a tax return, (2) the spouse did not include the income attributable to the other spouse on their own return, (3) they did not know, and had no reason to know of, the income, and (4) it would be unfair to tax them on their spouse's income in light of all the facts and circumstances. To determine whether it would be inequitable to tax the spouse on the other spouse's income, the Internal Revenue Service will use the equitable factors in Revenue Procedure 2013-34 that were discussed in the last section. Rev. Proc. 2013-34, Section 4.01.

## **E. Injured Spouse Relief**

A person may be entitled to relief as an injured spouse if

- a) they filed a joint tax return;
- b) they and their spouse were entitled to a refund;
- c) they made and reported tax payments, such as federal income tax withholding or estimated tax payments, or claimed a refundable tax credit on the joint return, such as the earned income credit or additional child tax credit;
- d) the IRS used the refund to pay a legally enforceable past-due debt(s) owed only by their spouse such as Federal tax, State income tax, State unemployment compensation, Child support, Spousal support, or Federal nontax debt (such as a student loan); and
- e) they are not legally obligated to pay this past-due debt.

To claim injured spouse relief, one must file a Form 8379, Injured Spouse Allocation, with the Internal Revenue Service.

## **F. How Do I Get Relief for my Client?**

### **1. Form 8857 (See <https://www.irs.gov/pub/irs-pdf/f8857.pdf>)**

To get innocent spouse relief, one must file a Form 8857, Request for Innocent Spouse Relief, with the Internal Revenue Service. Generally, the IRS will make a determination as to whether or not a spouse qualifies for relief within 6 months. However, if the IRS does not respond to the request within 6 months, you can file a petition with the United States Tax Court to ask the Tax Court to determine that your client qualifies for relief from joint and several liability.

You can also make a claim that your client is entitled to innocent spouse relief in response to a notice of deficiency from the IRS asserting that your client owes additional taxes or in response to a notice of lien or levy. You will still need to submit a Request for Innocent Spouse Relief to enable the IRS to evaluate your client's case.

**2. Is There Anything I Can Do to Strengthen My Client's Case Before Filing a Form 8857?**

There are things you can do to strengthen your client's case. You should make sure that your client is divorced or has been living in a separate household for the last twelve months before filing Form 8857. You can also make sure that your client is current with filing their tax returns and paying the taxes due. It is also a good idea to obtain as much evidence of abuse or financial control as possible.

**3. Form 8379**

To claim injured spouse relief, to claim a spouse's proper share of a tax refund, a Form 8379, Injured Spouse Allocation, must be filed with the Internal Revenue Service.

**4. When Must One Request Relief?**

For "Innocent Spouse Relief" and "Separation of Liability Relief" relief one must request relief within two years after the IRS takes action to collect the tax liability. See Treas. Reg. § 1.6015-5(b)(2). For "Equitable Relief" a claim must be filed before the expiration of the time the IRS has to collect the tax. Rev. Proc. 2013-34; Section 4.01(3)(a). To get a refund one must file before the expiration of the period of limitations for claiming a credit or refund. Rev. Proc. 2013-34; Section 4.01(3)(b).

## **5. What Happens if the IRS Rejects the Claim?**

When a Form 8857 is filed, it is reviewed by IRS Cincinnati Centralized Innocent Spouse Operation (aka “CCISO”). If the IRS rejects the innocent spouse claim, you will have the opportunity to dispute the disallowance with the IRS Office of Appeals. If Appeals also rejects your client’s claim, a petition may be filed with the United States Tax Court to dispute this. The Tax Court will review the evidence presented to the Internal Revenue Service, as well as your client’s testimony, and any additional evidence submitted at trial.

If you would like a copy of my free Innocent Spouse Relief E-Book, it can be downloaded at: <http://boeshaarlaw.com/resources/>.

### **Attachments:**

- 1) Form 8332 – Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent
- 2) Form 8857 – Request for Innocent Spouse Relief

**8332**

Form  
(Rev. January 2010)  
Department of the Treasury  
Internal Revenue Service

**Release/Revocation of Release of Claim  
to Exemption for Child by Custodial Parent**

► Attach a separate form for each child.

OMB No. 1545-0074

Attachment  
Sequence No. 115

Name of noncustodial parent

Noncustodial parent's  
social security number (SSN) ►**Part I Release of Claim to Exemption for Current Year**

I agree not to claim an exemption for \_\_\_\_\_  
for the tax year 20\_\_\_\_\_.  
Name of child

Signature of custodial parent releasing claim to exemption

Custodial parent's SSN

Date

Note. If you choose not to claim an exemption for this child for future tax years, also complete Part II.

**Part II Release of Claim to Exemption for Future Years (If completed, see Noncustodial Parent on page 2.)**

I agree not to claim an exemption for \_\_\_\_\_  
for the tax year(s).  
(Specify. See instructions.)  
Name of child

Signature of custodial parent releasing claim to exemption

Custodial parent's SSN

Date

**Part III Revocation of Release of Claim to Exemption for Future Year(s)**

I revoke the release of claim to an exemption for \_\_\_\_\_  
for the tax year(s).  
(Specify. See instructions.)  
Name of child

Signature of custodial parent revoking the release of claim to exemption

Custodial parent's SSN

Date

**General Instructions****What's New**

**Post-2008 decree or agreement.** If the divorce decree or separation agreement went into effect after 2008, the noncustodial parent cannot attach certain pages from the decree or agreement instead of Form 8332. See *Release of claim to exemption* below.

**Definition of custodial parent.** New rules apply to determine who is the custodial parent and the noncustodial parent. See *Custodial Parent* and *Noncustodial Parent* on this page.

**Purpose of Form**

If you are the custodial parent, you can use this form to do the following.

- Release a claim to exemption for your child so that the noncustodial parent can claim an exemption for the child.
- Revoke a previous release of claim to exemption for your child.

**Release of claim to exemption.** This release of the exemption will also allow the noncustodial parent to claim the child tax credit and the additional child tax credit (if either applies). Complete this form (or sign a similar statement containing the same

information required by this form) and give it to the noncustodial parent. The noncustodial parent must attach this form or similar statement to his or her tax return each year the exemption is claimed. Use Part I to release a claim to the exemption for the current year. Use Part II if you choose to release a claim to exemption for any future year(s).

**Note.** If the decree or agreement went into effect after 1984 and before 2009, you can attach certain pages from the decree or agreement instead of Form 8332, provided that these pages are substantially similar to Form 8332. See *Post-1984 and pre-2009 decree or agreement* on page 2.

**Revocation of release of claim to exemption.** Use Part III to revoke a previous release of claim to an exemption. The revocation will be effective no earlier than the tax year following the year in which you provide the noncustodial parent with a copy of the revocation or make a reasonable effort to provide the noncustodial parent with a copy of the revocation. Therefore, if you revoked a release on Form 8332 and provided a copy of the form to the noncustodial parent in 2010, the earliest tax year the revocation can be effective is 2011. You must attach a copy of the revocation to your tax return each year the exemption is claimed as a result of the revocation. You must also keep for your records a copy of the revocation and evidence

of delivery of the notice to the noncustodial parent, or of reasonable efforts to provide actual notice.

**Custodial Parent and Noncustodial Parent**

The custodial parent is generally the parent with whom the child lived for the greater number of nights during the year. The noncustodial parent is the other parent. If the child was with each parent for an equal number of nights, the custodial parent is the parent with the higher adjusted gross income. For details and an exception for a parent who works at night, see Pub. 501.

**Exemption for a Dependent Child**

A dependent is either a qualifying child or a qualifying relative. See your tax return instruction booklet for the definition of these terms. Generally, a child of divorced or separated parents will be a qualifying child of the custodial parent. However, if the special rule on page 2 applies, then the child will be treated as the qualifying child or qualifying relative of the noncustodial parent for purposes of the dependency exemption, the child tax credit, and the additional child tax credit.

## Special Rule for Children of Divorced or Separated Parents

A child is treated as a qualifying child or a qualifying relative of the noncustodial parent if all of the following apply.

1. The child received over half of his or her support for the year from one or both of the parents (see the *Exception* below). Public assistance payments, such as Temporary Assistance for Needy Families (TANF), are not support provided by the parents.
2. The child was in the custody of one or both of the parents for more than half of the year.
3. Either of the following applies.

a. The custodial parent agrees not to claim an exemption for the child by signing this form or a similar statement. If the decree or agreement went into effect after 1984 and before 2009, see *Post-1984 and pre-2009 decree or agreement* below.

b. A pre-1985 decree of divorce or separate maintenance or written separation agreement states that the noncustodial parent can claim the child as a dependent. But the noncustodial parent must provide at least \$600 for the child's support during the year. This rule does not apply if the decree or agreement was changed after 1984 to say that the noncustodial parent cannot claim the child as a dependent.

For this rule to apply, the parents must be one of the following.

- Divorced or legally separated under a decree of divorce or separate maintenance.
- Separated under a written separation agreement.
- Living apart at all times during the last 6 months of the year.

If this rule applies, and the other dependency tests in your tax return instruction booklet are also met, the noncustodial parent can claim an exemption for the child.

**Exception.** If the support of the child is determined under a multiple support agreement, this special rule does not apply, and this form should not be used.

**Post-1984 and pre-2009 decree or agreement.** If the divorce decree or separation agreement went into effect after 1984 and before 2009, the noncustodial parent can attach certain pages from the decree or agreement instead of Form 8332, provided that these pages are substantially similar to Form 8332. To be able to do this, the decree or agreement must state all three of the following.

1. The noncustodial parent can claim the child as a dependent without regard to any condition (such as payment of support).

2. The other parent will not claim the child as a dependent.

3. The years for which the claim is released.

The noncustodial parent must attach all of the following pages from the decree or agreement.

- Cover page (include the other parent's SSN on that page).
- The pages that include all of the information identified in (1) through (3) above.
- Signature page with the other parent's signature and date of agreement.

*The noncustodial parent must attach the required information even if it was filed with a return in an earlier year.*

The noncustodial parent can no longer attach certain pages from a divorce decree or separation agreement instead of Form 8332 if the decree or agreement was executed after 2008.

## Specific Instructions

### Custodial Parent

**Part I.** Complete Part I to release a claim to exemption for your child for the current tax year.

**Part II.** Complete Part II to release a claim to exemption for your child for one or more future years. Write the specific future year(s) or "all future years" in the space provided in Part II.

**TIP** *To help ensure future support, you may not want to release your claim to the exemption for the child for future years.*

**Part III.** Complete Part III if you are revoking a previous release of claim to exemption for your child. Write the specific future year(s) or "all future years" in the space provided in Part III.

The revocation will be effective no earlier than the tax year following the year you provide the noncustodial parent with a copy of the revocation or make a reasonable effort to provide the noncustodial parent with a copy of the revocation. Also, you must attach a copy of the revocation to your tax return for each year you are claiming the exemption as a result of the revocation. You must also keep for your records a copy of the notice to the noncustodial parent, or of reasonable efforts to provide actual notice.

**Example.** In 2007, you released a claim to exemption for your child on Form 8332 for the years 2008 through 2012. In 2010, you decided to revoke the previous release of exemption. If you completed Part III of Form 8332 and provided a copy of the form to the noncustodial parent in 2010, the revocation will be effective for 2011 and 2012. You must attach a copy of the revocation to your 2011 and 2012 tax returns and keep certain records as stated earlier.

### Noncustodial Parent

Attach this form or similar statement to your tax return for each year you claim the exemption for your child. You can claim the exemption only if the other dependency tests in your tax return instruction booklet are met.

**TIP** *If the custodial parent released his or her claim to the exemption for the child for any future year, you must attach a copy of this form or similar statement to your tax return for each future year that you claim the exemption. Keep a copy for your records.*

**Note.** If you are filing your return electronically, you must file Form 8332 with Form 8453, U.S. Individual Income Tax Transmittal for an IRS e-file Return. See Form 8453 and its instructions for more details.

**Paperwork Reduction Act Notice.** We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by Internal Revenue Code section 6103.

The average time and expenses required to complete and file this form will vary depending on individual circumstances. For the estimated averages, see the instructions for your income tax return.

If you have suggestions for making this form simpler, we would be happy to hear from you. See the instructions for your income tax return.

**8857**

Form  
(Rev. January 2014)  
Department of the Treasury  
Internal Revenue Service [03]

**Request for Innocent Spouse Relief**

OMB No. 1545-1590

► Information about Form 8857 and its separate instructions is at [www.irs.gov/form8857](http://www.irs.gov/form8857).**Important things you should know**

- Do not file this form with your tax return. See Where To File in the instructions.
- Review and follow the instructions to complete this form. Instructions can be obtained at [www.irs.gov/form8857](http://www.irs.gov/form8857) or by calling 1-800-TAX-FORM (1-800-829-3676).
- While your request is being considered, the IRS generally cannot collect any tax from you for the year(s) you request relief. However, filing this form extends the amount of time the IRS has to collect the tax you owe, if any, for those years.
- The IRS is required by law to notify the person on line 5 that you requested this relief. That person will have the opportunity to participate in the process by completing a questionnaire about the tax years you enter on line 3. This will be done before the IRS issues preliminary and final determination letters.
- The IRS will not disclose the following information: your current name, address, phone numbers, or employer.

**Part I Should you file this form?**

Generally, both you and your spouse are responsible, jointly and individually, for paying any tax, interest, or penalties from your joint return. If you believe your current or former spouse should be solely responsible for an erroneous item or an underpayment of tax from your joint tax return, you may be eligible for innocent spouse relief.

Innocent spouse relief may also be available if you were a resident of a community property state (see list of community property states in the instructions) and did not file a joint federal income tax return and you believe you should not be held responsible for the tax attributable to an item of community income.

**1 Do either of the paragraphs above describe your situation?**

- Yes. You should file this Form 8857. Go to question 2.
- No. Do not file this Form 8857, but go to question 2 to see if you need to file a different form.
- 2 Did the IRS take your share of a joint refund from any tax year to pay any of the following past-due debt(s) owed ONLY by your spouse? • Child support • Spousal support • Student loan (or other federal nontax debt) • Federal or state taxes**
  - Yes. You may be able to get back your share of the refund. See Form 8379, Injured Spouse Allocation, and the instructions to that form. Go to question 3 if you answered "Yes" to question 1.
  - No. Go to question 3 if you answered "Yes" to question 1. If you answered "No" to question 1, do not file this form.
- 3 If you determine you should file this form, enter each tax year you want innocent spouse relief.** It is important to enter the correct year. For example, if the IRS used your 2011 income tax refund to pay a 2009 joint tax liability, enter tax year 2009, not tax year 2011.

Tax Year \_\_\_\_\_ Tax Year \_\_\_\_\_ Tax Year \_\_\_\_\_  
Tax Year \_\_\_\_\_ Tax Year \_\_\_\_\_ Tax Year \_\_\_\_\_

**Part II Tell us about yourself and your spouse for the tax years you want relief**

4 Your current name (see instructions)	Your social security number	
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**Address where you wish to be contacted.** If this is a change of address, see instructions.

Number and street or P.O. box	Apt. no.	County
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City, town or post office, state, and ZIP code. If a foreign address, see instructions.

Best or safest daytime phone number (between 6 a.m. and 5 p.m. Eastern Time)

**5 Who was your spouse for the tax years you want relief? File a separate Form 8857 for tax years involving different spouses or former spouses.**

That person's current name	Social security number (if known)
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Current home address (number and street) (if known). If a P.O. box, see instructions.

Apt. no.

City, town or post office, state, and ZIP code. If a foreign address, see instructions.

Daytime phone number (between 6 a.m. and 5 p.m. Eastern Time)

**Note.** If you need more room to write your answer for any question, attach more pages. Be sure to write your name and social security number on the top of all pages you attach.

**Part II Tell us about yourself and your spouse for the tax years you want relief (Continued)**

- 6 What is the current marital status between you and the person on line 5?

- Married and still living together
- Married and living apart since \_\_\_\_\_

MM DD YYYY

- Widowed since \_\_\_\_\_

Attach a photocopy of the death certificate and will (if one exists).

- Legally separated since \_\_\_\_\_

MM DD YYYY

Attach a photocopy of your entire separation agreement.

- Divorced since \_\_\_\_\_

MM DD YYYY

Attach a photocopy of your entire divorce decree.

**Note.** A divorce decree stating that your former spouse must pay all taxes does not necessarily mean you qualify for relief.

- 7 What was the highest level of education you had completed when the return(s) were filed? If the answers are not the same for all tax years, explain.

- Did not complete high school
- High school diploma or equivalent
- Some college

- College degree or higher. List any degrees you have ► \_\_\_\_\_

List any college-level business or tax-related courses you completed ► \_\_\_\_\_

Explain ► \_\_\_\_\_

- 8 Were you or other members of your family a victim of spousal abuse or domestic violence, or suffering the effects of such abuse during any of the tax years you want relief or when any of the returns were filed for those years?

- Yes. If you want the IRS to consider this information in making its determination, complete Part V of this form in addition to other parts of the form. First read the instructions for Part V, to understand how the IRS will proceed with evaluating your claim for relief in these circumstances.

If you checked "Yes" above, we will put a note on your separate account. This will enable us to respond appropriately and be sensitive to your situation. We will remove the note from your account if you request it (as explained in the instructions).

If you do not want us to put a note on your account, check here . . . . . ►

- No. Complete the other parts of this form except for Part V.

- 9 When any of the returns listed on line 3 were filed, did you have a mental or physical health problem or do you have a mental or physical health problem now? If the answers are not the same for all tax years, explain below.

- Yes. Attach a statement to explain the problem and when it started. Provide photocopies of any documentation, such as medical bills or a doctor's report or letter.

- No.

Explain ► \_\_\_\_\_

- 10 Is there any information you are afraid to provide on this form, but are willing to discuss?

- Yes
- No

**Part III Tell us if and how you were involved with finances and preparing returns for those tax years**

- 11 Did you agree to file a joint return?  Yes  No

Explain why or why not ► \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

- 12 Did you sign the joint return? See instructions.  Yes  No

Explain why or why not ► \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**Note.** If you need more room to write your answer for any question, attach more pages. Be sure to write your name and social security number on the top of all pages you attach.

**Part III Tell us if and how you were involved with finances and preparing returns for those tax years (Continued)**

- 13 What was your involvement with preparing the returns? Check all that apply and explain, if necessary. If the answers are not the same for all tax years, explain.

- You were not involved in preparing the returns.
- You filled out or helped fill out the returns.
- You gathered receipts and cancelled checks.
- You gave tax documents (such as Forms W-2, 1099, etc.) for the preparation of the returns.
- You reviewed the returns before they were filed.
- You did not review the returns before they were filed. Explain below why you did not review the returns.
- You did not know a joint return was filed.
- Other ► \_\_\_\_\_

Explain how you were involved ► \_\_\_\_\_

- 14 When the returns were filed, what did you know about any incorrect or missing information? Check all that apply and explain, if necessary. If the answers are not the same for all tax years, explain below.

- You knew something was incorrect or missing, but you said nothing. Explain below.
- You knew something was incorrect or missing and asked about it. Explain below.
- You did not know anything was incorrect or missing.
- Not applicable. There was no incorrect or missing information.

Explain ► \_\_\_\_\_

- 15 When any of the returns were filed, what did you know about the income of the person on line 5? Check all that apply and explain, if necessary. If the answers are not the same for all tax years, explain.

- You knew that the person on line 5 had income.

List each type of income on the lines provided below. (Examples are wages, social security, gambling winnings, or self-employment business income.) Enter each tax year and the amount of income for each type you listed. If you do not know any details, enter "I don't know."

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

- You knew that the person on line 5 was self-employed and you helped with the books and records.
- You knew that the person on line 5 was self-employed and you did not help with the books and records.
- You knew that the person on line 5 had no income.
- You did not know whether the person on line 5 had income.

Explain why you did not know whether the person on line 5 had income ► \_\_\_\_\_

- 16 When the returns were filed, did you know if the returns showed a balance due to the IRS for those tax years? If the answers are not the same for all tax years, explain.

- Yes. Explain when and how you thought the amount of tax reported on the return would be paid ► \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

- No. Explain why you did not know the return showed a balance due. ► \_\_\_\_\_
- \_\_\_\_\_

- Not applicable. There was no balance due on the return.

- 17 When any of the returns were filed, were you having financial problems (for example, bankruptcy or bills you could not pay)? If the answers are not the same for all tax years, explain.

- Yes. Explain ► \_\_\_\_\_

- No.

- Did not know. Explain ► \_\_\_\_\_

**Note.** If you need more room to write your answer for any question, attach more pages. Be sure to write your name and social security number on the top of all pages you attach.

**Part III Tell us if and how you were involved with finances and preparing returns for those tax years (Continued)**

- 18 For the years you want relief, how were you involved in the household finances? Check all that apply. If the answers are not the same for all tax years, explain.

- You were not involved in handling money for the household. Explain below.
- You knew the person on line 5 had separate accounts.
- You had joint accounts with the person on line 5, but you had limited use of them or did not use them. Explain below.
- You used joint accounts with the person on line 5. You made deposits, paid bills, balanced the checkbook, or reviewed the monthly bank statements.
- You made decisions about how money was spent. For example, you paid bills or made decisions about household purchases.
- Other ► \_\_\_\_\_

Explain anything else you want to tell us about your household finances ► \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- 19 Did you (or the person on line 5) incur any large expenses, such as trips, home improvements, or private schooling, or make any large purchases, such as automobiles, appliances, or jewelry, during any of the years you want relief or any later years?

- Yes. Describe (a) the types and amounts of the expenses and purchases and (b) the years they were incurred or made.

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- No.

- 20 Has the person on line 5 ever transferred assets (money or property) to you? (Property includes real estate, stocks, bonds, or other property that you own or possess now or possessed in the past.) See instructions.

- Yes. List the assets, the dates they were transferred, and their fair market values on the dates transferred. If the property was secured by any debt (such as a mortgage on real estate), explain who was responsible for making payments on the debt, how much was owed on the debt at the time of transfer and whether the debt has been satisfied. Explain why the assets were transferred to you. If you no longer possess or own the assets, explain what happened with the assets.

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- No.

**Part IV Tell us about your current financial situation**

- 21 Tell us about your assets. Your assets are your money and property. Property includes real estate, motor vehicles, stocks, bonds, and other property that you own. In the table below, list the amount of cash you have on hand and in your bank accounts. Also list each item of property, the fair market value (as defined in the instructions) of each item, and the balance of any outstanding loans you used to acquire each item. Do not list any money or property you listed on line 20.

Description of Assets	Fair Market Value	Balance of Any Outstanding Loans You Used To Acquire the Asset

**Note.** If you need more room to write your answer for any question, attach more pages. Be sure to write your name and social security number on the top of all pages you attach.

**Part IV Tell us about your current financial situation (Continued)**

22 How many people are currently in your household, including yourself?	Adults _____	Children _____
<b>23 Tell us your current average monthly income and expenses for your entire household.</b>		
<b>Monthly Income</b> — If family or friends are helping to support you, include the amount of support as gifts below.		<b>Amount</b>
Gifts . . . . .		
Wages (Gross pay) . . . . .		
Pensions . . . . .		
Unemployment . . . . .		
Social security . . . . .		
Government assistance, such as housing, food stamps, grants . . . . .		
Alimony . . . . .		
Child support . . . . .		
Self-employment business income . . . . .		
Rental income . . . . .		
Interest and dividends . . . . .		
Other income, such as disability payments, gambling winnings, etc. List each type below:		
Type . . . . .		
Type . . . . .		
Type . . . . .		
<b>Total Monthly Income</b>		
<b>Monthly Expenses</b> — Enter all expenses, including expenses paid with income from gifts.		<b>Amount</b>
<b>Food and Personal Care:</b>		
Food . . . . .		
Housekeeping supplies . . . . .		
Clothing and clothing services . . . . .		
Personal care products and services . . . . .		
<b>Transportation:</b>		
Auto loan/lease payment, gas, insurance, licenses, parking, maintenance, etc. . . . .		
Public transportation . . . . .		
<b>Housing and Utilities:</b>		
Rent or mortgage . . . . .		
Real estate taxes and insurance . . . . .		
Electric, oil, gas, water, trash, etc. . . . .		
Telephone and cell phone . . . . .		
Cable and Internet . . . . .		
<b>Medical:</b>		
Health insurance premiums . . . . .		
Out-of-pocket expenses . . . . .		
<b>Other:</b>		
Child and dependent care . . . . .		
Caregiver expenses . . . . .		
Income tax withholding (federal, state, and local) . . . . .		
Estimated tax payments . . . . .		
Term life insurance premiums . . . . .		
Retirement contributions (employer required) . . . . .		
Retirement contributions (voluntary) . . . . .		
Union dues . . . . .		
Unpaid state and local taxes (minimum payment) . . . . .		
Student loans (minimum payment) . . . . .		
Court-ordered debt payments (for example, court- or agency-ordered child support, alimony and garnishments). List each type below:		
Type . . . . .		
Type . . . . .		
Type . . . . .		
Miscellaneous . . . . .		
<b>Total Monthly Expenses</b>		

**Note.** If you need more room to write your answer for any question, attach more pages. Be sure to write your name and social security number on the top of all pages you attach.

**Part V Complete this part if you were (or are now) a victim of domestic violence or spousal abuse**

As stated in line 8, providing this additional information is not mandatory but may strengthen your request. Additionally, if you prefer to provide this information orally, check the "Yes" box on line 10.

If you were (or are now) a victim of domestic violence or spousal abuse by the person on line 5, the IRS will consider the information you provide in this part to determine whether to grant innocent spouse relief. However, the IRS is required by law to notify the person on line 5 that you requested this relief. There are no exceptions to this rule. That person will have the opportunity to participate in the process by completing a questionnaire about the tax years you entered on line 3. This will be done before the IRS issues preliminary and final determination letters. However, the IRS is also required by law to keep all the personal identifying information (such as current names, addresses, and employment-related information) of both you and the person on line 5 confidential. This means that the IRS cannot disclose one person's information to the other person. If the IRS does not grant you relief and you choose to petition the Tax Court, your personal identifying information is available, unless you ask the Tax Court to withhold it.

The person on line 5 will receive a questionnaire about the tax years you entered on line 3. Except for your current name, address, phone numbers, and employer, this form and any attachments could be disclosed to the person on line 5. If you have any privacy concerns, see instructions.

The IRS understands and is sensitive to the effects of domestic violence and spousal abuse, and encourages victims of domestic violence to call 911 if they are in immediate danger. If you have concerns about your safety, please consider contacting the 24-Hour (Confidential) National Domestic Violence Hotline at 1-800-799-SAFE (7233), or 1-800-787-3224 (TTY), or 1-855-812-1001 (Video Phone Only for Deaf Callers) before you file this form.

A representative from the IRS may call you to gather more information and discuss your request. Be sure you enter your correct contact information on line 4.

**24a During any of the tax years for which you are seeking relief or when any of the returns were filed for those years, did the person on line 5 do any of the following? Check all that apply. (Note: If this does not apply to you, skip lines 24a, b, and c, and complete lines 25 through 29.)**

- Physically harm or threaten you, your children, or other members of your family.
- Sexually abuse you, your children, or other members of your family.
- Make you afraid to disagree with him/her.
- Criticize or insult you or frequently put you down.
- Withhold money for food, clothing, or other basic needs.
- Make most or all the decisions for you, including financial decisions.
- Restrict or control who you could see or talk to or where you could go.
- Isolate you or keep you from contacting your family members and/or friends.
- Cause you to fear for your safety in any other way.
- Stalk you, your children, or other members of your family.
- Abuse alcohol or drugs.

**b Describe the abuse you experienced, including approximately when it began and how it may have affected you, your children, or other members of your family. Explain how this abuse affected your ability to question the reporting of items on your tax return or the payment of the tax due on your return.**

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**c Attach photocopies of any documentation you have, such as:**

- Protection and/or restraining order.
- Injury photographs.
- Police reports.
- A statement from someone who was aware of or witnessed the abuse or the results of the abuse (notarized if possible).
- Medical records.
- Doctor's report or letter.
- Any other documentation you may have.

**25 Are you afraid of the person listed on line 5?**

- Yes     No

**26 Does the person listed on line 5 pose a danger to you, your children, or other members of your family?**

- Yes     No

**27 Were the police, sheriff, or other law enforcement ever called?**

- Yes     No

**28 Was the person listed on line 5 charged or arrested for abusing you, your children, or other members of your family?**

- Yes. Provide details below.
- 

- No

**29 Have you sought help from a local domestic violence program?**

- Yes. Provide details below.
- 

- No
-

**Note.** If you need more room to write your answer for any question, attach more pages. Be sure to write your name and social security number on the top of all pages you attach.

## **Part VI Additional Information**

- 30 Please provide any other information you want us to consider in determining whether it would be unfair to hold you liable for the tax.

**Part VII Tell us if you would like a refund**

- 31 By checking this box and signing this form, you are indicating that you would like a refund if you qualify for relief and if you already paid the tax. See instructions

### **Caution**

**Caution:** By signing this form, you understand that, by law, we must contact the person on line 5. See instructions for details.

**Sign  
Here**

Keep a copy  
for your  
records.

Under penalties of perjury, I declare that I have examined this form and any accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature

| Data

<b>Paid Preparer Use Only</b>	Print/Type preparer's name	Preparer's signature	Date	Check <input type="checkbox"/> if self-employed	PTIN
	Firm's name ►	Firm's EIN ►			
	Firm's address ►				Phone no.

## Five Things You Should Know About Taxes & Divorce



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## Five Things to Know About

- 1) Joint and Several Liability for joint tax returns
- 2) Rules for claiming your child as your dependent when divorced
- 3) Taxation of alimony
- 4) Taxation of transfers pursuant to a divorce and deductibility of attorney's fees for tax advice
- 5) Innocent Spouse relief

### David & Diane



- David worked at an architectural firm.
- Diane works at a construction company.
- They have two children.
- Diane filed for divorce 9/2014; final 4/2015.

### Joint and Several Liability

- 1) General rule – both spouses are jointly and severally liable for any tax that is due for any year they file a joint return.
- 2) Marital status is determined as of the last day of the year.
- 3) If spouses file separate tax returns, they can amend within three years.
- 4) If spouses file a joint return, must amend before the due date of the joint return.

### **Children of Divorced or Separated Parents**

- 1) Custodial parent (with whom child resides for more than half of the year) typically claims child on their tax return.
- 2) If both parties agree, and custodial parent signs form which noncustodial parent attaches to their tax return, the non-custodial parent may claim the child on their tax return.

### **Alimony**

- 1) If, it is a court-ordered payment paid to a spouse after separation or divorce,
- 2) there is no obligation to pay after the recipient's death, and
- 3) it is not child support, then the spouse who pays alimony may claim a tax deduction for it and the spouse who receives it must include it in income.

### **Transfers Between Spouses**

- 1) Generally, no gain or loss is recognized on a transfer of property from a taxpayer to their spouse (or former spouse) if it is incident to their divorce.
- 2) A transfer is incident to a divorce if it occurs within one year of the divorce.

### **Attorney's Fees**

- 1) Attorney's fees generally are deductible if paid for tax advice.
- 2) For example:
  - To arrange for tax-deductible spousal support,
  - To obtain determine one's tax liabilities, and
  - To arrange for tax-deductible alimony.

## Innocent Spouse Relief

- 1) Generally, two spouses who file a joint tax return are **jointly and severally liable**. IRC § 6013(d)(3).
- 2) **Innocent Spouse Relief** is relief from joint and several liability for taxes owed by two spouses.
- 3) The **Requesting Spouse** is the spouse who requests relief.
- 4) The other spouse is the **Nonrequesting Spouse**.

## Innocent Spouse Relief

Kinds of Innocent Spouse Relief:

- 1) § 6015(b) – erroneous item of one spouse
- 2) § 6015(c) – allocation of liability
- 3) § 6015(f) – equitable relief
- 4) § 66(c) – community property income

## Innocent Spouse Relief

Requirements - I.R.C. § 6015(b) Relief

- 1) File joint tax return
- 2) Understatement attributable to erroneous item of one spouse
- 3) Other spouse did not know, or have reason to know, of understatement
- 4) Inequitable to hold liable for the tax
- 5) Elect within 2 years of IRS collection

## Innocent Spouse Relief

Requirements - I.R.C. § 6015(c) Relief

- 1) File joint tax return
- 2) Understatement of tax
- 3) No longer married, legally separated, or not member of same household for 12 months.
- 4) Elect within two years after start of IRS collection activities.

## **Innocent Spouse Relief**

Requirements - I.R.C. § 6015(c) Relief

Collection Activities are:

- 1) A refund offset
- 2) Collection Due Process levy notice
- 3) The filing of a lawsuit by the U.S. to collect the joint liability, and
- 4) The filing of a claim by the IRS in a court proceeding.

## **Innocent Spouse Relief**

Requirements - I.R.C. § 6015(c) Relief

A spouse is not eligible if:

- 1) assets are transferred between spouses as part of a fraudulent scheme, or
- 2) the spouse had actual knowledge when signing the tax return of any item giving rise to a deficiency.

## **Innocent Spouse Relief**

Requirements - I.R.C. § 6015(c) Relief

Actual knowledge defense:

- 1) Commissioner has burden of proof to show actual knowledge of the unreported income or erroneous deduction at the time the return was signed. I.R.C. § 6015(c)(3)(C).
- 2) IRS must allege facts in its answer in court to establish actual knowledge.

## **Innocent Spouse Relief**

Requirements - I.R.C. § 6015(c) Relief

Actual knowledge defense

- 3) Erroneous deduction –  
Commissioner must show actual knowledge of the factual circumstances making the item unallowable as a deduction.

## **Innocent Spouse Relief**

### Requirements - I.R.C. § 6015(c) Relief

#### Relief under I.R.C. § 6015(c)

- If a spouse qualifies for relief under I.R.C. section 6015(c), the relief is an allocation between the spouses of the deficiency in tax under I.R.C. section 6015(d).

## **Innocent Spouse Relief**

### Equitable Relief - I.R.C. § 6015(f)

#### Governed by Revenue Procedure 2013-34

#### Threshold Eligibility Requirements - § 4.01

- 1) File joint return
- 2) Relief n/a under I.R.C. § 6015(b), (c)
- 3) Claim filed timely (by CSED date)
- 4) No assets transferred between spouses as part of a fraudulent scheme

## **Innocent Spouse Relief**

### Equitable Relief - I.R.C. § 6015(f)

#### Threshold Eligibility Requirements

- 5) The nonrequesting spouse did not transfer disqualified assets to the requesting spouse
- 6) The requesting spouse did not knowingly participate in filing a fraudulent joint tax return

## **Innocent Spouse Relief**

### Equitable Relief - I.R.C. § 6015(f)

#### Threshold Eligibility Requirements

- 7) The tax liability is attributable to an item of the nonrequesting spouse, unless:
  - solely due to community property law,
  - nominal ownership
  - did not know of misappropriation of funds
  - abused and feared retaliation if questioned
  - nonrequesting spouse's fraud caused tax deficiency.

## **Innocent Spouse Relief**

### **Equitable Relief - I.R.C. § 6015(f)**

#### **When to File Claim**

- 1) Governed by new Rev. Proc. 2013-34
- 2) No requirement to elect within 2 years of IRS collection activity
- 3) File before expiration of the period of limitation for collection under section 6502, or the period of limitation for credit or refund under section 6511

## **Innocent Spouse Relief**

### **Equitable Relief - I.R.C. § 6015(f)**

#### **Streamlined Determinations**

- 1) No longer married
  - Divorced, Legally Separated, Widow(er), Not in same household
- 2) Would suffer economic hardship if relief were not granted; and
- 3) Did not know or have reason to know of understatement/potential underpayment.
  - Abuse or exclusive control of finances

## **Innocent Spouse Relief**

### **I.R.C. § 6015(f) – Equitable Factors:**

- 1) Marital Status
- 2) Economic hardship
- 3) Knowledge/reason to know of item giving rise to the deficiency or understatement or of future nonpayment
- 4) Legal obligation to pay tax liability
- 5) Significant benefit from nonpayment
- 6) Compliance with tax laws
- 7) Sign in poor mental/physical health

## **Community Property Income**

### **I.R.C. § 66(c)**

- 1) No joint return filed
- 2) One spouse did not include on own separate return an item of community property income attributable to the other spouse
- 3) Spouse did not know of the item of community property income
- 4) It would be inequitable for the spouse to pay tax on this income

## How to Request Innocent Spouse Relief

- 1) File Form 8857, Request for Innocent Spouse Relief, with IRS.
- 2) Raise it as a defense to a notice of deficiency in Tax Court.
- 3) Raise it as a defense in response to IRS collection action.
- 4) Within two years of IRS collection action for relief under I.R.C. section 6015(b) or (c)

## Injured Spouse Relief

### Requirements:

- 1) Filed joint tax return
- 2) Entitled to a refund
- 3) Made tax payments or claimed refundable tax credit
- 4) IRS used refund to pay one spouse's legally-enforceable past-due debt
- 5) Spouse obtaining relief not legally obligated to pay this past-due debt

File Form 8379, Injured Spouse Allocation

## David & Diane



- Is Diane eligible for innocent spouse relief under I.R.C. section 6015? Which kind(s)?
- Is Diane eligible for relief from tax on community property income?

## Innocent Spouse Relief

### Summary:

- 1) The kinds of innocent spouse relief available
  - 1) I.R.C. § 6015(b) – erroneous item of one spouse
  - 2) I.R.C. § 6015(c) – allocation of liability
  - 3) I.R.C. § 6015(f) – equitable relief
  - 4) I.R.C. § 66(c) – community property income
- 2) How to Request Relief from Joint and Several Liability

## **Questions about Taxes and Divorce?**



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## CHAPTER FIVE

**DOMESTIC VIOLENCE RESTRAINING ORDERS**

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**JULIANA U. WONG** is a partner with the litigation firm of Frey Buck, P.S. She focuses her practice on family law matters, handling a wide array of matters ranging from contested dissolutions with high asset estates, custody, child support issues to simple uncontested dissolutions, and adoptions. While her practice involves significant litigation, as the previous chair of the Washington Bar Association Professionalism Committee, she promotes collaborative and cooperative litigation in family law.

## **DOMESTIC VIOLENCE Orders for Protection/Restraining Orders**

### **I. Introduction**

The purpose of this section will focus on a few significant aspects of family law orders for protection which are not widely confronted all the time, but have potential impact on how a family law attorney litigates and strategizes a DVPO matter. These materials will not go in depth into the procedural mechanism of securing or defending a civil order for protection.

### **II. Restraining Orders**

There are a number of different kinds of orders which are available to victims of domestic violence or harassment. It is essential for family law attorneys to know of all orders entered between parties to avoid conflicts when multiple orders of different types are entered.

**(See Exhibit 1 – Comparison of Court Order in Washington State).**

To prevent the issuance of competing orders, the legislature mandated that by July 1, 1997, the judicial information system would contain a database containing names and cause numbers of every order of protection issued under RCW 26.50; criminal no-contact order issued under RCW 10.99, anti-harassment order issued under RCW 10.14; dissolution action under RCW 26.09; and third party custody action under RCW 26.26. This is available to all municipal, district and superior courts. *RCW 26.50.160.*

#### **a. Domestic Violence Protection Order**

An order for protection is available to victims of domestic violence under RCW 26.50. See generally, *Tacoma v. State*, 117 Wn.2d 348, 351-53 (1991). Protection orders are civil and an individual may obtain a protection order for him/herself or on behalf of a minor family or household member. Protection orders are available to the individuals in municipal, district or superior court. (*If the matter involves children or makes a specific request to exclude a party from a shared dwelling, the petition will always be referred to superior court. RCW 26.50.020(2).*)

#### **RCW 26.50.020**

Commencement of action—Jurisdiction—Venue.

(1)(a) Any person may seek relief under this chapter by filing a petition with a court alleging that the person has been the victim of domestic violence committed by the respondent. The person may petition for relief on behalf of himself or herself and on behalf of minor family or household members.

(b) Any person thirteen years of age or older may seek relief under this chapter by filing a petition with a court alleging that he or she has been the victim of

violence in a dating relationship and the respondent is sixteen years of age or older.

(2)(a) A person under eighteen years of age who is sixteen years of age or older may seek relief under this chapter and is not required to seek relief by a guardian or next friend.

(b) A person under sixteen years of age who is seeking relief under subsection (1)(b) of this section is required to seek relief by a parent, guardian, guardian ad litem, or next friend.

(3) No guardian or guardian ad litem need be appointed on behalf of a respondent to an action under this chapter who is under eighteen years of age if such respondent is sixteen years of age or older.

(4) The court may, if it deems necessary, appoint a guardian ad litem for a petitioner or respondent who is a party to an action under this chapter.

(5) The courts defined in \*RCW 26.50.010(4) have jurisdiction over proceedings under this chapter. The jurisdiction of district and municipal courts under this chapter shall be limited to enforcement of RCW 26.50.110(1), or the equivalent municipal ordinance, and the issuance and enforcement of temporary orders for protection provided for in RCW 26.50.070 if: (a) A superior court has exercised or is exercising jurisdiction over a proceeding under this title or chapter 13.34 RCW involving the parties; (b) the petition for relief under this chapter presents issues of residential schedule of and contact with children of the parties; or (c) the petition for relief under this chapter requests the court to exclude a party from the dwelling which the parties share. When the jurisdiction of a district or municipal court is limited to the issuance and enforcement of a temporary order, the district or municipal court shall set the full hearing provided for in RCW 26.50.050 in superior court and transfer the case. If the notice and order are not served on the respondent in time for the full hearing, the issuing court shall have concurrent jurisdiction with the superior court to extend the order for protection.

(6) An action under this chapter shall be filed in the county or the municipality where the petitioner resides, unless the petitioner has left the residence or household to avoid abuse. In that case, the petitioner may bring an action in the county or municipality of the previous or the new household or residence.

(7) A person's right to petition for relief under this chapter is not affected by the person leaving the residence or household to avoid abuse.

(8) For the purposes of this section "next friend" means any competent individual, over eighteen years of age, chosen by the minor and who is capable of pursuing the minor's stated interest in the action.

Domestic Violence is defined as: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another;

or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member. *RCW 26.50.010*

The court will issue an ex parte temporary order for protection if the court finds irreparable injury could result from domestic violence if an order is not issued immediately. *RCW 26.50.070(1)*. Such temporary relief can be secured telephonically. *RCW 26.50.070(3)*.

Upon conducting a full hearing, after allowing the respondent an opportunity to appear and be heard, the court may issue a full order for protection that:

- Restrains the respondent from committing acts of domestic violence;
- Restrains the respondent from having any contact with the respondent or children or household members;
- Excludes the respondent from a dwelling which the parties shares or from the residence, workplace, school of the petitioner or the like of the children including daycare;
- Establishes provisions related to custody, care and residential time with minor children;
- Orders necessary services for the respondent including, but not limited to domestic violence perpetrator treatment, anger management, or chemical dependency evaluations and treatment therein;
- Orders payment of administrative court costs and service fees; and
- Requires the respondent to surrender any firearms or danger weapons.

**(See Exhibit 2).**

If the full order for protection contemplates restraining contact between the respondent and his/her minor children, the protection order *cannot* exceed one year. *RCW 26.50.060(2)*. If contact with respondent's children is not at issue, the order may exceed one year or can be made permanent.

A domestic violence protection order that prohibits contact with a child does not improperly modify a parenting plan. *In re Marriage of Stewart*, 133 Wn. App. 545, 137 P.3d 25 (2006); *In Re Marriage of Barone*, 100 Wn.App. 241, 247, 996 P.2d 654 (2000). However, a court may not allow a protection order to serve as a de facto [permanent] modification of a parenting plan." *In re Marriage of Watson*, 132 Wn. App. 222, 234, 130 P.3d 915 (2006); *In re Marriage of Barone*, 100 Wn. App. 241, 247, 996 P.2d 654 (2000).

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**Practice Tip** – When children are involved in a DVPO matter and there is an existing Parenting Plan, it would be good practice to file a Petition to Modify Residential Schedule/Parenting Plan prior to the return hearing on the DVPO petition. This ensures that the Court has the authority to *modify* an existing Parenting Plan.

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b. *Restraining Order*

A temporary or continuing restraining order can be obtained in any of the following situations:

- (a) By one married to the respondent in a dissolution, legal separation or declaration of invalidity action, *RCW 26.09.505, .060*;
- (b) By one who has children in common with the respondent in a paternity action, *RCW 26.26.130, .590*;
- (c) In a nonparental action for child custody. *RCW 26.10.040, 115*.

Such orders can prohibit any person from:

- a. Transferring, removing, encumbering, concealing, or disposing of any property unless in the ordinary course of business or for necessities;
- b. Molesting or disturbing the peace of the other party or of any child’;
- c. Going onto the grounds of or entering the home, workplace, or school of the other party or the daycare or school of any child upon a showing of the necessity therefore;
- d. Removing a child from the state; and
- e. Requires the respondent to surrender any firearms or danger weapons.

**(See Exhibit 3).**

*RCW 26.09.060(2)*

A temporary restraining order may be issued without requiring notice to the other party only if it finds (on the basis of the moving affidavit or other evidence) that **irreparable injury** could result if any order is not issued until the time for responding has elapsed. *RCW 26.09.060(5)*. Such temporary orders may not exceed 14 days, or upon court order, not to exceed 24 days if necessary to ensure that all temporary motions in the case can be heard at the same time.

c. *Anti-Harassment Order*

An anti-harassment protection order may be obtained by any person who is a victim of unlawful harassment defined as a knowing and willful course of conduct which seriously alarms, annoys, or harasses one or is detrimental to such person and which serves no legitimate purpose. *RCW 10.14.020*. Anti-harassment orders require no particular relationship between the parties and may be obtained in district court, but may not address any issue associated with parenting of children. *RCW 26.10*. Anti-harassment orders may be sought in either district or superior court. Where a respondent is under the age of 18, the matter will always be held in superior court. *RCW 10.14.150*.

- An order under this chapter is designed to provide victims with a speedy and inexpensive method of obtaining civil anti-harassment protection orders to prevent further unwanted contact with another person.

*RCW 10.14.130* – If another restraining order is available to the victim under RCW 10.99 (Domestic Violence – Official Response) or RCW 26.50 (Domestic Violence Prevention), then an anti-harassment order is not available to that victim.

An ex parte temporary order is only available if the court finds that great or irreparable harm will result to the petitioner if the temporary anti-harassment protection order is not granted. *RCW 10.14.080(1)*.

After a full hearing, the court may do any of the following:

- Restrain the respondent from contacting the petitioner or respondent's minor children;
- Restrain the respondent from keeping surveillance on the petitioner;
- Requires the respondent to remain some distance away from the petitioner's home or workplace; and
- Requires the respondent to surrender any firearms or danger weapons.

(See Exhibit 4).

d. No-Contact Order

One may be protected by a no-contact order when criminal charges are pending or filed. A non-contact order may be issued to a family or household member when a domestic violence related criminal case is pending. *RCW 10.99.045, .050*. A no-contact order is often a condition of sentencing in a criminal matter and is often a condition of release, bail or sentencing.

## **RCW 10.99.040**

### **Duties of court—No-contact order.**

(1) Because of the serious nature of domestic violence, the court in domestic violence actions:

- (a) Shall not dismiss any charge or delay disposition because of concurrent dissolution or other civil proceedings;
- (b) Shall not require proof that either party is seeking a dissolution of marriage prior to instigation of criminal proceedings;
- (c) Shall waive any requirement that the victim's location be disclosed to any person, other than the attorney of a criminal defendant, upon a showing that there is a possibility of further violence: PROVIDED, That the court may order a criminal defense attorney not to disclose to his or her client the victim's location; and
- (d) Shall identify by any reasonable means on docket sheets those criminal actions arising from acts of domestic violence.

(2)(a) Because of the likelihood of repeated violence directed at those who have been victims of domestic violence in the past, when any person charged with or arrested for a crime involving domestic violence is released from custody before arraignment or trial

on bail or personal recognizance, the court authorizing the release may prohibit that person from having any contact with the victim. The jurisdiction authorizing the release shall determine whether that person should be prohibited from having any contact with the victim. If there is no outstanding restraining or protective order prohibiting that person from having contact with the victim, the court authorizing release may issue, by telephone, a no-contact order prohibiting the person charged or arrested from having contact with the victim or from knowingly coming within, or knowingly remaining within, a specified distance of a location.

(b) In issuing the order, the court shall consider the provisions of RCW 9.41.800.

(c) The no-contact order shall also be issued in writing as soon as possible, and shall state that it may be extended as provided in subsection (3) of this section. By January 1, 2011, the administrative office of the courts shall develop a pattern form for all no-contact orders issued under this chapter. A no-contact order issued under this chapter must substantially comply with the pattern form developed by the administrative office of the courts.

(3) At the time of arraignment the court shall determine whether a no-contact order shall be issued or extended. So long as the court finds probable cause, the court may issue or extend a no-contact order even if the defendant fails to appear at arraignment. The no-contact order shall terminate if the defendant is acquitted or the charges are dismissed. If a no-contact order is issued or extended, the court may also include in the conditions of release a requirement that the defendant submit to electronic monitoring as defined in RCW 9.94A.030. If electronic monitoring is ordered, the court shall specify who shall provide the monitoring services, and the terms under which the monitoring shall be performed. Upon conviction, the court may require as a condition of the sentence that the defendant reimburse the providing agency for the costs of the electronic monitoring.

(4)(a) Willful violation of a court order issued under subsection (2), (3), or (7) of this section is punishable under RCW 26.50.110.

(b) The written order releasing the person charged or arrested shall contain the court's directives and shall bear the legend: "Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order."

(c) A certified copy of the order shall be provided to the victim.

(5) If a no-contact order has been issued prior to charging, that order shall expire at arraignment or within seventy-two hours if charges are not filed.

(6) Whenever a no-contact order is issued, modified, or terminated under subsection (2) or (3) of this section, the clerk of the court shall forward a copy of the order on or before the next judicial day to the appropriate law enforcement agency specified in the order. Upon receipt of the copy of the order the law enforcement agency shall enter the order

for one year or until the expiration date specified on the order into any computer-based criminal intelligence information system available in this state used by law enforcement agencies to list outstanding warrants. Entry into the computer-based criminal intelligence information system constitutes notice to all law enforcement agencies of the existence of the order. The order is fully enforceable in any jurisdiction in the state. Upon receipt of notice that an order has been terminated under subsection (3) of this section, the law enforcement agency shall remove the order from the computer-based criminal intelligence information system.

(7) All courts shall develop policies and procedures by January 1, 2011, to grant victims a process to modify or rescind a no-contact order issued under this chapter. The administrative office of the courts shall develop a model policy to assist the courts in implementing the requirements of this subsection.

**(See Exhibit 5).**

### **III. Third Party Assessment: Clinic Definition of Domestic Violence vs. Statutory Definition**

There are two (2) different viewpoints in understanding domestic violence and how to address the issue of abuse: the behavioral/clinic viewpoint and the legal viewpoint.

The behavior/clinical definition of domestic violence is more comprehensive in defining the conduct and focuses on the impact of the dynamics between the players: victim, children and perpetrator. (Anne L. Ganley, PhD., *Domestic Violence, Parenting Evaluations and Parenting Plans: Practice Guid for Parenting Evaluators in Family Court Proceedings*, 2009).

The legal definition is broader than the behavioral definition in defining the context, but narrower in defining the conduct.

#### *a. Behavior Definition of Domestic Violence*

Domestic Violence is:

1. A **pattern** of assaultive and coercive behavior;
2. Including physical, sexual, and psychological attacks, as well as economic coercion;
3. That adults or adolescents use against their intimate partners.

*(Pattern is defined as two or more occurrences).*

#### **Analysis of Information:**

*For the purpose of this report, domestic violence is defined as a pattern of behaviors (two or more) that includes physical force against person or property or the credible threat of physical force, in addition to behaviors of coercive control, such as tactics of economic and psychological control, or use of the children to control the other parent.*

(Anne L. Ganley, PhD., *Domestic Violence, Parenting Evaluations and Parenting Plans: Practice Guid for Parenting Evaluators in Family Court Proceedings*, 2009).

a. *Legal Definition of Domestic Violence*

Domestic Violence is: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member. *RCW 26.50.010*

In many cases involving a Petition For an Order for Protection wherein children are involved, the court may refer the matter for a Domestic Violence Assessment with a court facilitated agency or an outside third party. The types of assessments may also be referred to as DV Risk Assessments.

(Some counties have their own court run programs i.e. King County – Family Court Services).

When assessing a case under a behavior definition of DV, the assessor may focus on historical acts of domestic violence which may have permeating through the relationship. This allows them to establish a “pattern” of abuse. Such acts may include control through economic means, isolation of a child or using a child to garner control (abusive use of conflict), property destruction or isolating the person from their support network. – Naturally, many of these acts would not be defined as domestic violence under the statute.

Assessments are child focused as well, ensuring the safety and welfare of the child.

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**Practice Tip** – When addressing a third party assessment, the practitioner needs to be careful with regards to those types of cases wherein there is only one act of physical harm (i.e. escalated argument which may have resulted in shoving, pushing, scratching and the police are called), but no other clear indication of battering behavior. Under the legal definition, the one incident is sufficient for a finding of domestic violence, but under the behavioral definition, a finding of domestic violence would be inappropriate.

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#### **IV. Fifth Amendment Implications with Civil Domestic Violence Orders for Protection**

Often an order for protection hearing occurs simultaneously with a criminal prosecution for assault. This creates particular evidentiary issues that have both substantive and strategic implications.

Some criminal attorneys have sought continuances in the civil order for protection hearing citing the Fifth Amendment privilege of their clients not to be forced to testify. Delays do not leave victims unprotected because the temporary order for protection is usually reissued. However, as the Washington State legislature has found, unnecessary delays go against the intentions of the Domestic Violence Prevention Act which provides for swift and efficient adjudication of these matters.

Washington's Domestic Violence Prevention Act does not have any limitations on the number of continuances. In some ways, the courts have attempted to remedy this problem by preventing use of the respondent's testimony in any future proceeding and by ensuring that the finding of abuse is not treated as res judicata (for future claims in which a finding of abuse could have an impact on the determination).

The Legislature enacted the Domestic Violence Protection Act with the intent of enabling the courts to intervene before injury occurs. *Spence v. Kaminski*, 103 Wn. App. 325, 334-35, 12 P.3d 1030 (2000).

The statute reflects the legislator's belief that victims of domestic violence should have "easy, quick, and effective access to the court system." RCW 26.50.035 Findings 1993 c 350; Laws of 1992, ch 111 sec. 1.

The protection order proceeding is "intended to be a rapid and efficient process." *In re Marriage of Stewert*, 133 Wn. App. 545, 552, 137 P.3d 29 (2006). Thus, the policies underlying the Domestic Violence Prevention Act provide for the following:

1. To provide free, quick and effective access to the courts for victims of domestic violence for protection orders;
2. To provide protection for the victim, his or her family and household members
3. To hold domestic violence offenders accountable for their acts; and
4. To provide effective enforcement of domestic violence orders for protection.

The legislative intent behind the Domestic Violence Prevention Act and related statutes confirm that it was envisioned that a person whom is a victim, be it a man or a woman, child or adult, is entitled to an effective and speedy method by which to come before the Court to address safety concerns related to acts of domestic violence. RCW 26.10 and 26.50.

The legislature specifically found that, "Domestic violence is a problem of immense proportions affecting individuals as well as communities...Domestic violence must be addressed more widely and more effectively in our State. Great knowledge by professionals who deal frequently with domestic violence is essential to enforce existing laws, to intervene in domestic violence situations that do not come to the attention of the law enforcement or judicial systems, and to reduce and prevent domestic violence by intervening before the violence becomes severe." RCW 26.50.035 Findings 1993 c 350; Laws of 1992, ch 111 sec. 1.

As stated in the legislative intent under *RCW 10.31.100*, the legislature intends to enhance the ability of the justice system to respond **quickly** and fairly to domestic violence.

It can be argued that a perpetrator has no needs to claim Fifth Amendment rights and remain silent in a DVPO proceeding. The perpetrator has the ability to respond to the civil proceeding via his/her representative counsel and can provide argument in written submissions, again, through counsel. The Fifth Amendment affords the perpetrator to not have to say anything against himself/herself; however, to invoke the privilege, the perpetrator must also state that he does not intend to say anything against himself (e.g., "I decline to answer on the grounds that it may tend to incriminate me"). This means, that the perpetrator cannot simply remain silent. He/she must assert his/her intention and his/her choice to decline to answer.

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**Practice Tip:** Push for immediate adjudication by the victim →

- a. Legislative intent meant for swift adjudication of orders for protection.
  - b. Immediate adjudication increases the likelihood that the lawyer for the defendant in the criminal case has not done sufficient investigation of the case, has had little time to understand the story from the alleged perpetrator's perspective, and is reasonably reluctant to allow the client to discuss the issue under oath.
  - c. In order to avoid a finding of abuse a respondent may be willing to negotiate with the victim to create an order that may not otherwise be available after a hearing either because the statute does not provide for such relief or the commissioner is unwilling to order it after a hearing. These provisions may include matters such as child support, maintenance, supervised visitation, etc.
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## V. Realignment of Parties

RCW 26.05.060(4) provides the court the authority to realign the parties as "petitioner" and "respondent" where the court finds that the original petitioner is the abuser and the original respondent is the victim of domestic violence.

### **RCW 26.50.060**

#### **Relief—Duration—Realignment of designation of parties—Award of costs, service fees, and attorneys' fees.**

...

(4) In providing relief under this chapter, the court may realign the designation of the parties as "petitioner" and "respondent" where the court finds that the original petitioner is the abuser and the original respondent is the victim of domestic violence and may issue an ex parte temporary order for protection in accordance with RCW [26.50.070](#) on behalf of the victim until the victim is able to prepare a petition for an order for protection in accordance with RCW [26.50.030](#).

The statute contemplates that given the circumstances of having to defend against a petition for an order for protection as the respondent, that the newly realigned victim may not have had the ability to file their own Petition for an Order for Protection. As such, the statute allows the Court to issue an ex parte temporary order for protection in accordance with RCW 26.50.070 until the victim is able to prepare a petition for an order for protection in accordance with RCW 26.50.030.

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**Practice Tip** - If the attorney anticipates making an argument for realignment of the parties, the best method would be to be proactive and file a Petition for an Order for Protection prior to appearing for the return hearing as the responding party.

- Despite the clear authority under RCW 26.50.070 to issue emergency orders for protection, Courts have often required an active Petition in order to realign the parties.
- 

### **EXAMPLE:**

**Superior Court of Washington  
For King County**

No. [REDACTED]

Petitioner (Protected Person)

vs.

Respondent (Restrained Person)

**Denial Order**

Domestic Violence

Antiharassment

Vulnerable Adult

Sexual Assault

Stalking

(Optional Use) (ORDYMT)

Clerk's Action Required

Next Hearing Date/Time: \_\_\_\_\_

At: \_\_\_\_\_

**This Matter** having come on for hearing upon the request of (name) [REDACTED]

for a:

- Temporary Order  
 Modification Order

Full Order

Renewal Order

Termination Order

and the **Court Finding:**

- Petitioner  Respondent did not appear.  
 Petitioner requested dismissal of petition.  
 The order submitted has not been completed or certified upon penalty of perjury.  
 This order materially changes an existing order. A hearing after notice is necessary.  
 No notice of this request has been made or attempted to the  vulnerable adult  opposing party.  
 The petitioner has failed to demonstrate that there is sufficient basis to enter a temporary order without notice to the  vulnerable adult  opposing party.

**Domestic Violence:**

- The domestic violence protection order petition does not list a specific incident and approximate date of domestic violence.  
 A preponderance of the evidence has not established that there is domestic violence.  
 The respondent proved by a preponderance of the evidence that the respondent will not resume acts of domestic violence against the petitioner or the petitioner's children or family or household members when the protection order expires.

Denial Order (ORDYMT) - Page 1 of 3  
WPS DV 6.000 / 07/01/01 DOW 02/01 DOW 10/11 DOW 7/27 DOW 7/28

(Page 2, skipped)

**Stalking:**

- The stalking protection order petition does not list specific incidents and approximate dates of stalking conduct.
- A preponderance of the evidence has not established that there has been stalking conduct.
- The respondent proved by a preponderance of the evidence that the respondent will not resume acts of stalking conduct against the petitioner or the petitioner's children or family or household members when the protection order expires.

**Harassment:**

- The harassment protection order petition does not list specific incidents and approximate dates of harassment.
- A preponderance of the evidence has not established that there has been harassment.
- The respondent proved by a preponderance of the evidence that the respondent will not resume harassment of the petitioner when the protection order expires.

