FAMILY LAW NEWSLETTER

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What About the Children? - The Rise and Fall of the Best Interests Standard in Third Party Custody and Visitation Cases

Mark Kramer, Kramer and Associates

Introduction

Generations ago, families were typically multi-generational. Children, parents and grandparents lived in the same household and parenting was commonly shared. After World War II, the parent/grandparent generations increasingly became physically separated. Then, a variety of factors (including drugs, alcohol and dire economic conditions to name a few) conspired to make the older generation a significant partner once again in parenting children. Read the rest...

Pension Division – Three Easy Steps to Avoiding Costly Errors

By: David W. Gault

Executive Summary

To get pension division right in divorce proceedings (meaning truly equitable), family law attorneys and members of the bench do not need to be technical experts. All they really need is an elementary and easily gained understanding of some basic concepts presented here. The following discussion focuses on division of retirement plans prior to retirement, but the same principles apply to pensions in payout status. A recent Court of Appeals opinion, ***Rushby and Rushby***, 247 Or App 528, 270 P3d 327 (2011), held that a pension in payout status must be treated as property and therefore subject to potential division, and is not to be regarded as merely an income stream. Read the rest...

Marriage Equality Background and the Oregon Family Fairness Act

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I. Introduction

Perhaps no social issue has impassioned more sustained debate among Americans in the last decade than the question of marriage rights for same-sex couples. Gay couples sought such protections for their relationships as early as 1971, ***Baker v. Nelson***, 191 NW2d 185 (Minn. 1971), appeal dismissed, 409 US 810 (1972), but the issue did not really impinge on the public consciousness until some 20 years later. Read the rest...

Editor's Note

It is exciting to bring you this month's issue of the newsletter with five outstanding articles, an announcement and a correction from one of last year's articles. It is difficult to determine how to lead off the newsletter this month so we are listing three articles as leads on the front page with hyperlinks to the full article inside.

We have been bringing you regular articles on military family law subjects now for some time and as these articles are becoming regular features we have named a section for them called The Military Family Law Feature. As long as those articles keep coming look for that feature section each issue.

I want to again thank these authors for submitting such great materials. I hope you have a chance to read each and every article and by all means save them for future reference.

Daniel R. Murphy
Editor

What About the Children? – The Rise and Fall of the Best Interests Standard in Third Party Custody and Visitation Cases (Continued from Page 1)

Today, grandparents, foster parents, and other third-parties play an increasing role in the care of children, statewide and nationally. "One child in 10 in the United States lives with a grandparent, a share that increased slowly and steadily over the past decade before rising sharply from 2007 to 2008, the first year of the Great Recession."[1] About four-in-ten (41%) of those children who live with a grandparent (or grandparents) are also being raised primarily by that grandparent. In 2009, 7.8 million children lived with at least one grandparent. 2.9 million (or 41%) were in households where a grandparent was the primary caregiver.[2] There are more than 8000 children in foster care on any given day in Oregon.33 Approximately 22,000 children are raised by relative caregivers instead of parents, the equivalent of 3% of all children in Oregon. Of that number about 10% are in foster care.[4]

The relationship between these third parties and natural or biological parents has resulted in a significant and evolving body of case law and statutory changes. In this author's view, the evolution of recent law has run counter to the best interests of children.

1 September 2010, Pew Research Center, Pew Social and Demographic Trends, analysis of recent US Census Bureau data.

2 *Id.*

3 2011 Children's Defense Fund Report (http://www.childrensdefense.org/child-research-data-publications/data/state-data-repository/cits/2011/children-in-the-states-2011-oregon.pdf.)

4 "Stepping Up for Kids" - Report, Anne E. Casey Foundation, May, 2012 – http://www.aecf.org/KnowledgeCenter/Publications.aspx?pubguid={642BF3F2-9A85-4C6B-83C8-A30F5D928E4D}

The World Before and After *Troxel v. Granville*

Before *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed 49 (2000), Oregon's jurisprudence involving disputes between third parties and legal parents, evolved from a strict preference in favor of legal parents to a fairly straight-forward application of the best interests test. In *Hruby and Hruby*, 304 Or 500 (1987), the Oregon Supreme Court held that the best interest standard is not applicable in custody disputes between natural parents and other persons, and that in custody disputes, a natural parent would not be deprived of custody absent "some compelling threat to their present or future well-being." That standard remained in place until 1999 when in *Sleeper and Sleeper*, 328 Or 504 (1999), *Hruby* was effectively swept aside and the Court ordered that the best interest standard be applied to psychological parent cases. In *Sleeper*, the stepfather, a primary caretaker, obtained custody over biological mother. (See also *Moore and Moore*, 328 Or 513 (1999)). Significantly, the court limited *Sleeper* holding, applying the best interests test under the statute, by making it limited by an undefined "supervening right" of a natural parent.

Therefore, before *Troxel*, once a third party had met the test for being psychological parent (*de facto* custodian), the best interest standard was applied and the psychological parent competed on an equal footing with the natural parent, subject to the natural parent's "supervening right." This "supervening right" was defined and applied in the post *Troxel* cases.

Then came *Troxel,* where United States Supreme Court, in a plurality opinion, held that awarding visitation to a non-parent, over the objections of a parent is subject to constitutional limitations. The court invalidated, as applied, a Washington statute authorizing "any person" to petition for visitation rights "at any time" and providing that the court may order such visitation if it serves the "best interest of the child," on the ground that the statute violates a legal parent's right to substantive due process. The court specifically recognized as a fundamental liberty interest, the "interest of parents in the care, custody and control of their children." *Troxel, supra* 530 US at 66. This is referenced below as the "*Troxel presumption.*"

In 2001, Oregon's legislature responded to *Troxel* by radically restructuring Oregon's psychological parent law (ORS 109.119) and in so doing, eliminated ORS 109.121-123, which gave specific rights to grandparents. That statute creates two classes of third parties - "psychological parents" and those with "an ongoing personal relationship." Psychological parents can seek custody or visitation; those with an ongoing personal relationship can seek only visitation. To obtain relief, both classes need to overcome the *Troxel* presumption by proving one or more rebuttal factors - psychological parents by a preponderance of the evidence and the others by a clear and convincing standards. Assuming the rebuttal is proven, then relief may be ordered if it is in the best interests of the children.

The Fallout - Oregon's Application of *Troxel*

Since 2001 there have been more than 30 cases directly or indirectly addressing grandparent and psychological parent issues arising under the 2001 statute. The vast majority of cases have applied ***Troxel*** and ORS 109.119 in custody contests. The Oregon Supreme Court has spoken only once - ***O'Donnell-Lamont and Lamont,*** 337 Or 86 (2004). There, the Court reversed the Court of Appeals and restored custody of the children to grandparents. Contrary to several prior Court of Appeals decisions, the Supreme Court held there that it is not necessary that a third party overcome the ***Troxel*** presumption by demonstrating that the birth parent would harm the child or is unable to care for the child. Rather, the Court adhered to the legislative standard that "the presumption could be overcome by a showing, based on a preponderance of the evidence, that the parent does not act in the best interest of the child." ***Id.*** at 107. While a parent's unfitness or harm to a child can be strong evidence to overcome the ***Troxel*** (and ORS 109.119) presumption, that presumption may be rebutted by evidence of any of the enumerated factors as well as other evidence not specifically encompassed by one of the statutory factors.

> *"The statutory touchstone is whether the evidence at trial overcomes the presumption that a legal parent acts in the best interest of the child, not whether the evidence supports one, two, or all five of the nonexclusive factors identified in ORS 109.119 (4) (b)."* Id. at 108.

Although ***O'Donnell-Lamont*** was clear that the ***Troxel*** presumption legal parent presumption could be overcome by one, two or any number of the rebuttal factors, considered in isolation or in their totality, that holding has been distorted in a serious of later decisions by the Court of Appeals. In such cases, the Oregon Court of Appeals has focused almost entirely on two factors, parental fitness and harm to the child.

