Family Law Changes

December 4, 2015 | Seattle, WA

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Chair and Faculty

A Special Thank You to Our Program Chair 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.

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Mark L. Alexander — *Seattle Divorce Services, Seattle, WA*

Program Faculty

Douglas P. Becker — *Wechsler Becker, Seattle, WA*

Mary L. Hammerly — *Attorney at Law, Issaquah, WA*

Commissioner Stephen M. Gaddis (Ret.) — *Gaddis Mediation Services, Bellevue/ Kennewick, WA*

Hon. Deborah D. Fleck (Ret.) — *JAMS, Seattle, WA*

Commissioner Eric Watness (Ret.) — *JAMS, Seattle, WA*

Janel K. Ostrom — *Seattle Divorce Services, Seattle, WA*

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Program Schedule

Family Law Changes

Friday, December 4, 2015

8:00 a.m. **Check-in • Walk-in Registration • Coffee and Pastry Service**

8:25 a.m. **Welcome and Introductions by Program Chair**
Mark L. Alexander, Seattle Divorce Services, Seattle

8:30 a.m. **Relocation: Changing Case Law and New Strategies**
The Child Relocation Act of 2000 was never simple, but it has become more confusing than ever after recent decisions by our appellate courts. Mr. Becker, one of the principal drafters of the Act, will explain what is happening at both the appellate and trial levels and review the strategies that are most effective in the courtroom.
Douglas P. Becker, Wechsler Becker, Seattle

9:30 a.m. **Guardianship vs. Third Party Custody**
Examine the positives, negatives and and/or roadblocks in selecting the legal vehicle to establish parental rights for a third party when one or more parents are deceased. Title 26 (non-parental custody) versus Title 11 (guardianship): That is the Question.
Mary L. Hammerly, Attorney at Law, Issaquah

10:30 a.m. **BREAK**

10:45 a.m. **Evolution of Successful Parenting Plan Negotiations**
Update your negotiation strategies when working out parenting plans
Commissioner Stephen M. Gaddis (Ret.), Gaddis Mediation Services, Bellevue/Kennewick

12:00 p.m. **LUNCH on your own**

1:00 p.m. **Changing Mediation Dynamics: Getting to an Offer Before 3 pm**
Learn effective strategies negotiators can employ to move parties towards resolution.
Judge Deborah D. Fleck, JAMS, Seattle
Commissioner Eric B. Watness, JAMS, Seattle

Schedule continued on next page

2:00 p.m. **BREAK**

2:15 p.m. **Life Changes after Dissolution: Steps to Take**
What are the steps you and your client need to take to prepare for life after divorce: Explore common issues after the divorce is final, and how to minimize complications for your clients in the months and years ahead.
Janel K. Ostrem, Seattle Divorce Services, Seattle

3:00 p.m. **Spousal Support: The Way We Were, the Way We Are, and the Way We Might Be Headed**
History, evolution, and whether we should be thinking of spousal support differently in the 21st century.
Marijean E. Moschetto, Moschetto & Koplin, Bellevue

4:00 p.m. **Adjourn • Complete Evaluation Forms**

Chair Biography

Mark Alexander

Mark graduated with honors from Harvard College and attended the Backus School of Law of Case Western Reserve University, where he was a legal research, advocacy, and writing instructor for first-year law students. Licensed as an attorney since 1979 and admitted in five states, he has been practicing family law in the Puget Sound area since 1990. He has served as Managing Attorney for the Family Law Mentor Program of the King County Bar Association and as Chair of the KCBA Family Law Section. A member for over 20 years of its Local Rules committee, he worked on the joint effort to update and clarify the King County Local Family Law Rules, coordinated group comments on proposed statewide Family Law Civil Rules, and has helped revise the family law forms into plain language. In addition to devoting time to the Greenwood and Eastside legal clinics and the Volunteer Settlement Conference program, Mark serves on the WSBA Family Law Executive Committee. He mediates and litigates at Seattle Divorce Services in Ballard.

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Seminar Sponsor: WSBA-CLE

Seminar Name: Family Law Changes (16547SEA/WEB)

Seminar Date: December 4, 2015

Approved Credits: **6.0 CLE Credits for Washington Attorneys (**6.0 General and 0.0 Ethics)

Hours of Attendance:

TIME OF ARRIVAL	TIME OF DEPARTURE

Credits Earned: _____ **general** _____ **ethics**

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CHAPTER ONE

RELOCATION: CHANGING CASE LAW AND NEW STRATEGIES

December 2015

Douglas P. Becker
Wechsler Becker

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DOUGLAS P. BECKER is a partner in Wechsler Becker, LLP. He is a family law litigator with over 30 years experience, as well as a family law mediator and arbitrator. In 1999-2000 Mr. Becker played a key role in passage of the Child Relocation Act and continues to be involved in legislative matters that affect family law. The Washington State Bar Association Family Law Section twice recognized his contributions to family law with the Family Law Attorney of the Year award in 1992 and a unique Special Service award in 2002. Mr. Becker has served on the WSBA Family Law Executive Committee since 1993 and he is the founder and moderator of the WSBA Family Law Section's web site/forum since 2000. He publishes Family Law QuickCites, a summary of Washington appellate decisions used by many Washington attorneys. He is also a long-standing member of the Domestic Relations Forms Sub-Committee of Washington's Administrative Office of the Courts as well as a frequent author and lecturer on family law topics.

RELOCATION: CHANGING CASE LAW AND NEW STRATEGIES

CASE LAW:

Relocation remains a common source of litigation in family law. From enactment of the Child Relocation Act in 2000 to now, there have been many questions raised for which the statutes don't provide clear answers. Several of those are discussed in this presentation.

As background, it is worth noting that before the Relocation Act, the parent with the majority of residential time had a near-absolute right to relocate with the child. "We interpret RCW 26.09.191(3) to require more than the normal distress suffered by a child because of travel, infrequent contact of a parent, or other hardships which predictably result from a dissolution of marriage." *Littlefield v. Littlefield*, 133 Wn.2d App. 39, 57, 940 P.2d 1362 (1997). This left the objecting party in the peculiar position of arguing the "normal distress" of relocation wasn't very high (and hence the circumstances of the case exceeded it) and the relocating party arguing that the "normal distress" of relocation was high (and hence the circumstances of the case didn't exceed the norm). In practice, the standard was unworkable and it made objection to relocation nearly impossible.

The Relocation Act was formulated to address the obvious question: what is in the best interest of the child in the individual case? However, as often happens with legislation on sensitive topics, more and more questions were raised that needed to be answered and the Act grew and grew. The finished product ended up complex and incomplete at the same time. No revisions of the Act have been attempted in the intervening 15 years.

1. 50/50 Parenting Plans

One obvious issue that was not addressed in the Relocation Act was the procedure for 50/50 parenting plans. Those plans were much less common then; but not rare, either. In 2000, toward the end of the 2-year process of drafting and the Act and moving it through committees, this issue was raised in the legislature. Rather than go back and re-engage all the stakeholders in the legislation, the sponsors decided to handle it with a legislative colloquy. In his colloquy in the House, then-Representative Dow Constantine stated: "Under [a 50/50 parenting schedule], the notice requirements apply to both parents and the presumption to neither." 56th Legislature, ESHB 2884 (February 14, 2000), attached.

For some time, a few judges were upset enough with the Relocation Act to reject its application on the basis that, without a primary parent, no one was required to give notice and therefore none of the Act could apply. Fortunately that attitude seems to have dissipated and most courts will apply the Relocation Act to 50/50 parenting plans, particularly when the colloquy is presented.

However, that message had not gotten through to the Court of Appeals as recently as 2014:

> "We note that, by the plain language of the child relocation statutes, the notice requirements are triggered by the intended relocation of a person 'with whom the child resides a majority of the time.' RCW 26.09.430. This plain language suggests that if neither parent qualifies as a parent with whom a child resides a majority of the time, for example when residential time is split 50/50, that neither parent can invoke the child relocation statute and receive the rebuttable presumption in his/her favor.
>
> *In re Marriage of Fahey*, 164 Wn. App. 42, 58-59, 62 P.3d 128 (2011).

2. International Relocations

As a practical matter, courts and evaluators are extremely reluctant to allow relocation of

a child outside the U.S. for many good reasons, including the difficulty of maintaining a relationship with the remaining parent, the expense of travel and the supposed deprivation to the child of living outside the U.S. Do not underestimate how strong this reluctance is. Even where parents are of foreign origin, that doesn't mean the child should be treated as if they were. Nonetheless, there is no difference, legally. The Child Relocation Act is not limited to relocations within the borders of the United States and does not impose additional or different requirements on international relocations. *In re Marriage of Rostrom*, 184 Wn. App. 744, 752, 761-62, 339 P.3d 185 (2014).

3. Best Interest of Relocating Parent

Some courts ignored the implications of the part of RCW 26.09.520 that states, "A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child *and the relocating person*…." Also one of the factors to be considered is 26.9.520(7), "The quality of life, resources, and opportunities available to the child *and to the relocating party* in the current and proposed geographic locations." That used to be given short shrift, but no longer.

The Washington Supreme Court, as well as the Court of Appeals, has made it clear that the relocating parent's interests must be weighed in the mix of factors: "The Washington Supreme Court has emphasized the importance of the interests of the relocating person…. The *Horner* court emphasized that the interests and circumstances of the relocating parent are '[p]articularly important' and that, '[c]ontrary to the trial court's repeated references to the best interests of the child, the standard of relocation decisions is not only the best interests of the child.' [*Horner*] at 894. Instead, 'trial courts consider the interests of the child and the relocating

person within the context of the competing interests and circumstances required by the [relocation act]. *Id* at 895.'" *In re Marriage of Kim*, 179 Wn. App. 232, 243, 317 P.3d 555 (2014), quoting *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124 (2004). See also *In re Marriage of Rostrom*, 184 Wn. App. 744, 752, 339 P.3d 185 (2014).

4. Relocation in Context of Dissolution Case

Sometimes relocation becomes an issue in a dissolution case. In making an *initial determination* of a *permanent* parenting plan, a parent's intention to relocate with the child must be considered and the factors for determining parenting plans under RCW 26.90.187 are superseded, to the extent they conflict, by the relocation factors under RCW 26.09.520. *In re Marriage of Kim*, 179 Wn. App. 232, 243, 317 P.3d 555 (2014)

5. The 30-day "Bright Line"

According to the Relocation Act, the relocation is allowed unless the objecting party files an objection within 30 days of receiving the Notice of Relocation. While that was long considered a "bright line," the Court of Appeals decided to bend the rules a bit:

> Although Pennamen failed to demonstrate good cause for his **untimely filing** [of his objection to relocation], the commissioner appears to have allowed Pennamen to proceed because he complied with CR 55…. By notifying Roberson of his objection, Pennamen informally appeared and invoked the protection of CR 55. Washington courts broadly construe the concept of appearance, focusing on whether the defending party has acted in a way that indicates to the moving party that he intends to defend…. On the same day Roberson moved for relocation by default, Pennamen filed his pleadings with the court. Under CR 55, Pennamen cured his untimely filing by responding before a hearing on the default motion.
>
> *In re Marriage of Pennamen*, 135 Wn. App. 790, 798-800, 146 P.3d 466 (2006) (Boldface added.)

6. Determination of Primary Parent

It is not unusual for the residential schedule of the parties *as practiced* to vary from the schedule given in the parenting plan. However, when it comes to determining a primary parent

for relocations, only what is on paper counts.

> Lawrence argues that because the children spent more than 50 percent of nights sleeping in his home since 2006, the trial court should not have considered Lisa the primary residential parent. But Lawrence cites no authority for the proposition that actual residential circumstances negate the express intent of a primary residential parent designation in a permanent parenting plan. …And, contrary to Lawrence's position, the parenting plan in place at the time of a proposed relocation is used to determine primary residential parenting status. See *R.F.R.*, 122 Wash.App. at 330, 93 P.3d 951.
>
> *In re Marriage of Fahey*, 164 Wn. App. 422, 59-60, 62 P.3d 128 (2011)

Unfortunately, the *Fahey* decision also included the designation of "custodial parent" for "all other" state and federal purposes as evidence of who the majority residential parent was, even though the facts on the ground were the opposite. The custodial parent designation is usually interpreted to mean, "all other purposes other than the parenting plan itself." By resorting to use of this provision as evidence of which parent the majority residential parent was, the court opened the door to all kinds of abuse and conflict over that designation, which is unfortunate.

7. The "Open Door" Trap

Some attorneys have argued and some judges have ruled that in order to seek a modification of the parenting plan based on relocation, there needs to be either a "nexus" between the relocation and the requested relief or an adequate cause determination about whether there is sufficient basis to grant the non-relocation-based relief. In other words, when a primary parent moves closer to the other parent, the other parent shouldn't be able to use it as an excuse to seek to become primary parent without showing adequate cause other than relocation. That certainly was the intent of the drafters. However, such restrictions appear to have been dropped, at least in King County Superior Court, and the prevailing view is that "anything goes as long relocation is being sought," based on the language of RCW 26.09.260(6) that provides:

> The court may order adjustments to the residential aspects of a parenting plan

> pursuant to a proceeding to permit or restrain a relocation of the child. The person objecting to the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to modify the parenting plan, including a change of the residence in which the child resides the majority of the time, **without a showing of adequate cause other than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued.** In making a determination of a modification pursuant to relocation of the child, the court shall first determine whether to permit or restrain the relocation of the child using the procedures and standards provided in RCW 26.09.405 through 26.09.560. Following that determination, the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan or custody order or visitation order.

This interpretation of the statutes doesn't allow for any limitation on relief caused by the language of the last sentence that "the court shall determine what modification **pursuant to relocation** should be made." At least for now, as long as relocation is being pursued, the court can do anything to the parenting plan it wants within its broad discretion.

This interpretation has given new impetus by the recent case of *In re Marriage of McDevitt*, 181 Wn. App. 765, 326 P.3d 865 (2014). In its interpretation of RCW 26.09.260(6), the court observed:

> The third sentence clearly states that the relocation petition itself is a basis for modifying a parenting plan. The second sentence of subsection (6) also expressly permits consideration of new parenting plans as a result of a relocation request.

181 Wn. App. at 765

Whether or not that language means that the Court of Appeals intended to expressly rule out the "nexus" test is debatable, but it is being interpreted that way. Just as importantly, the *McDevitt* also held that, if the mother accomplished a temporary relocation during the proceedings, before trial, she could not then revoke the move, move back to whence she came, and demand a return to the *status quo ante*.

Unless and until the legislature acts, "anything goes" is the rule as long as a relocation is

being pursued *or has already occurred under temporary orders or by mutual agreement.*

NEW STRATEGIES FOR RELOCATION CASES

Although not new, it is worth stating that an objection to relocation of the child (i.e. a major modification, as opposed to a minor modification where the objection is only to the relocating parent's proposed parenting plan) is a full-on *custody fight*. This is due to the fact that if the relocating parent is going to exercise their Constitutional right to move (which the court is required to presume will happen), the court can only decide with which parent the child will live most of the time. That's exactly why the Objection to Relocation form is also a Petition for Modification. There is no other option. The importance of this is that an objecting parent who does not seek to become primary parent or cannot succeed in a request to become primary parent cannot possibly succeed with an object to relocation and may open themselves to possible sanctions under RCW 26.09.550.

For relocating parents, there are now two significant concerns. First, "anything goes" in terms of the modification request by the opposing parent. To use an example of a case I had recently, the parenting plan had an "over 50 miles" schedule and an "under 50 miles" schedule and the mother was moving back within 50 miles of the father. The mother's argument was that, since the father wasn't objecting to the relocation itself, no change was warranted because the "under 50 miles" schedule had already been agreed upon. The court rejected that argument on the basis the "anything goes" and allowed the father to proceed with his request for a wholesale modification of the parenting plan.

Second, the choice of whether a relocating parent should seek a temporary relocation, even by agreement, is now problematic, when it never was before. A temporary relocation can and probably will result in the loss of the option to say "never mind, stop everything, I'm not

relocating" under RCW 26.09.260(6) and 26.09.530 if the case turns against the relocating parent. However, in the absence of a temporary relocation, if the court denies relocation and the relocating party abandons their relocation, the court lacks authority to modify the parenting plan without finding adequate cause to support a modification on other grounds. Suspicions about future conduct or a comparison of living environments are not sufficient. *In re Marriage of Grigsby*, 112 Wn. App. 1, 57 P.3d 1166 (2002).

In favor of the relocating parent, it is now clearer than ever that the benefits of the relocation *for the relocating parent* must be considered by the court, which means the court must make a finding on that factor. This was not hugely important before, but is now.

Strategically, it is also important that the relocating parent not signal any weakness of their resolve to relocate. If the relocating parent signals they can be coerced into foregoing relocation, that is exactly what will happen because of the belief that relocating is not usually not in the best interest of the child. But your client wouldn't have come to you if it were the best answer for them! The temptation for the evaluator or court to essentially blackmail the relocating party into abandoning the relocation is simply too great, despite the prohibition in the Relocation Act (RCW 26.09.530) from considering whether a relocating parent *would* forego relocation if things go against them. (The objecting parent is always allowed to argue that the relocating parent *could* forgo relocation under RCW 26.09.520(9)).

The concern that a relocating parent who says, "I'm relocating no matter what" will be viewed as too selfish or "lacking in judgment" isn't accurate (unlessthe reasons for relocating are weak). If there are good reasons to move, almost any judge or evaluator will take the relocating parent's need to relocate seriously and not be led astray by such claims. You should force the evaluator and judge to make the tough decision. It takes the "coercion" option away and forces

them to focus solely on the custody aspects of the case. If you have approached it as a custody case, you should succeed.

Insisting the relocation will occur also eliminates the resulting transportation burden from consideration as a factor because “the transportation burden will apply either way when my client moves, your Honor, so let’s talk about something that makes a real difference, like the opposing party’s parenting history and current environment.”

Remember that the Notice of Relocation can be pretty bare bones. All the information that is mandatory is “a brief statement of the specific reasons for the intended relocation of the child” and an address for service of the objection. RCW 26.09.440(2)(a). All the rest, including the proposed parenting plan, date of the move, etc., should be in the Notice of Relocation “if available” and if not available, provided “as that new information becomes known.” RCW 26.09.440(2)(b).

Don’t forget to get a GAL/evaluator appointed immediately, by motion if necessary. It’s nearly impossible to settle and certainly difficult to go to trial in relocation cases without an expert opinion. The intrusiveness and cost of an evaluation should always be explained to clients before the litigation commences.

It’s unclear from the Relocation Act whether a motion to permit or restrain temporary relocation should be filed by the relocating party or the objecting party. The Act authorizes either parent to bring such a motion. The best practice is to bring the motion regardless of which side you represent.

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VOLUME I

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~~to serve the best interests of the child. In applying these standards, the court shall retain the custodian established by the prior decree unless:~~

~~(a) The custodian agrees to the modification;~~

~~(b) The child has been integrated into the family of the petitioner with the consent of the custodian; or~~

~~(c) The child's present environment is detrimental to his or her physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.~~)) The court shall hear and review petitions for modifications of a parenting plan, custody order, visitation order, or other order governing the residence of a child, and conduct any proceedings concerning a relocation of the residence where the child resides a majority of the time, pursuant to chapter 26.09 RCW.

(2) If the court finds that a motion to modify a prior custody decree has been brought in bad faith, the court shall assess the attorney's fees and court costs of the custodian against the petitioner.

NEW SECTION. **Sec. 22.** Captions used in this act are not any part of the law.

NEW SECTION. **Sec. 23.** Sections 2 through 18 of this act are each added to chapter 26.09 RCW and codified with the subchapter heading "Notice requirements and standards for parental relocation.""

Correct the title.

Representatives Constantine and Carrell spoke in favor of the adoption of the amendment.

The amendment was adopted.

The bill was ordered engrossed.

There being no objection, the rules were suspended, the second reading considered the third and the bill was placed on final passage.

Representatives Constantine, Carrell, Carlson and Kastama spoke in favor of passage of the bill.

COLLOQUY

Representative Carrell: Does the presumption created in section 14 of this act apply to any other sections of RCW title 26?

Representative Constantine: No. The presumption created in section 14 of this act is intended to apply exclusively to section 14 of the act and is not intended to apply by analogy to any other sections of RCW title 26.

Representative Carrell: How does this act apply in situations in which the child resides an equal amount of time with each parent?

Representative Constantine: Under such circumstances, the notice requirements apply to both parties and the presumption to neither.

Representative Lambert spoke against the passage of the bill.

Speaker Ballard stated the question before the House to be final passage of Engrossed Substitute House Bill No. 2884.

CHAPTER TWO

GUARDIANSHIP VS. THIRD PARTY CUSTODY

December 2015

Mary L. Hammerly
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MARY L. HAMMERLY is a sole practitioner and has been practicing for over thirty-five (35) years. Her practice focuses on Family Law and Elder Law. In addition to handling all types of family law cases, she also handles guardianships, estate planning and probate and an increasing portion of her practice is as a Guardian ad Litem in Title 11 and Title 26 cases. She has handled over 100 Title 11 cases as a Guardian ad Litem. She is appointed in many cases specifically because she has experience in both Title 11 and Title 26 when combined issues exist in the same case. Her knowledge and experience in both family law and elder law provider her a unique ability to handle complex cases involving issues in both areas of the law.

She is a former chair of the Family Law Section of the King County Bar Association and the Family Law Executive Committee of the Family Law Section of the Washington State Bar Association. She has also been involved in a number of other local and state committees. She is currently a mentor for Eastside Legal Assistance Program and the King County Bar Association.

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I. Unique Purpose of Guardianship and Third Party Custody Statutes

Many people look at third party custody under RCW Title 26 and Guardianship under RCW Title 11 as interchangeable.[1] While in some situations either guardianship or third party custody may be a workable solution, in many cases, that is not true. The two actions fill different and unique roles and are designed for different purposes.

The purpose of a guardianship action is set forth in RCW 11.88.005 in the legislative intent which states:

> It is the intent of the legislature to protect the liberty and autonomy of all people in this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person. The legislature recognized that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs with the help of a guardian. However, the liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs.

The guardianship action is initiated to provide the guardian (who may or may not be the petitioner) with the right to "substitute decision making" for the alleged incapacitated person only to the extent that the alleged incapacitated person is unable to do so. In many situations the guardian and the incapacitated person are not living in the same residence. The role of the guardian is to manage both the finances and the care of an incapacitated person, but not actually provide the care himself/herself.

In contrast, RCW 26.10.005 states the following as the intent of the legislature:

> It is the intent of the legislature to reenact and continue the law relating to third-party actions involving custody of minor children in order to distinguish that body

[1] There is also a guardianship authorized by RCW 13.36, but it is used in connection with dependency cases. This type of guardianship is not addressed in these materials.

> of law from the 1987 parenting act amendments to chapter 26.09 RCW, which previously contained there provisions.

The petitioner in a third party custody action is requesting rights as a custodial parent. It is similar to other parenting actions under RCW Title 26, such as actions in dissolution or parentage cases. The end result is an order providing the third party with custody of the child, but in most cases, other parties (normally, but not necessarily the parents) are provided with traditional "visitation" and child support may also be provided.

II. Jurisdiction and Venue

A guardianship action can be brought in the county where the incapacitated person is domiciled or it can be brought in the county where a parent or spouse of the incapacitated person lives. [RCW 11.88.010 (3)]. If there are plans to move a child to a different state, depending the urgency of the situation, waiting until the child is in the final state to file the guardianship action may be appropriate because guardianship orders are generally transferred to the new jurisdiction when the incapacitated person moves.