**Other:**

Petitioner renews/denies request for realignment/motion denied absent/counter petition

**The court orders that:**

- The request to waive the filing fee is denied.
- The request for a temporary order is denied and the case is dismissed.
- The request for a full order is denied, and the petition is dismissed. Any previously entered temporary order expires at 9:17 am today.
- The request for a temporary order is denied and the clerk is directed to set a hearing on the petition.
- The request before the court is denied, provided that it may be renewed after notice has been provided to the  vulnerable adult  opposing party according to the Civil Rules.
- The request to modify, terminate, or renew the order dated \_\_\_\_\_ is denied.
- The parties are directed to appear for a hearing as shown on page One.

The requesting party shall make arrangements for service of the petition/motion and this order on (name) \_\_\_\_\_ via \_\_\_\_\_

law enforcement, professional process server, a person who is 18 or older who is not a party to the case. A Return of Service shall be filed with the clerk at or before the hearing.

**Failure to Appear at the Hearing May Result in the Court Granting All of the Relief Requested in the Petition or Motion.**

This order is dated and signed in open court.

Date: 1/27/2015 Time: 9:17 am

Judge/Commissioner

Melinda Johnson-Taylor

Copy Received:

Copy Received:

Petitioner

Date

Respondent

Date

Denial Order (ORDYMT) - Page 3 of 3  
WPF DV-6.020 (07/2013) - RCW 26.50, RCW 10.14, RCW 74.34, RCW 7.90

## Ex. 1

### **Comparison of Court Orders for Washington State**

Many Tribal Courts have similar civil and criminal court orders. Check with your local Tribal Court for details.

<u>Kind of Order</u>	<u>SEXUAL ASSAULT PROTECTION ORDER</u>	<u>DOMESTIC VIOLENCE PROTECTION ORDER</u>	<u>No-CONTACT ORDER</u>	<u>RESTRANDING ORDER</u>
<u>Nature of Proceeding</u>	Civil or criminal, in context of pending criminal action or as a condition of sentence, under RCW 7.90	A person who fears violence from a "family or household member" (RCW 10.99.020), or who has been the victim of physical harm or fears imminent physical harm, or stalking from a "family or household member", (includes dating relationships). Petitioners 13 or older in a dating relationship with a Respondent, 16 or older, minors aged 13-15 with a parent, guardian, guardian ad litem, or next friend.	Criminal, in context of pending criminal action, under RCW 10.99.	Civil, normally in context of pending dissolution or other family law action, under RCW 26.09.26, 10, 26, 26.
<u>Who may obtain order?</u>	A person who does not qualify for a domestic violence protection order, and is a victim of nonconsensual sexual conduct or nonconsensual sexual penetration, including a single incident, may petition for a civil order. Minors under age of 16 with parent or guardian. Court may appoint a guardian ad litem for either petitioner or respondent at no cost to either party.  The court may issue an order on behalf of victims of sex offenses when criminal charges are filed.	Incident must have been reported to the police. Criminal charges must be pending. Judge must consider issuance pending release of defendant from jail, at time of arraignment, and at sentencing.	Petitioner who is married to respondent or has child in common.	
<u>Jurisdiction</u>	District, Municipal, or Superior Court. See RCW 26.50.020(5).  Telephonic hearings available pursuant to court rule and in limited circumstances.	Telephone hearings available in limited circumstances. <ul style="list-style-type: none"><li>• TPO—District, Municipal, or Superior Court.</li><li>• PO—limited to Superior Court if Superior Court has family law action pending, or if case involves children or order to vacate home.</li></ul>	District, Municipal, or Superior Court only.	Superior Court only.
<u>Cost to Petitioner</u>	No filing or service fees.	No filing or service fees.	None.	Same as dissolution. Filing fee waived if indigent.
<u>How does the respondent receive notice?</u>	Notice of civil order served on the respondent. Notice by certified mail, or publication authorized in limited circumstances.	Verbal and written notice given at bail hearing, arraignment, or sentencing. As part of sentencing, the court may issue a no contact order.	Notice served on respondent or respondent's attorney.	
	Notice of criminal order given to defendant verbally and in writing when order is entered.			

REVISED June 2013. This information does not constitute legal advice. Laws change both as a result of legislative and court decisions.

Kind of Order	<b>SEXUAL ASSAULT PROTECTION ORDER</b>	<b>DOMESTIC VIOLENCE PROTECTION ORDER</b>	<b>No-CONTACT ORDER</b>	<b>RESTRAINING ORDER</b>
<u>Consequences if order is knowingly violated</u>	Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise Gross Misdemeanor.	Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise Gross Misdemeanor.	Mandatory arrest. Release pending trial may be revoked. Additional criminal or contempt charges may be filed. Felony if any assault, reckless endangerment or drive-by-shooting, otherwise Gross Misdemeanor.	Mandatory arrest. Gross Misdemeanor. Possible criminal charges or contempt.
<u>Maximum duration of order</u>	<ul style="list-style-type: none"> <li>• Temporary civil SAPO-14 days with service.</li> <li>• Full civil SAPO—Designated by court up to two years.</li> <li>• Criminal orders—Designated by court.</li> <li>• Post sentencing provision may last up to two years following imprisonment, or community supervision, conditional release, probation or parole.</li> </ul>	<ul style="list-style-type: none"> <li>• TPO—14 days with service.</li> <li>• TPO—24 days certified mail or with service by publication.</li> <li>• PO—Designated by court, one year, or permanent.</li> </ul>	Until trial and sentencing are concluded. Post-sentencing provision lasts for possible maximum of sentence in Superior Court, in District or Municipal court, for a fixed period not to exceed 5 years.	<ul style="list-style-type: none"> <li>• TRO—14 days.</li> <li>• Preliminary injunction—dependency of action.</li> <li>• RO in final decree—permanent unless modified.</li> </ul>
Kind of Order	<b>ANTI-HARASSMENT ORDER</b>	<b>VULNERABLE ADULT PROTECTION ORDER</b>		
<u>Nature of Proceeding</u>	Civil, under RCW 10.14.	Civil, Under RCW 74.34.110 and RCW 26.50.		
<u>Who may obtain order?</u>	A person who does not qualify for a domestic violence protection order, and who has been seriously alarmed, annoyed or harassed by a conduct which serves no legitimate or lawful purpose. Petitioners 18 or older with Respondent 18 or older. If Respondent is under 18, unless emancipated or guardian ad litem appointed. Or, Petitioner under age 18 with parent or guardian with a Respondent under 18 in cases where adjudication of offense has happened or is under investigation against petitioner. Parties generally are not married, have not lived together, and have no children in common.	A vulnerable adult, or an interested person on behalf of a vulnerable adult, who has been abandoned, abused, subject to financial exploitation, or neglect or threat thereof. The Department of Social and Health Services may also obtain an order on behalf of a vulnerable adult.		
<u>Jurisdiction</u>	Must file in District or Municipal Court. Transfer to Superior Court when there is an action pending between the parties, order to vacate home, the respondent is under eighteen; or the action would interfere with a respondent's care, control, or custody of the respondent's minor child.	Superior Court		
<u>Cost to Petitioner</u>	No filing or service fees for stalking, sexual assault or domestic violence victims.	No service or filing fees.		

<u>Kind of Order</u>	<b>VULNERABLE ADULT PROTECTION ORDER</b>
<u>How does the respondent receive notice?</u>	Notice served on the respondent. Notice by certified mail, or publication authorized in limited circumstances.
<u>Consequences if order is knowingly violated</u>	Gross Misdemeanor. Discretionary arrest with possible criminal charges or contempt. Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise Gross Misdemeanor.
<u>Maximum duration of order</u>	TAHO–14 days. TAHO–24 days certified mail or with service by publication. AHO–1 year or permanent. VAPO–Designated by court, for a fixed period not to exceed 5 years.
<u>Kind of Order</u>	<b>STALKING PROTECTION ORDER</b>
<u>Nature of Proceeding</u>	Civil under RCW 7 (RCW chapter number is pending the code reviser's decision after July 28, 2013, when statute takes effect).
<u>Who may obtain order?</u>	A person who does not qualify for a domestic violence protection order, and is a victim of any stalking conduct. Stalking conduct includes stalking as defined by RCW 9A.46.110, cyberstalking as defined by RCW 9.61.260 or repeated contacts, attempts to contact, monitoring, tracking, keeping under observation, or following another person and causing a person to feel intimidated, frightened, or threatened.  Petitioner 16 may file (not required to have a guardian or next friend). Parent or guardian may petition on behalf of any minor, including minors 16 or 17. Interested person may petition on behalf of vulnerable adult. Court may appoint a guardian ad litem for either petitioner or respondent. If Respondent is 15 or younger and not emancipated, a guardian ad litem must be appointed. Petitioner shall not be required to pay fees.
	Criminal, in context of pending criminal action at arraignment or as a condition of sentence, under RCW 9A.46.110 or 060 and RCW 7 (RCW chapter number is pending the code reviser's decision after July 28, 2013, when statute takes effect).  Incident must have been reported to the police. Stalking related criminal charges must be pending. The court may issue the order by telephone before arraignment or trial on bail or personal recognizance if no other restraining or protective order exists, and victim does not qualify for a domestic violence protection order. Court must also consider issuance at time of arraignment, and at sentencing regardless of any existing protective orders.  If criminal charges are dismissed or defendant is acquitted, the victim can file for a separate civil Stalking Protection Order. The criminal Stalking No Contact order may be continued until a full hearing.  As a part of sentencing, if the victim does not qualify for a Domestic Violence Protection order, the court may issue Stalking No Contact Order. Post-sentencing provision lasts for possible maximum of five years.

<u>Kind of Order</u>	<b>STALKING NO CONTACT ORDER</b>				
<u>Jurisdiction</u>	Telephonic hearings available pursuant to court rule and in limited circumstances.				
Must file in District or Municipal Court. Transfer to Superior court if the petitioner, victim or respondent is under eighteen, there is a pending Superior court action involving the parties, the action involves possession of property, or the action would interfere with a respondent's care, control, or custody of the respondent's minor child.					
<u>Cost to Petitioner</u>	No fees.	No fees.	No fees.		
<u>How does the respondent receive notice?</u>	Notice of civil order served on the respondent, if respondent is a minor, parent or legal guardian shall be personally served. Notice by certified mail, or publication authorized in limited circumstances.	Verbal and written notice of order given at bail hearing, arraignment, or sentencing. If criminal charges dismissed or defendant acquitted, victim may file for civil stalking order.	Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment otherwise Gross Misdemeanor.		
<u>Consequences if order is knowingly violated</u>	Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment otherwise Gross Misdemeanor.				
<u>Maximum duration of order</u>	TSTPO–14 days with personal service TSTPO – 24 days certified mail or with service by publication. STPO–fixed period of time or permanent.	Five years for a final stalking no contact order.			
<b>GLOSSARY</b>					
<b>TAHO</b> Temporary Anti-Harassment Order <b>AHO</b> Anti-Harassment Order <b>TPO</b> Temporary Order for Protection <b>PO</b> Order for Protection <b>RO</b> Restraining Order <b>TRO</b> Temporary Restraining Order <b>TVAO</b> Temporary Vulnerable Adult Order <b>TSAPo</b> Temporary Sexual Assault Protection Order <b>SAPO</b> Sexual Assault Protection Order <b>TSTPO</b> Temporary Stalking Protection Order <b>STPO</b> Stalking Protection Order					

Prepared by the Washington State Coalition Against Domestic Violence, [www.wscadv.org](http://www.wscadv.org),  
 June 2013. Consultation from David Ward, Legal Voice, [www.legalvoice.org](http://www.legalvoice.org).  
 Washington Coalition of Sexual Assault Programs, Olympia, WA, [www.wcsap.org](http://www.wcsap.org).  
 Originally adapted from the *Domestic Violence Manual For Judges, Volume I - Criminal*, 1992.  
 The Criminal Domestic Violence Manual Subcommittee, the Office of the  
 Administrator for the Courts for the State of Washington, Olympia, WA, updated 1998.

## Ex. 2

Court of Washington For		Order for Protection													
Petitioner (First, Middle, Last Name)      DOB vs.		No. Court Address _____  Telephone Number: (____) (Clerk's Action Required) (ORPRT/ORWPNP)													
Respondent (First, Middle, Last Name)      DOB		Names of Minors: <input type="checkbox"/> No Minors Involved (List first, middle and last name/s and age/s)  _____ _____ _____													
		<b>Respondent Identifiers</b> <table border="1"><tr><td>Sex</td><td>Race</td><td>Hair</td></tr><tr><td> </td><td> </td><td> </td></tr><tr><td>Height</td><td>Weight</td><td>Eyes</td></tr><tr><td> </td><td> </td><td> </td></tr></table>		Sex	Race	Hair				Height	Weight	Eyes			
Sex	Race	Hair													
Height	Weight	Eyes													
		<b>Respondent's Distinguishing Features:</b> _____													
Caution: Access to weapons: <input type="checkbox"/> yes <input type="checkbox"/> no <input type="checkbox"/> unknown															
<b>The Court Finds Based Upon the Court Record:</b>															
The court has jurisdiction over the parties, the minors, and the subject matter. Respondent had reasonable notice and an opportunity to be heard. Notice of this hearing was served on the respondent by <input type="checkbox"/> personal service <input type="checkbox"/> service by mail pursuant to court order <input type="checkbox"/> service by publication pursuant to court order <input type="checkbox"/> other _____.															
<input type="checkbox"/> Respondent received actual notice of the hearing.															
Respondent <input type="checkbox"/> was <input type="checkbox"/> was not present at the hearing.															
This order is issued in accordance with the Full Faith and Credit provisions of VAWA: 18 U.S.C. § 2265.															
Respondent's relationship to the victim is:															
<input type="checkbox"/> spouse or former spouse <input type="checkbox"/> current or former dating relationship <input type="checkbox"/> in-law <input type="checkbox"/> parent or child <input type="checkbox"/> parent of a child in common <input type="checkbox"/> stepparent or stepchild <input type="checkbox"/> blood relation other than parent or child <input type="checkbox"/> current or former domestic partner <input type="checkbox"/> current or former cohabitant as roommate <input type="checkbox"/> current or former cohabitant as part of a dating relationship															
Respondent committed domestic violence as defined in RCW 26.50.010.															
<input type="checkbox"/> Respondent represents a credible threat to the physical safety of the protected person/s.															
Additional findings may be found below. The court concludes that the relief below shall be granted.															
<b>Court Order Summary:</b>															
<input type="checkbox"/> Respondent is restrained from committing acts of abuse as listed in provisions 1 and 2, on page 2.															
<input type="checkbox"/> No-contact provisions apply as set forth on the following pages.															
<input type="checkbox"/> Additional provisions are listed on the following pages.															
<b>This order is effective immediately and for one year from today's date, unless stated otherwise here (date):</b> _____															

***It is Ordered:***

1. Respondent is **restrained** from causing physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking  petitioner  
 the minors named in the table above  these minors only:

(Respondent: If the petitioner is your spouse or former spouse, current or former domestic partner, the parent of a child in common, or a current or former cohabitant as part of a dating relationship, you will not be able to own or possess a firearm, other dangerous weapon, ammunition, or concealed pistol license under state or federal law for the duration of the order.)

2. Respondent is **restrained** from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in RCW 9.61.260, and using telephonic, audiovisual, or other electronic means to monitor the actions, locations, or wire or electronic communication of  petitioner  the minors named in the table above  
 only the minors listed below  members of the victim's household listed below  the victim's adult children listed below:
3. Respondent is **restrained** from coming near and from having any contact whatsoever, in person or through others, by phone, mail, or any means, directly or indirectly, except for mailing or service of process of court documents by a 3<sup>rd</sup> party or contact by Respondent's lawyer(s) with  petitioner  the minors named in the table above  
 these minors only:

If both parties are in the same location, respondent shall leave.

4. Respondent is **excluded** from petitioner's  residence  workplace  school;  the day care or school of  the minors named in the table above  these minors only:  
 Other  
 Petitioner's address is confidential.  Petitioner waives confidentiality of the address which is:  
 5. Petitioner shall have exclusive right to the residence that petitioner and respondent share. The respondent shall immediately **vacate** the residence. The respondent may take respondent's personal clothing and tools of trade from the residence while a law enforcement officer is present.  
 This address is confidential.  Petitioner waives confidentiality of this address which is:  
 6. Respondent is **prohibited** from knowingly coming within, or knowingly remaining within \_\_\_\_\_ (distance) of: petitioner's  residence  workplace  
 school;  the day care or school of  the minors named in the table on page one  
 these minors only:  
 Other:

7. Petitioner shall have possession of essential personal belongings, including the following:

8. Petitioner is granted use of the following vehicle:

Year, Make & Model \_\_\_\_\_ License No. \_\_\_\_\_

9. Other:  
\_\_\_\_\_  
\_\_\_\_\_

**Protection for minors:** This state  has exclusive continuing jurisdiction;  is the home state;  has temporary emergency jurisdiction  that may become final jurisdiction under RCW 26.27.231(2);  other: \_\_\_\_\_

10. Petitioner is **granted** the temporary care, custody, and control of  the minors named in the table above  these minors only:

The respondent will be allowed visitations as follows:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Petitioner may request modification of visitation if respondent fails to comply with treatment or counseling as ordered by the court.

If the person with whom the child resides a majority of the time plans to relocate the child, that person must comply with the notice requirements of the Child Relocation Act. Persons entitled to time with the child under a court order may object to the proposed relocation. See RCW 26.09, RCW 26.10 or RCW 26.26 for more information.

11. Respondent is **restrained** from interfering with petitioner's physical or legal custody of  the minors named in the table above  these minors only:

12. Respondent is **restrained** from removing from the state  the minors named in the table above  these minors only:

#### **Additional requests:**

13. Respondent shall participate in treatment and counseling as follows:  
 domestic violence perpetrator treatment program approved under RCW 26.50.150 or counseling at: \_\_\_\_\_  
 parenting classes at: \_\_\_\_\_  
 drug/alcohol treatment at: \_\_\_\_\_  
 other: \_\_\_\_\_

<input type="checkbox"/> 14. Petitioner is granted judgment against respondent as provided in the Judgment, WPF DV 3.030.
<input type="checkbox"/> 15. Parties shall return to court on _____, at _____.m. for review.
<b>Protection for pets:</b>
<input type="checkbox"/> 16. Petitioner shall have exclusive custody and control of the following pet(s) owned, possessed, leased, kept, or held by petitioner, respondent, or a minor child residing with either the petitioner or the respondent. (Specify name of pet and type of animal): _____.
<input type="checkbox"/> 17. Respondent is <b>prohibited</b> from interfering with the protected person's efforts to remove the pet(s) named above.
<input type="checkbox"/> 18. Respondent is <b>prohibited</b> from knowingly coming within, or knowingly remaining within _____ (distance) of the following locations where the pet(s) are regularly found: <input type="checkbox"/> petitioner's residence (You have a right to keep your residential address confidential.) <input type="checkbox"/> _____ Park <input type="checkbox"/> other: _____

**Prohibit Weapons and Order Surrender**

The Respondent must:

- not obtain or possess any firearms, other dangerous weapons, or concealed pistol license; and
- turn in any firearms, other dangerous weapons, and concealed pistol license as stated in the **Order to Surrender Weapons** filed separately.

**Findings** – The court (*check all that apply*):

- must** issue the above orders and an **Order to Surrender Weapons** because:
  - the first restraint provision is ordered above, and the court found on page one that the Respondent had *actual notice*, represented a *credible threat*, and was an *intimate partner*.
  - the court finds by clear and convincing evidence that the restrained person has:
    - used, displayed, or threatened to use a firearm or other dangerous weapon in a felony; or
    - previously committed an offense making him or her ineligible to possess a firearm under RCW 9.41.040.
- may** issue the above orders and an **Order to Surrender Weapons** because the court finds by a preponderance of evidence, the Respondent:
  - presents a serious and imminent threat to public health or safety, or the health or safety of any individual by possessing a firearm or other dangerous weapon; or
  - has used, displayed or threatened to use a firearm or other dangerous weapon in a felony; or
  - previously committed an offense making him or her ineligible to possess a firearm under RCW 9.41.040.

**Warnings to the Respondent:** A violation of provisions 1 through 6 of this order with actual notice of its terms is a criminal offense under chapter 26.50 RCW and will subject you to arrest. If the violation of the protection order involves travel across a state line or the boundary of a tribal jurisdiction, or involves conduct within the special maritime and territorial jurisdiction of the United States, which includes tribal lands, you may be subject to criminal prosecution in federal court under 18 U.S.C. §§ 2261, 2261A, or 2262.

A violation of provisions 1 through 6, 17, or 18 of this order is a gross misdemeanor unless one of the following conditions apply: Any assault that is a violation of this order and that does not amount to assault in the first degree or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony. Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony. Also, a violation of this order is a class C felony if you have at least two previous convictions for violating a protection order issued under Titles 7, 10, 26 or 74 RCW.

If your relationship to the victim is as intimate partner, then effective immediately, and continuing as long as this protection order is in effect, **you may not possess a firearm or ammunition under federal law**. 18 U.S.C. § 922(g)(8). A violation of this federal firearms law carries a maximum possible penalty of 10 years in prison and a \$250,000 fine.

If you are convicted of an offense of domestic violence, you will be forbidden for life from possessing a firearm or ammunition. 18 U.S.C. § 922(g)(9); RCW 9.41.040.

**You Can Be Arrested Even if the Person or Persons Who Obtained the Order Invite or Allow You to Violate the Order's Prohibitions.** You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application.

Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

**Warning:** A person may be guilty of custodial interference in the second degree if they violate provisions 10, 11, or 12.

#### **Washington Crime Information Center (WACIC) Data Entry**

It is further ordered that the clerk of the court shall forward a copy of this order on or before the next judicial day to \_\_\_\_\_  County Sheriff's Office  City Police Department **where petitioner lives** which shall enter it into WACIC.

#### **Service**

- The clerk of the court shall also forward a copy of this order on or before the next judicial day to \_\_\_\_\_  County Sheriff's Office  City Police Department **where respondent lives** which shall personally serve the respondent with a copy of this order and shall promptly complete and return to this court proof of service.
- Petitioner shall serve this order by  mail  publication.
- Petitioner shall make private arrangements for service of this order.
- Respondent appeared and was informed of the order by the court; further service is not required.

#### **Law Enforcement Assistance**

- Law enforcement shall assist petitioner in obtaining:
  - Possession of petitioner's  residence  personal belongings located at:  the shared residence  respondent's residence  other: \_\_\_\_\_
  - Custody of the above-named minors, including taking physical custody for delivery to petitioner.
  - Possession of the vehicle designated in paragraph 7, above.
  - Other: \_\_\_\_\_
  - Other: \_\_\_\_\_

***This order is in effect until the expiration date on page one.***

If the duration of this order exceeds one year, the court finds that an order of one year or less will be insufficient to prevent further acts of domestic violence.

Other: \_\_\_\_\_

Dated: \_\_\_\_\_ at \_\_\_\_\_ a.m./p.m.

---

**Judge/Commissioner**

I acknowledge receipt of a copy of this Order:

➤ \_\_\_\_\_  
Signature of Respondent/Lawyer WSBA No. \_\_\_\_\_ Print Name \_\_\_\_\_

➤ \_\_\_\_\_  
Signature of Petitioner/Lawyer WSBA No. \_\_\_\_\_ Print Name \_\_\_\_\_

**Petitioner or Petitioner's Lawyer must complete a Law Enforcement  
Information Sheet (LEIS).**

## Ex. 3

Superior Court of Washington, County of \_\_\_\_\_

In re:

Petitioner/s (*person/s who started this case*):  
\_\_\_\_\_  
\_\_\_\_\_

And Respondent/s (*other party/parties*):  
\_\_\_\_\_  
\_\_\_\_\_

No. \_\_\_\_\_

Restraining Order

Temporary (TRO)

Final (RSTO)

(ORWPNP)

Clerk's action required: 7

### Restraining Order

*This order replaces all earlier Restraining Orders restraining the same person signed in this case number. Use a separate order for each restrained person.*

1. This Order restrains (*name*):  
\_\_\_\_\_

Restrained Party's Distinguishing Features:  
\_\_\_\_\_

#### Restrained Party's Identifiers

Sex	Race	Hair
Height	Weight	Eyes

**Caution:** Access to weapons:  yes  no  unknown

2. This Order protects (*name/s*): \_\_\_\_\_

and the following children, who are under 18 (if any)

Child's name	Age	Child's name	Age
1.	4.		
2.	5.		
3.	6.		

### 3. To the Restrained Person listed in 1:

This Order starts immediately, and ends in 12 months or on (date): \_\_\_\_\_

**Warning! You must obey this order.** Violation of this order with actual notice of its terms is a **criminal offense** under Chapter 26.50 RCW and will subject the violator to arrest (RCW 26.09.060). This order is enforceable in all 50 U.S. states, the District of Columbia, and U.S. territories and tribal lands (18 U.S.C. § 2265).

### 4. Findings

**Authority:** The court has jurisdiction over the parties, the children listed in 2, and the subject matter.

**Notice:** The Restrained Person had reasonable notice and an opportunity to be heard. He/She was notified of the hearing by  personal service  service by mail allowed by the court  service by publication allowed by the court

The Restrained Person  was  was not present at the hearing.

The Restrained Person had actual notice of the hearing.

other (specify): \_\_\_\_\_

**Credible Threat:** The Restrained Person represents a credible threat to the physical safety of the Protected Person.

**Intimate Partner:** The Restrained Person is/was an intimate partner to the Protected Person (including current and former spouses and domestic partners, parents of a child-in-common, and people who lived together as part of a dating relationship).

**Military:** The (check one):  Petitioner  Respondent lives in the state of Washington, but was not able to go to the hearing because s/he is an active-duty member of the National Guard or Reserves (or a dependent of one). A failure to act despite the absence of the service member will result in a manifest injustice to the other party.

### 5. Court Orders to the Restrained Person listed in 1:

**Warning!** You must obey this order until it ends. If you know about this order but do not obey, you may be arrested and charged with a crime.

**Do not disturb**

The Restrained Person must not disturb the peace of the Protected Person or of any child listed in 2.

**Stay away**

The Restrained Person must not knowingly go or stay within \_\_\_\_\_ feet of the Protected Person's home, workplace, or school, or the daycare or school of any child listed in 2.

The Restrained Person must stay away from the Protected Person's home, workplace, or school, and the daycare or school of any child listed in 2.

**Do not hurt or threaten**

The Restrained Person must not:

- Assault, harass, stalk or molest the Protected Person or any child listed in 2; or
- Use, try to use, or threaten to use physical force against the Protected Person or children that would reasonably be expected to cause bodily injury.

**Warning!** If the court checks this box, the court must consider if weapons restrictions are required by state law; federal law may also prohibit the Restrained Person from possessing firearms or ammunition.

**Prohibit weapons and order surrender**

The Restrained Person must:

- not possess or obtain any firearms, other dangerous weapons, or concealed pistol license; and
- immediately turn in any firearms, other dangerous weapons, or concealed pistol license as stated in the **Order to Surrender Weapons** (form All Cases 02-050), filed separately.

**Findings** – The court (*check all that apply*):

- must** issue the above orders about weapons because:
  - the “*Do not hurt or threaten*” restraints are ordered above, and the court found in section 4 that the Restrained Person had *actual notice*, represented a *credible threat*, and was an *intimate partner*. RCW 9.41.800.
  - the court finds by clear and convincing evidence that the restrained person has:
    - used, displayed, or threatened to use a firearm or other dangerous weapon in a felony; or
    - previously committed an offense making him or her ineligible to possess a firearm under RCW 9.41.040.
- may** issue the above orders about weapons because the court finds by a preponderance of evidence that the Restrained Party:
  - presents a serious and imminent threat to public health or safety, or the health or safety of any individual by possessing a firearm or other dangerous weapon; or
  - has used, displayed or threatened to use a firearm or other dangerous weapon in a felony; or
  - previously committed an offense making him or her ineligible to possess a firearm under RCW 9.41.040.

**Other restraining orders:** \_\_\_\_\_

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## 6. To the person who asked for this order:

Fill out a *Law Enforcement Information Sheet* (form All Cases 01.0400) and give it to the clerk. (Check one):

- You must notify** the other party because neither s/he nor his/her lawyer signed this order or was at the hearing when this order was made. Have someone serve a copy of this order to the other party. After serving, the server fills out a *Proof of Personal Service* (form FL All Family 101) and gives it to you. File the original *Proof of Personal Service* with the court clerk, and give a copy to the law enforcement agency listed below.

- You do not have to notify** the other party. The other party or his/her lawyer signed this order or was at the hearing when this order was made.

## 7. To the clerk:

Provide a copy of this Order and the *Law Enforcement Information Sheet* to the agency listed below within one court day. The law enforcement agency must enter this Order into the state's database.

Name of law enforcement agency where the Protected Person lives: \_\_\_\_\_.

*The restrained person's information will be removed from the state's database when this Order ends unless the court signs a new Order or extends the end date of this Order.*

**Ordered.**

---

Date                          Time                          Judge or Commissioner

### Petitioner and Respondent or their lawyers fill out below.

This order (*check any that apply*):

- is an agreement of the parties       is an agreement of the parties  
 is presented by me       is presented by me  
 may be signed by the court without notice to me       may be signed by the court without notice to me

 Petitioner signs here **or** lawyer signs here + WSBA #

 Respondent signs here **or** lawyer signs here + WSBA #

---

Print Name                          Date                          Print Name                          Date

## Ex. 4

Court of Washington	
For _____	
Petitioner, _____ Petitioner, (DOB) _____	vs. vs.
Respondent. _____ Respondent. (DOB) _____	
No. _____	
<b>Order for Protection - Harassment (ORAH/ORWPNP)</b>	
Court _____	Address: _____ _____
Telephone Number: (_____) _____	
(Clerk's action required)	

**Warning to the Respondent:** Violation of the provisions of this order with actual notice of its terms is a criminal offense under chapter 10.14 RCW and will subject a violator to arrest. Willful disobedience of the terms of this order may also be contempt of court and subject you to penalties under chapter 7.21 RCW.

1. Full Faith and Credit: The court has jurisdiction over the parties, the minors and the subject matter. This order is issued in accordance with the Full Faith and Credit provisions of VAWA.18 U.S.C. § 2265.
2. Notice of this hearing was served on the respondent by  personal service  service by publication pursuant to court order  other \_\_\_\_\_.
3. Minors addressed in this order:

Name (First, Middle Initial, Last)	Age	Race	Sex

Based upon the petition, testimony, and case record, the court finds that the respondent committed unlawful harassment, as defined in RCW 10.14.080, and was not acting pursuant to any statutory authority, and it is therefore ordered that:

<input type="checkbox"/> <b>No-Contact:</b> Respondent is <b>restrained</b> from making any attempts to contact Petitioner and any minors named in the table above.
<input type="checkbox"/> <b>Surveillance:</b> Respondent is <b>restrained</b> from making any attempts to keep under surveillance Petitioner and any minors named in the table above.
<input type="checkbox"/> <b>Stay Away:</b> Respondent is <b>restrained</b> from entering or being within _____ (distance) of Petitioner's <input type="checkbox"/> residence <input type="checkbox"/> place of employment <input type="checkbox"/> other:  <input type="checkbox"/> The address is confidential. <input type="checkbox"/> Petitioner waives confidentiality of the address which is:  <input type="checkbox"/> <b>Other:</b> _____ _____ _____
<input type="checkbox"/> <b>Pay Fees and Costs:</b> judgment is granted against Respondent in favor of _____ in the amount of \$ _____ for costs incurred in bringing the action and \$ _____ for attorneys' fees. <b>Notice: Petitioner, you must fill out and file a completed form WPF UH 04.0700, Judgment Summary.</b> The court has granted judgment against the respondent in the amount of \$ _____ for administrative court costs and service fees. A Judgment Summary, form WPF UH 04.0700, must be completed and filed.

<input type="checkbox"/> <b>Prohibit Weapons and Order Surrender</b>  The respondent must: <ul style="list-style-type: none"><li>• not obtain or possess any firearms, other dangerous weapons, or concealed pistol license; and</li><li>• turn in any firearms, other dangerous weapons, and concealed pistol license as stated in the <b>Order to Surrender Weapons</b> filed separately.</li></ul> <b>Findings</b> – The court ( <i>check all that apply</i> ):  <input type="checkbox"/> <b>must</b> issue the above orders and an <b>Order to Surrender Weapons</b> because the court finds by clear and convincing evidence that the respondent has: <ul style="list-style-type: none"><li><input type="checkbox"/> used, displayed, or threatened to use a firearm or other dangerous weapon in a felony; or</li><li><input type="checkbox"/> previously committed an offense making him or her ineligible to possess a firearm under RCW 9.41.040.</li></ul> <input type="checkbox"/> <b>may</b> issue the above orders and an <b>Order to Surrender Weapons</b> because the court finds by a preponderance of evidence, the respondent: <ul style="list-style-type: none"><li><input type="checkbox"/> presents a serious and imminent threat to public health or safety, or the health or safety of any individual by possessing a firearm or other dangerous weapon; or</li><li><input type="checkbox"/> has used, displayed or threatened to use a firearm or other dangerous weapon in a felony; or</li><li><input type="checkbox"/> previously committed an offense making him or her ineligible to possess a firearm under RCW 9.41.040.</li></ul>
---

### **Washington Crime Information Center (WACIC) Data Entry**

**It is further ordered** that the clerk of court shall forward a copy of this order on or before the next judicial day to \_\_\_\_\_  County Sheriff's Office  Police Department, **where Petitioner lives** and shall enter it into WACIC.

**Service**

The clerk of court  Petitioner shall forward a copy of this order on or before the next judicial day to:

\_\_\_\_\_ County Sheriff's Office,  
 \_\_\_\_\_ Police Department,

**where Respondent lives** which shall personally serve the respondent with a copy of this order and shall promptly complete and return to this court proof of service.

**Or**  Petitioner has made private arrangements for service of this order.

**Or**  Respondent appeared; further service is not required.

**Or**  Respondent did not appear. The restraint provisions in this order are the same as those in the temporary order. The court is satisfied that the respondent was personally served with the temporary order. Further service is not required.

**This Antiharassment protection order expires on \_\_\_\_\_.**

If the duration of this order exceeds one year, the court finds that Respondent is likely to resume unlawful harassment of the petitioner when the order expires.

Other: \_\_\_\_\_.

Dated \_\_\_\_\_ at \_\_\_\_\_ a.m./p.m.

Judge/Court Commissioner \_\_\_\_\_

I acknowledge receipt of a copy of this Order:

➤ \_\_\_\_\_  
Signature of Respondent/Lawyer WSBA No.

Print Name \_\_\_\_\_

Date \_\_\_\_\_

➤ \_\_\_\_\_  
Signature of Petitioner/Lawyer WSBA No.

Print Name \_\_\_\_\_

Date \_\_\_\_\_

**Petitioner or Petitioner's Lawyer must complete a Law Enforcement Information Sheet (LEIS).**

## Ex. 5

<p>Court of Washington for _____</p> <p>Plaintiff vs. Defendant (First, Middle, Last Name)</p>	<p>No.</p> <p><input type="checkbox"/> Pre-Trial   <input type="checkbox"/> Post Conviction <input type="checkbox"/> Replacement Order (paragraph 10)</p> <p><b>Domestic Violence No-Contact Order</b></p> <p>(clj = NOCON, Superior cts = ORNC, ORWPNP) Clerk's action required: Para 9</p>								
<p style="text-align: center;"><b>No-Contact Order</b></p> <p><b>1. Protected Person's Identifiers:</b></p> <p>Name (First, Middle, Last) _____ DOB _____ Gender _____ Race _____</p> <p>If a minor, use initials instead of name, provide other info., and complete a Law Enforcement Information Sheet (LEIS).</p> <p><b>2. Defendant:</b></p> <p>A. do not cause, attempt, or threaten to cause bodily injury to, assault, sexually assault, harass, stalk, or keep under surveillance the protected person.</p> <p>B. do not contact the protected person, directly, indirectly, in person or through others, by phone, mail, or electronic means, except for mailing or service of process of court documents through a third party, or contact by the defendant's lawyers.</p> <p>C. do not knowingly enter, remain, or come within _____ (1,000 feet if no distance entered) of the protected person's residence, school, workplace, other: _____.</p> <p>D. other: _____</p> <p><b>3. Firearms, Weapons, and Concealed Pistol License, Defendant:</b></p> <p><input type="checkbox"/> do not obtain, own, possess or control a firearm. (RCW 9.41.040.) <input type="checkbox"/> do not obtain or possess a firearm, other dangerous weapon, or concealed pistol license. (RCW 9.41.800.) <input type="checkbox"/> shall <b>immediately surrender</b> all firearms and other dangerous weapons within the defendant's possession or control and any concealed pistol license. Comply with the <b>Order to Surrender Weapons</b> filed separately. (RCW 9.41.800.)</p> <p><b>Defendant's Identifiers:</b></p> <table border="1"><tr><td colspan="2">Date of Birth</td></tr><tr><td colspan="2"></td></tr><tr><td>Gender</td><td>Race</td></tr><tr><td></td><td></td></tr></table>		Date of Birth				Gender	Race		
Date of Birth									
Gender	Race								

4. This no-contact order expires on  \_\_\_\_\_ (date and time) or  
 1 year  2 years from today's date.  
If no date is entered and no box is checked, this order expires 5 years from today's date.  
The court may extend a no-contact order even if the defendant does not appear at arraignment.

**Warning:** Violation of this order with actual notice of its terms is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. **You can be arrested even if the person protected by this order invites or allows you to violate the order's prohibitions.** You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written request.

#### **Findings of Fact**

5. Based upon the record both written and oral, the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense, that the defendant represents a credible threat to the physical safety of the protected person, and the court issues this Domestic Violence No-Contact Order under chapter 10.99 RCW to prevent possible recurrence of violence.
6. The court finds that the defendant's relationship to a person protected by this order is an
  - Intimate partner (former/current spouse; former/current domestic partner; parent of a child in common; or former/current cohabitant as part of a dating relationship) or
  - Other family member as defined by Ch. 10.99 RCW: \_\_\_\_\_.
7.  (Pretrial Order) For crimes not defined as a serious offense, the court makes the following mandatory findings pursuant to RCW 9.41.800(1) and (2):
  - The defendant used, displayed, or threatened to use a firearm or other dangerous weapon in a felony.
  - The defendant is ineligible to possess a firearm due to a prior conviction pursuant to RCW 9.41.040; or
  - Possession of a firearm or other dangerous weapon by the defendant presents a serious and imminent threat to public health or safety, or to the health or safety of any individual.

**Additional Warnings to Defendant.** This order does not modify or terminate any order entered in any other case. You are still required to comply with other orders.

Willful violation of this order is punishable under RCW 26.50.110. State and federal firearm restrictions apply. 18 U.S.C. § 922(g)(8)(9); RCW 9.41.040. In addition to other state and federal firearm restrictions, if you and the protected person are intimate partners, you cannot own, obtain, or possess a firearm, other dangerous weapon, or concealed pistol license for as long as this order is in effect. A violation is a felony and will subject you to arrest.

Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

#### **Additional Orders**

8.  Civil standby: The appropriate law enforcement agency shall, at a reasonable time and for a reasonable duration, assist the defendant in obtaining personal belongings located at:  
\_\_\_\_\_.
9. The clerk of the court shall forward a copy of this order on or before the next judicial day to: \_\_\_\_\_  County Sheriff's Office  City Police Department where the case is filed, which shall enter it into the Washington Crime Information Center.
10.  This order replaces all prior no-contact orders protecting the same person issued under this cause number.

Dated: \_\_\_\_\_ Time \_\_\_\_\_ a.m./p.m.  in open court with the defendant present.

I acknowledge receipt of a copy of this order:

\_\_\_\_\_  
Judge/ Pro Tem/Court Commissioner

Defendant

The protected person shall be provided with a certified copy of this order.

I am a certified or registered interpreter or found by the court to be qualified to interpret in the \_\_\_\_\_ language, which the defendant understands. I translated this order for the defendant from English into that language.

Signed at (city) \_\_\_\_\_, (state) \_\_\_\_\_, on (date)  
\_\_\_\_\_.  
\_\_\_\_\_.  
\_\_\_\_\_.  
\_\_\_\_\_.

Interpreter: \_\_\_\_\_ print name: \_\_\_\_\_

## CHAPTER SIX

## LEGISLATIVE UPDATES

June 2016

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**KEVIN G. RUNDLE** has been practicing high-conflict family, domestic violence, and sexual assault litigation for eighteen years, twelve years as attorney or director for the YWCA Pierce County Legal Services Program before returning to private practice with Lutz Law Offices, P.S. Kevin serves as a pro tem commissioner for the Pierce County Superior Court, serves as a trustee and treasurer elect for the Family Law Executive Committee (FLEC) of the WSBA, and currently sits on the executive committee for the Honorable Robert Bryan Chapter of the American Inns of Court. Kevin has also previously served as President for the TPCBA Family Law Section and committee chair of the Family Law Committee for the Volunteer Legal Services (VLS) Program. Kevin was awarded the 2011 American Inns of Court Civility Award and was named the TPCBA Family Law Attorney of the Year 2009.

**RICHARD L. BARTHOLOMEW** received his undergraduate degree and his J.D. from the University of Washington. From 1975 to 1977 he was in private practice in Seattle. From 1977 to 1980 he worked for a legal services program in Milwaukee, Wisconsin, directing the program during his last year there. In 1980 Mr. Bartholomew returned to his native Washington and practiced for three years with Cordes, Cordes, & Younglove in Olympia. He and Patricia L. Morgan practiced in a firm together from 1983 until 2006. Mr. Bartholomew has been a pro tem family court commissioner, a pro tem judge, an arbitrator, a guardian ad litem, and a mediator in family law cases in Thurston County. He is a member of the Family Law Sections of the Washington State Bar Association and the Thurston County Bar Association. He is a past chairman of the Thurston County Bar Association Family Law Section, and has been the Legislative Coordinator for the Family Law Executive Committee of the Washington State Bar Association since the fall of 1997. In that capacity he has worked on family law related legislation and has testified before the legislature on family law bills. He was a member of the WSBA's Legislative Committee from 2005 to 2016 and is a former chair of that committee. He was the Family Law Attorney of the Year in 2000, and received a Special Lifetime Achievement Award from the Family Law Section in 2015. His practice always emphasized family law.

Rick retired from the private practice of law as of August 31, 2015. He continues to act as a guardian ad litem and as a mediator.

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Kevin Rundle

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## **I. Introduction**

I have been the legislative liaison for the Family Law Section of the Washington State Bar Association since 1998. I have enjoyed this position tremendously. I have met excellent attorneys, but much more importantly, I have made wonderful friends. I have learned a lot about the legislative process itself. I enjoyed being part of the development of family law in the state of Washington, and I enjoyed working with legislators. I believe the Family Law Section has made an important difference in the development of family law related legislation.

I retired from the active practice of law as of August 31, 2015, although I continue to act as a guardian ad litem and to mediate cases. It is time for someone new to be the legislative liaison. I am happy to report that Kevin Rundle has volunteered to take on the responsibility. I am sure Kevin will do an excellent job.

## **II. Family Law Legislative Update**

I am providing summaries only. As always, I recommend that practitioners review the entire text of the bills and statutes. A cite to the legislative URL is provided at the end of these materials to make it easy to find the bills online. A look at the legislative history on this site for a particular bill will tell you whether it passed or not. The text of the original bills, any amendments thereto, and the final version as passed are also available on this site.

When the regular session ended without an approved budget, the governor vetoed approximately twenty-six bills. He did this as a protest of sorts for the legislature not passing a budget before the end of the regular session. Later, he agreed that it was appropriate for his vetoes to be overridden in certain cases, so many of the vetoed bills became law.

### **A. Bills that Passed**

Unless otherwise noted, the effective date of bills that passed is June 9, 2016.

#### **HB 2394 – Creating the parent to parent program for individuals with developmental disabilities**

**Companion bill: SB 6329**

This bill adds new sections to RCW 71A.14, the local services chapter under the developmental disabilities title.

One new section states,

"The goals of the parent to parent program for individuals with developmental disabilities are to: (1) Provide early outreach, support, and education to parents who have a child with special needs; (2) Match a trained volunteer support parent with a new parent who has a child with similar needs to the child of the support parent; and (3) Provide parents with tools and resources to be successful as they learn to understand the support and advocacy needs of their children."

Another new section reads,

"Subject to the availability of funds appropriated for this specific purpose, activities of the parent to parent program for individuals with developmental disabilities may include: (1) Outreach and support to newly identified parents of children with special needs; (2) Trainings that educate parents in ways to support their child and navigate the complex health, educational, and social systems; (3) Ongoing peer support from a trained volunteer support parent; and (4) Regular communication with other local programs to ensure consistent practices."

Finally, a section is added to read,

"(1) Subject to the availability of funds appropriated for this specific purpose, the parent to parent program for individuals with developmental disabilities must be funded through the department and centrally administered through a pass-through to a Washington state lead organization that has extensive experience supporting and training support parents for individuals with developmental disabilities. (2) Through the contract with the lead organization, each local program must be locally administered by an organization that shall serve as the host organization. (3) Parents of children with developmental disabilities shall serve as advisors to the host organizations. (4) A parent or grandparent of a child with developmental disabilities shall provide program coordination and local program information. (5) The lead organization shall provide ongoing training to the host organizations and statewide program oversight and maintain statewide program information."

### **HB 2440 – Concerning host home programs for youth**

This bill amends RCW 74.15.020 and adds a section to RCW 74.15. RCW 74.15 relates to care of children, expectant mothers, and persons with developmental disabilities.

A host home program serving youth who are not in the care of the department, and fulfilling other requirements, is exempted from the definition of

“agency”. A host home shall be receive local, state, or government funding but shall register with the secretary of state. Host programs are mandatory abuse reporters.

**HB 2591 – Notifying foster parents of dependency hearings and their opportunity to be heard in those hearings**

This bill amends RCW 13.34.096. The statute currently requires that foster parents and others be given notice of their right to be heard prior to each proceeding involving a child. This bill adds that the notice shall be “timely and adequate”, and defines that term to mean notice at the time the department would be required to give notice to parties to the case and by any means reasonably certain to notify the foster parents. The court is to state in writing after every hearing whether the department gave the notice.

The bill also requires the department to give foster family home notice of expected placement changes. At FLEC’s suggestion, an “exigent circumstances” exemption was put into the section of the bill requiring notice of expected placement changes.

AOC is to submit an annual report to a representative of the foster parent association of Washington state, including in the report whether foster parents received timely notification of dependency hearings as required by this statute, and whether caregivers submitted reports to the court.

**HB 2711 – Increasing the availability of sexual assault nurse examiners.**

The bill was also sent to the criminal law section.

This bill adds a new section to RCW 43.70 for the purpose of studying the availability and cost of sexual assault nurse examiners throughout the state. Findings of the study are to be reported to the governor by December 1, 2016.

**SB 5635 - Enacting the uniform power of attorney act.**

This bill conforms Washington’s power of attorney laws to those of several other states.

The bill makes all new powers of attorney durable unless it is stated otherwise in the document. A power of attorney naming a spouse as attorney in fact is automatically revoked if a petition for dissolution, legal separation, or invalidity is filed. If such action is terminated by agreement, the power of attorney is automatically reinstated. FLEC objected to the automatic reinstatement provision because there are many reasons that people may want to dismiss actions regarding marriage that do not necessarily mean that they

would want their spouse to again have power of attorney. The bill passed with this provision intact.

The bill makes it clear that an agent is to act in the principal's best interests unless the POA states otherwise. An agent is entitled to reasonable compensation for acts performed under the POA unless the POA states otherwise. An agent is required to cooperate with a person who has authority to make health care decisions on behalf of the principal.

An agent is required to keep a record of all receipts, disbursements, and transactions made on behalf of the principal.

An agent is to "[A]tempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

- (i) The value and nature of the principal's property;
- (ii) The principal's foreseeable obligations and need for maintenance;
- (iii) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
- (iv) Eligibility for a benefit, a program, or assistance under a statute or rule.

The law becomes effective on **January 1, 2017**. The law is not retroactive, meaning currently existing powers of attorney are durable only if they so state, as is the law now. Whether or not the automatic reinstatement provision applies to powers of attorney executed before the effective date of the act is an unanswered question.

The law is quite comprehensive. Attorneys who draft POA's or advise clients regarding them should read the entire statute.

### **SB 6498 – Creating a testamentary privilege for alcohol or drug addiction recovery sponsors.**

#### **Companion bill: HB 2789**

RCW 5.60.060 is amended to add the following sub-section:

"An individual who acts as a sponsor providing guidance, emotional support, and counseling in an individualized manner to a person participating in an alcohol or drug addiction recovery fellowship may not testify in any civil action or proceeding about any communication made by the person participating in the addiction recovery fellowship to the individual who acts as a sponsor except with the written authorization of that person or, in the case of death or disability, the

person's personal representative. authorization of that person or, in the case of 24 death or disability, the person's personal representative."

The bill was also referred to the Criminal and Litigation Sections.

This is one of the bills that were vetoed by the governor, with the veto later being overridden.

### **B. Bills that Failed**

#### **SHB 1037 – Implementing changes to child support based the support work group.**

##### **Companion bill: SB 5389**

The states are required by the federal government to review their child support schedules every four years. The state of Washington created a minimum of two work groups over the past few years to look at the support schedule. These work groups came up with comprehensive recommendations. The work group's product has been introduced in bill form several times in the legislature. Again this year, the legislature looked at the work of the child support work group. It appeared to have a good chance of passing this year. It passed the House with a vote of 92 in favor and 5 against, with 1 excused. The bill died after that.

This bill would have eliminated the two-tier system of support calculations. That is, support would be the same regardless of the ages of the children.

The bill would have required the court to use the whole family formula for "children not before the court" (other than the children for whom support is being set, children of one of the parties but not step-children) unless "adjusting the standard calculation would result in insufficient funds to meet the basic needs of the children in the receiving household and, when taking into consideration the totality of the circumstances, the application of the adjustment would be unjust."

The following provisions would have been added to the section on post-secondary support:

"(b) Before determining the parents' obligations for postsecondary educational support, the court shall consider all grants and scholarships awarded to the child, including work-study opportunities if an actual work-study position is available for the child, and subtract those amounts from the total cost of

postsecondary educational support to determine the unmet need for postsecondary educational support.”

“(4) If one or both parents saved separately for postsecondary educational support and paid those amounts directly to the educational institution or the child, those amounts should be considered part of the parent's share of postsecondary educational support.”

There is a provision allowing a parent to temporarily suspend post-secondary education support payments if a child fails to pursue a course of study appropriately.

**HB 1857 - Concerning extreme risk protective orders. Revised for 1st Substitute: Concerning extreme risk protection orders.**

**Companion bill: SB 5727**

This bill was introduced by Representative Jenkins during the 2015 session and reintroduced this session.

This bill would create a new restraining order called an extreme risk protection order. It would amend RCW 9.41.047 and add new sections to Chapter 10.79 RCW, and it would add a new chapter to Title 26 RCW.

A family or household member of a person or a law enforcement officer would be authorizes to file a petition requesting that the court issue an emergency extreme risk protection order on an ex parte basis, pending a full hearing, enjoining the subject of the petition from having in his or her custody or control, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or dangerous weapon.

An affidavit accompanying the petition would have to allege facts supporting the following: The subject of the petition poses a significant danger, in the near future, of personal injury to himself, herself, or another by having in his or her custody or control, purchasing, possessing, or receiving a firearm or dangerous weapon ; and an emergency extreme risk protection order is necessary to prevent personal injury to the subject of the petition or another because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances of the subject of the petition.

A person filing such a petition, knowing it is false, would be guilty of false swearing.

A person in possession of a weapon in knowing violation of an extreme risk protection order is guilty of a misdemeanor.

The bill lists factors a court is to consider. There must be clear, cogent, and convincing evidence for an order to be entered. The person who is subject to the order must file proof of surrender of weapons and receipt within five judicial days of the entry of the order.

If a person other than the subject of the protection order claims title to any firearms or dangerous weapons surrendered pursuant to this law, and the person is determined by the law enforcement agency to be the lawful owner of the firearm or firearms, or dangerous weapon, the firearm or firearms, or dangerous weapon shall be returned to the lawful owner, provided that the lawful owner agrees to maintain the firearm or firearms or dangerous weapon, while not in the lawful owner's direct custody or control, locked and separate from ammunition, and to ensure that the person subject to the protection order does not gain access, possession, custody, or control of the firearm or firearms, or dangerous weapon.

The testimony regarding this bill last year focused on mental health issues although mental health is not mentioned the bill.

HB 2461 was a similar bill. It was sent to the Criminal Law Section as well as the Family Law Section. It also failed.

### **HB 2300 - Protecting the personal information of a person acting as a guardian ad litem.**

This bill is sponsored by Representative Moeller. The Elder Law Section supported the bill.

The bill was introduced as HB 1035 last year. The bill would add a new section to chapter 42.56 RCW (public records act) to read as follows:

“The following information regarding a guardian ad litem governed under chapter 11.88, 13.34, or 26.12 RCW is exempt from disclosure under this chapter and must be automatically withheld from public inspection and copying unless the guardian ad litem specifically requests the information be released:

- (1) Current residential address;
- (2) Current telephone number; and
- (3) All other identifying information that may be used to harm a guardian ad litem.”

**HB 2401 – Providing procedures to allow court orders for visitation with adults.**

This bill was also sent to the Elder Law Section.

The bill would add a new chapter to Title 11. It would allow a relative, neighbor, or close friend to petition the court for an order allowing visitation with an adult. A petitioner cannot file more than one such petition per year per proposed visitee, absent a substantial change of circumstances or other good cause.

The bill states what the petition must contain, which includes the relationship between the petitioner and the proposed visitee, the nature of the visitation being requested, the condition of the visitee's health, any deficit in the visitee's mental functioning and that deficit's impact on the visitee's ability to respond knowingly and intelligently to queries about the requested visitation, the names and addresses of the proposed visitee's relatives, and the name and address of the visitee's guardian or limited guardian, if any. The court can set a hearing, which shall be no later than sixty days from the filing of the petition.

Prior to the hearing, the court shall assign a guardian ad litem from the 11.88.090 registry. The GAL shall investigate and must do the following: (a) Interview the visitee, the petitioner, the visitee's relatives, the visitee's guardian or limited guardian, and, to the extent practical, neighbors, and, if known, close friends of the visitee; (b) inform the visitee of the contents of the petition; (c) determine whether the visitee has retained an attorney or whether the visitee plans to retain an attorney. (Relatives are defined to include the visitee's spouse, or registered domestic partner, parents, children, current or former stepchildren, and siblings.)

The GAL shall file a written report at least fifteen days prior to the hearing. Copies go to the petitioner and the petitioner's attorney, the proposed visitee and attorney, the visitee's guardian, all relatives of the visitee unless the court determines that providing the report to any of these persons will result in harm to the proposed visitee, and to any other person identified by the court.

The cost of the GAL is assessed to the petitioner unless such assessment would impose a substantial hardship on the petitioner. (The bill is silent as to who pays if there is a hardship.)

If the court determines that the proposed visitee possesses sufficient capacity to make a knowing and intelligent visitation decision and the visitee desires visitation with the petitioner, then court must grant reasonable visitation.

If the court determines that the visitee does not possess such capacity, then the court must grant visitation if the court determines that the visitee would desire such visitation and that such is in the best interests of the visitee. The court must not order visitation if the court finds that the visitee would not desire such visitation or that it would not be in the visitee's best interest.

A visitation order can be modified.

There are penalties for a person not a party to the order who knowingly interferes with the order.

A determination of capacity of a visitee for the purposes of visitation shall not be cited as evidence in any other legal proceeding.

**HB 2402 – Requiring a guardian or limited guardian to provide certain communications with relatives of incapacitated persons.**

This was also sent to the Elder Law Section.

This bill would amend RCW 11.92.043. A guardian or limited guardian would be required to give notice under RCW 11.92.150 of proceedings as soon as reasonably possible if the incapacitated person dies or has been hospitalized for three days or more in an acute care hospital, and, in the case of death, of any funeral arrangements and the location of the incapacitated person's final resting place.

RCW 11.92.150 is the statute relating to a request for special notice of proceedings.

**HB 2411 – Removing the marriage element from the crime of rape of a child in the first degree.**

This bill was also sent to the Criminal Law Section.

The bill would amend RCW 9A.44.073 as follows:

"(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old (~~(and not married to the perpetrator)~~) and the perpetrator is at least twenty-four months older than the victim.

"(2) Rape of a child in the first degree is a class A felony."

**HB 2483 – Protecting minors from sexual exploitation**

This bill was also sent to the Juvenile Law Section and the Business (Cyberspace) Section.

The bill would add a new chapter to Title 10 RCW.

In any criminal investigation of an offense involving the sexual exploitation of children under chapter 9.68A RCW, the attorney general or a prosecuting attorney would be able to issue subpoena to a provider requiring the production of records reasonably relevant to the investigation. Chapter 9.68A relates to the sexual exploitation of children. A "provider" is defined to be "a provider of electronic communication services or remote computing services." "Electronic communication service" means any service that provides to users the ability to send or receive wire or electronic communications. The bill defines the scope of the subpoena and gives the provider an opportunity to petition the court for an order modifying or quashing the subpoena. The provider is prohibited from disclosing the existence of the subpoena to the subscribers or customers whose records or information are the subject of the subpoena.

**HB 2612 – Authorizing the termination of all legal responsibilities of a nonparent if genetic testing shows by clear and convincing evidence that a man is not the genetic father of a child.**

**Companion bill: SB 6452**

The act was to be known as the Brandon Jones act.

A new section would be added to RCW 26.26 as follows:

"(1) A man may file a petition in superior court to rescind an acknowledgment of paternity, challenge a presumption of paternity, or contest an adjudication of paternity under this chapter at any time within the limitations imposed under subsection (4) of this section if genetic testing that complies with RCW 26.26.410 shows by clear and convincing evidence that the man is not the genetic father of the child.

"(2) If the court enters an order pursuant to subsection (1) of this section disestablishing a man as the father of the child based on genetic testing that shows that he is not the genetic father, the man is, as of the date of the order of disestablishment, discharged from all of the rights and duties of a parent pursuant to subsections (7) and (8) of this section.

"(3) If the court enters an order disestablishing a man as the father of a child, then the order must direct vital statistics to remove his name from the child's birth certificate.

“(4) This section does not apply if: (a) The man is the child's adoptive father; or (b) The child was conceived by assisted reproduction and the man consented to assisted reproduction with the intent to be the parent of the child born.

“(5)(a) A petitioner seeking to rescind an acknowledgment of paternity, challenge a presumption of paternity, or contest an adjudication of paternity of a child born on or after the effective date of this section must file the petition within two years of the date on which the petitioner becomes aware of the facts alleged in the petition indicating that the petitioner is not the child's genetic father. (b) A petitioner seeking to rescind an acknowledgment of paternity, challenge a presumption of paternity, or contest an adjudication of paternity of a child born before the effective date of this section has two years from the effective date of this section to file a petition, regardless of the date on which the petitioner became aware of the facts alleged in the petition indicating that the petitioner is not the child's genetic father.

“(6) For purposes of this section, an acknowledgment of paternity shall be deemed to have been executed on the basis of a material mistake of fact or fraud perpetuated by the child's natural mother pursuant to RCW 9A.60.030 where evidence and genetic testing in accordance with RCW 26.26.410 and 26.26.420 shows that the man who is the signatory of an acknowledgment of paternity is not identified as the father of a child.

“(7) An order of disestablishment entered under this section must vacate all previous orders of child support if the court finds by clear and convincing evidence that the moving party is not the biological father of the child who is the subject of the support order. The petitioner of the vacated order may bring an action in court against the natural biological mother or natural biological father of the child to obtain restitution for child support previously paid pursuant to any previous or vacated orders.

“(8) As of the date of the entry of the disestablishment order, the man is not liable for any future child support amounts or other future financial or legal obligations.

“(9)(a) At any time before the court renders an order terminating the parent-child relationship under this section, the petitioner may request that the court also order periods of visitation of, or access to the child by the petitioner following termination of the parent-child relationship. If requested, the court may order periods of visitation of, or access to, the child only if the court determines that denial of periods of visitation of or access to the child would significantly impair or harm the child's physical health or emotional well-being. (b) During any period of visitation of, or access to, the child ordered under this subsection, the

nonparent has the rights and responsibilities of a third party under RCW 26.09.240, subject to any limitation specified by the court in its order.”