In ***State v. Wooden***, 184 Or App 537 (2002), a custody order in favor of maternal grandparents was reversed in favor of father where grandparents failed to prove father was unfit. In ***Strome and Strome***, 185 Or App 525 at 201 Or App 625 (2005), the Court of Appeals affirmed its prior (pre-***O'Donnell-Lamont***) decision awarding custody three children to birth father where father was deemed fit at least for the ten months prior to trial. In ***Mulheim v. Armstrong***, 217 Or App 275 (2007), the Court of Appeals reversed the trial court's award of custody of a child to maternal grandparents finding that even with expert testimony supporting grandparents, that there was insufficient evidence to demonstrate "a serious present risk of psychological, emotional or physical harm to the child." ***Id.*** At 287, quoting ***Strome and Strome,*** 201 Or App 625, 634-35 (2005). In ***Nguyen and Nguyen***, 226 Or App 183 (2009) an award of custody to maternal grandparents was reversed and custody was awarded to birth mother where the court found that mother's history did not make her ***presently*** unable to care adequately for the children and that as in prior cases, there is insufficient evidence of "serious present risk" of harm. See also ***Sears v. Sears & Boswell***, 198 Or App 377 (2005)("Grandparents did not show birth mother to be unfit at the time of trial or pose a serious risk of harm to the child."); ***Dennis and Dennis***, 199 Or App 90 (2005) (an award of custody to maternal grandmother reversed where father was not shown to be presently unfit at the time of trial or that a transfer of custody to birth father would pose a present serious risk of harm).

In one of the few post ***O'Donnell-Lamont*** cases going the other way, in ***Wurtele v. Blevins***, 192 Or App 131 (2004), ***rev. den.,*** 337 Or 555 (2004), the Court affirmed a custody judgment in favor of maternal grandparent over legal father's objections. The court found compelling circumstances in that if legal father was granted custody, he would deny contact between the child and grandparents causing her psychological harm, including threatening to relocate with the child out of state.

In contrast, there have been no Supreme Court cases and few Court of Appeals cases addressing ORS 109.119 in the context of third party visitation, rather than custody. In ***Harrington v. Daum***, 172 Or App 188 (2001), the Court of Appeals reversed a trial court's decision awarding visitation to deceased mother's boyfriend over the objection of legal father. In ***Harrington***, father had offered continuing contact to boyfriend, but boyfriend wanted more. In ***Williamson v. Hunt***, 183 Or App 339 (2002), (decided under pre-ORS 109.119 (2001) standards), a order for grandparent visitation was reversed where there was no evidence to overcome the birth parent presumption. In ***Meader v. Meader***, 194 Or App 131 (2004), the matter was birth parents' motion to terminate grandparents' visitation previously ordered in light of birth parents' relocation to Wyoming. Finding "persuasive evidence" that the children at issue were showing signs of distress related to the visitation, the court terminated grandparents' visitation rights. In ***Van Driesche and Van Driesche***, 194 Or App 475 (2004), the Court of Appeals reversed the trial court's award of parenting time to stepfather over birth mother's objections, finding that the parties' co-habitation and mother's prior encouragement of the stepparent relationship was insufficient to overcome the legal parent presumption. Stepfather had contended that denial of visitation would harm.

In the recent case of ***G.J.L. v. A.K.L.***, 244 Or App 523 (2011), CA A143417 (Petition for Review Denied), grandparents were foster parents of grandson for most of his first 3 years of life. After DHS returned child to birth parents and wardship was terminated, parents cut off all contact with grandparents. The trial court found that grandparents had established a grandparent-child relationship and that continuing the relationship between them and child would be positive. The trial court denied their petition for visitation because of the "significant unhealthy relationship" between grandparents and

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

Deadline	Issue
August	07.15.12
October	09.15.12
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mother.[5] No expert testimony was presented at trial. On appeal, the Court of Appeals found that grandparents had prevailed on three statutory rebuttal factors (recent primary caretaker; prior encouragement by birth parents; and current denial of contact by parents). However, the Court of Appeals denied relief because grandparents failed to prove a "serious present risk of harm" to the child from losing his relationship with grandparents, and that grandparents' proposed visitation plan (49 days per year) "would substantially interfere with the custodial relationship." A Petition for Review was denied.

Whither The Best Interests Standard?

ORS 109.119 was formulated in response to *Troxel* but nothing in *Troxel* dictates the narrow focus on the parental fitness and serious present risk of harm that has so preoccupied the Court of Appeals. *Troxel* specifically gave wide latitude to the states to determine how the legal parent presumption was to be applied:

> Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court -- whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with JUSTICE KENNEDY that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." Post, at 9 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter. 530 U.S. at 73.

Reasonable minds can differ about the Court of Appeals' constricted focus (serious present risk of harm to the child and present parental unfitness) in custody cases. Assuming such a focus is consistent with *O'Donnell-Lamont and Lamont* and appropriate in a custody case, should the same hold true when only visitation is at issue? If so, should there be a lesser threshold of evidence that is necessary to show serious present risk of harm to a child? Can ***serious present risk of harm*** be demonstrated, where the third party has been totally cut off from contact? If so, what

5 Strained relations, if not outright antipathy, between biological parents and thirds parties is a prevalent issue in these cases. The effect of this on continuing the third party-child relationship is beyond the scope of this article. Suffice it to say, if strained relations between parents was enough to limit parenting time, there would be far less parenting time for noncustodial parents. In parent v. parent cases, the court has ample tools to limit the fallout on children. The court can use those same tools in third party cases.

threshold of evidence is required? Are professional forensic witnesses required or can other professional or lay witnesses suffice? If the Court is essentially demanding expert testimony to meet the serious present risk of harm standard, is it even possible for an expert to competently arrive at such a finding within the current limitations of social science?

In none of the reported third party custody cases did the Supreme Court or Court of Appeals sanction a scheme that would allow a total termination of the third-party or grandparent relationship. In fact, in *Wurtele v. Blevins*, custody was awarded to maternal grandparents in large part because the court found that if birth father was granted custody he would deny contact between the child and grandparents including threatening to relocate out of state. Even in cases in which a custody award in favor of grandparents was reversed, the Court of Appeals has taken special note to direct a planful transition of the children to ensure that continuing contact with the grandparents occurred. See *State v. Wooden, Dennis and Dennis, and Strome and Strome*. But the absolute termination of a third party relationship, even one found to be in the best interests of a child, has been the result of constricted focus of the Court of Appeals.

All of us should be concerned about the impact of termination of a bonded third-party relationship to the children involved. Under our current focus, the best interest of the child is sometimes not even reached and if reached, the discussion is invariably secondary to the arguments about the *Troxel* presumption. The *Troxel* presumption is a matter of federal constitutional mandate, but the application and interpretation of that mandate should be revisited. The rights of children and in particular the *best interests* standard have been unfairly and inappropriately neglected in the Court of Appeals' construction of ORS 109.119. In *Troxel,* Justice Stevens noted in his forceful dissent:

> While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, 491 U.S. at 130 (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. 530 US at 88

He continued:

> It seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child. 530 US at 91.

Now that we have had more than a decade of experience after *Troxel* and the restructured ORS 109.119, it is high time to reflect on the impact of that experience on children and the risk it poses to third party relationships with children. The discussion and application of the best interests of children standard can and should be elevated in our cases. Such a much needed refocusing can be done without violating the commands of *Troxel* and ORS 109.119.

Pension Division – Three Easy Steps to Avoiding Costly Errors (Continued from page 1)

The three steps (summarized here and more fully explained below) essentially are:

> **Step One:** Correctly distinguish between a Defined Contribution Plan (a DC plan) and a Defined Benefit Pension Plan (a DB plan). General Judgment language that fails to distinguish the difference can compromise your intended result.
>
> **Step Two:** If the plan is a DB plan, consider carefully which "accrued benefit" it is that you are apportioning: the one accrued as of the date of divorce or the one that will exist fully-matured at the date of the employee's retirement.
>
> While dividing the accrued benefit at date of divorce may sound intuitively fair and correct, it appears to be presently contrary to Oregon law, and for good reason as explained later in this article.
>
> **Step Three:** Craft your General Judgment language to properly reflect your intent with the matters discussed in Steps One and Two. If the plan is a DC plan, award a dollar sum or a percent of the account balance as of a specified effective date, and address those issues of plan loans and investment earnings and losses between award date and distribution date. If the plan is a DB plan, refer to division of an accrued benefit rather than an account balance, while clearly identifying the benefit being apportioned and providing the marital fraction that derives the "marital portion".

Step One – Distinguish Between DC and DB

Many of you are well acquainted with the difference between a DC plan and a DB plan. That said, I continue to see general judgment language that attempts to treat a DC plan such as a 401(k) as if it were a pension plan by trying to assign a share of an annuity at retirement that does not exist, or more commonly, tries to assign an account balance in a pension plan that contains no account balance.

In general terms, DC plans are those carrying an account balance and the most prolific example is the 401(k) plan. Contributions into the employee plan account come from the employer or from elective deferrals of employee wages, or a combination of both. Investment results then hopefully grow the balance in the account, and the account balance at retirement constitutes the benefit.

Often the balance is rolled over to an IRA at retirement. Yes, there are a limited number of DB plans that carry an account balance, but those are more often treated as if they were DC plans when it comes to dividing them. **For DC plans, your general judgment language should award**

either a percentage or a specific dollar sum, while specifying the effective date of the division.