In the Guardianship of Marshall, 46 Wn. App. 339, 731 P.2d 5 (1986) the court made it clear that the guardianship statute cannot be used to terminate or interfere with parental rights. Marshall, supra at 343 and 344 states the following:

> We agree with the Marshalls that guardianship is an improper proceeding to terminate a parent's right to custody of his or her children. . . . Similarly, a guardianship proceeding is an improper proceeding in which to adjudicate visitation rights. . . . "A guardian is a creature of statute, and has only those powers that are prescribed by statute." . . . Accordingly, the mere appointment of a guardian does not necessarily extinguish the rights of the parents to the custody of a child . . . Nothing in RCW 11.88.010 et. seq confers the right of custody upon a guardian. . . Any aspect of the order directed to custody or visitation is invalid.

There are situations where a guardian of the estate is required to manage a child's assets, but this is an entirely different purpose than obtaining an order providing that a third party is a guardian of the person. The goal is to have custodial or parental rights, the court does not have the right to grant such rights under the guardianship statute if one or both of the parents is alive.

In a third party custody action there are a number of factors to consider in addressing jurisdiction and venue. The first factor that must be considered is the impact of the Uniform Child Custody Jurisdiction and Enforcement Act on the proceeding. (UCCJEA or RCW 26.27) Even if this is the first time the third party is requesting custody of a child, if a prior custody order was entered in another state, in most cases that state has continuing jurisdiction and unless that state waives jurisdiction, the case must be brought where the prior custody order was entered. If there is not a need to file in another jurisdiction under the UCCJEA then RCW 26.10.030 (1) controls and states that the action can be filed in the county in the county where the child is permanently resident or where the child is found, but only if the child is not in the physical custody of one of the parents. If juvenile court is involved, they have primary jurisdiction and the case cannot move forward until juvenile court provides the superior court with concurrent jurisdiction.[2] Property investigation of these jurisdictional issues before filing is critical to avoid delays in the process which is frequently being addressed at a very emotional time for the parties.

Third party custody actions require that the mandatory forms be used (RCW 26.10.015), but mandatory forms are not required in guardianship actions. Model forms have been in existence since about 2000 for guardianship cases and are available on the Washington State Court website. (www.courts.wa.gov/forms/) In addition to the state model forms, some counties

[2] If juvenile court is involved, the guardianship under RCW Title 13 may be the better choice.

have their own local forms[3] so if you are not familiar with procedures in your county it is wise to check whether there are forms unique to your county. Since these are no mandatory forms, any forms can be used, but the courts prefer the model forms to the extent there is a form appropriate to meet the needs of the issues being presented.

III. Emergency Relief

In most circumstances temporary orders are not entered in guardianship cases and there is limited ability to enter temporary orders. Since all cases are supposed to be resolved within sixty (60) days there is less need for temporary relief than in a third party custody case where the case could continue for a year or longer. RCW 11.88.045 (5) provides that a petitioner or any person may move for temporary relief under Chapter RCW 7.40 (injunctions) to protect the alleged incapacitated person from abuse, neglect abandonment, or exploitation. The standards required by RCW 7.40 are very stringent and normally require that a bond be placed if there is a question as to another party being injured by the injunction. Emergency restraining orders are possible, but there are significant limitations on the issuance of such orders. (RCW 7.40.050.) Domestic Violence Protection Orders under RCW 26.50 or Vulnerable Adult Protection Orders under RCW 74.34 may also be possibilities, but these are beyond the scope of the guardianship statute. RCW 11.88.090 (8) and (9) provide the guardian ad litem the authority to make emergency decisions to obtain emergency life-saving medical services and to obtain a temporary injunction under RCW 7.40. When there are contested issues concerning care of a child, the guardianship statutes are really not designed to provide the relief required to give the petitioner temporary custody or stabilize the status quo.

[3] There are some situations in guardianship practice that are not addressed completely by the forms, but in most cases they at least provide a place to begin drafting even if the actual form is not present. It is also wise to check to see if there are any guidelines for your courts. King County has its own set of forms, so it is useful to determine if there is a difference between the state and county forms for your jurisdiction.

The third party custody statute provides authority for temporary relief in much the same way that other statutes in RCW 26 do. RCW 26.10.110 makes provision for an award of temporary custody. RCW 26.10.115 provides for entry of temporary restraining orders similar to those in a dissolution or parentage action, but do not provide for protection of financial assets. (In the area of financial relief to control a child's assets, the guardianship statute provides better remedies.) Since many third party custody cases may take several months to resolve, temporary relief such as temporary custody, visitation and child support can be provided after a hearing. RCW 26.10.110 and .115). In general maintaining the status quo or protecting the child from abuse or neglect during the pendency of the action is far easier under the third party custody statues than through the guardianship statutes.

IV. Legal Standards

Unlike the third party custody statutes that are designed to address claims to traditional "custody rights" of a parent or third party, the guardianship statute was designed to address the needs of individuals who are incapacitated. In general these people have some life experiences and may not believe they are "incapacitated". The statute focuses on preserving the rights of incapacitated individuals, by requiring the least restrictive alternative to assist the incapacitated person possible. The court cannot enter an order of guardianship, unless the court determines that the alleged incapacitated person is incapacitated as required by statute. Pursuant to RCW 11.88.010 (d), a child under the age of eighteen (18) is determined to be incapacitated, however it is helpful to understand the standard that is used by the court in determining incapacity in other cases. RCW 11.88.010 (1)(a) and (b) provides these definitions:

> (a) For purposes of this chapter, a person may be deemed incapacitated as to the person when the superior court determines the individual has a significant risk of personal harm based on upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.

(b) For purposes of this chapter, a person may be deemed incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.

The determination of incapacity is a legal determination, not a medical determination and requires a demonstration of management incapacities in the area of the person or estate. [RCW 11.88.010 (1)(c). Although these standards may not appear relevant when the custody or guardianship of a child is considered, it is important when one looks at the role of the guardian ad litem in a guardianship case and the court's overall response to a guardianship action.

Although RCW 26.10.100 states that the basis for an award of custody is the best interests of a child, the case law has limited that determination in a number of ways. The jurisdictional basis to filing a petition requires that the petitioner allege that the child is not in the physical custody of either parent or that neither parent is a suitable custodian. [RCW 26.10.030 (1)]. Unless there is a showing of parental unfitness or for other exceptional reasons, custody cannot be granted to a third party even if the third party would be a better custodian than the parent. [(See Marriage of Allen, 28 Wn. App. 637, 626 P.2d (1976) and In re Custody of Stell, 56 Wn. App. 356, 783 P.2d 615 (1989).]

V. Qualifications of a Guardian or Third Party Custodian

The guardianship statute requires that the guardian must meet specific standards to be appointed as guardian. [RCW 11.88.020 (1)] Most of these requirements are fairly straight forward, but some can present problems in some situations. The guardian must be over the age of eighteen (18) and be of sound mind. The guardian cannot be convicted of a felony or a misdemeanor involving moral turpitude at any time during their life. If the proposed guardian has one conviction resulting from making a poor decision at age eighteen (18) or nineteen (19),

that individual cannot serve as guardian even if their life after that has been without any fault. The guardian is also required to complete a training that addresses the role and duties of a guardian. [RCW 11.88.020 (3) and RCW 11.88.030 (2).] Careful discussions with the proposed guardian before filing the action, as well as a check of the client's criminal record before proceeding with a guardianship action is critical.

Although having problems in one's past background does not preclude one from obtaining custody of a child in a third party custody action, the information must be provided to the court. RCW 26.10.160 incorporates the standard "191" restrictions so these apply in addition to the other unique requirements imposed for third party custody action. RCW 26.10.135 requires the court to inquire into the background of the proposed custodian. It states:

> (1) Before granting any order regarding the custody of a child under this chapter, the court shall consult the judicial information system, if available, to determine the existence of any information and proceedings that are relevant to the placement of the child.
>
> (2) Before entering a final order, the court shall:
>
> (a) Direct the department of social and health services to release information as provided under RCW 13.35.100; and
>
> (b) Require the petitioner to provide the results of an examination of state and national criminal identification data provided by the Washington state patrol criminal identification system as described in chapter 43.43 RCW for the petitioner and adult members of the petitioner's household.

Although this statue does not seem to require the review of department of social and health services records for other adult members of the Petitioner's household, my experience has been that both the criminal and department of social and health services records are required for every member of the household of the proposed custodian before a final third party custody order is entered. There is no prohibition in awarding custody to a person with either a criminal record or prior issues with the department of social and health services or if someone in the household has

these problems, however in most situations the courts will require a complete explanation of any criminal record or any past history of abuse or neglect of a child in reaching the legal conclusions that the best interests of the child will be met in the home of the proposed custodian.

Looking at the background of the person who is requesting custody of a child, either via a guardianship or third party custody action, before anything is filed is critical to determine whether the method chosen will be able to provide the results being sought.

VI. Role of Guardian and Custodian

In a series of sections in Chapter 11.92 RCW, beginning with RCW 11.92.035 the statutes set forth the specific duties of the guardian. A large portion of RCW 11.92 addresses duties to handle financial obligations. The only portion of RCW 11.92 that address duties to address the personal needs of the incapacitated person is RCW 11.92.043. Subsection (4) sets out the specific duties of the guardian as to the person. It states:

> Consistent with the powers granted by the court, to care for and maintained the incapacitated person in the setting least restrictive to the incapacitated person's freedom and appropriate to the incapacitated person's personal care needs, assert the incapacitated persons rights and best interests, and if the incapacitated person is a minor where otherwise appropriate, to see that the incapacitated person receives appropriate training and education and that the incapacitated person has the opportunity to learn a trade, occupation or profession.

Subsection 5 of RCW 11.92.043 places restrictions on the powers of the guardian to authorize certain invasive procedures. While the statute does address specific responsibilities to a minor in some ways the responsibilities of a parent are inconsistent with the authority granted to a guardian. One would wonder if a guardian appointed for a teenager, would be required to place that teenager in the "least restrictive environment" for such a child. Clearly that is not the case, but it points out one the reasons that the guardianship statutes do not always meet the needs of a child. RCW 11.92.040 (6) addresses payment of funds to care for an incapacitated person to a

third party or even directly to an incapacitated person. One of the most significant differences between the guardianship statutes and the third party custody statutes is that the guardian is not expected to be providing the day to day care for the incapacitate person, which places management of the incapacitate person's financial assets in a much more important position.

The powers and duties of the custodian in a third party custody cases are specifically stated in RCW 26.10.170 which states:

> Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including education, health care, and religious training, unless the court after hearing, finds upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical, mental or emotional health would be endangered.

RCW 26.09.170 goes on to indicate that the court may order an appropriate agency to supervise to make certain that custodial and visitation terms of the decree are carried out. Nothing is mentioned about finances or payment for the costs of the care. The focus is on providing care to the child and does not place any limitations on what the custodian is permitted to do unless there is concern about the physical, mental or emotional health of the child.

VII. Investigation by Guardian ad Litem or Other Impartial Third Party

In Title 11 guardianship actions the role of the guardian ad litem and even the contents of the report are specifically spelled out in RCW 11.88.090. RCW 11.88.090 (5) spells out the majority of the duties of the guardian ad litem which include the following:

A. Meet with the alleged incapacitated person and discuss specific rights the AIP is given by the guardianship action and rights that the alleged incapacitated person would lose if the order of guardianship is entered. RCW 11.88.090 (5)(a).

B. Obtain a written medical or psychological report to verify the basis for the alleged incapacity. RCW 11.88.090 (5)(b).

C. Meet with the proposed guardian and discuss a specific list of issues. RCW 11.88.090 (5)(c).

D. Consult with others who have had a significant, continuing interest in the alleged incapacitated person. RCW 11.88.090 (5)(d).

E. Investigate alternate arrangements that would meet the alleged incapacitated person's needs that would be less restrictive than a guardianship. RCW 11.88.090 (5)(e).

After doing the investigation, the guardian ad litem is required to provide a report at least fifteen (15) days before the hearing that includes nine specific requirements, many of which are related to the level of incapacity and the needs of the alleged incapacitated person. [RCW 11.88.090 (5)(f).] When a guardianship action is filed for a minor, many of the requirements of RCW 11.88.090 have little to do with the needs of a child, therefore the report, if done as required by the statute may not have the information that is really needed to determine the needs of the child.

RCW 26.10.130 provides the authority to appoint a guardian ad litem or other investigator in a third party custody case. RCW 26.10.130 (2) provides a list of things that the guardian ad litem may do, but there is no requirement that the guardian do any specific things, unless the guardian ad litem is ordered to do so by the court in the order of appointment. The report of the guardian ad litem must be filed at least ten (10) days before the hearing or trial. [RCW 26.10.130 (3).] The role of the guardian ad litem can be varied depending on the circumstances and the needs of the case.

VIII. Rights of Child

There are a number of rights guaranteed to the alleged incapacitated person in guardianship cases that make little sense in a most third party custody cases. The alleged incapacitated person is guaranteed an attorney and one of the duties of the guardian ad litem is to advise the alleged incapacitated person of his/her right to an attorney. If the alleged incapacitated person requests an attorney, the court is required to appoint an attorney for the

alleged Incapacitated Person. If the alleged incapacitated person is unable to pay for an attorney, the attorney is appointed at public expense. [RCW 11.88.045 (1)] If the alleged incapacitated person selects his/her own attorney, that attorney must petition the court to permit his/her representation of the alleged incapacitated person. [RCW 11.88.045 (2)]. The alleged incapacitated person has the right to present evidence at the hearing and is entitled to a jury trial on the issue of incompetence. The entire process must be completed within sixty (60) unless there is good cause to cause for a delay. [RCW 11.88.030 (6).] The primary focus is on the issue of incompetence; only after incompetence is determined is the issue of who the guardian should be addressed. While the appropriateness of the proposed guardian is an issue and the guardian must meet specific criteria to be appointed, it is frequently secondary to the determination of incompetence and the need for any third party to assist the alleged incapacitated person.

While one might argue that the rights of the child are considered throughout a third party custody case, since the best interests of the child is the focus, the child's ability to express his/her concerns in the judicial forum are very limited. RCW 26.10.170 addresses the appointment of an attorney for the child with respect to custody, support and visitation. The appointment of an attorney is discretionary with the court and in practice is rarely utilized, but the involvement of a child in a custody proceeding is normally not recommended and if done is highly criticized.

IX. Child Support and Visitation

A. Child Support

There is nothing in the guardianship statutes that specifically provides for an award of child support, against a living parent, however if the child support orders in effect at the time of death of the parents provide for the payment of ongoing support after the death of the parent, it

would follow that the guardian of the estate of the child would have a right to enforce the claim for support against the estate of the deceased parent for the benefit of the child.

The third party custody statute specifically provides for the award of child support. RCW 26.10.115(1) states that the support can be requested with an affidavit setting forth the factual basis for the support and the amount requested. RCW 26.10.045 states that the child support determination should be based on the child support schedule. If one is seeking child support from a living parent, the third party custody approach is the only legal vehicle that could be used since Marshall, supra indicates that the guardianship statutes cannot be utilized to assign any parental rights to third parties if one or both parents is still alive.

B. Visitation

Guardianship statutes anticipate the appointment normally of one (1) guardian who will manage the affairs of the incapacitated person. There is no provision in the guardianship statutes to provide for visitation by any third party as indicated in Marshall, supra. If there are a number of individuals having a legitimate reason for contact with a child and such contact is in the best interests of the child, unless the guardian agrees to this contact, there is no way to provide for this. Individuals seeking visitation can request special notice of proceedings so they know what is happening in the case, but there is no provision for actual contact or visitation in the traditional sense.[4]

If there are individuals wanting contact with a child, visitation can be provided in a third party custody case, just as it can be provided in any family law matter. This is specifically authorized by RCW 26.10.040 (1)(a). If parents died in difficult circumstances (such as a suicide-murder), the family of the murdered victim may want to restrict contact with the

[4] While courts may provide visitation if there is agreement among the parties, if it is not agreed an order providing for visitation is not authorized by guardianship statutes.

perpetrator's family. The statute requires the court to "consider, approve or make provision for" visitation, however the constitutional rights of any living parent would need to be considered in a third party custody case, but visitation for others will depend on the best interests of the child.

X. Management of Assets

Chapter 11.92 RCW focuses on the rights and duties, especially the financial duties of the guardian. Issues such as sale of real estate, mortgage of property, representation in other court actions, routine payment of debts and management of bank accounts are addressed. Management of the financial needs of an incapacitated person is one of the primary reasons for the creation of a Title 11 guardianship.

In contrast there is nothing said anywhere in RCW 26.10 about management of financial assets of a child. There are multiple references to child support in RCW 26.10.040, .045, and 050. Health insurance is mentioned in RCW 26.10.060. That is the extent to which financial issues are addressed in the third party custody statutes, so if a child has significant assets that need to be managed, it will have to be done through the guardianship statutes.

XI. Time to Reach Resolution

The guardianship statutes have specific deadlines as to the maximum time to complete the matter. The resolution of these cases within sixty (60) days is mandatory pursuant to RCW 11.88.030 (6) unless an extension of time is requested within the sixty (60) day time period and can be granted for good cause shown. If the extension is granted, a new hearing date must be set. In an alleged incapacitated person requests of jury trial or if there are other issues that cannot be resolved quickly the manner will be set on the trial calendar, but normally the trial is no more than sixty (60) or ninety (90) days later. The goal is to resolve the issues as quickly as

possible so that the status of the incapacitated person is in question for the shortest period possible.

Normally third party custody cases follow the same time pattern as any other family law matter. RCW 26.10.140 provides that custody cases have priority in being set for trial, however there is not a definite deadline for completion as is in guardianship cases and they are not provided the expedited resolution as is provided for relocation cases.[5] Since procedures are not consistent between counties the length of time it takes to resolve a case will vary based on the trial setting procedures of each county.

XII. Permanency of Orders

When a guardianship order is entered, it is entered for a limited period of time, normally from one (1) to three (3) years. The order on its face has a date of expiration, usually a four (4) months after the anniversary date of the original order. [RCW 11.88.095 (2) and RCW 11.92.040]. (After a guardianship order is entered, the guardian is provided a form called Letters of Guardianship. The Letters are a one (1) page form that has the courts seal and has an expiration date clearly indicated. If a guardian attempts to use the letters after that expiration date, they will be rejected in most circumstances.) The court maintains a role monitoring guardianship cases throughout their existence. If the report requirement is not met, the original order will terminate and the role the guardian is thereby terminated. After the reports are filed a hearing is set to review the reports. If the reports were prepared property and filed in a timely manner, a new order is entered, new Letters are prepared with a new expiration date and the guardianship will continue for another specific period of time. There are exceptions to the need for review, such as funds being held in a blocked account and not removed from the account,

[5] If a third party custody case involved a relocation, whether the accelerated schedule provided for relocation cases would apply would probably depend on whether the case was filed as a relocation case or as a new custody case.

except by court order. (RCW 11.88.100 and .105.) All guardianship orders are subject to modification and/or termination if the court deems changes are just and in the best interest of an incapacitated person. (RCW 11.88.120.) Modifications do not required the high showing of change of circumstances and detriment to the child that is required for custody and parenting orders. Change typically occur in cases where the condition of the incapacitated person either improves or worsens or for some reason the original guardian is not able to continue to act as guardian or has failed to handle the guardianship duties properly. Because reviews of guardianship are scheduled periodically, the orders are never "permanent".

When a third party custody order is entered, it is subject to the strict modification standards for all parenting modifications that require a showing of change of circumstances and a showing of detriment to the child. (RCW 26.10.190) Relocations are also governed by RCW 26.09. There are no reporting requirements. Once a child is placed in the custody of a third party, that order remains as written until modified by a subsequent court based on strict modification standards.

XIII. Attorney Fees and Litigation Costs

There are a number of provisions within the guardianship statute that guarantee rights and put the responsibility for payment of the costs on the county in certain situations. RCW 11.88.030 (4) provides that no filing fee is required if the alleged incapacitated person has assets valued at less than $3,000.00. The county is required to pay the costs for the attorney for the alleged incapacitated person if 1) the individual is unable to afford counsel, or 2) the expense of an attorney would result in substantial hardship to the alleged incapacitated person or 3) the alleged incapacitated person does not have practical access to funds to pay an attorney, however

reimbursement may be ordered if an attorney is provided at public expense due to the third variable.

The guardian ad litem fees are paid by the alleged incapacitated person unless such payment would result in substantial hardship, in which case the county is generally required to pay the guardian ad litem fees. The court has the authority to later allocate the guardian ad litem fees to the petitioner, the incapacitated person or any other person involved in the proceeding. As is true of other parenting proceedings, if it is found that the petition was filed in bad faith, the petitioner is required to pay all costs for the guardian ad litem. [RCW 11.88.050(10)]

RCW 11.92.180 provides for compensation of guardians as well as attorney fees incurred by the guardian. In most cases the attorney fees incurred by the Petitioner are paid from the estate of the alleged incompetent person, unless there is a finding that the alleged incapacitated person is not incapacitated.

The third party custody statutes provide for an award of attorney fees, other professional fees or costs in a manner very similar to dissolution actions. This is provided by RCW 26.10.080. The court is permitted to provide for payment of the fees for an attorney appointed for the child against any or all of the parities, but provides for payment of the fees for the child's attorney to be paid by the county, if the all the parties are indigent. A party is also permitted to petition the court for payment of "necessary travel and other expenses incurred by any witness whose presence at the hearing the court deems necessary to determine the best interests of the child." There is not a specific provision requiring fees of the guardian ad litem or other evaluator to be paid, except RCW 26.10.080 which addresses attorney fees and costs. Other

than in the very limited situation where the court appoints an attorney for the child and all parties are indigent, all fees and costs must be borne by the parties and are not paid by the county.[6]

XIV. Conclusion

While some cases could be resolved by either the third party custody statute or the guardianship statute a careful review of the needs and goals of the family should be considered before moving forward. In most cases third party custody is a better procedure when the welfare of a child is considered because it permits more flexibility in obtaining temporary order, allows for visitation and is more permanent. It does not require regular court reports which can be costly for the guardian to complete, even if they are done only every three (3) years. If the child is inheriting money and there is not a trust that can manage the money, the only alternative is a guardianship of the estate, but if the money is not needed, it can be placed in blocked accounts, limiting the need to provide reports to the court during the child's minority. While these may be general rules, there are always exceptions, so the needs and goals of the family must be the first priority.

[6] There are many references to fees being paid by the county. Fees paid by the county are strictly controlled. In King County the maximum fee in most cases is $3,000.00 at the rate of $45.00 per hour.

Appendix I
Typical Guardian ad Litem Report in Title 11 Guardianship

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

In The Matter of the Guardianship of , An Alleged Incapacitated Person.	**No.** **REPORT OF GUARDIAN AD LITEM** **RCW 11.88.090** **(RTGAL)**

A. SUMMARY RECOMMENDATIONS

I (do not) recommend that the Court appoint _____, as the (limited) guardian of the person and (limited) guardian of the estate of the AIP.

I (do not) recommend a bond or blocked account because the assets of the AIP are _____.

I recommend that reports be filed on a _____ basis.

I recommend that the AIP retains (does not retain) the right to vote.

B. BACKGROUND INFORMATION

1. Appointment.

1.1 Date of Appointment.

1.2 Date of Service of Copy of Petition on Guardian ad Litem**.**

1.3 Date Guardian ad Litem's Statement of Qualification Was Filed and Served.

1.4 Qualifications of Guardian ad Litem**.** I attest that I am free from influence by anyone interested in the results of these proceedings and that I have the requisite knowledge, training and expertise to perform the duties required by statute. My Statement of Qualifications is on file with the Court. I attest that I am on the Guardian ad Litem Registry for this County and am qualified to serve as Guardian ad Litem in Guardianship matters.

2. Precipitating Issues.

3. Personal Information regarding Alleged Incapacitated Person.

3.1 Date of Birth.

3.2 Age.

3.3 Current Residence.

3.4 Phone Number.

4. Medical/Psychological Report. As required by RCW 11.88.045, I have obtained a written medical/psychiatric report from ____. The report was filed with the court on _____. The examining physician/psychiatrist was selected by ____. The reason for selecting this individual to prepare the medical/psychiatric report was _____.