FLEC has previously opposed similar legislation.

**HB 2631 – Preventing discriminatory treatment by government or entity based on beliefs and practices held with regard to marriage as the union between one man and one woman.**

This bill would add new sections to Chapter 49.60 RCW and a new section to Chapter 19.86 RCW. Chapter 49.60 is the chapter on discrimination and the human rights commission. Chapter 19.86 is the chapter on unfair business practices and consumer protection.

The bill is somewhat similar to North Carolina’s HB2, which has been in the news of late.

One section of the bill reads:

“The legislature intends by this act to recognize, protect, and further the constitutionally protected rights of all individuals and entities of any faith tradition or heritage, religious belief, philosophical tenet, matter of conscience, or practice regarding marriage as the union of one man and one woman, consistent with the law, and to ensure government does not attempt to force individuals or entities to accept, comply with, or conform to another person’s or entity’s faith tradition or heritage, religious belief, philosophical tenet, matter of conscience, or practice regarding marriage as the union of one man and one woman.”

The bill goes on to state:

“An individual or entity has the constitutionally and statutorily recognized and protected right to choose whether or not to provide services or goods related to the solemnization or celebration of marriage if such marriage is contrary to the individual’s or entity owner’s sincerely held religious belief, philosophical tenet, matter of conscience, or practice regarding the institution of marriage as the union of one man and one woman.”

Another section reads:

“Notwithstanding any other provision of law, the state shall not take any discriminatory action against a person or entity, in whole or in part, directly or indirectly, on the basis that such person or entity believes or acts in accordance with a religious belief or moral conviction regarding the institution of marriage as the union of one man and one woman.” Discriminatory action is defined in the statute to mean to alter tax treatment of or to penalize any person protected by

the act; disallow a deduction for tax purposes of any charitable contribution made to or by any person or entity protected by the act; withhold, reduce, exclude, terminate, etc., contracts, loans, licenses, etc., from or to any person protected by the act; deny any state benefit to any person protected by the act; or to otherwise discriminate against a person or entity protected by the act.

Another section reads:

“A person or entity has standing to assert and may assert an actual or threatened violation of this act by the state as a claim or defense in any judicial or administrative proceeding and obtain compensatory damages, injunctive relief, declaratory relief, or any other appropriate relief against the state.”

### **HB 2674 – Filing fee surcharges to fund DRC’s.**

**Companion bill: 6448**

This bill would raise the surcharge from “up to ten dollars” to “twenty dollars” on each civil filing fee in district court, and from fifteen to twenty dollars on each filing fee in superior court, to fund dispute resolution centers. This flat fee may be adjusted annually up to the state’s fiscal growth factor.

### **HB 2705 – Increasing the seriousness level of first degree rape and first degree rape of a child.**

The bill was also sent to the Criminal Law Section.

This bill would amend RCW 9.94A.515 to increase rape 1 and rape of a child 1 from seriousness level XII to seriousness level XV. This is not a criminal law seminar so the results of this potential change are outside the scope of this seminar (and outside the scope of my knowledge).

### **HB 2776 – Clarifying the authority of officers to restrain children when necessary.**

This bill was also sent to the Juvenile Section.

This bill would amend RCW 9A.16.020 and RCW 9A.16.100. RCW 9A.16 is the chapter relating to criminal defenses. RCW 9A.16.020 relates to use of force. RCW 9A.16.100 relates to the use of force on children and actions presumed unreasonable.

The bill would add the following language to RCW 9A.16.020, stating that the use of force against another is not unlawful in certain cases. The added provision is:

“Whenever reasonably used by a person acting in his or her 21 official capacity as a law enforcement officer, school resource 22 officer, or school security officer to restrain a person under the 23 age of eighteen if doing so is necessary to prevent the person from 24 endangering the physical safety of himself or herself, the officer, 25 or another person, or from damaging real or personal property.”

RCW 9A.16.100 states that certain actions against children are presumed unreasonable. These include “(a) Throwing, kicking, burning, or cutting a child; (b) striking a child with a closed fist; (c) shaking a child under age three; (d) interfering with a child's breathing; (e) threatening a child with a deadly weapon; or (f) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks. The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate. This list is illustrative of unreasonable actions and is not intended to be exclusive.”

The bill would add language that this section does not prohibit or otherwise modify other lawful uses of force authorized under RCW 9A.16.020.

### **HB 2797 – Concerning communication, visitation, and interaction involving incapacitated persons.**

This bill would amend RCW 11.92.043 and add a new section to Chapter 11.88 RCW.

The new section added to Chapter 11.88 RCW reads as follows:

“(1) Except as otherwise provided in this section, an incapacitated person retains the right to communicate, visit, and interact with other persons upon his or her consent, which includes the right to receive visitors, telephone calls, and personal mail. If the incapacitated person is unable to express consent for communication, visitation, or interaction with another person, consent may be presumed based on the incapacitated person's prior relationship or history with the person.

“(2) A guardian or limited guardian may not restrict an incapacitated person's right to communicate, visit, or interact with other persons unless specifically authorized by court order.

“(3) Upon a guardian or limited guardian's motion and a showing of good cause, the court may enter an order allowing restrictions to be placed on an incapacitated person's ability to communicate, visit, or interact with another person. In determining good cause, the court must consider: (a) Whether any protection, restraining, or no-contact orders have been issued to protect the incapacitated person from the person seeking access to the incapacitated person; (b) Whether abuse, neglect, or financial exploitation of the incapacitated person by the person seeking access to the incapacitated person has occurred or is likely to occur; (c) Any documented wishes of the incapacitated person regarding communication, visitation, or interaction with the person seeking access; and (d) Any other factors deemed relevant by the court.

“(4) If a guardian or limited guardian has grounds to believe that there is an immediate need to prevent or limit the incapacitated person's contact with another person in order to protect the incapacitated person from abuse, neglect, abandonment, or financial exploitation, as those terms are defined in RCW 74.34.020, the guardian may prevent or limit contact without a court order for the period necessary to prepare and file a petition for a vulnerable adult protection order.”

RCW 11.92.043 would be amended by adding the following the duties of a guardian:

“To promptly inform any relatives entitled to notice of proceedings under RCW 11.92.150 and any other person designated by the incapacitated person if the incapacitated person: (a) Changes residence or is staying at a location other than his or her residence; (b) Has been admitted to a medical facility for emergency care in response to a life-threatening injury or medical condition, or for acute care; or (c) Dies, in which case the notification must be made in person or by telephone.”

### **HB 2463 – Concerning JIS.**

#### **Companion bill: SB 6402**

This bill amends last year's JIS bill, which required a court to file a copy of documents considered through the JIS. This bill makes that requirement in effect “[U]pon request of a party.”

### **HB 2912 – Enhancing crime victim participation in the criminal justice system process.**

This bill has also been sent to the Criminal Law and Civil Rights Sections.

The legislature recognizes that “[I]mmigrants are frequently reluctant to cooperate with or contact law enforcement when they are victims of crimes, and the protections available to immigrants under the law are designed to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of trafficking in persons, domestic violence, sexual assault, and other crimes while offering protection to such victims.”

The bill states in part:

“(1) Upon the request by the victim or representative thereof including, but not limited to, the victim's attorney, accredited representative, or domestic violence, sexual assault, or victim's service provider, a certifying agency shall make a determination on United States citizenship and immigration services form I-918 supplement B or relevant successor certification form, whether the victim was a victim of criminal activity and has been helpful, is being helpful, or is likely to be helpful to the detection or investigation or prosecution of that criminal activity.

“(2) The certifying official shall fully complete and sign the United States citizenship and immigration services form I-918 supplement B or relevant successor certification, and regarding victim helpfulness, include specific details regarding the nature of the crime investigated or prosecuted and a detailed description of the victim's helpfulness or likely helpfulness to the detection or investigation or prosecution of criminal activity.”

A certifying agency is to process the mentioned paperwork within 90 days of a request, and, “A certifying agency and certifying officials are prohibited from disclosing any personally identifying information or the immigration status of a victim or person requesting the United States citizenship and immigration services form I-918 supplement B certification or relevant successor certification, except to comply with federal law or legal process, or if authorized by the victim requesting the certification.”

**HB 2913 – Creating efficiencies regarding requirements for license withholding and suspension for noncompliance with a child support order.**

This bill states that any licensing agency may suspend a license for delinquent child support. The bill is intended to maintain compliance with federal regulations. Apparently there are some statutes pertaining to specific licensing agencies that may be in conflict with other statutes or and this bill looks to be intended to override those provisions and make the statutes consistent with each other and with federal law.

**HB 2915 – Concerning notification requirements for the department of social and health services.**

**Companion bill: SB 6495**

This bill relates to notification of “founded” or “unfounded” findings of investigations for abuse and/or neglect of a child by DSHS. The bill states that a “founded” finding must be served upon the party or parties by certified mail, return receipt requested. An “unfounded finding” can be sent via regular mail or email. The statute provides service options with respect to financial issues as well. The statute further provides for alternative service arrangements for child support obligations, delinquencies, and suspension of licenses.

**HB 2957 – Concerning the custody and placement of juveniles.**

This bill has also been sent to the Criminal Law and Juvenile Law Sections.

The bill would amend RCW 13.40 by adding language which allows for a juvenile to be taken into custody for questioning without a court order if it is suspected that the juvenile is either a delinquent juvenile or a juvenile in need of intervention. The juvenile must be advised of his or her rights against self-incrimination and the right to counsel. The parents, guardian, or, if neither can be found, a close relative or friend as chosen by the juvenile must be immediately informed that the juvenile is in custody, the location, when it happened, etc. A probable cause hearing must be set to continue keeping in custody and contempt may be found for violations for failure to appear, etc.

**HB 2958 – Ensuring a parent or guardian has the authority to admit and keep a minor child into a treatment facility for chemical dependence treatment for fourteen days.**

This bill was also sent to the Juvenile Law Section.

The bill allows for a parent or guardian to keep a juvenile in an in-patient chemical treatment facility for up to fourteen days if a law enforcement officer chooses to take a juvenile to a treatment center instead of jail for nonviolent crimes and the treatment provider recommends that the child be returned to the parents or guardian.

**SB 6151 - Concerning sexual assault protection orders.**

The bill was also sent to the Criminal Law Section.

This bill would amend RCW 7.90.120 (2) to allow sexual assault protection orders to be made permanent. There is currently a two-year maximum time period. Section 2 of the bill would authorize the petitioner to seek renewal of non-permanent orders. Currently the law allows renewal of temporary orders. The bill contains several factors to be considered in issuing the renewal, focusing on the likelihood of the sexual harassment to continue if the order is allowed to expire. Passage of time and compliance with the order are not sufficient for the respondent to meet his or her burden of proof.

**SB 6383 – Concerning the requirements for filing a petition for a superior court to deal with a dependent child.**

This bill would modify RCW 13.34.040. The statute currently provides that any person may file a petition regarding a dependent child. The current statute requires that, in counties having paid probation officers, these officers shall, to the extent possible, first determine whether a petition is reasonably justifiable. This bill states that such determinations by paid probation officers are not necessary if the department is the petitioner.

**HB 6396 – Changing rule-making requirements to require pre-adoption review by the attorney general and a yearly expiration.**

This bill would add a new section to RCW 34.05 to require that no rule may be adopted by an agency except within the power delegated to the agency by law. The bill further sets out the parameters of rule-making. Beginning July 1, 2016, no rule could be adopted by an agency unless it is first submitted to the attorney general's office for an opinion on the constitutionality and legality of the rule. Failure to first pass through the A.G.'s office makes the rule void. The bill also provides for expiration of rules adopted or amended before November 1<sup>st</sup> to expire on June 1<sup>st</sup> of the next year unless the expiration is postponed by the legislature. Any rule that does expire may not be readopted by an agency unless expressly authorized by statute.

**SB 6497 – Concerning notification requirements for DSHS.**

This bill was also sent to the Juvenile Law Section.

RCW 28A.225.005 would be amended to require schools to notify parents of the students of the benefits of regular attendance, potential effects of excessive absenteeism on school performance, resources available to assist the

child and parents and guardians, the role and responsibilities of the school, and the consequences of truancy. Reasonable efforts are to be made to communicate with the parents in a language in which the parents are fluent.

If an elementary school child has five or more absences in a month or ten or more in the school year, the school district shall schedule a conference with the parent and child for the purpose of identifying the barriers to the child's regular attendance.

**SB 6499 – Concerning electronic payments to DCS when remitting funds in response to an order to withhold income.**

This bill was requested by DSHS.

The bill was also sent to the Business Law Section.

Payments made pursuant to a withhold order from DSHS are to be made electronically if the business has ten or more employees or ten or more contractors; if the employer or contractor has received such orders for more than one employee even if fewer than ten employees; the employer or business uses a payroll processor to handle its payroll and such processor has the capacity to make electronic payments. The department may waive these requirements if the business is in good faith unable to comply. Failure to comply can result in fines.

**SB 6524 – Addressing factors to be considered when sentencing youth in adult criminal court committed as minors.**

The bill was also sent to the Juvenile Law Section.

This bill would amend RCW 9.94A.535 and create a new section.

“The defendant's age, sophistication, and role in the crime if the defendant is under adult court jurisdiction for a crime committed as a minor” is added as a mitigating factor to be considered during sentencing.

**SB 6586 – Requiring the department of social and health services to collect and publicly report information on the safe surrender of newborn children.**

**Companion bill: HB 2939**

Under Washington's safety of newborn children law, newborns can be anonymously surrendered to certain institutions, including emergency

departments of hospitals, fire stations, and federally designated rural health clinics. This bill would require DSHS to compile and collect information about the numbers and medical conditions of newborns transferred under the statute and to report the information to the public.

### **C. Bill Chart**

<b>Bill #</b>	<b>Page</b>	<b>Description of bill</b>	<b>Pass?</b>
HB 1037 Comp. SB 5389	6-8	Child support based on work group	No
HB 1857 Comp. SB 5727	6-9	Extreme risk protection orders	No
HB 2300	6-10	Protecting GAL information	No
HB 2394 Comp. HB 6329	6-4	Creating parent to parent program for individuals with development disabilities	Yes
HB 2401	6-11	Visitation with an adult	No
HB 2402	6-12	Certain GAL communication	No
HB 2411	6-12	Rape of a child	No
HB 2440	6-5	Host home programs for youth	Yes
HB 2461	6-10	Extreme risk protection orders	No
HB 2463 Comp. SB 6402	6-18	Concerning JIS	No
HB 2483	6-12	Protecting minors from sexual exploitation	No
HB 2591	6-6	Notice to foster parents of dependency hearings	Yes
HB 2612 Comp. SB 6452	6-13	Termination based on genetic testing	No
HB 2631	6-15	Preventing discrimination based on belief that marriage is between one man and one woman	No
HB 2674 Comp. SB 6448	6-16	Filing fee surcharges to fund DRCs	No
HB 2705	6-16	Increasing seriousness level of rape	No
HB 2711	6-6	Regarding sexual assault nurse examiners	Yes
HB 2776	6-16	Regarding authority of officers to restrain children	No
HB 2789 Comp. SB 6498	6-7	Testamentary privilege for alcohol or drug recovery sponsors	No*
HB 2797	6-17	Regarding communication and visitation involving incapacitated persons	No
HB 2912	6-18	Enhancing victim participation in the criminal justice process	No
HB 2913	6-19	Regarding license withholding for noncompliance with child support order	No
HB 2915 Comp. SB 6495	6-20	DSHS notification requirements	No
HB 2939 Comp. SB 6586	6-22	DSHS to report information regarding surrendered newborns	No
HB 2957	6-20	Concerning custody and placement of	No

<b>Bill #</b>	<b>Page</b>	<b>Description of bill</b>	<b>Pass?</b>
		juveniles	
HB 2958	6-20	Parent's authority to keep juvenile in treatment center	No
SB 5635	6-6	Uniform power of attorney act	Yes
SB 5727 Comp. HB 1857	6-9	Extreme risk protection orders	No
SB 6151	6-21	Concerting sexual assault protection orders	No
SB 6329 Comp. HB 2394	6-4	Creating parent to parent program for individuals with development disabilities	Vetoed*
SB 6383	6-21	Regarding requirements for filing dependency petition	No
SB 6396	6-21	Regarding administrative rule making	No
SB 6402 Comp. HB 2463	6-18	Concerning JIS	No
SB 6448 Comp. SB 2674	6-16	Filing fee surcharges to fund DRCs	No
SB 6452 Comp. HB 2612	6-13	Termination based on genetic testing	No
SB 6495 Comp. HB 2915	6-20	DSHS notification requirements	No
SB 6497	6-21	School attendance notification requirements	No
SB 6498 Comp. HB 2789	6-7	Testamentary privilege for alcohol or drug recovery sponsors	Yes
SB 6499	6-22	Electronic payment to DCS	No
SB 6524	6-22	Youth criminal mitigating factor	No
SB 6586 Comp. HB 2939	6-22	DSHS to report information regarding surrendered newborns	No

\* = Companion bill passed

Comp. = companion bill

### **III. Legislative URL**

You can review the bills yourself by going to <http://apps.leg.wa.gov/billinfo/>. You can then search by bill number or key word.

### **IV. What's coming next year?**

1. A bill to update Washington's child support statutes is likely to be introduced each year until it passes.
2. As I stated last year, given the outbreaks of vaccine preventable diseases, I expect the legislature to look at this issue, perhaps by

requiring children to be vaccinated in order to attend public school, unless there is a medical reason a particular child is unable to be vaccinated.

3. Shared parenting bills are likely to continue to be introduced in the legislature.
4. There is likely to be a bill next year requiring early mediation in dissolution matters involving children.
5. Non-parental visitation, either limited to grandparents or not, will probably be back next year.
6. A bill to create extreme risk protection orders is probably going to be re-introduced next year.
7. Many of the bills that did not pass this year will be back, if not exactly as written this year, in some modified form

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## CHAPTER SEVEN

## DETERMINING JURISDICTION FOR INTERSTATE FAMILIES

June 2016

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**LARRY J. COUTURE** is a stockholder in the firm of L.J. COUTURE P.S., a General Litigation firm in Tacoma, Washington. A 1971 graduate of the University of Oregon School of Law he worked for the Pierce County Prosecuting Attorney's Office until the end of 1972 and has been in private practice since that time. His practice emphasises Family Law matters. He has served as President of the Family Law Section of the Tacoma-Pierce County Bar Association, a Member of the Board of Trustees of the TPCBA, a member of the Ad Hoc Committee of the Pierce County Superior Court Mediation Days program and currently sits as a member of the Family Law Executive Committee (FLEC).

Larry has served on various Washington State Bar Committees, including Rules and Procedures, Discipline, Professionalism and the Fee Arbitration and Mediation Panels. He has also served on numerous TPCBA Committees over the years and has been a speaker at numerous Seminars and Groups.

Additional practical experience comes from having served as a Pro Tem Judge and Court Commissioner throughout Pierce County in varoius Municipal, District and Superior Court venues. He is a long time Arbitrator and serves as both a privately paid mediator and arbitrator.

When not practising law Larry is involved in family, travel and has served as President of the Broadway Center for the Performing Arts in Tacoma, as President of Tacoma Sunrise Rotary, as a board member of Family Counseling Center and First Place for Children and a Board Member of Puget Sound Legal Assistance Foundation.

**RHEA J. ROLFE** has been practicing law for forty years, primarily as a solo practitioner. She has taught college-level law-related courses, including Women and the Law, Business Law, Urban Law, and Women of Color in America, and has been an investigator for human rights agencies and a staff attorney for the Washington State Bar Association. Rhea has been an arbitrator, mediator, and guardian ad litem, and a hearing examiner for the City of Seattle Civil Service Commission. She was the legal advisor for the City of Seattle Office of Women's Rights. She currently focuses her practice on family law, with a special interest in interstate and international custody and abduction issues (UCCJEA and Hague Convention). Rhea was an editor for the WSBA Family Law Deskbook, and has served on the YWCA Pathways for Women Displaced Homemakers' Advisory Board, Operation Lookout Advisory Board, and the Washington Blues Society Board of Directors. She co-wrote a chapter on discrimination laws for the Young Lawyer's Practice Manual, and wrote a chapter on Overcoming the Challenges of International Custody Issues for Thompson-West's Inside the Mind series. She has been a frequent speaker for college and high school students and for CLE seminars. She has been a mentor for University of Washington Law Sctudents, and a Judge for Moot Court Appellate Competitions for the University of Washington. She is a published songwriter, active in the Washington Blues Society, and has regularly served as a judge in the International Blues Challenge in Memphis. She is proud to be serving her second three-year term on the Family Law Executive Committee.

**Summary of Washington Relocation Cases**  
**Compiled by Rhea J. Rolfe and Monique Gilson-Moreau**

Year	Name	Trial Court	On Appeal
2002	<i>Marriage of Grigsby</i> 112 Wn.App 1 (Div 1); 57 P.3d 1166 <i>[While not specifically overruled, later cases appear to allow a major modification under a relocation action even if the relocation is later abandoned.]</i>	Relocation abandoned. (Mom) Court modified parenting plan, changing custody from mother to father, even though relocation was abandoned. Mother gave notice of intent to relocate; court restrained relocation, then mother decided not to relocate (prior to trial). Court modified the parenting plan anyway.	The Ct. of Appeals <b>reversed</b> the <b>modification</b> , and ruled that father could seek modification only if he could show adequate cause, establishing that there was a substantial change of circumstances of the children, that modification was necessary to serve the best interests of the children, and that one or more of the circumstances contained in RCW 26.09.260 are present. <b>BUT SEE MCDEVITT, below.</b>
2003	<i>In re Custody of Osborne</i> 119 Wn.App 133 (Div I) 79 P.3d 465 <i>[Involves third-party rights under Relocation Act.]</i>	Dismissed. (Great-grandmother) Trial court dismissed great-grandmother's objection and allowed relocation, based on Troxel.	Court of Appeals <b>reversed and remanded</b> because great-grandmother had visitation rights under the agreed parenting plan, and so was entitled to a hearing. Constitutionality of relocation statute discussed at length. Third party rights dependent on language in the specific parenting plan. RCW 26.09.540 requires notice to anyone entitled to residential time.
2004	<i>Marriage of Horner</i> 151 Wn.2d 884; 93 P.3d 124	Relocation denied. (Mom) Case was moot because mother abandoned original relocation, then started a different one, but the court thought it presented important issues, so reviewed it anyway.	Court of Appeals <b>affirmed</b> , but Supreme Court reviewed this <b>moot case</b> (court can review a moot case if it raises an issue of continuing and substantial public interest) because the court failed to consider and balance the 11 relocation factors. Trial court must determine whether the detrimental effect of relocation outweighs the benefit of the change to the child <i>and the relocating parent</i> . The act both incorporates and gives substantial weight to the traditional presumption that a fit parent will act in the best interests of her child. The burden of overcoming that

Year	Case	Summary	Trial Court	Appeal
			presumption is on the objecting party, who can prevail only by demonstrating that the detrimental effect of the relocation upon the child outweighs the benefit of the change to the child and the relocating person. RCW 26.09.520. Court must find by preponderance of evidence (after considering all 11 factors) that relocation would be more detrimental than beneficial, and it must make findings on each factor. Major discussion of the 11 factors.	
2004	Parantage of RFR No. 30452-)-II, Div. 2 <b>Unpublished Opinion</b>	Relocation Allowed. (Mom) No parenting plan at the time of relocation. Mom was denied temporary custody pending trial. A GAL recommended to her that she move without the child to establish herself in the new location, and she did. At trial, court found she was the parent with whom the child resided the majority of the time, before she moved, so she was entitled to the presumption.	<b>Affirmed.</b> There was “sufficient evidence” to support trial court’s findings. Dad’s objection on constitution grounds also denied, based on Osborne, that a fit parent will act in the child’s best interest.	
2006	<i>Marriage of Penneman</i> 135 Wn. App 790, 146 P. 3d 466 (Wash. App. Div I)	Relocation Denied. (Mom) Court allowed untimely objection by dad. Commissioner found nothing warranted relocation before trial. Trial court discussed mom’s drug use, and that some of her claims were false. Court likely considered mom’s boyfriend’s various past criminal charges. Reasons originally given for relocation were not true.	<b>Affirmed.</b> Court would not be held to the technicality of a late filing, as he appeared and filed a responsive pleading before the hearing, curing the default. “[t]he procedural rules for objecting to relocation are more analogous to the rules for answering a complaint...[f]ailure to [answer a complaint within the specified period] does not result in an automatic judgment for the plaintiff. The plaintiff must still move for a default judgment, and, if the defendant complies with CR 55 by answering before the hearing, the court will still hear the case on the merits despite the untimely filing.”	

Year	Case	Summary	Trial Court	Appeal
2006	<i>Marriage of Momb/Ragone</i> 132 Wn.App 70 (Div 3, 2006); 130 P.3d 406	Relocation Denied. (Dad) Father, one year after mod making him primary parent, filed notice of intent to relocate to South Dakota. Father argues relocations statutes violate equal protection, commerce clause, right to privacy in family matters and freedom to travel protected by due process clause of constitution. Trial court addressed the 11 factors.		<b>Affirmed.</b> Constitutionality of relocation statutes considered at length <i>In re Osborne</i> . Detailed discussion of constitutional issues. A decision to relocate is a type of decision that justifies exercise of <i>parens patriae</i> , allowing State to intrude on family because decision may conflict with the physical or mental health of the child. Court confirms that the 11 factors must be considered, as opposed to the best interest of the child. Court considered <b>Factor 7</b> and did not find that proposed location offered anything better to child than available in current location. To the contrary, isolating child in new location from current available activities not positive factor. Court concluded that stated reason for relocating – <b>business</b> – made no sense to the court. Court concluded relocation based substantially on desire to get away from relocating party's previous wife (not the other parent), and request was not made in good faith.
2008	<i>Bay v Jensen</i> 147 Wn.App 641 (Div 2) 196 P.3d 753	Relocation allowed. (Mom) Trial court allowed mother to relocate out of California without examining 11 factors, and entered an order precluding father from filing any further “legal action” in Pierce County until he paid fees, and awarded fees to mother.		<b>Reversed and remanded for further hearing</b> for failure to examine all 11 factors. Court of Appeals also vacated award of fees and remanded for new hearing on fees.
2008	Marriage of Spring (II) No. 60711-1-I Div. I <b>Unpublished Opinion</b>	Relocation ignored. (Mom) Trial court had denied dad's motion to restrain mom's relocation, and permitted mom to move pending trial. Mom moved. Dad appealed, and appeals court remanded, but did not require mom to move back. See more, below.		<b>Affirmed.</b> Relocation act does not apply to this case because the child was supposed to reside equally with both parents, and the act states that it applies only to people with whom the child resides the majority of the time. Since the child didn't reside with either parent the majority of the time, a relocating parent could not give notice under the act, but was also not entitled to presumption. There was no “change in principal

Year	Case	Summary	Trial Court	Appeal
2008	<i>Marriage of Spring</i> (IV) No. 61229-8-I Div. I <b>Unpublished Opinion</b>	Relocation ignored again. (Mom) On remand, trial court entered summary judgment for dad, but struck mom's Notice, dismissed dad's Objection, and canceled the trial. Mom was not ordered to move back. Move was from North Bend to Redmond.		residence" since the child didn't have one.
2009	<i>Marriage of Pfeiffer and Cueva</i> No. 27328-8-III Div. 3 <b>Unpublished Opinion</b>	Relocation allowed. (Mom) Wife sought relocation because she had a job and court found father opposed relocation for "control" reasons.		<b>Affirmed.</b> Child continued to reside about equally with each parent, and attended the same school she previously attended. This is a slightly different result than usually expected, and which statements from the legislators confirm, that in equal residential cases, both parties must give notice of intent to relocate. This case implies that neither party must give notice, but since the residential time remained the same, and the school remained the same, it might also just be "no harm, no foul." This is a weird one, and seems to contradict other decisions, making me think the Court of Appeals was just tired of these people (this was their fourth appearance), but as of June 10, 2016, Casemaker says that there is no negative treatment in later cases.
2009	<i>Marriage of Shay</i> No. 63870-0-I, Div. I <b>Unpublished Opinion</b>	Relocation denied (Mom) Mom filed for relocation due to job transfer. TRO prevented mom from taking kids out of state for vacation. Many other pre-trial events occurring. Trial determined detrimental effects of children moving outweighed the benefits to them and mom. Mom lost her job, so reason for move was moot.		<b>Dismissed.</b> Case was moot by the time it got to appellate court, because the relevant facts had changed. Court discussed case anyway, even though there was no basis for providing an advisory opinion. Court implied it would have reversed trial court.
2011	<i>Marriage of Fahey</i> 164 Wn.App 42, (Div.2,	Relocation allowed. (Mom) Trial court restricted dad's time, and		<b>Affirmed.</b> Because mother was "designated" as the primary residential parent, the presumption applies, even

Year	Case	Summary	Trial Court	Appeal
	2011); 262 P.3 <sup>rd</sup> 128	required that the visits be in new location. Considered father's disability. The court found that although the plan was nearly 50/50, the mother was "intended to be" the primary residential parent. Dad's request for GAL was denied.		though father had 50% or more time with children. Found no "manifest abuse of discretion." Dad's disability <u>was</u> considered, but was not "per se illegal discrimination or bias", but rather an implicit requirement of RCW 26.09.520(6), which is an "analysis of each parent's ability to parent and care for his/her children based on their age, developmental state, and needs in each of the new and current geographic settings". Good dissenting opinion.
2011	<i>Marriage of McDonald</i> No. 27637-6-III Div. 3 <b>Unpublished Opinion</b>	Relocation allowed. (Mom) RCW 26.09.520 not relevant standard in a <b>dissolution trial</b> . Trial court's decision governed by RCW 26.09.187(3), i.e., <b>best interest standard</b> . In divorce trial, court entered final parenting plan naming mother primary residential parent and authorizing relocation to Oregon in a temporary order. Father claimed trial court failed to examine 11 relocation factors.		Ct. of App. <b>Affirmed</b> . Commissioner at temporary order hearing had considered 10 factors, 11 <sup>th</sup> factor relates to temporary order, the amount of time before a final decision can be made at trial and the likelihood that on final hearing the court will approve the intended relocation of the child. RCW 26.09.510(2)(b). The trial court did not apply the 11 factors, accepting the father's position at trial that the dissolution standards should apply, and not the relocation standards. While the appeals court says this is wrong ("The trial court erred in accepting the proposition that the dissolution trial was not "a relocation trial"), the court found that the father's position on appeal, that the relocation factors <i>should</i> have been addressed, was "barred by the doctrine of invited error."
2011	<i>Marriage of Wehr</i> 165 Wn. App 610 (Div 2); 267 P.3d 1045	Relocation denied. (Mom) Trial court found that "any significant disruption in contact with their father would have damaging impact on the children." Father never missed support payment, never missed an hour of visitation available, has built home around needs of children,		<b>Affirmed</b> . Court found detrimental effects outweighed benefits to the children. Mother wanted to move for job possibilities, without evidence that she had firm job offer.

Year	Case	Summary	Trial Court	Appeal
		routinely takes them skiing, crabbing and camping. Also evidence of relationship with paternal grandmother and aunt. Children doing well under status quo, disruption would necessarily have negative impact on them.		
2011	<i>Marriage of Howd</i> Nos. 66054-3-I, 66251-1-I, 66894-3-I Div. 1 <b>Unpublished Opinion</b>	Relocation denied. (Mom) Court found that relocating children would be more disruptive to children than not relocating. Did not appoint a relocation evaluator. Found mom less flexible than dad, and more prone to jump to negative conclusions.	<b>Affirmed.</b> Trial “court may allow or disallow relocation based on an overall consideration of the best interest of the children.” “Sufficient” (not “substantial”) evidence supported trial court’s determination. Struck a provision that trial court added <i>sua sponte</i> to the parenting plan. Appeal combines issues of relocation, child support, and contempt. Confirmed that under an 8/6 residential arrangement, the parent with 8 days is the parent with whom the children live a majority of time, and is entitled to the presumption.	
2011	<i>In re M.L., Lail v. Briggs</i> , No. 42698-6-II, Div. 2 <b>Unpublished Opinion</b>	Relocation denied. (Mom) Temporary order denied relocation and placed child with dad. Mom filed notice to relocate for employment reasons, dad filed objection. Court told parents to work out a schedule, but when they didn’t, court apparently held it against mom, and said it did not intend to change its mind. Court basically said it didn’t matter what happened at trial, court was going to side with dad. Court said modification was appropriate, but not relocation, and found adequate cause. Court indicated that many of the factors did “not apply”,	<b>Order denying relocation vacated and remanded to a different judge.</b> This extraordinary decision to remand to a different judge was based on the “unusual circumstances” that the court evidenced an inability to overlook its previously stated views and findings. Good discussion about what specifics the court should address within some of the factors. Court indicated that the court clearly did not address the factors, especially since the court said several of them didn’t apply. Court vacated the order giving dad temporary custody, and also remanded the modification case to a different judge.	

Year	Case	Summary	Trial Court	Appeal
2012	<i>In re Rylee Rogers</i> No. 41140-7-II Div. 2 <b>Unpublished Opinion</b>	so didn't address them.	Relocation denied. (Mom) Trial court found one of 11 factors inapplicable, six were neutral and 4 weighed against relocation. Relocation would negatively affect the child's emotional development, and the child would be isolated in Kentucky. Mom failed to show that she couldn't obtain work in Washington, and wouldn't be able to afford to fly the child back to Washington very often.	<b>Affirmed.</b> Trial court has broad discretion, provided it considers all the factors, evaluating the interests of the child and the relocating person. Mom didn't assign error to trial court's findings, so they weren't really before the court on appeal. Trial court must consider all child relocation factors, ensuring that it evaluates the interest of the <b>child and the relocating person</b> within the context of competing interests.
2013	<i>In re Parentage of KBK; Juden and Kilgore</i> No. 43560-8-II Div 2 <b>Unpublished Opinion</b>	Relocation denied. (Mom) Unmarried parents, not in contact; paternity and parenting plan not established until child is 2. Dad has "limited residential time" twice a month and video conferencing. Dad's visits were suspended due to two contempt citations. Visits reinstated two years later. Mom provides notice to relocate for better job in Texas, intending to live with her mother and also attend school. Court found detrimental effects of move outweighed benefits to child and mom, and found that mom's primary reason for moving was to be near her mom, upon whom she was financially dependent, and that wasn't a good enough reason to relocate, that she		<b>Vacated and Remanded.</b> Good discussion of factors in this opinion, as well as history of relocation act. Trial court abused its discretion by failing to consider all 11 factors, and making "numerous factual findings" not supported by the record. Trial court had also considered whether or not the relocating person would forego the relocation if not permitted to take the child (forbidden by statute). Court failed to give adequate consideration to the child's relationships with others, and mom's other reasons for relocating, including education and job opportunities, and quality of life, about which the trial court appeared to be relying on its own subjective opinion, rather than the evidence.

Year	Case	Summary	Trial Court	Appeal
		didn't have a realistic plan to become self-supporting in Texas, that Washington offered a better quality of life and better educational opportunities. The court entered a new residential schedule.		
2014	<i>Marriage of Brooks</i> No. 44692-8-II Div. 2 <b>Unpublished Opinion</b>	Relocation allowed. (Mom) Trial court modified the parenting plan after parties agreed to relocation. Parties agreed to first relocation. Dad objected to second relocation, then agreed to the relocation, but wanted the court to consider changes to parenting plan after determining relocation.	<b>Affirmed.</b> Father argued that there was no evidence that the relocation required a modification of the parenting plan, and that when a relocation does not create a substantial change in circumstances, no modification should occur. Court disagreed, saying that relocation itself is a substantial change in circumstances.	
2014	<i>Marriage of Kim</i> 179 Wn App 232, 317 P.3d 555 (Wash.App. Div III),	Relocation allowed (Mom) Court looked at good faith. Mom had no job opportunities in prior residence. Dad misunderstood relocation act.	<b>Affirmed.</b> Restated that best interest of children is not the standard, and that <i>relocating person's</i> interests and circumstances must be taken into account.	
2014	<i>Marriage of Raskob</i> 183 Wn.App. 503, 334 P.3d 30 (Wash.App. Div. I)	Relocation allowed; parenting plan modified. Trial court made major modifications to the plan based on mother's actual relocation. Relocation accomplished unilaterally by mother. Father decided that it was a "fait accompli" and didn't fight, but wanted modifications.	<b>Affirmed.</b> "When a parent violates the relocation provision of an agreed parenting plan, the trial court has authority to make major modification to the plan." Trial court's findings support its conclusions of law, trial court had statutory authority to modify parenting plan and award sanctions. Significant change from prior assumptions about the law, allowing a major modification based on a parent's violation of the relocation provisions of the parenting plan. [Also includes Order Granting Motion to Publish.]	
2014	<i>Marriage of McDevitt &amp; Davis</i> , 181 Wn.App.765, rev. den.	Trial court allowed relocation by mom from Hawaii to Colorado (which had already occurred), and	<b>Modification affirmed.</b> Mother argued that the trial occurred solely based on mother's <b>relocation</b> , not father's petition to modify, so with no relocation, dad	

Year	Case	Summary	Trial Court	Appeal
	191 Wn.2d 1018, 326 P.3d 865 (Wash. App. Div. 3)	made what amounted to a major modification. Mom withdrew request. Dissolution allowed mother to relocate to Hawaii. Parenting plan called for review when twin boys were 2. Dad filed for minor mod when kids were 3, which was denied by trial court. Dad then filed an amended petition for modification. Mom then gave notice of relocation to Colorado. Commissioner found relocation request, but not modification request, justified a hearing. After trial, mom withdrew her request to relocate, <i>but trial court entered the major mod anyway.</i>	would have to establish adequate cause to proceed on modification (per <i>Grigsby</i> ). Appellate court said: a modification based on relocation is governed by RCW 26.09.260(6), and relocation by itself is a basis for modifying a parenting plan, and that an adequate cause for modification hearing “shall not be required so long as relocation is being pursued.” Court differentiated <i>Grigsby</i> , indicating that the major difference here is mother <i>relocated while motion was pending</i> , and court had ruled on parenting plan modification before she withdrew her intent to relocate.	
2014	<i>Marriage of Rostrom</i> 184 Wn. App. 744, 339 P.3d 185 (Wash. App. Div. 1)	Relocation allowed to Australia. (Mom)  Mom met Australian on a business trip and filed for dissolution. After entering into CR2A re: dissolution, she found out she was pregnant. She filed notice to relocate to marry and be with new parent. Dissolution was entered, with mom as primary parent. Court then held relocation trial and allowed relocation.	<b>Affirmed, but remanded.</b> Trial court adequately considered the relocation factors, supported by substantial evidence, but failed to include “significant stipulations made by the parties” regarding continuing jurisdiction to modify and enforce the orders (including that the United States would be the children’s “habitual residence” under the Hague Convention, and that modification could occur only in Washington “or the state where [dad] resides”). Washington treats foreign countries as states under the UCCJEA. The court has broad discretion, and the burden is on the objecting party to rebut the presumption that the primary residential parent will be allowed to relocate. Findings were supported by the record, including that dad had “challenges” with one of the children, and had alcohol issues.  The stipulations the court discusses are concerning, since	

Year	Case	Summary	Trial Court	Appeal
			it is well-established that people cannot agree to jurisdiction—a state either has it or it doesn’t—so an agreement that the case could be modified in a state other than Washington, if dad moved elsewhere, is probably unenforceable. The same may be true regarding the Hague Convention, since the children’s “habitual residence” would most likely be found to be Australia.	
2015	<i>Marriage of Philpott</i> No. 72228-0-I Div. 1 <b>Unpublished Opinion</b>	Allowed relocation. (Dad) Dad relocated unilaterally. Court found mom had brought objection to relocation in bad faith, assessed attorney's fees jointly and severally against mom AND attorney. Court stated that statute allowed neither a major modification, nor changing the primary residence of the children, but only whether to allow a relocation or not, and then to adjust the parenting plan only to the extent necessary to accomplish the relocation.	<b>Reversed for abuse of discretion.</b> Technically, this isn't a relocation case, since mom didn't appeal. Attorney appealed the assessment of attorney's fees. Nevertheless, the court does a good job of analyzing the criteria for modification within a relocation case, and confirming that a major modification may be appropriate, as well as changing the primary residence of the children. The court determined that sanctions had been assessed based on an erroneous view of the underlying law (the relocation act). <sup>1</sup>	
2015	<i>Marriage of Bent</i> No. 46824-7-II Div 2 <b>Unpublished Opinion</b>	Relocation Allowed. (Mom) During dissolution proceedings, mom got TRO against dad, and he got only supervised visitation. Dad was ordered to undergo psych eval. Dad moved to amend, supervision was dropped, GAL appointed. Mom filed notice to relocate. GAL recommended that she be allowed to relocate.	<b>Affirmed.</b> Discussion of constitutionality of statute, and due process. Trial court properly address the relocation factors. Dad failed to assign error to any of the trial court's factual findings, so they are treated as verities on appeal. The appellate court recited the RCW.09.197(3)(a) factors for establishing a parenting plan, and noted that the trial court analyzed those factors in determining that mom was the primary residential parent, and then the relocation factors, giving mom the presumption. Dad failed to rebut the presumption.	
2015	<i>Marriage of Dunn</i> No. 45042-9-II Div. 2	Relocation denied. Court had previously modified the parenting	<b>Vacated and remanded to a different judge.</b> Trial court failed to address all of the relocation factors,	

Year	Case	Summary	Trial Court	Appeal
	<b>Unpublished Opinion</b>	plan. Trial court denied relocation in temporary order. Trial judge chastised mom on the record, and told her she would have “to prove why [she] should [get to relocate]. Court modified parenting plan and gave child to dad, even though mom said she could move in with her mom, close to dad. At trial, the same judge heard mom’s boyfriend’s criminal trial for assault (acquitted), and stated intent to use information from the criminal trial in the relocation trial.		failed to recognize the presumption, and failed to apply the correct legal standard, relying instead on a best interest standard. The trial court did not enter findings on each factor, and it appeared that the trial court failed to articulate any reflection of the factors, and thus abused its discretion. Although no adequate cause was required due to relocation, the modification was also vacated pending outcome of relocation decision, since the denial of relocation was vacated. Remand was to a different judge because the sitting judge had retired, and the record reflects that the judge “would have difficulty overlooking his previously stated views or findings.”.
2015	<i>Marriage of McNaught</i> 189 Wn.App. 545, 359 P. 3d 811 (Wash.App. Div.I)	Relocation allowed, but court imposed restrictions on dad. Mom changed her mind by time of trial. Mother filed notice of relocation to move near her parents. Temporary order denied move. During the parenting evaluation, she changed her mind, because her parents decided to move to Washington, so evaluator did not evaluate relocation, but instead recommended that the child gradually move to a week-on/ week-off parenting plan. By the time of trial, mom changed her mind again and decided to relocate, because parents weren’t able to move. Trial court reviewed the 11 factors.		<b>Affirmed in part; reversed in part, and remanded .</b> Statute re-frames analysis from best interest of the child to best interest of child <i>and relocating parent</i> . Found substantial evidence supporting the move, confirmed that the burden is on the person opposing relocation to demonstrate that the move is not appropriate. Dad argues that once sufficient evidence is produced to rebut the presumption, the burden shifts to the other party. Court rejected this argument. <i>Larson v. City of Bellevue</i> , 1888 Wn.App. 857, 355 P.3d 331 (2015). Public policy favors relocation. The 11 factors are a balancing test. Although the trial court did not make specific findings on each factor, the court of appeals determined that the trial court had heard substantial evidence on each factor, which was reflected in its findings. It was proper to consider the mother’s close relationship to her family. The trial court abused its discretion in imposing some of the visitation restrictions on the father, as they were unsupported by evidence (e.g., how much notice must be given before

Year	Case	Summary	Trial Court	Appeal
2015	<i>Marriage of Quinones</i> No. 46525-6-II, Div. 2 <b>Unpublished Opinion</b>	Relocation allowed (Mom). Parties met and married in Arizona. Dad discharged from service, moved to Washington. Dad in Air Force Reserves. Mom found a new job in Arizona. Dad filed for dissolution. Mom filed notice of relocation. GAL appointed. Parents agreed to final parenting plan without addressing relocation. Mom was designated primary residential parent. After dissolution, mom filed a second notice to relocate. Court denied in temporary order, because it found no compelling reason to relocate before trial. Reasons to relocate included family and contacts, her and the child's health, and a job prospects. Dad kept a dog and cat, in spite of child's allergies to them, and resisted his asthma treatment. Dad failed to overcome the presumption.	visits; delegating time to others).	<b>Affirmed.</b> Court addressed statutory factors and made detailed findings on each. Substantial evidence supported the trial court's findings. Father made choices in his career that resulted in his being absent from the family for lengthy periods of time, leaving mom to handle all the responsibilities, and he discounted the child's medical needs.

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## CHAPTER EIGHT

### APPROACHES FOR DISARMING HARDBALL NEGOTIATION TACTICS

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## APPROACHES TO DISARM HARDBALL NEGOTIATION TACTICS

### A. INTRODUCTION

Between 94% and 98% of family law cases are reportedly settled without the need for trial. With such numbers, trial is truly the exception. Resolution through agreement is the norm, outnumbering trial by perhaps 20 to 1. Hence, the primary job description of the typical family law attorney could be said to be a negotiator.

Over the last 30 or so years, an expanding body of scholarship and research has developed on negotiation and conflict resolution, including books, scholarly journals, and even a law review dedicated to the topic. Major centers for research and teaching negotiation and conflict resolution are at Harvard, Rutgers, Pepperdine, and Hofstra Universities, among others.<sup>1</sup> Several institutions offer undergraduate and graduate degrees in negotiation.

Research challenges many long-held beliefs and changes what is understood about negotiation, including what works and what does not. One finding is that those who share information end up with better deals than those who keep information guarded.<sup>2</sup> Another finding is that certain commonly used non-offensive words (including the words “accepting” or “rejecting” when discussing a proposal) will often result in a more aggressive response.<sup>3</sup> These are just two examples in a mountain of research that challenges common beliefs about negotiation.

Most people who use a hardball tactic do so because they either fear they will be at a disadvantage if they do not use it, or they think it will get them a better deal. Sometimes hardball works. But the research suggests that the opposite is the more likely outcome. A hardball tactic can come across as aggressive, dishonest, and offensive. The person who used the tactic can end up being viewed as untrustworthy. An attempt to gain advantage by pushing, bluffing, or maneuvering the other into accepting an otherwise-unacceptable outcome easily backfires.

In other words, if you use a hardball tactic, there’s a good chance you’ll end up worse off. The reason is because hardball tactics come with significant risks, which include:

- A likelihood that the tactic will create resistance and encourage brinksmanship, thereby increasing the odds of an impasse.
- The prospect of confrontation, anger, miscommunications, etc.
- A possibility that the other side simply will not be willing to bargain.

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<sup>1</sup> Harvard Law School’s Program on Negotiation (“PON”) is perhaps the best known, and is a consortium that also includes the Harvard schools of business and psychology, and academics from MIT and Tufts. The PON has many excellent resources available, include some free publications. Visit [www.pon.harvard.edu](http://www.pon.harvard.edu).

<sup>2</sup> Grant, A., *Give and Take* (2013); Worthy, Gary, and Kah, 13 J. of Personality and Social Psychology 59-63 (1969).

<sup>3</sup> Larrick & Blount, 72 J. of Personality and Social Psychology 810-25 (1997).

- The possibility that you will be viewed as an untrustworthy negotiator, resulting in suspicion about your motives and additional scrutiny on your proposals and ideas.
- Creating a climate that works against responsiveness and openness, creating delay, added anxiety, and fewer opportunities to explore possible alternative avenues for agreement.
- Poorer decision-making as a consequence of not getting much information from an opponent who is now more guarded.
- Greater difficulty in accurately predicting the responses of the opponent, who can be expected to be more guarded and may become prone to resort to surprises.
- A greater chance of planting seeds of dissatisfaction in any settlement that may be reached, thereby undermining its stability. This can lead to a higher risk of future default, modifications, contempt and enforcement proceedings, or simply having to put up with or deal with a pattern of passive aggressive behaviors.
- A likelihood that relationships will be impaired, such as reducing the ability to co-parent or work cooperatively.

These risks are often underestimated or overlooked by the hardball negotiator. With all these risk and problems, a hardball tactic or a similar display of power is usually not the smartest move.

## **B. THE ROLE OF PREPARATION**

The most important element to avoid being taken in by a hardball tactic is being well-prepared. Hardball tactics work best against those who are complacent, who can be bluffed, and who can be shaken. You will be less likely to be bluffed or shaken, and more able to spot and respond to hardball tactics, if you thoroughly understand what is under discussion and the dynamics. There is no substitute for making a serious effort to understand whatever may impact the negotiation.

Good preparation includes a thorough understanding of the facts and the law, and also what is important to each party, what may be at stake for each, what each person's concerns and goals might be, and the real-world implications of different options. Work is the only way to understand the numbers, the issues, and the emotions. Good preparation will also provide you with a better assessment of what every negotiator should know—your BATNA, WATNA, MLATNA, and ZOPA.

## **C. FOUR KEY NEGOTIATION CONCEPTS TO HELP KEEP YOU FROM BEING TAKEN IN BY HARDBALL TACTICS.**

There are 4 key negotiation concepts you should establish before every negotiation. The validity of your assessment to formulate where you stand on these concepts is directly tied to your preparation. Having a good understanding of where you and each other party stands on these concepts can act as a powerful immunization against hardball tactics.<sup>4</sup>

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<sup>4</sup> The terms and acronyms that follow are the most commonly used to describe the concepts. They were coined by Harvard professors William Ury and Roger Fisher.

<b>ABBREVIATION</b>	<b>STANDS FOR</b>	<b>LECTURE NOTES</b>
BATNA	Best Alternative to a Negotiated Agreement	
WATNA	Worst Alternative to a Negotiated Agreement	
MLATNA	Most Likely Alternative to a Negotiated Agreement	
ZOPA	Zone of Possible Agreement	

Don't just do the analysis to establish the range for each concept for yourself or your client. Do it for every party. What is each party's BATNA, WATNA, MLATNA, and ZOPA? What informs their perspective? Think about what you would do if you were them.

#### D. DISTRIBUTIVE vs. INTEGRATIVE NEGOTIATION

Most of the effective responses to hardball tactics involve some form of redirection. When redirecting, it is helpful to be clear about where you want to go. You have two primary options where to redirect: towards a distributive negotiation or towards an integrative negotiation. Here's the difference:

*Distributive negotiation* is competitive in nature. Each negotiator tries to get more at the expense of the other. An example might be haggling over a car—the seller wants to get the highest possible price, and the buyer wants to pay the lowest possible price. Each negotiator aims for a bigger slice of the pie—leaving the other with the smaller slice. The focus is on “winning,” which means that the other loses (recognizing that the discussion needs to be within sufficient range so each negotiator is willing to negotiate.) Because each negotiator participates in the bartering, each compromises from what is essentially a polarized position until both can agree.

Distributive negotiation is most effective when there is a measurable single goal (like getting the best price) and there is no ongoing relationship to consider. Another example of where distributive negotiation is likely most effective is with an insurer about damages for a personal injury—there is only one goal (the amount) and no ongoing relationship between the victim and insurer.

Distributive negotiation is least effective when there is an ongoing relationship to consider, or when the issues are nuanced or complex. Pressing for the best deal, by trying to win at the expense of the other, tends to hurt the relationship—after all, no one likes someone who is perceived to be out to get them. When the issues are complex, distributive negotiation can easily become a game of whack-a-mole—as soon as agreement is reached on one issue, the battle field can shift as to the other issues.

Hardball negotiation lives at the extreme of the distributive negotiation approach; the goal of a hardball tactic is distributive: to “win” or get more—often by trying to move the ZOPA in their direction. If trying to redirect a hardball negotiator so the negotiation becomes a productive distributive negotiation (*i.e.*, a discussion that is “within the ballpark”), the redirection will usually be about resetting expectations and/or setting ground rules. The risk is that the essential dynamics of the negotiation will not change.

*Integrative negotiation* is an approach where the negotiators try to find value for all, usually by working together. The focus of each negotiator is not on getting the “most” at the expense of the other, but on each getting what they need so they agree. Neither engages in self-sacrifice, both try to understand what’s important to the other in order to reach agreement, and all pay attention to the impact of the negotiation on the relationship. Instead of trying for the larger slice of the pie, the negotiators may seek to enlarge the pie. If the pie can’t be enlarged, they seek to address the shortfall by figuring out how they can deal with that.

Integrative negotiation is most effective when working together can result in mutual gain, such as when preserving a co-parenting or other relationship, or when planning can help each party. Complex, nuanced, and interrelated issues can be handled because it is often possible to

discuss and balance a range of priorities and preferences within a comprehensive whole. Integrative negotiation is therefore well suited for the typical family law matter, which involves both relationships and multiple interrelated issues.<sup>5</sup> It is a negotiation approach that happens to be often used in Collaborative law and facilitative mediation, and in many business negotiations.

Integrative negotiation is less effective if there is no ongoing relationship, or when the transaction is simple. The time and effort needed can be excessive when the only question is the sales price of the Prius. If trying to redirect a hardball negotiator towards a more integrative negotiation approach, the redirection will often be about identifying what needs to be addressed, the concerns of each, and focusing the conversation on those topics. The risk is that doing so takes an investment of time and persistence, and may not always be successful.

Key differences between the two approaches can be summarized as:

	DISTRIBUTIVE NEGOTIATION	INTEGRATIVE NEGOTIATION
CONTENT	Win-lose	Win-win
TONE	Friendly, unfriendly, or businesslike	Friendly or businesslike
PRESERVING RELATIONSHIPS	Less important than the deal	As important as the deal
PROCESS	Take opposite positions and slowly compromise	Create solutions that address concerns and goals of each
STANCE	Rigid/confrontational	Flexible/supportive

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<sup>5</sup> Common methods used in integrative negotiation approaches include interest-based negotiation, varieties of which have been popularized by Ury and Fisher's classic *Getting to Yes: Negotiating Agreement without Giving In* and by Marshall Rosenberg's *Nonviolent Communication*.

## **E. TECHNIQUES TO RESPOND TO COMMON HARDBALL TACTICS**

Caution: Using these tactics is not recommended. See above for drawbacks.

TACTIC	LECTURE NOTES
<b>Highball-Lowball</b>	
<b>The Nibble</b>	
<b>Good Cop, Bad Cop</b>	
<b>The Vise</b>	

Bogey	
Snow Job	
The Brink	
Fake Deadline	
Lying	

<b>Commitment Tactics</b>	
<b>Threats</b>	

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## CHAPTER NINE

### **WHY CAN'T WE BE FRIENDS? THE USE AND ABUSE OF SOCIAL MEDIA IN FAMILY LAW CASES**

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## **I. INTRODUCTION: OH, BRAVE NEW WORLD, OR, WHAT IS THIS STUFF?**

“Fail to plan, plan to fail.” Business and professional practices have changed substantially over the last five years, ten years, twenty years...no matter how short or how long your time in practice, the likelihood is that you’ve seen changes based on changes in technology, and the pace of change seems to be accelerating.

You can allow yourself to be swept along with the tide. Or you can take a step back, take a measured look at trends that may be developing, and come up with a plan to manage your practice (as a whole) and manage your cases (individually) in light of the trends you spot. Comment 6 to RPC 1.1, “Competence,” notes that “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice \* \* \* .”

In 2016, part of “competence” means understanding a brave new world of social media, in which your clients and their opposing parties are creating evidence at a blinding pace. Whether or not you want to *participate* in this world where may seem like the inhabitants spend all their time documenting every plate of sushi that passes before them, you need to understand that this evidence exists, how your clients and your opponents are creating it, what advice to give your clients about it, how to access it, and how to offer and object to it at trial.

What are “social media”? Social media are computer-mediated tools that allow people to create, share and discuss information, whether in text or graphic form, in virtual communities and networks. The virtual communities and networks can be loosely-defined. For purposes of this discussion, social media is information sharing that is typically not one-to-one, although the social media tools frequently also have components that permit one-to-one communication, and restrict the audience for information, which makes distinctions among types of unfamiliar technology more difficult to make.

How do people participate in social media? An ever-increasing percentage of social media participation is done through mobile devices, especially smartphones, because uploading photos and videos is a shorter process if you use the mobile device that originally captured the images rather than a laptop or a desktop computer. This is important when considering how to go about discovery, because it means that you might want to look at people’s phones. It is also important at trial, if your trier of fact is not conversant with the technologies involved and the way parties typically use their smartphones.

The parties in your case may have set up their Facebook accounts so that they can communicate with others using Facebook as a conduit, so that Facebook Wall postings, Facebook instant messaging, and Facebook chat can be made through their smart phones, potentially leaving traces of evidence on the phone, itself as well as on the Internet. Most people check and post to Twitter using their phones (or at the most iPads), rather than more robust conventional computers (because desktop integration is not as good as the mobile app). Some parties may have Twitter accounts linked to Facebook, so that they can tweet updates to their Facebook status. You need to

understand how your clients, and their children, are using technology. In many cases their use may be more sophisticated than yours. For example, the North Carolina State Bar Council adopted the view that a lawyer's obligation to provide competent and diligent representation (see, e.g., Mass. R. Prof. C. 1.1 and 1.3) requires a lawyer to "advise the client of the legal ramifications of existing postings, future postings, and third party comments. Advice should be given before and after the law suit is filed." See 2014 N.C. Ethics Op. 5, #1.

What types of social media are there? Your own client, the opposing party, and the children in the case may all have Internet presences that can be found in many different places, all of which have their own "personalities": Facebook, VK (European emphasis), Ello, Qzone (China), WeChat, YouTube, Twitter, Pinterest, Snapchat, Vine (six-second videos), Yahoo! Answers, Google+, Tagged, LinkedIn (for the old folks), Myspace (for the unhip), MeetMe, Meetup, Foursquare, Tinder (dating/hookup app), OKCupid (ditto), and Siren (ditto, but local company! Woman-founded!). There are many other social media sites with potentially useful content, such as LiveJournal (dying out), StumbleUpon, Goodreads (books), and reddit. There are photo sharing sites such as Instagram (very popular and on the rise), Flickr, Photobucket, DeviantArt, Twitpic, ImageShack, TinyPic, WebShots, Imgur, Shutterfly, SmugMug, Snapfish, and Tumblr; message boards of affinity organizations (the direct descendants of the BBS, with the ability to add photos and graphics (HTML--collectively, "pictures") to posts on the message board), chat rooms (seemingly less popular nowadays) and even the websites of the family business. Reviews on Leafly may be pertinent if cannabis is an issue in your case. There are social networks built into gaming platforms such as Xbox and Playstation, and platform-independent networks such as Pixwoo. Weight Watchers' mobile app has a popular Instagram-like social media function called Connect. Less organized, but still viable sources of information, are blogs and vlogs (video blogs).

Your client, or an opposing party, might moderate a forum on a topic relevant to case issues. Listservs—many family law attorneys are familiar with the use of a listserv through the Family Law Section hosted on Yahoogroups—are a cross between a bulletin board and email. Depending on the purpose of the listserv and the nature of a party's postings, a listserv might provide relevant evidence. In the highly publicized California case of *Muniz v. United Parcel Service, Inc.*, 2011 WL 311374 (N.D. Cal. Jan. 28, 2011), as a part of questioning plaintiff's counsel's fee application, the defense (unsuccessfully) sought to subpoena postings by the attorney on a state employment law listserv and on social media websites including LinkedIn.

Auction sites such as eBay and craigslist can provide relevant information as well as to sources of income, types of expenditures, and disposition of assets.

Material generated by the children, although sometimes less useful than you might think, may be useful for evaluator consideration and might be admissible under the state of mind exception to the hearsay rules. It may also lead to other, more readily admissible evidence.

## **II. MANAGE YOUR OWN “SOCIAL MEDIA PRESENCE.” MAYBE.**

### **A. Deciding Whether To Participate**

Humans are social creatures by nature, and the rise of social networking has arguably increased the total amount of happiness in the world as people find new ways of making connections with one another. Global productivity at work may have declined in proportion to the increase in happiness, because social media can be a terrible time sink. Not every lawyer has the time or inclination to participate actively in social media, and there are too many forms to participate across the board, unless you make a career out of it.