If the plan is a DC plan, be sure to address at least two important issues: (1) the impact of an existing participant loan, and (2) the disposition of plan investment earnings and losses between the effective date of the award and the date of segregation of the award to a separate account for the receiving party or distribution to that party.

The effective date can be the date of entry of the General Judgment or some earlier date such as the date of separation or any date agreed to by the parties for valuation and division of the assets composing the marital estate. Pursuant to a Qualified Domestic Relations Order (QDRO) more formally carrying out the instruction to the plan administrator, the plan administrator will retroactively divide the account as of the specified date and allocate subsequent investment earnings separately to each segregated account (his and hers). When it is the intent of the parties that the award be of a specific sum, one neither improved nor damaged by subsequent investment results within the plan, then the effective date becomes an unidentified future date, most commonly described as "the earliest date administratively feasible for the plan administrator to segregate the award ".

Recently plan administrators have become more restrictive about how far back in time they will entertain performing a division. Some administrators publish their cutoff date looking back and these limitations were usually prompted by a change in third party administrators leading to a non-availability of records. Usually, however, one can go back at least several years.

Plan loans need to be addressed at the stage of the general judgment. They are available in only DC plans, and not all DC plans offer them. When the plan participant borrows from his or her plan account, only that party is liable for the loan, although the debt is still considered to be part of the marital estate in most instances. From the viewpoint of the plan account, the loan is simply another investment, one which will generate earnings in the form of interest, and the receivable still is carried as part of the account's total balance.

When the loan is taken out before the parties have separated and its proceeds flow into the marital estate and benefit both parties either directly or indirectly, then the award to the non-employee spouse of half of the DC plan account balance would normally be for half of the balance **after** subtracting the loan balance at division date. If the loan was taken out after the parties had separated and the proceeds were not used to pay off other debts that were debts of the marital estate, and those proceeds benefitted only the plan participant, then the half awarded to the non-employee spouse would normally be specified to be **before** reduction of the account balance by the amount of the loan balance.

When there have been pre-marital accumulations in a DC plan account, **the "marital portion"** becomes the entire growth within the account during the marriage. While some would try to argue that the investment returns during the marriage associated with the balance at date of marriage should be excluded from the marital estate, it is my understanding that this has been proven to be a losing argument. **When pre-marital accumulations exist, you would generally subtract the balance at date of marriage from the balance at division date, divide by two, and express your award to the non- employee spouse in the general judgment as a dollar sum, or at least recite that the award is to be calculated in this fashion.**

Defined benefit pension plans, in contrast, contain no account balance. What they do contain is a contractual promise to pay a benefit, usually in the form of a lifetime annuity beginning at retirement date. The benefit is determined either by a formula that takes into account service years and pay levels, or by stated annual additions to the annuity size pursuant to a plan formula. With these plans, there is no immediate transfer of a percentage of an account balance or a sum of money to a separate account for the non-employee spouse. Instead, there is an assignment of a share of that future stream of annuity payments.

In DB plans, survivorship is an important issue in both pre-retirement and post-retirement divorces. When married, spousal consent is normally required before a plan participant can elect a single life annuity payable for only his or her life. Otherwise some form of joint and survivor retirement option is mandatory. If the parties divorce, the employee would be free upon retirement (unless otherwise ordered by a court) to opt for a larger single life annuity or a joint annuity with a new spouse. In many plans, the former spouse's benefits would end with the employee's death. In a growing number of DB plans, the share of the pension assigned to the non-employee spouse can be adjusted in payment size so as to be payable for the remaining life of that person. If representing the non-employee spouse in a pre-retirement divorce where a separate life annuity is not available to your client, you may want to consider the appropriateness of requiring the employee spouse to name and retain your client as survivor annuitant. In a pre-retirement divorce involving a military pension, survivorship rights (termed the "Survivor Benefit Plan" or "SBP") can be obtained only if so provided in the general judgment. The supplemental judgment cannot be the initial source of the award.

If the parties are still married at retirement time and later divorce, your client (the non-employee spouse) usually would have an irrevocable right to remain as survivor beneficiary if a joint and survivor option had been elected. Still, it would not be a bad idea for you to confirm that entitlement in the general judgment.

A DB plan is either a "final pay" plan or a "trade union style" plan. "Trade union style" is a label of this author's choosing merely for convenience and lack of a better label. This class of plan is most commonly used in an industry/union setting, but could also be labeled a "settled benefit" plan.

"Final pay" plans are those in which the benefit is determined at time of retirement by assigning a

compensation factor equally to every year of plan participation. This type of plan is not commonly present in trade union settings. But it is the most common type of plan throughout corporate America and is present in government plans, including civil service and the military.

In final pay plans, as the participant retires, a factor (usually in the range of 1% to 2%) is applied to his or her average compensation for the highest years (usually three). The compensation factor is then multiplied by the number years of plan participation. The label "final pay" is derived from the expectation that in most cases the participant's pay levels just before retirement will be the highest and therefore used in the calculation. In a final pay style plan, every year of plan participation contributes equally to the final benefit. Accordingly, the allocation to the marital years can be calculated under a time rule approach. The value of the contribution of the marital years to the final benefit is not determinable at date of divorce because the compensation factor and the number of years of total service are not yet known.

Trade union style plans, in contrast, do have known or "settled" benefits[1] earned each year as the employee works. Industry employers and the trade unions typically negotiate a contract resulting in a pension plan that provides an employer funded pension benefit for each hour of qualifying service. There may be vesting requirements, but essentially the addition to the accumulating monthly pension benefit associated with each year of service is determined and recorded at the time. Accordingly, the amount of pension benefit earned during the marriage years is readily obtainable from the participant's account record, but as you will see later in the next section of this article, that may not matter and the participant's account record will most likely not be the source of establishing the marital portion.

Step Two – Pick Which "Accrued Benefit" You Are Apportioning For a DB Plan

In the most common type of DB plan, a "final pay" style plan, a division at date of divorce will usually favor the employee, while a division at the date of the employee's retirement, even though being subject to a marital fraction, will favor the non-employee. You would, of course, prefer the one that benefits your client, and it is common to see either one utilized. Only one, however, appears to conform to the law.

While dividing the accrued benefit at date of divorce may sound intuitively fair and correct, it appears to be contrary to Oregon law, and for good reason. Counsel for the non-employee spouse has available to him or her the force of ***Kiser and Kiser*** (176 Or App 627, 32 P3d 244 (2001)) and ***Stokes and Stokes*** (234 Or App 566, 228 P3d 701 (2010)) to argue for a division of the fully-matured benefit as of the date of the employee's retirement. **The difference in dollars here can be substantial.** In Oregon divorces, when a DB plan is divided as of date of divorce (as does happen), it is usually due to a lack of understanding on the part of counsel for the non-employee.

The ***Kiser*** Case involved the Civil Service Retirement System (CSRS), which is a classic example of a final pay style plan. One of the issues in appeal was whether Wife should be awarded half of the accrued benefit as it stood at date of divorce based on a hypothetical assumption that Husband's employment had ended at date of divorce, or whether it should be based on a marital fraction applied to his fully-matured benefit at the future date of his actual retirement. The court ruled the latter and based its reasoning on the "final pay" nature of CSRS and the fact that defined benefit plans in general are not "liquid" at the date of a pre-retirement divorce. This raises the question of whether a plan not of a final pay nature (such a trade union style plan) would be subject to the reach of ***Kiser*** and cases like it, such as ***Stokes***.

The most notable cases (***Richardson*** – 1989, ***Caudill*** – 1996, ***Kiser*** – 2001, and ***Stokes*** – 2009) all addressed final pay style plans. Question: Could one argue that neither the Oregon Court of Appeals nor the Oregon Supreme Court has actually ruled on the proper method of determining the marital portion of trade union style plans? After all, you do have readily available in this type of plan a record which reports year by year the amount of retirement benefit earned.

In spite of that, it was the opinion of two authorities[2] who reviewed this article that there is no explicit authority supporting the idea that trade union style plans should be treated any differently than final pay plans and that the broader based principles stated in ***Kiser*** and ***Stokes*** would suggest no distinction. Someone determined to make the distinction might need to be prepared to argue the position at the Court of Appeals and Supreme Court levels in the hope of making new law. On the other hand, if your proposal to divide the accrued benefit as it stands at date of divorce is not challenged by the other side, creating new law will not be necessary.

Step Three – Craft Your General Judgment Language Explicitly

The general judgment needs to be explicit about the amount or percentage of a DC account being awarded. Further, it needs to be specific about the effective date of the assignment, the way a plan loan is to be treated, and whether the award is subject to adjustment for investment activity within the participant's account between the assignment date and the award's segregation and/or distribution.