5. Meeting(s) With Alleged Incapacitated Person.

5.1 Circumstances of Meeting.

Date of Meetings with Alleged Incapacitated Person	Location of Meeting	Other Persons Present

5.2 Agreement or Objection to Appointment of a Guardian.

5.3 Reaction to the Proposed Guardian.

5.4 Right to Counsel.

5.5 Preferences Regarding Choice of Counsel.

5.6 Right to a Jury Trial.

5.7 Summary of Interviews with Alleged Incapacitated Person and Guardian ad Litem's Impressions.

C. INVESTIGATION

6. Written Material Reviewed: I have reviewed the Medical/Psychological Report, _____ and the pleadings and records on filed.

7. Individuals Interviewed: During the course of my investigation, I interviewed the following persons:

Name	Date of Contact	Relationship to AIP

8. AIP's Ability to Manage Health, Safety, Nutrition and Housing.

8.1 Health.

8.2 Housing.

8.3 Nutrition.

8.4 Safety.

9. AIP's Ability to Manage Finances.

10. Appropriate Guardian for the AIP.

11. Nature, Cause and Degree of Incapacity – Functional Limitations.

11.1 Medical Diagnosis and Cause.

11.2 Degree of Incapacity.

12. Evaluation of Proposed Guardian.

12.1 Dates of Contact between Guardian ad Litem and Proposed Guardian.

12.2 Identity and Contact Information Regarding Proposed Guardian.

a. Name.

b. Address.

c. Telephone Number.

d. Fax Number.

e. Email Address.

f. If Guardian is Certified, Provide Certification Number.

12.3 Relationship, if Any, between Proposed Guardian and Alleged Incapacitated Person.

12.4 Description of Steps Proposed Guardian Has or Intends to Take to Meet the Alleged Incapacitated Person's Needs.

13. Alternatives to Guardianship.

14. Degree of Assistance Required.

15. Estimate of Estate. The assets, funds, and income of the Alleged

Asset	Value
Real Property	$-0-
Stocks, Mutual Funds and Bonds	$-0-
Mortgages and Notes	$-0-
Bank Accounts	$-0-
Furniture and Household Goods	$-0-
Other Personal Property	$-0-
Total Approximate Value of	**$-0-**

Assets	

Asset	**Value**
Social Security Benefits	$
Washington State Assistance	
Other	
Total Approximate Monthly Income	$

D. RECOMMENDATIONS

16. Recommendation as to Appointment of Guardian.

17. Duration and Limitations.

18. Recommendation Regarding Alleged Incapacitated Person's Right to Vote.

19. Recommendation Regarding Right to Jury Trial.

20. Recommendation Regarding Appointment of Independent Counsel.

21. Recommendation Regarding Bond/Annual Reports.

21.1 Bond. The Court set bond in the amount of $_____;

21.2 Restricted Account Access. The Court block or restrict access to the following assets: _____

21.3 Reports. The Guardian should file reports: every year/every other year/ every third year/ an annual report for the first year and then every third year.

22. Recommendation Regarding Presence of Alleged Incapacitated Person at Hearing. The presence of the Alleged Incapacitated Person should/should not be waived. The AIP is able/unable to attend the hearing. If unable to attend, please explain the reasons: The following special arrangements should be made for the hearing:

23. Other Recommendations:

24. Recommendation as to Guardian ad Litem's Continuing Involvement in Future Proceedings. I recommend that the Guardian ad Litem be/not be involved in future proceedings in this matter.

25. Individuals Who Should Be Advised of Their Right to Request Special Notice of Proceedings Pursuant to RCW 11.92.150.

Name and Title	Address	Relationship to Alleged Incapacitated Person

26. Guardian ad Litem Compensation.

UNDER PENALTY OF PERJURY UDNER THE LAWS OF THE STATE OF WASHINGTON, I DECLARE THE FOREGOING IS TRUE AND CORRECT.

Signed at Issaquah, Washington on _____.

_____
Mary L. Hammerly, WSB #8911
Guardian ad Litem

Appendix II
Typical Report of Guardian ad Litem in Third Party Custody Case

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

In Re the Custody of: Petitioner, Respondent	**No.** **REPORT OF GUARDIAN AD LITEM**

I. INVESTIGATION

A. Persons Interviewed Regarding the Situation.

Name of Person	Date of Contact	Relationship to Parties

B. Written Material Reviewed:

C. Background.

D. Current Situation.

E. Summary of Contacts

1. (Name of Petitioner)

2. (Name of Respondent)

3. Name of each collateral and relationship to parties and/or children

F. Home Visits

II. ANALYSIS/CONCLUSIONS

A. Analysis of Statutory Criteria. Authority to appoint a Guardian ad Litem is set forth in RCW 26.10.130. The statutory basis for determination of a third party custody is the best interest of the child, however before the child's best interests are considered, there has to be a determination of whether either parent is capable of providing for the child. [RCW 26.10.030 (1)]

1. Suitability of Parents

a. Mother.

b. Father

2. Petitioner's Ability to Satisfy the Bests Interests of the Child

Option 1. The Petitioner's ability to satisfy the best interests of the child is not relevant because mother/father is a suitable custodian.

Option 2. RCW 26.10.045 provides that custody is based on the best interests of the child. The best interest of the child is more completely defined in RCW **26.09.187** (3).

a. The relative strength, nature, and stability of the child's relationship with the petitioner.

b. The agreements of the parties, provided they were entered into knowingly and voluntarily.

c. The petitioner's past and potential for future performance of parenting functions as defined in "RCW 26.09.004(3), including whether the petitioner has taken greater responsibility for performing parenting functions relating to the daily needs of the child.

d. The emotional needs and developmental level of the child.

e. 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.

f. 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.

g. The petitioner's employment schedule.

h. Limitations of petitioner or parents if the parents wish to visit with the child.

(If multiple parties are requesting custody and/or visitation, repeat section for each parent.)

B. Discussion

III. RECOMMENDATIONS

UNDER PENALTY OF PERJURY UDNER THE LAWS OF THE STATE OF WASHINGTON, I DECLARE THE FOREGOING IS TRUE AND CORRECT.

Signed at Issaquah, Washington on _____.

_____
Mary L. Hammerly, WSB #8911
Guardian ad Litem

Appendix III

Altering a Guardianship Report to Accommodate Third Party Custody

12. **Evaluation of Proposed Guardian.** This case is very difficult because it is using the guardianship statute, to make what is for all practical purposes a parenting decision. _____ is residing with _____ in _____, Washington, however his _____ who live in _____have requested that they be appointed guardians for him. In addition to evaluating the proposed guardians based on the guardianship statutes, I have also considered the factors that the court is required to consider in making a third party custody decision because this statute considers factors that could be helpful in determining with whom _____ should live:

12.1 Petitioners (Mother's Family)

12.1.1 Dates of Contact between Guardian ad Litem and Proposed Guardian.

12.1.2 Identity and Contact Information Regarding Proposed Guardian.

a. Name. _____
b. Address. _____
c. Telephone Number. _____
d. Fax Number. _____
e. Email Address. _____
f. If Guardian is Certified, Provide Certification Number. Not applicable.

12.1.3 Relationship, if Any, between Proposed Guardian and Alleged Incapacitated Person. _____

12.1.4 Description of Steps Proposed Guardian Has or Intends to Take to Meet the Alleged Incapacitated Person's Needs. _____

12.2 Counter-Petitioners - Father's Family.

12.2.1 Dates of Contact between Guardian ad Litem and Proposed Guardian. _____

12.2.2 Identity and Contact Information Regarding Proposed Guardian.

a. Name. _____
b. Address. _____
c. Telephone Number. _____
d. Fax Number. _____
e. Email Address. _____
f. If Guardian is Certified, Provide Certification Number.

12.2.3 Relationship, if Any, between Proposed Guardian and Alleged Incapacitated Person. _____

12.1.4 Description of Steps Proposed Guardian Has or Intends to Take to Meet the Alleged Incapacitated Person's Needs. _____.

12.3 Third Party Custody Analysis. As indicated above, this is not a third party custody case, but the analysis based on third party custody statutes looks more closely at the needs of a child in a situation of this type than the guardianship statutes and could be helpful in determining who is best able to meet _____'s needs. RCW 26.10.100 states that third party custody should be determined based on the best interests of a child. "Best interests" are not defined in RCW 26.10.100, but the factors the court is required to consider in developing a residential schedule in a parenting plan are the following:

a. The relative strength, nature, and stability of the child's relationship with each proposed guardian. _____

b. The agreements of the parties, provided they were entered into knowingly and voluntarily. _____

c. Each proposed guardian'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. _____

d. The emotional needs and developmental level of the child. _____

e. 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. _____

f. The wishes of the parents, the wishes the proposed guardians and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule. _____

g. Each proposed guardian's employment schedule. _____

13. Alternatives to Guardianship. Third party custody is an alternative to guardianship. It is possible to provide for visitation in a third party custody case. There are no living parents who have a superior constitutional right, therefore any constitutional limitations on visitation for third parties having are not present. _____ should be given a chance to have contact with the families of both of his parents and this cannot technically be addressed in a guardianship. Third party custody does not require regular reports to the court and depending on how one looked at this requirement, this could be an advantage or a disadvantage.

	Issue	Guardianship	Third Party Custody
I.	Unique Purposes of Guardianship and Third Party Custody Statutes	To provide for assistance to an incompetent person with the least degree of restrictions possible.	To provide for the care and custody of a child, as well as address other needs of a child such as visitation and child support.
II.	Jurisdiction/Venue	RCW 11.88.010(3) provides that guardianship actions can be brought in the county where the incapacitated person is domiciled or where a parent is domiciled. In Matter of Guardianship of Marshall, the court made it clear that guardianship cannot be used to extinguish a parents rights to custody.	In third party custody cases, the UCCJEA applies which has specific rules for custody cases if there is a conflict between states for jurisdiction. If UCCJEA does not apply, then RCW 26.10.210 states venue is proper where the last custody order was entered, where the child resides, where a parent resides or where a parent or person having physical custody resides.
III.	Emergency Relief	RCW 11.88.090 (8) and (9) authorize the GAL to have very limited emergency authority, but nothing equivalent to temporary custody. RCW 11.88.045 (5) permits temporary relief under RCW 7.40 (injunction) to protect the alleged incapacitated person from abuse, neglect, abandonment, or exploitation.	Temporary Restraining Orders and even emergency "custody" orders can be obtained pursuant RCW 26.10.100 and 26.10.115
IV.	Legal Standards	In a guardianship matter, the court must first determine that the alleged incapacitated person is unable to handle his/her personal or financial affairs and when that determination is made, then decide to what degree this person needs assistance of a guardian or third party. RCW 11.88 095	In a 3rd party custody case, the court must determine that a parent is not available or capable of caring for a child in order to grant custody to a third party. RCW 26.10.032
V.	Qualifications of Guardian or Third Party Custodian	RCW 11.88.020 (1) provides specific qualifications for a guardian. Among the roadblocks to appointment is conviction for any felony or misdemeanor involving moral turpitude.	There is nothing specific in RCW 26.10 that imposes any qualifications on a custodian. This issue is discretionary with the court and subject to typical "191" limitations.

VI.	Role of Guardian or Custodian	Duties of the guardian of the person are stated in RCW 11.92.043, but RCW 11.92 also includes a number of requirements concerning finances, reports, etc.	Specifically stated in RCW 26.10.170 and anticipates that the custodian will be providing the care.
VII.	Investigation by GAL or Other Impartial Third Party	A GAL is always required in a guardianship, however the nature of the investigation they perform is geared more to the needs of the incompetent individual than to the custody standards. [RCW 11.88.080 (3)]	RCW 26.10.135 requires that CPS and criminal records be obtained for every third party petitioner and any adult residing in his/her household. RCW 26.10.130 provides for investigation if requested.
VIII.	Rights of Child	RCW 11.88.045 guarantees the alleged incapacitated person a number of rights, including an absolute right to an attorney, to testify at trial and to have a jury on the issue of incompetence as well as other rights.	RCW 26.10.070 provides the court with the discretion to appoint an attorney to represent the child.
IX.	Child Support and Visitation	RCW 11.88.095 addresses disposition of guardianship petitions, but it says nothing about providing for visitation or child support for a child. RCW 11.92.043(4) is the only reference to specific duties in a minor guardianship and it references primarily traditional guardianship duties such as maintaining the needs of the child, but nothing specific about visitation. The Marshall case referenced above set aside a visitation provision because it was not authorized by statute.	RCW 26.10.140 gives the court specific authority to award child support. RCW 26.10.040 specifically requires the court to consider any visitation that may be in the child's best interests. Also see RCW 26.10.170 which sets forth general duties of custodian.
X.	Management of Assets	Management of assets by a guardian is specifically authorized by various portions of RCW 11.92.	The rights of the custodian are set forth in RCW 26.10.170 and there is no right to manage a child's assets.

XI.	Time to Reach Resolution	A normal guardianship case will reach a hearing in 60 days [RCW 11.88.030 (6)] and even if set for trial will be resolved very quickly.	Normally in King County, a 3rd party custody case is placed on an 11 month track in King County. In compelling circumstances a motion can be made to speed up the trial date and custody cases must be given priority in setting. (RCW 26.10.140.)
XII.	Permanency of Order	RCW 11.88.120 provides for modification or termination of a guardianship if the court deems changes just and in the best interest of an incapacitated person.) Unlike a custody decree the order appointing a guardian is done for a limited period not exceeding three (3) years and prior to the expiration of the order reports must be filed with the court. [RCW 11.92.040 (3)] If the report requirement is not met, the order appointing a guardian terminates and is not renewed. "RCW 11.88.095 (2)(c) requires the court to set the period for future reports. RCW 11.92.040 (3) states that the maximum period between reports is every three years. Bond is required in all cases unless the assets of the incapacitated person are worth less than $3,000.00 or if all funds are placed in blocked accounts. (RCW 11.88.100 and .105) "	Once an order of custody is entered, it is subject to standard custody modification provisions, I.e. must show change in circumstances. RCW 26.10.090. "Once a 3rd party custody order is entered, the court normally has no further involvement unless a request is made to the court. There is no provision in the 3rd party custody statute for bond. "
XIII	Attorney Fees	RCW 11.88.090 (10) permits the court to assign the fee for the GAL to the petitioner, the incapacitated person, or any person who has appeared in the action. Fees are frequently paid from the estate of the Incapacitated Person. Attorney fees and GAL fees may be paid by the state in certain circumstances	RCW 26.10.080 specifically authorizes the court to require a party to pay attorney fees or other litigation costs.

CHAPTER THREE

EVOLUTION OF SUCCESSFUL PARENTING PLAN NEGOTIATIONS

December 2015

Commissioner Stephen M. Gaddis
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STEPHEN M. GADDIS served King County Superior Court for over 25 years as commissioner and superior court judge prior to his retirement in 2005; thereafter, served as a pro tem in Pierce County Superior Court for two years. A 1970 graduate of the University of Washington School of Law, he has published numerous articles on Family Law and taught Family Law at the Washington State Judicial College, the Annual Spring Judicial Conferences and at numerous bar and bench trainings. He is now a private Mediator and Arbitrator, working throughout the Puget Sound area. He has taught mediation practices and techniques since establishing the Northwest Mediation Service in 1977; co-instructing "Mediation and Advanced Family Law" at Seattle University, School of Law five years; been trained and is a trainer of mediation practices in Collaborative Law and Cooperative Law cases.

While on the Superior Court bench, he chaired the court's Family Law Committee, the Washington State Child Support Schedule Commission, and co-founded the Juvenile Court Guardian ad Litem and Family Law CASA Programs. He served on the State Model GAL Training Program, was member of the Parenting Act drafting committee, and vice-chaired the Domestic Violence Task Force, which authored the Domestic Violence Prevention Act. Comm. Gaddis was a drafter of the King County Guardian ad Litem Registry Administrative Policy, Local Guardian ad Litem Rules, and edited numerous forms and instructions for use by the Family Law facilitators. He has chaired the King County Family Law Section; the State Bar Family Law Section Executive Committee; and was vice-chair of the State Supreme Court's Certified Professional Guardian Board. He was named Family Law Judge of the Year by the WSBA-FLS, profiled in the October, 2008, issue of the King County Bar Bulletin (picture above), the July, 2010, issue of the Washington Mediation Association, & has been named to the Who's Who List of World Class Business Leaders. Stephen Gaddis Mediation & Arbitration

Family Law Changes, Friday, December 4, 2015

Presented by the WSBA in Partnership with the Family Law Section

"Parenting Orders: Yesterday, Today & Tomorrow"

Presented By Stephen M. Gaddis

I. A Short History of Parenting Orders

II. What Is a Parenting Plan and What Should It Include?

III. How Might One Best Successfully Negotiate a Parenting Plan Order?

IV. Models and Ideals for the Parenting Plans of Tomorrow

V. Supplementary Materials

a. "Parenting Plan vs. Parenting Issues"
b. "Negotiating a Successful Parenting Plan"
c. "Healthy Communications Practices"
d. "Selecting A Family Law Mediator"
e. "Child-Centered Mediation"
f. "High Conflict Cases"
g. Brief Introduction to the Author

Stephen M. Gaddis
Commissioner, Retired

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Mediation of a Parenting Plan vs. Mediating Parenting Issues

There is a significant difference in the need, manner and procedure for the drafting or mediation of a Parenting Plan Order from the manner of handling the many parenting issues which may arise in the course of a Parenting Plan's application to the life of the children and their parents.

I. Development of a Parenting Plan Order

A ***Parenting Plan*** is a binding court order, enforceable by a finding of Contempt of Court, which order describes the legal relationship and responsibilities of parents for their children; and regulates their responsibilities and access/authority in dealing with third parties in matters pertaining to their children, such as healthcare, education, religion, travel and activities. It is comprised of four major components: (1) a residential schedule, (2) the allocation of decision-making responsibility for major decisions, (3) procedures for dispute resolution between the parents and (4) provisions to customize the Parenting Plan to the specific needs of the children and the history of the family. It is ***not*** intended to be a manual for "How to Raise Our Children," a social plan for the children, or to dictate how the other parent should handle their responsibilities with the children. It should contain of a minimum of aspirational ("feel good") language, as these provisions can be ambiguous in application, can encourage false reliance and are seldom found to be or able to be enforceable by the courts.

The ***Mediation*** process is particularly effective in assisting the parents in negotiating and agreeing upon a Parenting Plan Order. The knowledge, skill, education and experience of the mediator will help the parents develop a Plan which best suits the needs of the children and the values of the family. They can avoid the pitfalls that others have not seen and which have intentionally or unintentionally stymied attempts to successfully co-parent their children -- thus preventing the children from developing confidant and healthy self-esteem and in achieving their developmental steps. It is a mixed legal and social process calling for the highest level of experience and expertise, most often by one with extensive judicial or family law experience.

Benefit of Legal Expertise and/or Legal Assistance. The development of a Parenting Plan Order calls for legal experience and foresight in the application of the law. Since the outcome of the process is an enforceable court order with which both parents will be expected to fully comply, it is helpful for the parents to have the assistance of legal counsel and beneficial to have an experienced former Family Court judge preside over the process. These persons can share their experience from many other cases as to what has worked, what is to be avoided and what has proven to be disastrous!

Specific Process Used. The Mediator has a wide array of methods, styles and options to assist the parents in developing a meaningful, thoughtful and successful Parenting Plan. The mediator may further define, amplify or adapt various tools and techniques to complete each of the necessary elements of a Parenting Plan in a manner that will achieve the greatest likelihood of success.

II. Parenting Issues

Resolving ***Parenting Issues,*** unlike the development of a Parenting Plan Order, is the process for handling those numerous questions, problems and issues which arise in the course raising one's children. They may relate to enrollment in private or public schools, the use of a tutor or an enrichment program; orthodontia and non-emergency healthcare; participation in certain religious activities, daycare, camps, sports or extra-curricular activities; out-of-state travel; environmental and safety conditions; and the plethora of lesser issues that may arise spontaneously requiring parental approval or participation, or which may lead to a conflict with the stated residential schedule or decision-making provisions of the Parenting Plan Order.

Mediation of Parenting Issues calls for a different experience and skill set than that for the drafting of a court order. The mediator must be knowledgeable in the developmental needs of children at each age and have the specific ability to apply that knowledge to the children and circumstances presented. The mediator must be specifically experienced in the dynamics of children of separated families, as the symptoms and manifestations of such children are quite unlike those in other circumstances. An array of persons with differing credentials and titles may be effective in this regard: child specialists, parenting coaches, communication coaches and retired/laid-off Family Court Social Workers are especially well-qualified. Attorneys, *guardians ad litem*, and judges are by their ***legal*** training not particularly qualified to serve, unless they have had courses in child development, worked extensively in Juvenile or Family Court, or been successful parents or foster parents themselves.

Benefit of Legal Expertise and/or Legal Assistance. The resolution of Parenting Issues usually does not call for legal analysis or application of the law, nor is the outcome of the process a court order. Thus it is not necessary to have the assistance of legal counsel or to have a legal-trained person preside over the process. However, either may be helpful if the matter has escalated; earlier attempts at resolution have been unsuccessful; or if the underlying issues require Enforcement or a Modification.

Specific Process Used. The specific process used in determining the outcome of Parenting Issues is generally defined by the terms of the Parenting Plan Order. The mediator may further define, amplify, or adapt various tools and techniques to achieve a successful outcome specific to the issue presented.

III. Experience of Stephen Gaddis

Stephen Gaddis was the author of the first Parenting Plan form used by the court (1982); served on the Washington State Parenting Act drafting committee (1988); and was chair of the Washington Child Support Schedule Commission. He attended classes in early childhood development and was a parent and foster parent. He was a member of the King County Court's Family Law Department and was appointed as the state's first Unified Family Court Commissioner. He co-founded the superior court's Volunteer Guardian ad Litem Program (the first of over 1500 CASA programs established throughout the US). Gaddis was professor of Mediation and Advanced Family Law at Seattle University School of Law and a faculty member at the Washington State Judicial College, for which he was also on the Board of Trustees. He was the featured mediator of the Washington Mediation Service (July, 2010); and was selected as featured professional of the King County Bar Association (October, 2008). He presided at the King County Juvenile Court during terms from 1983 to 2002, while also serving on the Unified Family Court bench.

Stephen M. Gaddis
A Professional Mediator and Arbitrator

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Negotiating a Healthy, Successful & Durable Parenting Plan Order

Introduction: Developing a Parenting Plan can be one of the most challenging subjects of negotiation for a professional, whether attorney, mediator, judge or therapist/mental health professional. This is so because (1) the negotiation is between the actual stakeholders who stand to personally gain or lose, rather than surrogates representing corporations or insurance companies; (2) there are two real persons with few subjects as personal or dear to them as their relationship with their children; (3) even if represented, the parties are most likely to be positional or have a personal agenda based upon their own desires and the history of the relationship; and (4) because the opposing party is a present or former intimate partner who may have caused them or are causing them hurt or injury. There are several practice methods that will vastly increase the likelihood of achieving a healthy, successful and durable Parenting Plan Order; and several practices that are detrimental to the process and are to be avoided if at all possible.

Practices that Facilitate and Enhance the Likelihood of a Successful Parenting Plan Negotiation:

1. ***Select the Best Resource.*** Ensure that the person selected to lead the negotiation is experienced and knowledgeable in child development, outcomes from various parenting practices, the unique conduct and behaviors of *'children of separation'* and the most common parental concerns voiced and the range of solutions for each one identified. Good intentions alone do not insure good outcomes!

2. ***Acquaint the Parents with the Issues.*** Consider sending this monograph out to the parties and others who will be present, in advance of the meeting. This will provide answers to a number of the questions that will invariably arise around the process.

3. ***Court-Ordered Parenting Seminar.*** Encourage the parents to attend the court-required Parenting Seminar in advance of the meeting, if they have not already done so.