Even if you never intend to become an avid user of social media, it would probably behoove you to experiment a bit so that you have some idea of how things work so you understand what evidence is available. Even the state court system and WSBA itself have (ponderous) social media presences. Many judges now have “public figure” pages on Facebook, which are more like websites within Facebook than “traditional” Facebook, and which aren’t very interactive. Something to consider, if you do want to experiment, is that many communities are, for lack of a better term, pseudonym-based, and it is a convention within those communities that your username will not bear any relation to your real name. This allows you to experiment without affecting your professional image if you want to have a personal life (subject to the possibility of being “outed” by aggregation, as discussed below), but can raise ethical issues of “pretexting,” which is an important enough issue that it has its own section below. If you want to dip your toe in the waters, Twitter might be less intimidating than some other communities because your tweets are limited to 140 characters, which isn’t much of a commitment.

Whether you know it or not, you probably have some web presence, even if the content about you has been written by other people. There is probably an Avvo.com profile about you, whether you have “claimed” this profile or not. Understanding what content already exists about you on the Internet will enable to you make a decision about how proactive you wish to be about online reputation management. There are now, of course, companies out there which will act as consultants, for a price, to assist you in doing so. Most of the advice addresses what to do about bad reviews, which is a problem as old as time.

Something to consider, with the rise of the Internet, is whether you might include a social media “non-disparagement” clause in your fee agreement at the start of your representation. Such a clause prohibits your client from posting negative review about the services of the firm online. The contract could include a liquidated damages provision for violation of this part of the agreement. You should always also include a severability clause if you include exotic language in your fee agreement.

The benefit to including such a provision is fairly obvious, in that it may discourage negative reviews of your firm’s services. However, one potential significant

drawback is a potential client may see the non-disparagement clause in your agreement and be concerned about why you feel it to be necessary.

Washington law currently has no statutory prohibition on non-disparagement clauses in contracts between businesses and consumers (it is unknown whether our legislature has any interest in specifically addressing non-disparagement clauses in the future). Other states, such as California, recently passed legislation prohibiting non-disparagement clauses. See, e.g., Cal. Civil Code Section 1670.8. The thought is that such clauses may impinge on First Amendment rights and would violate public policy. Moreover, a suit against a disgruntled former client promulgating his or her dissatisfaction via social media, either to enforce the clause or as a defamation/intentional interference with a business expectancy may face other problems: Washington's anti-SLAPP law, since a disgruntled client can claim that a bad or incompetent lawyer is a "matter of public concern." In *Johnson v. Ryan*, 186 Wn. App. 562, 346 P.3d 789 (2015), the defendant engaged in "vitriolic Internet blogging" against the plaintiff Johnson, the executive artistic director of the Spokane Civic Theatre, who had first hired and then fired him as the music director. Her suit for defamation and interference with business expectancy was dismissed by the trial court when the defendant asserted that his statements were a matter of public concern. The Court of Appeals reversed, and returned the case to the trial court, over an impassioned dissent. This appears to have been a close case, and a lawyer-plaintiff is unlikely to fare as well as did Ms. Johnson.

#### B. When You Participate, You Aggregate

Many of us voluntarily dispense small harmless pieces of information about ourselves in a number of places throughout the Internet by means of social media. For many lawyers, the sharing of such information is part of a calculated marketing strategy (for example, providing credentials on LinkedIn) or less calculated soft networking, for example on Facebook. For many other lawyers, participation in social media can be a meaningful personal activity by which real and lasting friendships can be formed. Such activity always reveals some personal information. Aggregated, those individually harmless pieces of information can provide a far more revealing portrait than we may feel comfortable with, or have had any intention of creating. In fact, commercial services, such as Spokeo and ChoicePoint, which collect such information, are actually called "data aggregators" or "personal information aggregators." Social network aggregators also exist, and can be very handy, see below.

#### C. The Ethical Dangers of LinkedIn and Other Professional Sites

Most of the following is taken from a 2013 *NWSidebar* article. It primarily discusses LinkedIn, but much of the information can be applied to Avvo as well. It is important to make sure you are not displaying false or misleading communication about yourself or your services as a lawyer on your professional online accounts.

Be aware of false endorsements, whether they are LinkedIn endorsements or a review written about you. A lawyer should not make or allow any false or misleading communication about the lawyer or about the lawyer's services. RPC 7.1. A

communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. Id. An endorsement on LinkedIn may be a false or misleading communication! Remember, lawyers are responsible for taking reasonable steps to ensure that truthful statements are made about their services. (RPC 7.1, Comment 1). This can be difficult in the case of Avvo. This author is aware of at least one case of a false review posted by an opposing party impersonating the lawyer's client. Avvo declined to remove the review.

Quid pro quo endorsements are very common, and are problematic. Using LinkedIn to return a favor to a friend can be problematic if the favor is an endorsement that is false or misleading, but the pull to provide a return endorsement as a matter of etiquette appears to be strong. Lawyers clearly may endorse other lawyers if the endorsement is based on their actual knowledge and understanding of the lawyer's services, but an endorsement could legitimately also be based on the lawyer's reputation with colleagues. Agreeing to endorse someone else's LinkedIn page for a gift or fee is a violation of the RPCs. See RPC 7.1, 7.2 (B), 8.4.

According to RPC 7.4, a lawyer can communicate that the lawyer does or does not practice in a particular field of law. However, a lawyer cannot state or imply that he or she is a "specialist" in a particular field of law, unless the lawyer is engaged in admiralty practice or is admitted to practice before the United States Patent and Trademark Office. The standard Washington language is that one's practice is "limited to" family law or "emphasizes" family law.

You are responsible for all of the links on your professional website. Screen your professional online accounts to make sure that your website and any other online media are free from false or misleading information. It is especially important to monitor information that other people post or link to on your professional page, in order to ensure that communications about legal services are truthful and in compliance with the RPCs. (Washington State Advisory Opinion 2070). You might or might not be able to quote from nice language about you in a judge's ruling. *Dwyer v. Cappell*, 762 F3d 275 (3<sup>rd</sup> Cir. 2014).

#### D. The Intricacies of Facebook

It is not uncommon for lawyers who are regularly opposing counsel to one another to be Facebook Friends, which means that you can see one another's posts on the massive Facebook website. In the world of Facebook, "friend" is a term of art that frequently extends past nodding acquaintances, and persons one has never met in real life, down to people you really disliked in high school, plus your grandmother, who has never really gotten the hang of Facebook. It is also not unheard of for lawyers to "friend" former, or even current, clients, or receive friend requests from them. This can lead to uncomfortable issues when your client sees something friendly opposing counsel in his case has just posted on your Timeline. In addition, disgruntled opposing parties or even former clients can easily obtain information about your most vulnerable spots. Custom settings allow you to restrict what different audiences see.

When Facebook was opened up in 2006 to anyone with an email address (it was originally limited to use of by those at educational institutions)<sup>1</sup>, relatively few sitting judicial officers signed up, but many lawyers did. Ten years later, those lawyers on Facebook are being appointed or elected to the bench, and lawyers who are their Facebook friends are appearing in front of them. Does the judicial officer need to recuse him or herself, or even disclose the existence of the Facebook friend relationship? Does the lawyer have any disclosure obligations?

There's no direct guidance in Washington state. The closest is Opinion 09-05 from the [Judicial] Ethics Advisory Committee, which stated that a judicial officer could "post a blog on the Internet" but that "caution should be exercised as to how that blog is used and comments responded to in order to make sure that the judicial officer's impartiality is not called into question or the action does not impair the judicial officer's ability to decide impartiality issues that come before the judicial officer." This author is unaware of any Washington ethics opinions directly addressing Facebook and judicial officers. The National Center for State Courts website has a (somewhat outdated) section on "Social Media and the Courts."

The state that has examined this issue of Facebook friending of judges the most thoroughly is Florida. In 2009, the Judicial Ethics Advisory Committee (JEAC) of the Florida Bar released an ethics opinion stating that a judge was not permitted to be Facebook friends with a lawyer who may appear before him or her.

In September 2012, the Fourth District Court of Appeal became the first Florida appellate court to address Facebook friendship between judges and lawyers in *Domville v. State*, 103 So. 3d 184 (Fla. DCA 2012), *rehearing denied*, 125 So. 3d 178 (Fla. DCA), *review denied*, 110 So.3d 441 (Fla. 2013). The court held that a judge was required to recuse himself from a case in which the prosecutor was his Facebook friend. The existence of the Facebook friendship could "create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial" and that fear is sufficient to require the judge's recusal. The Supreme Court of Florida declined to hear the appeal.

In January 2014, in *Chace v. Loisel*, 170 So. 3d 802 (Fla. 5<sup>th</sup> DCA 2014), the Fifth District Court of Appeal weighed in, calling into question the 4th DCA's understanding of the meaning of Facebook friendship:

We have serious reservations about the court's rationale in *Domville*. The word "friend" on Facebook is a term of art. A number of words or phrases could more aptly describe the concept, including acquaintance and, sometimes, virtual stranger. A Facebook friendship does not necessarily signify the existence of a close relationship. Other than the public nature of the internet, there is no difference between a Facebook "friend" and any other friendship a judge might have. *Domville*'s logic would require disqualification in cases involving an acquaintance of a judge. Particularly in smaller counties, where everyone in the

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<sup>1</sup> <https://www.theguardian.com/technology/2007/jul/25/media.newmedia> (accessed 5/24/2016)

legal community knows each other, this requirement is unworkable and unnecessary.

To require judges to step aside from hearing cases based solely on Facebook friendships, the 5th DCA explained, is to misunderstand "the true nature of a Facebook friendship," and doing so "casts a large net in an effort to catch a minnow."

Despite its criticism of *Domville*, the 5th DCA held that the trial judge in *Chace* should have followed the 4th DCA's guidance and recused herself. Why? For two reasons. First, at the time that the motion to recuse was made, *Domville* was the only decision of a Florida appellate court on the issue of Facebook friendship. When there is only one appellate court decision on an issue, every trial court in the state is required to apply the law as interpreted in that decision.

Second, the Facebook activity of the judge in *Chace* was worse and more likely to result in bias than merely being Facebook friends with one of the lawyers in the case. The judge in *Chace* actually sent a Facebook friend request to the wife, Ms. Chace, while her divorce case was pending before the judge. On her attorney's advice, Ms. Chace didn't accept the request. The judge thereafter awarded most of the marital debt to Ms. Chace and gave Mr. Loisel a "disproportionately excessive" alimony award.

The 5th DCA found the judge's conduct of reaching out via Facebook to a party in a case pending before her, which was apparently a practice of this judge, to be more troubling than an existing Facebook friendship between a judge and a lawyer. It regarded Ms. Chace's fear of bias to be well-founded, and ordered the judge to recuse herself.<sup>2</sup>

Another interesting Facebook case is the tale of Judge Michelle Slaughter, originally assigned to preside over the "Boy in the Box" case in Galveston, Texas. Judge Slaughter posted to Facebook, among other things, during the course of a trial of a man accused of locking his nine-year-old son inside a wooden box at the family home. Judge Slaughter was originally removed from the case and admonished by the State Commission on Judicial Conduct, for her use of Facebook, but a Special Court of Review found in late 2015 that she had not violated any judicial standards by her social media activity. *In re Honorable Michelle Slaughter, Presiding Judge of the 405<sup>th</sup> Judicial District Court, Galveston County, Texas*, Docket No. 15-0001 (Special Court of Review of Texas, September 30, 2015). Judge Slaughter's website is worth a visit.

It goes without saying that you should not extend a friend invitation to an opposing party on Facebook. If the party is represented, that would be an ethical violation; if the party is not, merely unwise. If you are not Facebook friends with a represented party, but they have "public" content (content you can see because it is public or you are a friend of a friend and their security settings permit this), is the act of "liking" that content unethical? Probably yes. Don't do it.

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<sup>2</sup> The judge involved resigned a year later, facing a trial on numerous ethics complaints.  
<http://www.nydailynews.com/news/national/florida-judge-accused-bizarre-ethics-violations-resigns-article-1.2236943> (accessed 5/24/2016)

Be careful what you post about your current cases. A New York lawyer posted a picture of himself and his client on Facebook after a mediation session in Florida. The picture, which portrayed him smiling, had a caption that said: "Pic After Making \$43 Million Dollar Deman[d at] Mediation." The defendant sought the sanctions, which were denied, claiming the posting was a "knowing and willful violation" of relevant Florida confidentiality provisions barring disclosure of mediation communications. *A1 Procurement LLC v. Hendry Corp.*, Case No. 1:11-cv-23582 (U.S.D.C. S.D. Fla. 2013). You can also leave yourself open to a claim that you are revealing client confidences or secrets, depending on what you post.

Be careful about creating accidental clients if you are giving legal advice. *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992) was decided before the rise of social media, but the formation of a relationship that the other party subjectively, and reasonably, believes is that of an attorney and client is easier than ever.

#### E. Can You Ethically Market Yourself on Daily Deal Websites?

The answer in Washington state, for the moment, is "yes," if you proceed with thought and care. Washington Advisory Opinion 2139 (issued in 2006) states that there is nothing inherently wrong with a lawyer offering discount coupons in general, as long as they are honored according to their terms. There is not a Washington Advisory Opinion specific to the "daily deal" websites Groupon (founded in 2008) or LivingSocial (founded in 2007), which offer discount coupons distributed by social media. Terms of use for both Groupon and LivingSocial may be found at their websites, and you should carefully review those terms. Bar ethics committees are split on the issue of whether daily deal sites may be used by lawyers. Maryland, Nebraska, New York (New York State Bar Association Opinion 897), North Carolina, Oregon, and South Carolina (South Carolina State Bar Association Opinion 11-05) all approve of daily deal sites, with some strong qualifiers; Alabama, Arizona, Indiana (Indiana State Bar Association Opinion 1 of 2012) and Pennsylvania absolutely disapprove.

When using social media coupons, as with any advertising, you must ensure that the coupon does not contain any false or misleading statements to satisfy RPC 7.1. For example: the daily deal must actually be a deal: the voucher has to represent the actual deal it purports to be. This can be tricky in application if a firm customarily adjusts flat fee quotes to meet the client's individual circumstances. Because of the difficulties of calculating a percentage discount on open-ended representation, flat-fee matters of limited scope are better suited for daily deals than, say, a full-on divorce.

The daily deal listing should also explain the preconditions that always have to be met, such as performance of a conflict check, determination that the lawyer is competent to undertake the representation, and that the lawyer accepts the representation. There is a question under RPC 5.4 whether a daily deal site would impede a lawyer's exercise of professional judgment if he or she is obligated to honor the coupon without qualification at the moment the consumer purchases it. Groupon's terms of use provide a mechanism for a refund, however, that appears to provide the lawyer with a mechanism to comply with RPC 5.4 and exercise independent judgment if it is necessary to decline representation.

The RPCs also say that a lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertisements or communications. RPC 7.2 (b)(1). Examine the terms carefully to make sure that you are not engaged in fee-splitting with a non-lawyer (the high percentage charged by the deal sites are what led Alabama to disapprove of Groupon). The WSBA RPC Committee says that a lawyer may pay for "ministerial services" to communicate information about the lawyer's practice, but the service may not be paid for subjective appraisals that bolster a lawyer's profile. As one commentator notes,

"Focusing on the high, percentage based cost of daily deal sites [to disapprove them] is also unfair because it disfavors attorneys in solo and small practice settings. The percentage based pricing of Groupon means that a solo practitioner can instantly reach a large audience without capital investment. Larger firms may have the ability to pay out of pocket for marketing campaigns, but the small fish rarely have this luxury. Sure, Groupon gets a windfall if the attorney's campaign takes off, but Groupon takes a haircut and shoulders the loss if the deal fizzles."

McLawsen, "Window Cleaning, Wine Tasting ... and Wills? Ethics of Attorney Marketing on 'Daily Deal' Websites, *NWLAWYER* Jul-Aug 2013, p. 8.

Arguably, the funds you initially receive for a social media coupon would need to be safeguarded pursuant to RPC 1.15A until earned. However, flat-fee arrangements are not subject to trust-fund accounting. RPC 1.5(f)(2). If a lawyer declines or terminates representation, then the lawyer must comply with RPC 1.16(d), which requires that any unearned fee be refunded.

### **III. AVOID UNPLEASANT SURPRISES**

#### **A. Do Your Research**

Always Google (or apply other search engine of choice to) the names of your own client, the opposing party, and any children in the case, including all names used, at the outset of the representation. Don't forget that you can search for images as well as text. The information that the public can view on an individual's Facebook page will vary depending on the privacy settings that he or she has chosen. A person's username, profile pictures, and user ID are always publicly available, and most profiles will reveal more. Print or save the public profile and make sure you note the date (which should appear on the bottom of the page). As the case progresses, it is a good idea to revisit and reprint the profile in the event that changes are made. The public content may be important in the event you need to make a motion to compel.

Always search on both parties' names through the Washington courts online database. Make sure you obtain and research any previous names of the parties and search on the previous names and all possible misspellings of unusual names. Consider the use of a data aggregator.

#### **B. Can You Clean Up? Part One: What Your Client Has Posted**

A difficult issue is advising your client to deactivate or delete social media accounts outright or to delete individual imprudent Facebook or Instagram postings. Is that considered spoliation? The classic definition of spoliation is “the intentional destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”

The duty to preserve evidence arises when the party has notice of the potential claims for which the evidence would be relevant. *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977). The duty to preserve evidence does not require pending litigation or discovery requests, *Henderson v. Tyrell*, 80 Wn. App. 592, 611 fn7, 910 P.2d 522 (1996), but it seems to require something more than the mere possibility of litigation: there is no general duty to preserve evidence. “Read as a whole, *Henderson’s* discussion of culpability as a factor implicitly holds that a party’s negligent failure to preserve evidence relevant to foreseeable litigation is not sanctionable spoliation. The discussion of the defendant’s culpability begins with the observation that many courts examine ‘whether the party acted in bad faith or conscious disregard of the importance of the evidence.’ 80 Wn. App. at 609. Negligence is not mentioned.” *Cook v. Tarbert Logging*, 190 Wn. App. 448, 464, 360 P.3d 855 (2015). In two other relatively recent cases, the courts have found that no duty to preserve evidence arises where a person has been injured by an arguably negligent act and a lawsuit is simply a possibility. In *Ripley v. Lanzer*, 152 Wn. App. 296, 215 P.3d 1020 (2009), the trial court refused to impose a sanction against medical providers who threw away a defective scalpel handle, knowing that it had been the cause of a broken blade that lodged in a patient’s knee. The court concluded that the evidence might not have been important and “we see no bad faith or other reason to show that this act was intended to destroy important evidence.” 152 Wn. App. at 326. In *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 136, 307 P.3d 811 (2013), in which the plaintiff sought an adverse inference instruction against a retailer that destroyed surveillance video that might have recorded when and how water came to be on the floor where she fell, the court “decline[d] to require store premises to retain all video anytime someone slips and falls and files an accident report.”

A high-profile Virginia attorney (former vice president of the Virginia Trial Lawyers Association) was suspended for five years, effectively ending his career, for counseling his client, through his assistant, to “clean up” his Facebook and MySpace profiles during the course of discovery. The client removed sixteen pictures, including one of himself holding a beer can and wearing a T-shirt that said “I ♥ hot moms.” The pictures were eventually recovered by forensic means. *In the Matter of Matthew B. Murray*, VSB Docket Nos. 11-070-088405 and 11-070-088422 (Virginia State Bar Disciplinary Board July 17, 2013). Murray also ended up paying \$544,000 of the opponent’s legal fees (the client was separately sanctioned \$180,000) in the underlying case. *Allied Concrete v. Lester*, 285 Va. 295, 736 SE 2d 699 (2013).

In another well-known, although unpublished, spoliation case, *Gatto v. United Airlines*, 2013 U.S. Dist. LEXIS 41909 (D.N.J. 2013), the plaintiff Gatto was a baggage handler who was ordered to give the defendant access to his Facebook account.

Although the parties clearly agreed that Gatto would change his account password and provide it to defense counsel, Gatto apparently claimed that the parties had not agreed that defense counsel could directly access his Facebook account. In any event, defense counsel logged into Gatto's account, purportedly to confirm that the password had been changed, and printed out portions of Gatto's Facebook page. Defense counsel also sent a signed authorization to Facebook to access Gatto's account, but Facebook objected and recommended that defense counsel have Gatto download his own account information.

After defense counsel logged into his account, Facebook notified Gatto that his account had been accessed from an unfamiliar IP address. Explaining later that his account had previously been hacked during an acrimonious divorce, Gatto deactivated his account. At some point after deactivation, the account contents were deleted and could no longer be retrieved. The opinion suggests that plaintiff took some affirmative action to make this happen. The sanction imposed was the argument of the adverse inference at trial.

Both *Murray/Lester* and *Gatto* were egregious cases where the spoliation occurred in the midst of discovery. Suppose you advise your client to deactivate before the case is filed. Is that still spoliation? A cynic could claim that divorce is always reasonably foreseeable when one is married. Suppose you give the advice a year before the case is filed? More subtly, suppose you discover, upon a review of your client's Facebook page, that she is Facebook friends with her young teenage daughter and that mom "overshares" material on her page that might not be suitable for a young child to see? Is it spoliation to suggest to a client that she put the child on "restricted" status so that the child is no longer exposed to the racy photos or memes? Or is it just good parenting? Is it spoliation to have your client untag herself in compromising photographs?

Even if it's not spoliation, is it a futile task, since there may be other copies of those incriminating photographs in other people's social media accounts, to suggest that a client clean up his or her social media presence? Is it also a futile task, if your client is unable to refrain from generating new imprudent communications going forward? One very difficult issue, particularly in (but not limited to) cases involving high-conflict parenting disputes, is attempting to manage a client who, for whatever reason, is generating new adverse evidence, seemingly by the bushel, each day. It is impractical to confiscate a client's cell phone, particularly because many people have eliminated landlines completely. Although Facebook, or a personal blog, arguably is not an essential tool for living in the way that a smartphone is, it appears to be almost impossible to get some clients to log off the Internet and return to the physical world. Since parenting cases are largely about patterns of events rather than isolated events, a client's ongoing creation of new bad evidence can be fatal to his or her case. Make sure you document your early good advice.

For a classic example of what not to do during your divorce litigation, a review of the unpublished decision in *B.M. v. D.M.*, 31 Misc.3d 1211, 2011 NY Slip. Op. 50570

(Sup. Ct. Richmond County, April 7, 2011)<sup>3</sup> is instructive. Wife was employed for the first two years of an eleven year marriage, and at the time of the entry of the court's decision had not worked in over fifteen years. Wife claimed at trial that injuries sustained in a car accident on her second wedding anniversary rendered her unable to work. However, "Wife's belly dancing was brought to this Court's attention in February 2009 when Husband attached a series of internet blogs [sic] as exhibits to motion papers. At trial, Wife incredibly testified that she stopped belly dancing in 2008, notwithstanding her own blogs which reveal otherwise. Wife further incredibly testified that she took belly dancing classes only once per week. Her claim in this regard is further disputed by her own blogs. \* \* \* Wife positively identified the contents of her blogs at this trial. \* \* \* Wife further admitted that the contents of what she posted on the internet was true. \* \* \* Wife also posted comments on Facebook about her [belly-dancing] performance. When asked why she didn't post online any pictures of herself dancing, Wife replied, 'Gotta be careful what goes on line pookies. The ex would love to fry me with that.'"

### C. Can You Clean Up? Part Two: Revenge Porn And Other Unsavory Concepts

Family law lawyers should be aware of a category of websites intended to publicize cheating spouses/partners. Their rise and fall is an interesting social phenomenon. These websites tend to come and go. The granddaddy of them all, CheaterVille, was taken down in April 2015. As of this writing, however, liarscheatersrus.com, www.cheaterregistry.com, and www.dontdatehimgirl.com (which seems to be shifting its emphasis to advice to the lovelorn) are all active. In a similar vein see myexwifeiscrazy.com for tales of bad behavior ("created by guys like you for guys like you"), and NeverLikedItAnyway.com (for the sale of gifts from exes, which may include community property items; also includes lots of stories, plus Instagram-like graphics).

Family law attorneys also need to be aware of another unsavory category of websites purveying nonconsensual pornography (NCP), defined as the distribution of sexually graphic images of individuals without their consent. The term "revenge porn," though frequently used, is somewhat misleading, because many perpetrators are not motivated by revenge or by any personal feelings toward the victim. In the case of divorcing couples, however, revenge is not an uncommon motivation.

The rise of Internet pornography has been dependent, in part, on the evolution of technology. As available bandwidth becomes more available, and less expensive, it became easier and easier to share first still images, and then videos, and the costs of web hosting substantially decreased. NCP websites have their genesis in *Hustler* magazine's monthly feature "Beaver Hunt," in which women's nude photographs were published, often accompanied by details of the woman including her name. In some cases the subject of the photograph had not consented to publication and *Hustler* was

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<sup>3</sup> The "Supreme Court" in New York State is its trial court of general jurisdiction, equivalent to our Superior Court.

on occasion successfully sued, see, e.g., *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5<sup>th</sup> Cir. 1984). Around 2000, an Italian researcher, Sergio Messina, identified the phenomenon of men sharing photos and videos of ex-girlfriends in Usenet groups, which he dubbed “realcore pornography.”

The inevitable conclusion of this trend combined with data aggregators was IsAnyoneUp.com, launched in 2010 by Hunter Moore, which featured naked photographs with the subjects’ full names and links to Facebook profiles (which meant that the images would pop up readily in Google searches of a victim’s name). The FBI intervened after anti-revenge porn activist Charlotte Laws uncovered a hacking scheme associated with IsAnyoneUp. Indictments for fifteen felonies were handed down under the Computer Fraud and Abuse Act in January 2014 for the site owner and his accomplices. Hunter Moore pleaded guilty to hacking and identity theft in early 2015 and was sentenced to two and a half years in prison on December 2, 2015.

A 2015 Washington statute makes “disclosing intimate images” a gross misdemeanor on the first offense and a class C felony if the defendant has one or more prior convictions for disclosing intimate images.” See RCW 9A.86.010 and 2384.SL (effective 6/9/2016). It is unclear whether this law will be subjected to a First Amendment challenge and, if so, what the outcome will be.

If you discover that your client has *uploaded* NCP, you should contact criminal defense counsel immediately if you are not competent to handle such matters on your own. If this is the first you are hearing of this statute, you should be referring this aspect of your case out rather than handling it yourself.

If your client is a victim of NCP, whether from a disgruntled spouse of some other party, the first step will be to document the evidence. He or she should capture screen shots of everything and save them to a folder on their computer – capture screen shots of the websites’ pages, results from a Google search of their name, and any texts, instant messages, friend requests or emails received as a result of the posting. Then print everything. This will serve as evidence. This link has instructions on capturing screen shots if your client needs them: <http://www.take-a-screenshot.org/>

If the client just wants the images/videos gone, they can hire a takedown service to have the images removed. DMCA Dot Com ([www.dmca.com](http://www.dmca.com)) is a thorough and efficient takedown service. Copybyte (<https://copybyte.com/stop-revenge-pornography/>) for takedown assistance.

If you want to submit the DMCA takedown notices on behalf of your client, or the client is a DIY type, this website has comprehensive instructions:  
<http://www.womenagainstrevengeporn.com/#!dmca-notice/co0y> You may need to find contact information for the site owner. You can do this by searching the domain name on DomainTools.com. Remember, you want to contact the site owner and the host, not the “registrar” shown on the whois info listed.

In addition, the Seattle-based firm of K&L Gates founded the Cyber Civil Rights Legal Project, which provides pro bono assistance to victims of NCP and can be a useful resource for clients, and the nonprofit organization Without My Consent offers substantial resources as well.

#### **IV. OBTAINING, USING, AND OPPOSING DISCOVERY OF SOCIAL MEDIA**

##### **A. Develop Case Specific Reasons for Social Media Discovery**

There are two types of direct evidence that can be gleaned from social networking sites, evidence that has been broadcast and evidence whose distribution is restricted. One example of a “broadcast” Facebook communication would be a party posting a photograph of herself showing apparent signs of intoxication, taken with her own cell phone camera, with a caption saying “Boy waz I drunk 2nite !!1!” to her Facebook Wall. One example of a bilateral Facebook communication would be a Facebook instant message exchange between two individuals in the Facebook instant message system (or an exchange posted on a Facebook Wall, which, although a dialogue, is also being broadcast).

There is a third type of evidence to be derived from social media: indirect evidence. If Mom misses that parent-teacher conference because of “bad traffic,” but used Foursquare to check into the Moonlight Cocktail Lounge around the same time, Mom has a problem. For example, if part of the theory of your case is that your opponent is a neglectful parent due to distractions from social media, establishing that the party was posting to Facebook at a time when the children were waiting to be picked up from school or daycare can assist in establishing that theory. Be careful to understand your technology, and your evidence, however, because it may be that the party in question was posting to Facebook from her phone while waiting in her car, making the evidence less damning than initially believed.

Use of Tinder or Siren may be evidence in committed intimate relationship cases may tend to establish that the relationship was not “committed.”

##### **B. Informal Discovery**

Any discussion of informal social media discovery must begin with an explanation of, and a caution about, the practice of “pretexting” (you may also see it called blagging or bohoing).

Pretexting is a social engineering technique in which a fictional situation is created for the purpose of obtaining personal and sensitive information from an unsuspecting individual. It sometimes involves researching a target and making use of his or her data for impersonation or manipulation. The federal Telephone Records and Privacy Protection Act of 2006 (signed into law January 3, 2007) makes pretexting a federal crime if used to obtain the billing records and other information phone companies retain on individual customers. 18 U.S.C. 1039. But what about pretexting to obtain information other than telephone records?

RPC 8.4(c) forbids lawyers from engaging in dishonesty, fraud, deceit or misrepresentation, and RPC 4.4 forbids lawyers from obtaining evidence in a manner that violates the legal rights of a third person. RPC 5.3 requires lawyers to supervise non-lawyer assistants. Does this mean that a lawyer is forever barred from investigating social media in general using a pseudonym? How about obtaining information from/access to a witness using a ruse? How about using a private investigator to do the same thing?

As usual, there is no Washington state authority directly on point addressing pretexting and social media. The issue can be someone subtle because the information is not, in a certain sense, confidential if it is being shared with a fairly wide swath of the Internet and is frequently shared in communities where no one uses their real names. The disciplinary stipulation that is most applicable by analogy is *In re Patrick J. Leahy*, Public No. 07#00036 (September 24, 2007). Mr. Leahy was a plaintiff's personal injury lawyer who called the house of the defendants-to-be, claiming to be a State Farm agent (State Farm having insured the defendants' car) and wanting to deliver some documents. Later in the same car he said he was working with a process server and misrepresented that he was not a lawyer. Mr. Leahy eventually stipulated that he had violated RPC 8.4(c) and RPC 4.1(a)(making a false statement of material fact or law to a third person). There is also WSBA Ethics Advisory Opinion 1415 (1991), stating that using an actor to impersonate a patient for purposes of gathering information to impeach an opposing expert would violate RPCs 4.1(a) and 8.4(c). This opinion is in accord with subsequent caselaw barring the opposing party or attorney (or, presumably, the attorney's agents) from contacting an expert *ex parte*. *In re Matter of Firestorm* 1991, 129 Wn.2d 130, 916 P.2d 411 (1996).

Note that fake accounts are expressly against the terms of service (TOS) of some, but not all, social media services: Facebook, for example, but not Ello, forbids pseudonyms, although the TOS are inconsistently enforced, to say the least. The New York City Bar Association (which is not a group with adjudicative authority) considers using a fake profile to send a Facebook friend request to be unethical. N.Y. City Bar Association Commission on Professional & Judicial Ethics, Formal Opinion 2010-2 (2010). That same opinion found using one's real profile to obtain the information to be ethical (assuming that other ethical provisions, such as the prohibition against contacting unrepresented parties, e.g., was not violated). The Philadelphia Bar Professional Guidance Committee (also not a group with adjudicative authority) has opined that this practice would be unethical unless the lawyer explained why the friend request was made because it concluded that the omission of one's intent is a false statement of material fact. Philadelphia Bar Association Professional Guidance Commission, Opinion 2009-02 (2009).

In a scary case from our neighbor to the south, the Oregon Supreme Court found that a lawyer engaged in sanctionable dishonesty when he briefly impersonated a former high school classmate, who had become a teacher, on Classmates.com as a joke. He posted a single impersonated message implying that he had had sex with some students, thinking, according to his testimony, that the teacher's friends would think it was funny and that no one would believe it because it was so outlandish. This

testimony, although accepted at face value by the Supreme Court, was somewhat questionable, because the lawyer knew that the teacher was already under investigation at the time for possible sexual misconduct with a student. The post led to a great deal of trouble for the teacher, so as jokes go it was a fairly malicious one. The post took a matter of minutes to make, and was only up on Classmates.com for a few days. Classmates.com eventually outed the lawyer's impersonation, leading, eventually, to a Bar investigation. The initial disciplinary panel dismissed the Bar complaint against the lawyer, but the Oregon State Bar appealed, requesting that the lawyer be suspended for sixty days. The Oregon Supreme Court issued a public reprimand, although two dissenting justices felt that no sanction at all should have been levied. *In re Carpenter*, 337 Or. 226, 95 P.3d 2013 (2004).

The most thoughtful article on the subject, although arguably becoming dated, is Shane Witnov, "Investigating Facebook: The Ethics of Using Social Networking Websites in Legal Investigations," 28 *Santa Clara High Technology Law Journal* 31 (2011).

1. Global Social Media Search Tools. Try WhosTalkin and Social Mention, which are quick and free social media aggregators.

2. The Wayback Machine. "By way of background, the Internet Archive is a nonprofit organization that has created an online library of digital media in an effort to preserve digital content for future reference. Its digital database is equivalent to a paper library, but is filled with digital media like websites instead of books. The library includes a collection of chronological records of various websites which Internet Archive makes available at no cost to the public via the Wayback Machine. The library's records include more than 85 billion screenshots of web pages which are stored on a computer database in California. Internet Archive's database provides users with the ability to study websites that may have been changed or no longer exist." *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627 (E.D. Pa. 2007). The Internet Archive has existed since 1996, and federal courts have regularly accepted evidence from the Internet Archive. See, e.g., *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, No. 8:06-CV-223, 2006 U.S. Dist. LEXIS 28873, at \*6, 2006 WL 1320242, at \*2 (M.D. Fla. May 12, 2006) (concluding that a printout from the Internet Archive could be authenticated by way of an affidavit from a "representative of Internet Archive with personal knowledge of its contents, verifying that the printouts Plaintiff seeks to admit are true and accurate copies of Internet Archive's records"). The Wayback Machine's FAQ are very helpful.

As of this writing, there are no Washington state appellate cases, published or unpublished, containing the phrase "Wayback Machine."

3. Specific Social Media Searches. If you know the opposing party's Twitter handle (which you can learn by means of interrogatory), you can search for public tweets to, from, and about them by searching at twitter.com with the terms: to:handle, from:handle, and @handle. In addition, at least theoretically any public tweets sent by either party from the inception of Twitter in 2006 through April 2010 should—eventually—be

available from the Library of Congress, but at last report the LoC was still struggling to get the project online: <http://www.politico.com/story/2015/07/library-of-congress-twitter-archive-119698.html>. If you don't have time to wait around for the Library of Congress to get its act together, you can use Twazzup and Topsy to search Twitter.

If you have the opposing party's cell phone bill, you may be able to derive information about the individuals called from that number by entering the cell phone numbers into the search bar on Facebook's main page. If that phone number is associated with a Facebook profile, and the profile has relatively lax security settings, your search will find that profile and any information that is publicly available, which will frequently include photographs. Such a search can assist you in identifying witnesses, and the photographs may contain metadata. This is a primitive form of aggregation.

If your client and the opposing party remain Facebook friends (or connected via other social media platforms), there is *probably* no duty to prevent communications between represented clients, but again, there doesn't appear to be any Washington authority directly on point. Oregon State Bar Committee on Legal Ethics, Formal Opinion 2005-164 (2005). See, e.g., *Miano v. AC & R Advertising, Inc.*, 148 F.R.D. 68, 89, *approved*, 834 F. Supp. 68 (S.D.N.Y. 1993) ("[w]hen a client independently and legally secures information which is relevant and useful to his case and provides it to counsel, the attorney's use of that information is not unethical"). Also, if you script your client's communications with the opposing party, you run the risk of an ethical violation as well.

### C. Formal Discovery

#### 1. Propounding Interrogatories and Requests for Production

Appearing at Appendix A to these materials are sample interrogatories and requests for production ("RFP") of documents. These discovery requests are comprehensive in scope, and will give rise, if used unedited, to claims of overbreadth (and potentially lack of relevancy). If you have time, use a two-step process of an interrogatory asking the party to identify all social media accounts and dates of use, followed up by a targeted RFP seeking the relevant material (for example, social media use from the last year only). To avoid getting into a fight about the definition of "social media," consider limiting the first interrogatory to specifically identified social media, e.g. Facebook, Twitter, Instagram, and LinkedIn.

Although some courts have compelled the production of *passwords* to social media sites as a part of the discovery process, such a request is fairly intrusive and not recommended as a first-line request. *Compare Howell v. The Buckeye Ranch, Inc.*, 2013 WL 1282518 (S.D. Ohio Oct. 1, 2012)(request for plaintiff's usernames and passwords for all social media sites overbroad when plaintiff's emotional state at issue) *with Zimmerman v. Weis Markets*, 2011 WL 2065410 (Northumberland County Ct. of Common Pleas May 19, 2011)(production of plaintiff's usernames and passwords compelled when extent of plaintiff's impairment/scarring from a motorcycle accident at

issue). “To enable a party to roam around in an adversary’s Facebook account would result in the party to gain access to a great deal of information that has nothing to do with the litigation and \* \* \* cause embarrassment if viewed by persons who are not ‘Friends.’” *Trail v. Lesko*, No. GD-10-017249, 2012 WL 2864004 (Allegheny County Court of Common Pleas July 3, 2012).

Note that it is extremely simple to request in discovery that a party produce the entire contents of his or her Facebook account. To overcome objections that downloading or printing Facebook content is cumbersome, you can incorporate into your discovery request a reference to Facebook’s simple instructions for downloading all account content. Because the response is likely to be voluminous, give some thought to an instruction that the production be made in digital format. These instructions are included in the sample discovery requests included at Appendix A to these materials. Take note of *Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387 (E.D. Mich. 2012), in which the court held that a “request for the entire Facebook account, which may well contain voluminous personal materials having nothing to do with this case, is overly broad.”

Twitter has a similar procedure for downloading one’s own tweets, and those instructions are included in the sample discovery requests as well.

If the party’s public social media information is not helpful, but you have reason to believe that relevant information may be shared to a more restrictive audience on the pertinent social media, screenshots provided by cooperative witnesses or deposition testimony from witnesses may lay a foundation to compel production of private social media material by the party. See *Thompson v. Autoliv ASP, Inc.*, No. 2:09-cv-01375-PMP-VCF, 2012 WL 2342928 (D. Nev. June 20, 2012). Thompson was involved in an automobile accident and suffered serious injuries. She asserted that she suffered a range of injuries and damages, including: ongoing medical treatment, therapy, a lost scholarship, the loss of ability to play the violin, emotional distress, depression, emotional volatility. Among other defendants, she sued the seatbelt and airbag manufacturers. One of the defendants found wall posts and photographs from plaintiff’s Facebook page undermining her claims. Defendant sought everything from plaintiff’s Facebook and MySpace account (wall posts, photographs, and messages from April 2007 to the present). In response, plaintiff provided only a redacted copy of her Facebook account history and a few photographs, and defendant moved to compel. The court ordered plaintiff to disclose (to defense counsel only) all information from her Facebook and MySpace accounts in an electronic storage device along with an “index of redacted social networking site communications.” See also *Bass v. Miss Porter’s School*, 2009 WL 3724968 (D. Conn. Oct. 27, 2009), in which the court after an *in camera* inspection determined that plaintiff had withheld relevant Facebook material, and consequently ordered production of her entire Facebook page. In other words: it’s always the coverup.

## 2. Objecting to Interrogatories and Requests for Production

The objection that is most likely to be successful in response to a request for social media discovery is that of overbreadth/burdensomeness. In the interesting case of *Brogan v. Rosenn, Jenkins & Greenwald, LLP*, 28 Pa. D & C 5<sup>th</sup> 553 (Lackwanna County Common Pleas 2013), plaintiffs Thomas and Wendy Brogan brought claims against their legal counsel and abstracting and title insurance companies for damages arising from the alleged failure to identify a recorded easement before their purchase of real property. Defendant Conestoga Title Insurance Company (“Conestoga”) denied that the Brogans had asserted a valid title defect claim. The Brogans moved to compel access to the Facebook login name, user name and password for a paralegal in Conestoga’s claims department. The Brogans had learned during a deposition of a former Conestoga employee that he had communicated via Facebook with the paralegal regarding his deposition subpoena, who had recommended that he contact Conestoga’s counsel to discuss the title insurance claim in advance of his deposition. Conestoga produced four Facebook messages exchanged between its paralegal and its former employee relative to his deposition, but refused to provide the Brogans with access to her Facebook account user name and password. The Brogans argued that they were entitled to full access to the paralegal’s Facebook account because of “irreconcilably inconsistent” deposition testimony by the paralegal and former Conestoga employee.

Conestoga objected on the grounds that the discovery request was overly broad and that it sought information that was protected by a general right of privacy. The court rejected any right of privacy (this objection almost never works), and found that social media content is discoverable where the moving party makes a “threshold showing of relevance by articulating some facts, gleaned from the publicly available portions of the user’s social networking account, which suggest that pertinent information may be contained on the non-public portions of the member’s account.” The court denied the Brogans’ motion, however, finding that the threshold showing had not been made. “While a limited degree of ‘fishing’ is to be expected with certain discovery requests, parties are not permitted to ‘fish with a net rather than a hook or a harpoon.’” [Citation omitted.]” Accord, *Palma v. Metro PCS Wireless, Inc.*, 18 F.Supp.3d 1346, 1347 (M.D. Fla. Apr. 29, 2014)(declining to order disclosure of all of plaintiff’s social media posts on grounds that request was too broad and not tailored to be reasonably calculated to lead to the discovery of admissible evidence).

A relevance objection can occasionally work (honestly, almost anything can lead to the discovery of admissible evidence in a family law case). In an employment discrimination case in Tennessee, the plaintiff sought damages for harassment and discrimination based upon plaintiff’s race and a hostile work environment. Defendant filed a motion to compel the production of Facebook and/or other social media data. The court found that the defendant lacked “any evidentiary showing that Plaintiff’s public Facebook profile contains information that will lead to the discovery of admissible evidence.” *Potts v. Dollar Tree Stores*, No. 3:11-cv-01180, 2013 WL 1176504 (M.D. Tenn. Mar. 20, 2013). In *McCann v. Harleysville Insurance Co. of New York*, 78 A.D.3d

1524, 910 N.Y.S.2d 614 (App. Div. 2010), Harleysville requested access to plaintiff Kara McCann's Facebook account to search for evidence regarding whether she had sustained a serious injury as the result of an automobile accident. In moving to compel discovery, Harleysville could not cite to any information on the public portions of McCann's Facebook page that arguably contradicted her claims. The appellate court therefore affirmed the trial judge's denial of the discovery motion, finding that Harleysville "essentially sought permission to conduct a 'fishing expedition' into plaintiff's Facebook account based on the mere hope of finding relevant evidence." However, court reversed the trial judge's entry of a protective order in favor of McCann, finding Harleysville was not barred from seeking access to her Facebook page in the future if circumstances warranted that discovery. The difference between *McCann* and a case like *Zimmerman, supra*, was the existence of some evidence suggesting that more was to be had.

There is an interesting Florida case in which the plaintiff in a slip-and-fall case was noted to have 1,285 photographs on her Facebook account immediately before her deposition, but only 1,249 photographs two days after her deposition. On that basis the court ordered production of all photographs posted to the plaintiff's account from two years before the accident to the present day (even when photographs are private, the number of photographs can be visible to the public). *Nucci v. Target Corporation*, 162 So. 3d 146 (Fla. Dist. Ct. App. 2015).

What really *shouldn't* work is an objection made purely on privacy grounds, although this might be successful if your judicial officer is totally unfamiliar with social media, and you provide a detailed argument based on the providers' descriptions of the privacy settings used by your client. "Indeed, as neither Facebook nor MySpace guarantee complete privacy, Plaintiff has no legitimate reasonable expectation of privacy \* \* \*. Thus, when Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy. As recently set forth by commentators regarding privacy and social networking sites, given the millions of users, "[i]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking." *Romano v. Steelcase, Inc.*, 30 Misc. 3d 426, 907 N.Y.S.2d 650, 656 (N.Y. Sup. Ct. Suffolk County 2010).

It's probably not a good idea procedurally to request *in camera* review, only because the volume of material is likely to be very high, and judges don't have time for all that. More common is the approach in *Holter v. Wells Fargo and Co.*, 281 F.R.D. 340 (D. Minn. 2011), in which the court ordered plaintiff Holter's counsel to review her private social media accounts, identify any relevant material, and produce it to defendant's counsel in discovery. The court found that information on Holter's social media site was potentially relevant to her liability and damage claims, but declined to allow Wells Fargo to have unfettered access to those accounts. "Just as the Court would not give defendant the ability to come into plaintiff's home or peruse her computer

to search for possible relevant information, the Court will not allow defendant to review social media content to determine what it deems is relevant.” *Id.* at 344.

### 3. Subpoena Problems

Congress passed the federal Stored Communications Act (“SCA”) because “the Internet presented a host of potential privacy breaches that the Fourth Amendment does not address.” See *Quon v. Arch Wireless Operating Company, Inc.*, 529 F.3d 892, 900 (9th Cir. 2008). The SCA governs the circumstances under which electronic communication service (“ECS”) providers and electronic storage providers may disclose customers’ data. It provides that whoever (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) 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 shall be punished as provided in subsection (b) of this section. 18 U.S.C. § 2701.

- The SCA precludes certain “providers” of communication services from divulging private communications to certain entities and individuals.
- The SCA defines an ECS as “any service that provides the user thereof the ability to send or receive wire or electronic communication.” 18 USC §2510[15].
- An ECS provider is only prohibited from divulging “the contents of a communication while in electronic storage by that service.”
- “Electronic storage” is defined as “any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof” or alternatively “any storage of such communication by an [ECS] for purposes of backup protection of such communication.”
- The SCA defines a remote computing service (“RCS”) provider as one engaged in “the provision to the public of computer storage or processing services by means of an electronic communications system.”
- RCS providers are prohibited from “knowingly divulg[ing] to any person or entity the contents of any communication which is carried or maintained on that service.”

Ordinarily a party has no standing to move to quash a subpoena issued to a nonparty unless the objecting party claims some personal right or privilege with regard to the information sought. Under the SCA, however, the party has a personal right with regard to stored emails and other electronically stored information. See *Crispin v. Christian Audigier*, 717 F. Supp. 2d 965, 974 (C.D. Cal. 2010) (discovery sought from Facebook, MySpace, and others).

The majority of courts hold that internet service providers and social media websites are ECS providers bound by the SCA to not produce postings and emails of their subscribers/ registrants in response to a civil subpoena. Instead, the party seeking discovery must use Rule 34 requests to the opposing party to obtain the postings.

In *Crispin v. Christian Audigier, supra*, 717 F. Supp. 2d at 97, the court quashed defendants' subpoenas duces tecum on third-party businesses, including Media Temple, Facebook, and MySpace, because these social media sites were considered electronic communication services (ECS) under the SCA. The court held that the social media sites were ECS providers under the SCA with respect to Wall posting and comments and that such communications were electronic storage and inherently private (!). In the alternative, the court held that Facebook and MySpace were RCS providers under the SCA with respect to Wall posting and comments. Therefore, Facebook and MySpace could not divulge the contents of any communication carried or maintained on that service (for RCS providers) nor divulge the contents of communication in electronic storage (for ECS providers). The court quashed subpoenas to Media Temple, Facebook, and MySpace to the extent that they sought private messaging. With respect to the subpoenas seeking Facebook wall posts and MySpace comments, the court vacated the lower court's decision for an insufficient evidentiary record regarding privacy settings of the social media accounts at issue. This decision has been sharply criticized as applying outdated law to new technology.

You should also note that companies such as Facebook are not Washington corporations, and Facebook in particular requires either a valid federal subpoena or a subpoena domesticated in California (which is a pain) and personally served on Facebook. Facebook's registered agent for service of process is: Custodian of Records, Facebook, Inc. c/o Corporation Services Company 2730 Gateway Oaks Drive, Suite100, Sacramento, CA 95833.

Instagram is a wholly-owned subsidiary of Facebook. Twitter owns Vine.

To obtain social media postings of a non-party witness the best practice is to serve a subpoena on the human witness, not the social media business or ISP.

#### 4. Social Media Deposition Questions

- a. Confirm the social media accounts listed in the interrogatory answer and determine whether any other accounts exist.
- b. What is the deponent's frequency of use? What does the deponent typically do on the various sites? Post pictures/video? Do friends tag the deponent in posted images?
- c. How does the deponent access the sites (smart phone/iPad/laptop)?
- d. How many friends on each site? What are the deponent's privacy settings? Has the deponent changed his/her privacy settings? When?

- e. Does the deponent acknowledge that the host (e.g. Facebook, Twitter) can see the deponent's content? That friends can share what the deponent has posted?
- f. What does the deponent discuss on social media?
- g. Has the deponent or any friend made statements about this case on social media?
- h. Does the deponent insert captions or comments on images or videos posted?
- i. How frequently do deponent's friends comment or reply to posts?
- j. Has the deponent blocked anyone on social media? Why?

**D. CR 36 Requests for Admission.**

CR 36 provides for the service of

"written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, **including the genuineness of any documents described in the request.**"

Emphasis added. If there is no genuine dispute about the authenticity of your document, you are likely to obtain an admission to that effect. If the party fails to respond, the fact or document is deemed admitted for the purposes of this lawsuit.

**E. Social Media Evidence and the Parenting Evaluation**

In appropriate cases, you should consider providing the material that you obtain in formal or informal discovery about a party's social media use to your parenting evaluator. As Patricia Recupero, J.D., M.D., writes:

Self disclosure in computer-mediated communication (CMC) may be more candid and revealing than the evaluatee's behavior in the psychiatrist's presence, and so the evaluatee's self-presentation and appearance online may be highly relevant. \* \* \*. Research has demonstrated that psychiatric patients can and do engage in impression management to influence the outcomes of psychiatric interviews. \* \* \* Material that the evaluatee has chosen to post online can help to elucidate his preferred social impression.

Conversely, profiles posted on social networking sites \* \* \* may contain information that contradict the evaluatee's intended impression. \* \* \* [M]aterial can be posted and "tagged" online showing a person's name or identity without that person's knowledge or permission \* \* \* Such digital footprints, together with questioning during the psychiatric interview, can help to corroborate or refute the initial impression the psychiatrist forms of the evaluatee.

Recupero, "The Mental Status Examination in the Age of the Internet," 38 *J. Am. Acad. Psychiatry Law* No. 1, 15 at page 17 (2010) (this entire article is well worth examining).

As one example from another area of the law, in *Reid v. Ingerman Smith LLP*, 2012 WL 6720752 (E.D.N.Y. Dec 27, 2012), a legal secretary sued her former law firm employer for same-sex harassment and sought damages for emotional distress. The law firm obtained some private Facebook postings by showing the court that her public postings contradicted her claims of mental anguish, and these postings were undoubtedly provided to the defense medical expert.

## V. SOCIAL MEDIA AT TRIAL

The primer on the law of social media evidence is still *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534 (D. Md. 2007), in which Magistrate Judge Paul Grimm issued a 101-page order setting forth the issues and which rules and cases are applicable.

### A. Addressing Spoliation Issues

If you believe that there has been spoliation of social media evidence in your case, in addition to a request for sanctions, one strategy is to request from the Court, via vest-pocket brief or as a pretrial motion, the application of an adverse inference based on the unavailability of the evidence. “Where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.” *Henderson v. Tyrell, supra*, 80 Wn. App. at 606; *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678, 871 P.2d 146 (1994); *Pier 67 v. King County, supra*, 89 Wn.2d 379 at 385-86.

However, keep in mind that in another recent case, “The trial court erred in concluding that Washington has recognized a general duty to preserve evidence; it has not. For that reason, and because only intentional spoliation logically supports an adverse inference, the trial court erred when it ruled in limine that it would admit evidence and allow defense argument in support of such an inference.” *Cook v. Tarbert Logging*, 190 Wn. App. 448, 451, 360 P.3d 855, 857-58 (2015).

### B. Offering Social Media Evidence

To authenticate a Facebook (or other Internet) posting, the proponent must show circumstantial indicia of authenticity. Another means of authentication can occur when an opponent fails to deny the authenticity of the posting offered as evidence. A third means of authentication is where the Facebook posting was produced by the opponent. Other relevant factors for authentication include the length of time the posting was up, whether the posting is still up, whether the posting was posted elsewhere, and whether the posting is up elsewhere. *Perfect 10, Inc. v. Cyberspace Ventures, Inc.*, 213 F. Supp. 2d 1146, 1153-54 (C.D. Cal. 2002).

Just because something is found on social media, and you get it admitted, doesn’t mean that the court will accept it as probative. In the unpublished case of *Marriage of Larsen*, No. 43025-8-II (Wa. Ct. App. Div. 2 2013) husband, who was self-

represented at trial, introduced printouts from wife's Facebook page to establish that wife's actual income from her new career as a massage therapist was higher than reported. The court admitted and considered the evidence, but did not find it persuasive. A succinct discussion of the role of Facebook in modern life and the issues invoked by requests for Facebook discovery can be found in an unpublished decision from a rural Pennsylvania county, *Largent v. Reed*, No. 2009-1823 (Nov. 7, 2011, Court of Common Pleas of the 39<sup>th</sup> Judicial District of Pennsylvania—Franklin County Branch) (“[o]nly the uninitiated or foolish could believe that Facebook is an online lockbox of secrets”).

### C. Objecting to Social Media Evidence

One method to deny authenticity is to claim the posting is just a rumor, innuendo and misinformation, as described in *St. Clair v. Johnny's Oyster and Shrimp, Inc.*, 76 F. Supp. 2d 773, 774-775 (S.D. Tex. 1999) (“any evidence procured off the Internet is adequate for almost nothing”). The usual rules against the admission of hearsay and character evidence continue to apply.

Another method is to claim that the posting was made from a “spoofed” account actually created by the opponent or a malicious third party, or that a legitimate account has been hacked. Much of the case law has resulted from criminal cases, where evidentiary standards are more rigorous than in family law cases. In *State v. Eleck*, 130 Conn. App. 632, 23 A.3d 818 (2011), the defendant, who was charged with assault, attempted to impeach a witness who testified against him. According to the witness, she had not communicated with the defendant since the assault; to impeach her testimony, the defense offered Facebook messages to show she had indeed communicated with the defendant. The witness then claimed that she did not author the messages, as her Facebook page had been hacked and she was not able to gain access. Based on the witness’s denial, the court found that the defense had not adequately authenticated the messages and thus they were inadmissible.

In *Griffin v. State*, 19 A.3d 415 (Md. 2011), MySpace evidence from a witness, Ms. Barber, was examined: “[T]he picture of Ms. Barber, coupled with her birth date and location, were not sufficient “distinctive characteristics” on a MySpace profile to authenticate its printout, given the prospect that someone other than Ms. Barber could have not only created the site, but also posted the ‘snitches get stitches’ comment. The potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user leads to our conclusion that a printout of an image from such a site requires a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site in order to reflect that Ms. Barber was its creator and the author of the ‘snitches get stitches’ language.” The majority opinion somewhat perversely suggested ways that, upon retrial, the prosecutor could have authenticated the profile, for example by calling Ms. Barber herself as a presumably hostile witness.

## **VI. CONCLUSION**

In some ways, the more things change, the more they stay the same. Clients and their opponents will continue to behave badly in ever-more-novel ways; the lawyer's job, as always, is to remain alert to the evidence to evaluate the case and to counsel the client as best one can in the light of facts beyond change.

## Appendix A

### SAMPLE INTERROGATORIES

1. Please identify any home or other e-mail accounts (including those associated with social media sites, e.g., jane.doe@facebook.com) that you maintained or used during the entire time that you claim is relevant to this case, including a listing of the specific e-mail addresses for all such accounts, when they were first established, and if they have been terminated, the date of termination.
2. Please identify any home or other Instant Messaging ("IM") applications or services (e.g., AOL Instant Messenger, Yahoo Messenger, MSN Messenger, Google Chat, Facebook Messenger, etc.) that you maintained or used during the entire time that you claim is relevant to this case, including a listing of the specific IM addresses or screen names for all such accounts, when they were first established, and if they have been terminated, the date of termination.
3. Please identify any chat rooms or social networking web-sites with which you maintained an account or used during the entire time that you claim is relevant to this case, including a listing of each such account, when it was first established, and if any has been terminated, the date of termination;
4. Please identify any Google+, MySpace, Facebook, Twitter, Meetup.com, Orkut, Flickr, Gather.com, Tumblr, Windows Live Spaces, MSN Spaces or similar social networking accounts that you maintained or used during the entire time that you claim is relevant to this case, including a listing of the specific screen names for all such accounts, when they were first established, and if they have been terminated, the date of termination.
5. Please identify any LinkedIn, Monster.com, CareerBuilder.com or similar job listing or professional networking accounts you maintained or used during the entire time that you claim is relevant to this case, including a listing of when they were first established, and if the account has been terminated, the date of termination;
6. Please identify any blogging or wiki provider or similar accounts that you maintained or used during the entire time that you claim is relevant to this case, including a listing of the specific screen names for all such accounts, when they were first established, and if the account has been terminated, the date of termination;
7. Please identify all personal ads you have placed on-line or in print, including a listing of where the ads were placed and when;
8. Please identify all online and internet personas or identities that you have assumed since [date], including a listing of all such identities or personas, the date each such identity or persona was used, the purpose for which each was used, and the names of the websites or services at which each such identity or persona was used.

9. Please describe any changes you have made to your privacy or other account settings, and describe any content that you have deleted or erased after [date].
10. For each of the websites and or services listed below, identify your usernames(s), the email address(es) associated with your account, and the approximate date you joined the website or service and, if you no longer participate in that website or service, the date you ceased participation. If you have never joined one of more of the listed websites or services, for each such website or service, expressly state that you have never joined that particular website or service:

[Then list social media sites of interest]

#### SAMPLE REQUEST FOR PRODUCTION

1. Please provide copies of all instant messaging logs or transcripts associated with any accounts identified in response to Interrogatory No. \_\_\_\_.
2. Please provide copies of any contributions you have made to any online forum or Website or online service associated with any accounts identified in response to Interrogatory No. \_\_\_\_.
3. Please provide copies of any documents or electronically stored information you have created and/or stored using any third party online service provider, including, but not limited to, Google+, MySpace, Facebook, Twitter, Meetup.com, Orkut, Flickr, Gather.com, Tumblr, Windows Live Spaces, MSN Spaces, LinkedIn, Monster.com, CareerBuilder.com, blogs, or wikis, associated with any accounts identified in response to Interrogatory No. \_\_\_\_.
4. Please provide an electronic copy of your complete Facebook history, including any and all profile information, postings, pictures, and data available pursuant to Facebook's "Download Your Own Information" feature.
5. For each Facebook account maintained by you, please produce your account data for the period of \_\_\_\_\_ through present. You may download and print your Facebook data by logging onto your Facebook account, selecting "Account Settings" under the "Account" tab on your homepage, clicking on the "learn more" link beside the "Download Your Information" tab, and following the directions on the "Download Your Information" page. [from *Held v. Ferrellgas, Inc.*, Case No. 2:10-cv-2393-EFM-GLR (D. Kan.)]
6. For each Twitter account maintained by you, please produce a .zip file of your account data for the period of \_\_\_\_\_. To download and view your Twitter archive: Go to your Account Settings by clicking on the profile icon at the top right of the Twitter home page and selecting Settings from the drop-down menu. "Click Request your archive." When your download is ready, Twitter will send you an email with a download link to the confirmed email address associated with your

Twitter account. Once you receive the email, click the “Go now” button in the email to log in to your Twitter account and download a .zip file of your Twitter archive. Please note: Twitter states that it may take a few days to prepare the download of your Twitter archive.

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## CHAPTER TEN - A

### RECREATIONAL MARIJUANA AND IMPACT ON FAMILY LAW

June 2016

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**RACHEL L. FELBECK** opened her solo practice in May of 1999 after working for five years primarily in family law. She received her B.A. in 1983 from University of Delaware. rachel graduated Cum Laude from Seattle University School of Law in December, 1994. In May, 1999 she opened her solo practice. Rachel specializes in family law including mediation, collaborative divorce, custody, child support, maintenance, settlement facilitation and related matters. Recently Rachel has been involved in several divorces that include issues relating to medical and recreational marijuana as well as mediation for recreational business disputes.