If the plan is a defined benefit pension plan, the share of the benefit flowing to the non-employee former spouse will not begin until the employee spouse either commences benefits or could begin benefits under the terms of the plan. The QDRO will instruct the plan administrator on how to calculate the former spouse's share, but before the QDRO can be properly written, the general judgment must instruct regarding the nature of the award. Vague language such as " Wife is to share equally in benefits earned during the marriage and Husband shall retain benefits earned after the divorce" is subject to a wide variety of interpretation.

The same applies to: "Wife is awarded one half of Husband's pension benefits earned from the date of marriage through the date of this Judgment". These examples do not say how the marital portion is to be determined and leaves a QDRO writer, engaged by opposing counsel, a lot of latitude to write the QDRO to the advantage of his or her client. Issues left unresolved in the general judgment can lead to either an unfavorable outcome for your client or additional litigation.

If you represent the non-employee spouse and the DB plan is a final pay type, you will want your client to have the benefit of what appears to be current law. You will want the general judgment to state that your client is awarded 50% of the "marital portion" of the pension and that the marital portion is to be determined by applying a marital fraction under a straight time rule to the fully-matured benefit at the date of the employee spouse's retirement or the date of your client's commencement of benefits, if earlier. Even in a case where you are apportioning a benefit accrued as of the date of divorce, a marital fraction (also called a "coverture fraction") may be needed if there was pre-marital plan participation.

If the DB plan is a trade union style plan, regardless of which party you represent you may well be stuck with applying a time rule to the benefit accrued through the date of retirement. With this type of plan the time rule is far less reflective of when and how benefits are accrued and could serve to award the non-employee less than half of the benefits actually generated during the marital years, a prospect that may tempt you to seek another approach.

In my practice I have seen cases involving a trade union style plan where the marital portion might be 60% if based on the actual benefit accrual record and 40% if based on the time rule. Depending on the method used, the non-employee spouse's share is either 30% or 20%. The actuarial present value of a union pension could easily be $600,000. In such an example, the selected method would affect the value of the award by $60,000.

Pension division in divorce occurring after retirement is not much different. The question of which benefit you are dividing has gone away, but if there were pre-marital benefit accumulations, the method of determining the marital portion remains an issue. If the plan were a final pay style plan, the time rule would be clearly applicable. If it were a trade union style plan, you might want to consider how binding you regard *Kiser* and cases like it. Regardless of the plan type or apportionment method used, if the pension is in payout status you would want to express your award not as a formula, but as a specific percent you have calculated based on your selected method. No need to describe a coverture fraction when both the numerator and the denominator are known quantities.

Thoughts on Benefits Seemingly Earned Post Divorce

A *Kiser* type division has found wide acceptance in a great number of jurisdictions throughout the nation, and is probably the most-commonly used method for apportioning final pay plans. When *Kiser* first came on the scene there was much fretting in Oregon that the ruling was bestowing upon the non-employee spouse a share of an asset created by the employee spouse during the post-divorce period. It is, of course, understandable that such a division would be regarded as inequitable **if such a consequence did result.** Also, I often see language in general judgments that attempts to articulate that benefits earned post-divorce are to go to the employee spouse, and most would agree that they should.

The rationale supporting a *Kiser* type division indicates that the confusion lies in defining what is produced during the marriage and what is produced post- divorce in final pay plans. Proponents of *Kiser* would argue that the value of the asset created by plan participation during the marital years can only be measured at retirement time when the compensation factor and the total years of service are both known. They say that to freeze the benefit indicated by the compensation level and years of service of the plan participant at date of divorce would be the equivalent of dividing a 401(k) account at date of divorce while allowing the plan participant to invest and grow his/her half in the remaining years before retirement and denying the non-employee spouse the right to invest and grow her/his half during that same waiting period.

Supporters of *Kiser* also hold that when the parties arrive at date of divorce they are co-owners of a joint asset, both halves of which should reach retirement time at the same value. Under a final pay style plan, the benefit formula weights each year of plan participation the same. The years up to the date of divorce are a done deal, carrying with them the right to an equal share of that portion of the final benefit created by the contribution during the marriage years.

Even though under one roof, what we really have are two pensions, one earned by the contribution of the marriage years and a second pension earned by the employee spouse both before and after the marriage. The methodology of *Kiser* awards to the employee spouse 50% of the pension earned during the marriage and 100% of the pension earned before and after the marriage. The non-employee spouse receives 50% of the benefit earned during the marriage years and none of the benefit earned during the pre or post marriage years.

David W. Gault

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Endnotes

1. It should be noted that the "settled" nature of trade union bargained retirement benefits is typically the case, but not universally. On occasion, at least in the past, collective bargaining has resulted in enhanced benefits based on prior service as well as future service. Due to inadequate funding, the trend as of late, however, is to reduce benefits with respect to future service, while leaving benefits associated with past service unaffected.

2. Reviewers and contributors: My gratitude and thanks for their very helpful contributions in the writing of this article go to Clark B. Williams, Esq., a well-known name to readers of the Family Law Newsletter, and to Jeffrey E. Potter, Esq., who practices law in Eugene, Oregon and was the appellate attorney in *Kiser and Kiser*.

Marriage Equality Background and the Oregon Family Fairness Act (Continued from page 1)

In 1993, the Hawai'i Supreme Court decided in *Baehr v. Lewin*, 852 P2d 44 (Haw 1993), that denying the right of marriage to same-sex couples amounted to sex discrimination. On remand, the trial court rejected the state's attempt to show a compelling state interest and held the marriage statute unconstitutional. The Hawai'i Supreme Court affirmed. *Baehr v. Miike*, 1996 WL 694235 (Haw Cir Ct 1996), *aff'd*, 950 P2d 1234 (Haw 1997).

Although an amendment to the Hawai'i constitution later superseded the *Baehr* holding, the Rubicon was crossed. Congress enacted the Defense of Marriage Act (DOMA), 110 Stat 2419 (1996), which limited federal recognition of marriage to opposite-sex couples, and further provided that no state need recognize "a relationship between persons of the same sex that is treated as a marriage" by any other state.[1] Thus began a complex patchwork of relationship recognition policies undertaken by each of the individual states and territories in the United States. The result for a family headed by a gay or lesbian couple is that the family members' legal relationships remain constantly in flux, changing according to their state of residence, the law of each state or territory to which they may travel, and whether the particular rights in question find their source in state or federal law.

According to the Human Rights Campaign (www.hrc.org), 29 states, including Oregon, have adopted constitutional provisions limiting marriage to opposite-sex couples. "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." Or Const Art XV, § 5a. Twelve states have enacted similar statutory restrictions. Meanwhile, 19 states and the District of Columbia have adopted varying levels of legal protection for same-sex couples and their children. While only six American jurisdictions allow same-sex couples to marry, at least ten countries worldwide, including Canada, plus Mexico City, do so.

State-law recognitions for same-sex couples fall into three general categories. As noted, six states—Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont, plus the District of Columbia—accord full marriage equality between same- and opposite-sex couples. One additional state—Maryland—recognizes all valid marriages performed in other jurisdictions, without regard to the sex of the spouses. Nine states—California,[2] Delaware, Hawai'i, Illinois, Nevada, New Jersey, Oregon, Rhode Island, and Washington[3] —give benefits and protections substantially similar to marriage through an alternative vehicle ("civil unions"). (Oregon, along with some other states, is calling this status a "domestic partnership," see ORS 106.310(1), which should not be confused with local partnership registration ordinances that mostly carry no direct legal consequences.) And three states—Colorado, Maine, and Wisconsin—provide individual benefits to same-sex couples that are more limited in scope than full marriage rights ("reciprocal beneficiaries").

II. Partnership Registration in Oregon

A. 2007 Legislation

Our legislature enacted the Oregon Family Fairness Act in 2007. *See* ORS 106.300. A "domestic partnership" under OFFA is "a civil contract entered into in person between two individuals of the same sex who are at least 18 years of age, who are otherwise capable and at least one of whom is a resident of Oregon." ORS 106.310(1). "Two individuals wishing to become partners in a domestic partnership may complete and file a Declaration of Domestic Partnership with the county clerk." ORS 106.325(1).

B. Effect of registration

All of the rights and responsibilities of a marriage accompany the registration:

> (1) Any privilege, immunity, right or benefit granted by statute, administrative or court rule, policy, common law or any other law to an individual because the individual is or was married, or because the individual is or was an in-law in a specified way to another individual, is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a domestic partnership or because the individual is or was, based on a domestic partnership, related in a specified way to another individual.
>
> (2) Any responsibility imposed by statute, administrative or court rule, policy, common law or any other law on an individual because the individual is or was married, or because the individual is or was an in-law in a specified way to another individual, is imposed on equivalent terms, substantive and

1 The Defense of Marriage Act has been held unconstitutional in a number of contexts. *See, e.g., Gill v. Office of Personnel Management*, 699 F Supp 2d 374 (D Mass 2010).