4. ***Beginning the Session.*** At the outset of the meeting, introduce the parties and others present to the procedural steps envisioned to be followed at throughout the meeting. Reassure the parents that communication will be directed to counsel and the mediator, not the other; that all statements will be respectful and positive in identifying or evaluating various alternatives; that anyone who is disrespectful, attacks or makes threats will be excused from the room and the process, in the extreme case, may be terminated.

5. ***Focus on the Children.*** Follow the practices identified for a Child-Centered mediation -- see other monographs describing this and the practices that enhance the final product by focusing on the children's needs apart from those of the parents. These are calculated to keep the children off the battlefield of the parents' emotional as well as legal divorce.

6. ***Consensus-Building.*** Start by building consensus by educating and discussing the provisions for Decision-Making, Dispute Resolution, and the customized provisions recommended for this family and these children.

7. ***No Legalese.*** Good Parenting Plans humanize the persons involved and are customized for the specific family's needs. They do not contain pages of aspirational paragraphs that attempt to provide a manual on parenting or deal with the failings of other non-similar cases. They have no Latin in them, and they refer to parents rather than parties, and use the terms 'mother' and 'father' rather than Petitioner and Respondent.

8. ***Brevity.*** Good Parenting Plans should be comparatively brief, 8-9 pages at most unless there are special issues.

9. ***Duration of Residential Time.*** Transfers should be minimized, favoring larger blocks of time to reduce separation and re-entry issues.

10. ***Responsibility for Transfers.*** Unless there are other contravening factors, ordinarily the care-providing parent provides the transfers to the home of the other, with pick-ups and returns to school or daycare work whenever possible. This system also reduces separation issues and supports the shared parenting residential schedule. Most importantly, it minimizes the need for communication, contact and possible miscommunication between the parents.

11. ***Healthy Communication.*** Communication on a good day can be misunderstood or misdirected. When made in the context of a separation with the overlay of competing interests of the parents and the non-knowledge of the context from which the other parent is coming, the odds of it being misunderstood or even hurtful are magnified. Consider following the recommendations contained in the monograph, 'Healthy Communication Practices for Separating Parents." If there is history of conflict or misunderstanding, the parents should consider using *Our Family Wizard* as means of emailing each other, tracking children's expenses and maintaining a common calendar for the children's activities/residential schedule.

Practices that Counter the Likelihood of a Successful Parenting Plan Negotiation:

1. ***Meeting Together vs. Using Separate (Caucus) Rooms Throughout***. Some parents initially feel that they would be most comfortable if they do not see, confront, or be confronted by the other parent at the time of the Parenting Plan negotiation. Trust between the parents may be at a low point. Similarly, there is less stress on the attorney, who, remaining in a separate room can avoid the hard work of negotiation (listening, evaluating and merging outcomes on points favoring the children or the other party, rather than simply re-broadcasting the wishes of the client (the 'Echo Chamber' concept), based solely on input of only one side (the client) without gaining information, understanding or context available from the other side. Wishing to remain cocooned is understandable, but unless there are special issues it is not supportable when considering the many times and circumstances when the parents WILL need to work together directly, without having the benefit two attorneys and a neutral mediator present.

    a. The use of separate rooms alone (as opposed to using separate rooms as a retreat or 'home base' to privately evaluate and negotiate alternative outcomes) can easily magnify the differences between the parents, rather than encouraging them to hear, understand and respond to the views of the other -- then working to find a middle ground in a way that best serves the children and the parents under new post-separation arrangements.

b. In the absence of information from the other side, each parent's own position can appear to be the ONLY solution or seem to be the righteousness one, rather than encouraging transparency, open negotiation and reasonable accommodation.

c. Using separate rooms throughout keeps the focus on the parent alone, rather than shifting the paradigm to "what's best for the children" or "what is best for the entire family," or to "what is best for the long term."

d. A mediator or third person – even one exceptionally skilled – cannot be an accurate conduit or messenger of a parent's thoughts or intentions, for those are often masked by the party's words, non-verbal communication, or reluctance to be transparent.

2. The Plan Is One of a Series of On-going Post-Separation Conflicts, which May/May Not Have Been Presented to Court (such as, Temporary Orders, Modification or Contempt). Once a matter has gone to court, there is a winner and a loser. Perhaps, if there are many issues, each side wins on one issue or another. But the die is cast, and the 'winner' has little incentive to back down from their victory, making subsequent negotiations more difficult.

3. ***One of the Parties Refuses to Participate in Good Faith Negotiations or Financially.*** A one-sided negotiation or mediation can be un-level. It leaves the non-paying party with the ability to stretch out time and costs to the other party, without a good faith commitment that they, too, are committed to achieving a settlement. They may simply walk from the negotiations, without cost or responsibility. With no money paid, there is 'no skin in the game' and the neutral's services are not fully appreciated, valued or utilized. Without the press of time and cost, far more time may be spent on the family's history, telling stories and blaming, rather than identifying and exploring constructive, alternative outcomes.

4. A Person Seeks to Set a Limitation on the Negotiation: Procedurally, Spatially, or Substantively with Non-Negotiable Issues or Requirements/Restrictions on the Professional's Ability to Help Merging the Family Interests to 'Evolve' into a Settlement.

a. Refers to setting actual limits in advance, rather than a clear expression of goals and intentions.
b. This shows a distrust of the neutral's ability to manage the process or the progress.
c. Few *parties* have had sufficient prior experience to set accurate parameters on the time or process in advance – and the same for attorneys and mediators, as every case is different.

5. One or More of the Parents or Others Has or Has Had a Bullying or Controlling Role.

a. This is counter to good faith negotiating. It demonstrates close-mindedness, not the open-mindedness required for a fresh, communicated and merged review of interests and needs.
b. It overlooks considerations of the other parent, the children, and what may be best in the long term individually or for all family members.
c. It encourages a false sense of "we know what is best," that limits the range of options.

6. One or More of the Parties is Self-Represented.

a. This deprives the party of the sounding board of reasonableness that counsel can offer, having had experience in many hundreds, if not thousands of other family cases.
b. In Washington this can be obviated by the use of 'unbundled legal services' or an advocate. An attorney can appear for a limited purpose or limited time, without committing either the party or the attorney to long-term representation of the client.

Stephen M. Gaddis
Commissioner, Retired

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Healthy Communication Practices for Separating & Separated Parents

It is strongly recommended that parents review and observe the following practices for facilitating healthy, respectful, effective communication during their separation/divorce process and thereafter:

1. ***Primary Means of Communication.*** The primary means of communication between the parents on parenting issues should be via e-mail, US mail or through their attorneys. Unless the parents have had a mutually successful history of texting and telephone communication, these means are discouraged except for emergency or urgent matters, as they do not afford the recipient the same opportunity to understand and explore the issues, develop and evaluate alternative solutions or give fair consideration to the requests being made or the primary needs of the child. Children's issues should NOT, under any circumstances, be discussed in the presence of the child.

2. ***Respond to Requests.*** E-mails should be responded to within 48 hours, unless there is a *bona fide* emergency in which case information should be relayed sooner via text or telephone and not e-mail. In responding to an e-mail request, either parent may suggest that the request be deferred for discussion until the next parenting or mediation session, or that the parents utilize the Dispute Resolution clause of the Parenting Plan, if any, as may then be in effect.

3. ***Always Be Respectful.*** The parents should always use a respectful tone in their communication with the other in whatever means they utilize. They should limit the content of their communications to actual, ***present*** issues pertaining to the child only; and all communications relating to the child should occur be outside the presence of the child, the child's siblings, friends or neighbors.

4. ***Share Current Contact Information.*** The parents should exchange and immediately update their contact information for each other (residence address, home and cell phone numbers, and a personal email address, which is checked at least daily).

5. ***Parents Need to Be Careful Base Their Actions and Responses on Facts, Not Assumptions or Rumors.*** Neither parent should assume or act upon assumptions drawn from incomplete communications, rumors or even (especially!) statements of the children. Rather, a parent should seek further information, clarification and confirmation; and then direct their concerns to the appropriate person or forum. Inappropriate or inaccurate communications of the other parent should be documented and retained.

6. ***Recognize the Integrity and Autonomy of the Others.*** Parents should always, (particularly during negotiating or mediation sessions), recognize that each person present may have a different

agenda, perspective, and concerns to be addressed. Neither is likely to see the same events in just the same way. Meetings together should include time for each person to fully address each of their own concerns. Others involved should cooperate in responding to the agenda concerns of all persons, to ensure that all of these are heard, understood, acknowledged and dealt with.

7. ***Suggestions for Communication & Conduct When Specifically Resolving Issues or Conflicts.***

   a. Address the problem and concerns at hand; do not attack each other or dredge up history.

   b. Avoid being positional. Instead, work to identify and communicate one's needs, interests and the outcomes they would like to attain (giving a sound basis for each).

   c. Focus on and work to achieve what is believed to be the most constructive and acceptable agreement for both sides, and most of all for the entire family: ***especially the children.***

   d. In speaking, be courteous and respectful of and to all persons present.

   e. Address others by their names, avoiding "he" or "she." Speak for yourself only by using positive "I" statements, not accusatory "you" statements.

   f. Do not interrupt when another person is speaking -- know and trust that each person will have a full opportunity to speak on each issue presented for discussion.

   g. Do not use language that blames or finds fault -- avoid inflammatory words and the use of conclusory terms such as "fair" and "unfair." Instead, use words such as "acceptable," "workable," "agreeable," or their converses, "unacceptable, unworkable, not agreeable." These are preferred because they acknowledge that reasonable people may differ in view.

   h. Practice active listening. Listen fully while the other person speaks and avoid planning a reply until the speaker has finished. Try to understand what the other is saying without being judgmental about the person or the message. Ask for more information on any points that aren't completely clear to you. Check out how accurately you understand what the speaker has said by restating your understanding in different words. Remember, you can say, "I understand" without meaning "I agree."

   i. If you have a complaint, raise it as your concern and follow it up with a constructive suggestion as to how it might be resolved.

   j. If something is not working with you, be open and state this to those present.

   k. Talk with your lawyer or another resource about anything you don't understand. Seek as much clarification as you need, to avoid being surprised or having misunderstandings later.

Most of All, Be patient with others and the process –the above practices have proven to work in thousands of other cases. By following them, each person will maintain a high standard for communication and thereby increase the quality and effect of it, and its understanding and acceptance by all others! Hearing > knowledge > understanding > acceptance > resolution > peace.

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Selecting a Family Law Mediator

Much has been written about the benefits of the mediation process as being the most desirable of the alternative dispute resolution methods. However, little has been written about the criteria for the selection of a particular person to serve as mediator in a case, or the information offered as to how mediators may differ in function (and result) according to their primary occupation, professional background, education, training, skill and experience – both in life and professionally.

There have been many misunderstandings voiced when counsel and parties have selected a mediator. Some select a mediator based on hourly rate or the amount of deposit required, without regard to the bottom line ***total*** cost the mediator may charge. An ineffective, bargain-rate mediator may take more time, or even not bring the parties to settlement. Others compare apples and oranges by disregarding the differences in the mediator's experience, practice and approach, for example by thinking that '*attorneys who mediate'* will follow the same path or get to the same result as a *'professional mediator.'* Some may select a mediator based upon friendship or affiliation, rather than a documented track record of that person in the type of proceeding for whom the mediator is sought. If two messages can be conveyed by this article, they are that not all who attend a course on mediation are by that alone, qualified or experienced to serve as a (your) mediator; and that a highly qualified mediator in one type of legal proceeding may not be well-suited to work in another. Mediators are not, and should not be, seen as a 'one-size-fits-all' class -- for if they were, their results would differ little from the generalist, 'one-judge-can-decide-anything' approach of our court system. Parties deserve outcomes based upon the particulars of their own case, not necessarily what the lobbyists got through the legislature or what the court may have decided in a similar, but not identical, case many years ago!

Generalizations in this article are intended to serve as a general guides in the selection process that parties and attorneys may use in finding the best mediator for a particular matter. In the search for the best mediation experience, the consumer needs to evaluate the qualifications of the mediator, as well as the method or type of mediation practiced. The appended chart summarizes the most common characteristics of each by the primary occupation of mediator retained.

Mediator selection is definitely not a Yellow Pages exercise; a mediator should not be selected based upon an advertisement in a general or legal publication, no matter how attractive the ad. Even a suggestion given by an attorney, who has merely heard the mediator's name or used the mediator in another, unrelated type of proceeding, may not be helpful. Each case must be evaluated on its own.

What a party and attorney ***CAN*** do in order to select the most appropriate and suitable mediator is to: (1) become knowledgeable when considering the recommendation of others, to inquire into the nature of the issues of the matter, the settlement arrived at, the satisfaction level of the parties, and the finality of the settlement; (2) check out the web site of the mediator to gain insight into their methods, values, knowledge, and experience; (3) email or call the candidate to generally discuss the methods and techniques used and the person's ability and willingness to handle the matter, and (4) be or become familiar enough with the person to be able to evaluate their understanding of the type of root problems that have evolved into a legal proceeding -- and their willingness to work on those issues as a part of

the process. The latter is significant, because in our society and culture, our financial, emotional, matrimonial and parenting problems all are treated alike by the legal process, using the law as the translator-matrix and value system for determining legal solutions to the issues in conflict. Yet the legal outcome attained in any cause may bear little relation to or may not resolve or even acknowledge the underlying root problem that brought the matter into the legal system, thus jeopardizing the value and finality of any outcome attained either by the court or by privately anticipating the court's actions.

Here is a chart that differentiates mediator-candidate types by their primary characteristics:

Characteristic Compared	**Many, Not All, Counselors and Therapists**	**Many, Not All, Former or Retired Judges**	**Many, Not All, Attorneys in Private Practice**	**Professional ADR Specialists & Mediators**
Primary Occupation	Family Ct Worker, Licensed Therapist, Counselor, LMHC, Nurse, Psychologist	***Primarily*** Settlement Conf.; ***Some*** Mediation, Med-Arb, Arbit'n	Practice of Law	***Only*** ADR: Mediation, Med-Arbitration, Arbitration
Primary Mediation Modes	Conciliation, Negotiation	Negotiation, Evaluative Med, Directive Med	Guided Negotiations, Facilitative Med, Evaluative Med.	Guided Negotiations, Facilitative Med, Evaluative Med, Transformative Med
Education	Social Work, Psychology, Mental Health, Religious	Assorted, Law School, Judicial College	Assorted, Law School	Assorted, Usually Legal and Advanced ADR
Training and Experience	Counseling, Family Dynamics, Mental Health Perhaps Mediation	Legal Training, Judicial Experience	Legal Training, Practice of Law, Mediation, ADR	Usually Legal Training, Advanced Mediation and ADR
License or Certifications	Family Counselor Mental Health	Member of Bar	Member of Bar	Member of Profess. ADR Societies
Related Experience	Family, Emotional, Religious Studies	Judicial Experience	Legal Experience	Teaching; Behavioral Studies
Criteria Applied	Family Values, Social Mores Religious Dogma	Statutory Law, Appellate Court Rulings	Statutory Law, Appellate Court Rulings	Family Values, with Interest-Based, in Legal Boundaries
Cost of Mediator	Free or Nominal if Provided by a Non-Profit; Hourly Rate for Professional Practice; Paid on Day of Service	'Big Box' Firms = $500-$650 per Hour, Billed by ½ day; Deposits May Be Forfeited; Full Deposits Required in Advance	$150-$300 per Hour; Fees Split Between Parties; May Be Billed for Time Used Only; Low or No Deposits	$300-$400 per hour for on-site; $500-$600 at Mediator's Office; Fees Split; Some Bill Only for Time Used
Method and Formality – Family Cases	Usually Parties Meet Together Through-out	Parties in Separate Caucus Rooms and May Not See Each Other	Usually Parties Are in Separate Caucus Rooms	Hybrid Style Used: Sides Both Together If Helpful And in Separate Rooms
Method and Formality –	Not Applicable	Parties in Separate Caucus Rooms	Separate Caucus Rooms Used	Sep. Caucus Rooms Used Unless Parties

Corporate & Insurance		and May Not See Each Other		Will Have Ongoing Relationships
Conflicts Best Used for	Family Issues, Religious Issues	Legal Issues	Legal Issues	Underlying Issues as Well as the Legal Issues Bringing Matter to Court
Settlement Outcomes	Reconciliation; Acceptance or Resolution of Family Issues; Reinstatement in Church or Position	What the Court Would Likely Order; Based on Law Rather than Interests of Either Side	Legal Finality; *Not Necessarily the* Emotional, Financial, Matrimonial or Parental Issues	Resolution of the Underlying Issues AND the Legal Issues Needed for Finality of Settlement
Tangible Record of Settlement Terms	Handshake; May Have Informal Written Notes or Agreement	Civil Rule 2A Stipulation; May Have Signed Final Court Documents	Civil Rule 2A Stipulation; May Have Final Docs Required by Crt	Civil Rule 2A Stipulation; May Have Final Docs Required by Court
Durability & Finality of Agreements	Morally Valued, Not Usually Legally Enforceable	Legally Enforceable	Legally Enforceable	Legally Enforceable, Long-term Duration as Under-lying Issues Are Resolved
Complements Collaborative Law (CL) or Cooperative Law?	Not at all, as Does Not Require Legal Representation	Not at all; Settlement Conferences are Steps in the Litigation Process	Complementary, if Trained in CL, & with a Signed Participation Agreement	Complementary; Collaborative Law Techniques May Be Applied in All Types of Actions
Feelings at Conclusion of Process	Reality, Sadness, Understanding, Acceptance, Hope Relief	Sense of Loss, Sometime Bullied, Sometimes Was Vindicated	"I won on some points; we both lost on others. Compromise always requires us to ***give*** some."	"I was heard. My interests were ***attained*** to the greatest degree possible." Relief, Time to Move on

Conclusion. Examine your goals and align those with those of the mediator for best results.

Counselor and Therapist Goals: To have the client gain and accept a clear sense of reality; to encourage the client to move forward in a way they supports their own individual goals and needs.

Former Judges' Goals: To bring a fair and final resolution to the pending legal issues, whatever the root causes were that brought them into the legal system, using the law and court precedent as a guide.

Attorney-Mediators' Goals: To bring a fair and final resolution to the pending legal issues, whatever the root causes were that brought them into the legal system, using the law and precedent as a guide.

Professional Mediators' Goals: (1) To have the client gain and accept a clear sense of reality; (2) to facilitate a settlement that encourages all parties to move forward maximizing their own interests; (3) that brings a fair and final resolution to pending legal issues; (4) that uses or references the parties' own values as a guide; (5) that handles matters with a concern for dealing with the root causes that brought the parties into the legal system in the first place; and that provides a sound foundation for consensus-building (for co-parenting) in the future as well as in dealing with today's problems.

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Child-Centered Mediation

Definition. Child-Centered Mediation, also referred to as Child-Focused Mediation, is a conflict resolution process wherein the parties (parents, usually) meet with a neutral, skilled professional who facilitates their arriving at a resolution that favors the best outcomes for the child, rather than seeking to reward the parents' claims of right, principles or self-interests. It is most useful when a child is vulnerable, such as a young child caught in the legal process of their parents' separation or divorce in which they have no voice or control, but will be profoundly affected by the outcome and the process. It is effective whenever the legal parties, as principle stakeholders, are likely to have or need to have an ongoing relationship with one another, in spite of their differences in values, households or living arrangements. The tools and techniques used are especially helpful in high-conflict cases, as they lead the parties away from conflict and toward healthy, safe decision-making paths now and for the future.

Goals.

1. Transparency for the child – the child will not be marked or treated differently because of the parents' choice to separate their households or legally divorce.
2. The child will be spared injury from the battlefield of the parents' unresolved conflicts, hurt or suffering. For the child, it will be a "no fault/no blame" solution to pending and future issues.
3. The child will not feel responsible for their parents' conflict, emotions, separation or divorce.
4. The child's loyalty to the other parent will not be tested, which in turn will discourage their separation anxiety, polarization, fabrication, exaggeration and confabulation.

Steps in the Process.

1. Parents select a professional skilled in *transformative mediation* and commit to follow the process that will lead to healthy, long-lasting solutions to the issues presented and those that will follow -- which solutions will be balanced and benefit ***all*** of the persons involved – child and parents alike.
2. Identify each of the issues and how they are affecting the child and each of the parents.
3. Brainstorm and evaluate each of the possible outcomes, measuring them against the best interests and outcome for the child, rather than as a reward for the principals, legal right claimed, experiences or self-interest of the parents.

Outcomes.

1. Child reaches each of his or her developmental steps on time.
2. Child has healthy self-esteem and reaches and expands his or her potential.
3. Transfers between the care provided by the parents are uneventful.
4. The child will share their feelings and experiences easily and openly with both parents.
5. Communications between the parents are clear, conflict-free, respectful, and limited solely to the well-being of the child (no mention of past issues or present living/household choices).
6. Parents experience peace in their interaction and support in their parenting by the other parent.
7. Parents are spared the angst, energy, industry, loss of focus, cost and self-absorption engendered by litigating their conflicts.

BEWARE: The <u>legal</u> forum converts ALL issues (whether of values, emotions, finances and/or parenting) to only the one lowest-common-denominator – the Law. Then it can only give <u>legal solutions</u> to the problem, which solutions seldom match the underlying conflict in values, emotions, finances or parenting issues that created the problem. Result: there is no real or lasting solution at all, with the ongoing conflict simply being re-manifested in different ways.

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Mediating 'High Conflict' Cases

A ***High Conflict Case*** is a legal matter requiring resolution in which the parties are highly emotionally charged against one another, in which there is a gross discrepancy in the facts asserted or the outcome sought, or in which the history of the parties illustrates a destructive pattern of dissent. High Conflict Cases may be found in all family law contexts, such as court cases, collaborative or cooperative law negotiations, or settlement conferences. They or the parties often may possess attributes which take the case out of the mainstream, such as domestic violence or control issues (behavioral or financial), drug or alcohol addictions, parental alienation, or poor money-management practices that have limited the options available.

Mediation is a private and confidential conflict resolution process wherein a skilled professional assists the parties and their counsel in attaining a final and binding legal, financial, and/or parenting outcome by agreement.

Can a High Conflict Case Be Mediated? Absolutely! However, as with other special issues or behaviors that may be dealt with in mediation, special consideration must be applied in the selection of the mediator and the techniques utilized in the process. In selecting a mediator, one ought to consider the professional's:

- General education, experience and skill as a mediator and their professional education, history and background;
- Specialized education in managing high conflict behaviors and moderating them a social context;
- Knowledge of the characteristics of the behaviors of the parties and of the specific subject matter of the conflict;
- An ability to practice and facilitate empathetic dialogue and understanding and to identify common values;
- A strong ability to communicate clearly and lead the persons safely through a group process;
- An ability to conduct the mediation and behave in a way that instills confidence, trust and willingness to cooperate.

What Are Some Examples of the Special Tools, Techniques and Considerations that Apply in Mediating a High Conflict Case? The following is a partial list of resources the mediator may call upon. Some may be unique or special to High Conflict Cases, but others are 'more amplified' applications of tried and true mediation techniques.

- Maintain highly-structured contact patterns of the parties and counsel throughout the process and the day;
- Consider use of a professional team or co-mediation with a behavioral professional present;
- ***Step One:*** Share the mediator's strategy for attaining a successful outcome with counsel at the beginning of the session, with counsel's abiding by and supporting it throughout the session;
- ***Step Two:*** Share with the parties the path to be followed, the benefits of the process and the potential benefits of the outcome. Extoll the need for group process as to outcome, good faith in negotiations and in setting aside unfinished business of the past that cannot be resolved.