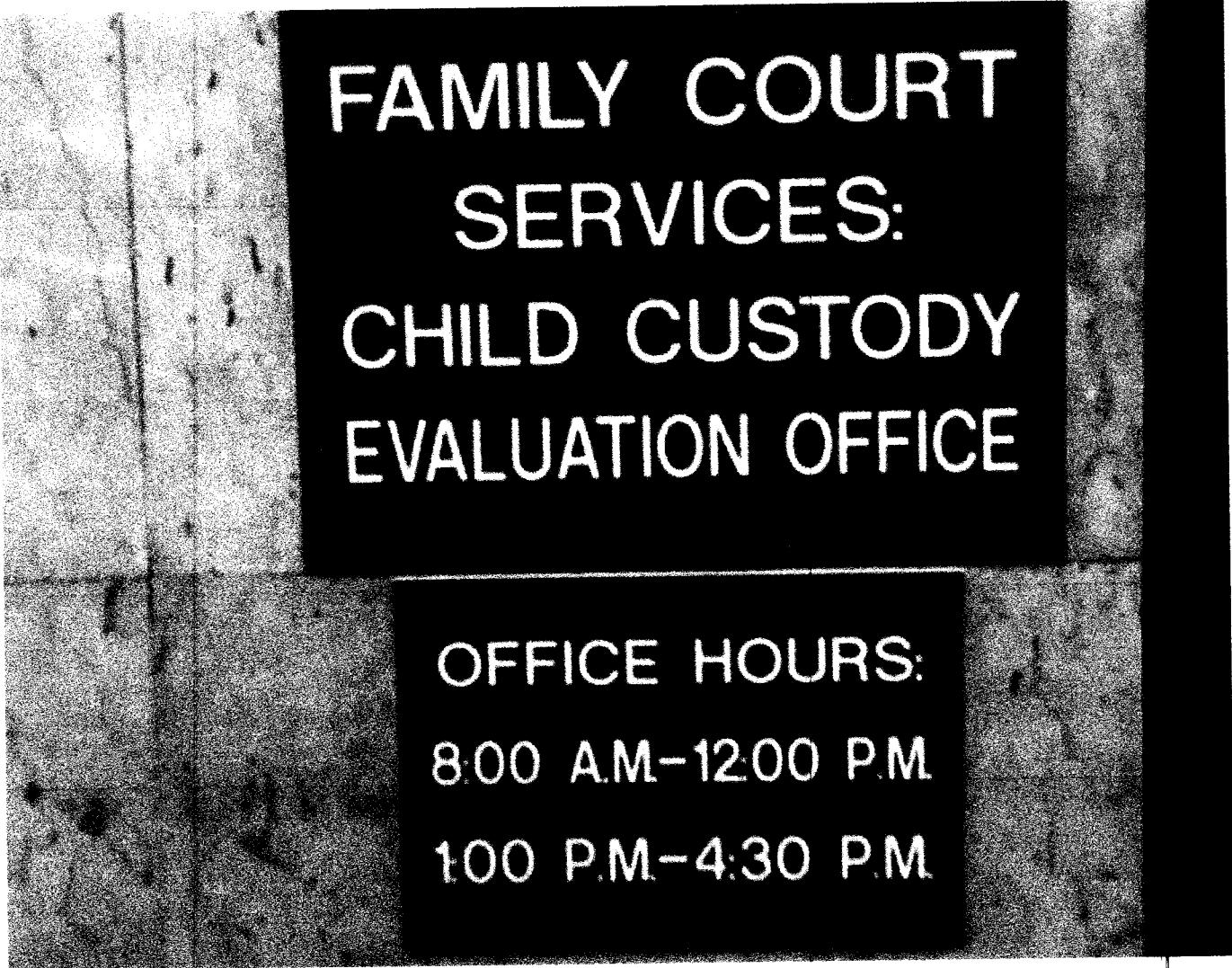
# **More Moms Losing Kids in Family Court Drug Wars**

By: **Cynthia L. Cooper**

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Cynthia cooper



# FAMILY COURT SERVICES: CHILD CUSTODY EVALUATION OFFICE

OFFICE HOURS:  
8:00 A.M.-12:00 P.M.  
1:00 P.M.-4:30 P.M.

*Credit: lewisha1990 on Flickr, under Creative Commons*

(WOMENSENEWS)-- At the same time that Colorado opened its doors to the legal sale of marijuana on Jan. 1 and New York Gov. Andrew Cuomo proposed loosening marijuana laws, there's a different reality for many pregnant and parenting women caught consuming drugs.

In the curtained world of family courts and child service protection agencies, women across the country face punishments for drug use. These include removal of children to foster care, repeated visits by government employees, home searches, mandated drug tests, unwanted court appearances and even forced detention. These reprisals may be noncriminal, but they are nonetheless bruising and burdensome.

While the public appetite for drug reform has grown, the situation for women with children has worsened in the past decade, in part because of a little-noticed law from the George W. Bush administration that redefines child harm from parental drug use. A parent's use of drugs and even mere possession can be considered "child endangerment" under sweeping language, peppered with a dictionary of newly crafted terms such as "substance-exposed infants" or SEIs and "drug-endangered children" or DECs. Those most affected are the economically distressed and women of color.

"There is very little attention to how the drug war is perpetrated in the child welfare system," said Emma Ketteringham, managing attorney of the Family Defense Practice of The Bronx

Defenders, a nonprofit organization that represents parents, at a panel in New York sponsored by the Open Society Foundations in November. "Unless you are on the receiving end of child welfare, you might not know what happens."

In many cases, pregnant women or newborns are tested for drugs without consent in public hospitals and a positive test can trigger a report to child protection services. That, in turn, can spur child welfare officials to start an investigation into child neglect. Advocates compare "test and report" of pregnant and parenting women to the biased profiling of "stop and frisk" by police on the streets of New York City.

The child welfare system is designed to buffer children from unfit parents, but when drug use is alleged Ketteringham said "unfitness is presumed."

## **Family Court Cases**

Family courts, found in 38 states, hear allegations of child neglect. Because they are civil law proceedings, parents are not afforded the same protections as defendants in criminal court. Mothers may encounter closed hearings,

a lack of appointed lawyers and scant scientific testimony. A "preponderance" of evidence legal standard is also harder to fight than the criminal law burden of "beyond a reasonable doubt." More difficult, neglect claims commonly proceed without any formal hearing. Susan K. Dunn, legal director at the American Civil Liberties Union of South Carolina, said that "the classic way of dealing with drug use is by bringing a 'safety plan' and it happens under the radar. Social services says, 'We're going to take the baby,' so moms comply. People's lives are in turmoil."

One of Dunn's clients was ordered into drug treatment without any consideration given to her employment and child care needs. Another woman who tested positive was dogged by a caseworker demanding drug tests after a single positive marijuana screen during childbirth, she said.

"It's not the case that only poor women have substance abuse issues, but middle- and upper-income women have an environment where they are more protected," said Dunn.

In Jackson, Wisc., about 30 miles from Milwaukee, Alicia Beltran was subjected to

noncriminal detention after she confided to a prenatal counselor that she had recently kicked painkillers. The 28-year-old was brought to family court in shackles on July 18, 2013. Without representation, she was ordered into a drug treatment program for three months under a state law that gives the court jurisdiction over a fetus "in need of protection" because of the mother's drug use.

National Advocates for Pregnant Women in New York worked with Wisconsin lawyer Linda S. Vanden Heuvel to file a still-ongoing challenge to the law in federal court.

Women's behavior became fresh targets with the 2003 founding of the National Alliance for Drug Endangered Children. Located in Westminster, Colo., it now has affiliates in 25 states that advocate for policies to intervene and treat children (DECs) who are at risk of harm from poor care by a substance-abusing parent.

The DEC movement follows the passage of the Child Abuse Prevention and Treatment Act on prenatal drug exposure and potential harm to children by exposure to any presence of illegal drugs. Under the 2003 law, states are required to have procedures for referring "substance-

exposed newborns" or other "drug endangered children" to child protection services or face loss of child abuse prevention funding.

The number of parents or children who are affected is unknown. The National Survey on Drug Use and Health for 2002-2007 found that 3 percent of children "lived with a parent who was dependent on or abused illicit drugs." In 2012, the Children's Bureau identified 64,484 children in 34 reporting states as "children with a drug abuse caregiver risk factor."

## **Crack Myths Fuel Legislation**

The drug-endangered children legislation developed "because of concern about infants affected by their mother's use of crack cocaine," according to the Children's Bureau of the federal government.

But at the same time, medical studies, including a major 2002 analysis by Dr. Deborah Frank of Boston University School of Medicine, disproved the initial dire predictions about the effects of crack on newborns, showing that alcohol and tobacco have more severe long-lasting effects.

Other literature declares that the movement started to combat methamphetamine labs.

Whichever genesis, the rules on drug-

endangered children continued to grow to include "children that faced dangerous exposure to any type of drug," according to the Office of National Drug Control Policy.

A Justice Department interagency task force included in its definition any child who "lives in or is exposed" to illegal drugs, including pharmaceuticals, when the child is "at risk" of experiencing harm "possibly resulting from neglect."

State laws have further cordoned mothers.

Twelve states and the District of Columbia now equate mere exposure of newborns to drugs as child abuse or neglect, according to the Children's Bureau. Eleven states consider exposing children to the possession or distribution of drugs to be child endangerment. The Obama administration's Office of National Drug Control Policy states on its website, "The DEC movement has rescued thousands of children and led to the development of numerous programs that have coordinated the efforts of law enforcement, medical services and child welfare services to ensure that drug-endangered children receive appropriate attention and care."

But, it notes, "a cohesive and coordinated" federal response was lacking.

Sara Arnold, an advocate for the legalization of marijuana, is a fierce critic of the DEC movement, which she said fails "to draw any distinction between use and abuse." The co-founder of the Family Law and Cannabis Alliance in Massachusetts, Arnold said that DEC activism in Colorado resulted in the refusal to provide specific protections for parents in the legalization of marijuana.

"Coloradan parents, even those who need marijuana as medicine, can and do face investigations, service plans and removal from the home solely for cannabis use," said Arnold. "DEC are the same old drug warriors trying to move the goalposts."

*Cynthia L. Cooper is an independent journalist in New York who frequently writes about women's rights and human rights.*

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# Marijuana & Child Custody

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## By Sara Arnold a.k.a. Sahra Kant

Originally published in Mass Grass.

One of the most common types of cases heard in family court — and one of the most bitterly fought — is child custody. Spend a single day in one court room at any courthouse in Massachusetts or elsewhere in the country and you'll hear a whole host of allegations made by parents or their legal representatives about each other. Often these accusations have to do with cannabis for medicinal or recreational use. This happens every day.

When one parent (or their attorney) brings up the other's marijuana use, the individual judge assigned to their case has substantial discretion in how to respond. A judge can disregard it as a non-factor; some do. But cannabis use of any kind has resulted in forced cessation of medicine, random and regular drug testing, coerced drug rehabilitation programs, limited or discontinued visitation time for the non-custodial parent or only supervised visitation, the non-using parent granted sole custody, and reported to Child Protective Services (CPS) by family court. Even if a parent's cannabis use never comes up in court, raising the topic in pre-hearing meetings between the parties' lawyers can be a successful threat to push a parent's capitulation on sole or shared custody, child support, true allegations of domestic violence, or other factors of these cases.

Those are the cases where both parents are battling over custody of their children. Sometimes there is only one parent, grandparents, or other family members who are fighting to be the custodial parent or guardian against the state, when the children are already languishing in foster care. Anyone seeking legal custody of a minor is assessed for suitability and appropriate environment by a team from CPS. If the social workers or their supervisors feel that there are issues which counter a child's best interest, they can deny custody or require changes to be made prior to placement. These decisions can be appealed to family court.

Unfortunately, as you know from my previous columns, medicinal or recreational cannabis use is considered a huge problem by \*both\* CPS and in family court for biological parents. It also applies to guardians, foster parents, adoptive parents, and anyone seeking temporary or permanent custody of children. This is an issue in states with medical and / or decriminalization laws — such as Massachusetts, where Chapter 94C clearly states that possession up to an ounce of marijuana on one's person, in one's home or in the body cannot be penalized by any instrument of the Commonwealth, and gives the explicit example of that being applied to foster or adoptive parents. This even includes states where cannabis is now legal.

Billy Fisher is a father who recently moved from Idaho to Washington state with his girlfriend and her 10-year-old son to fight for custody of his baby daughter Lilly. He is a legal medical marijuana patient for medically-documented intractable back pain

with bulging discs in his lower spine and hips from a fall several years ago. His girlfriend is Serra Frank, the founder of Moms for Marijuana International as well as co-founder of Compassionate Idaho, Idaho NORML & the Idaho HOPE Fest. It's understandable that Billy believed CPS and family court was there to help and protect his daughter. He knew his daughter was in an unsafe and instable environment and his first priority was Lilly's safety. In desperation, he sought help from them in the form of an emergency removal of baby Lilly from her mother's home. He thought his daughter would soon be home with her family. At the time of writing, Lilly has been in foster care just shy of four months.

Billy willingly agreed to and passed all CPS assessments. He agreed to accept services like counseling and classes, if he must do them to be able to be with his daughter. The only thing CPS and family court have a problem with is his medical marijuana use, about which he has been upfront and honest, in a state where it is legal and understood that use ≠ abuse. He's been drug tested several times and CPS demanded that he submit to a 30-day inpatient substance abuse treatment program to be considered for custody of Lilly. In addition to the unacceptability of this requirement on a medical marijuana patient in a fully legalized state, it would cause the loss of his job, risk his family's housing, and financial catastrophe for his and Serra's family. Billy bravely said no.

The court in Spokane won't allow use of any studies on cannabis because they are "hearsay", even DEA Judge Francis Young's 1988 ruling on lack of toxicity. Only expert testimony given specifically for this case will be accepted. Billy has also been told the judge will make him stop using his medicine regardless of being a patient with a Washington state medical marijuana card. But Washington's medical marijuana statute, part RCW 69.51A.120 does cover this, and clearly states "parental rights and residential time [are] not be restricted." Child Protective Services and family court do not seem to care about the law.

For most of his case, Billy had a state-assigned public defender who failed miserably to advocate for his client or even assist his client in navigating the complicated family court system. Due to his girlfriend's activism, he has access to something most parents in his position do not — a cannabis community who helped him get a private, pro bono legal team and advisors. This is another strong step towards final success in the fight for Lilly. It's a key difference between his case and the cases of so many others who don't or can't have any publicity.

There is a similar case in Maine of a grandmother who legally uses medicinal cannabis for her back pain. After her grandchildren were removed from the home of their mother, this grandmother fulfilled all of the mandatory foster care training and home visits asked of her by CPS. She provided reports from multiple doctors who said she was capable of taking care of the kids. She had and continues to have visits at her home with the kids every other weekend, but CPS won't place the children in her custody because she uses medical marijuana. Grandma has no legal help in Maine (and no right to a public defender like in Washington state) to handle CPS bureaucracy and contest the denial of custody in family court. The children have been in state custody for almost a year, which means that a permanency hearing may soon occur to adopt out the children without the judge ever hearing about this devoted grandmother and her unyielding attempts at gaining custody of her

grandchildren.

Right now there is a medical marijuana patient in Cambridge District Court fighting their former spouse for shared custody. They are being forced by the judge to provide drug tests, have their parenting time in a supervised visitation center instead of at home or being able to take their child anywhere of their choosing, and is barely allowed to see their child after having their amount of visitation time reduce due to testing positive for marijuana. There is another medical marijuana patient in the same court who has stopped using their medicine as recommended by their doctor to be on equal footing in their custody battle, and who now also has to fight against the returning symptoms of their conditions.

Child custody injustice over cannabis use happens every single day. It has happened to people you know. It could happen to you. Marijuana reform must include family court, including guaranteeing legal protections by enforcing those that we have already won as well as future successes.

# Child Protective Services & Family Court: The Last Gasp of the War on Cannabis

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## By Sara Arnold a.k.a. Sahra Kant

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What's worse than going to jail for cannabis? Your children taken away by child protection services for it. If you're incarcerated, you receive a specific custodial sentence — which may be reduced for good behavior or perhaps even commuted — during which you are guaranteed visits with your family. You can count down to your release, which is guaranteed to occur (at least eventually, although there are collateral consequences of a drug conviction and a criminal record afterwards). If your children are removed as part of a child protective services (CPS) intervention, they are taken from your parental custody for an indeterminate amount of time, you may or may not get to see or even speak to them, they may fare badly and suffer in care, and they may be gone forever. If Americans are not careful, the last vestiges of the war on drugs will be fought in our wombs and with our children.

While well-off, financially stable "marijuana mamas" and "pot parents" have gotten a lot of media traction recently, the palpable fear among poor parents of what would happen if they were so open about their use has not. To those of us heavily involved on the child protection issue and aware of the risk we and others are taking by talking publicly about this, it can be somewhat disconcerting to see a certain class of mothers so brazenly open — as if they don't even have to think about any possible negative consequences of this publicity to themselves and their families. It's a good thing that they're coming out of the proverbial closet, but they are putting themselves at a risk they don't fully understand while doing so and unintentionally whitewashing the effect of prohibition on poor parents (especially those of color). All parents are potentially subject to anonymous child protective reports by any ordinary citizen (like a "friend", playgroup associate, neighbor, etc) or mandated reporter (such as healthcare, childcare/educational, religious, and social system professionals). Mandated reporters are people who are or might be around children while doing their jobs, and are required by law to report suspected child abuse or neglect to CPS, with penalties for not doing so ranging from loss of licensure to civil and criminal liability including fines and jail time. Some professionals may incorrectly believe they're mandated reporters. Others may not even have met the child nor seen the parent interact with them before filing a mandated report, such as

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with self-disclosed cannabis use or reading about disclosure in a patient's medical records.

Given the nature of mandated reports, it is more likely to be someone of limited means who can't afford a private school, private insurance and private hospitals, a home birth, or receives public benefits who will be facing such a traumatic intrusion into their family lives. Public schools are the source of most mandated reports. Most hospitals are mandated, by state-level misreading of federal law or hospital administrative policies, to report a postnatal mother or newborn screening positive for what is usually worded as "an addictive drug at birth" or being "substance-exposed". Those who are already in the system — SSDI/SSI, welfare, employment or independent living rehabilitation assistance — are already under a microscope and have no choice but to interact with (sometimes ill-meaning) government pencil-pushers. Several studies [] show that people of color are more likely to be both drug tested and reported to CPS.

People who can't afford to hire both marijuana and family law attorneys are more likely to have their children taken away, with few choices of marijuana lawyers because most of those deal with criminal rather than civil cases and often have no interest in civil matters or are ill-equipped to work in the highly specialized area of child welfare. Other aspects of life more likely to be found within the context of poor families such as substandard housing, food insecurity, physical and mental health issues, and a lack of a parental support network all contribute to the marks against them by poorly-trained child protective caseworkers.

Specifically for pregnant women, there is federal legislation to which states (and American territories) agree to participate in order to receive federal child welfare funds. This is called the Child Abuse Prevention & Treatment Act (CAPTA) and requires providers to report "infants born with and identified as being affected by illegal substance abuse or withdrawal symptoms" as a result of prenatal drug exposure. Federal law does not define the terms "affected by illegal substance abuse" or "withdrawal symptoms"; nor does it explain the significant difference between being "affected... as a result of exposure" and "exposed." In the spirit of bureaucracy, states are not told how this has to be implemented other than that they must have "policies and procedures" in place to notify some service providing agency — not necessarily child protective services — and an "established plan of safe care" for affected newborns. Some states pass specific laws (at least the ones which didn't already have them) and some include them in their Child Protection Services written policies or rules and regulations. This is true even though CAPTA does not direct hospitals to do anything in particular or to define a "drug-affected newborn" as abused or neglected. To receive the federal funds, a high-up state official merely has to reassure the federal government that they are complying with the Act, and the implementation is up to them.

What that means is the pregnant woman is often drug tested as a regular part of her prenatal care (arguably without adequate consent) and where a positive result guarantees neonate testing; newborn tests also occur if a mother knows her rights and declines prenatal drug testing with or without disclosure of use, "acts suspiciously" postpartum, and on a supposedly random basis. Overwhelmingly, these tests are given to babies of those of low socioeconomic status, women of color,

or similar external factors. Any positive drug test result guarantees substantiation of a child neglect report in the case of a newborn in any state, even though cannabis is not “addictive.” It counts as such thanks to its Schedule I status in the federal Controlled Substances Act. Even if the baby tests negative, a report to child protective services will often still be made if the mother has tested positive at any point during her pregnancy (including early pregnancy, from use before she knew she was pregnant). These negatives may still be deemed worth further investigation for such reasons as the mother was “acting weird in the hospital.” Acting weird? Please alert the media if you can ever figure out what is “normal” behavior after giving birth, future award-winning sociologist. In fact, data from the 1997-2004 National Survey on Drug Use & Health shows that while women may reduce their intake of cannabis when they learn of being pregnant, around 3% continue to use marijuana throughout the duration of their pregnancy. Fear of coercive and punitive child protective services policies dissuades and discourages women from seeking early (or any) prenatal care which would otherwise benefit maternal and fetal health as well as damages the relationship a woman has with her healthcare providers.

The exact terminology used differs by state, but generally to support or substantiate a report means that the allegation of abuse or neglect has been verified via CPS investigation to be accurate. In the case of newborns, a positive test result is often enough to support or substantiate (usually neglect) prior to CPS assessment of any other factors. For older children, support or substantiation is not evenly applied from state-to-state, or even by individual caseworkers in the same state. Support or substantiation of neglect or abuse results in a further determination of level of concern. Usually, this takes the form of terminology like “little to no concern”, “moderate concern”, and “high concern”; there is never the possibility of “no concern” for a substantiated allegation. This means that every positive test will at least result in an investigation and a family being made forever “on the radar” by a permanent administrative record.

It is even common for there to be false positive results on newborn immunoassay tests. One study showed that 47% of these “presumptive” tests — which test for an antibody reaction rather than a chemical one and then if affirmative assume the chemical is there — that showed an initial positive result were incorrect. In another study, even popular baby washes like Johnson & Johnsons, Aveeno, and CVS brand as well as adult products and even hospital gel hand soap regularly cause false positive results for marijuana; there is even a study saying both immunoassay and THC assay tests are unreliable. Chromatography is necessary to confirm the actual presence of (carboxy) THC, but it is expensive; most hospitals do not confirm the results of presumptive assay tests before filing a mandated report. Thus mothers who do not even use marijuana can face child protective services for it regardless. Parents who use cannabis can also have false positive results for other drugs they didn’t take. A poppy seed bagel, ibuprofen, cough medicine, or Sudafed can show positives for opiates, barbituates, cannabinoids, and methamphetamines. This even happens to our neighbors to the north: a woman in Montreal, Quebec, Canada was denied her newborn daughter for a week due to a false positive test for methamphetamine, from a drug test given to her baby solely on the basis that she

had self-reported and tested positive for cannabis that she had used early in her first trimester, prior to finding out she was pregnant. The US government has extensive standards for its Federal Workplace Drug Testing program, including split samples and confirmatory testing with very specific thresholds and collection protocols. Before denying someone a job, there are strict standards to follow; mothers facing child protection investigations don't get such benefits.

Medical use is where the class divide starts — but as with everything, does not entirely disappear, given that medical marijuana users are more likely to be noticed by the system. Even in states with existing medical marijuana laws, parents with recommendations and valid cards, and/or who are registered caregivers/cultivators (especially cultivators), find themselves at the short end of the child protection stick. "Patient registries put targets on the back of parents," says Cheyenne Weldon of Texas NORML and the NORML Women's Alliance. This is especially true when patient registries aren't legislated for limited and specific access, such as to confirm patient status, but also to federal agencies, law enforcement officials, and child protective services. Maine discontinued its patient registry due to the potential abuse of the patient reporting system against its residents.

There is almost no provision in state-based medical marijuana legislation protecting parents (and their children) from child protection services. It exists in the medical marijuana law in Washington state, but CPS continues to go after patients' families. When this has been legally clarified after legislation has been passed, such as by Michigan's Attorney General in August 2013, protections have been limited by exceptions like "creating an unreasonable danger to a minor that can be clearly articulated and substantiated". In Michigan, this legal opinion has been taken by their Kafka-esque CPS to mean any medical use in a home where there is a minor. Investigations are generally done based on allegations of neglect, using misapplication of federal law on mandated reporting, federal Department of Health & Human Services regulations or guidance, state laws covering child endangerment or "drug-exposed children", and/or written and unwritten state CPS policies & procedures.

"Drug-endangered children" is a reasonably new concept from the mid-2000s. The National Alliance for Drug Endangered Children (National DEC) grew out of collaborative local DEC efforts between law enforcement, social services, attorneys and physicians. Initially, they existed to raise awareness about and protect children from "hazardous drug environments"; namely, meth labs. They have since expanded to include all legal or illegal drugs of abuse, which they interpret to include cannabis. National DEC defines "drug endangered" to mean "children who are at risk of suffering physical or emotional harm as the result of illegal drug use, possession, manufacturing, cultivation, or distribution. They may also be children whose caretaker's substance misuse interferes with the caretaker's ability to provide a safe and nurturing environment." The organization doesn't make distinctions between types of substance nor between frequency and manner of use (such as use not necessarily equating to abuse). As a result of having come from the movement to remove children from "meth homes", they use the term "clandestine labs" to refer to any premises at which any illegal substances are manufactured or prepared. Half the states have their own DEC Alliances. Partially as

a result of DEC lobbying efforts and collaboration with lawmakers, as of July 2012, 33 states have the criminal offense of exposing a child to illegal drug activity on the books, and 11 consider exposing children to the manufacture, possession, or distribution of illegal drugs to be child endangerment. "Drug endangered children" can be applied to parents regarding babies and children of all ages. None of these DEC laws are based on any scientific, evidentiary research.

Some states are trying to pass so-called "personhood" laws to amend state constitutions redefining "persons" to include fertilized eggs, embryos, and fetuses which would then be used to apply these "drug endangered children" laws to the unborn. One state, Alabama, judicially re-wrote their DEC law to apply to fetuses from the moment of conception, using the drug endangered children legislation to create a de facto "personhood" law and advance a different political agenda; this is also being attempted in other states. These laws, in whatever form they take, would and do make zygotes — from the moment sperm meets egg — potential victims, their mothers potential perpetrators and their bodies crime scenes, and their relationship with their pregnancies under the auspices of the child protective system..

President Obama's ONDCP established the Federal Interagency Task Force on Drug Endangered Children as part of the 2010 National Drug Control Strategy. Involved federal agencies include a veritable alphabet soup of acronyms, bringing together such disparate groups as the Department of Homeland Security (DHS), Department of Education (DOE), Department of Transportation (DOT), Office of National Drug Control Policy (ONDCP), and many others. The interagency task force's first act was to develop and provide DEC training courses for law enforcement personnel, being offered this summer as a part of the 2013 National Drug Control Strategy. It defines DEC to mean "...a person, under the age of 18, who lives in or is exposed to an environment where drugs... are illegally used, possessed, trafficked, diverted, and/or manufactured and, as a result of that environment: the child experiences, or is at risk of experiencing, physical, sexual, or emotional abuse; the child experiences, or is at risk of experiencing, medical, educational, emotional, or physical harm, including harm resulting or possibly resulting from neglect...." As a consequence of marijuana's illegality at a federal level, this applies to any children living in a home where it is used or grown.

Parents are guilty until proven innocent of the allegations against them. Once they are screened-in by child protective services (or an investigation is immediately initiated without screening) — which generally occurs end of day on Fridays or over the weekend to limit access to possible helpful advocates — an investigation or assessment occurs with warrantless entry to the family home where deeply irrelevant questions are asked, including of any children old enough to privately question, and the child or children are checked for bruises. (To my knowledge, cannabis has never caused second-hand physical bruising. Or, for that matter, first-hand.) The child's pediatrician will be contacted, and if the parent is a medical marijuana patient their use may be disclosed to their child's doctor without their consent; a medical marijuana patient will also have their own doctors contacted. Technically, child protection access can be declined, but then CPS can go to a judge or police for access and may go directly to removing children from the

home; child protection services do make "emergency" removals with the assistance of police even without the necessary judge's order prior to, during or after an investigation. Here are four examples of parents who have lost their children to the state due to immediate "emergency" measures being taken:

Fredrica Ballard, a legal medical marijuana patient from Nevada, was arrested on possession with intent to distribute and child endangerment for cultivation in her home where her two pre-teens lived as well as her two adult sons who were also charged. She is a free woman, yet she hasn't had custody of her minor son and daughter kids for over two years (and they have been moved to Missouri). Based on this arrest long before his child was even conceived, the newborn daughter of Fredrica's adult son was taken into Nevada CPS custody at birth and continues to be in foster care. "I have done nothing wrong and I am fighting because it's the right thing to do", says Fredrica. "My children were taken against their will like prisoners of war. They were happy children in their family home of legal [registered] patients, with a legal grow in a locked grow room. That is not grounds for destroying my childrens' life."

In rural northern California, Daisy Bram and her husband Jayme Walsh are legal medical marijuana patients who were cultivating in compliance with Proposition 215. On September 7, 2011, Butte County police officers showed up unannounced and by trespassing to inspect their home grow. The cops agreed they were indeed in compliance with state law and left. Despite this, a SWAT team and California's child protective services (DSS) came back three weeks later on September 29th to remove their 2 sons into state custody. Daisy was also charged with felony child abuse and misdemeanor child endangerment for breastfeeding by the local District Attorney, Jeff Greeson. California DSS tried and failed to adopt out her children without parental consent. She successfully fought and won all charges and had her children returned to her, only to have the same criminal charges re-filed in March 2012 by the same DA, which continues to wind through Butte County court.

Understandably wishing to start over to the greatest degree possible, Daisy and Jayme moved their family to Tehama County. They welcomed a third little boy into their family in late 2012. In January 2013, CPS once again conducted an emergency removal from the home into state custody. The Tehama County DA Gregg Cohen and Prosecutor Alessio Larabee, filed their own charges for felony child abuse and misdemeanor child endangerment due to breastfeeding — plus felony possession, possession with intent to supply, and cultivation. This time Jayme was arrested as well, including for child cruelty, and almost half a year later continues to languish in Tehama County Jail with no trial held (much less a conviction or sentence) and a prohibitively high million dollar bail. As a likely result of standing up for her rights as a legal patient, Tehama County even took Daisy's car through asset forfeiture when she was outside the courthouse following a hearing on her case. Daisy and Jayme's three children remain in foster care and seem to have been subjected to genuine maltreatment; according to Daisy and evident by pictures she took recently during a supervised visit (never unsupervised) allowed by the court, they were "bruised, scratched, angry and not clothed appropriately" (despite Daisy having brought seasonal clothing for her boys on previous visits). Thankfully, they were moved in late May to a couple in Chico sympathetic to Daisy and Jayme, but the

children needlessly remain in limbo away from their loving parents and their family home.

Another example are the "Idaho 3", who at least now have their children back, albeit two of them are still facing criminal charges. Multiple sclerosis patient Lindsey Rinehart, her husband Josh, and friend Sarah Caldwell — all marijuana advocates and activists in Idaho with Compassionate Idaho, their local NORML chapter, and Moms for Marijuana — were on a hiking and camping trip together while their four sons, between the ages of 5 and 11, stayed at the Rineharts' home with a babysitter. During this time, a report was made by the boys' elementary school that another child had brought cannabis to school, eaten it and become ill. It did not come from the Rinehart home, but police went to their house and obtained permission from the babysitter to search, when they found Lindsey's medicine. CPS was called and all the children were subject to an emergency removal from the home and placement in foster care. Sarah's two boys were returned after a few days, but the Rineharts spent two and a half torturous weeks without their children. Unfortunately, this was predicated on cessation of Lindsey's use of a well-known treatment for her MS — her symptoms started returning while her sons were still under state control, and continue now unabated — and both Rineharts still face criminal charges. If she or Josh are charged, it is entirely possible they will face new involvement from Boise's child protection services.

Then there is the nightmare faced by the Hill family. Two-year-old Alex Hill was removed from her loving Texas home after her parents Joshua Hill and Mary Sweeney were accused of "neglectful supervision" for using marijuana in their bedroom while Alex was asleep in her own room. Alex was placed in a home by private company Texas Mentor, the subject of "114 deficiencies or violations" in the previous two years. After her parents demanded a new foster care placement due to signs of abuse they saw during visitation with their daughter, Alex was placed with the Small family by the same for-profit business. Mere months later, Sherrill Small — who with her husband had decided to be a foster parent for a source of income — killed Alex Hill by blunt trauma to the head for the transgression of having gotten herself some food and water. Sherill Small showed no remorse when interviewed by police and has now been charged with capital murder. Alex Hill was happy and safe in her parents' home regardless of her parents' cannabis use; now she is dead. All her parents can do is try to obtain justice for the little girl they will never get to see grow up.

Any parent in a position similar to these examples (of which there are many more) would rather be in jail than living with the indeterminate nature of having had child protective services take their children, whom they may or may not get to see or even speak to, who may suffer in foster care, and who ultimately may be lost permanently to state-sanctioned kidnapping or death. Child welfare advocates like the National Coalition for Child Protection Reform (NCCPR) think removing children from the family home for cannabis use is overkill given the nature of the drug in question and a bad idea from the perspective of child welfare given the generally poor outcomes for children in foster care. "The stress any [new or experienced] mother faces... could be compounded by a child protective services worker coming the door, poking and prying into the home asking mom about the most intimate aspects of her life,

questioning friends, neighbors and relatives. All because, like a great many Americans, mom smoked pot... the child could be placed at risk of foster care", says Richard Wexler of NCCPR. "The harm should be obvious: Children traumatized by needless investigations, courts overloaded with ridiculous cases, and in some cases, children even forced into foster care. There's also the time, money and effort wasted on these cases that is stolen from finding children in real danger... CPS, and judges, need to be far more careful about weighing the alleged harm to the child of staying in a loving home where mom smokes marijuana, against the harm to that child of taking him or her away. [The] heartbreaking truth is that some of these children are no better off in the care of the state than they were in the hands of abusive and negligent parents. So imagine how much worse off the children are when their parents were not, in fact, abusive or negligent in the first place."

Even in post-legalization Colorado, a medical marijuana user was investigated by the state's child protective agency. But for her and many like her throughout the US, a neglect allegation at a child's birth is always supported as valid, even if it is of "little or no concern" and no further action is required. If that is the case, the parent's name still goes on a central state registry that may be accessed by both DCF and law enforcement — forever. Again, the horrifying implication there is indeed that using cannabis during pregnancy is unquestionably evidence of neglect. This is despite some courts having decided that isn't the case, such as in DYFS v. A.L. in the New Jersey Supreme Court and Jones v. Jones in New York (the latter of which also ruled that cannabis in the home is not by itself evidence of neglect for older children). Even if the allegation is for an older child and is proven to be entirely unsupported, it is still kept on file at state CPS.

Continued involvement by child protective services in a family's life is guaranteed if there is any moderate or serious concern, and incidentally, is often threatened by caseworkers in early contact with a parent on their radar. If that happens, CPS forms a "treatment" plan which may include: regular and/or random drug testing, a coerced drug treatment program, coerced prescription medication of the physical or psychiatric varieties, forced cessation of breastfeeding, or forced cessation of cannabis (even if used medicinally) — and the kicker there is that if doing so causes a health crisis such that the pregnancy is put at risk, or causes the parent to be legitimately unable to care for any existing children, that can be considered a breach of the plan. Parents may be forced to attend parenting classes even when there is no evidence that their parenting is impaired, or anger management classes when they express frustration at the unjust interference in their family life. The specter of non-emergency removal always hangs over any parent in these circumstances, who may be considered by the caseworker, at any time, to have failed in their parental duties and in their service plan with child protection services. Anything other than total submission and contrition is considered noncompliance with the plan.

There is no "double jeopardy" in a child protective services investigation. They can and will keep coming for as long as anonymous or mandated reports are made to CPS about the parent, or as long as they keep giving birth in a hospital environment, despite any past allegations of neglect being declared "entirely unsupported" or "supported" (solely because of existent cannabis use and nothing else), but of "little to no concern." Greater intervention becomes increasingly likely and more intrusive

in subsequent cases. Many child welfare departments apply very narrowly or outright ignore highly relevant case law in their own states like *In re Drake M* in California and the aforementioned New Jersey Supreme Court and the New York cases that, frankly, they should be required to follow — and these states set an example for all other states by the existence of this hard-won case law and the willingness or resistance of child protection services to follow it. Each case worker brings their own attitudes, education (which may not be more than a year-long social worker certification or an undergraduate BA degree in any major plus a 6 or 12 week child protection services training with no social work certification), experiences, and opinions of their direct supervisor and field office; most of them are very young women who are not themselves parents. It is impossible to find out just how much any of these nightmare scenarios are happening. No figures on a federal or state level are publicly available for action taken against families for any drug use, much less narrowing it down to just cannabis, or for any of the stages of child protective services agencies' activity.

As with most politics, it's instructive to follow the money. A key piece of context is that it benefits the states financially to conduct investigations, and particularly for state-sanctioned kidnapping, with a cornucopian variety of lucrative financial incentives and one-off payments. States receive a payment from the federal government of matching funds plus bonuses for each child they manage to remove from their loving families, and ongoing funds for foster care and upkeep; the child protective services agency receives money directly from the states. The nuances and vulgarities of complementary and contradictory federal and state law, combined with the lure of federal money — on top of existing infrastructure and wages — creates incentives for mass investigations of cannabis users. The secrecy and stigma behind child protection makes it an easy cash cow and makes easy targets of the millions of cannabis users who have the gall to reproduce.

In all states, sooner or later a child can be adopted out without biological parental consent; some take as little as 12 (non-consecutive months) whereas others take years, often with court dates for the parents delayed until towards the end of this time period. That allows for easier use of a legal facet called "bonding with an alternative caregiver" in some states' laws that may alone may be used an excuse to permanently remove and withhold a child from their natural parents even if they have complied with the hoops set out for them by child protective services and greatly disrupts family life regardless.

All child protection cases take places in family courts, which are civil courts. Many of the due process protections that apply in criminal court, including the right to counsel and basic procedures, are not automatic rights and may not apply in family court proceedings, unless a parent is charged with felony or misdemeanor child abuse or criminal endangerment (ie, for breastfeeding). Following family court reforms in some states, some do provide public defenders; in New York, they are provided to everyone in family court (including children). In states where no public defender is offered, a family court defendant unable to afford expensive lawyers is forced to go pro se (represent themselves against the state's attorney). The only option for the child to have public representation is a guardian ad litem, who does not necessarily need to be an attorney and may be working entirely in the interests

of the state. Even for those who can afford it, all marijuana law practices can offer are expensive criminal attorneys with little, if any, experience — and often no interest — in this area of civil law. Proceedings are closed to the public and decisions are often unpublished, sealed and confidential, preventing public oversight and accountability.

The citizens of the Commonwealth of Massachusetts, where I live, are far luckier than most. So are New Yorkers, despite appearances. Mandated reporting is not a federal requirement, but implementation of CAPTA's bribery, DHHS rules and regulations, and a variety of state-based additions to child welfare laws vary from state to state. Even different counties or municipalities in the same state can apply their state's laws differently. Unfortunately, progressive cannabis legislation in many states makes little to no difference. They can even go backwards — there are an increasing number of states whose professional pediatrics associations are advocating a restriction on medical marijuana patient qualification for pregnant and breastfeeding women. In Arizona, the APA's state chapter is trying to add a requirement for women to be asked if they're pregnant, take pregnancy tests prior to receiving their medical cannabis recommendations, and be denied them if they are pregnant.

Even with the disastrous results of being both a parent and a cannabis user in the states which have passed progressive legislation, they tend to be better off than those states which have not. In Texas, Alabama, Mississippi, Oklahoma, Ohio, North Carolina, South Carolina, Idaho, Nevada, California, Florida, and more, parents — particularly women, especially those of color — are facing state-sanctioned kidnapping at initial investigative stages]. Here's a little-known and never-discussed fact for you about welfare drug testing: a positive result equals an instant report to child protective services, which in the case of states like Florida, is easy given that Florida's child protection agency, DCF, is the administrator of the TANF cash benefit welfare program.

States have attempted all manner of legal gymnastics to criminally prosecute women who give birth to babies who test positive for drugs, relying upon laws that create a separate legal status for the unborn to argue that mothers who use criminalized drugs commit crimes against their own children. These laws — part of the so-called "personhood" movement existing to pose a challenge to Roe v. Wade — make fertilized eggs, embryos, and fetuses count as individual people with their own separate rights. Some states have attempted to charge women with "delivery of a drug" through the umbilical cord. Others have attempted to use charges of "corrupting another with drugs" (forcing or coercing someone to take a drug). Tennessee continued to charge women with assault of their unborn children for a full two years after the law was twice amended to make it clear that it was not intended to be used that way. Mississippi now stands to become the second state where women can be charged with homicide if they lose a pregnancy and test positive for a criminalized drug.

These and other states prosecute women who test positive for marijuana during pregnancy. In fact, prosecutions for women using cannabis while pregnant are already happening on a regular basis in Alabama. As I mentioned earlier, they have judicially modified state law to apply "meth house" drug endangered children

crystal meth labs; with these chemical endangerment cases, the mother's womb itself is being treated as the inhospitable and dangerous environment akin to said lab. As the law now includes fertilized eggs, embryos, and fetuses, such that a woman who tests positive for cannabis at any point in pregnancy, whether or not she knows she is pregnant yet, could be immediately arrested for the felony of exposing a zygotic "child" to an "environment" (that is, a woman's body) where it may come in contact with marijuana. Women have already been arrested for delivering babies who tested positive for cannabis at birth.

District Attorneys in many states also criminally charge with child endangerment mothers whose babies test positive after birth or who themselves test positive while breastfeeding. It is certainly possible that a woman who tests positive for cannabis after a fetal demise, and/or whose late-stage miscarriage or stillbirth is tested, could also be charged with reckless criminal endangerment, manslaughter, or even murder. Marijuana activists should not be lulled into a false sense of security by the harmlessness of cannabis — many of the drug war myths upon which the prosecutions of women using cocaine were based have been just as roundly debunked as "reefer madness".

In addition to the involvement of child protective services and ultimately family court in the lives of non-neglectful parents, cannabis is also a disastrous issue in wider family court matters. A parent in a divorce or other custody case who uses marijuana can and often do have that fact used against them by a parent who does not. Cannabis use — including that which is clearly medical — can and does trigger penalties of financial child support, being limited to supervised (versus unsupervised) visitation with their children, loss of custody, or complete loss of parental access. Family court can make its own "treatment plan" for a cannabis-using parent and punish them for non-compliance. Marijuana use by a parent can require negotiation and compromise even where domestic violence is present to avoid greater risk or demands put upon the parent by a judge (or a report to CPS). All this, despite a substantial amount of scientific evidence showing its folly. Dr. Melanie Dreher's controlled, longitudinal study on cannabis-using pregnant women in Jamaica, is the most mentioned in this field and shows that there is no difference in offspring (except children of mothers who used cannabis while pregnant were slightly smarter). But it is not the only one. Many studies have shown the presence of endocannabinoids in breast milk are an integral part in the growth of the gastrointestinal system (which have endocannabinoid receptors, as many as the brain, stimulating appetite and digestion . Likely because of those cannabinoids, a study accidentally discovered the possibility that cannabis use may reduce infant mortality and treats Failure to Thrive as well as stimulates infant brain development. The Netherlands, New Zealand/UK and three separate US studies, including one by the CDC have all shown that that cannabis does not cause a risk of perinatal death, a need for special care, premature labor, placental abruption, or reduced birth weight. A Canadian study showed that growing up around cultivation did not affect children. A British longitudinal study shows no increased risk of psychosis-like symptoms to adolescents who were exposed to cannabis in the womb. Marijuana has been used for thousands of years in prenatal treatment and

childbirth especially for hyperemesis gravidum (severe morning sickness). I'm the first to admit these and the offline database of evidence-based scientific studies compiled by JD MPH student Jess Cochrane is not enough to be fully conclusive. I'd love to see more controlled, longitudinal, peer-reviewed studies in this area. Unfortunately, such studies are blocked by the National Institute on Drug Abuse (NIDA), whose public stance is not to fund studies that propose to research benefits of cannabis. However, what we do know definitely is that the effect on parents and children of child protective services and family court is much greater than any perceived risk to a fetus or child. We also know that the presence of cannabis use does not equal abuse, addiction or dependence. We know that whether a person is a good parent or not has no correlation to whether they use marijuana medically or recreationally. As Dr. Peter Fried, the leading researcher on the effects of social cannabis use, wrote in an affidavit for a South Carolina CPS case: "Based on my 30 plus years of experience examining the newborn, infants, toddlers, children, adolescents and young adults born to women who used [marijuana] during pregnancy it is important to emphasize that to characterize an infant born to a woman who used marihuana during pregnancy as being 'physically abused' and/or 'neglected' is contrary to all scientific evidence (both mine and subsequent work by other researchers). The use of marijuana during pregnancy ... has not been shown by any objective research to result in abuse or neglect." Clearly, this lack of effect is true for older children as well.

Given Colorado DHS is still going after medical marijuana patients following the passage of Amendment 64, they will undoubtedly go after parents who choose to use recreationally as well. In fact, the report released by the Task Force, about which I've written extensively, contained several worrying parts in their suggested implementation for legalization that are directly aimed at pregnant women and parents. These were passed into law by the Colorado legislature as part of their omnibus regulation bills. The process and the outcomes are likely to be replicated in other states unless direct action is taken to prevent it.

Part of the reason why medical, decriminalization and even legalization changes nothing is the lack of attention paid to this issue by marijuana policy organizations. It is often marginalized or seen as unimportant or "fringe." "Child protective investigations and removals have received very little attention in drug policy reform efforts, which have focused primarily on challenging the criminal justice responses to drug use," states Farah Diaz-Tello, staff attorney at National Advocates for Pregnant Women (NAPW). Organizations like NAPW and their legal staff, or individual child welfare organizations, are far more likely to be intimately involved in advocating for change and intervening directly in cases of those in the midst of being persecuted than cannabis reform organizations. Indeed, those that are writing laws for changes in cannabis policy ought to include specific provisions protecting those users from investigation by child protection services or other interference by family courts — but depending on the date of this article's publication, in 19-21 states and Washington DC with medical marijuana, 16 or 17 with decriminalization, and 2 with legalization, this has never occurred.

In recent months, persecution of cannabis-using pregnant women and parents has increasingly been covered in all kinds of mainstream and alternative media. When a

parent using cannabis in front of their child is brought up, representatives of marijuana policy organizations are always quick to clarify that it is inappropriate and unacceptable. I do not condone use in front of progeny. But it doesn't make sense that this is the only medication a patient shouldn't take in front of their kids. Moreover, if legalizers really want marijuana to be treated like alcohol, how can it possibly be a serious problem to enjoy a toke but totally fine to relax with a glass of chardonnay in front of the kids at the end of a long day? I have also heard statements from reformers implying that parenting is worthy of judgment if cultivation occurs in the home, even if locked away, despite all existing evidence that there is no effect on children and zero chance of overdose or death. As Ricardo Cortes says in the title of his awesome children's book, it's just a plant. (One worthy of harm reduction like recommending pregnant women and parents vaporize or eat their marijuana instead of smoking it.)

There may be an understandable sense of risking cannabis's newfound popularity at a delicate and crucial time. I get this, but if there is already pushback from drug warriors regarding pregnant women and parents, it will be what they go after with the increased liberalization of marijuana laws, and will continue long after legalization — as their last stand and last push for relevance — if they are not stopped by reformers. This can already be seen in the advent of "drug-endangered children" propaganda and in the work of disingenuous and fake "third way" of anti-marijuana crusader groups like Patrick Kennedy, Kevin Sabet, and David Frum's Project SAM. Education and work to raise public awareness, along with making this issue a priority in organizational agendas, are necessary to remove the secrecy around child protective services involvement as well as de-stigmatize use by pregnant women and parents just as cannabis reform organizations have worked so tirelessly to destigmatized cannabis use since the days of reefer madness. For obvious reasons, parents who have been at the sharp end of child protective services are understandably wary of coming forward. Very few do. However, it is crucial in fully ending prohibition that they — like all parents — come out of the closet, being welcomed and supported in doing so by cannabis reform organizations. There is almost no recourse for mandated reports made to harass or retaliate against a family and none against those who erroneously believe themselves to be mandated reporters and who may not even have met nor seen the parent interact with their children. There is almost no recourse for a false positive immunoassay test which has led to a mistaken investigation. There is no recourse for an ex-spouse using an irrelevant non-factor in good parenting to play dirty in a custody battle. There is almost no recourse for trumped-up fetal or child endangerment charges. There is no recourse to this being a facet of the new Jim and Jane Crow. It is a certainty to say there is little or no recourse for any of this; that parents who use cannabis for any reason and their children are completely at the mercy of the unyielding bureaucracy absent any judicial, legislative or political will to require change.

But all is not lost. The movement toward medicalization, decriminalization, and legalization is what shows us that the political process can yield change and their passage is necessary to protect pregnant women and parents. Some examples of various ways to fix this problem: individual or class action litigation against a state

actor that would change current law and practice by providing new precedent in each individual state or on a federal level, executive order from President Obama, voting out elected judges from their posts for penalizing cannabis users, changing federal law (like CAPTA or marijuana's Schedule I status), modifying DHHS regulations, giving appropriate guidance from a harm reduction perspective to pregnant and breastfeeding women, and educating healthcare providers about the true benefits and risks of cannabis (avoiding unduly treating pregnancy or breastfeeding as contraindications and mothers of infants as a separate class of medical marijuana patients).

As the push for greater political and societal acceptance for cannabis successfully progresses, parents must be at the forefront of the marijuana movement and pregnant women cannot be treated as a token to be traded for recreational use among people who look like the people who make the laws. All states which have passed progressive cannabis legislation need to be pressured to remove, edit or clarify provisions of their mandated reporting laws. When changes to state laws occur by ballot initiatives, the authors must ensure a provision protecting pregnant women and parents is in the text that is approved by the voters. As constituents, we must ensure that when our federal, state and local legislators craft or sponsor marijuana-related legislation, they hear from us how they can truly help protect families by including a provision on child welfare, ensuring that no pregnant woman or parent will face interference by a child protection agency or family court solely on the basis of cannabis use. This must be a central and mainstreamed part of marijuana activism and advocacy; it can't be an afterthought.

If we work together, each one of these fixes that stacks upon each other will ultimately mean no parent is left behind when the prohibition of cannabis is relegated to the trash bin of history.

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Full disclosure: for me, this is my professional life's work and my personal mission. I am a cannabis activist and advocate as well as a (legal in the Commonwealth of Massachusetts) medical marijuana patient with two children under the age of three. I have been the subject of four mandated reports resulting in three investigations for my use and am extremely thankful that has been the limit of my own experience. If any of this article resonates with your own history and experience with child protective services and/or family court and you want to leave the proverbial closet behind, you need non-legal advice and advocacy or legal referral, please look at Family Law & Cannabis Alliance & please don't hesitate to get in touch with me. I would also love to hear from otherwise interested parties such as parents who haven't faced any of this but feel impacted in your access to services to which you would otherwise be eligible if these risks to your parenthood didn't exist, those over 18 whose parent was investigated when you were a minor, cannabis or family law attorneys, workers in nonprofits or NGOs in this field, current or former law enforcement officials, court officers, social workers, and child protection officials. Confidentiality assured.

## **MARIJUANA AND FAMILY LAW**

### **LIST OF RESOURCES**

1. WAC 314-55
2. RCW 69.50
3. WSLCB FAQs on Advertising and Licenses: [http://www.liq.wa.gov/mj2015/faq\\_i502\\_advertising](http://www.liq.wa.gov/mj2015/faq_i502_advertising); [http://www.liq.wa.gov/mj2015/faqs\\_i-502](http://www.liq.wa.gov/mj2015/faqs_i-502)
4. WSLCB Frequently Requested Lists: <http://www.liq.wa.gov/records/frequently-requested-lists>
5. In re marriage of Wieldraayer, 147 Wn.App. 1048 (2008). The Court of Appeals affirmed the trial court's order of supervised visits, stating the "dangers inherent in the use of marijuana do not turn on whether or not the use is sanctioned by the State." In this case, the court found that the father was using marijuana for its "intoxicating effects", had allowed his young daughter to "sniff the glass while he was smoking" and used marijuana around his children.
6. In re Marriage of Parr and Lyman, 240 P.3d 509 (Colo. Ct. App. 2010). The Court of appeals reversed a parenting restriction for a father who became a medical marijuana patient after his original parenting plan required UA testing to "demonstrate that he does not return to marijuana use." The Court of Appeals found that the trial court did not find that the use of medical marijuana physically or mentally endangered his daughter (but the Court left the requirement for UA testing in place.)
7. Weems v. Winn, 272 Ore. App. 758 (2015). The Court of Appeals remanded the case back to the trial Court in part because the trial court relied on the mother's marijuana use in awarding custody to the father. The mother had a medical marijuana card and worked in a medical marijuana dispensary. The Court of Appeals found that the trial court could consider lifestyle factors such as the mother's legal marijuana use when making a custody decision, but only if the record established that mother's use would like endanger the health, safety or welfare of the child. The trial court did not make such a finding.
8. Wikipedia – Charlott's Web marijuana strain for epileptic children.

9. Berkeley Patient's Care Collective – [www.berkeleypatientscare.com](http://www.berkeleypatientscare.com) . Guide for medical marijuana patients to understand different treatment modalities available from cannabis.
10. Family Law and Cannabis Alliance – [www.flcalliance.org](http://www.flcalliance.org) .
11. [www.Cannabisnowmagazine.com](http://www.Cannabisnowmagazine.com)

## Marijuana Industry and Family Law

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### Medical v. Recreational Marijuana

- Medical Products
- Recreational Products
- Effect on Individuals
  - Inhaled Products
  - Edibles

### Parenting Issues

- Temporary Orders
- Custody Issues
  - Recreational Users
  - Medical Users
- CPS

### Owning Businesses

- Starting a marriage
- Ending a marriage
- Death of a spouse

## Business Valuations

- Illegal businesses under Federal law
- Tax Deduction Issues
- Banking Issues
- Reporting income
- Risk Analysis
- Medical Businesses v. Retail Businesses

## Ancillary Businesses

Like the California and Alaska gold rushes – those that got rich were the ancillary businesses providing services to the industry.

Types of ancillary businesses

Valuation problems for ancillary businesses

## Cooperative Gardens

- Those who are registered in the medical marijuana database may grow marijuana in their domicile. No more than 15 plants may be grown in a housing unit, unless the housing unit is the location of a cooperative. No plants may be grown or processed if any portion of the activity may be viewed or smelled by the public or the private property of another housing unit.
- The provision authorizing collective gardens is repealed, effective July 1, 2016. In their place, four member cooperatives are permitted. A maximum of 60 plants (15 plants x 4 members) may be grown at the cooperative location.

## Family Support and other concerns

- Determining Income for a cash business
- Out of State concerns
- Deposition Testimony

### Practice Tip

- Always ALWAYS check the most recent regulations and laws. This is an ever changing area of practice with new laws and regulations popping up almost daily.
- Don't relay in legal advice that was good 6 months ago as it may have changed.

## CHAPTER TEN - B

**RECREATIONAL MARIJUANA AND IMPACT ON FAMILY LAW**

June 2016

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**ANNE VAN LEYNSEELE** is passionate about helping cannabis businesses and organizations maximize productivity by assisting them in understanding and complying with the fast-paced changes happening in Federal and State laws, regulations, and policy. She spent four years as a federal attorney advisor of health care policy in Washington DC; upon her return to Washington State she jumped into passing a State law regarding patient record confidentiality. On a daily basis, Anne applies her business acumen and regulatory knowledge to improving best practices in this burgeoning cannabis industry.

Anne is a corporate cannabis attorney and founder of NWMJ Law, an exclusive cannabis industry law firm in Washington and coming soon to Oregon. She works with a diverse range of businesses coaching and counseling owners from start-up to stabilizing to growth stages, while keeping pace with the ever changing regulatory and legislative environment. She has changed the paradigm of how cannabis business structure their businesses and "cleaned-up" some miss-formed organizations. Her key goals for each company is to minimize risk and build a solid basis for growth.

Prior to becoming an attorney, Anne managed the business development of production and technology entities, advised corporation on process efficiency, defined corporate communications strategies for many Fortune 100 companies, and owned her own Los Angeles based film production company. In her spare time, she mentors at-risk-youth, manages her farm in Hawaii, surfs, and competes in triathlons.

## **Current Laws Regarding Recreational Cannabis in Washington State**

### **Possession**

Currently possession of up to one ounce (28 grams) of marijuana is decriminalized for persons over 21 years of age. Also, the possession of up to 16 ounces of marijuana-infused product in solid form (Butter, Brownies, Cookies, etc), and 72 ounces of marijuana-infused product in liquid form are not subject to criminal or civil penalties. Possession over one ounce, up to 40 grams is a misdemeanor charge. Over 40 grams is a Class C Felony.

**Under 21:** Possession of any marijuana or marijuana products is a misdemeanor. Possession of over 40 grams is a Class C Felony.  
*RCW 69.50.4013*

**In your vehicle:** Any cannabis products must be stored out of the immediate reach of the driver. i.e trunk, farthest back seat, etc.

**Public Consumption:** It is currently a Class 3 Civil Infraction to consume cannabis or cannabis products in public view.

### **Sale/Delivery**

Retail sales of cannabis by state-licensed entities to those over the age of 21 are regulated in this state. Marijuana sales by unlicensed entities remain subject to criminal penalties.

Delivery of Cannabis is a Class C Felony, punishable by a maximum of 5 years in prison and up to \$10,000 in fines no matter the amount.

**Minors:** Involving a minor in a “drug transaction” is a Class B felony punishable by up to 10 years in prison and a fine of up to \$10,000.00  
Minors cannot acquire cannabis from a licensed retail store holding a medical endorsement; they must designate a “provider” over the age of 21 to acquire their medical cannabis.

**RCW 69.50.414:** Parents or legal guardians of a minor to whom a controlled substance was sold or transferred have a cause of action against the person who sold or transferred the substances. Damages may include costs of rehabilitation services for the minor, forfeiture of any money made in the transaction, and attorney's fees. This does not apply to practitioners.

### **Manufacturing**

**Marijuana:** Cultivation for either personal use or distribution is a class C felony punishable by up to 5 years imprisonment and/or a fine up to \$10,000.

**Medical Exception:** Currently Medical Patients are allowed to cultivate up to 15 plants and participate in a collective garden which contains no more than 45 plants (This collective garden provision expires July 1<sup>st</sup>, 2016) **After July 1<sup>st</sup>, 2016** Qualifying Patients and Designated Providers may only cultivate a maximum of 4 if they choose to not participate in the patient registration program. Patients that choose to participate may cultivate six, up to fifteen plants per household,

regardless of the amount of patients within the home. (provisions for new patient cooperatives are expected to be implemented as well)

**Hash/Concentrates:** Manufacturing of cannabis concentrates via hydrocarbon solvents or other explosive solvents is a class C felony. No exceptions unless licensed by the State to do so.

### **Driving While High**

Currently, operating a vehicle or in physical control of a vehicle while under the influence of cannabis carries the same penalties as alcohol. The threshold for intoxication is 5 Nano grams of active cannabinoids within the bloodstream; the test is a blood draw. (This arbitrary threshold is currently being litigated *City of Kent v. Cobb* )

“Green DUI’s” are a Gross Misdemeanor and carry the same penalties as alcohol DUI’s.

### **Authorization for Minor Use**

**RCW 69.51A.220:** Under certain provisions and very unique circumstances physicians may authorize the use of medical cannabis for minors under eighteen years of age. The Parent must act as the designated provider for the minor child and enter into a tightly regulated set of rules.

### **Where to find it?**

Currently the only lawful place to acquire cannabis is through a State Licensed Retail Store.

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## CHAPTER ELEVEN

### SOCIAL SECURITY CHANGES AFFECTING DIVORCE

June 2016

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**PAULA M. MARTIN** graduated with her undergraduate degree from Washington State University in 1993 and Willamette University College of Law with a joint MBA and Law degree in 1997. After interning at the Landerholm Law Firm, she joined Marla Heikkala & Associates in 1997 and has practiced there since.