2 California currently recognizes marriages between spouses of the same sex–both domestic and foreign–that were contracted only between June 16, 2008, and November 4, 2008. Proposition 8 (2008), California's "defense of marriage" constitutional amendment, has recently been held unconstitutional. *Perry v. Brown*, ___ F3d ___, 2012 WL 372713 (9th Cir 2012),

3 The status of the law in Washington is in flux, as the legislature has recently passed, and Governor Gregoire has signed, a bill adopting full marriage equality in that state. If the measure survives an expected referendum, Washington will join the ever-growing ranks of states where gay and lesbian couples can marry on the same terms as everyone else.

procedural, on an individual because the individual is or was in a domestic partnership or because the individual is or was, based on a domestic partnership, related in a specified way to another individual.

(3) Any privilege, immunity, right, benefit or responsibility granted or imposed by statute, administrative or court rule, policy, common law or any other law to or on a spouse with respect to a child of either of the spouses is granted or imposed on equivalent terms, substantive and procedural, to or on a partner with respect to a child of either of the partners.

(4) Any privilege, immunity, right, benefit or responsibility granted or imposed by statute, administrative or court rule, policy, common law or any other law to or on a former or surviving spouse with respect to a child of either of the spouses is granted or imposed on equivalent terms, substantive and procedural, to or on a former or surviving partner with respect to a child of either of the partners.

ORS 106.340.

Couples should be advised that even a law as broad as Oregon's creates a status that is different from marriage and one that courts are likely to construe strictly. While the case law so far is perhaps unsurprising to a lawyer's eye, ironies abound. A couple married in Canada cannot make a joint bankruptcy filing; that is a question of federal law governed by DOMA.[4] ***In re Kandu***, 315 BR 123 (Bankr WD Wash 2004). A civil union in California makes the couple eligible for only a single homestead exemption between them; that is a question of state law. ***Rabin v. Schoenmann***, 359 BR 242 (BAP 9th Cir 2007). According to one case, domestic partners in California who mistakenly believe that they have registered their relationship cannot be treated as putative spouses. ***Velez v. Smith***, 48 Cal Rptr 3d 642 (Cal Ct App 2006).[5] And the court held in ***Burns v. Burns***, 560 SE2d 47, ***cert den*** (Ga Ct App 2002), that the former wife violated a consent order that prohibited child visitation while living with an unmarried partner, despite the fact that she and her partner had registered a civil union in Vermont.

C. Status of Other Relationships

Attorneys consulting with domestic partnership clients will need first to determine the true status of the relationship. Besides whether or not the relationship is truly registered with the state, the existence of county and municipal registrations before 2008 creates confusion.

A relationship must have been registered with the state on or after February 4, 2008, in order for the rights and obligations of ORS 106.340 to apply. The registration occurs at the county clerk's office. ORS 106.325(1). A copy of the registration form and a Certificate of Registered Domestic Partnership is given to the partners. ORS 106.325(2). In practice, this is called a "registered domestic partnership" or RDP. If there is any question of whether a valid registration has occurred, a copy of the certificate can be ordered from the Oregon Center for Health Statistics.

An unregistered partnership or one registered only with one of the old county or municipal registries is a common-law domestic partnership subject to the rules of ***Beal v. Beal***, 282 Or 115, 577 P2d 507 (1978), and its progeny.

D. Pre-Partnership Agreements

The Uniform Premarital Agreement Act (UPA), ORS 108.100 – ORS 108.740, governs premarital agreements in Oregon. While an argument can be made that it does not apply to RDPs, Oregon law recognized premarital agreements long before adoption of the UPA. ***See, e.g., Leathers and Leathers***, 98 Or App 152, 779 P2d 619 (1989), rev den, 309 Or 625 (1990). Pre-partnership agreements should be enforced under Oregon common law even in the event that a court finds the UPA inapplicable.

Parties to a proposed RDP should be advised to consider carefully whether to enter into a pre-partnership agreement. Alongside all of the other good reasons for considering a premarital agreement exists a lacuna in the law with regard to dissolution rights and obligations accruing before 2008 when the RDP law came into existence. ***See*** discussion, ***infra***, at § E.2.

E. Dissolution

1. Jurisdiction

Gay and lesbian couples that consider marrying or otherwise formalizing their relationships must consider a host of issues created by the probable non-recognition of such marriages in most American jurisdictions, and by the frankly uncertain status granted by at least some state civil union and reciprocal beneficiary laws. Perhaps the clearest example of unintended consequences is the question of how to dissolve the relationship, should that unfortunate need arise. At least some of the jurisdictions where same-sex marriages are performed will marry a non-resident couple. Many American couples likewise have traveled to Canada to marry. Some or all of these jurisdictions, like Oregon, have residency requirements for divorces. Similarly, at least some "civil union" states allow non-resident couples to register, but not to dissolve, their relationships.

State courts differ in their approaches to the question of whether a same-sex relationship celebrated in one state may be dissolved in another.

DOMA permits a state to declare that same-sex marriages violate its public policy and will not be recognized. 28 USC § 1738C (2012). The Oregon public opted to do this in Ballot Measure 36 (2006), now codified in the Oregon Constitution at Article XV, section 5a.

4 The continuing viability of *Kandu* and similar cases is subject to serious question. After a federal bankruptcy court in California held DOMA unconstitutional in this context, *In re Balas*, 449 BR 567 (Bankr CD Cal 2011), the Obama Administration stopped filing motions to dismiss such joint bankruptcy filings as a matter of policy.

5 Another district of the California Court of Appeal has disagreed. *Ellis and Arriaga*, 76 Cal Rptr 3d 401 (Cal Ct App 2008).

Whether granting a divorce is a "recognition" of the marriage is a matter of heated debate in other states. Compare ***Christiansen v. Christiansen***, 253 P3d 153 (Wyo 2011) (trial court had jurisdiction to dissolve Canadian marriage, notwithstanding state DOMA statute), ***with J.B. and H.B.***, 326 SW3d 654 (Tex App 2010) (***contra***); ***see also Chambers v. Ormiston***, 935 A2d 956 (RI 2007) (no state DOMA). The question has yet to be presented to an Oregon appellate court.

And while a few other states' trial courts have allowed their citizens equitable relief to dissolve a Vermont civil union, ***Dickerson v. Thompson***, 2010 NY Slip Op 02052 (NY App Div 2010); ***Salucco v. Alldredge***, 17 Mass L Rptr 498 (Mass Super Ct 2004); ***see also Alons v. Iowa Dist. Court for Woodbury County***, 698 NW2d 858 (Iowa 2005) (standing of strangers to appeal trial court dissolution), the prudent view is that most will not. ***See Rosengarten v. Downes***, 802 A2d 170 (Conn Ct App), ***appeal dismissed***, 806 A.2d 1066 (Conn 2002). Presumably, Oregon would allow dissolution of a foreign civil union, because a civil union law is present here. But again, no appellate case has considered the question.

The Oregon law adopts several provisions designed to address these difficulties, at least insofar as domestic partnerships registered in Oregon are concerned. First, as already noted, at least one of the proposed partners must reside in Oregon. ORS 106.310(1). Second, entering into a domestic partnership constitutes consent to have the relationship dissolved in Oregon, and the jurisdiction of the domestic relations court is expanded to allow dissolution in the Oregon county in which either partner last resided. ORS 106.325(4). Finally, the registration form itself states consent to the jurisdiction of Oregon courts for dissolution, "even if one or both partners cease to reside in, or maintain a domicile in, this state * * * ." ORS 106.325(5)(d).

2. Treatment of Time Before 2008.

Many—if not most—RDPs existed in fact before the effective date of the RDP statute on February 4, 2008. The RDP law does not speak to treatment of prior years in the event of dissolution, leading to legal uncertainty.

A number of marital dissolution issues potentially turn on the length of the marriage. Spousal support depends, among other factors, upon "the duration of the marriage," ORS 107.105(1)(d)(A)(i), —(B)(ii) & —(C)(i), but ultimately must be awarded "as may be just and equitable" in the particular case. The presumption of equal contribution to marital assets applies only to property acquired "during the marriage," although the court assumes jurisdiction over all of the parties' property and must divide it "as may be just and proper in all the circumstances." Presumably, both statutory standards are flexible enough to allow the courts to consider the length of the relationship before 2008, ***see, e.g., Lind and Lind***, 207 Or App 56, 70, 139 P3d 1032 (2006), although their precise willingness to do so remains to be developed through case law. Other similar ambiguities in the domestic partnership law may also be exposed as time progresses.