Emphasize the desire to attain interests of the parties to the exclusion of validation of principles. The purpose is to find common ground, not to punish or remedy the past. Focus on what can be done: settling present issues and those reasonably anticipated for the future:

  - Emulate strong leadership techniques of the mediator in managing the agenda: issues, priority, progress and written work product;
  - Strong application of techniques in managing the context and nature of the communication among each of the sub-groups, the greater group and the language used throughout the process;

- ***Step Three:*** Commence the session with empathetic listening to each party and active listening with each professional present. Interactively 'peel the onion' to identify the real issues that are below the surface and which are driving the conflict or preventing a resolution. Conduct a values clarification dialogue in order to establish reasonable criteria by which to measure desired outcomes and the degree of success attained with each round of negotiations;
- ***Step Four:*** Educate the parties and counsel at each step of what the alternatives are as to the defined process and the outcomes available. Keep the process moving forward, so that each side can see progress and increase participation. Use verbal and non-verbal cues to acknowledge *bona fide* concerns and the good faith exploration of alternatives in meeting expressed values and goals:
  - Use a series of periodic, individual 'check-ins' with the parties and counsel;
  - Make reference to and utilize available allied professionals: parenting coaches, communication specialists, child specialists, financial specialists and others;
  - Make reference to and utilize therapeutic resources: counselors, therapists, evaluative agencies;
  - Avoid comments & communication that will escalate the tension, fear, distrust or misconduct of the parties;
  - Keep an accurate record of moves and progress throughout negotiations.
- ***Step Five:*** Conclude the session with a genuine acknowledgement of the contribution of each person present and the benefits to be experienced with a balanced outcome.

Of course there are many more tools and techniques in the inventory of a mediator skilled and experienced in working with High Conflict Cases. Do not be shy about asking the mediator you are considering engaging as to their prior experience and success in working with high conflict families and their suggestions as to how they might handle your matter. Know, however, that the rules are different in high conflict cases and the obvious or easiest path is not always the best.

Once a mediator has been selected, listen to and support the recommendations and initiatives of the mediator in managing the conflict resolution process for the best result – both in the process itself and in the outcome attained. That person (or persons, if a co-mediation or team is used) is entrusted with setting the direction and is responsible for moving all parties and counsel forward to a successful outcome, which can be endorsed by all.

Side Note: To some degree or another, every case may be seen as being high conflict. That can be a fair assumption when parties are dealing with the termination of a social, emotional and affectionate relationship. Though this may be more a matter of perception of the parties than fact or even be transitory to the date, it should be respected in all events. It is far easier to reduce the level of the process as it moves along, than to attempt to rescue it later from inadvertent or advertent missteps.

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Professionals Who Assist in Family Law Proceedings

Parents who care deeply and are heavily invested in the values and paths their children will develop and live by have several options in today's legal environment for selection among the various types of professional persons who can assist them in developing, modifying, adjusting, or enforcing a Parenting Plan Order. The professional person's roles are remarkably different, sometimes overlapping and almost always confusing. This monograph, while it cannot describe all the iterations parents may agree upon for 'job descriptions,' illustrates the primary differences among them, and the strengths and weaknesses that each may offer the family according to the degree of co-parenting they seek and/or are capable of.

Following are generalizations, which do not describe every case or situation, and are categorized with the knowledge that invariably certain of the practicing professionals may take issue with the descriptions given or take offense at the characterizations made. They are asked to be generous in understanding of the needs of the bar, bench, and public to have general guidance as to the differing roles offered and the consequential effects of each, when called to participate in the legal forum.

I. Roles Proven to Be Helpful to Families Who Seek Healthy Co-Parenting (Listed in the Order of Least Intervention to Greatest Intervention)

1. ***Parenting or Communications Coach / Counselor / Family Specialist / Psychotherapist.*** There are many names for the mental health professionals who assist couples and families. It is important when choosing a coach or provider during or after a divorce that the provider be trained, licensed, and have specialized or have a strong background with ***families of separation or divorce.*** With this experience and expertise, they can focus on assisting the family in developing the skills of clear communication, respectful negotiation, consensus-building, acceptance or accommodation of differing values, and in dealing with the parenting issues unique to children of separation and divorce. The purpose here is ***not*** to create an ongoing therapeutic relationship focusing on an illness model; rather it ***is*** to provide a resource to family members in dealing with present and future issues they encounter in a fair and rational way, based on best individual and collective interests, apart from prior relationship, historical, or challenging communication & values issues they have experienced in the past.

   Working with a Coach/Counselor/Specialist will help the parents focus on the child's needs and best interests; respect the needs and values of the other parent; and create or support a joint or team (co-parenting) approach. These professionals can level the negotiating playing field and educate the parties on the dysfunctional effects of an imbalance of power or control. They will work with both parents toward mutual ends, with loyalty to and confidentiality of the parents in their communications, while protecting a child's interests.

2. ***Child Therapist.*** In some cases, 'children of separation' can be caught in the differences of values, opinions, or conduct of the parents; or the child may have emerging preferences of one's own on residential or relationship issues. The Child Therapist can listen to and work with the child in adapting to and modifying the environment for the better, and in taking the child out of the parental conflict.

   This professional works in a defensive or protective role, as when the parents cooperate there is less need to focus on the child's symptomology, which usually abates with the parents' resolution of conflict. The influence of the Child Therapist, then, stresses the development of adaptive strategies for the child and recommendations for the parents. The Child Therapist will work primarily with the child, inviting participation by the parents as appropriate, retaining loyalty to the child and confidentiality of the child's communications.

3. ***Child Specialist.*** This professional may be appointed by the court, but is most often jointly retained by the parents, most often in a Collaborative Law case, with the purpose of working with the child and parents to identify the ***child's*** interests and healthy preferences when the parents are conflicted. The professional can recommend remedial actions of the parents in their conduct or decisions to better create a healthy environment for the child, or a decision affecting the child's environment or development. The Child Specialist's loyalty is to the strengthening of the family unit; and while the child's communications remain confidential to the child, the Specialist may use these upon which to base recommendations to the parents and the child. This person is pro-active and may informally use mediation techniques in their practice.

4. ***Parenting Coach/Parenting Coordinator/Communication Coach***. This person has a therapeutic background and will offer the parents tips, techniques, and insights as to how to achieve healthy and respectful communication with one another and how to accept, blend or work with differing values of the parents, as applied to specific issues. Additionally, the person will be attentive to the concerns and interests of the parents and place them in the context of the children's needs and interests. As a neutral professional (as to the parents), but partisan as to favoring the children's interests, the person will use therapeutic techniques as well as informal mediation to assist the parents in resolving conflicts involving the children. The person is NOT an investigator or an evaluator, rather is one who applies treatment techniques to reach the underlying core issues and resolve those, so that no legal intervention is required or sought.

5. ***Mediator.*** A mediator is a trained, skilled, and experienced professional retained by the family or appointed by the court, or whose intervention is required by court rules or a court order, to serve as a neutral specialist in dispute and conflict resolution. In the Family Law area of practice, one may distinguish between those who have a legal background (with or without mediation training or experience) and those who have specialized their practice as dispute resolution specialists; or former judges (most of whom are found in the large 'rent-a-judge' firms) who mostly conduct settlement conferences, rather than mediation; attorneys who mediate as a sideline (and thus whose mediation practice is courthouse-centric in their outcomes); and non-legally trained individuals, whose strengths are value-setting, as opposed to the attainment of legally-enforceable decision resolution.

The mediation process is often described as the crown jewel of the dispute resolution processes, as it offers the greatest attributes of: (1) retaining decision-making by the stakeholders and the persons with the greatest knowledge of the case and issues; (2) providing confidentiality to those participating and avoids the 'scanning to Internet' that occurs in public court cases; (3) providing finality of decision-making, unlike the court process which offers numerous procedures for avoiding judgment; (4) applying the parties' interests and family values as the core value criteria for resolution, rather than the rigid application of prior decisions of appellate courts or the lobbied decisions made by the legislature on the same or similar issues; (5) allowing the participants to select their own neutral facilitator based upon the professional's personal skill, knowledge, and prior experience; (6) providing a far more timely and economical process, as the sessions may be scheduled on short notice, may not require attorney representation, and can be held by telephone; and (7) avoiding the game-playing and eliminating the rewards for slavishly following the Rules of Evidence (which the courts must), the embarrassment of 'hard' cross-examination, and the inevitable loss of support system for the children (for what teacher, neighbor or family member wants to take sides and testify against one of the parties?).

A well-trained, professional mediator may begin with ***facilitative mediation*** and move to ***evaluative mediation,*** as needed; avoiding ***directive mediation*** (instructing the parties on what to do); and ultimately will aspire to attain ***transformative mediation*** particularly in cases in which there are children or will be an on-going/long-term relationship of the parties.

6. ***Mediator-Arbitrator.*** The parties may agree that a mediator who has worked with a family and become familiar with their unique history, value system and issues can guide them to a resolution of the principle issues in dispute; and thereafter they may follow-up applying that knowledge to ensuing incidental or omitted issues, or even to the principal matters at issue if they have full confidence and trust in the mediator's knowledge of the law and ability to apply their own values in fashioning an outcome that best meets the interests of all.

   The mediation component of the process follows the traditional mediation arrangements, with the caution that communications may be limited by or given with the knowledge that they may become a part of the data set used in the arbitration component. When the parties become 'stuck' on one or more issues or time runs out in the mediation session, they may stipulate to the mediator's application of the values previously agreed upon to be applied to the remaining issues and for the mediator to then act as an arbiter to decide them.

7. ***Arbitrator.*** An arbitrator is a jointly-retained or court-appointed neutral dispute resolution specialist. One may be appointed to serve under the Uniform Arbitration Act, by contract, or in accordance with the state and local rules for court-ruled mandatory arbitration. The arbitrator may decide a matter on behalf of conflicting parties. applying state law, if the issue is subject to a legal action; or the parties' values or a combination of both, if deciding within a Family, Guardianship, Estate or Mental Health action. The decisions of the arbitrator must be grounded both on the specific facts and law, and may or may not be fully legally binding or appealable, depending upon the nature of the agreement or appointment.

Arbitration proceedings, unlike court adjudications, are strongly preferred by many persons, because they are private in nature (the public may not attend and documents are not scanned to go on the Internet); are confidential, according to the rules applied; treat the parties with respect and as decision-makers (unlike the top-down, model of court proceedings); allow the parties to choose the arbiter, based upon that person's unique qualifications, skill, knowledge and experience (rather than being selected by unknowing voters or selected by a governor); are far more time-related and economical than court actions; allow the impacted parties to speak directly to the decision-maker, rather than only through attorneys or sworn declarations; and allow the parties to have a decision based upon their own unique family history and values rather than the approach common to courts, which must follow impersonal legal precedents in a high volume of similar, yet different cases and factual situations.

An ***arbitration proceeding*** is usually episodic, in that it responds to a discrete issue or problem, determines a resolution, and then the case is 'closed.' The same arbiter or process may be used if and when future issues arise, but there is no ongoing requirement for this. There is a strong advantage, however, in having one neutral professional become familiar with the family and its values, rather than submitting issues to a parade of different commissioners and judges, who may ordinarily rotate through their positions, each month and/or year.

8. ***Special Master or Case Manager.*** A ***Special Master or Case Manager*** serves in effect as an ongoing Mediator-Arbitrator in a court-supervised proceeding. One may be retained or appointed if there are ongoing disagreements, the family's problems are longitudinal, or if the parties have demonstrated an ongoing inability to resolve matters themselves in important relationship issues.

   The ***Special Master or Case Manager*** meets with and becomes familiar with the family (including the children) and its ongoing issues. When a specific matter arises, this professional then will interview the parties and encourage a settlement that best meets the interests of the family and each member, but failing that, has authority to make a ***decision*** that the parties must abide by until overruled by a further agreement, decision of an arbitrator or ruling of the court. Caution: be aware of the notion "if you build it, they will come." A decision-maker who is too familiar or accessible can easily become a 'mini-judge' rather than an assistant to the family, whose primary role is to encourage family self-determination.

II. Roles Reserved for More Needy Families, Whose Parenting Styles & Behavior Are Antithetical to Successful Co-Parenting/Parallel Parenting (Listed from Greater to Lesser Intervention in Decision-Making)

1. ***Judge or Court Commissioner.*** A judicial officer, whether judge or court commissioner (a non-elected judge) is the ultimate choice in the family's loss of influence over their own parental control, autonomy, values and household in raising their minor children. The judge will possess the least information regarding the history of the family and its values because of institutional limitations: restrictive Rules of Evidence, presentation and filtering of information by attorneys, the effect of gamesmanship in the courtroom, and economic differences of the parties. The decisions made may be speculative at best and damaging at worst, but always

expensive, both in emotional and financial cost to all family members. It is the last option, but sometimes necessary.

2. ***Psychiatrist or Psychologist.*** These medically-trained professionals are certified specialists in diagnosing and treating persons suffering from mental illness. The information the professional provides is intended as guidance for families. However, it may be misapplied in a Parenting Plan Order proceeding in an exclusionary manner, justifying imposition of restrictions and conditions on one or both parents which are longer lasting and less treatable or responsive for what short-term issues may call for.

   The psychiatrist or psychologist is a type of evaluator who views each party in a vacuum, with no obligation to remain neutral as between the parties involved or to develop a bridge between their conduct, values or needs. They usually report their findings and recommendations to the court, thus requiring court action for the resolution of the issue(s). The reports can split the parties further apart and/or further divide the couple and children from their support systems. They may be used as heavy ammunition in court warfare. The professionals have no ongoing responsibilities, once the report is written; and have no accountability for their consequences.

   Sometimes a 'psychological evaluation' is incorporated as a part of a Parenting Evaluation Report. In these cases, the evaluation is often little more than a canned commentary, drawn from a computer-generated scoring system of national tests, thus offering little assistance or enlightenment to either the parents or the decision-maker. However, the reports do offer the potential to add fuel to a fire or to labeling and name-calling to be used by the parents in court.

3. ***Guardian ad Litem (GAL) /Attorney for Child.*** While the ***Guardian ad Litem*** (definition: a guardian for purposes of litigation) is often referred to as 'the voice of the child;' that is really not the role served. The ***Guardian ad Litem*** is an additional *party* to the proceeding, vested with representing the child's best interests, not the child's preferences. They have the authority to seek and attend discovery, and file motions, as well as to make reports and to testify and/or call witnesses at trial. A related alternative is the appointment of an attorney for the child. Case and common law support a finding that children who have the attained the 'age of discretion' (age 13 and older is the criteria used by some Juvenile Courts), may be appointed their own attorney, rather than a ***Guardian ad Litem***. Again, this appointment supports the harmful, adversary litigation process, pitting family members against one another, rather than promoting teamwork in the resolution of the conflict, offering long-term solutions.

   It must be acknowledged that litigation is frequently a binary, win-lose or winner-takes-all conflict process, wherein one party benefits at the detriment of the other. Having two conflicting (warring) parties, such as a father and a mother, can be harmful enough to the child's self-esteem and support system, so that adding a third party with legal standing may serve only to escalate the conflict among the now-three contesting parties. The ***Guardian ad Litem*** may investigate and take a position that is difficult for either parent to accept. Yet, since as the court is prohibited from doing its own independent investigation to determine a solution best for the family other than choosing from that offered by the contesting parties, the ***Guardian ad Litem's*** recommendations often become heavily relied upon by the court, as the ***GAL*** is believed to be neutral as between the parents and working in the child's best interests.

Thus, the appointment of a ***GAL*** or ***Attorney for Child*** may inadvertently serve to aggravate and escalate the level of conflict. The likelihood of settlement may be enhanced based upon the quality of the report; however, a party, perceiving failure or inability to overcome the recommendations of the ***GAL***, may be led to abandon their position or simply give in.

4. ***Court-Appointed Special Advocate (CASA).*** A ***Court-Appointed Special Advocate*** is the special name given to a community volunteer ***Guardian ad Litem***, trained and serving under the jurisdiction of the Juvenile or Family Court. When the first program (of now over 1500 nationwide) was co-created by Judge David Soukup, then attorney Stephen Gaddis, and Social Worker Carmen Ray-Bettineski) it filled the void in litigation for low-income persons, cases in which the child had strong preferences, or in which a third party sought child custody.

   Functionally, the ***CASA*** is a ***Guardian ad Litem***, differing only from private ***Guardians ad Litem*** in training, payment, issues employed-for, and extent of court training and supervision.

5. ***Parenting Evaluator.*** A ***Parenting Evaluator*** is a professional retained by the parties or appointed by the court to investigate and make recommendations to the court. This person may possess varying credentials (none are specifically required by the court), education, values, and skills.

   Parenting Evaluators may work with the parents, infrequently utilizing some mediation techniques, with their investigation culminating in a Report to Court. This document, according to its content and detail, may prove helpful to the parties and the court. However, it also has the ability to wreak great havoc on the child's support system and the parties' relations with others by forcing the matter to go to court, forcing those in the child's support constellation to choose sides, and in quoting remarks made by persons interviewed out of context or in a way that will drive a wedge between the person interviewed and a party or child. The negative consequences can outweigh the positives, particularly if the report exceeds 25-30 pages, containing information best left unpublicized, in reaching a settlement or in seeking to attain a settlement. If the matter must proceed to court, there will be ample opportunity for the evaluator to comment at that time, both as to content and to context.

III. Sample Language That May Be Used or Adapted to a Family's Needs

"The role of the _____ is to assist the parents and family in resolving disagreements that arise or may arise from the application of the Parenting Plan Order or in the course of their joint parental decision-making. The role is not to provide therapy, to 'represent' either parent or the child or to perform an evaluation. The role is to encourage family self-determination. It is accomplished by (1) facilitating clear and respectful communication between the parents, (2) identifying the issues and healthy outcomes available for each, (3) assisting the parents in opting for alternatives available using the best interests of the child as a primary determinant, and (4) in the event that a resolution by the parents is not achieved, by providing a brief, written recommendation that the professional sees as being the best outcome for the child involved. The process followed is confidential as to the family and the professional will not directly share any statements made by a child to anyone, although these may frame a reference or basis for the recommendation to the parents."

(Optional) "The parents agree that the professional shall not called as a witness in or to make any declaration for any court proceeding, except as authorized or directed incidental to the state-mandated reporting requirements pertaining to child abuse, abandonment or neglect."

STEPHEN M. GADDIS, PROFESSIONAL MEDIATOR & ARBITRATOR



Stephen Gaddis served King County Superior Court for over 25 years as commissioner and superior court judge prior to his retirement in 2005; thereafter, served as a pro tem in Pierce County Superior Court for two years. A 1970 graduate of the University of Washington School of Law, he has published numerous articles on Family Law and taught Family Law at the Washington State Judicial College, the Annual Spring Judicial Conferences and at numerous bar and bench trainings. He is now a private Mediator and Arbitrator, working throughout the Puget Sound area. He has taught mediation practices and techniques since establishing the Northwest Mediation Service in 1977; co-instructing "Mediation and Advanced Family Law" at Seattle University, School of Law five years; been trained and is a trainer of mediation practices in Collaborative Law and Cooperative Law cases.

While on the Superior Court bench, he chaired the court's Family Law Committee, the Washington State Child Support Schedule Commission, and co-founded the Juvenile Court Guardian ad Litem and Family Law CASA Programs. He served on the State Model GAL Training Program, was member of the Parenting Act drafting committee, and vice-chaired the Domestic Violence Task Force, which authored the Domestic Violence Prevention Act. Comm. Gaddis was a drafter of the King County Guardian ad Litem Registry Administrative Policy, Local Guardian *ad Litem* Rules, and edited numerous forms and instructions for use by the Family Law facilitators. He has chaired the King County Family Law Section; the State Bar Family Law Section Executive Committee; and was vice-chair of the State Supreme Court's Certified Professional Guardian Board. He was named Family Law Judge of the Year by the WSBA-FLS, profiled in the October, 2008, issue of the King County Bar Bulletin (picture above), the July, 2010, issue of the Washington Mediation Association, & has been named to the Who's Who List of World Class Business Leaders.

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CHAPTER FOUR

CHANGING MEDIATION DYNAMICS: GETTING TO AN OFFER BEFORE 3PM

December 2015

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JAMS

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HON. DEBORAH D. FLECK (Ret.) served over two decades on the King County Superior Court. During her 21 years on the bench, Judge Fleck handled a wide range of complex civil cases and is highly respected for her work ethic, fairness and intellect. She is well known for her ability to recognize when cases are ripe for settlement and has a reputation for helping parties achieve resolution. During her judicial career, she served as Chief Judge of the Regional Justice Center and Chief Judge of the Unified Family Court which resulted in the implementation of Early Resolution Case Manager attorneys providing a Family Law Orientation to pro se parties, followed by on-site mediation for cases not settled prior to trial.

COMM. ERIC B. WATNESS (Ret.) an experienced neutral, has successfully resolved many disputes involving all aspects of marriage dissolutions, such as property division, child support, parenting and visitation plans, termination of parental rights, non-parental custody, and claims of domestic violence. He has also handled matters involving same sex and domestic partnerships and he has particular expertise in adoption matters. He spent 16 years as a Court Commissioner with the King County Superior Court in their Ex Parte and Probate Departments, and Family Law and Juvenile Courts where he also conducted trials as Judge Pro Tem and handled numerous judicial settlement conferences. In addition, he practiced law for 13 years handling family law, adult guardianships, probate and adoption matters, and five years as Assistant Attorney General representing the Washington State Department of Social and Health Services, child support and juvenile dependency

CHANGING MEDIATION DYNAMICS:
GETTING TO AN OFFER BEFORE 3

P.M. Judge Deborah Fleck, Ret.
Commissioner Eric Watness, Ret.

What it takes: Proper Timing, Information Sharing and **Preparation**

A. Proper Timing

1. Do you have all the information you need to properly advise your client – has there been full disclosure of assets, have character and value of property been determined, do you need financial records, appraisals, expert reports and the like? Are there business or tax issues outstanding? Even if you do have all the information you need,
2. Are the parties ready to address all the issues?

B. Information Sharing

1. Exchange discovery, legal positions and proposals well in advance, together with financial declarations if child support, spousal maintenance, debt allocation and/or attorneys' fees are requested.

2. Consider a client-written declaration, perhaps for the mediator's eyes only, to speed the normal timeframe of the client speaking to the mediator, while at the same time recognizing the importance of the client's belief that he or she has been truly heard by a neutral party.

C. Preparation

1. **Mediator preparation:** the mediator must thoroughly prepare by reviewing the materials presented, doing additional legal research as necessary and persistently following up to reach resolution if the case doesn't settle on the day of mediation. Telephone calls between the mediator and each attorney prior to the mediation are helpful.

2. **Attorney pre-mediation preparation**

   a. Select the mediator for this particular case

      Before agreeing to a mediator, analyze a suggested mediator's style and whether that mediator will be a good match with your case and client and whether the mediator is able to efficiently use the time allotted

      Understand opposing counsel's style and personality as well when selecting the mediator

b. Be thoroughly knowledgeable about the facts of your client's case and the controlling law

c. Prepare the client

1. Discuss the mediation process with your client (how it works, the need to attend in good faith and to compromise from a trial position)

2. Identify with your client the most important outcomes in getting the case resolved, develop the starting proposal, possible alternative proposals that meet the client's true interests and needs, and identify acceptable concessions

3. Review with the client the opposing party's position and together attempt to understand that party's real interests and needs

4. Review with the client the risks of trial (expense, delay, anxiety, uncertainty, lack of confidentiality) and ensure the client understands the benefits of eliminating the risk through his or her own resolution

5. Ensure that all persons necessary to evaluate proposals, such as accountants, are available by telephone

d. Alert the mediator

e. Identify the goals of the mediation: global resolution or discreet issues

f. Identify barriers to resolution

D. The Mediation

1. Recognize the importance of your client and the other spouse developing trust in the mediator which usually occurs when the client speaks directly to the mediator. However, attorneys may want to impress upon the client not to talk too much.