The firm emphasizes Social Security Disability and Washington Worker's Compensation. She is a member of the WSBA Solo & Small Practice Section, Clark County Bar, and on the Board of the WSBA Administrative Law Section.

# CAN SOCIAL SECURITY IMPACT YOUR CASE?

**Paula M. Martin, Attorney at Law**  
Marla Heikkala & Associates, Vancouver, WA

Materials Prepared by:  
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## INTRODUCTION – HISTORY OF SOCIAL SECURITY

The Social Security Act was signed into Law by President Franklin D. Roosevelt on August 14, 1935. In addition to several provisions for general welfare, the new Act created a social insurance program designed to pay retired workers age 65 or older a continuing income after retirement. It also provided a lump sum benefit at death. In the original Act, benefits were to be paid only to the primary worker when he/she retired. Benefits were to be based on payroll tax contributions that the worker made during their working life.

The 1939 Amendments made a fundamental change in the Social Security program. These Amendments added two new categories of benefits: payments to the spouse and minor children of a retired worker (so-called dependents benefits) and survivors' benefits paid to the family in the event of the premature death of a covered worker. This change transformed Social Security from a retirement program for workers into a *family-based* economic security program.

The Social Security Amendments of 1954 initiated a disability insurance program which provided the public with additional coverage against economic insecurity. In September 1960 President Eisenhower signed a law amending the disability rules to permit payment of benefits to disabled workers of any age and to their dependents. Under the Amendments of 1961, the age at which men are first eligible for old-age insurance was lowered to 62, with benefits actuarially reduced (women previously were given this option in 1956).

In the 1970s, the Social Security Administration became responsible for a new program, Supplemental Security Income (SSI). *The Contract With America Advancement Act of 1996*, signed on March 29, 1996, made a change in the basic philosophy of the disability program. Beginning on that date, new applicants for Social Security or SSI disability benefits could no longer be eligible for benefits if drug addiction or alcoholism is a material factor to their disability. Unless they could qualify on some other medical basis, they could not receive disability benefits. Individuals in this category already receiving benefits had their benefits terminated as of January 1, 1997.

## **TYPES OF BENEFITS THAT MAY IMPACT YOUR SETTLEMENT DISCUSSIONS**

### **DISABILITY**

#### **DISABLED, INSURED OR BENEFICIARY BENEFITS (DIB)**

Social Security Disability Insurance pays benefits to a worker and certain members of their family if they are "insured," meaning that the individual has a sufficient earnings record and paid Social Security taxes.

Each time a worker receives a paycheck, money is taken out for Social Security taxes. Think of this as like paying into an insurance policy. With each quarter of meeting the minimum payment requirements, the individual gets a quarter of coverage. These individuals gain insured status. As long as a person has "insured status" or is found disabled while they have "insured status" they can claim and draw benefits on their own account.

An individual needs 10 of the last 20 quarters of credits prior to claiming disability in order to have insured status. This is basically, five consecutive years of quarters. If you represent an individual who worked outside the home prior to marriage, but then stayed home to work at raising their family, they would likely not have insured status and would need to re-enter the work force for five consecutive years to gain their own insured status for disability purposes. They may still have quarters that will allow them to claim retirement at the appropriate age for their date of birth.

As a rule, if a fully insured individual stops paying into the system, their insured status lasts about 5 years. That date when your insured status runs out is called "Date Last Insured". One must be found disabled on or before that date in order to draw benefits. An individual receives the same amount of money just as if they retired on the date set for their retirement age. When they reach that age, they continue to receive the same amount; the funding is switched from the disability fund to the retirement fund at Social Security.

#### **SUPPLEMENTAL SECURITY INCOME (SSI)**

Supplemental Security Income pays benefits based on financial need. The criteria used for evaluation of need is very similar to the State DSHS requirements. Think of these benefits as a Federal Welfare system.

Currently, the amount an individual who is eligible for SSI receives per month is \$733.00. An eligible individual with an eligible spouse together receive \$1,100.00 per month. In 2016, there was no COLA added to the base amount.

The first \$20.00 received each month is exempt from reduction. After that, the monthly amount is reduced by subtracting monthly countable income. Income is anything

received during a calendar month and can be used to meet needs for food or shelter. It may be in cash or in kind. In-kind income is not cash; it is food or shelter, or something that can be used to get food or shelter. Countable income is determined on a calendar month basis. It is the amount actually subtracted from the maximum Federal benefit to determine your eligibility and to compute the monthly payment amount. There are many exclusions to what is and is not countable income. Please see the list at [www.ssa.gov](http://www.ssa.gov).

The following is a list of basic items that are usually counted in this calculation:

1. Money earned as a result of performing work (this is referred to "earned income").
2. Payments received from such sources as Social Security, Veteran's benefits, a pension, alimony, or child support (this is generally referred to "unearned income").
3. Any type of free rent/shelter or food benefits received from a nongovernmental source. For example, if you are allowed to live rent free with a friend or your parents, this will be considered as income (this is called "in-kind income" because it isn't actually income, but it is essentially equal to earning the amount of money you would otherwise have to pay for the food, rent, and life necessities being provided to you).
4. A portion of income earned by other people in the house (like a spouse or parent). This is called "deemed income", because although not earned, it is assumed that a portion of this money will go towards the disabled person's care and upkeep.

## **CHILD DISABILITY SSI BENEFITS AND DEEMING**

Children, too, can be awarded disability benefits under the SSI program. There are special rules used in evaluating these disabilities. Before getting to the evaluation of the disabilities of the child, Social Security will perform an evaluation based upon financial eligibility. Social Security will consider not only the child's income and resources when deciding if eligible for SSI, but also considers the income and resources of family members living in the child's household. These rules apply if the child lives at home. They also apply if he or she is away at school but returns home from time to time and is subject to the parent's control. If the child's income and resources, or the income and resources of family members living in the child's household, are more than the amount allowed, the application will be denied and no payments made.

### **Child Support**

Program rules under the Social Security Act excludes one-third of a child support payment received from countable income. (*Social Security Act § 1612(b)(9), 42 U.S.C. § 1382a(b)(9)*)

**Example:**

Monthly Federal SSI benefit rate for 2016	\$733.00
Child support payment for child	\$300.00
Minus 1/3 of the child support payment	(\$100.00)
Minus the \$20 general income exclusion	<u>(\$20.00)</u>
Total countable income (\$300-\$100-\$20)	\$180.00
SSI benefit (\$733-\$180)	<u>\$553.00</u>
Total income available to the child (\$553+\$300)	\$833.00

NOTE: This example assumes the child has no other income and does not include a state supplemental payment. Currently, Washington State does not have a supplemental payment.

**Parent Income or Maintenance**

The total income to the household is counted in the calculation for child SSI. Income and maintenance payable to the custodial parent is counted, without discount, in this determination.

**DISABLED ADULT CHILD (CDBR)**

An adult disabled before age 22 may be eligible for adult child's benefits if a parent is deceased or is receiving retirement or disability benefits. Social Security considers this a "child's" benefit because it is paid on a parent's Social Security earnings record. The "adult child"—including an adopted child, or, in some cases, a stepchild, grandchild, or step grandchild—must be unmarried, age 18 or older, and have a disability that started before age 22.

The disabled adult child can receive up to 50% of the parent's benefit or retirement amount, depending on whether there are other family members getting benefits based on the parent's work record.

**DEPENDENT'S BENEFITS**

**Upon Death of Wage Earner**

Unmarried children, who are younger than age 18 (or up to age 19 if they are attending elementary or secondary school full time), can also get benefits upon their deceased parent's earnings record. Biological, adopted or dependent step children are all included. Remember, benefits stop when the child reaches age 18 unless they are a student or disabled.

For students, Social Security will send a notice approximately 3 months prior to the child's 18<sup>th</sup> birthday. If the child will continue to be a full time student after age 18, a statement of attendance certified by a school official must be completed indicating that the child is a full time student and under age 19. Benefits will then usually continue until

the child graduates, or until two months after reaching age 19, whichever comes first. A surviving parent may also receive benefits because they have a child of the wage earner in their care. In general, the date these benefits stop may be different than the child's. If the child is not disabled, the benefits will end when he or she turns 16.

How much a family can get from Social Security depends on the wage earners average lifetime earnings. The more earned, the more the monthly benefits will be. Within a family, a child can receive up to half of the parent's full retirement or disability benefit. If a child receives survivor's benefits, they can get up to 75 percent of the deceased parent's basic Social Security benefit. There is a limit to the amount of money that can be paid to a family. The family maximum payment is determined as part of every Social Security benefit computation and is based upon a number of factors. It can be from 150 to 180 percent of the parent's full benefit amount. If the total amount payable to all family members exceeds this limit, Social Security will reduce each person's benefit proportionately (except the parents) until the total equals the maximum allowable amount.

Children can get benefits at any age if they were disabled before age 22 and remain disabled. Under certain circumstances, benefits can also be paid to stepchildren, grandchildren, stepgrandchildren, or adopted children. (From [www.ssa.gov](http://www.ssa.gov))

### **Upon Disability of Wage Earner**

When an individual starts receiving disability benefits, other members of the family may qualify for benefits on that record. They may be paid to children, a disabled child and/or adult child disabled before age 22. The same criteria applies for children as noted above in the "Upon Death of a Wage Earner" section.

### **Child Benefits**

These benefits are based upon disabled parent's earnings record and family maximum. They are paid until the child turns age 18 or is no longer a full time high school student. There is no provision in the law for continuing payments through post-high school education.

### **Disabled Adult Child Benefits**

Receipt of benefits for a disabled adult child results in the child receiving the family maximum portion of the wage earner's account. If both parents are wage earners, Social Security will make payment through the account in which the child receives a higher payment.

Remember, the child must meet the criteria for disability as prescribed by Social Security on or before turning age 22. One difficulty – parents are waiting until their own retirement until seeking any benefits from Social Security. Many times, the adult child is well beyond age 22, creating a problem not only in documenting the degree of disability

prior to age 22, but finding records that would have been helpful have been destroyed by medical providers, schools or other agencies. Documenting a remote onset of disability is difficult; without appropriate documentation, almost impossible.

A practice tip for those working in the domestic relations or estate planning areas would be to advise parents with children with disabilities to:

1. Obtain and maintain in a secure place for all medical, educational and vocational records for their child prior to them turning age 22.
2. If appropriate, apply for and obtain SSI benefits for the disabled adult child prior to age 22. An allowance by Social Security for SSI at that time will result in a presumptive determination that the child was disabled for Disabled Adult Child benefits so long as the disability is continuous until the later application.
3. Although it is admirable for parents to support and nurture their child with disabilities, it is important to seek the help of outside sources such as the Division of Vocational Rehabilitation (DVR) or other agencies to encourage and help their child. From an advocate's standpoint, it is a "win-win" situation—either the person is successful in finding work or a vocation, or their inability to get and maintain work on a full time basis is well documented for a finding of disability.

## **PROCESS OF OBTAINING DISABILITY BENEFITS**

### **Initial Application**

The initial application for Disabled, Insured or Beneficiary Benefits (DIB) on the individual's earnings record can be accomplished either online at [www.ssa.gov](http://www.ssa.gov) or by calling Social Security at 1-800-772-1213. Applications for Supplemental Security Income (SSI) or other disability benefits can only be accomplished through calling the 800 number and scheduling an appointment either on the phone or in person with the local Social Security office.

For most people, the medical requirements for disability payments are the same for all adult programs and disability is determined by the same process. Social Security will ask for information about medical/psychological conditions, work and education to help in deciding if disability can be found under the rules. It is important to be in care and treatment for all conditions alleged as barriers to employment. Social Security will look at all of these conditions and weigh their impact on an individual's ability to work. Most federal regulations regarding Social Security disability benefits can be found in Title 20 of the Code of Federal Regulations (C.F.R.). Specifically, SSD is discussed in Part 404 and SSI is discussed in Part 416. Social Security Rulings and the Program Operations Manual System (POMS) are also used by the Agency to evaluate disability. The adjudication process at this initial level, on average, can take over 6 months before receiving a determination.

## **Reconsideration**

If an individual is denied at the initial stage of application, they can request Reconsideration within 60 days of the date they receive the denial. Each state has an agency specifically created to evaluate claims called the Disability Determination Service (DDS). Additional information can be provided to the DDS at this level. Adjudication at this stage can take as little as 30 days; the average, again, is approximately 6 months.

## **Hearing**

After a denial at Reconsideration, a Request for Hearing is filed. The matter then goes to the Office of Disability Adjudication and Review (ODAR) for hearing. The ODAR office which handles the hearings for Southwest Washington is located in Downtown Portland. Unfortunately, it is taking between a year and 18 months after the date of request for hearing for a hearing to be scheduled. Hearings are usually presented live in Portland and testimony is taken from the claimant. The judge may also call a medical and/or vocational witness. It may take up to 6 months to receive a decision from the judge.

## **Appeals Council**

A denial from the judge may be appealed to the Appeals Council in Falls Church, Virginia. This is a paper appeal; additional medical or vocational information may be submitted, as well as arguments as to the errors alleged to have been committed by the judge. Files at the Appeals Council can wait for review and a decision for as long as two years.

## **Federal District Court**

The next level of appeal is to the Federal District Court for the jurisdiction in which the claimant resides. (Vancouver residents deal with the Federal District Court for the Western District of Washington in Tacoma.)

## **POST DISABILITY ISSUES**

### **Benefits – DIB**

1. An applicant can only receive benefits one year prior to application despite claiming disability for time prior to one year.
2. There is a 5 month waiting period for payment of disability benefits. This means that dollar benefits are only paid beginning with the sixth month of eligibility.
3. A claimant is only eligible for Medicare 24 months after entitlement to monetary benefits (meaning 29 months after date of disability).

## **Benefits – SSI**

1. An applicant can only receive benefits from the date of application forward.
2. There is an offset for money, in-kind support, and income received each month of disability.
3. One must report all income/asset changes monthly.
4. SSI recipients are eligible for Medicaid only.
5. There may be offsets for spousal maintenance.

## **PAYMENT OF BENEFITS**

As stated previously, Social Security is always paying one month behind; get paid for January with check in February.

Benefits for dependents are paid directly to the custodial parent or guardian until the dependent reaches age 18 or is legally emancipated. Upon reaching age 18, the benefits will be paid directly to child. A child who turns 18 in September and is still a full time high school student will receive check directly until the month of graduation. Benefits are paid directly to the individual unless Social Security determines that a payee is necessary. Circumstances include:

1. Having a guardian;
2. Is a minor;
3. Has drug, alcohol or mental health issues that are a documented barrier to financial responsibility;
4. Or with the recipient's consent.

## **Taxation of Benefits**

The taxability of any type of Social Security benefit is dependent upon the other sources of income the individual may have and their tax bracket. One would need to consult with their individual tax professional to determine taxability and how to structure their income and assets to maximize tax savings.

It is always best to consult your tax professional concerning your specific situation. In general, although benefits for a child are paid to a parent (i.e., "Joan Smith for Carrie Smith") they really belong to the child. The SS benefits count as support the child provided for themselves. If they have no other income, they will likely not need to file a return. In 2015, if the child's income, including (1/2 of the payments from Social Security, as they are considered unearned income), is less than \$10,300, then they do not have to file an individual return with the IRS.

However, if the Social Security benefits add up to over half of the child's support, then the parent may not be able to claim the child on their tax return for the purposes of being a dependent.

## **DEPENDENT BENEFITS AND IMPACT ON CHILD SUPPORT**

Dependent benefits can be a credit toward the financial obligation of the non-custodial parent. The back lump sum can be credited for back due or back support obligations; the monthly amount for the current monthly obligation. Usually the obligated parent would need to contact the support authorities in the State the obligation originated and provide them with the notice from Social Security showing the exact dollar amount awarded.

The obligated parent must do something legally to gain a court order to adjust the obligation if the amount received does not cover what is owed or if the monthly amount received is less than the ordered monthly obligation. Otherwise, the deficit will continue to accrue.

Are the dependent payments included as income to parent on the child support worksheet? This is a source of discussion and difference of opinion. Since the money is usually paid to the custodial parent, is it income to them? Since the money is not paid to the disabled non-custodial parent/or disabled custodial parent, it is not really income to them or paid by them directly, but should it be placed on their section of the worksheet since it is paid on their behalf? Where does it really fit in the calculations in order to fairly reflect the obligations of the parties?

## **DISABILITY REVIEW**

As a rule, once an individual is found disabled, they should expect a continuing disability review every 1-3 years. The first step in this review is that they make contact with the individual and ask for an update concerning their conditions, medical/psychiatric care and treatment, medications and work or work-like activity. They will then contact those providers for updated chart notes and information about the individual. Key items that are considered: medical improvement, a return to work, activities that would indicate the individual could possibly return to gainful employment; a failure to follow prescribed treatment; and a failure to continue in any type of treatment.

The frequency of reviews depends on the nature and severity of the medical condition(s) found in the allowance of the claim and whether they are expected to improve. If improvement is expected, the first review generally will be six to 18 months after the date of disability. If improvement is possible, but can't be predicted, the review of the case will occur about every three years. If improvement is not expected, the case will still be reviewed about every seven years.

The first step in a review is usually an inquiry by letter, asking the Social Security recipient for information about their condition, continuing treatment and providers of treatment. It is very important for a Social Security recipient to remain in care and treatment; Social Security is likely to assume that if a person is not in treatment, they must be better. If, after receipt of that information, Social Security decides that a full

medical review is needed, they will ask the recipient to come to the Social Security office to answer additional questions.

If it is determined that the person is no longer entitled to benefits, a notice is sent by mail indicating that the person is no longer qualified and the date benefits will cease. These notices should be read carefully and with caution. There could be deadlines stated that may affect the claimant and do not just attempt to stop benefits. For example, many notices indicate that there is a 10-day deadline from receipt of the notice to ask for continued benefits pending the review of the claim and progression through any appeal process. If this deadline is not met, the individual will not have any income throughout the process unless reinstated for benefits. Remember, the appeal process, like the application process, has the potential for going through Reconsideration, Hearing, and Appeals Council review of any cessation of benefits.

The Social Security Administration is also aggressively investigating fraud or ineligibility for continuing disability benefits. The Cooperative Disability Investigations (CDI) Program was started in 1998. The process typically begins with a fraud referral from a State Agency or part of the Social Security Administration. They also receive fraud referrals from private citizens, anonymous sources, and law enforcement agencies. Disability fraud can involve malingering, filing multiple applications, concealing work or other activities, and exaggerating or lying about disabilities.

## **RETIREMENT**

### **Individual**

An individual who has a work record can start Social Security retirement benefits as early as age 62 or as late as age 70. The monthly benefit amount will be different depending upon the age an individual starts receiving it.

If benefits are started early, they will be reduced based on the number of months benefits are received before reaching full retirement age. The reduction in the benefit amount also depends on the year you were born. The maximum reduction at age 62 will be:

- 25 percent for people who reached age 62 in 2013
- 30 percent for people born after 1959

An individual could see a change in benefit amount if there is work after starting to receive benefits. Some benefits may be withheld if the individual has excess earnings. However, upon reaching full retirement age, there will be a recalculation of benefits to give credit for any months in which some benefits were not received because of earnings.

One can wait until full retirement age and benefits will not be reduced. A delay of benefits until after full retirement age, will likely result in an increase based on the number of months the individual does not receive benefits between full retirement age and age 70. There is no additional benefit increase after reaching age 70, even if one continues to delay taking benefits.

**Note:** Social Security benefits are paid the month after they are due. For example: If Social Security benefits are to start in May, receipt of the first benefit check will be in June.

Retirement age is based upon one's date of birth. In 2016, the following chart reflects full retirement age:

<b>Age To Receive Full Social Security Benefits</b> (Called "full retirement age" or "normal retirement age.")	
<b>Year of Birth*</b>	<b>Full Retirement Age</b>
1937 or earlier	65
1938	65 and 2 months
1939	65 and 4 months
1940	65 and 6 months
1940	65 and 8 months
1942	65 and 10 months

1943-1954	66
1955	66 and 2 months
1956	66 and 4 months
1957	66 and 6 months
1958	66 and 8 months
1959	66 and 10 months
1960 and later	67
<p><i>*If you were born on January 1st of any year you should refer to the previous year. (If you were born on the 1st of the month, we figure your benefit (and your full retirement age) as if your birthday was in the previous month.)</i></p>	
Source – <a href="http://www.ssa.gov">www.ssa.gov</a>	

## Divorced Spouse Benefits

A divorced individual, whose marriage lasted 10 years or longer, can receive benefits on an ex-spouse's record (even if he or she has been remarried) if:

- They are unmarried;
- They are age 62 or older;
- The ex-spouse is entitled to Social Security retirement or disability benefits; **and**
- The benefit the divorced individual is entitled to receive based on their own work is less than the benefit that would be received based on the ex-spouse's work.

**Note:** The benefit as a divorced spouse is equal to one-half of the ex-spouse's full retirement amount (or disability benefit) if received benefits at full retirement age. The benefits do not include any delayed retirement credits the ex-spouse may receive.

Upon remarriage, one generally cannot collect benefits on your former spouse's record unless the later marriage ends (whether by death, divorce or annulment).

If the ex-spouse has not applied for retirement benefits, but can qualify for them, the former spouse can receive benefits on his or her record if they have been divorced for at least two years.

If eligible for retirement benefits on one's own record **and** divorced spouse's benefits, Social Security will pay the retirement benefit first. If the benefit on the ex-spouse's record is higher, an additional amount on the ex-spouse's record will be calculated so that the combination of benefits equals that higher amount.

**Note:** If born before January 2, 1954 and have already reached full retirement age, one can choose to receive only the divorced spouse's benefit and delay receiving your

retirement benefit until a later date. If the birthday is January 2, 1954 or later, the option to take only one benefit at full retirement age no longer exists. If you file for one benefit, you will be effectively filing for all retirement or spousal benefits.

## **PROCESS OF OBTAINING RETIREMENT BENEFITS**

The Social Security Administration recommends that a prospective retiree, spouse or divorced spouse submit an application 4 months prior to their chosen retirement age, be it for early or regular retirement. Social Security indicates that their online retirement application can take as little as 15 minutes! They recommend:

1. That you be at least 61 years and 9 months old;
2. Not be currently receiving benefits on your own Social Security Record;
3. Not have already applied for retirement benefits; and
4. Want benefits to start no more than 4 months in the future; they will not process an application if you apply for benefits more than 4 months in advance.

### **Spousal Benefits and Retirement**

Even if a spouse has never worked under Social Security, they may be able to get spouse's retirement benefits if at least 62 years of age and the wage earner spouse is receiving retirement or disability benefits. They can also qualify for Medicare at age 65.

A person who qualifies for benefits on their own record, will be paid that amount first. If the benefit on the spouse's record is higher, they will get an additional amount on the spouse's record so that the combination of benefits equals that higher amount.

An ex-spouse can receive benefits on a former spouse's record (even if the former spouse has remarried) if:

1. The marriage lasted 10 years or longer;
2. The claiming ex-spouse is unmarried;
3. The claiming ex-spouse is age 62 or older;
4. The former spouse is entitled to Social Security retirement or disability benefits; and
5. The benefit the claiming ex-spouse on their own work is less than the benefit they would receive on the ex-spouse's work.

A divorced spouse can receive benefits equal to one-half of the ex-spouse's full retirement amount if they start receiving benefits at the full retirement age. If there are additional ex-spouse(s) who also qualify for benefits, he or she will not affect the total amount of benefits each (or the family) may receive.

Divorced spouses who remarry, generally cannot collect benefits on a former spouse's record unless the later marriage ends (whether by death, divorce or annulment).

If the ex-spouse has not applied for retirement benefits, but can qualify for them, one can receive benefits on his or her record if they have been divorced for at least two years.

## **Medicare**

Most individuals who apply for retirement also apply for Medicare at the same time. The main exception to this is when a married couple has a working spouse who is not retiring and chooses to maintain coverage on the retiring spouse. In the event of dissolution of marriage, this coverage can become a critical part of the negotiations of any settlement. Medicare has four parts:

1. Hospital insurance (Part A) helps pay for inpatient care in a hospital or skilled nursing facility (following a hospital stay), some home health care and hospice care.
2. Medical insurance (Part B) helps pay for services from doctors and other health care providers, outpatient care, home health care, durable medical equipment, and some preventive services.
3. Medicare Advantage plans (Part C) are available in many areas. People with Medicare Parts A and B can choose to receive all of their health care services through a single provider under Part C.
4. Prescription drug coverage (Part D) helps pay for the costs of prescription drugs.

## **Payment for Medicare**

Part A is available at no cost if the individual is age 65 or has been entitled to Social Security disability benefits for 24 months.

Anyone who is eligible for Medicare hospital insurance (Part A) can enroll in Medicare medical insurance (Part B) by paying a monthly premium. Some people with higher incomes will pay a higher monthly Part B premium.

Receipt of Part A and Part B benefits directly from the government, means that the individual has original Medicare. If you receive your benefits from a Medicare Advantage organization (Part C) or other company approved by Medicare, you have a Medicare Advantage plan. Many of these plans provide extra coverage and may lower out-of-pocket costs. One can enroll in a Medicare Advantage plan during the initial enrollment period the first time they are eligible for Medicare. You can also enroll during the annual Medicare open enrollment period from October 15 – December 7 each year. The effective date for the enrollment is January 1 of the upcoming year.

Anyone who has Medicare hospital insurance (Part A) or medical insurance (Part B) is eligible for prescription drug coverage (Part D). Joining a Medicare prescription drug plan is voluntary, and requires an extra monthly premium for the coverage. Some beneficiaries with higher incomes will pay a higher monthly Part D premium.  
(Source: Social Security – Medicare @ ssa.gov)

## **2016 CHANGES IN SPOUSES BENEFITS**

The Bipartisan Budget Act that passed in November 2015 closed two loopholes that were used primarily by married couples. These rules could also be used by divorcing spouses to receive higher benefits. If you relied on these provisions in formulating benefits for your clients for their future retirement, they will no longer be effective if your client did not reach full retirement age prior to April 30, 2016, the effective date of the enactment.

### **Suspension of Benefit Rules**

If your client takes their retirement benefit and then asks (on or after April 30, 2016) to suspend it to earn delayed retirement credits, the spouse (or divorced spouse) or dependents generally won't be able to receive benefits on that Social Security record during the suspension. The client also won't be able to receive spouse benefits on anyone else's record during that time.

### **Eligibility as retiree and spouse/divorced spouse simultaneously**

If a couple is eligible for benefits both as a retiree and as a spouse (or divorced spouse), they must start both benefits at the same time. This "deemed filing" used to apply only before the full retirement age, which is currently 66. Now it applies at any age up to 70, if the individual turned 62 after January 1, 2016.

(Reference: March 14, 2016 – Virginia P Reno, Deputy Commissioner, Retirement and Disability Policy – Social Security Administration)

## **WHAT IF? FACT SCENARIOS FOR DISCUSSION WITH GROUP**

1. Marilyn previously came to you and you helped her file for divorce; the 90 day waiting period has expired. You have been in settlement discussions with opposing counsel. At today's appointment she tells you she has now met the love of her life and wants her marriage dissolved immediately as she has the Church of Elvis in Vegas reserved for next weekend.

You check the calendar: Joe and Marilyn have been married for 9 years and 11 months as of today. What do you tell her?

2. Barney (age 49) and Betty (age 64) have separated and are in the midst of dissolving their 27 year marriage. Barney is concerned about paying maintenance to Betty as she has not worked outside the home their entire married life. During the settlement negotiations, it was mentioned that Betty will not be able to draw the spouse's portion on his Social Security retirement until he reaches full retirement age. Barney is concerned that he will be paying maintenance for at least 16 years if she does not have some other source of income.
  - a. Is this true?
  - b. When Barney reaches retirement age, how much will Betty receive?
  - c. If Betty receives spousal maintenance, will this impact the amount she would receive when the time comes for her to draw on his retirement?
  - d. How can Betty get her own earnings record/Social Security account to help lessen his burden?
3. Clyde and Bonnie have decided to end their 25 year marriage. They separate in May 2014 and Clyde is paying her \$2,500.00 per month in maintenance during the pending proceedings. Although Bonnie has been working for many years as a teacher during their marriage, she has back surgery which is not very successful, rendering her unable to return to any type of job since May 2013. Their dissolution has currently not been finalized.

She applies for Social Security Disability and is eventually awarded benefits. She receives an award notice which indicates that her back benefits will be paid in a lump sum, directly into her separate checking account that she set up after date of separation in the amount of \$38,000.00. This is for disability payments from November 2013 to the present. She will receive \$2,335.00 per month into the future so long as she is disabled.

4. a. Are Bonnie's back benefits separate or community property?  
b. Does Clyde get any credit for paying maintenance for the same time that she was awarded disability?
4. Barbara loves weddings. She loves the ceremony; in fact she has been married seven times. She was married to Conrad for 11 years before he died, Michael for 3 months before that was annulled, Mike for one year which ended in divorce, Eddie

for 13 years which also ended in divorce, Richard for 6 months (another annulment), John for 5 years until his death, and finally Larry, who left her after 9 years and they are still married.

Although Barbara has worked, she thinks that she might be able to collect a greater retirement on one of her many loves' accounts. What do you think?

Both Conrad (for 2 years before Barbara) and Eddie (15 years after he and Barbara divorced) each had at least one other wife. What is the effect on Barbara's ability to draw benefits if she is eligible? Do they have to share benefits?

## **RESOURCES**

These materials are only designed to give you an overview of the potential impact of Social Security on the settlement discussions concerning your family law cases. For more detailed information, please reference the Social Security website at [www.ssa.gov](http://www.ssa.gov).

You and your client may also choose to register online for their own account to see their personal earnings history and estimate of benefits under various scenarios (Disability, Retirement, Early Retirement, Spousal Benefits).

### **Attachments/References:**

#### **From the Social Security Website:**

1. [Survivors Planner: If You're the Worker's Surviving Divorced Spouse](#)
2. [Social Security Benefit Amounts for the Surviving Spouse by Year of Birth](#)
3. [Survivors Planner: How Much Would Your Survivors Receive?](#)
4. [Disability Planner: Benefits For A Disabled Child](#)
5. [Disability Planner: Benefits for your Divorced Spouse](#)
6. [Important Information for Same-Sex Couples](#)
7. [Fact Sheet: 2016 Social Security Changes](#)
8. [Monthly Statistical Snapshot, March 2016](#)
9. [Social Security Update – February 2016](#)

## **Attachment #1**

### **Survivors Planner: If You're The Worker's Surviving Divorced Spouse**

If you are the divorced spouse of a worker who dies, you could get benefits just the same as a widow or widower, **provided that your marriage lasted 10 years or more.**

Benefits paid to you as a surviving divorced spouse who meets the age or disability requirement as a widow or widower won't affect the benefit rates for other survivors getting benefits on the worker's record.

**Note:** If you remarry **after you reach age 60** (age 50 if disabled), the remarriage will not affect your eligibility for survivors benefits.

**If you are caring for a child under age 16 or disabled** who is getting benefits on the record of your former spouse, you would not have to meet the length-of-marriage rule. The child must be your former spouse's natural or legally adopted child.

However, if you qualify because you have the worker's child in your care, your benefit will affect the amount of the benefits of others on the worker's record.

(Source: [www.ssa.gov/planners/survivors/ifyou3.html](http://www.ssa.gov/planners/survivors/ifyou3.html))

## Attachment #2

### Social Security Benefit Amounts for The Surviving Spouse by Year of Birth

The earliest a widow or widower can start receiving Social Security survivors benefits based on age will remain at age 60.

#### Receiving Survivors Benefits Early

As a general rule, survivors benefits based on age will be about the same total Social Security benefits over a lifetime, whether they start early or at full survivors retirement age. If monthly benefits start before full retirement age, the amount is smaller to take into account the longer period a person receives them.

Widows or widowers benefits based on age can start any time between age 60 and full retirement age as a survivor. If the benefits start at an earlier age, they are reduced a fraction of a percent for each month before full retirement age.

If a person receives widow's or widower's benefits, **and** will qualify for a retirement benefit that is more than their survivors benefit, he or she can switch to their own retirement benefit as early as age 62 or as late as age 70. The rules are complicated and vary depending on the situation, so talk to a Social Security representative about the options available.

#### About The Chart

The chart below lists full retirement ages for survivors based on year of birth. It includes examples of the age 62 survivors benefit based on an estimated monthly benefit of \$1000 at full retirement age. **Click on the year of birth** to find out how much the benefit will be reduced if someone begins receiving survivor's benefits between age 60 and full retirement age.

**Note: If the worker started receiving retirement benefits before his or her full retirement age, we cannot pay the full retirement age benefit amount on their record.** The maximum survivors benefit is limited to what he or she would receive if they were still alive.

Year of Birth <sup>1</sup>	Full (survivors) Retirement Age <sup>2</sup>	At age 62 <sup>3</sup> a \$1000 survivors benefit would be reduced to	Months between age 60 and full retirement age	Monthly % reduction <sup>4</sup>
1939 or earlier	65	\$829	60	.475
1940	65 and 2 months	\$825	62	.460
1941	65 and 4 months	\$822	64	.445

<b>Year of Birth <sup>1</sup></b>	<b>Full (survivors) Retirement Age <sup>2</sup></b>	<b>At age 62 <sup>3</sup> a \$1000 survivors benefit would be reduced to</b>	<b>Months between age 60 and full retirement age</b>	<b>Monthly % reduction <sup>4</sup></b>
1942	65 and 6 months	\$819	66	.432
1943	65 and 8 months	\$816	68	.419
1944	65 and 10 months	\$813	70	.407
1945 - 1956	66	\$810	72	.396
1957	66 and 2 months	\$807	74	.385
1958	66 and 4 months	\$805	76	.375
1959	66 and 6 months	\$803	78	.365
1960	66 and 8 months	\$801	80	.356
1961	66 and 10 months	\$798	82	.348
1962 and later	67	\$796	84	.339

1. If the survivor was born on January 1<sup>st</sup> of any year, use the information for the previous year.  
 2. If someone was born on the 1st of the month, we figure the benefit (and the full retirement age) as if his or her birthday was in the previous month.  
**Note:** The full retirement age may be different for retirement benefits.  
 3. The \$1000 benefit would be reduced to \$715 for anyone who started receiving survivors benefits at age 60.  
 4. Monthly reduction percentages are approximate due to rounding. The maximum benefit is limited to what the worker would receive if he or she were still alive.  
 5. Survivor's benefits that start at age 60 are always reduced by 28.50%.

## How To Use This Information

Each survivor's situation is different.

You cannot use the Retirement Estimator to determine benefit amounts for a surviving spouse. However, if you know what the worker's yearly lifetime earnings were, you can use our Online Calculator to get a rough estimate of what the benefits would be for the surviving spouse at full retirement age.

If you know what the widow or widowers benefit is at full retirement age, you can use the information for the survivor's year of birth to find out how much the widows or widowers benefit would be at various ages.

## Pros And Cons

There are disadvantages and advantages to taking survivors benefit before full retirement age. The advantage is that the survivor collects benefits for a longer period of time. The disadvantage is that the survivors benefit may be reduced.

Each person's situation is different. Make sure you talk to a Social Security representative before you decide to retire.

**ALERT**

If you decide to delay your benefits until after age 65, you should still apply for Medicare **benefits** within three months of your 65th birthday. If you wait longer, your Medicare medical insurance (Part B) and prescription drug coverage (Part D) may cost you more money.

(Source: [www.ssa.gov/planners/survivors/ifyou3.html](http://www.ssa.gov/planners/survivors/ifyou3.html))

## **Attachment #3**

### **Survivors Planner: How Much Would Your Survivors Receive?**

How much your family would receive in benefits depends on your average lifetime earnings. The higher your earnings were, the higher their benefits would be. We calculate a basic amount as if you had reached full retirement age at the time you die.

**Note:** If you are already receiving reduced benefits when you die, survivor benefits are based on that amount. The **maximum** survivors benefit amount is limited to what you would receive if you were still alive.

These are examples of monthly benefit payments:

- Widow or widower, full retirement age or older --100 percent of your benefit amount;
- Widow or widower, age 60 to full retirement age -- 71½ to 99 percent of your basic amount;
- Disabled widow or widower, age 50 through 59 -- 71½ percent;
- Widow or widower, any age, caring for a child under age 16 -- 75 percent.
- A child under age 18 (19 if still in elementary or secondary school) or disabled -- 75 percent.
- Your dependent parent(s), age 62 or older:
  - One surviving parent -- 82½ percent.
  - Two surviving parents -- 75 percent to each parent.

Percentages for a surviving divorced spouse would be the same as above. There also may be a special lump-sum death payment.

### **Maximum Family Amount**

There's a limit to the amount that family members can receive each month. The limit varies, but it is generally equal to about 150 to 180 percent of the basic benefit rate. If the sum of the benefits payable to family members is greater than this limit, the benefits will be reduced proportionately. (Any benefits paid to a surviving divorced spouse based on disability or age won't count toward this maximum amount.)

### **Other Things You Need To Know**

- There are limits on how much survivors may earn while they receive benefits.
- Benefits for a widow, widower or surviving divorced spouse may be affected by several additional factors:
  - If he or she remarries
  - If he or she is eligible for retirement benefits on their own record
  - If he or she will also receive a pension based on work not covered by Social Security

(Source: [www.ssa.gov/planners/survivors/onyourown5.html](http://www.ssa.gov/planners/survivors/onyourown5.html))

## **Attachment #4**

### **Disability Planner: Benefits For A Disabled Child**

A child under age 18 may be disabled, but we don't need to consider the child's disability when deciding if he or she qualifies for benefits as your dependent. The child's benefits normally stop at age 18 unless he or she is a full-time student in an elementary or high school (benefits can continue until age 19) or is disabled.

For a child with a disability to receive benefits on your record after age 18, the following rules apply:

- The disabling impairment must have started before age 22, and;
- He or she must meet the definition of disability for adults.

### **Adults Disabled Before Age 22**

An adult disabled before age 22 may be eligible for child's benefits if a parent is deceased or starts receiving retirement or disability benefits. We consider this a "child's" benefit because it is paid on a parent's Social Security earnings record.

The "adult child"—including an adopted child, or, in some cases, a stepchild, grandchild, or step grandchild—must be unmarried, age 18 or older, and have a disability that started before age 22.

**Example:** A worker starts collecting Social Security retirement benefits at age 62. He has a 38-year old son who has had cerebral palsy since birth. The son will start collecting a disabled "child's" benefit on his father's Social Security record.

(Source: [www.ssa.gov/planners/disability/dqualify10.html](http://www.ssa.gov/planners/disability/dqualify10.html))

## **Attachment #5**

### **Disability Planner: Benefits For Your Divorced Spouse**

If you are divorced, even if you have remarried, your ex-spouse may qualify for benefits on your record. (If your ex-spouse will also receive a pension based on work not covered by Social Security, such as government or foreign work, his or her Social Security benefit on your record may be affected.)

To qualify on your record, your ex-spouse must:

- have been married to you for at least 10 years;
- be at least 62 years old;
- be unmarried; and
- not be eligible for an equal or higher benefit on his or her own Social Security record, or on someone else's Social Security record.

**Note:** The amount of benefits payable to your divorced spouse has no effect on the amount of benefits you or your current spouse may receive.

(Source: [www.ssa.gov/planners/disability/dfamily3.html](http://www.ssa.gov/planners/disability/dfamily3.html))

## **Attachment #6**

### **Important Information for Same-Sex Couples**

On June 26, 2015, the Supreme Court issued a decision in Obergefell v. Hodges, holding that same-sex couples have a constitutional right to marry in all states. Social Security recognizes valid same-sex marriages for purposes of determining entitlement to Social Security benefits or eligibility for Supplemental Security Income (SSI).

#### **If you are a spouse, divorced spouse, or surviving spouse of a same-sex marriage or non-marital legal same-sex relationship**

We encourage you to apply right away for benefits. If you disagree with our decision about your entitlement to benefits, eligibility for benefits, or payment amount, you should appeal.

#### **If you receive Supplemental Security Income (SSI)**

We consider same-sex marriages when determining SSI eligibility and payment amount. You must report changes to us, including changes to your marital status and address.

If we told you that we paid you too much SSI due to recognition of your same-sex marriage, please call **1-800-772-1213 (TTY 1-800-325-0778)** or contact your local Social Security office. On March 16, 2016, we updated our SSI overpayment-waiver policy. So, even if you already asked us about the overpayment, and even if we previously denied your request to waive the overpayment, we will review your case again under our updated policy, if you request that we do so.

#### **Medicare entitlement and enrollment**

If you have questions about how your same-sex relationship may affect Medicare, please refer to CMS at <http://cms.hhs.gov/> or call CMS at **1-800-Medicare**.

#### **If you have additional questions**

If you have questions about how a same-sex marriage or non-marital legal relationship may affect your claim or to tell us if you are married, separated or divorced, please call **1-800-772-1213 (TTY 1-800-325-0778)** or contact your local Social Security office.

Advocates, members of the media, and others with general questions about same-sex marriage or non-marital legal same-sex relationships and Social Security programs may contact their Regional Communications Director.

(Source: [www.ssa.gov/people/same-sexcouples/](http://www.ssa.gov/people/same-sexcouples/))

## Attachment #7

### Fact Sheet – 2016 SOCIAL SECURITY CHANGES

#### Cost-of-Living Adjustment (COLA):

Monthly Social Security and Supplemental Security Income (SSI) benefits will not automatically increase in 2016 as there was no increase in the Consumer Price Index (CPI-W) from the third quarter of 2014 to the third quarter of 2015. Other important 2016 Social Security information is as follows:

Tax Rate:	2015	2016
Employee	7.65%	7.65%
Self-Employed	15.30%	15.30%
<b>NOTE:</b> The 7.65% tax rate is the combined rate for Social Security and Medicare. The Social Security portion (OASDI) is 6.20% on earnings up to the applicable taxable maximum amount (see below). The Medicare portion (HI) is 1.45% on all earnings. Also, as of January 2013, individuals with earned income of more than \$200,000 (\$250,000 for married couples filing jointly) pay an additional 0.9 percent in Medicare taxes. The tax rates shown above do not include the 0.9 percent.		
Maximum Taxable Earnings:	2015	2016
Social Security (OASDI only)	\$118,500	\$118,500*
Medicare (HI only)	No Limit	
Quarter of Coverage:	2015	2016
	\$1,220	\$1,260
Retirement Earnings Test Exempt Amounts:	2015	2016
Under full retirement age <b>NOTE:</b> One dollar in benefits will be withheld for every \$2 in earnings above the limit.	\$15,720/yr. (\$1,310/mo.)	\$15,720/yr.* (\$1,310/mo.)
The year an individual reaches full retirement age <b>NOTE:</b> Applies only to earnings for months prior to attaining full retirement age. One dollar in benefits will be withheld for every \$3 in earnings above the limit. There is no limit on earnings beginning the month an individual attains full retirement age.	\$41,880/yr. (\$3,490/mo.)	\$41,880/yr.* (\$3,490/mo.)

<b>Social Security Disability Thresholds:</b>	<b>2015</b>	<b>2016</b>
Substantial Gainful Activity (SGA)		
Non-Blind	\$1,090/mo.	\$1,130/mo.
Blind	\$1,820/mo.	\$1,820/mo.*
Trial Work Period (TWP)	\$780/mo.	\$ 810/mo.
<b>Maximum Social Security Benefit:</b>	<b>2015</b>	<b>2016</b>
Worker Retiring at Full Retirement Age	\$2,663/mo.	\$2,639/mo.**
<b>SSI Federal Payment Standard:</b>	<b>2015</b>	<b>2016</b>
Individual	\$733/mo.	\$ 733/mo.*
Couple	\$1,100/mo.	\$1,100/mo.*
<b>SSI Resources Limits:</b>	<b>2015</b>	<b>2016</b>
Individual	\$2,000	\$2,000
Couple	\$3,000	\$3,000
<b>SSI Student Exclusion:</b>	<b>2015</b>	<b>2016</b>
Monthly limit	\$1,780	\$1,780*
Annual limit	\$7,180	\$7,180*
<b>Estimated Average Monthly Social Security Benefits Payable in January 2016:</b>		
All Retired Workers		\$1,341
Aged Couple, Both Receiving Benefits		\$2,212
Widowed Mother and Two Children		\$2,680
Aged Widow(er) Alone		\$1,285
Disabled Worker, Spouse and One or More Children		\$1,983
All Disabled Workers		\$1,166
* Because there is no COLA, by law these amounts remain unchanged in 2016.		
** A decrease in full maximum benefits occurs when there is no COLA, but there is an increase in the national average wage index.		

(Source: [www.ssa.gov/news/press/factsheets/colafacts2016.html](http://www.ssa.gov/news/press/factsheets/colafacts2016.html))

## Attachment #8

### Monthly Statistical Snapshot, March 2016

(Released April 2016)

Table 1: Number of people receiving Social Security, Supplemental Security Income, or both

Table 2: Social Security benefits

Table 3: Supplemental Security Income recipients

<b>Table 1. Number of people receiving Social Security, Supplemental Security Income (SSI), or both, March 2016 (in thousands)</b>				
Type of beneficiary	Total	Social Security only	SSI only	Both Social Security and SSI
All beneficiaries	65,488	57,153	5,575	2,760
Aged 65 or older	44,477	42,309	963	1,206
Disabled, under age 65 <sup>a</sup>	14,191	8,024	4,612	1,554
Other <sup>b</sup>	6,820	6,820	...	...

SOURCES: Social Security Administration, Master Beneficiary Record and Supplemental Security Record, 100 percent data.

NOTES: Social Security beneficiaries who are entitled to a primary and a secondary benefit (dual entitlement) are counted only once in this table. SSI counts include recipients of federal SSI, federally administered state supplementation, or both.

... = not applicable.

a. Includes children receiving SSI based on their own disability.

b. Social Security beneficiaries who are neither aged nor disabled (for example, early retirees, young survivors).

<b>Table 2. Social Security benefits, March 2016</b>				
Type of beneficiary	Beneficiaries		Total monthly benefits (millions of dollars)	Average monthly benefit (dollars)
	Number (thousands)	Percent		
Total	60,324	100.0	74,285	1,231.42
Old-Age and Survivors Insurance	49,540	82.1	63,259	1,276.94
Retirement benefits	43,463	72.0	56,490	1,299.74

**Table 2. Social Security benefits, March 2016**

<b>Type of beneficiary</b>	<b>Beneficiaries</b>		<b>Total monthly benefits (millions of dollars)</b>	<b>Average monthly benefit (dollars)</b>
	<b>Number (thousands)</b>	<b>Percent</b>		
<b>Retired workers</b>	40,449	67.1	54,423	1,345.49
<b>Spouses of retired workers</b>	2,350	3.9	1,633	695.02
<b>Children of retired workers</b>	664	1.1	434	653.10
<b>Survivor benefits</b>	6,077	10.1	6,769	1,113.88
<b>Children of deceased workers</b>	1,918	3.2	1,601	834.45
<b>Widowed mothers and fathers</b>	131	0.2	122	929.41
<b>Nondisabled widow(er)s</b>	3,767	6.2	4,859	1,289.83
<b>Disabled widow(er)s</b>	259	0.4	186	717.99
<b>Parents of deceased workers</b>	1	(L)	1	1,138.39
<b>Disability Insurance</b>	10,785	17.9	11,026	1,022.33
<b>Disabled workers</b>	8,889	14.7	10,362	1,165.74
<b>Spouses of disabled workers</b>	139	0.2	44	319.47
<b>Children of disabled workers</b>	1,757	2.9	619	352.50

SOURCE: Social Security Administration, Master Beneficiary Record, 100 percent data. NOTE: (L) = less than 0.05 percent.

**Table 3. Supplemental Security Income recipients, March 2016**

Age	Recipients		Total payments <sup>a</sup> (millions of dollars)	Average monthly payment <sup>b</sup> (dollars)
	Number (thousands)	Percent		
All recipients	8,335	100.0	4,752	540.81
Under 18	1,261	15.1	850	646.69
18–64	4,906	58.9	2,956	560.55
65 or older	2,168	26.0	945	434.85

SOURCE: Social Security Administration, Supplemental Security Record, 100 percent data.

c. Includes retroactive payments.  
d. Excludes retroactive payments.

(Source: [www.ssa.gov/policy/docs/quickfacts/stat\\_snapshot/](http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/))

## **Attachment #9**

### **Social Security Update – February 2016**

#### **Acting Commissioner Keynotes at the National Academy of Social Insurance Annual Conference**

The National Academy of Social Insurance held its annual conference on January 28 at the National Press Club in Washington, D.C. This year, the theme of the event was “Disparate Income, Wealth, and Opportunity: Implications for Social Insurance.” Acting Commissioner Carolyn W. Colvin provided details about the crucial role we play in providing a financial safety net for millions of Americans.

“Today, Social Security’s insurance protection has become the foundation of retirement security for almost all American workers and families. The average retirement benefit is modest, about \$1,340 a month, yet benefits are the main income for most seniors. For two in three seniors who receive Social Security, it is more than half of their total income.”

The Acting Commissioner continued by stating, “Social Security is particularly important to seniors in communities of color. In African American and Latino communities, nearly three in four seniors who receive Social Security get most of their income from it.”

It’s clear that Social Security plays a vital role in the quality of people’s lives. Over the decades, public opinion polls have consistently shown that large majorities of Americans strongly support Social Security. Year after year, respondents consider Social Security crucial for their economic stability. You and your clients can learn more about our lasting commitment to providing fair and equal retirement income to American workers at [www.socialsecurity.gov](http://www.socialsecurity.gov).

#### **Social Security Works with Small Businesses**

One of Social Security’s priorities is to reach out to small and disadvantaged businesses about contracting opportunities. This applies to both prime contractors and subcontractors.

Acting Commissioner Carolyn W. Colvin said, “Social Security recognizes that small businesses, including service disabled, veteran-owned, historically underutilized business zone, small disadvantaged, and women-owned, are a vital part of our economy. We embrace a culture of shared responsibility in seeking qualified small businesses to support the mission of the agency.”

You and your clients can find information about contracting opportunities and our ongoing commitment to small and disadvantaged businesses by going to our webpage dedicated to Small and Disadvantaged Business Utilization at [www.socialsecurity.gov/agency/osdbu](http://www.socialsecurity.gov/agency/osdbu).

## **Empower Yourself During America Saves Week**

Saving for retirement should be on everyone's mind, regardless of their financial situation. According to financial experts, you'll need at least 70 percent of your pre-retirement income to enjoy a comfortable retirement. For the average American worker, Social Security will replace only about 40 percent of pre-retirement earnings. Unless you have an additional pension, you'll need to save more to close that shortfall.

Started in 2007, America Saves Week is an annual opportunity for organizations to promote good savings behavior. It also serves as a reminder for individuals to assess their own saving practices. Typically, thousands of organizations participate in America Saves Week, reaching millions of people.

"Social Security is an important part of a sound financial plan. But, it can't be the only part. To enjoy a comfortable retirement, people need to save and invest throughout their working lives. The Department of Treasury's new *myRA* savings account is an excellent place to start. Social Security also offers valuable tools to assist with planning for a comfortable future. I always encourage workers to view their personalized Social Security Statement frequently for estimates of their future Social Security benefits," says Acting Commissioner Carolyn W. Colvin. "It's easy to do by creating a my Social Security at [www.socialsecurity.gov](http://www.socialsecurity.gov). This service is free, fast, and secure. What better time than America Saves Week to get serious about planning for the future. To start saving today for a secure future, open a *myRA* account. For more information visit [www.myRA.gov](http://www.myRA.gov)."

You and your clients can also encourage others to take the America Saves Pledge, where they can make a commitment to themselves to save for an identified goal. You can learn more about saving for your future at [www.americasavesweek.org](http://www.americasavesweek.org).

## **Fiscal Year 2017 Budget and Social Security**

Under the President's Fiscal Year 2017 budget, Social Security will continue its key programs including the Social Security Old Age, Survivors, and Disability Insurance Program (OASDI) and the Supplemental Security Income (SSI) Program.

To support this mission, the President's budget provides \$13.230 billion in discretionary funding for the agency. This funding will allow us to balance our important service and stewardship work, and to develop and pilot innovative new strategies to help people with disabilities remain in the workforce. Funding highlights include:

- Improving and modernizing customer service by providing the resources needed to reduce the national 800 number wait times, maintain field office service quality, and provide more online services.
- Investing in cost-effective program integrity efforts, such as continuing the path to eliminating pending Continuing Disability Reviews (CDR) by the end of 2019.

- Executing a plan for Compassionate and Responsive Service (CARES) to tackle pending hearings and begin to bring down hearings wait times.

Social Security continues to improve customer service and expand customer choice with the addition of new services to the my Social Security portal, including online Social Security number replacement cards. The customer experience can be tailored to the person, whether a customer prefers to visit an office, call us by phone, or visit us online. Learn more about the budget and related information at [www.socialsecurity.gov/budget](http://www.socialsecurity.gov/budget).

### **Same-Sex Married Couples and SSI**

Last year, the Supreme Court issued a decision in Obergefell v. Hodges, holding that same-sex couples have a constitutional right to marry in all states. As a result, we're recognizing more same-sex couples as married for purposes of determining entitlement to Social Security benefits or eligibility for Supplemental Security Income (SSI) payments. This month, we issued clarifications and instructions for processing claims, appeals, post-eligibility, and post-entitlement actions involving a determination of marital status.

"As with previous same-sex marriage policies, we worked closely with the Department of Justice," said Acting Commissioner Carolyn W. Colvin. "With the release of these instructions, we continue our commitment to treating all Americans fairly, with dignity and respect."

We encourage anyone who believes they may be eligible for benefits to apply now. Learn more at [www.socialsecurity.gov/same-sexcouples](http://www.socialsecurity.gov/same-sexcouples).

### **New Rules for Claiming Strategies**

We have published additional information regarding changes to deemed filing and to file and suspend claiming strategies resulting from the Bipartisan Budget Act of 2015.

First, individuals who are eligible for both retirement and spouse benefits (including divorced spouse benefits) must claim the two benefits simultaneously.

Second, if you submit a request to suspend your benefits to earn delayed retirement credits on or after April 30, 2016, you won't be able to receive auxiliary benefits on someone else's Social Security record. In addition, if you suspend your benefit, anyone receiving benefits on your record — excluding divorced spouses — will also be suspended for the same months your benefit is suspended.

Please visit our *Retirement Planner* at [www.socialsecurity.gov/retire](http://www.socialsecurity.gov/retire) to view frequently asked questions and an information guide on these topics.

(Source: [www.ssa.gov/news/newsletter/](http://www.ssa.gov/news/newsletter/))

## CAN SOCIAL SECURITY IMPACT YOUR CASE?

Presented by  
Paula M. Martin  
Attorney at Law

### History of Social Security

- 1935 – Social Security created
- 1939 – Added Survivor benefits
- 1954 – Disability Program
- 1970's – Supplemental Security Income



## 2 Types of Benefits

- Disability
  - Disabled, Insured, or Beneficiary Benefits (DIB)
  - Supplemental Security Income Benefits (SSI)
- Retirement



Image retrieved with permission from: [401kcalculator.org](http://401kcalculator.org)

## DIB Benefits

- Disabled
- Insured
- Beneficiary
  - Death of a Wage Earner
  - Disability of a Wage Earner
  - Child Benefits
  - Disabled Adult Child Benefits
    - See Practice Tip, page 7

## Divorced Spouse Benefits

A divorced individual whose marriage lasted 10 years or longer can receive benefits on an ex-spouse's record if:

- They are age 62 or older (or 50 and disabled);
- The ex-spouse is entitled to Social Security retirement or disability benefits; **AND**
- The divorced spouse benefit is larger than own earnings record.

## SSI Benefits

- Disability definition is the same as DIB.
- SSI is asset and income dependent
  - Assets limited to \$2,000
    - Exceptions: home, car, term-life insurance, burial plot
- Income Types:
  - Earned Income
  - Unearned Income
  - In-kind Income
  - Deemed Income

## Disability Application Process

- Initial Application
- Reconsideration
- Hearing
- Appeals Council
- Federal District Court

## Payment of Benefits

- DIB
- SSI
- Always a month behind
- Taxation
- Child Support



Image retrieved with permission from: [401kcalculator.org](http://401kcalculator.org)

## Retirement Benefits

Age To Receive Full Social Security Benefits (Called "full retirement age" or "normal retirement age.")	
Year of Birth*	Full Retirement Age
1937 or earlier	65
1938	65 and 2 months
1939	65 and 4 months
1940	65 and 6 months
1940	65 and 8 months
1942	65 and 10 months
1943-1954	66
1955	66 and 2 months
1956	66 and 4 months
1957	66 and 6 months
1958	66 and 8 months
1959	66 and 10 months
1960 and later	67

\*If you were born on January 1st of any year you should refer to the previous year. (If you were born on the 1st of the month, we figure your benefit (and your full retirement age) as if your birthday was in the previous month.)

Source - [www.ssa.gov](http://www.ssa.gov)

## 2016 Changes in Spouses Benefits

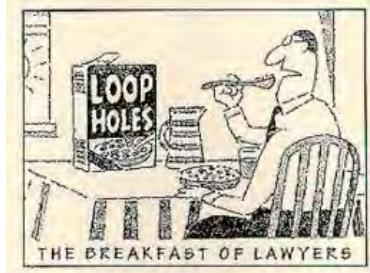
The Bipartisan Budget Act that passed in November 2015 closed two loopholes that were used primarily by married couples.

These rules were also used by divorcing spouses to receive higher benefits.

If you relied on these provisions in formulating benefits for your clients for their future retirement, they will no longer be effective if your client did not reach full retirement age prior to **April 30, 2016**, the effective date of the enactment.

## 2016 Changes in Spouses Benefits

### Suspension of Benefit Rules



Closes the file and suspend loophole.

## 2016 Changes in Spouses Benefits

### Eligibility as retiree and spouse/divorced spouse simultaneously

Deemed Filing: Now applies at any age up to 70.



## What If? Fact Scenario #1

Marilyn previously came to you and you helped her file for divorce; the 90 day waiting period has expired. You have been in settlement discussions with opposing counsel. At today's appointment she tells you she has now met the love of her life and wants her marriage dissolved immediately as she has the Church of Elvis in Vegas reserved for next weekend.

You check the calendar: Joe and Marilyn have been married for 9 years and 11 months as of today. What do you tell her?

## What If? Fact Scenario #2

Barney (age 49) and Betty (age 64) have separated and are in the midst of dissolving their 27 year marriage. Barney is concerned about paying maintenance to Betty as she has not worked outside the home their entire married life. During the settlement negotiations, it was mentioned that Betty will not be able to draw the spouse's portion on his Social Security retirement until he reaches full retirement age. Barney is concerned that he will be paying maintenance for at least 16 years if she does not have some other source of income.

- Is this true?
- When Barney reaches retirement age, how much will Betty receive?
- If Betty receives spousal maintenance, will this impact the amount she would receive when the time comes for her to draw on his retirement?
- How can Betty get her own earnings record/Social Security account to help lessen his burden?

## What If? Fact Scenario #3

Clyde and Bonnie have decided to end their 25 year marriage. They separate in May 2014 and Clyde is paying her \$2,500.00 per month in maintenance during the pending proceedings. Although Bonnie has been working for many years as a teacher during their marriage, she has back surgery which is not very successful, rendering her unable to return to any type of job since May 2013. Their dissolution has currently not been finalized.

She applies for Social Security Disability and is eventually awarded benefits. She receives an award notice which indicates that her back benefits will be paid in a lump sum, directly into her separate checking account that she set up after date of separation in the amount of \$38,000.00. This is for disability payments from November 2013 to the present. She will receive \$2,335.00 per month into the future so long as she is disabled.

- Are Bonnie's back benefits separate or community property?
- Does Clyde get any credit for paying maintenance for the same time that she was awarded disability?

## What If? Fact Scenario #4

Barbara loves weddings. She loves the ceremony; in fact she has been married seven times. She was married to Conrad for 11 years before he died, Michael for 3 months before that was annulled, Mike for one year which ended in divorce, Eddie for 13 years which also ended in divorce, Richard for 6 months (another annulment), John for 5 years until his death, and finally Larry, who left her after 9 years and they are still married.

Although Barbara has worked, she thinks that she might be able to collect a greater retirement on one of her many loves' accounts. What do you think?

Both Conrad (for 2 years before Barbara) and Eddie (15 years after he and Barbara divorced) each had at least one other wife. What is the effect on Barbara's ability to draw benefits if she is eligible? Do they have to share benefits?