3. Custody & Parenting Time

If the parties are both parents by operation of law, see discussion, ***infra***, at § 2.b., or an adoption or other legalization of the relationship with both partners has occurred, then ORS 107.137 will guide the court's discretion in awarding custody based upon the best interests of the child. ***See also*** ORS 107.105(1)(a).

If only one parent is the legal parent, then the provisions of ORS 109.119 may apply, according a right of custody or visitation in the non-legal parent. Note that a partner in an RDP has the various procedural rights of a stepparent under ORS 109.119(5). ORS 106.340(3).

In order to obtain custody or visitation, the non-legal parent will be required to rebut the statutory and constitutional presumption that the legal parent acts in the child's best interest. ORS 109.119(2)(a); ***Troxel v. Granville***, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000). Presumably, the statutory consideration that "[t]he legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor," ORS 109.119(4)(a)(C) & —(b)(D), will be a key factor in these cases.

3. Federal Issues

Note that an RDP is not a marriage under state or federal law. Although this is sometimes characterized as a DOMA issue, that is something of a misnomer, since DOMA does not speak to state domestic partnerships at all. Clients should be advised of the following:

i. Taxation of Property Awards. Before enactment of IRC § 1041 in 1984, depending on state law, a transfer of property incident to divorce could be considered a taxable event under federal tax law. ***United States v. Davis***, 370 US 65 (1962). In 1981, the Oregon Legislature added language to ORS 107.105(1)(f) designed to avoid the ***Davis*** holding:

> Subsequent to the filing of a petition for annulment or dissolution of marriage or separation, the rights of the parties in the marital assets shall be considered a species of co-ownership, and a transfer of marital assets pursuant to a decree of annulment or dissolution of marriage or of separation entered on or after October 4, 1977, shall be considered a partitioning of jointly owned property.

Or Laws 1981 ch 775, § 1. After the amendment, Oregon law did not cause property distribution upon divorce to be a taxable event under federal law. ***See Engle and Engle***, 293 Or 207, 219, 646 P2d 20 (1982). Presumably, the same statute might rescue a property division pursuant to an RDP dissolution from federal taxation.

ii. Deductibility of Spousal Support. Marital support awards are deductible by the payor, IRC § 215, and includable in income by the recipient, IRC § 71. Those rules have no application to payments made pursuant to an RDP dissolution. Certainly such support payments may not be deducted by the payor; whether they must be included in income by the recipient is an open question.

iii. Division of Retirement Plans. As of this writing, there is no general mechanism that allows the tax-free division of federally qualified retirement plans between divorcing domestic partners. This author has participated in cases where plans were divided with a domestic partner who qualified as a "dependent" under the tax code, but such cases are quite unusual.

F. Interstate Portability

1. Full Faith and Credit issues

Much is hazy in legal landscape, but one thing is clear: In the short term, sister-state recognition of these relationships will be spotty at best, and will be fought out on a case-by-case basis. The federal constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," but a once-esoteric aspect of the case law interpreting that clause holds that public acts and records are held to a different standard from judicial proceedings. Thus, the Tenth Circuit held in ***Finstuen v. Crutcher***, 496 F3d 1139 (10th Cir 2007), that Oklahoma must recognize, as co-parents, same-sex couples who obtained adoption judgments in other states, and even that it must issue amended birth certificates if the couples' children were born in Oklahoma. But the Kansas and Ohio courts declined to recognize, on behalf of their own citizens, amended birth certificates issued in other states that showed a change of sex following sex-reassignment treatments. ***In re Gardiner***, 42 P3d 120 (Kan), ***cert den sub nom Gardiner v. Gardiner***, 537 US 825 (2002); ***In re Nash***, 2003 WL 23097095 (Ohio Ct App 2003). The logic of the latter cases rests on the notion that one state may decline to recognize another state's public acts and records—though not its court judgments—based on policy considerations. ***See generally Finstuen***, 42 P3d at 1151–56 (discussing Full Faith and Credit Clause).

The New York courts have denied the right to bring a wrongful death action, and the right to workers' compensation death benefits, to the surviving partner of a Vermont civil union. ***Langan v. State Farm Fire & Cas.***, 849 NYS2d 105 (NY App Div 2007) (workers' compensation); ***Langan v. St. Vincent's Hosp. of N.Y.***, 802 NYS2d 476 (NY App Div 2005), ***appeal dismissed***, 850 NE2d 672 (NY 2006) (wrongful death). They initially denied spousal health benefits to one of the husbands in a Canadian marriage, although the Appellate Division vacated that decision in the wake of the *Martinez* case. ***Funderburke v. N.Y. State Dept. of Civil Serv.***, 822 NYS2d 393 (NY Sup Ct 2006), ***order vacated and appeal dismissed***, 854 N.Y.S.2d 466 (NY App Div 2008). In perhaps the most notorious litigation yet to arise from the civil-union debate, the Virginia courts have yielded to a Vermont judgment that accords parental rights to both partners in a Vermont civil union who bore a child in Virginia and then moved to Vermont. ***Miller-Jenkins v. Miller-Jenkins***, 637 SE2d 330 (Va Ct App 2006), ***cert den***, ___ US ___, 128 S Ct 1127, 169 L Ed 2d 950 (2008). The United States Supreme Court has also denied certiorari in the Vermont case. ***Miller-Jenkins v. Miller-Jenkins***, 912 A2d 951 (Vt 2006), ***cert den***, ___ US ___, 127 S Ct 2130, 167 L Ed 2d 863 (2007).

2. What law governs

Even where a state chooses to recognize a relationship formalized elsewhere, implementation in a specific case can lead to surprising results. Interpreting that state's former reciprocal beneficiaries law, the New Jersey Tax Court held in ***Hennefeld v. Township of Montclair***, 22 NJ Tax 166 (2005), that, although the New Jersey law recognized the parties' Vermont civil union, the rights accorded to the relationship were determined by New Jersey's law and not by Vermont's. Thus, the court held, the couple could not hold New Jersey real property as tenants by the entirety, since that was not a right extended by the New Jersey reciprocal beneficiaries law. 22 NJ Tax at 187, 190–91. The court granted the favored tax status actually at issue in the case, but only after the couple re-registered their relationship in New Jersey. 22 NJ Tax at 203–04.

III. Conclusions (So Far!)

The outcomes in ***Burns***, ***Garber***, and ***Velez*** should be considered carefully. Practitioners should note that the putative spouse doctrine, for example, may not be a privilege, immunity, right, benefit or responsibility *of marriage*. The significance of these cases is in how they illustrate that a broadly written civil union statute can never capture the entire field of matrimonial law. A civil union, however expansive it may be, is not a marriage, and couples considering one should not treat it as such. At least in the short term, these clients need to consider, first, how their relationship is to be dissolved should that become necessary, and second, how the traditional tools of gay and lesbian relationship planning—domestic partnership agreements, powers of attorney, wills, and adoptions—may still be needed in order to give their families the legal protections they expect and deserve.

Flying Solo without Flying Alone

By Ryan M. Johnson

I had it down: cover letter, resume, transcript, references, envelope and stamp. I could whip that package together and send it to a prospective employer just minutes after the job opening was posted. However, as I was feverishly applying for jobs while simultaneously studying for the bar exam, I had the gnawing feeling that spending what little money I had on postage would all be for naught. Sure enough, passing the bar only punctuated the fact that I was unemployed. I had a wife, three kids, was living at my mom's house and had no money. I was scared, but my fear was a blessing in disguise. It drove me to do what I knew I needed to do – I hired myself.

People commented about how brave or courageous I was for starting my own practice. No. Bravery had nothing to do with it. Necessity and fear was all it took, and it takes very little effort to have needs and feel fearful. So without further ado, I give you my perspectives on starting a solo practice in Marion County as a two-year licensed attorney.

You Are Not An Attorney Until You Have A Client.

Minesweeper was the game of choice during my administrative law class. When starting a new game you sort of click in random spots hoping to avoid a bomb until things just "open up." Starting a law practice works the same way. In the beginning, you need to poke and prod about. Clients will not just find you – you have to go and get them, and you cannot practice law without them. Talk to family, talk to friends, talk to acquaintances and put your name on the Oregon State Bar Referral list – the world needs to know you are accepting clients. My very first case was a referral from an old acquaintance. It was personal injury defense clients who had a gap in their umbrella coverage and was personally liable. I sheepishly asked for a retainer of $100.00, and thought I was stealing them blind, but they gladly paid. My clients prevailed. Happy with my work, they referred another plaintiff-side personal injury client to me. That person in turn referred a friend to me for another personal injury case. Slowly, my poking and prodding about began to pay off, and things began to "open up."