2. Consider asking the mediator for time deadlines through the day.

3. Negotiate in good faith.

4. Identify techniques to move the negotiation forward as well as what behaviors or techniques impede progress.

5. Decide if you want the mediator to move from a facilitative to an evaluative approach at some point in the process

6. Come prepared with a checklist (or your final proposed paperwork) to be sure you have covered all issues

7. Prepare a draft of a CR2A Agreement, or proposed Property Settlement Agreement; if children are involved, also prepare the Parenting Plan, Child Support Order and worksheets and exchange them before the mediation or at its outset

    a. Bring your laptop with the documents ready to be modified as necessary

Achieving Workable – and Just - ADR Results in Family Law
By Deborah Fleck, Ret., JAMS

Mediation is the ADR vehicle most commonly used in family law cases, although arbitration is gaining ground, at least with issues arising out of permanent parenting plans. Most frequently, mediation results in a final settlement – often after a marathon session. A long session or a follow-up session is not surprising, given the sheer number of issues - factual, legal, emotional and financial - that need to be addressed involving the most important issues in the lives of the family members.

When the parties reach their own agreement, it should be one that is practical, workable and addresses the needs and abilities of both parties. Are there ways to improve both the process and the results of mediation? With minor tweaks, there are. But what does it take? The keys to a successful family law mediation are open communication and information sharing, adequate preparation, and proper timing. Often, the simple opportunity for a party to be heard – to speak to a retired judge – is a necessary step in moving forward to settlement.

Open Communication – with the opposing party and with the mediator. Prior to court rule requirements to participate in ADR and prior to modern technology, family law attorneys regularly communicated by telephone and through written proposals. This is still very good practice. Yet, with court-mandated ADR, the paradoxical result is often that the parties have not exchanged positions or proposals until the mediation itself, which frequently occurs close to trial. Sometimes attorneys have not discussed the mediation process itself with their clients, or do not have the documents they need to resolve the case.

Instead, use an "old school" implement - pick up the telephone early in the case. Make yourself available by telephone as well. The working relationship you develop by actually speaking with reasonable opposing counsel can save time and money in the end. While it may seem that sending off emails, reviewing responses, and issuing follow-up emails is most efficient and also makes a record, in the end it often takes *more* time and creates further conflict and entrenchment.

Once discovery is reasonably complete, and the parties have had sufficient time to begin addressing the emotional and financial upheaval of a separation, you are able to develop creative potential solutions with you client. Exchanging mediation letters with legal issues defined and important documents attached far in advance of mediation allows both sides to be prepared to address opposing legal positions, to resolve some factual disputes, and to agree on character and valuation of some assets, in advance of mediation. This can streamline the mediation process itself, and increase the likelihood of resolution on mediation day. Many mediators make a pre-mediation call, where the attorneys can provide information that is often helpful to the mediator in finessing through trouble spots.

Preparation – Worth the Effort. An attorney who is well prepared for mediation has not wasted time – if the case doesn't settle, it is well on the road for trial. If it does settle, as most cases do, the mediation process saves time, money and emotional stress for the parties. They will have reached a solution, often creatively structured, in ways that could not occur at trial. Attorneys who are well-versed in the details of their case are able to quickly analyze offers, make counter-proposals, and advise their clients. Simply put, the benefit of thorough preparation is hard to overstate.

Proper Timing and Mediator Selection. Family law cases have their own emotional timeline**,** distinct from other types of litigation. In many cases, it takes several months for one party to reach a stage of partial equilibrium, a new norm. It is not helpful to attempt to settle family law cases before both parties have reached that comfort level. The process of emotional adjustment simply must take place. But when the clients are emotionally ready and both sides have enough information regarding the facts and the law, successful mediation avoids the financial and emotional costs of trial as well as allows the clients to eliminate the risks of trial and move on with their lives.

When attorneys have worked together for several months using the telephone as well as more modern technology, they are able to identify a mediator with the listening skills, depth of knowledge, temperament and creativity to help the parties achieve resolution in the best interest of their children if children are involved – a permanent parenting plan that is workable and practical. They are able to identify a mediator who will help them achieve a result with adequate assets as well as liquidity for both parties in higher asset cases. They are able to engineer necessary protections where substance abuse, physical abuse, or mental health issues are involved. And they will have the ability to identify the correct timing for the greatest likelihood of a successful mediation, given their in-depth knowledge of their client and any barriers to resolution. By focusing on what is just and equitable for both parties, in the best interests of children, rather than the rights of the parents, and by being creative problem-solvers who actively listen, attorneys and the mediator can be agents to achieve a compromise solution that is acceptable, one that meets the needs and abilities of both parties.

CHAPTER FIVE

LIFE CHANGES AFTER DISSOLUTIONS: STEPS TO TAKE

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I. INTRODUCTION

The judge has signed off on the final decree and the parties are divorced. The attorney takes the case file back to the office, ready to close out the file and move onto the next case.

There's just one problem, the work isn't done yet. Many attorneys fail to take the important step of assisting their clients through the transition from married to single. In addition to some obvious steps that some clients will need assistance with, such as QDROs, there are other steps that deserve a few minutes of time during a final client meeting.

These materials will attempt to review the major issues that may need to be addressed by your client as they move through the transition to the next chapter in their lives.

II. A FINAL CLIENT MEETING TO REVIEW REMAINING TASKS

For some clients, a follow-up meeting may not be necessary (particularly in a short term marriage where the parties didn't have much in terms of shared assets and no one changed their name). For most cases, however, there will be at least a few issues that you and the client should discuss, preferably in person. Below are the issues that should be reviewed with a client during a final meeting.

A. ATTORNEY TASKS

1. **Transfer Real Property.** If the decree awarded real property to either party and a title change is needed, the attorney should prepare the quit claim deed(s) and real estate tax affidavit(s) to be recorded in the county where the property is.

    a. **Real Estate Excise Tax Affidavit Form.** Washington State requires that a Real Estate Excise Tax Affidavit be completed in order to record a quit claim deed. Remember that WAC 458-61A-203(2) provides that "The real estate excise tax does not apply to any transfer, conveyance, or assignment of property or interest in property from one spouse or domestic partner to the other in fulfillment of a settlement agreement incident to a decree of dissolution, declaration of invalidity, or legal separation." This WAC should be referenced in section 7 of the REETA form. A fill-in pdf form is available from the Washington State Department of Revenue at http://dor.wa.gov/docs/forms/realestexcstx/realestextxaffid_e.pdf.

    b. **Out of State Property.** For any property located outside of Washington State, the attorney should direct the client to contact local counsel to prepare the deeds.

2. **Divide Retirement Accounts.** If the final orders divide one of more retirement accounts, a Qualified Domestic Relations Order (QDRO) or another retirement order may be needed. In many cases, the QDRO or other retirement order will be submitted along with the decree, but other times, it will be completed separately. Unless you are very familiar with preparing QDROs, I recommend consulting with an attorney who focuses their practice on such orders, as improperly preparing them can lead to major issues for the client (and a malpractice claim for the family law attorney if the issue cannot be rectified).

> **Proceed with caution if the plan participant is already receiving benefits.** If the plan participant is already receiving benefits from the retirement plan, the QDRO or other retirement order language may need to be included in the decree. Check with an attorney who is familiar with that particular retirement plan before entering the decree with the court.

a. **Attorney Steps.** Most plan administrators will need a certified copy of the decree or QDRO or other retirement plan order in order to divide the accounts. If you have any concern as to whether the language that your order includes will not be accepted by the plan administrator, you may want to seek pre-approval of the plan prior to obtaining the judge's signature.

b. **Client Steps.** Once the QDRO or other retirement order has been approved, the client receiving the funds (known as the "alternative payee") is contacted by the plan administrator for direction as to where the funds should be directed. The client should be advised to speak with a financial advisor prior to receiving this communication from the plan administrator in order to decide where the funds should be directed to.

B. CLIENT TASKS

1. **Name Changes.** If your client changed their name in the decree, while their name is legally changed as of the date of the decree, the relevant federal and state authorities will not automatically update their name within their systems. It's therefore important that the client be advised of the processes for each of the government agencies that they will need to change their name with.

a. **Social Security.** For name changes with Social Security, the client will need to present a certified copy of the dissolution decree. They will need to take the certified copy of the decree with them to the social security office to have their name changed.

b. **Driver's License.** To change one's name on their driver's license, the client will need to physically go to a licensing office, bringing with a copy of the

decree. According to the Washington State Department of Licensing website, a certified copy of the decree is required, though anecdotally it appears that many offices will accept non-certified decrees for purpose of changing one's name on their license.

c. **Passport.** The State Department also requires a certified copy of one's divorce decree to change a passport. The good news is that this task is done by mail. If the client's passport is less than a year old, there is no charge for updating the passport because of a name change. For more information, see:http://travel.state.gov/content/passports/en/passports/services/correction.html#Changes

> **Attorney action** – remember to obtain certified copies of the decree from the court if your client is changing their name.

2. **Vehicles.** Review the property awarded to each party in the decree or separation contract. If the title to any of the vehicles need to be changed to the other party (or a name removed from a title if the vehicle was jointly titled), the client will need to take a trip to a state licensing office.

a. **Title Changes.** In order to change a title to a vehicle, the client needs to bring a certified copy of the decree (and separation contract if that is where the assets and debts are divided) and the original title to the vehicle to the licensing office.

i. The decree must specifically identify the vehicle that is being transferred, ideally with the **year**, **make/model**, **license plate** and **VIN number**. So long as the client has the current title to the vehicle in hand when they go to the licensing office, there should not be a need for the other spouse to participate in this process.

ii. If the parties do not have their title, additional forms will be required. If a debt is still owed on the vehicle, the client will need to contact the lien holder prior to attempting to transfer title. The lienholder may not permit the title transfer to occur without the loan being paid off or refinanced.

b. **Vehicle Insurance Policies**. After a dissolution, the parties will need to get separate insurance policies for their vehicles.

> **Practice tip:** If the parties have children who are teenagers (or who will be teenagers soon), the issue of which parent will cover them on auto insurance should be included as part of the final settlement. Insurance for teen drivers can be very expensive and the issue is often not addressed in the Order of Child Support.

c. **Toll Devices**. Remind your client to update any *Good to Go* or other automatic toll devices and accounts that may be connected to their vehicles.

3. **Bank and Investment Accounts.** To make changes in account titles or ownership for bank accounts, the client will need to go their local bank branch with a copy of their decree (and separation contract, if applicable). At the same time, the client should update their legal name with the bank. Anecdotally, most banks will accept "non-certified" copies of the decree, though policies could vary by bank.

   a. **Financial Advisor.** As with any major life change, if the client hasn't done so in the course of the divorce, now is a good time for them to sit down and review their investment and retirement plans.

4. **Other Shared Accounts**. In addition to bank accounts, the client may need to separate other shared accounts they held with their spouse.

   a. **Credit Card Accounts.** Review the decree. The client will need to contact their credit card company to close any joint credit card accounts or to remove a spouse as a signatory on an account.

   b. **Cell Phone Accounts.** The client should be reminded of the importance of separating any "family" cell phone plans that they may have. In addition, like auto insurance, if the parties intend for their children to have their own cell phones, the costs for such plans should be addressed in the order of child support. In addition, if there will be a cost associated with ending a "family plan" prior to the contract period, this cost could be included in the final settlement. Some cell phone service providers are easier to work with then others in splitting accounts.

   c. **Cable and Internet Providers.** Anecdotal evidence suggests that changing a shared account or moving an account to an address is unnecessarily and frustratingly complicated, at least with one major provider of such services. Advise the client to simply disconnect the service and start over with a new plan as a single person.

A Report from the Front Lines – as told by a former client

It's easier to divorce your spouse than it is to divorce Comcast.

The State of Washington does not require separating wives and husbands to show up in court with a driver's license or a passport. Comcast does. Both parties have to go stand in line at a Comcast "customer service" center just to remove one name from a cable TV account and make the other, well, solo.

"It's the law," a Comcast rep solemnly told me on the phone.

What law?

What law in Washington State puts Xfinity on a higher plane than marital status (even when there's not a Seahawks game on TV)?

Oh, right, they said, after a long hold when they were asked to cite the law. After all, I had a lawyer now. Maybe we could work to change the law. Turns out, they said, it's not a law, but an FCC regulation. Well, no, they acknowledged another long-hold later, it's not that, either, really - just an inviolable Comcast procedure, one that's probably filed in the same sales binder that says they happily will *make* a cable contract over the phone, no line-standing and no photo IDs required. Then again, it is easier to get married than divorced.

And don't even get me started on "custody." Approval of a parenting plan seemed like child's play versus the arcane rules and weeks on hold it took to "port" custody of the old phone number so that Comcast-issued phone number could just stay in the same house where it had "lived" for years.

Turns out you can beat the Comcast system. Sort of. Give up. Disconnect the married service (if you're out of a locked-in contract) and then re-install in the exact same house, in the exact same rooms -- maybe even on the exact same TVs. Just give up and start all over again as a single, as long as you don't mind paying extra to have Comcast gear installed back into exactly where you left it.

I'm not sure yet if I'll get remarried. But I'm pretty sure I'm going to try DirecTV or DishNet next time around. Or maybe just stick to Netflix.

5. **Utilities on Family Home.** If the name associated with the utilities for the family home does not align with the current occupant, the accounts need to be updated. The client should be directed to contact the utility company for assistance.

6. **Medical Insurance.** Once the divorce is final, the spouse who provided insurance to the other spouse should notify their employer or health plan provider to remove the former spouse. For a spouse who relied on their husband or wife to provide insurance, they will need to locate new insurance, either through their employer, a private insurance broker or through the Affordable Care Act marketplace. The

health benefit exchange program in Washington is called the Washington Healthplanfinder and it's located at www.wahealthplanfinder.org.

7. **Business Interests.** If the parties jointly own a business, the governing documents for that business may need to be updated, along with their records with the Secretary of State. The client should be directed to an attorney familiar in that area of law for assistance with this task.

8. **Internet Security Considerations.**

a. **Passwords and Security Questions.** If the parties had a contentious divorce, you have probably already advised them of the importance of changing their passwords (and security questions) for any of their major online accounts. If they haven't already done so, now is a good time to remind them to change their account passwords, including:

i. Email accounts
ii. Online bank and/or investment accounts.
iii. Credit card/student loan accounts.
iv. Social media (Facebook/Twitter, etc.) accounts.
v. Online retailers (Amazon, Nordstrom, etc.)

Note, to be very secure, the new passwords should not only use multiple kinds of characters, but they should also be different from the person's past naming conventions for passwords (i.e. if the client always used their kid's name in their passwords, they should come up with something new). A password manager program such as "LastPass" is also a good option. Any security questions should be updated and it's a good idea to come up with untrue "answers" to these questions, as a former intimate partner may know the true answers.

b. **Smartphones and Other Devices that Track a Person's Location.**

If your client has a smartphone or other device that tracks their movement or geographic location, you may want to advise the client to not only change their password but possibly disconnect that feature. It goes without saying that this is particularly critical if there are issues of domestic violence or stalking involved.

III. ESTATE PLANNING CONSIDERATIONS.

A. **Attorney Role.** Regardless of whether you are in a position to prepare estate planning documents for a recently divorced client, as their family law attorney, you need to be aware of some basic estate planning considerations to help your client prepare for life as a single person.

B. **Overview of Basic Estate Planning Principles, RCW Chapter 11.** First, a review of some basic estate planning principles:

1. **Testate vs. Intestate Estates.** When a person dies (known as the "decedent"), property they own or hold in their name needs to be transferred to a living person or other entity. In order to determine who is entitled to the property, the probate court would first look to see if they have a valid will or other estate planning document. If so, the Personal Representative would typically move to admit the will and would thereafter distribute the estate in accordance with the terms of the will. If a person dies ***with*** a will, they died "testate" and are referred to as the "testator." If the person dies and ***there is no will*** or other estate planning documents in place, they are said to have died "intestate." When this occurs, there is a statutory scheme located at RCW 11.04.015 to determine who is entitled to the decedent's property. An Administrator, rather than a Personal Representative, administers the estate when a person dies intestate.

   Presumably, the legislature's intent with the descent and distribution scheme in RCW 11.04.015 was to approximate what a "typical" person would want to have happen to their property upon their death (if this does not give you comfort, it would be a good idea to have an estate plan in place!). Therefore, the statute predictably includes spouses and domestic partners, as well as the children of the decedent in the distribution scheme.

2. **Probate Property and Nonprobate Property.** Remember that there are two basic kinds of property at issue when a person dies, "probate property" and "nonprobate property." Generally speaking, non-probate assets are those assets that would pass directly to a beneficiary upon a person's death without reference to the will and without going through a probate process. Probate assets are distributed in accordance with a person's will.

   a. The nonprobate property that a typical person might have includes retirement accounts, life insurance, and bank accounts that have a survivorship provision. To claim the benefits, a beneficiary typically submits a death certificate to the plan administrator along with proof of identification.

b. Probate assets make up the rest of the decedent's estate (real property, cash, personal property, etc.). These assets are usually distributed through the formal probate process.

C. **Washington Estate Planning Statutes Specific to Divorce.** In addition to providing a descent and distribution scheme for a person who dies without a will, the legislature was also concerned about individuals who die without updating their estate planning documents after significant life events. One of those life events is divorce (another is remarriage).

1. **The Will Statute - RCW 11.12.051.** This statute addresses what happens when a decedent dies with a will that includes a distribution to a former spouse. Unless the decedent updated his or her will *after* the divorce was final, the ex-spouse will not receive any probate assets. That statute provides, in part:

> If, after making a will, the testator's marriage or domestic partnership is dissolved, invalidated, or terminated, all provisions in the will in favor of or granting any interest or power to the testator's former spouse or former domestic partner are revoked, unless the will expressly provides otherwise. Provisions affected by this section must be interpreted, and property affected passes, as if the former spouse or former domestic partner failed to survive the testator, having died at the time of entry of the decree of dissolution or declaration of invalidity. Provisions revoked by this section are revived by the testator's remarriage to the former spouse or reregistration of the domestic partnership with the former domestic partner.

RCW 11.12.051(1). Essentially, the statute provides that if while you were married you included your spouse in your will and then you got divorced, the state assumes that you do not want to give your ex this property anymore (though if you do, that's fine, you just need to make it clear that such a designation survives the divorce or reaffirm the distribution to the ex-spouse in a will made after a divorce). This statute addressed what many saw as a terrible side effect of failing to promptly update one's will after a divorce.

Practice Tip – In addition to removing one's former spouse from a will or other estate planning document, there may be other alterations that are needed to the client's estate plan. It is best to encourage the client to consider updating their documents, even if RCW 11.12.051(1) addresses the concern of a former spouse taking under an old will.

2. **The Nonprobate Asset Statute - RCW 11.07.010.** This lengthy and fairly complex statute attempts to address the situation where a decedent fails to update his or her beneficiaries on a "nonprobate asset." It provides, in part:

> If a marriage or state registered domestic partnership is dissolved or invalidated, or a state registered domestic partnership terminated, a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse or state registered domestic partner, is revoked. A provision affected by this section must be interpreted, and the nonprobate asset affected passes, as if the former spouse or former state registered domestic partner, failed to survive the decedent, having died at the time of entry of the decree of dissolution or declaration of invalidity or termination of state registered domestic partnership.

RCW 11.07.010(2)(a). The purpose of RCW 11.07.010 mirrors the will statute but instead addresses non-probate assets. However, as discussed below, this statute may not be effective for some nonprobate assets, so clients should be warned not to rely on it.

3. ***Estate of Lundy v. Lundy*, 187 Wn. App. 948 (2015) - a Cautionary Tale.** Here, the Court of Appeals Division One considered whether RCW 11.07.010(2)(a) applied to a beneficiary designation in a 401(k) account governed by ERISA (the Employee Retirement Income Security Act of 1974). The court ruled that the provisions of ERISA trump contrary state laws. As a consequence, the statute was inapplicable and *did not* revoke a former spouse's claim to certain retirement benefits.

a. **Facts of the *Lundy* case.**

i. During their marriage, Mr. and Ms. Lundy had each accrued retirement accounts in their own names through their respective employers. While married, they had named each other as the sole beneficiary of their retirement accounts. The parties divorced in 2009. In their divorce decree, each party was awarded "all retirement funds and 401Ks" in his and her own name.

ii. Neither party changed their beneficiaries on their retirement accounts after the divorce in 2009.

iii. In 2013, Mr. Lundy passed away. He had no will and was not married at the time. His former wife was listed as the beneficiary of his 401(k) account, which at that time was worth nearly $500,000.

Like most private employer retirement plans, the plan was governed by ERISA.

iv. The 401(k) funds were distributed to the ex-wife by the plan administrator in accordance with the beneficiary designation in place at the time of Mr. Lundy's death.

v. The administrator of Mr. Lundy's estate sued, claiming that RCW 11.07.010(2)(a) automatically revoked the designation of Mr. Lundy's ex-spouse as of the date of the decree of dissolution. The estate claimed that the proceeds should instead be directed to Mr. Lundy's statutory heirs.

b. **Holding in *Lundy*.** Relying on a number of cases, including the U.S. Supreme Court's decision in *Egelhoff v. Egelhoff,* 532 U.S. 141 (2001), Division One ruled that ERISA preempts contrary state law (in this case RCW 11.07.010(2)(a)). The court reasoned that since one of the purposes of ERISA is to ensure a speedy and efficient distribution of proceeds in accordance with the plan documents, it would frustrate the federal law to uphold the terms of RCW 11.07.010(2)(a). In other words, a plan administrator should be able to rely on the beneficiary designation, without further research into what a state law may say about the decedent's marital status.

Practice Tip - The take home message from *Lundy* is that your client should immediately change their retirement plan beneficiaries once the decree is entered. If they don't, and they pass away, their funds could end up going to their ex-spouse.

c. **Can Artful Drafting Avoid a *Lundy* Situation? Possibly.** The *Lundy* court made it clear that no matter how it is drafted, a state law cannot interfere with the beneficiary designation on an ERISA plan. *Lundy* at 187 Wn. App. 969. The court then considered the argument of waiver. The estate had claimed that Ms. Lundy waived her right to Mr. Lundy's retirement in the divorce. *Id*. at 960-61. The court considered this argument, but ultimately dismissed it based on the facts of the case:

> Disclaiming an ownership interest in not the same as disclaiming future rights as a beneficiary. By contrast, in many cases cited by the Estate, the ex-spouse explicitly waived the right to receive ERISA proceeds. *See*, e.g., *Kennedy*, 555 U.S. at 289 (ex-spouse divested of "'all right, title, interest, and claim in'" ERISA accounts); *Andochick v. Byrd*, 709 F.3d 296, 297 (4th Cir.) (ex-spouse waived " 'any interest, including but not limited to any survivor benefits'"

> and " released and relinquished any future rights 'as a beneficiary under'" ERISA plans), cert. denied, 134 S.Ct. 235 (2013); *Estate of Kensinger v. URL Pharma, Inc.,* 674 F.3d 131, 132-33 (3d Cir. 2012) (ex-spouse agreed to " 'waive, release, and relinquish any and all right, title and interest'" in ERISA accounts).
>
> In the absence of an express agreement, waiver requires "unequivocal acts or conduct evincing an intent to waive." *Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980). Here, there was no such clear conduct demonstrating Kelly's intent to waive her rights as beneficiary of Craig's retirement account. The only evidence the Estate cites regarding intent is Kelly and Craig's lack of closeness after their divorce. But, we cannot infer intent from "doubtful or ambiguous factors." *Id*.
>
> Federal law preempts a party's reliance on RCW 11.07.010(2)(a) for recovery of ERISA funds in the hands of the designated beneficiary. If *Kennedy* would allow recovery of funds from the designated beneficiary on the basis of waiver by private agreement, the agreement here does not establish an express waiver of the rights to receive those funds as a beneficiary. The Estate has not established a valid postdistribution claim to recover ERISA benefits.