## For More Information

[www.ssa.gov](http://www.ssa.gov)

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[www.vancouverdisabilitylawyer.com](http://www.vancouverdisabilitylawyer.com)



Marla Heikkala  
& Associates

**Disability Lawyers**

## CHAPTER TWELVE

**SHARED PARENTING PLANS AND PARENTING PLANS  
FOR CHILDREN BASED ON AGE**

June 2016

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**LANDON E. POPPLETON, PHD, JD**, is a licensed psychologist in the state of Washington (PY 60041144) and Oregon (1999). He has doctoral degrees in both psychology and law. Since 2001 he has worked with adults, families, and children in a variety of settings- including supervised visitation; domestic and juvenile courts; state, federal, and private run hospitals and clinics; prisons; behavioral health; and in private practice settings as both a practitioner and consultant. He is trained in the “scientist-practitioner model” and provides research informed interventions and assessment to families struggling with conflict and transitions. He specializes in marriage, and divorce related challenges people face, including having worked with high conflict families of divorce for 15 years. He is trained in empirically based assessment, and conducts bilateral parenting evaluations, mediation, parenting coordination, and reunification counseling in his practice.

**NICOLE ZENGER, PHD**, is a Licensed Clinical and Forensic Psychologist who received her doctorate degree in clinical psychology from Brigham Young University, with an emphasis in forensic and child psychology. She has over 10 years of experience in psychological and forensic evaluations. She has had the opportunity to work in collaboration with the domestic and criminal court, attorneys, physicians, mental health professionals, social workers, and correctional officers. Dr. Zenger provides services to the family courts, both in evaluation and expert testimony. She performs child custody evaluations, relocation evaluations, parental capacity evaluations, and general psychological assessments of individual parties. She serves as a parenting coordinator in cases of high conflict to assist in the implementation of parenting plans, resolve disputes, and educate on cooperative parenting. She has received training in advanced child custody issues and high-conflict divorce.

## **Best Interest of the Child Standard: Strengths and Weaknesses, and Considerations for the Determination of a Residential Parent.**

*By*

*Landon Poppleton*

### **Introduction**

The best interest of the child standard (BIC) for determining legal custody and residential placement in divorce and separation<sup>1</sup> remains poorly defined, lends itself to much judicial discretion, and due to its vague and ambiguous definition, leads to increased inter-parental disputes and litigation. It offers no clear guideline for a judicial decision maker to help a family.<sup>2</sup>

In a contested child custody case there are two different issues to address as it pertains to the subject child; legal custody and parenting time. Legal custody deals with which parent has decision making rights over important life issues, such as medical and school decisions. Parenting time deals with where the subject child will reside and when. Different states have different ways of addressing BIC as it relates to legal custody and parenting time. For example, Oregon State has a series of factors to consider in determining legal custody,<sup>3</sup> and states that when parents are in dispute, “the court shall develop the parenting plan in the best interest of the child...”<sup>4</sup> The statutory

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<sup>1</sup> While marking progress over 100 plus years of child custody disputes

<sup>2</sup> Krauss, D.A. and Sales, B.D. *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCHOLOGY, PUBLIC POLICY, AND LAW., 843, 484 (2000)

<sup>3</sup> OR. REV. STAT. §107.137 (2013).

<sup>4</sup> OR. REV. STAT. §107.105(b) (2013).

factors for decision making in Oregon can be relied on as “informative” to come to parenting time determinations.<sup>5</sup> Washington State looks at a concrete series of factors to make the determination for “parenting time,” including parent-child relationships, developmental needs, and past and future parenting performance related to the daily needs of the subject child.<sup>6</sup> These two states represent different ways of approaching the issues surrounding the definition of “child’s best interest” as it relates to parenting time.<sup>7</sup> On the face of it, Oregon’s statute allows the decision maker to take into consideration any facts that might be relevant to a family. Washington’s statute attempts to provide very standardized criteria to be applied uniformly across families.

Each approach has its own strengths and weaknesses. Where Oregon allows for optimal judicial discretion, it also leads to optimal unpredictability, and thus higher willingness for warring parties to take their chances with any given judge on any given day. Washington’s statute is more determinative, and thus predictable, but applies a one-size-fits-all standard in an increasingly pluralistic society. The strengths and weaknesses of these two approaches will be discussed in more detail below. For the discussion in this paper, both “custody” and “parenting time” will be not be analyzed differently, but incorporated under “the best interest of the child” model presented under at the end this document.

Several organizations have weighed in on this issue of BIC as it pertains to legal custody and parenting time, including the American Law Institute, the American

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<sup>5</sup> McArthur & Paradis, 201 Or. App. 530, 120 P.3d 904 (2005).

<sup>6</sup> Permanent parenting plan, WASH. REV. CODE. § 26.09.184 3a (2007).

<sup>7</sup> This is one example only in comparing the differences.

Psychological Association, the American Association of Matrimonial Lawyers, and the Association of Family and Conciliation Courts, yet this issue remains contested in the professional literature.<sup>8</sup> This paper will continue this debate, and ultimately strive to provide a working model to help decision makers come to best interest determinations around legal custody and residential placement. What I hope to illuminate is an ecologically valid<sup>9</sup> model for BIC that ties the circumstances of a child to a developmental outcome, where other standards are not couched in child development.

In part I of this paper I will briefly provide a contextual history of standards set for determining legal custody and parenting time, including the rationale behind them as they pertain to the developmental needs of a child. This will provide a historical context for the BIC standard as to couch the recommendations in this paper in context. In part II I will analyze the strengths and weaknesses of some of the current BIC standards. In part III I will present a way in which facts associated with a family might be applied to meet the best interest of a child based on the developmental needs of a child in an increasingly diverse society. The conclusion will be that BIC is not likely to ever provide a singular answer for all families, but when looked at through a developmentally appropriate lens, will help the trier of fact meet particular outcome “goals” for a child in any given family caught in a parental dispute.

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<sup>8</sup> Stephen Parker, *The Best Interest of the Child- Principles and Problems*, 8 INT. J. LAW, 26-41 (1994).

<sup>9</sup> **Ecological validity** refers to the extent to which the findings of a research study are able to be generalized to real-life settings. See <http://study.com/academy/lesson/ecological-validity-in-psychology-definition-lesson-quiz.html>

## **I. Contextual history of standards set for determining child custody.**

The current “best interest” standard for determining custody between separating parents is preceded by several doctrines of presumption that have been found to violate the 14<sup>th</sup> Amendment of the constitution. Judge Maddox, in the *Devine* case,<sup>10</sup> provides an illuminating history of these doctrines up to the current “best interest” standard that has been applied across jurisdictions in the United States.<sup>11</sup> It will be important to understand this history as the BIC standard proposed in this paper also represents an advancement from the presumption standard, but more importantly should be couched in the history of the existent BIC standard. The following traces this history of these standards, relying on the commentary in *Devine* as a guide.

### *English Common Law*

Up to the 19<sup>th</sup> century, English Common law granted children to the father in divorce. Women had few rights. Judge Maddox, in *Devine* states the history:

“At common law, it was the father rather than the mother who held a virtual absolute right to the custody of their minor children. This rule of law was fostered, in part, by feudalistic notions concerning the “natural” responsibilities of the husband at common law. The husband was considered the head or master of his family, and, as such, responsible for the care, maintenance, education and religious training of his children. By virtue of these responsibilities, the husband was given a corresponding entitlement to the benefits of his children, i.e., their services and association.”<sup>12</sup>

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<sup>10</sup> In *Devine v. Devine*, two young boys who were raised by working parents were subject to a child custody dispute. The court awarded custody of the two boys to the mother based on the “Tender Years” doctrine, and the father appealed claiming that the presumption violated his 14<sup>th</sup> Amendment Rights.

<sup>11</sup> Ex parte *Devine*, 398 So. 2d 686, 689 (Ala. 1981).

<sup>12</sup> *Id.*

Accordingly “English common law consisted of a bright line rule that a father was the person entitled, by law, to custody of his child.”<sup>13</sup> The child was the property of the father, and the courts “rationalized that the father’s financial support of his child entitled him to the labor the child could provide.”<sup>14</sup> Judge Maddox, in *Devine*, stated, consistent with this:

“We are informed by the first elementary books we read, that the authority of the father is superior to that of the mother. It is the doctrine of all civilized nations. It is according to the revealed law and the law of nature, and it prevails even with the wandering savage, who has received none of the lights of civilization. By contrast, the wife was without any rights to the care and custody of her minor children...”

“By marriage, husband and wife became one person with the legal identity of the woman being totally merged with that of her husband. As a result, her rights were often subordinated to those of her husband and she was laden with numerous marital disabilities. As far as any custodial rights were concerned, Blackstone stated the law to be that the mother was “entitled to no power (over her children), but only to reverence and respect.”<sup>15</sup>

English common law constitutes the first “presumption” doctrine for determining the legal decision making and parenting time of a child subject to divorce or separation.

### *Tender Years*

English common law doctrine was later replaced by a doctrine that recognized the position of a mother in the development of a child, especially to an infant or toddler

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<sup>13</sup> Matthew B. Firing, *In Whose Best Interests? Courts’ Failure to Apply State Custodial Laws Equally Amongst Spouses and Its Constitutional Implications*, 20 Quinnipiac Prob. L.J. 223, 225 (2007).

<sup>14</sup> *Id.*

<sup>15</sup> William Blackstone, *Commentaries on the Law of England* 453 (Tucker ed. 1803) (as cited in *Ex parte Devine*, 398 So. 2d 686, 688-89 (Ala. 1981)).

of “tender years.” The “Tender Years” doctrine became the prevailing doctrine for determining child custody for upwards of a century.<sup>16</sup> Judge Maddox describes the origins of the “Tender Years” doctrine in the United States, noting:

“In the United States the origin of the tender years presumption is attributed to the 1830 Maryland decision of *Helms v. Franciscus*, 2 Bland Ch. (Md.) 544 (1830). In *Helms*, the court, while recognizing the general rights of the father, stated that it would violate the laws of nature to “snatch” an infant from the care of its mother.”<sup>17</sup>

As Judge Maddox describes in Devine, this doctrine was replaced by the BIC, with the major effect taking place by about 1980. Despite the change, the Tender Years doctrine continued to influence court decisions for many years. There is one study that suggests that some judges, despite the change in doctrine, continued to award custody to a mother over a father based on gender alone.<sup>18</sup> This study is informative in that it provides support that the tender years doctrine held on at the courtroom and case level for many years after the change. There were no recent studies found to indicate that this trend continues.

#### *Immergence of the Best Interest of the Child*

The Tender Years doctrine was replaced by the best interest of the child standard during the second half of the 20<sup>th</sup> century. The BIC standard is presumably a gender-neutral standard that considers the “best interest of the child” in child custody determinations. It emerged due in part to pressure from men’s rights groups, legal

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<sup>16</sup> Matthew B. Firing, *In Whose Best Interests? Courts' Failure to Apply State Custodial Laws Equally Amongst Spouses and Its Constitutional Implications*, 20 Quinnipiac Prob. L.J. 223, 227 (2007).

<sup>17</sup> *Ex parte Devine*, 398 So. 2d 686, 689 (Ala. 1981).

<sup>18</sup> J. Hellman, *A Survey of the perceptions of judges, attorneys, and mental health professionals with respect to child custody determinations*, Unpublished doctoral dissertation, University of Northern California, Greeley (1998).

commentators, court decisions, and legislation that argued that the “Tender Years” doctrine was unconstitutional<sup>19</sup>. For instance, the majority of father’s rights groups, including The Divorce Racquet Busters and The American coalition for Fathers and Children, asserted that fathers were victims of the family court, and unjustifiably discriminated against in child custody decisions.<sup>20</sup> It also changed due to arguments that decisions based on presumption were unconstitutional. For instance, Judge Maddox in Devine states:

“...the United States Supreme Court held that any statutory scheme which imposes obligations on husbands, but not on wives, establishes a classification based upon sex which is subject to scrutiny under the Fourteenth Amendment. The same must also be true for a legal presumption which imposes evidentiary burdens on fathers, but not on mothers. The fact that the presumption discriminates against men rather than women does not protect it from judicial scrutiny.”<sup>21</sup>

Consistent with the prevailing attitudes about the doctrine in the 1970s and 1980s, the *Devine* court found the “Tender Year’s” Doctrine unconstitutional.<sup>22</sup> The judge writes in the opinion, “We conclude that the tender years presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex.” He adds, “Like

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<sup>19</sup> See C. Gail Vasterling, *Child Custody Modification Under the Uniform Marriage and Divorce Act: A Statute to End the Tug-of-War?*, 67 WASH. U. L.Q. 923, 928 (1989) as an example of this tension.

<sup>20</sup> C Bertoia & J. Drakick, *The fathers’ rights movement, contradictions in rhetoric and practice*, 14 JL. FAM. ISS, 592-615 (1993).

<sup>21</sup> Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); Ex parte Devine, 398 So. 2d 686, 692 (Ala. 1981).

<sup>22</sup> See also, Ketola v. Ketola, 636 So. 2d 850 (Fla. Dist. Ct. App. 1994); Kuutti v. Kuutti, 645 So. 2d 80 (Fla. Dist. Ct. App. 1994) as examples of cases that abolished the Tender Years doctrine.

the statutory presumption in *Reed*, the tender years doctrine creates a presumption of fitness and suitability of one parent without any consideration of the actual capabilities of the parties.”<sup>23</sup>

The Devine case represents the peak of an era of transition, from a presumption of custody based on gender (including the common law and tender years doctrines) to one based on the needs of the child and the fitness of the parents involved. It also introduced an area of uncertainty as it pertains to trial court determinations of child custody. Per Mnookin, a highly published professor of law and Director of the Harvard Negotiation Project, “Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with the child’s happiness? Or with the child’s spiritual or religious training? Should the judge be concerned with the economic “productivity” of the child when he grows up? Are the primary values of life in warm, interpersonal relationships, or in discipline and self-sacrifice? Is stability and security for a child more desirable than intellectual stimulation?”<sup>24</sup>

## **II. Strengths and weaknesses of the current BIC standards**

The child’s best interest remains an elusive construct to define, and there is an ongoing debate within courtrooms and in the professional literature on how to define it and apply it to any given family.<sup>25</sup> To resolve this issue it follows that many jurisdictions

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<sup>23</sup> Ex parte Devine, 398 So. 2d 686, 695-96 (Ala. 1981).

<sup>24</sup> Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp., Probs. 226, 233-237, 255-256, 261-264 (1975).

<sup>25</sup> See <http://childcustodyproject.org/essays/best-interests-of-the-child/> for example.

have attempted to codify this standard in a doctrinal schema.<sup>26</sup> For example, one attempt to do this is in the Uniform Marriage and Divorce Act.

"The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including: (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved. The court shall not consider the conduct of a proposed custodian that does not affect his relationship with the child"<sup>27</sup>

The UMDA standard is a good start, but it is difficult to determine how it fits into the developmental needs of the child. Not all states have adopted this model, but have devised their own schemas to provide rules and predictability in making such an important decision.<sup>28</sup> An additional problem is there is a lack of general uniformity across jurisdictions on how BIC is defined.<sup>29</sup>

Two statutory schemas illustrate this; Washington and Oregon. Oregon presents a statutory schema for determining legal custody.<sup>30</sup> Oregon provides a list of 6 factors that are to be weighed by the court as they apply to the facts of a family to determine

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<sup>26</sup> Robert H. Mnookin & D. Kelly Weisberg, 434, CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW, (Vicki Been et al. eds., 7<sup>th</sup> ed. 2014).

<sup>27</sup> National Conference of Commissioners on Uniform State Laws, ULA Marr & Divorce s 307, (1970).

<sup>28</sup> See CHILD CUSTODY ACT OF 1970, 722.23 "Best interest of the child" defined for one of the first.

<sup>29</sup> See Tolle Woodward & William T. O'Donohue, IMPROVING THE QUALITY OF CHILD CUSTODY EVALUATIONS, 119 (2012).

<sup>30</sup> Factors considered in determining custody of child, OR. REV. STAT. § 107.137 (2013).

decision making authority over a child, and which also double as being “informative” to determine parenting time.<sup>31</sup> The statutory factors are as follows:

Factors considered in determining custody of a child:

- (1) Except as provided in subsection (6) of this section, in determining custody of a minor child under ORS 107.105 (Provision of judgment) or 107.135 (Vacation or modification of judgment), the court shall give primary consideration to the best interests and welfare of the child. In determining the best interest and welfare of the child, the court shall consider the following relevant 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. However, the court may not consider such willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in a pattern of behavior of abuse against the parent or a child and that a continuing relationship with the other parent will endanger the health or safety of either parent or the child.<sup>32</sup>

The Oregon statute goes on to state that no factor should be considered in isolation, but that the totality of factors should be considered as it pertains to the family. The statute for determining the residential schedule of a child is codified in ORS 107.105(b). Under that statute it simply outlines that once “custody” of the child is determined, then parenting time for the non-residential parent should be determined based on the “best interest of the child.”<sup>33</sup> <sup>34</sup> Even though ORS 107.137 is informative<sup>35</sup>

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<sup>31</sup> McArthur & Paradis, 201 Or. App. 530, 120 P.3d 904 (2005).

<sup>32</sup> Factors considered in determining custody of child, OR. REV. STAT. § 107.137 (2013).

<sup>33</sup> Provisions of judgment, OR. REV. STAT. § 107.105(b) (2013).

<sup>34</sup> As noted previously, ORS 107.137 is informative to determine parenting plan under this schema.

to a trier of fact, ORS 107.105(b) leaves open a wide degree of discretion to the court, and large variability in outcomes across courts and judges. As with any statutory schema, case law helps inform how the standard is to be interpreted.<sup>36</sup>

Washington State takes a very different approach. Where Oregon relies, to some degree, on the same statute for both legal custody and parenting time, Washington looks at two different statutory schemas: Child custody is found under RCW 26.09.187:

**"(2) ALLOCATION OF DECISION-MAKING AUTHORITY.**

(a) **AGREEMENTS BETWEEN THE PARTIES.** The court shall approve agreements of the parties allocating decision-making authority, or specifying rules in the areas listed in RCW26.09.184(5)(a), when it finds that:

- (i) The agreement is consistent with any limitations on a parent's decision-making authority mandated by RCW 26.09.191; and
- (ii) The agreement is knowing and voluntary.

(b) **SOLE DECISION-MAKING AUTHORITY.** The court shall order sole decision-making to one parent when it finds that:

- (i) A limitation on the other parent's decision-making authority is mandated by RCW 26.09.191;
- (ii) Both parents are opposed to mutual decision making;
- (iii) One parent is opposed to mutual decision making, and such opposition is reasonable based on the criteria in (c) of this subsection.

(c) **MUTUAL DECISION-MAKING AUTHORITY.** Except as provided in (a) and (b) of this subsection, the court shall consider the following criteria in allocating decision-making authority:

- (i) The existence of a limitation under RCW 26.09.191;
- (ii) The history of participation of each parent in decision making in each of the areas in RCW 26.09.184(5)(a);
- (iii) Whether the parents have a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(5)(a); and

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<sup>35</sup> McArthur & Paradis, 201 Or. App. 530, 120 P.3d 904 (2005).

<sup>36</sup> Nuanced interpretation of case law is beyond the scope of this paper, as this paper deals with the macro-analysis of the standard itself.

- (iv) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

Contrary to the less defined "child best interest" approach to establishing a residential schedule in Oregon, Washington has produced a separate statutory schema for the courts to weight various facts associated with a family in making residential provisions in a parenting plan. This is coded under RCW 26.09.187:

Residential Provisions:

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:

- (i) The relative strength, nature, and stability of the child's relationship with each parent;
- (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
- (iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
- (iv) The emotional needs and developmental level of the child;
- (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
- (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
- (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight. RCW 16.09.187

Both of the Oregon and Washington approaches noted above have specific problems as they pertain to the child's best interest. One such problem is the difficulty

in tying them to any developmental outcome for the child.<sup>37</sup> They each fail to define what the statute is attempting to accomplish in terms of the development of the child. The terms “best interest” and “welfare” are ambiguous at best and ill-defined at worst. In addition, in an increasingly “pluralistic” society<sup>38</sup> the courts need to consider the appropriateness of the existent statutory factors as they pertain to any particular case at bar.

The Oregon and Washington policies provide two state level standards that illustrate the different ways in which BIC has been defined. There are other standards promulgated in the psycho-legal literature that have received both praise and endured criticism. These additional standards represent some movement to a more developmentally appropriate model for determining BIC. These include the American Law Institute “Approximation Rule,” The Association of Family and Conciliation Courts’ standards, and the American Psychological Association’s standards.

#### *American Law Institute*

The American Law Institute published their Principles of the Law of Family Dissolution: Analysis and Recommendations in 2002. In this document the “approximation rule” is delineated:

“Operationally, the approximation rule means that allocations of custodial responsibility, when not otherwise agreed to by the parents, should reflect the roles each parent assumed prior to their separation. This does not mean that caretaking arrangements are expected to remain the same after the divorce. What it means is that a parent who has been the primary caretaker of the child should remain so, and that parents who had co-

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<sup>37</sup> The meaning of this will become clear to the reader in the following sections as part of the thesis for this paper. For the sake of efficiency, it is not outlined here.

<sup>38</sup> Greater diversity makes it difficult to apply a set of standardized criteria. It presents a form of a Procrustean bed to every family dynamic. As a result of diversity a standardized BIC standard become deluded. See Maxwell v. Maxwell where the values around sexual orientation influenced the outcome of the case at the lower court level. See Maxwell v. Maxwell, 382 S. W. 3d 892 (Ky. Ct. App. 2012).

equal roles before their separation should also retain those roles afterwards, if possible.”<sup>39</sup>

The rule seeks to maintain consistency for the children pre- to post-dissolution. However, it has been criticized in the practicality of its application. This standard does not take into consideration how the respective parenting roles of parents pre-dissolution will be changed post-dissolution. It also does not take into consideration the difficulty in determining who performed what role in the highly contested case.<sup>40</sup>

#### *Association of Family and Conciliation Courts (AFCC)*

The AFCC is a flagship organization in domestic relations law that provides standards and trainings to family law professionals.<sup>41</sup> The AFCC produced its Model Standards placing emphasis on making child custody recommendations consistent with the Federal Rules of Evidence 702- where expert evidence to support recommendations made to the court is “based upon sufficient facts or data” and is the product of “reliable principles and methods.” Overall, these standards provide more of a “process” approach than a “content” approach that other standards supply. These standards were created for professionals who provide recommendations to the court concerning child custody and parenting time. They also provide judges a standard by which to evaluate the work of professionals who appears in court.<sup>42</sup>

#### *American Psychological Association (APA)*

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<sup>39</sup> American Law Institute published their *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y. (2001).

<sup>40</sup> Andrew Schepard, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 162 (2004).

<sup>41</sup> ASSOCIATION OF FAMILY AND CONCILIATION COURTS, <http://www.afccnet.org/>

<sup>42</sup> Association of Family and Conciliation Courts, MODEL STANDARDS OF PRACTICE FOR CHILD CUSTODY EVALUATION (2006).

The APA has also weighed in on the “best interest of the child” in disseminating standards for psychologists who make recommendations in disputed cases. The APA standards, similar to those disseminated by the AFCC are primarily written for professionals who provide recommendations to the court. The largest contribution these standards made to the field is a modification of the “Best Interest of the Child” in stating “Recommendations, if any, are based on what is in the best *psychological interests* of the child” (*Italics added*).<sup>43</sup>

The “best psychological interest” of the child adds a developmental facet to “best interest.” The standards state “the primary consideration in a child custody evaluation is to assess the individual and family factors that affect the best psychological interest of the child,” with a focus on the “parenting capacity, the psychological and developmental needs of the child, and the resulting fit.”

Overall, each of the standards noted in this section makes an independent contribution to the BIC, with each moving closer to a standard that has a developmental goal at stake. In summary, the history of doctrines has moved from a presumption standard to a best interest of the child standard, to various entities addressing the definition of BIC through a variety of lenses. The goal of this paper is to present a BIC model in the context of the evolution of this standard. As noted in the introduction the best interest of the child can really most likely be achieved with long-term

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<sup>43</sup> American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSY. 677-680 (1994).

developmental outcomes in mind.<sup>44</sup> The following section will present a framework to meet this goal.

### **III. The best interest of a child based on the developmental needs of a child.**

In order to establish a developmentally appropriate framework for making BIC determinations a foundation for child development is required. At a basic level, children develop on a course of “developmental pathways,” or according to a course that is considered “normative” or “pathological” depending on the factors, positive or negative, associated with that child’s life. The developmental path a child is on in life is defined by “the sequence and timing of behavioral continuities and transformations and, ideally, summarizes the probabilistic relationships between successive behaviors.”<sup>45</sup> In other words, children have developmental tasks, and milestones to meet on the course of healthy development. For instance, young children have to attach to their caregivers in healthy ways, be able to explore their world, toilet train, and get along with others in preparation for school or navigating other social situations. School-age children are generally in a stage of mastery development in their academics and extra-curricular activities. And adolescents have the developmental task of individuating in preparation to separate from their parents and be independent functional adults. There are things that can interfere with this “developmental pathway,” which is where the concepts of risk and resilience are useful to understand.<sup>46</sup>

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<sup>44</sup> Jonathan W. Gould & David A. Martindale, THE ART AND SCIENCE OF CHILD CUSTODY EVALUATIONS (2007).

<sup>45</sup> R. Loeber, *Questions and advances in the study of developmental pathways* (1991). In D. Cicchetti & S. L. Toth (Eds.), *Models and Integrations*, 3 Rochester Symposium on Developmental Psychopathology, 97-116 (1991).

<sup>46</sup> *Id.*

### *Risk and Resiliency in Child Development*

Factors that can interfere with a child's developmental pathway are considered "risk factors." Risk factors to a child's development are "variables that precede a negative outcome and increase the chances that the outcome will occur."<sup>47</sup> Risk factors typically involved acute, stressful situations, as well as chronic adversity. Resiliency is defined as a child's ability to "avoid negative outcomes despite being at risk for problems."<sup>48</sup> Factors associated with resiliency are strong self-confidence, coping skills, ability to avoid risk situations, and ability to fight off or recover from misfortune. Much of a child's ability to avoid negative outcomes is associated with what has been called the "protective triad" of resources and health-promoting events, which involved strengths of the child, the family, and school/community. Risk and resiliency are important factors to consider in the context of divorce/separation.<sup>49</sup> The reason for this is that divorce introduces a host of risk factors into a child's life, which will be discussed below.

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<sup>47</sup> Id

<sup>48</sup> Id

<sup>49</sup> J.B. Kelly, Risk and Protective Factors Associated with Child and Adolescent Adjustment Following Separation and Divorce (2012). In, Parenting Plan Evaluations: Applied Research for the Family Court 49-84 (K.F. Kuehnle & L.M. Drozd eds., 2013).

### *Divorce as a general risk factor*

Divorce appears to be general risk factor to healthy child development.<sup>50</sup> Two major studies have looked at the effects of divorce on child adjustment over time. Wallerstein, in her longitudinal study noted that divorce affects children differently depending on the developmental stage they are in. She found preschoolers to manifest regression, aggression, sleep disturbance, and fantasies of abandonment; Children 5 to 8 reveal grief, longing for the departed parent, and fantasies of replacement; Children 8 to 12 evidence anxiety, loneliness, and anger; and adolescents act out, suffer depression, have suicidal thoughts, and express anxiety about having a successful marriage.<sup>51</sup> Her findings constituted the first long-term study on divorce, and she was pessimistic in her conclusions. Her study was criticized due to her selecting her sample from mental health patients.<sup>52</sup>

Hetherington and Kelly produced an independent study on the long-term effects of divorce on children. Their findings were more optimistic, but produced similar findings as Wallerstein. They found that children of divorce are at greater risk of long-term depression and difficulties maintaining intimate relationships among children of divorce and separation.<sup>53 54</sup>

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<sup>50</sup> Judith Wallerstein, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* (1996).

<sup>51</sup> Wallerstein, Judith (1996). *Second Chances: Men, Women and Children a Decade After Divorce* (Houghton Mifflin, 1996).

<sup>52</sup> Sandra Blakeslee, *How One Woman Changed the Way We Think About Divorce*, SLATE MAGAZINE (Oct. 1, 2014), <http://www.slate.com>.

<sup>53</sup> Judith Wallerstein, *THE UNEXPECTED LEGACY OF DIVORCE: A 25-YEAR LANDMARK STUDY* (2000).

<sup>54</sup> Mavis Heatherington & John Kelly, *FOR BETTER OR FOR WORSE, DIVORCE RECONSIDERED*, (2002).

Both studies seem to support the theory that children of divorce and separation are at greater risk of mood and interpersonal difficulties. Their studies show that divorce presents a general risk factor for children developing to healthy adults compared to their similar-aged peers who grew up in intact homes. Divorce appears to present a context for greater risk to the development of long-term competency and resiliency. In other words, if one only looks at the joint long-term findings of the Wallerstein and Heatherington studies, the long-term goal would be to formulate custody and parenting time arrangements that promote a child's ability to bounce back in the face of adversity (resiliency) and competency in life (social role, inter-personal functioning, and intra-personal well-being),<sup>55</sup> and manage risk of not meeting these objectives.

### *Risk Formulation*

The formulation of risk requires an understanding of the child on various levels. This would include the current resiliency of the child, the parenting risk factors that exist in the child's family system, the social environment of the child, and the interaction of all these factors. To be able to fully understand the relevant risk and resiliency factors that need to be considered in a child's post-dissolution life, the developmental literature on such factors in divorce and separation demands a brief review in this paper. The findings of such studies should serve as part of an empirical bases and risk analysis model to promote the "best interest of a child" through the minimization or management of risk factors, and the promotion of resiliency factors in a child's life.

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<sup>55</sup> An alternative goal might be to promote family stability by preventing divorce and separation through premarital education, post-marital counseling, and post-separation mediation. The focus of this paper is on contested child custody cases.

A generally accepted model of risk assessment that could be applied to child custody determinations is empirically based judgment, or Structured Professional Judgment. This approach provides utility to the court in family court matters in two ways. First, it helps create a formulation of parenting risk by analyzing research based risk factors using a decision-making framework; and second, it speculates about future (see Hart and Logan<sup>56</sup> for how this has been applied in the violence risk assessment literature). A risk formulation approach provides a model to minimize risk factors and maximize resiliency, or protective factors in the subject child's life through structure and intervention. The following section will review relevant risk and protective factors to consider in the development of a custody and parenting time arrangement.

#### *Risk and Resiliency Factors in Divorce/Separation*

Risk factors to a child not meeting his or her developmental tasks, including long-term competency and resiliency, can be conceptualized across various domains. And there are several reviews that outline various risk and resiliency factors to child development, and which could serve as a basis for developing an ecologically valid model for determining a child's best interest. As noted above, while it appears that children from divorce are more likely to experience psychosocial adjustment problems long-term, a clear explanation has not been derived experimentally as to "why." Rather, factors found to be associated with poorer outcomes have been illuminated in the

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<sup>56</sup> S.D. Hart & C. Logan, *Formulation of Violence Risk Using Evidence Based Assessments; The Structural Professional Judgment Approach. Forensic Case Formulation* (P Sturmy & M. Wiley McMurran, eds., 2011).

research literature, and serve as a basis for a “risk factor” model to serve as a guide for those making determinations in child custody matters.

Several professionals have attempted to identify “risk” and “resiliency” factors to child development in divorce/separation. In this section I will provide a brief summary of the larger reviews that have been done. This section will conclude with a summary from this review of factors that should be considered in determining BIC, most specifically in promoting developmental outcomes of “resiliency and competency.”

Joan B. Kelly completed an exhaustive review of “risk and protective” factors found in the professional literature, and which were found associated with child and adolescent adjustment following separation and divorce.<sup>57</sup> Dr. Kelly concluded several things, including the detrimental effect of conflict on child adjustment. She noted “The most destructive post-divorce conflict is when parents use their children to express their anger...”<sup>58</sup> She stated that “protective buffers against high conflict after separation and divorce include warm, competent parenting; shielding children from conflict by encapsulation of anger and disputes; not using the children to express anger;” and refraining from attacks on the other parent.<sup>59</sup> In addition to “conflict” as a risk factor to child maladjustment she summarizes a host of other risk factors from her review.

Dr. Kelly looked at research on parents, parenting, children, and environmental risk factors to children in divorce and separation, and noted the following:

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<sup>57</sup> Kelly, J.B. (2012). Risk and Protective Factors Associated with Child and Adolescent Adjustment Following Separation and Divorce. In, Parenting Plan Evaluations: Applied Research for the Family Court. Kuehnle, K. F. & Drozd, L.M. (Eds.). Oxford, pp. 49-84.

<sup>58</sup> *Id.*, pp. 60.

<sup>59</sup> *Id.*

- Parental Adjustment and mental health is a predictor of a child's psychological adjustment;
- The quality of the co-parenting relationship is a "major predictor of emotional and social adjustment and academic performance";
- Low father involvement is associated with more delinquency and externalizing and internalizing problems in boys and girls;
- Loss of important relationships is a source of distress, pain, and sadness;
- Family structure transitions are associated with increased problems of all types for children; and
- Decreased economic resources are a source of family stress.

She emphasizes the importance of being aware of the empirical research on the outcomes for children and adolescents in divorce and separation, and noted "in particular, the extent of risk for children when parents separate and the major factors associated with increased risk and enhanced resilience..."<sup>60</sup>

Similarly, to Dr. Kelly's review, Woodward and O'Donohue reviewed numerous studies and found a reliable set of factors that increase the likelihood of maladaptive outcomes. These include the following:

- Poor parent-child relationship;
- Poor parenting skills (specifically, highly critical, harsh, inconsistent or permissive parenting);

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<sup>60</sup> *Id.*, pp. 72.

- Environmental instability (this factor subsumes low SES, low maternal education, disadvantaged minority status, as well as child maltreatment);
- Parent mental health problems [poor emotional regulation/mental disorder of the parent (and particular maternal disorders)]; and
- Excessive inter-parental conflict.<sup>61</sup>

The authors not only look at these as “risk factors”, or in their terminology “egregious factors,” but view the opposite as “promotive factors.” These include positive parenting, parental school involvements, promotion of interpersonal relationships, promotion of mental health, promotion of community involvement, and effective co-parenting. Thus, they not only view “risk” factors that divorce introduces into a child’s life, and should be considered in making best-interest recommendations, but also “resiliency” factors that help children overcome the potential negative effects of divorce.

In conclusion, there appears to be a general consensus in the developmental literature that there is a reliable set of factors to consider in formulating a custody and parenting plan arrangement, and which should be formulated to meet specific aims to promote the “best interest of a child.” These “guiding principles” create a nexus between the independent stressor of “divorce and separation” and developmental outcomes of “resiliency and competency.”

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<sup>61</sup> Lauren Woodwood Toole & William T. O’Donohue, IMPROVING THE QUALITY OF CHILD CUSTODY EVALUATIONS: A SYSTEMIC MODEL, 29 (2012).

This review supports the following general factors that should be considered in the development of a custody and parenting plan arrangement to meet this aim. They are:

- 1- “Minimization of loss,” including loss of community, friends, and important adults;
- 2- “Promotion of healthy parent-child relationships,” including supporting those that might put a child at risk due to poor parental adjustment or disposition;
- 3- Supporting a sense of “security,” including financial security and familiarity of environments;
- 4- “Managing conflict,” with a specific focus on “perceptible conflict” that might undermine relationships and put stress on a child and adolescent; and
- 5- Meet age-related needs, such as “attachment and bonding” and routine needs taking into consideration the age, developmental level, and the specific needs of the child involved.<sup>62</sup>

#### **IV. “Child best interest” defined in terms of developmental outcomes.**

In this paper I reviewed the different models in which “child best interest” has been defined historically. I draw the conclusion from that review that the BIC standard is not only ill-defined in many jurisdictions, but can be difficult to use to create a nexus between the facts of the case and the needs of the child in terms of his or her development.

For example the factor found in the Uniform Marriage and Divorce Act<sup>63</sup> - wishes of a parent and child are not factors generally supported in the developmental literature

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<sup>62</sup> See Florida AFCC chapter review of the literature for support for these factors, as found in a CE presentation.

<sup>63</sup> Uniform Marriage and Divorce Act, § 402 factors 1 and 2.

to be connected to child long-term resiliency and competency. While an important factor to consider is individual autonomy it does not appear to have a clear nexus to promoting child development.<sup>64</sup> On the other hand there are some that are connected, including “the mental and physical health of all individuals involved.”<sup>65</sup> However, this latter factor does not necessarily provide any guidance on how to consider the tension between minimizing a child’s exposure to a parent’s mental health problem through minimal contact, and what the loss of parental relationship might mean for a child.

To attempt to bridge these issues, I propose a risk formulation model with very clear “outcome” objectives for the child. I suggest that the court might use such a model to determine the child’s best interest. The family court would optimally look at various risk and protective factors as they pertain to a child/adolescent’s long-term adjustment, and seek to apply them as they relate to the facts of the family. This should include wide discretion in how they might be applied and managed.<sup>66</sup> Many of these “risk” factors can be managed, and therefore would not necessarily be determinative to the case where they might otherwise be under a strict statutory schema.

#### *Structured Professional Judgment and Parenting Risk*

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<sup>64</sup> Parental autonomy might have a putative connection to child development. For instance, one might hypothesize that increased parental autonomy has a direct effect on inter-parental conflict, and thus increasing autonomy will have a positive effect on decreasing toxic conflict. It might also be found to increase inter-parental conflict under certain circumstances. It is not my intention to minimize autonomy in this paper, but to suggest that we just don’t know enough about its connection to child development to consider it highly. Until that research is done parental autonomy might best be considered in light of other factors, including the state’s value to promote autonomy as much as feasibly possible in a given case.

<sup>65</sup> Uniform Marriage and Divorce Act, § 402 factor 4.

<sup>66</sup> In some cases, there is not good solution to optimize a child’s potential for development. Take for example the special case of parental alienation, which is beyond the scope of this paper. In parental alienation even the most optional solution of maximizing promotive and minimizing risk actors is not enough. The case is constantly changing, and the court often needs to step in to manage the case towards a solution that is acceptable for a child to be raised under.

As noted earlier, a generally accepted model of risk assessment that could be applied to child custody determinations is Structured Professional Judgment. This approach provides utility to the court in child custody matters through case formulation of parenting risk, by analyzing research based risk factors using a decision-making framework to speculate about future. In each case there is a demand to minimize risk factors and maximize resiliency factors in the subject child's life. Per the review noted in an earlier section, these factors could reasonably include 1) minimization of loss, 2) promotion of healthy parent-child relationships, 3) security, including financial security, 4) managing conflict, and 5) age-related needs, such as "attachment and bonding" and routine needs. This model is more than a weighing of statutory factors, but includes an application of principles to apply to any case in order to promote competency and resiliency in a child's development. Take the following case as examples, with application of the "risk" model.

*Case Example 1:*

Samantha's mother and father divorce when she is 6 years old. There are no parent capacity issues, and both parents are bonded to Samantha and provide a healthy home environment for her. They had a tumultuous divorce, but only continue to have problems making decisions together about her special education needs in school. It appears to the court the issue is not about the particular interests one party or the other has against their co-parent, since they both have Samantha's interest in mind. And the conflict doesn't appear to be completely intractable. The issue is about how to achieve the objectives of Samantha's special education.

In this case it likely would not make sense to order sole custody to one parent over another, as might likely happen in the state of Oregon if one parent disagrees with joint legal custody. A low level intervention like child consultant informed mediation or parenting coordination would likely suffice. There are also no major risk factors to the child's development noted in the case, save the possibility of "perceptible conflict." The risk in this case it is circumscribed around one issue, and can likely be managed with a dispute resolution process incorporated into the parties' parenting plan.

*Case Example 2:*

Sean was raised in a so-called "traditional" home, where his father was the breadwinner and mother the homemaker. His parents divorce when he is 14 years old. He identifies more with his father, and does so around sports. He loves his mother, and she has been there for him day-to-day for his entire life. His mother has recently entered the job market, and has very little flexibility in her new job. Sean is a good student, and very independent. His parents have a cooperative co-parenting relationship, and are fully capable of meeting his needs during their parenting time.

The statutory factors in his jurisdiction are in line with a "primary parent presumption."

In this case, if one were to attempt to follow the risk and protective model of child best interest, it would be in his best interest to promote parent-child relationships as much as possible, and to do so contrary to any primary parent presumption. The reason for this is found in the model- while his father was not considered the primary

parent during the marriage, he is the person Sean identifies with.<sup>67</sup> And there are not risk factors that the promotion of one or both parent-child relationships would introduce into his life (such as parental mental health). In this case the ALI “approximation rule” or a statutory presumption in favor of the primary parent would not be flexible enough to meet the developmental needs of Sean in terms of maximizing resiliency factors and minimizing risk factors.

Not all cases are such low-conflict cases, and many can get very messy. The following vignette provides an example where the risk factor model can still apply.

*Case Example 3:*

Charlie falls on the Autism spectrum, and has high day-to-day needs. His Father was the primary parent during his parents' marriage, but during the marriage he became severely depressed to the point that his mother had to balance meeting his needs and the financial demands of the family. To be able to work and take care of him at the same time she brought her widowed mother into the home, Charlie's grandmother. Charlie's father never overcame his depression, and due to the stress his lack of functioning created for the family Charlie's mother filed for divorce and asked for primary custody of Charlie. Charlie's father fired back alleging a long history of domestic violence, for which no evidence was ever forthcoming. Charlie's day-to-day needs are high, and due to his parent's absenteeism, his father's lack of bonding with him due to depression and

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<sup>67</sup> There is an emphasis here on the “parent-child” relationship factor.

his mother's having to work long days to meet his daily and treatment need, Charlie is most bonded to his paternal grandmother.

This case requires not only the framework of a risk factor model to promote the child's relationship and stability needs, but an understanding of the facts of the case as they apply to the model. Charlie's day-to-day monitoring and treatment needs are high. He is most bonded with his maternal grandmother, and his mother is more psychologically stable than his father. It would clearly serve Charlie's interests to be primarily placed with his mother, as his mother brings to the table her own personal stability and her own mother for support. Being placed with his mother will not only meet Charlie's daily needs more because of grandmother involvement, but also minimize loss of important relationships and minimize the risk of insecurity due to finances and mental health. The question remains, how much time is necessary to optimally maximize the father-son relationship without introducing the risk factors that come with that relationship loss? Ideally it would not likely drop below 30% of parenting time,<sup>68</sup> but if too much exposure is of concern much of this time could occur in a structured setting or during extended weekends to maximize the father-son relationship and maintain security of routine and meet his daily needs free of the risk of his depression resulting in neglect.

Each the vignettes above attempted to minimize risk factors and maximize resiliency factors in the subject child's life, specifically minimization of loss, promotion of healthy parent-child relationships, security, managing conflict, and age-related needs,

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<sup>68</sup> There is support that parenting time schedule that provide at least 30% of parenting with a non-residential parent buffers the effect of "loss of important parent relationships." See Kelly, J.B. (2012). Risk and Protective Factors Associated with Child and Adolescent Adjustment Following Separation and Divorce. In, Parenting Plan Evaluations: Applied Research for the Family Court. Kuehnle, K. F. & Drozd, L.M. (Eds). Oxford, pp. 49-84.

such as “attachment and bonding” and routine needs. This model is more than a weighing of statutory factors, but includes an application of principles to promote competency and resiliency in a child’s development. One example is that of “child custody,” where there are both dispositional<sup>69</sup> and intervention factors<sup>70</sup> of a case to consider.

## **V. Conclusion**

A formulation of risk that hinges the facts of the family and child’s circumstances around empirically based risk and protective factors of healthy child development, without a statutory mandate to weigh one over the other has a lot of developmental appeal. First, while it establishes a series of factors to consider in the development of a parenting plan, it does so with a clear “outcome” in mind- the long-term resiliency and competency of a child. It also takes into consideration the natural diversity in society, where one case might demand a higher weighing of a particular set of factors over another. Finally, the greatest value is that the illumination of relevant “risk factors” to a particular child lends itself naturally to court intervention to “manage” such risks through judicial orders if necessary in a case.

The draw back to a “risk formulation” approach is that the factors could be relegated to a list of factors to weigh in making determinations without considering the dynamic nature of them and opportunities they create to actively “promote” the best interest of a child. Rather than view them as stagnant, there is a natural tension

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<sup>69</sup> “Coercion and control” domestic violence would be an example of a clear need for sole decision making to minimize the effect of a parent using child burdening conflict against the other parent.

<sup>70</sup> There are many options to a family to manage “risk factors”, such as parenting coordination to manage conflict and mental health treatment to manage mental health. An understanding of “risk factors” in a family lends itself logically to these times of management/intervention strategies.

between “factors” that is produced due to the nature of divorce and separation, and which makes them dynamic. For example, the tension between maximizing relationships and maximizing security in routines is evident in that to have a stability of routines (being in the same home for the school week for example) naturally subtracts from relationship opportunities with one parent. A demand to promote these two resiliency factors creates pressure on families and the court to “actively” promote them rather than default to “local rules”.

## CHAPTER THIRTEEN

## APPEALS AND FAMILY LAW

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**CATHERINE WRIGHT SMITH** is a shareholder in the Seattle law firm of Smith Goodfriend, P.S. She has handled over 400 appeals in Washington state and federal courts, and was counsel for the parents in *Troxel v. Granville*, 530 U.S. 57 (2000). Catherine is a past President of the American Academy of Appellate Lawyers, founded the Washington Appellate Lawyers Association, is editor-in-chief of the Washington Appellate Practice Deskbook, and was honored to be named WSBA Family Lawyer of the Year in 2001.

**VALERIE A. VILLACIN** is a shareholder in the Seattle law firm of Smith Goodfriend, P.S. Valerie has been counsel of record in over 125 appeals. Valerie is involved in all phases of the appellate process, from consulting with trial attorneys regarding potential appellate issues, to assisting with post-mandate issues in the trial court. She is a member of the Washington Appellate Lawyers Association, a contributing author to the Washington Appellate Practice Deskbook, and wrote the chapter on appeals in the most recent edition of the Washington Practice volumes on Family and Community Property Law.

Between the two of us, we have been practicing law, almost entirely in the appellate courts, for almost 50 years. (Though were we a property division, the disproportionate nature of that aggregate number might be considered an abuse of discretion.) We have handled hundreds of appeals, ranging from criminal misdemeanors to multi-million civil judgments, raising every substantive issue imaginable.

One of the most “appealing” aspects of practicing appellate law is not only the possibility of trying to bring about a just result in a particular dispute, but of shaping policy through the common law. We have always tried to keep those two complementary goals in mind in evaluating and arguing cases on appeal.

Sometimes that is a more difficult thing to do in family law cases than in other types of disputes. Because of the emotions involved, because these disputes aren't "just about money," keeping both the client's and the attorney's goals and expectations realistic can be difficult.

But it is in domestic relations - an area of the law that some think should not even be subject to appeal as a matter of right, and where the criteria governing decision-making at trial and the standard of review on appeal are intentionally crafted to make it more difficult to obtain appellate review of a trial court's decision - that we have often had the most success in fulfilling our goals as appellate lawyers. Here are a few tips – on winning appeals, on losing appeals, and on family law appeals in general – based on our experience:

### **THREE THINGS YOU MUST DO TO WIN A FAMILY LAW APPEAL**

- **Know Your Audience.**

Of the 31 men and women currently sitting as appellate judges in this state, few had any domestic relations experience before joining the appellate bench. For most appellate judges, RCW ti. 26 is foreign territory - a "third world country" they don't really want to visit, and that they won't explore without a clearly written, concise guidebook. Your briefing must be their "travel guide." Don't presume knowledge about the law or family dynamics governing domestic relations cases in the appellate courts.

What appellate judges *are* experts at is appellate procedure, and at deferring to trial court judges who must make decisions “on the fly” and without extensive briefing. Don't waste the appellate court's time with cases that ignore the deferential standard of review governing most domestic relations decisions, that invite a retrial of factual issues, or that depend upon an argument that the trial court was never given the opportunity to consider. Don't expect the appellate court to set off cross-country in search of reasons to reverse a discretionary decision. Your “travel guide” must set out a clear route to the desired result, explaining the limits to the trial court's discretion in the statutes and governing case law (see **Read the Statute, *infra***).

- **Think Outside The Box.**

Many family lawyers are good at their jobs because they know "how things work," can predict what a particular trial judge or commissioner will do given a particular fact pattern, and act on that knowledge in resolving family law disputes. When a domestic relations case has not settled (as the vast majority do), and has not only gone to trial but is on its way to appeal, "that's how we always do it" is not a sufficient reason to do anything. The appellate judges don't necessarily know (or care) how things are "always" done (see **Know Your Audience**, *supra*), and you must think creatively to find a fair resolution for the unusual family dynamic that has lead to a domestic relations appeal.

- **Read The Statute.**

Divorce is wholly statutory, and RCW ch. 26.09 is the Rosetta stone of domestic relations appeals. We joke that the secret to our success as appellate lawyers is that we read the statutes. But there is more than a little truth to that claim in domestic relations appeals. Sometimes when we evaluate a case for purposes of appeal it seems that we are the first attorneys involved who have actually looked at and critically addressed the statutory criteria for decision that govern the substantive issues in the case (see **Think Outside The Box**, *supra*).

The statute establishes limits on the trial court's discretion in making its decisions. In order to effectively argue that a trial court abused its discretion, you must first read the statute.

"Family law" is not an oxymoron. The Dissolution Act of 1973, the Parenting Act of 1987, the Uniform Child Support Guidelines, and the Relocation Act of 2000, are comprehensive, thoughtful pieces of legislation that attempt (in some instances more successfully than others) to reflect consistent themes and parameters. Use the language of the statutes in arguing your cases.

## **THREE REASONS YOU MAY LOSE A FAMILY LAW APPEAL ANYWAY**

- **The Tie Goes To Respondent.**

So now you are ready to appeal. You've thought **outside the box**, and you have **read the statute**. It's a "slam dunk," right? (For some reason, prospective appellants always think their appeal is a "slam dunk.") Not quite.

There is a principle in insurance coverage disputes that "the tie goes to the insured" – that is, if the question whether there is coverage for a claim could be answered either "yes" or "no," there will be coverage. That principle applies, in spades, to appeals - and particularly in family law appeals. If two different conclusions can be reached from the body of evidence, the appellate courts will side with the respondent. Likewise, if there are

two reasonable interpretations of statutory language, the appellate courts will most likely adopt an interpretation that will lead to affirmance.

This momentum towards affirmance is based, in part, on the appellate judges' recognition that they do not have experience in domestic relations (see **Know Your Audience, supra**). As the Supreme Court noted in *Parentage of Jannot*, 149 Wn.2d 123, 127, 65 P.3d 664, 666 (2003): "Because adequate cause determinations are fact intensive, we recognize that a trial judge generally evaluates fact based domestic relations issues more frequently than an appellate judge and a trial judge's day-to-day experience warrants deference upon review."

- **Bad Facts Make Bad Law.**

But wait, you might think: "I have the law on my side!" (see **Read the Statute, supra**) In the end, that still may not be enough. Even if the trial court did not quite hit the mark on the law, the facts are often such that the result is not a surprise, and the appellate courts will still want to side with the respondent.

There is a presumption that because the trial judge may have spent days, or maybe even weeks, with the parties in the courtroom listening to them testify, that the trial court probably reached the right result. Because of the extreme deference given a trial court's factual determinations, even the most ironclad statutory argument cannot overcome bad facts.

Appeals nevertheless are often pursued by litigants because the trial court "got the facts wrong." This dynamic is particularly apparent in the case law interpreting RCW ch. 26.50. Most individuals subjected to an arguably unjust and unnecessary protection order will just keep their heads down until the order expires. It is the individuals against whom orders are most justified that will pursue an appeal. The "bad facts" in those cases make for bad law.

- **"Nothin' From Nothin' Leaves Nothin."**

Appeals are often pursued from bad results that are the result of a number of discretionary decisions, each of which is likely within the range of acceptable decisions. To paraphrase the immortal Billy Preston, "you gotta have somethin' if you wanna" convince the appellate court to reverse. If you must rely on the concept of "cumulative error," consider you may have no error at all to argue on appeal.

Rarely can one obtain a reversal "by a thousand (paper) cuts." Instead, it is best that the first blow be a challenge to a legal conclusion from which challenges to underlying discretionary decision can successfully flow. For instance, a successful challenge to the characterization of property – a legal conclusion – can result in reversal of the property

distribution and even spousal maintenance, since the two are closely linked. See, e.g., *Marriage of Kile and Kendall*, 186 Wn. App. 864, 347 P.3d 894 (2015).

## THREE WAYS TO KEEP YOUR SANITY (AND YOUR LAW LICENSE) WHILE HANDLING FAMILY LAW APPEALS

- **Recognize Your Limits.**

Good lawyers (and good judges) recognize that the law is of limited utility in healing the psychological and sociological traumas that lead to and flow from the breakup of a marriage or the other dysfunctional family dynamics that are governed by the chapters of RCW tit. 26. In the end, we can not legislate or decree matters of the heart. The statutes and case law governing domestic relations properly reflect those limits on our abilities as attorneys and judges. *Marriage of Littlefield*, 133 Wn.2d 39, 940 P.2d 1362 (1997) and *Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), are examples of the appellate courts' proper resistance to judicial/legislative micro-management of family dynamics. And when the appellate courts have stepped in to "fill in the blanks" when a case presents a situation not addressed by statute, such as in *Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005), it often leads to years of effort (and experience) establishing the contours of the "common law." Viz., *Dependency of D.M. & S.R.*, 136 Wn. App. 387, 149 P.3d 433 (2006); *Adoption of R.L.M.*, 138 Wn. App. 276, 156 P.3d 940 (2007); *Parentage of J.A.B.*, 146 Wn. App. 417, 191 P.3d 417 (2008); *Parentage of M.F.*, 168 Wn.2d 528, 228 P.3d 1270 (2010); *In re Beach*, 159 Wn. App. 686, 246 P.3d 845 (2011); *Custody of A.F.J.*, 179 Wn.2d 179, 314 P.3d 373 (2013); *Custody of B.M.H.*, 179 Wn.2d 224, 315 P.3d 470 (2013); *Custody of M.J.M.*, 173 Wn. App. 227, 294 P.3d 746 (2013); *Parentage of J.B.R.*, 184 Wn. App. 203, 336 P.3d 648 (2014); *Custody of J.E.*, 189 Wn. App. 175, 356 P.3d 233 (2015).

Lawyers are often drawn to family law through a desire to help others. There is sometimes an almost overwhelming desire to "fix" things by seeking relief that a court cannot practically provide. Our clients are, by and large, adults. They do not permanently lose the power of reason simply because their relationships founder. They have the ability to make decisions for themselves and their families and to deal with the disappointment if their expectations are not fulfilled. Except in extraordinary situations, the law should be interpreted and applied to facilitate the autonomy of litigants, including the parties in family law cases.

Recognize the limits on your ability to effect psychological healing through the law. Recognition of those limits often includes telling clients to not appeal. In many instances, the best advice is to tell a client to move on with their life and adapt to the newly structured family and/or finances established by the trial court orders.

- **Avoid Projection.**

Most lawyers (and judges) have never been the victim of crime. Luckily, most of us will never be defendants in a civil case. Having seen the costs and effects of litigation, we will avoid suing others as well. A large part of our value in society as lawyers is the ability to look at a situation dispassionately, and to advise and advocate without undue emotional involvement for the participants in events that lead to litigation.

But all of us have family relationships. We are all children, parents, siblings, spouses, or lovers. It is difficult for us both as lawyers and judges not to project our own experiences into the often very different family dynamics that lead to domestic relations litigation. This projection can lead to bad advice (and bad decision-making) that says more about the lawyers and judges involved than the parties before them.

That is one of the main reasons that as lawyers we must remain focused on the law (see **Read The Statute**, *supra*) in those cases that lead to appeal (see **Think Outside The Box**, *supra*) in order to fulfill our responsibility to help the judges before whom we appear (see **Know Your Audience**, *supra*) stay "on-task" in deciding these cases (see **Recognize Your Limits**, *supra*). If projection has become a problem in a family law matter that you are handling, it may be time to bring someone else into the loop, or to try a new approach to the dynamic among the parties, attorneys, and judges involved that has led a domestic relations case to the appellate courts.

- **Honor The System.**

The power and responsibility of the courts in our society cannot be overemphasized. The realistic use of the appellate courts to resolve family law disputes, and to provide the parameters for resolution without litigation of the problems facing hundreds of other like-situated families, is one of the most compelling and gratifying ways of fulfilling this role of the lawyer in society. We don't usually approve of block quotes, but the founding partner of our firm and Catherine's mentor Malcolm Edwards has explained far more eloquently than we can why the responsible exercise of legal authority is the obligation of each of us as lawyers:

[A]lways be filled with the knowledge that as a lawyer, you are fulfilling a high purpose in society. You are the instrument through which our society resolves conflicts peacefully; and the method we choose to resolve conflict is what determines whether we are civilized or savages. I know of no more important role that anyone can fill in society, and we fill that role. And it is in fulfilling that role that we are truly professional.

Being always aware of the important purpose we fill in society will help us become better advocates. We will be able to write and speak with purpose and an inner conviction that what we are doing is important. This knowledge

will cause us to show respect to others involved in the process, including judges, opposing counsel and the adverse parties. We need this respect to be effective in an arena of conflict.

Being filled with the knowledge that what we are doing is vitally important will give us inner strength that will show through to the court, to the jury, and opposing counsel. This high purpose will motivate us by elevating the otherwise hundreds of mundane things we do to a part of a ritual that leads to fulfillment of a goal larger than each of us--that is, holding the fabric of society together through peaceful resolution of disputes.

M. Edwards, *Professionalism on Appeal*, Appellate Advocacy in the Nineties at 1 (privately published 1990).

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## CHAPTER FOURTEEN

## RESIDENTIAL REAL ESTATE CHALLENGES IN A DIVORCE

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**KIM O. DALES** is currently a Managing Broker at Windermere Real Estate Co. in Seattle WA. After practicing as a Registered Nurse for 20 years spanning 4 states, from bedside nursing to up in the air literally as a Nurse Recruiter hiring nurses across the country, to managing a medical unit, supervising a 240 bed hospital then working at Seattle Children's Hospital, Kim decided to make a career change. In 2001 she reinvented herself and became a Realtor. Almost 15 years later Kim continues to enjoy the challenges that real estate holds. Having dealt with many different types of real estate transactions from the simple to the complex, divorce transactions are one of the more challenging aspects of my real estate practice. Kim feels that her background in nursing has been invaluable in dealing with her clients.

Kim enjoys giving back to the community and supports the following organizations: Windermere Foundation; Laurelhurst Elementary School Annual Auction; Seattle Preparatory School; Outdoors for All (a non profit organization that gives both youth and adults valuable outdoor experiences); Whidbey Camano Island Trust; Methow Conservancy; Methow Trails Association; Fonterra; Seattle Children's Hospital; Downtown Emergency Service Center; Mobility Outreach International; Social Justice Fund of Seattle.

**CASEY GRANSTON** is a Loan Officer at Caliber Home Loans. He was born and raised in Seattle, WA attending High School at Roosevelt, and then graduating from Western Washington where he played golf. After college he tried playing golf professionally for 3 years, while bartending on the side to earn money, as golf is hard! After he moved home he found the mortgage industry.

He has been in the mortgage industry for 7 years. He started his career at Wells Fargo in 2009. In 2012 he opened an office for Supreme Lending in Seattle working until 2015 when he switched to Caliber. Casey's business model is centered on customer service and communication. His background has helped him in dealing with multiple people and personalities on a regular basis.

In his spare time he golfs, play basketball, softball, outdoor activities, cooking, and loves his family.

## **Introduction:**

Buying and selling a home is an extremely stressful process, especially in our current market environment where housing prices are accelerating at a breakneck pace. Add divorce to the mix and the stress levels intensify. In my real estate practice when a divorce is involved, it is not unusual to be contacted by just one party that will be selling the home. Typically, and I am not sure why it is the wife. Many times the spouse can not buy the other party out, so both must sell and split the proceeds.

Many times neither party are on speaking terms, and the Realtor becomes the liaison between both parties. This, is not an easy task as I have literally had to email clients separately so that they don't have to communicate at all. Or, I've had clients that I would email jointly but they would respond asking me to ask the other spouse about xyz. It is amazing how many times the process starts out amicably then deteriorates.