Let The Law Choose You.

As long as you are able and prepared to do the work to advocate effectively for your client you need to take almost anything that comes your way so you can find your fit. My second case was a referral from the Oregon State Bar. My client was facing a child custody dispute. With more confidence, I asked for a retainer of $300.00, and still thought I was stealing them blind, but they gladly paid. I put countless hours into the case and did a full day trial. In the end, my client prevailed. But more importantly, I learned that I had a knack for family law. During my first few months, I practiced in other areas such as criminal law, consumer law, business law and trusts and estates but the fit was not there. In the end, personal injury and family law chose me.

Build Your Network.

Once the law has chosen you, you need to build your network. The Marion County Bar is phenomenal. Ask and ye shall receive. I introduced myself to as many attorneys in my practice areas as I could as well as the judges. I bought the attorneys lunches and picked their brains. In the end I began forming friendships so that when I had questions (and I had many) I had a list of people to call for direction. I needed more than one or two mentors. I realized that if I was not asking several questions each week then I was ignorant of the many questions I should have been asking. Having multiple mentors helped me respect my mentors' time. It also helped me observe and learn different techniques and styles. I even found that if I played my cards right, my mentor's would occasionally throw my sorry soloing soul a referral.

Don't Reinvent The Wheel.

Just because you are solo doesn't mean you have to start from scratch. Other attorneys (and their staff) are generally willing to share forms, contacts, know-how and office management techniques. The PLF has a multitude of resources, templates and forms. The OSB Bar Books likewise has forms. There are multiple state wide list serves for various areas of law. There is even a list serve for Salem Startup Solos at salem-startup-solos@googlegroups.com. Don't be afraid to get information from those who have paved the road before or who are in your same situation.

Put In The Work.

Going solo takes a lot of commitment and work. I remember going to my office for the first month and spending eight hours each day but yet I only had two clients. I had a goal of making a template of each letter or pleading I created for my current case for future use. This paid huge dividends as my caseload increased as I was better able to quickly and efficiently handle the heavier caseload. Work hard for your clients. I think of, and treat, every client as if they represent ten or more future potential clients. I want as many people as possible walking around thinking that I am the bees' knees (for us younger generation – that means they think I am the best attorney). While you can't please everyone, missing out on or disappointing one potential client could mean missing scores of potential clients down the road.

Get Feedback.

Performance evaluations are important, and I didn't have a senior partner to give me one. However, many opposing attorneys have been willing to discuss with me my trial or negotiation techniques once the case is finalized. The Marion County Circuit Court Judges likewise are extremely helpful and very gracious about evaluating a performance after a hearing, particularly if you ask them before-hand that you will be seeking their feedback.

Own Your Mistakes.

You will make mistakes, but you must take responsibility for them. Be honest with your client. When I make a mistake with my client, I tell them, apologize and then I tell them what I am going to do to fix it. When I make a mistake with the opposing attorney or with a judge, I let them know and I apologize. Candor is the best policy, and if there is one thing you can control in a world of worry and inexperience it is your reputation. I have found that if I am willing to do the preparation, no mistake I make is unfixable.

Surround Yourself With Good People And Count Your Blessings.

You won't be successful without the help of others. Keeping my practice going has been a combination of hard work and a serendipitous landscape of helping hands. I sought out people who understood my goals and my commitment to making things work. Being fluent in Spanish, I was blessed to find a niche within the Hispanic community. I was also blessed to find office space where I found mentors next door – literally. Be grateful for Lady Luck, because you will need her. Finally, when you meet

with small successes, look first to thank others that made it possible and second to pat yourself on the back. After all, being a successful solo practitioner is not achieved alone.

Anecdotes:

- *I now know that asking for a one hundred dollar retainer is not stealing.*
- *I have increased my required retainer amount.*

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Matrimonial Law Grants Available

The Oregon Chapter of the American Academy of Matrimonial Lawyers is accepting grant applications from individuals or organizations who promote the study, practice or development of matrimonial law including but not limited to representing clients, lobbying, teaching, and advising spouses and children. Applications should be submitted to Laura Parrish at 777 High Street #102, Eugene, OR 97401 not later than September 1, 2012.

MILITARY FAMILY LAW

Military Divorce: Returning Warriors and "The Home Front"

*by Mark E. Sullivan**

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Return of the Warriors

The final departure of American troops from Iraq, and the winding down of operations in Afghanistan are both signs of a "new phase of relations" between the U.S. and these countries, to use Vice President Joe Biden's language. This comes with news of other force reductions. The Defense Department has announced a planned drawdown of American military forces in Europe in 2015, with the loss of one or two of the four combat brigades stationed in Germany and Italy. In short, empty outposts overseas means full billets and bedrooms back at home. Many servicemembers (SMs) are returning to the United States.

Those who are coming back from the Middle East are not only from the active-duty forces (Army, Navy, Air Force, Marines and Coast Guard); they are also from the Reserve Component, that is, the National Guard and the Reserves. Thus the homecoming impact will be felt nationwide, not just in communities near military bases. While reuniting with one's family will be a joyous experience for SMs, it may create significant stresses for some. And these stresses may lead to legal consequences.

Stresses and Relationships

One party has usually been solely in charge of the home for the entire deployment, without any help and with heavy responsibilities for running the home. This means managing the budget, taking care of children and – quite often – holding down a job as well. But the returning SM, having been overseas and in harm's way for a year or more, has his or her own issues. These SMs need time to decompress and to adjust to new responsibilities, routines and duties – both at home and at work.

And what about "the other woman" or "the other man"? Sometimes there is an "interim relationship" which was formed while one spouse was gone. If this is so, it will have to be dissolved so that the marriage may continue. When this doesn't happen, then the marriage will be in trouble and a separation is definitely on the radar screen. The impacts on the parties include separation, interim support, domestic violence, temporary custody and many more issues.

The result for the family law attorney is a confusing welter of rules, laws, cases and problems. When does state law govern? When should the injured party seek redress through the military? How does federal law affect the conflict? Where can one locate co-counsel who is familiar with these matters, a consultant who can give quick and accurate advice, or an expert witness who is available in person or by phone or Skype to assist the court?

Rules and Resources

Where the Oregon practitioner will find the resources for a military divorce case varies according to the issue involved. The usual matters involved are custody and visitation for minor children, support for the spouse and children, the role of the Servicemembers Civil Relief Act in default rulings and motions to stay proceedings, and

division of the military pension. Domestic violence may also be involved in some family law cases involving military personnel. The well-read Oregon attorney is the one best armed to defend or prosecute in these areas. They are complex and often counter-intuitive. A mentor, consultant or expert will often be useful as a guide through the wilderness.

There are several sources of information for the attorney caught up in these problem areas. For the following scenarios, assume that the parties are Army Sergeant Fred Wilson and his wife, Maria Wilson, the mother of their two minor children.

The Servicemembers Civil Relief Act (SCRA)

Formerly known as the Soldiers' and Sailors' Civil Relief Act, the SCRA is found at 50 U.S.C. App. § 501 *et seq*. It was passed by Congress in 2003. The two most important areas in civil litigation are the rules for default judgments (when the SM has not entered an appearance) and the motion for stay of proceedings. The former requires an affidavit as to the Fred's military status and the appointment of an attorney for Fred by the judge. The duties of the attorney are not specified, and there are no provisions for payment. The default section of the SCRA is at 50 U.S.C. App. § 521.

At 50 U.S.C. App. § 522 are the requirements for Fred's obtaining a continuance (called a "stay of proceedings" in the Act) for 90 days or more. Here are the requirements:An overview of the Act is found at "A Judge's Guide to the Servicemembers Civil Relief Act," at www.abanet.org/family/military (the website of the ABA Family Law Section's Military Committee). The Guide tells about the requirements and protections of the SCRA and the steps one should take to comply with the Act's requirements. It contains a sample motion for stay of proceedings and what the appointed attorney needs to do to protect his or her *newest client*.

Family Support – Rules and Regulations

Fred is required to provide adequate support to Maria and the children; each of the military services has a regulation requiring adequate support of family members. The Air Force support policy is found at SECAF INST. 36-2906 and AFI 36-2906. (Note: Numbered rules and regulations can be easily found by typing the number of the regulation into one's favorite search engine). The Marine Corps policy on support of dependents is found at Chapter 15, LEGALADMINMAN, found at http://www.marines.mil/unit/mcieast/sja/Pages/legal-assistance/domestic-relations/default.aspx. The Navy Policy for support issues is at MILPERSMAN, arts. 1754-030 and 5800-10 (paternity). Go to http://www.public.navy.mil/bupers-npc/reference/milpersman/Pages/default.aspx. The policy of the U.S. Coast Guard is located at COMDTINST M1000.6A, ch. 8M. This may be found at http://isddc.dot.gov/OLPFiles/USCG/010564.pdf. The nonsupport policies and rules of the U.S. Army are found at AR [Army Regulation] 608-99. See also the *Silent Partner* info-letter on "Child Support Options" at the ABA website shown above.