187 Wn. App. 948, 959-61 (citing *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan,* 555 U.S. 285 (2009)).

d. **Possible Waiver Language.** The only way to ensure that an ex-spouse will not receive retirement funds is to immediately update the beneficiary on the account. This should be done as soon as possible after the decree is entered. *However*, at least in the context of agreed cases, attorneys may want to consider including explicit waiver language as suggested by the court's decision in *Lundy*. Possible language that *may* allow a post-distribution claim to be made against the ex spouse:

> "I, WIFE, hereby relinquish and waive any and all right, title, interest and claim, including any survivor benefit or beneficiary rights, in the HUSBAND's _____ retirement account."

POST-DECREE CHECKLIST

1. IMPLEMENTING THE DECREE OR SEPARATION CONTRACT

- ☐ **REAL PROPERTY.**
  - ☐ **Transfer Real Property Titles.** Transfer real property to party identified in decree by preparing deeds and Real Estate Excise Tax Affidavit(s). Record deed(s) with county. ***Attorney task.***
  - ☐ **Pursue Refinancing Options.** Review the decree (and separation contract if applicable) for any refinancing requirements. Refinance home in accordance with the timeline stated in the final documents. ***Client task.***
- ☐ **RETIREMENT ACCOUNTS.** Divide retirement accounts as provided for in the decree by preparing QDRO or other Retirement Order. ***Attorney task*** – *certified copy of decree and retirement order needed.*
  - ☐ **Contact Financial Advisor.** Once the QDRO or other retirement order has been approved, funds will need to be directed to a designated account. ***Client task.***
- ☐ **VEHICLE TITLE TRANSFERS.** Change titles to any vehicles as needed to comply with the decree. Bring certified copy of decree (and separation contract if applicable) to licensing office along with original vehicle title. ***Client task*.**
- ☐ **BANK ACCOUNTS.** Change account owners on any bank or investment accounts as provided for in decree. Bring certified copy of decree (and separation contract if applicable) to local bank branch. ***Client task.***
- ☐ **BUSINESS INTERESTS.** Amend governing documents to transfer interests in any jointly held business to the party designated in the decree. ***Business attorney task.***

2. OTHER CHANGES

- ☐ **NAME CHANGES.** Obtain a certified copy of decree from court. ***Attorney task.***
  - ☐ **Social Security**. Take certified copy of decree to social security office. ***Client task.***
  - ☐ **Driver's License**. Take certified copy of decree to local licensing office. ***Client task.***
  - ☐ **Passport.** Submit required paperwork and certified copy of decree to the State Department by mail. ***Client task.***
- ☐ **INSURANCE POLICIES.** Review existing insurance policies to determine if changes are needed.
  - ☐ **Health Insurance**. Notify employer of divorce to remove former spouse from health insurance or obtain new health insurance policy. ***Client task.***

- ☐ **Vehicle Insurance**. Remove spouse from existing policy or obtain new policy. ***Client task.***

☐ **SEPARATE ANY OTHER SHARED ACCOUNTS.**

- ☐ **Joint Credit Cards**. Contact credit card company to close accounts or remove spouse as authorized user. ***Client task.***
- ☐ **Cell Phone Accounts**. Contact cell phone carrier to separate or terminate a shared account. ***Client task.***
- ☐ **Cable/Internet Providers**. Disconnect shared accounts; create new account. ***Client task.***
- ☐ **Utilities.** Separate or reassign utility accounts on the family residence (water, sewer, garbage, electricity) if needed. ***Client task.***
- ☐ **Tolling Accounts.** Reassign any *Good to Go!* or other automatic tolling accounts. ***Client task.***

☐ **SECURE ONLINE ACCOUNTS**

- ☐ **Email Accounts**. Update password and security questions. ***Client task.***
- ☐ **Online Bank and Investment Accounts**. Update password and security questions. ***Client task.***
- ☐ **Credit Card Accounts.** Update password and security questions. ***Client task.***
- ☐ **Social Media Accounts (Facebook/Twitter etc.).** Update password and security questions. ***Client task.***
- ☐ **Geographic Tracking on Devices**. If desired, disable any tracking applications on cell phone or other devices to protect privacy. ***Client task.***

3. UPDATE ESTATE PLAN

☐ **WILL AND POWER OF ATTORNEY DOCUMENTS.** Review estate plan and determine if an updated will and other estate planning documents should be completed. ***Client/Estate planning attorney task.***

☐ **UPDATE BENEFICIARIES:** Updating one's will is not enough. Beneficiaries should be immediately updated on any nonprobate assets, including:

- ☐ **Retirement Accounts**. Contact plan administrator to update your beneficiary designation. ***Client task.***
- ☐ **Investment Accounts**. Contact financial advisor for account to update your beneficiary designation. ***Client task.***
- ☐ **Life Insurance Policies.** Review language of decree to determine if there is a continuing obligation to provide life insurance to benefit the former spouse. Contact insurance agent to update beneficiary designation. ***Client task.***

LIFE CHANGES AFTER DISSOLUTION: STEPS TO TAKE

Janel K. Ostrem

Seattle Divorce Services

A Final Client Meeting

- The work of a divorce is usually not over at the time the decree is signed.
- Many attorneys rush through this phase of a case, either because we feel the issues are not "legal" or because we simply don't want to work on a case that has already lingered in our offices for too long.
- Today we will discuss the importance of a final client meeting and the topics that should be addressed.

How many folks routinely do a final client meeting in their practice?

Three Main Topics to Cover

- Attorneys Follow-Up Tasks
- Client Follow-Up Tasks
- Estate Planning Considerations

Attorney Tasks

Transfer Real Property

- Prepare quit claim deeds to property
- Prepare Real Estate Tax Affidavits
  - Cite WAC 458-61A-203(2) in section 7 to document that the transfer shall not be taxable.
- Refer client to local counsel for out of state deeds

Attorney Tasks Con't

Divide Retirement Accounts

- Qualified Domestic Relations Orders for 401(k) plans
- Other Retirement Orders for Government Plans

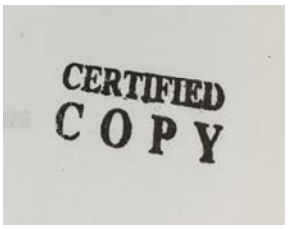
- Decide if you will do these orders in-house or find outside counsel.
- Encourage client to seek advice of financial advisor before funds are distributed from plan administrator.

Client Tasks

Name Changes

- RCW 26.09.150(3): Upon request of a party whose marriage or domestic partnership is dissolved or declared invalid, the court shall order a former name restored or the court may, in its discretion, order a change to another name.
- Social Security
- Driver's License
- Passport

- Client will need certified copy of decree from courthouse.



Client tasks continued

Vehicles

- Title changes
  - Licensing office
  - Decree should specifically identify the vehicle awarded to the client by year, make/model, license plate and VIN number.
- Vehicle insurance policies
  - Update plans, decide who is going to cover teen drivers.
- Update automatic tolling accounts (*Good to Go).*

Client tasks continued

Bank and Investment Accounts

- Review decree
- Update accounts if needed
- Consider meeting with a financial planner to update retirement plan.

Client tasks continued

Other Shared Accounts

- Credit card accounts
- Cell phone accounts
  - Who will be covering children's phone expenses?
- Cable and internet providers
  - Better not to attempt to modify an existing account.
  - Disconnect the account and start over with a new plan.

Client tasks continued

Other Shared Accounts

- Utility accounts for family home
- Medical insurance
  - Washington's health benefit exchange program: www.wahealthplanfinder.org.
- Business interests
  - Refer client to business attorney if changes are needed to governing documents for business.

Client tasks continued

Internet Security Considerations

- Passwords and security questions
  - Email accounts
  - Online bank/investment accounts
  - Credit card/loan accounts
  - Social media (Facebook/Twitter)
  - Online retailers (Amazon, Nordstrom, etc.)
- Don't use the same or similar naming conve for new passwords.
- Disable location tracking applications if needed.

Estate planning considerations

Overview of basic estate planning principles and terms (RCW Chapter 11)

Testate vs. Intestate Estates

- Testate = will
- Intestate = no will, distribution per statute (RCW 11.04.015)

Probate vs. Nonprobate Property

- Probate assets
  - Distributed pursuant to will or statute if no will
- Nonprobate assets
  - Distributed based on named beneficiary
  - Life insurance, 401(k) plans, etc.

Estate planning considerations

Washington State Estate Planning Statutes Specific to Divorce

The Will Statute

- RCW 11.12.051
- Unless a client updates their will *after* the divorce is final, any distribution to the former spouse will be automatically revoked.

Estate Planning

Nonprobate Asset Statute

- RCW 11.07.010
- Purpose is the same as the will statute, but may not be effective for all nonprobate assets.

Power of Attorney Statute

- RCW 11.94.080
- Unless the power of attorney specifically provides otherwise, a spouse's appointment is automatically revoked upon entry of decree.

The *Lundy* Case

Estate of Lundy v. Lundy, 187 Wn. App. 948 (2015)

- Division One case
- Court considered whether RCW 11.07.010(2)(a) (the nonprobate asset statute regarding the effect of divorce) applied to a beneficiary designation in a 401(k) account governed by ERISA, a federal statute.
- Division One ruled that ERISA trumped any contrary state laws. The statute was inapplicable and *did not* revoke the former spouse's claim to certain retirement benefits.

The *Lundy* Case

Facts of the *Lundy* Case

- Both spouses had retirement in their own names.
- Divorce decree language: Each party is awarded "all retirement funds and 401Ks" in his or her own name.
- Divorce occurs in 2009. Neither spouse updates beneficiaries on their retirement plans.
- In 2013, Mr. Lundy dies.
- Mr. Lundy's former wife is listed as the sole beneficiary on his 401(k), worth about $500K.
- The plan administrator distributes the funds to the ex-wife.
- Mr. Lundy's estate sues.

The *Lundy* Case continued

- Take home message = change your beneficiaries!
- What can attorneys do to prevent a *Lundy* situation?
- Waiver language might work, such as:

"I, WIFE, hereby relinquish and waive any and all right, title, interest and claim, including any survivor benefit or beneficiary rights, in the HUSBAND's retirement account."

Questions?

CHAPTER SIX

SPOUSE SUPPORT: THE WAY WE WERE, THE WAY WE ARE, AND THE WAY WE MIGHT BE HEADED

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MARIJEAN E. MOSCHETTO is a partner in the Bellevue law firm of Moschetto & Koplin Inc., P.S. Marijean was born and educated in Seattle, obtained her J.D. from McGeorge School of Law in Sacramento in 1978 and returned to Seattle to practice with her father. After her father's passing, Joe Koplin and Marijean formed their firm in 1989 and have been having fun practicing law together ever since. Marijean's long-term practice focuses primarily on Family Law.

A peripatetic "Bar Fly", Marijean began her bar association service as a member of the East King County Bar Association Board of Trustees in the early 1990's and served as President of the Eastside Legal Assistance Program in 1994-95. She has been an active member of several Washington State Bar Association organizations including the Board of Governors (1996-1999), the WSBA Professionalism Committee (chair, 2001-2002), the WSBA Family Law Section (chair, 2004-2005), faculty and board member for the Washington Leadership Institute (2004-2010, co-chair 2009), member of WSBA CLE Committee (chair, 2012-2013), the WSBA Solo & Small Practice Section (chair, 2013-2014). She is a member of the King County Bar Association and currently serves on the CLE Committee. She is a frequent presenter at CLE's on topics ranging from client interview techniques to leadership for lawyers to family law topics. She has been named a Super Lawyer many times, and in 2006 was voted one of Washington Law & Politics Top 25 Family Law Super Lawyers. In 2013 she was named as one of the Top 100 Attorneys in Washington as published in the Seattle Met Magazine, which included a featured interview in the July, 2013 issue.

Of equal importance, Marijean's world class baking skill is a welcome addition to her legal expertise and make her a sought-after committee member for groups who recognize that lawyers cannot survive on jurisprudence alone. She is the lead baker for the 4 M's, a group of women involved in the legal profession who recognize the integral nature of good relationships and good food. When not doing everything else in her life, she enjoys relaxing with science fiction, studying her Italian, or trying a good cookbook.

Introduction

Alimony (*aka* spousal maintenance, maintenance, spousal support) is a periodic payment of money to the other spouse, usually to assist with living expenses but not always confined to that purpose especially in its modern usage.

Legal scholars and practicing attorneys for years have been frustrated with trying to determine some underlying theory that justifies a periodic payment of money to the other spouse after the marriage has ended. This is not specific to a state, but a national discussion of the reasons for this remedy.

There is no doubt that some of the differences among the various formulations of criteria and results, both in the differences between the states and the differences between jurisdictions and courts in the State of Washington, have to do with differences in the statutory language authorizing such payments, the case law interpreting those statutes, and the common law guiding the actions of the individual judges. But that doesn't help lawyers advise clients, or citizens understand what their responsibilities might be if they get divorced. An inability to predict an outcome in a given case results in a perception that the law is unfair.

One further note: Having practiced many years, I tend to use the term "alimony" while knowing that the proper terminology in this state is "maintenance". I also use the term "divorce" frequently instead of "dissolution of marriage." My apologies to those who are disconcerted by this, and I trust that our communications will still be clear.

The Way We Were: History and Perspective

The origins of alimony have roots in three separate systems of law: the ecclesiastical courts, the English system, and for community property states, the Spanish system. Of course, in those times the only persons who were able to look for some kind of support for living expenses were persons who had some status or wealth that permitted them the opportunity to sue for support. Most of the populace if abandoned by their spouses simply had to cope with the situation and had no recourse. But that is not the subject of this historical review.

Political Marriages, Political "Divorce". The rights of women waxed and waned in centuries past insofar as her ability to control her destiny and control her property, especially for those of the noble class. Especially during medieval times, when the possibility of a marriage ending began to be discussed and laws and rules began to be promulgated, the life of a woman was controlled either by her father or by her husband. She was a commodity in some sense to increase the wealth or political power of the family. Her father made as advantageous a marriage as he could for these reasons.

The "marriage contract", possibly written but certainly understood if not written, provided that the wife would bring a dowry, property to give to the husband upon marriage, that he would then own during marriage. The size and nature of the dowry was the major determining factor to whom the daughter was married. She also brought her virginity so that the husband could be assured that any children were his. The church required that marriage be for life, so divorce was not possible. After marriage, a woman had no property to support herself, it belonged to the husband even if the parties lived separate and apart. So the husband's part of the bargain was to support the wife for life.

As the power of the ruling classes grew, marriages could be terminated in rare circumstances by annulment, but it required a special dispensation was granted either by a church court or by the Pope. And the church did not want to encourage separation or divorce. The historical power struggles of Henry VIII and the Roman Catholic Church over whether he could be granted an annulment from Catherine of Aragon have fascinated us ever since the 1400's.

Giving the property back to the wife and seeking a legal separation or divorce was not only difficult but could prove to be politically unwise. For example, Henry II of England married Eleanor, who brought with her to the marriage the rich lands of Aquitaine in France, giving Henry a claim to territory in France to further his ambitions to become the ruler of France. As Henry and Eleanor famously quarreled for years, they could not divorce for religious and political reasons. But Henry was required to support Eleanor and he did, virtually imprisoning her but providing room, board, and some staff although it was not in the style of the queen she was. Nevertheless, she had no recourse to the courts that in any event supported the rule that her land belonged to the King of England. Her only options were to seek a legal separation or an annulment. Both of those would have put her directly into conflict with Henry and would have had vast political ramifications for the political ambitions of herself and her children.

As there was no secular way to get a divorce, the church courts did intervene in certain circumstances to enforce a duty of support of the wife by the husband. But, when a wife initiated suit requesting alimony, the church imposed strict standards. To obtain a divorce *a mensa et thoro*¸ the wife had to be in need and blameless, and had to prove the husband was adulterous or cruel plus the husband had greatly profited from the marriage

through the acquisition of his wife's property. If the wife had any fault, she lost the right to support.

In 1857 in England the law courts took over the matter of divorce and the concept of proving "fault" began to erode somewhat. The courts would still examine whether the husband was at fault for breaking "the marriage contract" but now began to award alimony to the wives whose own actions contributed to the disintegration of the marriage, theorizing that such would prevent society from bearing the costs of divorce. Fault continued to be a basic factor in determining alimony until 1972 when England shifted to no-fault divorce.

The Spanish system was different from the English system. Like England, legal separation from cohabitation became available but while annulment was allowed, absolute divorce was still unavailable. Upon the granting of a legal separation or annulment, the wife's property was returned to her and she was entitled to a portion of the profits earned during the marriage from the community property. The wife was also entitled to alimony from the husband if he was at fault for the ending of the marriage. If the wife was at fault, the innocent husband could retain her property but still had to support the wife.

Evolution of Alimony in California. In the United States, almost every state from statehood had law relating to the duty of support and award of alimony after separation. Examining the evolution of California's law provides not only a historical context of alimony in community property states, but shows the evolution of the idea in the West.

In 1851, California enacted its first divorce statute permitting the court "In any action for a divorce, the court may, during the pendency of the action, or at the final

hearing, or afterwards, make such order for the support of the wife as may be just, and may at any time thereafter annul, vary, or modify such order." In 1872, it expanded this law and introduced the concept of "fault" as a basis for an award of alimony to the wife after the divorce was granted from an at-fault husband "during life, or for a shorter period" and provided the power to modify that award as well as the power to require the husband to post security for payments.

But, the statute made clear that the award was to be taken first from the community property if possible, and the court could refuse to award alimony if the wife had a separate estate or sufficient community property was awarded to enable proper support. It is important to remember that in those days, wealth was not earned in service industries but through the use of real property. Income derived from the management of real property. Thus, the emphasis was on use of the property as a first source of supporting the wife.

There were further revisions, and in 1933 the statute was amended to provide that the husband's obligation to pay would terminate when the wife remarried. 1951 revisions added that death terminated the obligation unless otherwise agreed between the parties. In 1967, alimony terminated or could be modified if the recipient cohabitated with another. In 1968, the statute was again amended to allow alimony to terminate if a court-ordered contingency occurred. A wholesale revision of the divorce laws occurred in 1970, further revisions were made in the 1980's and by 1992 the California legislature moved the laws of marriage and divorce over to its own Family Code.

Washington History on Alimony. *Loomis v. Loomis,* 1955, 47 Wash. 2d 468, 288 P. 2d 235, provides a fascinating history of alimony law in Washington. The issue before

the Court was whether courts of the state had the authority to grant periodic payments of alimony to the wife when there were no children. There was no statute actually speaking to an award of alimony upon divorce.

How had this dispute arisen? In 1854 the Washington Territorial Legislature vested the power to grant divorce in the district courts through constitutional art. II § 24 and art. IV § 6. The 1854 "Act Regulating Divorces", however, did not use the word "alimony". It provided that the court during the pendency of the action could make orders for the disposition of property and the children of the parties as may be deemed right and proper.

The term "alimony" was not used until *Madison v. Madison,* 1859, 1 Wash. T. 60, where the husband was required to put "a sum certain" into the hands of a trustee who was to pay amounts over to the defendant-wife quarterly, and at her death the principal reverted to the husband. Note that the husband was suing for divorce in this case, not the innocent wife.

The Legislature in 1860 re-enacted the 1854 law but changed the title to "An act to regulate suites for divorce and alimony" although the provisions of the 1854 Act were not changed. It wasn't until 1921 that the law mentioned alimony as a specific remedy, but the literal language limited it to the period during the interlocutory order of divorce.

In *King v. Miller,* 1894, 10 Wash. 274, 38 P. 1020, the husband disputed the court's authority to order him to pay alimony after the decree of divorce. However, this case arose on a foreclosure action brought by the wife against the husband, and because there had been no appeal from the decree the court rules the award *res judicata.* The courts continued to award alimony where appropriate.

In re Cave, 1901, 26 Wash. 213, 66 P. 425, arose as a *habeas corpus* action when the husband was jailed for contempt for failure to make monthly payments of alimony to his former wife. Mr. Cave argued that since the statute didn't provide for permanent alimony, the court didn't have jurisdiction to make such an order. The Supreme Court disagreed, but the opinion is confusing to me. In this case, Mr. Cave had sold a business for $500 and kept the money, refusing to share it with Ms. Cave. They had children. The divorce decree required Mr. Cave to pay money to Ms. Cave $20 per month. Although the Court stated it had the power to award alimony, it is unclear from a reading whether this was a property award, child support, or what we today think of as alimony:

> "The court is here unrestricted as to the provision to be made for the maintenance of the minor children. The circumstances of each case alone determine what provision should be made for such children. In cases where there is no property and the parties have ability to earn money, the court is no doubt authorized to require a stipulated sum to be paid at certain intervals for the maintenance of such children. So also it will be readily seen that a wide discretion is given to the trial court to distribute the property of the parties. There are no restrictions upon the court as to the manner or such disposition. It may be disposed of in a lump sum, or by installments, monthly or otherwise…. <u>This method of disposing of the property of the parties, call it alimony or whatever name you will, has been recognized by this court in a number of cases</u>…." (Emphasis mine)

In 1933 the Act was amended to allow the court to <u>modify</u> divorce decrees as to alimony and the care, support and education of children.

In 1949, the Legislature enacted RCW 26.08.110. Surprisingly, there was only one brief mention as to alimony:

> 'If the Court determines that either party, or both, is entitled to a divorce or annulment, judgment shall be entered accordingly, granting the party in whose favor the Court decides a decree of full and complete divorce or annulment, and making such disposition of the property of the parties, either community or separate, as shall appear just and equitable, having regard to the respective merits of the parties, to the condition in which they will be left by such divorce or annulment, to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision

> for costs, and for the custody, support and education of the minor children, of such marriage. Such decree as to alimony and the care, custody, support and education of children may be modified, altered and revised by the Court from time to time as circumstances may require. Such decree, however, as to the dissolution of the marital relation and to the custody, management and division of property shall be final and conclusive upon both parties subject only to the right to appeal as in civil cases * * *." *Laws of 1949, chapter 215, § 11, RCW 26.08.110* (Emphasis mine).

The Court in *Loomis* faced this conundrum, did courts have the authority or not to award alimony if there was no specific grant of statutory authority? The Court's conclusion was yes, but it wasn't a slam-dunk. After reviewing the history of alimony, six justices (one did not participate) decided that the court could award alimony in divorce. Two justices dissented, stating there was no statutory authority and the matter should be left to the legislature.

Note that although fault was a component of divorces in that time, there was still the notion that due to the inability to support herself, after the end of a marriage the wife usually still needed to be supported although the distinction between alimony and child support and property division was blurred.

The Way We Are: Washington Law

Washington Law. RCW 26.08 was repealed. RCW 26.09.090 is our law enumerating the factors pertaining to spousal maintenance. Alimony is now called "maintenance".

Originally revised in 2008 and in this form as of 2015, it states:

> "(1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court

may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance."

What is the source of this statutory language? And what does it mean? Again, a bit of background and history is important to understanding our current position.

In the 50's, 60's and 70's the movement among legal scholars to provide guidance and hopefully unify some of the legal theories and laws in the nation gained speed. Family law did not escape these efforts. The Uniform Marriage and Divorce Act (UMDA) was originally promulgated in 1970, and amended in 1971 and 1973. It was seminal in revising concepts and theories surrounding many aspects of modern divorce and family law and in suggesting approaches for statutory revision. Relating to alimony, the UDMA renamed alimony "maintenance" and shifted the examination from fault to a needs based analysis. Thus, it signaled the demise of the theory of the marriage contract, where the wife's role was to provide a home and children the husband assumed the duty

to support the family, including her, for the rest of her life. Of course, this reflected not only the shifting social structure where divorce was more often sought, and as often by the wife as the husband, but the growth of women's labor in the paid job market and women's rights.