When dealing with parties in a divorce situation the Realtor needs to be very goal oriented. The focus needs to be on the house, with compassion towards the parties involved, but not agreement. We should never take sides.

Below are some common questions that **Realtors** deal with when working with clients in the process of getting a divorce:

- **Who signs the listing and closing documents?** If the clients are not divorced both parties will need to sign all documents as we are a community property state, even if one of the parties is not listed on title.
- **How does a realtor arbitrate/mediation during the sales process with high conflict parties?** Personally the best strategy is open communication. If the attorney wants to be on the email thread that is fine if both parties agree. If each party wants to be contacted by phone or email separately I always request their wishes.
- **How do parities efficiently handle repairs/improvements to the real estate in question during a pending divorce?** If both parties have legal representation, I would suggest drafting a document for each party to sign outlining in detail who is responsible for what repairs. Ie. Replacing a roof or a sewer line is much more expensive than painting.
- **How are commissions divided between the seller and the buyer?** In the state of Washington ALL commissions are paid for by the sellers. This might also be something to discuss as one party might be liable for the commissions. Also the excise tax, 1.78% to be deducted at closing is a significant amount of money. This should also be discussed by the Realtor when doing the initial market analysis and discussing net proceeds as there may be an arrangement as to who pays what.

## Title questions:

- **Martial liens? How do they appear on the title and what is the process to remove them? Is it your opinion as a title company that any liens should be dealt with before listing the property?**

The title company will review the decree and the property settlement agreement (PSA) to see if there are any financial considerations regarding the sale of the home (for example: she got the property, but he gets \$50,000 from the sale). A title company can access the decree info through our systems, but often the PSA isn't filed with the case, so title will need to get that from the seller directly. Sometimes the cases are sealed, then title will also need to get the info from the seller directly (or from their attorney with their permission).

Any liens can be dealt with out of the proceeds of the sale, and an escrow officer will work with the seller and/or their attorney to get the proper paperwork to provide clear title to the new buyer. If that obligation has already been taken care of (for instance, she refinanced the home—paid the ex-husband his money—and a few years later is selling the house), title will need proof that it happened (via a satisfaction in the divorce case or a release of lien depending on how the attorney secured the obligation).

- **Is it good to get liens cleared before listing?** This depends on the situation. If its taken care of out of proceeds, generally okay to list the property. If it's been paid and the satisfaction can easily be procured, then probably okay to list. If the listing agent thinks it might be difficult to get that satisfaction, then maybe it would be prudent waiting until it's been done.
- **Do martial liens effect commercial property differently than residential?**

Marital liens can attach to any real property, and would be handled the same as noted above.

- **Has title ever had an issue with one party agreeing to paying on a lien but the other refusing and how is that handled?**

Unfortunately, this is not uncommon but both parties need to remember that if the seller or sellers can't provide marketable title ie. an un-paid lien against the property, the contract can't be fulfilled and can not close.

- **Do title generally have a letter from the attorney involved in the divorce, what type of verbiage do title companies like to see?**

This depends on the situation. For a lien, title needs a release of lien and/or a satisfaction depending on how they secured the obligation. There might be other info title would need from a divorce attorney along the way.

- **For title purposes is there any difference between legally separated, filing for a divorce or actually being divorced?**

When the actual divorce is finalized there's a clear-cut (usually) agreement on who gets what, so that is a good road map for all involved.

A pending divorce means they are still married, so title move ahead with both parties signing for the sale. This can get messy as often the parties aren't talking to each other, or have other issues that make the process awkward.

If they are legally separated, and there's an agreement, that helps, but much will depend on the situation and how title is held, and other issues.

### **Escrow:**

- **Who is present at signing?** Both parties need to agree to the distribution of funds before the signing appointment so as not to come to blows at escrow.
- **Title and or the parties attorney's should have all correct documentation to the escrow office a few days before signing.** There are often disputes as to who receives the extra "penny" if the proceeds cannot be equally divided. Getting the closing information to escrow so they can draw up the Seller's Closing Documents in a timely manner for all parties to review will make the signing process much less stressful.
- **Who coordinates the final documents?** Title and Escrow coordinate all documents so that there are no surprises.

**Case story:** An escrow company recently had to leave 3 hours between her signing and that of her soon-to-be ex husband so that she didn't breath his air!

### **Conclusion:**

Remember selling a home as part of the divorce process is just one more step to ending the relationship your clients had together, and chances are at one point in their marriage that this home was purchased during a much happier time full of hope and dreams. That same home now is a sad reminder of what was lost. The Realtor is really in the trenches when it comes to getting the parties on the same page. For me it is very important to know exactly what I am getting into so I can navigate any landmines during the listing process. A Realtor has two best friends: Open communication is key to a successful listing and closing. Title and Escrow play an integral role in a successful transaction. The title officer paves the way, the escrow agent closes the deal, and the Realtor holds it all together!

### **Acknowledgements:**

Michelle Barry Title coordinator @ CW Title Seattle, WA  
Rebecca Warnock JD @ Escrow Link Seattle, WA



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## Credit Reports and Issues

- ▶ No late payments for 12 months
  - ▶ Any late in 12 months on a mortgage kills any deal
  - ▶ Either party is late on mortgage, it will reflect on both parties credit report.
  - ▶ There is no way of removing this from either credit report



## Qualifying (outside the box)

- ▶ Asset Dissipation- Using your retirement accounts to qualify for this
  - ▶ 70% of the asset divided by 360
  - ▶ Only Retirement accounts, 401K/IRA
  - ▶ Must be fully vested
  - ▶ 1 unit Primary or 2<sup>nd</sup> home only
  - ▶ Max LTV 70%
  - ▶ No Penalty of pulling money out

## Important Documentation

### Alimony/Child Support

- ▶ To use the income we must have received 6 months of payments-with documentation of that income
- ▶ Must show it continue for 3 years

### Divorce Documents

- ▶ Legally Separate: Copy of legal separation agreement, showing division of assets, liabilities, potential obligations
- ▶ No legal Separation: Letter from Attorney outlining the proposed settlement
  - ▶ Underwriter will compare these to the credit report, so further work may be needed to prove this

## Loan Options

- FHA Loans
  - 3.5% down
  - Funds can be gifted
  - Non-occupying co-borrower
  - 3 years after short sale
  - Higher qualifying on DTI, 580 credit score
- Conventional Loans (\$0-\$417,000)
  - 3%-20% down,
  - lower MI, lower fees,
  - if married you do not need the husband/wife on the loan
  - 620 credit score



## Communication

- The sooner you get the clients to us, the sooner we can figure out what we need to do and how to make it work.
- Once you know a mortgage is involved, call us, so we can assess the situation and see what needs to be done.



## Title Vesting/Loan Options

- ▶ In the State of Washington, on particular loans, only one person can be on the loan when they are married
- ▶ In some case one person can be on title as well



# A Realtors Tutorial

## Divorce and Real Estate

KIM O. DALES, MANAGING BROKER WRE CO.

### The Role of the Realtor

- Liaison between both parties
- Impartial
- Goal oriented
- Compassionate
- Focus on the property



## Common Questions



- ▶ Who signs the listing agreement?
  - ▶ Both parties need to sign as a community property state
- ▶ What type of arbitration/mediation is successful in the sales process?
  - ▶ Open communication is preferable
  - ▶ Respect each parties individual wishes

## Common Questions



- ▶ How do parties efficiently handle repairs/improvements to the real estate in question during a pending divorce?
  - ▶ If legal representation is involved, in writing outlining who is responsible for what repairs
- ▶ How are commissions divided between seller and buyer?
  - ▶ In WA state all commissions are paid by the seller

## Common Questions

- ▶ What if one party wants to buy another property before the divorce is final?
  - ▶ The party that wants to purchase a piece of property can inform the other party – after the parties separate, the property acquired is his/her separate property. It might be that the property is purchased by both, and then the non-purchasing spouse signs his/her share via a quit claim deed

Section Header

CAN USE IF YOU WANT

## Title Questions

- ▶ How do marital liens appear on title and what is the process to remove them?
  - ▶ Title company has access to divorce information
  - ▶ They will need to review the property settlement statement for details on how proceeds are split between the two parties
  - ▶ Any liens are paid out of net proceeds

## Title Questions

- ▶ Should liens be cleared before listing the property?
  - ▶ Depends on the situation. Can generally be taken out of net proceeds
- ▶ Do marital liens affect commercial property differently than residential?
  - ▶ Marital liens can attach to any real property, and would be handled in the same way
- ▶ Has title ever had an issue with one party agreeing to paying off a lien but the other refusing?
  - ▶ This isn't uncommon but if seller cannot provide marketable title the property cannot close

## Title Questions

- ▶ Does title generally communicate with the divorce attorney, and what type of verbiage does the title company like to see?
  - ▶ For a lien, title needs a release of lien and/or a satisfaction depending on how they secured the obligation. There could be other information needed along the way
- ▶ Is there a difference between legally separated, filing for divorce or actually being divorced?
  - ▶ A finalized divorce is easiest as the property settlement agreement will be clear on division of proceeds
  - ▶ Pending divorce can be messy and awkward
  - ▶ If they are legally separated and there is an agreement it will help, but it depends on the individual situation and how title is held

## Escrow Questions



- ▶ Who is present at the signing:
  - ▶ Both parties need to agree to distribution of funds before the signing appointment. They can sign separately
  - ▶ Title and/or the attorney should have all correct documentation to the escrow office a few days before signing

## Escrow Questions

- ▶ Who coordinates the final documents?
  - ▶ Title and escrow coordinate all documents to avoid any surprises
- ▶ Case story:

An escrow company recently had to leave 3 hours between signing a wife and her soon to be ex husband so that she didn't breathe his air!



## Conclusion

Remember selling a home as part of the divorce process is just one more step to ending the relationship your clients had together, and chances are they purchased this home during a much happier time full of hopes and dreams. This same home is now a sad reminder of what was lost.

The Realtor is really in the trenches which it comes to getting the parties on the same page.

A Realtor has 2 best friends:

- ▶ Open communication is key to a successful listing and closing
- ▶ Title and Escrow play an integral role in a successful transaction. The title officer paves the way, the Escrow Agent closes the deal and the Realtor holds it all together!



## Acknowledgements:

Michelle Barry - Title Coordinator at CW Title,  
Seattle WA

Rebecca Warnock JD at Escrow Link, Seattle WA



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## CHAPTER FIFTEEN

## CASE LAW UPDATE

June 2016

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**CHARLES E. SZURSZEWSKI** has been practicing family law with Connolly, Tacon & Meserve since 1987. His lengthy experience includes work in arbitration, divorce, custody and support, mediation, and prenuptial agreements. Before joining the firm, Chuck served as a deputy prosecuting attorney with the Thurston County Prosecuting Attorney's Office, handling civil cases and heading up the Family Support Division for several years. He is also the former head of the Olympia Office of Child Support Enforcement. A 1977 graduate of the University of Puget Sound School of Law (now Seattle University School of Law), Chuck did his undergraduate work at Dartmouth College and the University of Puget Sound. Chuck is finishing a term on the Family Law Executive Committee and is a past chair. He was on the 2015 Governor's Task Force to make recommendations to the legislature regarding child support legislation. Since 2015, he has served on a subcommittee to draft the questions for the LLLT bar exam. He is the former president of the Washington Family Support Council, a statewide organization composed of support enforcement professionals.

**CHRISTINA A. MESERVE** has practiced family law in Olympia for 35 years, all with the firm now known as Connolly Tacon & Meserve. She is a 1975 graduate of the Evergreen State College and a 1978 graduate of the University of Washington Law School. Chris is a former president of Washington Women Lawyers, a former president of the Thurston County Bar Association, and a former member of the Board of Trustees of Evergreen. In 1996, Chris was honored by the Thurston County Bar Association with the Daniel Bigelow Lawyer of the Year Award for service to the profession and the community. She has been a fellow of the American Academy of Matrimonial Lawyers since 1997. She begins a three-year term on the WSBA Board of Governors this October.

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*In Re Discipline of Abele*  
184 Wn.2d 1 (August 2015)

This attorney discipline case arose out of the representation of one of the parties in a three-way child custody battle in Snohomish County. The lawyer was suspended from the practice of law for one year and her reinstatement was conditioned upon completion of an evaluation to determine her fitness to practice law.

The other two attorneys testified that the case was unusual, complex and contentious. The trial lasted for thirteen days. The unchallenged findings of fact reflected that Abele was repeatedly admonished for interrupting the court and other counsel during the course of the trial, that she was held in contempt for her disruptive behavior and that she was allowed to purge herself of contempt by contacting the Lawyers Assistance Program of the WSBA. Abele was charged with violating RPC 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal), RPC 3.5(d) (a lawyer shall not engage in conduct intended to disrupt a tribunal), RPC 8.4(d) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer), and RCP 8.4(j) (a lawyer shall not willfully disobey or violate a court order directing him or her to do or cease doing an act which he or she ought in good faith to do or forbear). The latter two charges arose from an altercation that occurred in the King County courthouse between Abele and a courthouse marshal.

The attorney did not claim that the conduct had not occurred. She simply argued that her outburst was not intended to violate the RPCs. She also claimed that her outburst warranted a lighter punishment than suspension.

The Supreme Court held that substantial evidence supported the hearing officer's findings and the unanimous adoption of the officer's findings by the Disciplinary Board. The court concluded that substantial evidence supported the finding that Abele was deliberately disruptive, repeatedly warned about her behavior, and that her contempt of the court's rulings was deliberate, willful and in bad faith. The court also concluded that stress of litigation is not a mitigating factor.

*Thomson v. Jane Doe*  
189 Wn. App. 45 (Division One, July 2015)

Deborah Thomson is a Florida attorney. She received a negative review from an anonymous reviewer on Avvo. Thomson filed a defamation lawsuit against the Jane Doe client and then filed a subpoena in King County Superior Court requesting from Avvo the anonymous poster's identity. Avvo refused to comply with the subpoena; Thomson moved to compel Avvo to comply. Avvo opposed the motion, arguing that Thomson failed to show that the post was defamatory and failed to provide evidence of damages.

The question is: What showing must be made by a defamation plaintiff seeking disclosure of an anonymous speaker's identity? Thomson presented no evidence to support her motion and thus, the trial court and the Court of Appeals concluded that Thomson failed to make a *prima facie* showing regarding her defamation claim.

The Court of Appeals characterized a negative review on Avvo as somewhere between commercial speech warranting the lowest level of protection, and political speech warranting the highest level of protection. The court concluded that a defamation plaintiff must make a *prima facie* showing of defamation in order to require the disclosure of the anonymous defendant.

*Foss Maritime Company v. Brandewiede*  
190 Wn. App. 186 (Division One, September 2015)

In this breach of contract case, the defendant's attorney was provided with a digital storage device by the plaintiff's former employee. The record was unclear as to how much of the information provided by the former employee was actually reviewed by the defendant's attorney. At some point, however, he became aware that the materials contained privileged information and the attorney stopped his review. Plaintiff filed a motion to disqualify counsel and for sanctions. The trial court reviewed the documents and issued an order disqualifying the lawyer. The trial court also issued an order excluding evidence that was "tainted" by the attorney's wrongful conduct.

The Court of Appeals reversed, calling the disqualification of counsel a "drastic sanction, only to be imposed in compelling circumstances". The Court of Appeals noted that mere access to privileged communications does not require disqualification. Disqualification should only be imposed if it is the least severe sanction adequate to address misconduct in the form of improper access to privileged information. The trial court was required to apply the four factors of: (1) prejudice, (2) counsel's fault, (3) counsel's knowledge of the claim of privilege, and (4) possible lesser sanctions.

*Marriage of Wixom*  
190 Wn. App. 719 (Division Three, October 2015)

We discussed this case last year, primarily under the heading of “Attorney Conduct.”

The parties were divorced in 2009, and entered into a split parenting plan. In 2011, both parties sought modification of the parenting plan. The father alleged failure to supervise, untreated mental illness, continuing drug abuse, and ongoing criminal behavior on the part of the mother. Following a seven day trial, the trial court dismissed the father’s modification request and granted the mother’s. There were 190 findings of fact, including findings that the father and his attorney had engaged in bad faith, had pursued allegations and innuendoes not well grounded in fact, had engaged in conduct for the improper purpose of harassing and causing unnecessary and needless increase in the cost of litigation, and had made an ongoing attempt to harass, embarrass, threaten and intimidate the mother, the guardian ad litem and the court commissioner. The trial court further found that there was a conspiracy between the father and his lawyer to “wage an all-out war against” the mother, her attorneys, the guardian ad litem and the court. The court found intransigence and ordered the father and his attorney, jointly and severally, to pay 90% of the mother’s attorney fees as Civil Rule 11 sanctions and based upon intransigence.

Last year, we discussed the decision by the Court of Appeals to disqualify the father’s attorney from representing him because of the conflict of interest.

The sole issue is whether the trial court erred in ordering the father and his attorney to be jointly and severally liable. The Court of Appeals confirmed that sanctions are appropriate “for lawyers who do not know when to stop.” Because both the father and his attorney were intransigent, joint and several liability was appropriate. The court granted additional fees to the mother on appeal.

*In Re Marriage of McNaught*  
189 Wn. App. 545 (Division One, August 2015)

The father appealed the trial court's determination that the mother should be allowed to relocate from Washington to Texas. The mother had initially filed a notice of intent to relocate, then told the parenting evaluator that she did not intend to relocate, then filed a second notice of intended relocation after the parenting evaluation was completed but before trial. The trial court allowed the requested relocation and adopted the parenting plan.

The Court of Appeals concluded that the parent objecting to the relocation bears the burden of persuasion on that issue. RCW 26.09.520 shifts both the burden of persuasion and the burden of production to a party opposing relocation.

The father also contended that the trial court failed to consider all eleven relocation factors. The trial court did not enter specific findings on each factor, so the Court of Appeals reviewed the factors and determined that substantial evidence had been presented on each one.

The trial court had also ruled that the father could not delegate his time to his family except under certain circumstances. The father cited *Marriage of Chandola*, a case we have discussed each of the last two years but a case that was decided after the trial court's ruling in this case. The Court of Appeals cited *Chandola* and *Magnusson v. Johannesson* (the fisherman father case) to reverse the trial court's ruling on the issue of delegation of residential time. The Court of Appeals also found that the trial court had abused its discretion when it required him to provide a 45 day notice for monthly visits, a 60 day notice for visits after the child begins school, and an eight month notice for winter break travel plans.

Finally, the court addressed the issue of the father's room and board and car rental expenses when he visited the child in Texas. The court noted that the statute only requires apportionment of the long distance travel cost "to and from the parents for visitation". Thus, only airfare is specifically required to be allocated; other expenses are in the court's discretion based upon their reasonableness and necessity. Here, the Court of Appeals concluded that no further contribution by the mother was required.

*In Re Marriage of Zandi*  
190 Wn. App. 51 (Division Two, August 2015)

This case presents a narrow issue.

The order of child support required the father to pay all uninsured medical expenses. The child was insured under the father's Kaiser insurance policy, which required treatment at a Kaiser facility or prior approval from Kaiser. Despite the terms of the father's insurance policy, the child, while visiting her aunt in Ohio, was taken to a non-Kaiser facility for follow-up surgery for kidney stones. Kaiser refused to pay the approximately \$13,000 in medical bills. The father appealed through the Kaiser appeal process, but Kaiser denied the appeal because the surgery was performed by a non-Kaiser provider without any prior request for authorization.

In a subsequent action brought by the mother to modify child support, she also sought an order which specifically required the father to pay the \$13,000 in medical expenses. The father's position was that the expenses were not "uninsured medical expenses" because insurance would have been available had the mother followed the policy requirements to obtain coverage. The trial court allocated the expenses 75 percent to the father and 25 percent to the mother. The mother appealed, claiming that the court lacked the authority to require her to pay 25 percent of the expenses. The trial court's conclusion was that the mother, as the primary residential parent, was in a better position to secure coverage for the kidney stone treatment by Kaiser.

The Court of Appeals reversed, holding that the trial court had abused its discretion by altering the terms of the child support order. Because Kaiser failed to provide coverage, the expenses were "uninsured medical expenses" and the child support order in effect at the time required the father to pay 100 percent of them.

*In Re Marriage of Selle*  
189 Wn. App. 957 (Division Three, September 2015)

The parties were divorced in 2004. Their parenting plan was modified in 2009, and the father received alternate weekends, every Wednesday evening, and one-half of holidays, special occasions, and vacations.

In December 2010, the father ceased having any contact with the children, both of whom are now over the age of 12.

In a 2013 support and parenting plan modification proceeding, the trial court determined that it had no authority to deviate from the standard calculation. The mother appealed, contending that the father's failure to exercise visitation with his children imposed a greater financial burden upon her, and that the trial court should have deviated upward from the standard calculation.

The court cited two Division One opinions which have discussed this issue, *Marriage of Scanlon* (2001), which held that no statutory basis existed to increase an obligor's child support payment, and *Marriage of Krieger* (2008), which held that an obligor's abdication of parental responsibility could provide a reasonable basis for an award. Here, Division III concluded that *Krieger* was better reasoned, and that the trial court has the authority to deviate upward when an upward deviation would better achieve an equitable apportionment of child support between the parents.

*In Re Parentage of O.A.J.*  
190 Wn. App. 826 (Division Three, October 2015)

The Court of Appeals considered two issues raised by the father in his appeal of the trial court's ruling.

The first was whether the father was entitled to a deviation in the child support calculation based upon his support of another child.

The trial court had refused to grant a deviation because there was no evidence that the father was required to pay child support by court order. The Court of Appeals agreed:

We hold that to obtain a deviation from the child support guidelines due to paying for the support of children from other relationships, the parent must establish the existence of a judicially enforceable support obligation concerning those children.

The second issue was the imputation of income to the mother. The trial court had found that even though she made \$13 per hour working part-time for a law firm, income should be imputed to her at minimum wage. The Court of Appeals concluded that this was directly contradictory to the statute, which requires the court to impute a parent's income "in the following order of priority: (a) full time earnings at the current rate of pay.  
..."

There were other issues involving the mother's income, as she had no taxable income reported on her income tax returns despite owning eight residential properties, six of which had a history of rental income. Additionally, the father raised concerns about the bank account records which documented annual deposits in excess of the gross receipts reported on the mother's tax returns by an average of \$80,000. The trial court did not address that issue, and neither did the Court of Appeals.

*In Re Marriage of Zacapu*  
192 Wn. App. 700 (Division Two, February 2016)

RCW 26.19.075 allows the court to grant a deviation in the child support standard calculation for an obligor's children from other relationships. The issue was whether the deviation of \$200 per month for six months and then \$174 per month was appropriate when the obligor had six stepchildren from his current marriage.

The trial court granted the deviation and the Court of Appeals affirmed.

RCW 26.16.205 makes a stepparent liable for the obligations for his or her stepchildren. The court concluded that that was a sufficient basis to find that the obligor was entitled to a deviation.

The trial court had held that denying the deviation would result in insufficient funds in the father's home to support his family of eight. The father's income was \$3,745 and the mother's income was \$2,047. By the time of the modification action, the parties had only one child who remained at home.

*Servatron v. Intelligent Wireless*  
186 Wn. App. 666 (Division Three, March 2015)

Defendant's counsel engaged in settlement negotiations with plaintiff's counsel. Defendant's attorney was not licensed in the state of Washington but was an attorney practicing in California.

On a couple of occasions, the plaintiff's attorney stated that if settlement did not occur, plaintiff would move forward with the default process and/or litigation. At one point, plaintiff's attorney sent the case scheduling order to opposing counsel.

Approximately a month after communications ceased, the plaintiff moved for default. Service of the motion was not made upon the California attorney or any of the defendants individually. In an affidavit in support of the motion, plaintiff's attorney declared that he had told defendants that plaintiff would "go into litigation mode -- including moving for a default." The trial court granted an order of default in July 2012 and a default judgment in October of 2012, all without notice to defendants. A year later, plaintiff commenced collection action. In response, the defendants hired Washington counsel to move to set aside the default order and the default judgment.

The trial court denied the motion, but the Court of Appeals reversed. The defendants had "appeared" in the lawsuit, entitling them to notice. Settlement negotiations and communications through their California attorney constituted substantial compliance with CR 55's appearance requirement, sufficient to entitle them to notice of the plaintiff's motion for default.

*In Re Termination of Parental Rights to M.J.*  
187 Wn. App. 399 (Division Three, April 2015)

In 2013, the legislature revised RCW 13.34.180(1)(f), the parental termination statute. The amendments to the statute require the court to consider whether a parent maintains a meaningful role in the child's life, whether the Department made reasonable efforts to help the parent remedy parental deficiencies, and whether particular barriers exist regarding visitation.

A.E., the mother of four children (two of them at issue here), is incarcerated for the second degree murder of the children's father's girlfriend. Following the mother's incarceration, the children spent time in a variety of foster homes and have been evaluated by developmental and behavioral specialists. The children experienced attachment issues and developmental delays. The specialists believe that any more than two visits annually to Purdy would be harmful to them. DSHS therefore moved to terminate the mother's parental rights.

While visitation several times a month would be necessary for the children to develop a relationship with their mother, visiting more than twice a year was disruptive to them. As a result, the court concluded that termination of the parent/child relationship was appropriate in order to find a permanent placement.

The Court of Appeals concluded that it was unable to ascertain how the trial court considered the 2013 amendments. It therefore reversed and remanded for consideration on the record. The Court of Appeals noted the difficulty in this case. A.E. was a concerned mother trying hard to maintain a position in her children's lives. One social worker described her as making greater efforts at communicating with her children than any parent she had seen in these circumstances. On its face, this evidence appeared to constitute a "meaningful role" as described in the statute. However, the trial court needed to balance that against the ability of the children to integrate into a stable and permanent home in light of the mother's incarceration. The Court of Appeals reiterated the rule announced last year, that DSHS is not required to provide visitation, only to consider what it can do to preserve the family unit.

*In Re Welfare of K.M.M.*  
187 Wn. App. 545 (Division Two, May 2015)

The juvenile court had terminated J.M.'s parental rights to K.M.M. J.M. appealed, arguing that DSHS failed to prove that all services reasonably capable of correcting parental deficiencies were expressly and understandably offered or provided. The Court of Appeals agreed with the trial court's assessment of the situation and affirmed the order terminating J.M.'s parental rights.

J.M. apparently had "mental health issues" which are not identified in the opinion. The child, who was seven when she was first removed from her parents' custody, was 11 at the time of the termination trial. She was adamant that she wanted no contact with her biological parents and that she perceived any visitation with them as being threatening to her relationship with her foster family.

The Court of Appeals discussed the "futility doctrine." In certain circumstances, services are futile because the services would not remedy the identified parental deficiencies. Here, no additional services would repair the parent/child bond between J.M. and his daughter.

The Department met its burden to prove that all necessary services were expressly and understandably offered or provided, and the juvenile court complied with due process requirements by finding that J.M. was currently unfit to parent his daughter. The termination order was affirmed.

*Dependency of H.S.*

188 Wn. App. 654 (Division Three, July 2015)

H.S. was 16 years old and resided with her father. She has cerebral palsy; she is tube fed and, for the most part, wheelchair-bound. H.S. was removed from her father's home after she told school officials she was afraid to go home because her father assaulted her.

The evidence established that the father "popped" or slapped H.S. when she was whining or spitting. The trial court found that H.S. was a dependent child because she was abused or neglected. The father appealed the finding. During the pendency of the appeal, H.S. turned 18 years old and the dependency issue became moot. The father, however, asked the court to rule on the appeal because of the collateral estoppel effect of a finding of abuse or neglect against him. DSHS argued that there would be no res judicata and/or collateral estoppel effects to the dependency finding.

The Court of Appeals disagreed, holding that a finding of abuse or neglect would be binding on the father in future proceedings. It also considered the statute which allows physical punishment, concluded that the trial court had substituted its judgment for the provisions of the statute, and reversed the finding. However, it remanded for the trial court to determine whether other acts of the father constituted abuse under the correct legal standard.

*Dependency of D.J.B.*  
188 Wn. App. 905 (Division One, July 2015)

Edelyn Saint-Louis's parental rights were terminated after trial. The evidence established that Saint-Louis had a myriad of risk factors and parental deficiencies. At the time of the termination trial, Saint-Louis was not incarcerated, but she had been incarcerated at the time the termination petition was filed.

Amendments to the dependency and termination statute which were enacted in 2013 provided a wide variety of rights to incarcerated parents and illustrate an intent by the legislature to give incarcerated parents an opportunity to participate and have their rights considered during various stages of the dependency and termination process. The statute specifically provides as follows:

*If the parent is incarcerated*, the court shall consider whether a parent maintains a meaningful role in his or her child's life . . . , whether the department made reasonable efforts as defined in this chapter. . . , and whether particular barriers exist. . . to visitation.

The issue on appeal was whether the italicized language above applies if the parent has been incarcerated at any time during the proceedings. The court noted that the statute contains provisions elsewhere to deal with prior incarceration, and that the use of the language above is not inadvertent. Accordingly, if the parent is not incarcerated at the time of the termination hearing, even if the parent was previously incarcerated during the dependency, the statute does not apply.

The Court of Appeals concluded that the Department had met its burden to provide the mother with available services during her incarceration and otherwise determined that Saint-Louis had numerous opportunities to engage in these services and failed to follow through. She had relapsed following in-patient and out-patient chemical dependency programs, had not been able to successfully complete 90 days of UAs without missed or diluted UAs, and was living with a man who had at least three domestic violence assault incidents despite Saint Louis having participated in domestic violence support groups. Her uncorrected parenting deficiencies made Saint-Louis a serious risk to the child and prevented her from being able to provide him with his basic needs. The trial court's ruling was upheld.

*Adoption of M.S.M.-P*  
184 Wn.2d 496 (October 2015)

The adoption statute provides that the general public shall be excluded from all adoption proceeding hearings. RCW 26.33.060.

In this case, a step-parent brought a termination and adoption proceeding together. The trial court had recited the adoption statute and proposed putting a sign on the courtroom door indicating that the hearing was closed. He asked for input. Counsel for both the biological parent and the prospective adoptive parent agreed.

After the trial court terminated the father's parental rights and entered an adoption decree, the biological father sought a new termination proceeding on the grounds that the closure of that portion of the proceedings violated the Washington State Constitution. There have been a flurry of cases involving closure of courtrooms and *Seattle Times v. Ishikawa*, 97 Wn.2d 30 (1982). The Court of Appeals had found constitutional error but indicated that the father had not preserved it and did not show actual prejudice. The Supreme Court found that the father's attorney's decision to consent to the closure was a valid waiver of the father's rights. A statement from a litigant's attorney that there is no objection to a closure is a sufficient waiver of the litigant's rights to an open hearing.

*Parental Rights to R.M.P.*  
191 Wn. App. 743 (Division Three, December 2015)

R.M.P. was born to a disabled mother, S.S.B. After dependency proceedings that lasted two years, the State filed a termination action. All of the witnesses testified that the mother could not currently parent R.M.P. safely, and that the severity of the child's needs was beyond the mother's limited capabilities. By and large, the mother had completed the services offered by the Department.

After the termination proceeding was commenced, but before the trial took place, the legislature enacted RCW 13.34.136(2)(b)(i)(B), which requires DSHS to make reasonable efforts to consult with the Developmental Disabilities Administration to create an appropriate permanency plan in dependency proceedings.

The Court of Appeals held that the enactment of the statute did not require the Department to dismiss the termination proceeding and refile a dependency action when the amendment was not effective until two months after the dependency proceeding ended. The trial court had concluded that due to the mother's developmental disabilities, there was no treatment that would render her capable of parenting in the near future. The Court of Appeals concluded that the trial court's determination was supported by clear, cogent, and convincing evidence and that additional services would have been futile.

*In Re Dependency of M.H.P., DSHS v. Parvin*  
184 Wn.2d 741 (December 2015)

We discussed the Court of Appeals decision in this case at the 2015 mid-year. Here, the Supreme Court reversed the trial court and the Court of Appeals decision.

King County had adopted a local rule which extended CrR3.12 to termination cases. King County's procedure was that attorneys for indigent parents in dependency and termination cases who sought expert services on behalf of their clients could bring an ex parte motion to obtain those services and have the moving papers sealed, also ex parte. Thus, neither the state nor CASA was advised of the defense's request.

The process had been upheld below; the Supreme Court reversed and found that the King County procedure (which had apparently been modified prior to oral argument) violated GR 15. GR 15 sets forth the procedure for sealing or redacting court records and provides for a hearing, with notice to all interested parties, on the motion to seal or redact. GR 15 contains an exception for criminal cases, which the Supreme Court found could not be extended to termination proceedings. Thus, King County's ex parte process violated both *Ishikawa* and the Public Records Act.

*Marriage of Lane*  
188 Wn. App. 597 (Division One, June 2015)

RCW 4.08.060 directs the court to appoint a guardian for an incapacitated person. The statute contemplates that a guardian is appropriate if the litigant is not competent to understand the significance of the legal proceedings. By contrast, a Title 11 guardianship is warranted only if the court finds the individual is at significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing or physical safety. A guardianship of an estate is required when there is a significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.

The Lanes had been married for nine years prior to their first separation and 14 years at the time of their second separation. A domestic violence protection order prohibited the wife from contacting the husband but allowed the wife to have weekly supervised visits with the parties' minor child.

Initially, an attorney was appointed to represent Sharon Lane under GR 33, which requires the court to make reasonable accommodations for persons with disabilities. She claimed that her disability prevented her comprehension of the proceedings. That attorney filed a motion for an order to appoint a litigation guardian ad litem under RCW 4.08.060 and to determine whether or not a Title 11 guardianship proceeding was in the client's best interest. The guardian ad litem recommended a litigation guardian. The wife opposed such an appointment. The appointment was ultimately made over her objection.

The parties attended mediation and the litigation GAL, on behalf of the wife, reached an agreement with the husband and his attorney. Under the terms of the agreement, the wife would receive 55% of the net assets, plus five years of spousal maintenance. The wife strongly objected to the terms of the agreement. Ultimately, the litigation GAL filed a motion to determine whether she had the authority to enter into the CR 2(a) agreement.

The trial court held that the litigation GAL did have such authority. The Court of Appeals reversed. A litigation GAL does not have the authority to waive a substantial right of an incapacitated person. Any waiver of trial, to be binding upon the client, must be specially authorized by the client. While the litigation GAL had the authority to act on the wife's behalf with regard to issues in litigation and to provide her attorney with authorizations needed to effectuate her best interests, she did not have the right to waive the wife's right to trial. Thus, the litigation GAL did not have the authority to enter into the CR 2(a) agreement over the wife's objection. The case was remanded for trial.

*Custody of C.D.*  
188 Wn. App. 817 (Division Three, July 2015)

In this nonparental custody action, the trial court concluded that the child's growth and development would be detrimentally affected by placement with an otherwise fit parent. The father appealed, claiming that he was not an unfit parent, that the maternal aunt and uncle were not better custodians for the child, and that the child should have been placed with him. He also appealed the court's denial of his request for continuance of trial, made the morning of trial, and objected to the guardian ad litem's performance.

The court considered the guardian ad litem's report and testimony, the report of the child's counselor, the testimony of the custodians and both parents and affirmed the trial court's ruling. C.D. has been exposed to domestic violence in his parents' home, had been the victim of sexual abuse by the father's neighbor, had been hit by his father and was afraid of him.

The Court of Appeals specifically noted that the father's request for continuance of the trial would have been considered under a more stringent standard had this been a termination proceeding. However, the only change to the current arrangements is that visitation must be based upon the counselor's recommendations.

*In Re Custody of J.E., Culver v. Eaton*  
189 Wn. App. 175 (Division Three, August 2015)

J.E. was born in 2001, and lived with his aunt and uncle, the Culvers, from age 2 until age 11. The arrangement was initially informal, although there was a power of attorney for the Culvers to exercise medical decision authority and a guardianship created in 2009.

In 2012, the biological parents, the Eatons, decided not to return J.E. to the Culvers' home. In response, the Culvers petitioned for non-parental custody. J.E. was initially returned to the Culvers, then placed with the Eatons, then returned to the Culvers after the adequate cause hearing. At some point in 2012, the court appointed a counselor and then a guardian ad litem for J.E. and developed a transition plan to return J.E. to his parents' home. Ultimately, both the counselor and the guardian ad litem concluded that it was in J.E.'s best interests to reside half-time in each home. The trial court adopted that arrangement and both parties appealed.

The trial court had concluded that the Eatons were fit parents. As a result, the statute requires that the child would suffer actual detriment if placed with the parents (RCW 26.10.032). The Court of Appeals noted that the actual detriment standard does not focus on the best interest of the child. Thus, while it was in the best interest of J.E. to live 50 percent of the time in each home, there was no evidence that J.E. would suffer actual detriment by residing with his parents. The trial court had concluded "severance of that arrangement would be actually detrimental to J.E.'s long-term growth and development". The Court of Appeals noted that this was not a finding, but was a conclusion and that there were not facts specifying any significant special need that he had that could not be met by his parents. Once the parents were found to be fit, and absent any showing of actual detriment such as a special need, the parents' parental rights superseded J.E.'s best interest. The Court of Appeals concluded that necessary "extraordinary facts" are required to interfere with the natural parents' rights.

The initial action was brought as a third-party custody action. After the aunt and uncle rested their case in chief, they moved to amend the pleadings to pursue defacto parentage. The trial court denied the motion to amend, concluding that prejudice would result. The Court of Appeals concluded that the denial of the motion to amend was not an abuse of discretion.

*Query:* Whether the result in this case would have been different if the aunt and uncle pursued de facto parentage initially.

*In the Matter of Custody of A.L.D., Moehlmann v. Lambert*  
191 Wn. App. 474 (Division Three, December 2015)

A.L.D. was given the fictitious name of Betty Sue in this opinion. The court reversed the trial court's ruling which had granted the non-parental custody petition of Betty Sue's grandparents. The court indicated that it was granting Lambert custody of her daughter "not because we are pleased with her parenting but because of the potent constitutional right to the care, custody and companionship of one's biological child." The court concluded that due process requires that a parent receive custody unless that parent is unfit or unless actual detriment to the child's growth and development would result from placing the child with the biological parent. The standard of proof is clear, cogent and convincing evidence.

It appears that there was more evidence that was not submitted to the Court of Appeals, including the trial exhibits. There also appeared to have been conflicting evidence regarding Betty Sue's conduct and conflicting evidence regarding her medical care, including whether her mother had provided immunizations in a timely manner.

Kelly Lambert was Betty Sue's mother. Injured at boot camp in the Army, Lambert attempted suicide and was discharged with the twin disabilities of manic depressive disorder and chronic lower back spasms. Her discharge order indicated a psychiatric history of chronic depressive symptoms and multiple suicide attempts.

Between 2010 and 2012 Lambert lived with her parents (the petitioners), three different boyfriends (one a convicted child molester) and a female roommate (also a convicted felon). In 2012, the Moehlmanns filed a petition for non-parental custody. On the same day, a judge signed an order granting Lambert's roommate non-parental custody of Betty Sue. Lambert wanted the roommate rather than her parents to have custody of her child. In a declaration supporting her petition in that action, Lambert declared that she was an unfit parent and an agreed adequate cause order found that the mother had physical and mental health issues which did not allow her to provide proper care for Betty Sue. At trial, Lambert agreed that giving custody to the roommate was inappropriate.

The two non-parental custody petitions were consolidated, the roommate's non-parental custody petition was dismissed, and temporary custody was awarded to the Moehlmanns. Between October 2012 and February 2014 (when trial occurred), Lambert had seven visits with Betty Sue, although she had the opportunity for 32 visits. As it developed, Lambert had become pregnant with the child molester's child and knew that her parents would disapprove. As a result, she did not exercise visitation while she was pregnant.

The Court of Appeals concluded that there was no record of Lambert's abilities in 2014 and thus the grandparents failed to establish by clear cogent and convincing evidence that actual detriment to Betty Sue would result from placement with her mother.

The takeaways from this case:

1. Make sure your findings of fact and conclusions of law identify the legal standard, and identify the actual detriment that will occur.
2. On appeal, make sure everything gets to the Court of Appeals, including all the exhibits.
3. Have a guardian ad litem appointed for the child. For some bizarre reason, no guardian ad litem was ever involved, even though the court commissioner ordered that one be appointed in 2012.
4. If CPS has been involved, bring the CPS employee to testify.
5. Focus on the current ability of the parent(s), not the circumstances when the action was filed.

*Custody of Z.C.*  
191 Wn. App. 674 (Division Three, December 2015)

This is a nonparental custody action involving ten-year old Z.C.

November 2005	Z.C. born to Melissa England. Father deceased.
August 2006	Vaughns (aunt and uncle) file nonparental custody action, alleging drug use. Temporary custody to Vaughns.
October 2006	Guardian ad Litem report: No unfitness, no detriment to growth and development.
December 2006	Court orders conversion to dependency so services can be provided. Never happens.
May 2008	Agreed orders entered, reciting that mother has a current drug problem that places the child in danger.
June 2009	Mother completes residential drug treatment program.
May 2011	Revised parenting plan, with increased visitation to mother.
December 2011	Court publishes <i>In Re Custody of T.L.</i>
May 2012	Mother seeks dismissal of nonparental custody and petitions for modification.
July 2012	Court rules no adequate cause for mother's petition. Mother claims she instructed lawyer to appeal.
November 2012	Mother's attorney resigns in lieu of disbarment.
June 2013	Mother files CR 60(b) motion to vacate.
November 2013	Motion denied.
January 2014	Mother files second petition for modification, alleging that Z.C. "now has a fit parent" and that Vaughns were isolating child from her. Court finds no adequate cause; appeal follows.

There was no conclusion of law in 2008 that the mother was currently unfit or that her custody would result in actual detriment to Z.C.'s growth and development. After the agreed orders were entered placing the child with the Vaughns, the mother immediately began a one year residential drug treatment program on the other side of the state. She successfully completed it in June 2009 and has remained clean and sober since.

The Court of Appeals concluded that the case is controlled by *Custody of T.L.* It reversed the trial court's 2012 and 2014 orders, awarded the mother attorney's fees on appeal, and remanded for a hearing at which the mother need not establish adequate cause and at which her fitness as a parent will be presumed.

The court found "extraordinary circumstances and a gross miscarriage of justice" to allow the mother to appeal the court's adverse 2012 ruling because the 2008 order did not make a specific finding that the mother was unfit or that Z.C.'s growth and development faced actual detriment if Z.C. was placed with her.

*In Re Marriage of Kile*  
186 Wn. App. 864 (Division Three, April 2015)

Jeannie Kile and Gordon Kendall were married for 28 years. For most of their married life, they farmed 1500 acres of ground in Thornton, Washington, that was either leased by or titled in Ms. Kile's name as her separate property. The principal issue in the divorce was the character of the farming operation.

The evidence appears undisputed that Ms. Kile's father felt strongly that his farm should be left to his daughter. He offered to lease his farm ground to her on a crop share basis. She was to pay one-third of the proceeds of crops grown as rent and retain two-thirds. This was apparently a standard crop sharing rate for dryland wheat farming in eastern Washington. It was anticipated that the husband, Mr. Kendall, would actually run the farm operations but title was in Ms. Kile's name as her sole and separate property. The evidence was that the bank accounts were maintained in the wife's name, the farm subsidy checks were made payable to the wife, the husband was issued W-2 forms and was paid as an employee and Ms. Kile was named as the employer. In addition to leasing the farm ground, Ms. Kile's father agreed to lease his equipment to his daughter with an option to purchase. The testimony was that the father was paid most of what he was owed but he also forgave some of the payments due under the equipment lease, approximately \$50,000. In addition, adjoining property became available in 1989. Ms. Kile's father encouraged his daughter to purchase the parcels, totaling 317 acres. He made the required down payments and the contracts identified Jeannie Kile "as her separate property" as the purchaser. Mr. Kendall executed a quitclaim deed to release his community property interest.

Thus, there were three separate assets: the farm's profits, the farm equipment that was purchased with the farm's profits, and the 317 acres.

The trial court concluded that those assets were the wife's separate property. The Court of Appeals reversed. Despite the title, and despite the history of treating the assets as the wife's separate property, they were acquired during the marriage and the presumption of community property prevailed.

Because the lease between Ms. Kile and her father was consistent with market rates, it was not a gift, but was rather an endeavor that was started during the marriage. As a result, the farm lease, the farm profits, and everything purchased with the farm profits became community assets. The wife was entitled to claim a separate property lien for the forgiven payments on the equipment and the down payments made on the 317 acres.

The husband had received 80% of what the trial court had characterized as community property. His request for spousal maintenance had been denied. In light of the appellate court's re-characterization of the property, the court on remand was to reconsider its division and the maintenance request.

*In Re Marriage of Persinger*  
188 Wn. App. 606 (Division One, June 2015)

Mark and Holly Persinger reached a pro se agreement which stated that each of the parties would receive 50 percent of the husband's L & I settlement and/or pension. At the time, Mr. Persinger was in the midst of a worker's compensation dispute with L & I regarding benefits related to an injury that occurred during the marriage. After dissolution, the Board of Industrial Insurance Appeals found that Mr. Persinger was permanently disabled and was entitled to disability compensation.

Mr. Persinger then filed a CR 60(b)(5) motion to vacate the decree, arguing that the award to the wife of L& I benefits was void. The wife responded with a motion for contempt and other post-decree relief. The court denied the husband's motion; the Court of Appeals reversed.

The worker's compensation statute provides that a worker may not voluntarily assign any compensation benefits to another person. RCW 51.32.040(1). The court noted that the statute prohibits assignment in dissolution proceedings, and that question was previously answered in 1996, in *In Re Marriage of Dugan-Gaunt*. Based on the plain language of the statute and relevant case law, the wife did not have a right to receive a portion of Mr. Persinger's L & I benefits because this was a statutory entitlement personal to him. Thus, that portion of the parties' property distribution was void. It was an abuse of discretion to deny Mr. Persinger's motion to vacate.

That having been said, the statute does not limit a court's ability to take into account such benefits in making a just and equitable property division. See the *Zahm* case (1999), where the court directed that a trial court consider a spouse's Social Security income to formulate a just and equitable division of the parties' marital property.

The case was remanded. "Any further relief is left to the parties in the dissolution court."

*Burgess v. Crossan*  
189 Wn. App. 97 (Division One, July 2015)

This case involves a commercial lease and unlawful detainer action against tenants who were husband and wife. The husband had committed nuisance upon the property, justifying the eviction of the couple and the business that they operated on the site.

The wife claimed that the parties leased the property individually as tenants-in-common, and thus she had no responsibility for her husband's conduct. The Court of Appeals concluded that the wife had not overcome the presumption that the leasehold was acquired during the marriage and thus was presumptively community property. "How spouses are named in a document does not determine the separate or community character of the property and provides little evidence of its character", citing *In Re Estate of Borghi*.

*Marriage of Schwarz*  
192 Wn. App. 180 (Division Three, January 2016)

The parties were married for 13 years before separating and filing a dissolution action. Both had been married before, and they entered the marriage with substantial separate assets.

The issues on appeal concern whether the wife had met her burden of overcoming the community property presumption with respect to certain investment accounts. The Court of Appeals found that the trial court had abused its discretion in characterizing the wife's assets as community property. The Court of Appeals noted that the trial court had been overwhelmed during the trial with the tracing issues presented by the parties' attorneys and had characterized the dissolution as involving "one of the most complex tracing cases" that he had heard. The Court of Appeals noted that it had the advantage of a transcribed report of proceedings which allowed it to determine that the wife had presented sufficient evidence of the separate character of the disputed assets.

The Court of Appeals held that evidence can be clear and convincing without being irrefutable. While the wife had admittedly moved her assets between banks and brokerage firms, that did not mean that the assets had been "hopelessly commingled" which is what the law requires once the wife has established that the assets were held prior to the parties' marriage. The Court of Appeals held that the evidence was not convoluted or confusing and it was sufficient.

Therefore, the trial court abused its discretion in finding that the wife failed to rebut the community property presumption. "Once clear and convincing positive proof is offered to rebut the community property presumption, it is up to the party without the burden to contradict that evidence or introduce doubt."

*In Re Estate of Craig S. Lundy v. Lundy*  
187 Wn. App. 948 (Division One, June 2015)

Practitioners struggle with how to protect a client's interests in changing their beneficiary designations post-decree.

While this case holds out hope that a properly drafted decree might constitute a waiver under ERISA, the Lundys (and their attorneys) failed to accomplish what we assume they wanted to accomplish.

The parties were divorced and the divorce decree awarded the husband as his separate property his 401k plan, but the husband failed to change his beneficiary designation post-decree. As the *Lundy* court said, "State law claims to recover, post-distribution, ERISA benefits have thus far been rebuffed."

Private retirement plans are controlled by ERISA, a federal scheme for regulating employee benefit plans. The courts have consistently held that ERISA preempts state law regarding the designation of the beneficiary. In other words, plan administrators who pay out pursuant to a beneficiary designation that was executed pre-decree and presumably waived post-decree are protected. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), *Hillman v. Maretta*, 133 S.Ct. 1943 (2013).

The estate argued that the wife had waived her interest in the retirement benefits. However, the court said there was no clear conduct demonstrating the wife's intent to waive her rights as **beneficiary** of the husband's retirement account. The court cited other states' cases in which a spouse had "released and relinquished any future rights as a beneficiary" under ERISA plans. The court is suggesting, but by no means holding, that language which waives an interest in the retirement benefits would need to specifically include language that the spouse waives any rights as a beneficiary of those accounts.

*Fearghal McCarthy, et al County of Clark, et al*  
\_\_\_\_ Wn. App. \_\_\_\_ (Division Two, April 2016)

This case involves the dismissal on summary judgment of multiple claims against Clark County, the Department of Social & Health Services and the City of Vancouver. The claims arose from a report by the petitioner's then-wife that he had struck his two-year-old child on the head. The wife later admitted that the report was false, and ultimately the father apparently obtained primary residential care of his children. In the meantime, however, he was denied contact with them for an extended period of time.

The father, on his own behalf and on behalf of his minor children, filed claims against the investigating agencies for negligent investigation as well as other causes of action. The trial court granted summary judgment in favor of all three defendants on all claims.

The Court of Appeals upheld the trial court's dismissal of summary judgment on the negligent investigation claims, and in an unpublished portion of the opinion, held that the trial court properly granted summary judgment on the remainder of the father's and children's claims.

RCW 26.44.050 creates a statutory duty in DSHS and law enforcement to investigate reports of abuse or neglect of a child. As a result of the imposition of the statutory duty, it has previously been held that parents and children have an implied cause of action against law enforcement and DSHS for negligent investigation under certain circumstances. However, the courts have construed that cause of action as a "narrow" exception to the rule that there is no general tort claim for negligent investigation. The claim is available only when there is an incomplete or biased investigation that results in a harmful placement decision. The claimant must prove that the faulty investigation was a proximate cause of the harmful placement. Here, the court held that there was a question of fact as to whether the sheriff's deputy's investigation was negligent, but concluded as a matter of law that the no-contact orders issued in the criminal proceedings do not constitute "harmful placement decisions" for purposes of the negligent investigation claim. Neither CPS nor the sheriff's office were involved in the family court commissioner's rulings on child placement.

*In re the Estate of Mower*  
\_\_\_\_ Wn. App. \_\_\_\_ (Division Two, May 2016)

Sixteen days after Dana and Christine's divorce was final, Dana unexpectedly died from a heart attack. He had not executed a new will prior to his death.

The provisions of his old will, which left his estate to his wife, were revoked under RCW 11.12.051. If his wife did not survive him, his will split his estate between his siblings and his wife's brother and sister-in-law.

The trial court granted summary judgment in favor of the brother and sister-in-law, and the Court of Appeals affirmed. While the provisions for the wife were revoked by operation of law, that does not mean the provisions to the wife's relatives failed as well.

## Case Law Update

Christina A. Meserve  
Charles E. Szurszewski



*In Re Discipline of Abele*  
184 Wn.2d 1 (August 2015)

The stress of a 13-day trial was not a mitigating factor in a disciplinary action based upon a lawyer's behavior both in and out of the courtroom.

*Thomson v. Jane Doe*  
189 Wn. App. 45 (Division One, July 2015)

A Subpoena to AVVO requesting an anonymous poster's identity must be preceded by a prima facie showing of defamation.

*Foss Maritime Company v. Brandewiede*  
190 Wn. App. 186 (Division One, September 2015)

The four factors to disqualify an attorney based upon the acquisition of privileged communication:

- (1) prejudice
- (2) counsel's fault
- (3) counsel's knowledge of the claim of privilege
- (4) possible lesser sanctions

*Marriage of Wixom*  
190 Wn. App. 719 (Division Three, October 2015)

Civil Rule 11 supported joint and several monetary sanctions against the client and lawyer, including attorney fees on appeal.

*In Re Marriage of McNaught*  
189 Wn. App. 545 (Division One, August 2015)

Only airfare costs, not other expenses of visitation, need be apportioned.

*In Re Marriage of Zandi*  
190 Wn. App. 51 (Division Two, August 2015)

The mother's failure to follow insurance protocols did not change allocation of medical costs.

*In Re Marriage of Selley*  
189 Wn. App. 957 (Division Three, September 2015)

Failure to visit can result in an upward deviation in support.

*In Re Parentage of O.A.J.*  
190 Wn. App. 826 (Division Three, October 2015)

In order to justify a deviation for other children, there must be a judicially enforceable support obligation.

*In Re Marriage of Zacapu*  
192 Wn. App. 700 (Division Two, February 2016)

Stepchildren qualify for deviation under RCW 26.19.075.

*Servatron v. Intelligent Wireless*  
186 Wn. App. 666 (Division Three, March 2015)

Settlement negotiations without any formal notice of appearance were sufficient to vacate default judgment.

*In Re Termination of Parental Rights to M.J.*  
187 Wn. App. 399 (Division Three, April 2015)

Court must consider whether incarcerated parent maintains meaningful role in the child's life.

*In Re Welfare of K.M.M.*  
187 Wn. App. 545 (Division Two, May 2015)

Futility Doctrine: Where additional services would not remedy parental deficiencies, termination appropriate.

*Dependency of H.S.*  
188 Wn. App. 654 (Division Three, April 2015)

Finding of abuse is not moot even though child has turned 18.

*Dependency of D.L.B.*  
188 Wn. App. 905 (Division One, July 2015)

A specific statutory provision aimed at giving direction to the department for an incarcerated parent does not apply if the parent is not incarcerated at the time of the termination hearing.

*Adoption of M.S.M.-P.*  
184 Wn.2d 496 (October 2015)

A litigant's constitutional right to an open forum can be waived by the litigant's attorney.

*Parental Rights to R.M.P.*

191 Wn. App. 743 (Division Three, December 2015)

A new statute requiring DSHS to make reasonable efforts to consult with the Developmental Disabilities Administration in a dependency proceeding did not apply in a termination case.

*In Re Dependency of M.H. P., DSHS v. Parvin*

184 Wn.2d 741 (December 2015)

Attorneys for indigent parents in dependency and termination cases must give notice to obtain funds to hire experts.

*Marriage of Lane*

188 Wn. App. 597 (Division One, June 2015)

A litigation guardian ad litem for an incapacitated person cannot waive the incapacitated person's right to trial.

*Custody of C.D.*

188 Wn. App. 817 (Division Three, July 2015)

Placement with a nonparent upheld.

*In Re Custody of J.E., Culver v. Eaton*  
189 Wn. App. 175 (Division Three, August 2015)

In a non-parent custody action, once the parent is found to be fit, parental rights supersede best interests of child.

Practice tip: Consider a de facto parentage case.

*In Re Custody of A.L.D., Moehlmann v. Lambert*  
191 Wn. App. 474 (Division Three, December 2015)

When a biological parent becomes fit to care for a child, the non-parent custodian loses.

*Custody of Z.C.*  
191 Wn. App. 674 (Division Three, December 2015)

Where no finding of unfitness, biological parent can gain custody at any time.

Mother granted attorney fees on appeal.

*In Re Marriage of Kile*  
186 Wn. App. 864 (Division Three, April 2015)

Community property presumption applied even where parties had treated the asset as the wife's separate property.

*In Re Marriage of Persinger*

188 Wn. App. 606 (Division Three, June 2015)

A Labor & Industries benefit is not divisible or assignable, even by agreement.

Court may consider Labor & Industries benefits in making property division.

*Burgess v. Crossan*

189 Wn. App. 97 (Division One, July 2015)

Leasehold is presumptively community property, regardless of name on document.

*Marriage of Schwarz*

192 Wn. App. 180 (Division Three, January 2016)

Once separate character of asset is established, only "hopeless commingling" overcomes the continuing presumption of separate property.

*In Re Marriage of McNaught*

189 Wn. App. 545 (Division One, August 2015)

In relocation, the burden of persuasion is on the party opposing relocation.

A parent may delegate his time to family members.

*In Re Estate of Craig S. Lundy v. Lundy*  
\_\_\_\_ Wn. App. \_\_\_\_ (Division One, June 2015)

An ERISA designation, not changed after the Decree of Dissolution was entered, trumps the waiver in a Decree of Dissolution.

Practice tip: Maybe, maybe, a specific waiver of rights in the decree would suffice? Better practice is to convince client to change the beneficiary designation.

*Fearghal McCarthy, et. al. County of Clark et. al.*  
\_\_\_\_ Wn. App. \_\_\_\_ (Division Two, April 2016)

Negligent investigation claims fail because temporary orders are not "harmful placement decisions" under statute.

*In Re the Estate of Mower*  
\_\_\_\_ Wn. App. \_\_\_\_ (Division Two, May 2016)

RCW 11.12.051 removes a former spouse from a will but not her relatives.

***Thank you***

Christina A. Meserve

Charles E. Szurszewski



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CHAPTER SIXTEEN  
**RULES OF PROFESSIONAL CONDUCT**

# WASHINGTON'S RULES OF PROFESSIONAL CONDUCT (RPC)

(with rule changes through April 14, 2015)

(Originally adopted effective 9/1/85. Substantially revised (with addition of comments) effective 9/1/06.)

Fundamental Principles of Professional Conduct

Preamble and Scope

1.0A Terminology

1.0B Additional Washington Terminology

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1.2 Scope of Representation and Allocation

1.3 Diligence

1.4 Communication

1.5 Fees

1.6 Confidentiality of Information

1.7 Conflict of Interest: Current Clients

1.8 Conflict of Interest: Current Clients: Specific Rules

1.9 Duties to Former Clients

1.10 Imputation of Conflicts of Interest: General Rule

1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

1.13 Organization as Client

1.14 Client with Diminished Capacity

1.15A Safeguarding Property

1.15B Required Trust Account Records

1.16 Declining or Terminating Representation

1.17 Sale of Law Practice

1.18 Duties to Prospective Client

## Title 2 Counselor

2.1 Advisor

2.2 (Deleted)

2.3 Evaluation for Use by Third Persons

2.4 Lawyer Serving as Third-Party Neutral

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3.2 Expediting Litigation

3.3 Candor Toward the Tribunal

3.4 Fairness to Opposing Party

3.5 Impartiality and Decorum of the Tribunal

3.6 Trial Publicity

3.7 Lawyer as Witness

3.8 Special Responsibilities of a Prosecutor

3.9 Advocate in Nonadjudicative Proceedings

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5.2 Responsibilities of a Subordinate Lawyer

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5.4 Professional Independence of a Lawyer

5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

5.6 Restrictions on Right to Practice

5.7 Responsibilities Regarding Law-Related Services

5.8 Misconduct Involving Lawyers and LLLTs Not Actively Licensed to Practice Law

5.9 Business Structures Involving LLLT and Lawyer Ownership

5.10 Responsibilities Regarding Other Legal Practitioners

## Title 6 Public Service

6.1 Pro Bono Publico Service

6.2 Accepting Appointments

6.3 Membership in Legal Services Organization

6.4 Law Reform Activities Affecting Client Interests

6.5 Nonprofit and Court-Annexed Limited Legal Service Programs

## Title 7 Information About Legal Services

7.1 Communications Concerning a Lawyer's Services

7.2 Advertising

7.3 Direct Contact with Prospective Clients

7.4 Communication of Fields of Practice and Specialization

7.5 Firm Names and Letterheads

7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

## Title 8 Maintaining the Integrity of the Profession

8.1 Bar Admission and Disciplinary Matters

8.2 Judicial and Legal Officials

8.3 Reporting Professional Misconduct

8.4 Misconduct

8.5 Disciplinary Authority; Choice of Law

**Appendix** Guidelines for Applying Rule of Professional Conduct 3.6