The provisions of the UMDA in many respects were adopted word for word by the Washington legislature in its revision of the marriage and divorce laws. However, the legislature did not adopt everything. Section § 308 of the UMDA states the following:

> "**§ 308. [Maintenance]**
>
> "(a) In a proceeding for dissolution of marriage, legal separation, or maintenance following a decree of dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
>
> (1) lacks sufficient property to provide for his reasonable needs; and
>
> (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.
>
> "(b) The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including:
>
> (1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
>
> (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
>
> (3) the standard of living established during the marriage;
>
> (4) the duration of the marriage;
>
> (5) the age and the physical and emotional condition of the spouse seeking maintenance; and
>
> (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance."

The comments of the authors make the intent clear that (a) marital fault was no longer to be examined, (b) the primary source was to be an award of property, just as in the past, and (c) maintenance was to permit the recipient the means to obtain employment:

> "The dual intention of this section and Section 307 is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance. Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered.
>
> "Assuming that an award of maintenance is appropriate under subsection 308(a), the standards for setting the amount of the award are set forth in subsection 308(b). Here, as in Section 307, the court is expressly admonished not to consider the misconduct of a spouse during the marriage. Instead, the court should consider the factors relevant to the issue of maintenance, including those listed in subdivisions (1)-(6)."

Factors (b) (1) – (6) are virtually identical to our statute. But § (a) was not included. That is, maintenance awards were not restricted to situations where the property award is insufficient to provide for reasonable needs of the requesting spouse or cannot support himself/herself through appropriate employment. Why this omission? I don't know.

Lacking the initial criteria as to when maintenance was to be awarded, this left Washington with a statute that can be used to justify any award, so long as a reviewing court says it was just and equitable. It gives courts the maximum flexibility (also known as "judicial discretion") to determine what is appropriate at the end of a marriage, but gives no clear guidelines for when and how much and how long maintenance would be awarded. As a result, we have a plethora of case law that is contradictory. Consider:

- Purpose of spousal maintenance is to support spouse, typically the wife, until she is able to earn her own living or otherwise becomes self-supporting. *In re Marriage of Luckey* (1994) 73 Wash.App. 201, 868 P.2d 189.

- Spousal maintenance is a flexible tool for equalizing the parties' standard of living for an appropriate period of time. *In re Marriage of Wright* (2013) 179 Wash.App. 257, 319 P.3d 45, reconsideration denied, review denied 180 Wash.2d 1016, 331 P.3d 1172, review denied 180 Wash.2d 1019, 327 P.3d 54.

- Alimony is not a matter of right, and when wife has ability to earn living, it is not policy of law to give her perpetual lien on her divorced husband's future income. *Morgan v. Morgan* (1962) 59 Wash.2d 639, 369 P.2d 516.

- Under this section, the only limitation placed upon the trial court's ability to award maintenance is that the amount and duration, considering all relevant factors, be just. *Washburn v. Washburn* (1984) 101 Wash.2d 168, 677 P.2d 152.

- The court's decision on spousal maintenance is governed strongly by the need of one party and the ability of the other party to pay an award; the only limitation on the maintenance award is that the amount and duration, in light of all the relevant factors, be just. *In re Marriage of Marzetta* (2005) 129 Wash.App. 607, 120 P.3d 75, review denied 157 Wash.2d 1009, 139 P.3d 349

- An award of alimony is governed by the need of the wife and the financial status of the husband. The wife is not entitled to her former standard of living as a matter of right and is obliged to prepare herself to be self-supporting. The policy of the law is that the wife has a duty to prepare herself for and gain employment if possible. *Cleaver v. Cleaver* (1973) 10 Wash.App. 14, 516 P.2d 508.

Examples of cases do not help to enable the practitioner to predict what a court might do:

- Forty-six-year-old, able bodied, childless wife who had good education and business training and considerable business experience would be granted $50 monthly alimony for only six months in order to encourage her to seek employment. *Murray v. Murray* (1946) 26 Wash.2d 370, 174 P.2d 296.

- Trial court abused its discretion in ordering former husband to pay former wife $1,400 per month in maintenance for indefinite time period plus her health insurance premiums and tuition; husband's monthly income as fire fighter was approximately $2,800, order left husband with approximately $1,000 per month and wife with $1,855 per month, husband's personal property was not significant, there was no evidence that husband was currently earning income apart from his fire fighter salary, order did not provide for future reduction in maintenance upon husband's retirement or in event of his disability yet required payment to wife of one-half husband's retirement or disability income, wife received most of equity in marital home, wife had part-time job, there was no finding that wife's health problems prevented her from working, and there was no evidence in record showing that husband dissipated or concealed assets. *In re Marriage of Mathews* (1993) 70 Wash.App. 116, 853 P.2d 462, review denied 122 Wash.2d 1021, 863 P.2d 1353.

- While fact that divorced wife needed time to rehabilitate herself for gainful employment and that duty to care for minor children would limit time available for such employment, established need for payment of alimony for limited period

of time, under particular facts of case, including ages of children and age and health of wife, fixing of alimony for maximum period of approximately eleven years at $200 a month was excessive, both as to time and amount. *Endres v. Endres* (1963) 62 Wash.2d 55, 380 P.2d 873.

- Before awarding maintenance to wife for period of 16 months, trial court was required to make express finding as to whether that was an appropriate length of time for maintenance in view of disparate earning capacities of parties. *In re Marriage of Estes* (1997) 84 Wash.App. 586, 929 P.2d 500.

- Permanent award of alimony is not favored. *Mose v. Mose* (1971) 4 Wash.App. 204, 480 P.2d 517; *McKendry v. McKendry* (1970) 2 Wash.App. 882, 472 P.2d 569.

- It is policy of this state to have divorced wife seek employment, if possible, and not give her permanent claim for alimony against her husband. *Dakin v. Dakin* (1963) 62 Wash.2d 687, 384 P.2d 639.

The July 2014 edition of the Family Law Handbook published by the Washington Courts advises citizens as follows:

"CHAPTER 5 SPOUSAL MAINTENANCE (ALIMONY)

"What is spousal maintenance?

"Spousal maintenance (alimony) is financial support provided by one spouse to the other during or after a divorce, separation, or invalidity proceeding.

"How does the court decide about spousal maintenance?

"If you file for divorce, legal separation, or request that your marriage be declared invalid, you have a right to ask for spousal maintenance. Maintenance is generally based on financial and economic factors, not whether one of the spouses is at fault. Instead, if there is a big economic difference between the spouses, maintenance may be ordered to help achieve financial independence. The court has a great deal of discretion to decide how much and for how long maintenance will be paid. The court considers many factors (such as the length of the marriage, health and ages of the spouses, and employment history), but there is not a formula like there is for child support. If maintenance has been ordered, a spouse can later ask that the order be changed under certain situations. Maintenance can greatly affect your tax situation. Some federal laws, including the tax code, may treat heterosexual married couples differently than same-sex married couples. Getting advice from a tax attorney or qualified financial planner is important."

The Way We Could Become

Today, it is an acknowledged risk that a marriage will end in divorce. The expectations of those entering marriage are quite different from the past as we examined earlier in these materials. Society has changed. Women are in the paid job market in record numbers, earning more than ever before and committed to a career. Many familial duties that were divided based upon gender roles - the wife assumed the caretaking roles for the family – are being changed. Duties such as housekeeping, cooking, caring for the children, are now being outsourced to paid professional helpers. And the advent of same-sex marriage I submit is going to push the envelope even further since research shows in these marriages there tends to be no traditional gender-based division of duties. Women as a class no longer need protection just because they are women.

The authors I've read state there are two issues to resolve: First, what is the purpose of alimony/maintenance in the usual case? From this, I'm excluding the *Washburn* types of cases, or the long-term marriage cases as those are not the usual type in daily family law practice. I'm talking about the more common case, which today normally involve families where both spouses have a job. Research tells us that today the pure homemaker cases are a definite minority. Second, can we have better rules and guidelines that we can use to help our clients, or for unrepresented parties to know and understand the expectations upon the ending of a marriage?

One theory to justify future maintenance dusts off the theory of "marriage contract" and puts it into a modern guise. Under this theory, we try to look at how the financially disadvantaged party is "damaged" at the end of the marriage. Were there economic sacrifices made by the two of them in favor of one of the spouses? Were there

foregone career opportunities? Was one of the spouses unjustly enriched somehow? Was there a reasonable expectation that by getting married, one would enjoy a higher standard of living in the future? Can this be proven, or is it just assumed? Is this something that we can quantify? What are the components of the contract? If we talk about damages, who is the breaching party to the contract?

"Partnership theory" starts from a somewhat similar place but ends up with a different conclusion. Marriage is often referred to as a partnership and in a colloquial sense it certainly is. And it is certainly true that spouses jointly contribute labor, financial and non-financial resources for the good of the relationship as a whole. So this theory states that beyond the acquisition of property, the one of the real rewards of the partnership is the investment into human capital, that is, the partnership has created earning power in one or the both of the spouses. The conclusion is that that earning power created should be divided in the future between the higher income earner and the lower income earner. Income stream, therefore, it simply another type of property to be divided in divorce. Unfortunately, this theory makes an assumption about how the income stream was created or answer the question of what to do when the partnership really hasn't created the income stream or income differences. What place does innate talent have in creating an income stream? If a spouse who requests divorce hasn't lived up to his/her partnership duties, should that person get maintenance? If a spouse has continued with his/her career during the marriage without hindrance, should that spouse be awarded maintenance? What responsibility does a spouse bear for his/her choice to remain at home, knowing the real possibility that the parties will divorce? Does the

theory apply equally well to marriages of less than ten years versus marriages of over ten years?

While it's important to set some kind of theory to support social and legislative policy, it is not my intent to engage in this debate. I'll leave it to the scholars and legislators. What I want to do is review what other organizations have suggested and other states have and consider those as a model for adoption in Washington. Increasingly, formulas are used to set the amount of alimony and the period it will be received, while reserving to judicial discretion unusual cases. This provides predictability for the parties who are ending the marriage and for the lawyers who are trying to advise them.

AAML Formula. In 2008, the American Academy of Matrimonial Lawyers (AAML) published a journal article suggesting that a compensatory rationale was unworkable. It agreed that a simple, workable formula should be used. The common denominators in any dissolution were income of the spouses and the duration of the marriage. Its suggested formula was: 30% of the payor's gross income under the child support guidelines of the state, minus 20% of the payee's gross income, with a maximum of 40% of the combined gross income, multiplied by 0.3 for marriages of 0-3 years, 0.5 for marriages of 3-10 years, 0.75 for marriages of 10-20 years, and permanent alimony for marriages of over 20 years. The spousal support payment is calculated before child support is determined. It doesn't apply where combined gross income of the parties is more than one million dollars a year. Finally, there are a number of deviation factors that the court can apply, such as unusual needs, receipt of a disproportionate share of the marital estate, or "other circumstances that make application of these considerations inequitable."

New Mexico Model. New Mexico's statute, NMSA 1978, § 40-4-7(E) (1997), has found favor with some commentators:

> "E. When making determinations concerning spousal support to be awarded pursuant to the provisions of Paragraph (1) or (2) of Subsection B of this section, the court shall consider:
>
> (1) the age and health of and the means of support for the respective spouses;
> (2) the current and future earnings and the earning capacity of the respective spouses;
> (3) the good-faith efforts of the respective spouses to maintain employment or to become self-supporting;
> (4) the reasonable needs of the respective spouses, including:
> a) the standard of living of the respective spouses during the term of the marriage;
> b) the maintenance of medical insurance for the respective spouses; and
> c) the appropriateness of life insurance, including its availability and cost, insuring the life of the person who is to pay support to secure the payments, with any life insurance proceeds paid on the death of the paying spouse to be in lieu of further support;
> (5) the duration of the marriage;
> (6) the amount of the property awarded or confirmed to the respective spouses;
> (7) the type and nature of the respective spouses' assets: provided that potential proceeds from the sale of property by either spouse shall not be considered by the court,unless required by exceptional circumstances and the need to be fair to the parties;
> (8) the type and nature of the respective spouses' liabilities;
> (9) income produced by property owned by the respective spouses; and
> (10) agreements entered into by the spouses in contemplation of the dissolution of marriage or legal separation."

The formula in New Mexico depends on whether children are involved:

Alimony Guideline Worksheet

Monthly Payment
(Use Only One Box)

If there are no children for whom support is paid, then use lines 1 through 6.

1. Payor's Gross Monthly Income _____
2. Multiply Line 1 by 0.3 x 0.30 = _____
3. Recipient's Gross Monthly Income _____

4. Multiply Line 3 by 0.5 x 0.50 = _____
5. Subtract Line 4 from Line 2 _____
6. Check a Box:
9 Line 5 is positive number. Payor pays this monthly alimony amount.
9 Line 5 is zero or negative. No monthly alimony is paid.

OR

If there are children for whom child support is paid, use Lines A through F.

A. Payor's Gross Monthly Income _____
B. Multiply Line A by 0.28 x 0.28 = _____
C. Recipient's Gross Monthly Income _____
D. Multiply Line C by 0.58 x 0.58 = _____
E. Subtract Line D from Line B _____
F. Check a Box:
9 Line E is positive number. Payor pays this monthly alimony amount.
9 Line E is zero or negative. No monthly alimony is paid.

California. California's statute has fairly standard language. California Family Code §4320 states:

> "In ordering spousal support under this part, the court shall consider all of the following circumstances:
>
> (a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:
>
> (1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.
>
> (2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.
>
> (b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.
>
> (c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.

(d) The needs of each party based on the standard of living established during the marriage.

(e) The obligations and assets, including the separate property, of each party.

(f) The duration of the marriage.

(g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.

(h) The age and health of the parties

(i) Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.

(j) The immediate and specific tax consequences to each party.

(k) The balance of the hardships to each party.

(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a "reasonable period of time" for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties.

(m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4325."

(n) Any other factors the court determines are just and equitable."

Commentators have suggested that the Santa Clara County computational method is a model for other jurisdictions:

"**C. TEMPORARY SPOUSAL OR PARTNER SUPPORT FORMULA:** **"**Temporary spousal or partner support is generally computed by taking 40% of the net income of the payor, minus 50% of the net income of the payee, adjusted for tax consequences. If there is child support, temporary spousal or partner support is calculated on net income not allocated to child support and/or child-related expenses. The temporary spousal support calculations apply these assumptions…..

"These policies are not Local Rules and do not have the force of law, and they do not replace judicial discretion.

"These policies are published to provide parties and counsel an understanding of decisions the Court is likely to make in specific factual situations commonly found in family law litigation, but not covered by case law or statute.

"These policies are general statements describing how the Court will usually deal with the specific issues set forth below. The intent of the Court in adopting these statements is to encourage and assist parties and counsel to resolve disputes.

"These policies will apply to temporary and permanent orders, in the Court's discretion. They will not apply to a given case when contrary to law or when the application results in undue hardship.

"A. SPOUSAL OR PARTNER SUPPORT
"1. Determination of Income

"The incomes of the payor and the payee will generally be determined in the same manner as set forth in the applicable provisions of current statutory child support law, with due consideration of applicable spousal or partner support statutes.

"2. Standard of Living During Marriage or Domestic Partnership

"In determining the standard of living during marriage or domestic partnership, as provided in current statutory and case law regarding the standard of living, the Court will usually base its findings on the combined gross incomes of the parties at the time of separation.

"3. Application of Local Spousal or Partner Support Formula

"The Court will use the local spousal or partner support formula at temporary spousal or partner support hearings except in the following circumstances:

> "a. The application would be inequitable; or
> "b. The demonstrated need for the requested support is below the formula amount.
>
> "In the interest of avoiding unnecessary litigation on this issue, the Expense Declaration of the payee will not be viewed as determining or fixing need, but as indicating the level of expenditure under the existing circumstances.
> (Eff. 1/1/05)"

Conclusion

As recently as 1968, a noted treatise on the law of domestic relations opined:

> "These rules acquire much of their force and vitality from the fact that they construct a model of correct behavior. They are moral precepts….[that] describe the traditional roles of husband and wife. The husband is to provide the family with food, clothing, shelter, and as many amenities of life as he can manage….The wife is to be the mistress of the household, maintaining the home with the resources furnished by the husband, and caring for the children."

We laugh. Times have certainly changed, and we congratulate ourselves on our enlightened modern attitudes.

We can't ignore the historical underpinnings to our current laws on alimony/maintenance, and the societal assumptions about it. What was once the theme, however, needn't drive the story for the future. As family law lawyers, we are uniquely situated by training and experience to making an impact on modernizing this important aspect of ending a marital relationship. I invite comments and future discussion on this topic from all of us to reach a fair result for our clients.

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SPOUSAL MAINTENANCE

The Way We Were, The Way We Are, And The Way We Might Be Headed

By
Marijean E. Moschetto

****

WSBA Family Law Section
FAMILY LAW CHANGES
December 4, 2015

SPOUSAL MAINTENANCE CHANGES: Discussion Questions

Assuming ability to pay, in awarding post-decree maintenance, rank in importance the following factors:

_____ *Need to train for future employment.*
_____ *Duration of marriage/domestic partnership.*
_____ *Age, health, emotional condition of requesting party.*
_____ *Standard of living during marriage/domestic partnership.*
_____ *Property award.*
_____ *Other: _____*

SPOUSAL MAINTENANCE CHANGES: Discussion Questions

True or False in Your County:

"If a spouse/domestic partner is working or is capable of working, he/she will not be awarded post-decree spousal maintenance."

True or False in Your County:

"Post-decree, the lives of the parties should be equalized for some period of time that is appropriate in the discretion of the court."

SPOUSAL MAINTENANCE CHANGES: Discussion Questions

The best model for decisions is:

_____ The AAML Formula.
_____ The New Mexico Model.
_____ The Santa Clara Rule.
_____ Other:_____.
_____ None, Washington's current statutory model works.

"The Marriage Contract"

"Alas, my love, you do me wrong
To cast me off discourteously…"

The concept of "blame"

- →Based upon violation of "contract"
- →Protected wife who was innocent only
- →Wife had to prove adultery and/or cruelty + profits from marriage due to acquisition of wife's property

Result = "Divorce", "*a mensa et thoro*"

The Spanish system

Community property system:

→Wife still brought property to be put under husband's control.

→But wife was entitled to her property and a portion of the profits at the end of the marriage (separation or annulment).

→Alimony/support awarded no matter who was at fault for the end of the marriage.

Evolution in California

- 1851 enactment: support based upon what was "just".
- Available during pendency or final hearing or afterwards.
- "Fault" not introduced until 1872
- Courts to use property first as a means of support.
- Order could be modified or terminated.

Washington: Historical Development of Concept of Alimony

Alimony in Washington

- 1854 Territorial Legislature enabled disposition of property, not continuing support.
- *Madison v. Madison,* 1859, first recorded case requiring trust for support of wife.
- 1894, *King v. Miller*, trial court awarded alimony but a foreclosure case.

Alimony in Washington *(cont'd)*

→*In re Cave*, 1901, arose as a *habeas corpus* case, but was it a property award or alimony?

"This method of disposing of the property of the parties, call it alimony or whatever name you will, has been recognized by this court in a number of cases…."

(Emphasis added)

- 1921 Legislature allowed alimony as interlocutory relief.
- RCW 26.08.110 enacted in 1949 allowed award of alimony but language not completely clear grant of authority.

Washington's RCW 26.09.090 Spousal Maintenance

- Must be married or in a domestic partnership.
- Amount and term to be "just" after consideration of:
  - Financial resources of requesting person;
  - Time necessary to find employment or be trained for employment;
  - Standard of living established;
  - Duration of relationship;
  - Age, physical and emotional condition;
  - Financial obligation of person seeking maintenance;
  - Ability of the person from whom the award is sought to meet his or her needs and financial obligations while meeting those of the other.

The UMDA

- Two important shifts:
  - Renamed periodic support "maintenance";
  - Fault no longer a factor, but implemented a <u>needs</u> based analysis.
- Adopted by many states, but importantly not all provisions were adopted.

The UMDA *(cont'd)*

- In Washington, the following was <u>not</u> adopted:

"In a proceeding for dissolution of marriage……the court may grant a maintenance order…only if it finds that the spouse seeking maintenance:

(1) lacks sufficient property to provide for his reasonable needs; and

(2) is unable to support himself through appropriate employment……"

Washington: Consequences of the "Just Result" Standard

- "Purpose of spousal maintenance is support spouse, typically the wife, until she is able to earn her own living or otherwise becomes self-supporting." *In re Marriage of Luckey (1994)*
- "Spousal maintenance is a flexible tool for equalizing the parties' standard of living for an appropriate period of time." *In re Marriage of Wright (2013)*

What could be the Future?

- What is the purpose we want to accomplish?
  - Recognize the financially disadvantaged party is "damaged" by the ending of the relationship and it needs to be remedied?
  - Recognize that there was an investment into "human capital" in the partnership marriage?
- Do we need more predictable rules or guidelines?
  - Should amount & length be determined by a "formula"?
  - Does the system of "judicial discretion" work better?

AAML Formula

Income:

+30% of the payor's gross income (per child support guidelines of the state),

-minus 20% of the payee's gross income,

max'd at 40% of the combined gross;

Times for length of marriage:

0-3 years	0.3
3-10 years	0.5
10-20	0.75
> 20 years	permanent

New Mexico: NMSA 1978§40-4-7(E)

No children:	Where Children Being Supported:
1. Payor's Gross Monthly Income _____	A. Payor's Gross Monthly Income _____
2. Multiply Line 1 by 0.3 x 0.30 = _____	B. Multiply Line A by 0.28 x 0.28 = _____
3. Recipient's Gross Monthly Income _____	C. Recipient's Gross Monthly Income _____
4. Multiply Line 3 by 0.5 x 0.50 = _____	D. Multiply Line C by 0.58 x 0.58 = _____
5. Subtract Line 4 from Line 2 _____	E. Subtract Line D from Line B _____
6. Check a Box:	F. Check a Box:
☐ Line 5 is positive number. Payor pays this monthly alimony amount.	☐ Line E is positive number. Payor pays this monthly alimony amount.
☐ Line 5 is zero or negative. No monthly alimony is paid.	☐ Line E is zero or negative. No monthly alimony is paid.

California Family Code §4320

- *Examines:*
  - earning capacity of supported party;
  - contributions of supported party to the other's education or career;
  - ability of other to pay support;
  - needs of each party;
  - obligations & assets;
  - duration of marriage;
  - ability of supported party to engage in gainful employment;
  - age, health;
  - history of domestic violence;
  - tax consequences;

California Family Code §4320 *(cont'd)*

- *And looks at:*
  - Balance of hardships to each;
  - "(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a "reasonable period of time" for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties."
  - Criminal conviction of an abusive spouse;
  - Any other factors "the court determines are just and equitable."

Santa Clara County formula

Equals:

40% of the net income of the payor,
(computed per child support law)
Minus 50% of the net income of the payee,

Both adjusted for tax consequences.

Provided if child support is paid, the net income is that not allocated to child support and/or child-related expenses.

And provided, judicial discretion must still be exercised.

SPOUSAL MAINTENANCE CHANGES: Discussion Questions

Assuming ability to pay, in awarding post-decree maintenance, rank in importance the following factors:

_____ *Need to train for future employment.*
_____ *Duration of marriage/domestic partnership.*
_____ *Age, health, emotional condition of requesting party.*
_____ *Standard of living during marriage/domestic partnership.*
_____ *Property award.*
_____ *Other:* _____

SPOUSAL MAINTENANCE CHANGES: Discussion Questions

True or False in Your County:

"If a spouse/domestic partner is working or is capable of working, he/she will not be awarded post-decree spousal maintenance."

True or False in Your County:

"Post-decree, the lives of the parties should be equalized for some period of time that is appropriate in the discretion of the court."

SPOUSAL MAINTENANCE CHANGES: Discussion Questions

The best model for decisions is:

_____ The AAML Formula.
_____ The New Mexico Model.
_____ The Santa Clara Rule.
_____ Other:_____.
_____ None, Washington's current statutory model works.

Questions and Discussion