Knowing Fred's pay and allowances is a key factor in determining support. All SMs receive a twice-monthly LES (leave-and-earnings statement). To learn how to decipher one of these, just type into any search engine "read an LES" to find a guide explaining the various entries on the form. Base pay is the "salary" which each SM receives. There is also the BAH (Basic Allowance for Housing) and BAS (Basic Allowance for Subsistence), which are non-taxable. Those stationed overseas and living off-base receive a non-taxable OHA (Overseas Housing Allowance). Information on these allowances is at the following website: http://militarypay.defense.gov/Pay/Allowances.html. Pay received in a combat zone is tax-free, and the IRS publishes an excellent guide to the various forms of pay and allowances, as well as the tax benefits for SMs and family members, the *Armed Forces Tax Guide*, IRS Publication 3 (available at www.irs.gov).

There are numerous garnishment resources at the website for the Defense Finance and Accounting Service (DFAS), located at www.dfas.mil. The statutory basis for garnishment is at 42 U.S.C. §§ 659-662 and the administrative basis is at 5 C.F.R. Part 581. A list of designated agents (and addresses) for military garnishment is at 5 C.F.R. Part 581, Appendix A. Military finance offices will honor a garnishment order that is "regular on its face." 42 U.S.C. § 659 (f). *See also United States v. Morton*, 467 U.S. 822 (1983) (holding that legal process regular on its face does not require the court have personal jurisdiction, only subject matter jurisdiction). Limits on garnishment are found in the Consumer Credit Protection Act, 15 U.S.C. § 1673.

Custody and Visitation

Custody and visitation options for Fred and Maria are governed by Oregon statutes and case law. Specific legislative enactments dealing with protection of servicemembers and their children are as follows:

- In a proceeding to reconsider custody, the requirement that a military deployment of the custodial parent is not, by itself, a change of circumstances (ORS 107.135(13));
- Limitations on modifying or setting aside any judgment as to custody or visitation when a parent is deployed (ORS 107.145(2));
- The requirement that when a court has entered a temporary order for custody and visitation, the child's absence from Oregon during the deployment shall be considered "a temporary absence for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act," so that Oregon retains exclusive continuing jurisdiction over custody (ORS 107.145(6));
- The authorization of the court to allow delegated visitation if a visiting parent is deployed (ORS 109.056(3));
- Expedited hearings for deploying parents or parents whose deployment is imminent (ORS 107.146(1))
- Use of electronic means to conduct the hearing when a deploying parent (or one whose deployment is

imminent) is not able to personally appear for testimony (ORS 107.146(2); and

- Provisions for accommodating the leave schedule and other circumstances of the deployed parent by temporary order (ORS 107.145 (3)(a) and (b).

Other Custody Issues

For general information on military custody and visitation issues, "Counseling on Custody and Visitation Issues" is a useful *Silent Partner* info-letter. It is found at the ABA website mentioned above.

If Fred is overseas and retaining the children beyond the date of return in the custody order or keeping the children, and a custody order requires their return, then Maria can use Department of Defense (DoD) Instruction 5525.09, 32 C.F.R. Part 146 (February 10, 2006), to obtain the return of children. In general, this Instruction requires SMs, employees, and family members outside the United States to comply with court orders requiring the return of minor children who are subject to court orders regarding custody or visitation.

Military Pension Division

The division of property upon divorce often involves military retirement benefits. The reader can find much useful information on rules and restrictions for the garnishment of military retired pay at the website of the Defense Finance and Accounting Service (DFAS), www.dfas.mil > "Find Garnishment Information" > "Former Spouses' Protection Act." In addition to a legal overview, there is a section on what the maximum allowable payments are and an attorney instruction guide on how to prepare pension division orders.

There is also a survivor annuity available to former spouses, the Survivor Benefit Plan (SBP). Information on the SBP is at the same website above at the "Retired Military and Annuitants" tab (under "Survivors and Beneficiaries") and at the "Provide for Loved Ones" link at this tab.

The federal statute which authorizes military pension division, the Uniformed Services Former Spouses' Protection Act, is set out at 10 U.S.C. § 1408, and the Survivor Benefit Plan is located at 10 U.S.C. § 1447 *et seq.* The Defense Department rules for both are in the DODFMR (Department of Defense Financial Management Regulation), http://comptroller.defense.gov/fmr/.

There are seven *Silent Partner* info-letters on dividing military retired pay and SBP coverage. All of these are found at the ABA website shown above.

Domestic Violence

The DoD Instruction on domestic violence is DoDI 6400.6 "Domestic Abuse Involving DoD Military and Certain Affiliated Personnel (August 21, 2007). Other websites containing useful information about the rules and procedures in this area are:

- www.vawnet.org (National Online Resource Center on Violence Against Women),
- www.ncdsv.org/ncd_militaryresponse.html (National Center on Domestic and Sexual Violence)
- and www.bwjp.org (Battered Women's Justice Project).

An excellent summary of the remedies and responses is found in "Domestic Violence Report," April/May 2001 by Christine Hansen, Executive Director of The Miles Foundation, which is at http://civicresearchinstitute.com/dvr_military.pdf .

Conclusion

Handling a military family law case can be a challenging experience for the Oregon practitioner. By using these rules, resources and regulations, the attorney can do a better job of providing prompt and professional guidance and protections for the servicemember and the spouse.

Correction Notice

In Mark Sullivan's "The Missing Military Annuity – Case Continued," in the September issue of Family Law Newsletter, the following language was proposed to give the former spouse coverage under Survivor Benefit Plan (SBP) –

> Mary Doe, the plaintiff, shall also be awarded former spouse coverage under the Survivor Benefit Plan, with defendant's retired pay as the base amount.

The author advises that, in light of a recent ruling by the Defense Finance and Accounting Service (DFAS) that denied SBP coverage to a former-spouse applicant due to unclear wording of the court order, the following language should be used to secure SBP coverage instead of the above clause:

> John Doe, the defendant, shall immediately elect former-spouse coverage for Mary Doe, the plaintiff, under the Survivor Benefit Plan, with his full retired pay as the base amount.

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

SUPREME COURT

There were no family law decisions in the Supreme Court during this period.

OREGON COURT OF APPEALS

CHILD SUPPORT

Celin Janel Bock and Robert David Bock, 249 Or App __ (2012) A146968

http://www.publications.ojd.state.or.us/Publications/A146968.pdf

Trial Court: Kirsten E. Thompson, Judge, Washington County Circuit Court

Opinion: Hadlock, J.

Father appeals a supplemental judgment that modified the child-support provisions of the judgment that dissolved his marriage to mother. Father argues that the parties' economic circumstances had not changed substantially and unexpectedly since the time of the original judgment and that the court therefore lacked authority to modify it.

Held: There was no unanticipated substantial change to the parties' economic circumstances. No evidence in the record supports the trial court's finding that the benefit that mother received from the "long-half" property division had been "used up." Moreover, under the specific circumstances of this case, a four percent increase in father's income over 17 months did not amount to a substantial and unanticipated change in circumstances. Accordingly, the trial court lacked authority to modify father's child-support obligations. Reversed. CA 04.04.12

PROPERTY DIVISION

Dale Andrew Gay and Traci Anne Gay, 250 Or App __ (2012) A144993

http://www.publications.ojd.state.or.us/Publications/A144993.pdf

Trial Court: David B. Connell, Judge, Benton County Circuit Court

Opinion: Schuman, P. J.

Wife appeals a judgment of dissolution, assigning error to the trial court's distribution to each party of its own minority shares in a closely held corporation. Wife contends that the court should have assigned a value to the shares, distributed all of them to husband, and imposed an equalizing judgment.

Held: In determining that a just and proper division would be achieved by having the parties retain their shares, the trial court did not abuse its discretion. Affirmed. CA 05.16.12

SPOUSAL SUPPORT; DEBT

Keith Ryder Berg and Debra Lynn Berg, 250 Or App ___ (2012) A146447

http://www.publications.ojd.state.or.us/Publications/A146447.pdf

Trial Court: G. Philip Arnold, Judge, Jackson County Circuit Court

Opinion: Wollheim, J.

Wife appeals a judgment dissolving the parties' 18-year marriage, contending that the trial court did not award an adequate amount or duration of spousal support, and erred in treating as a marital obligation indebtedness that the parties incurred for the remodel of their kitchen after the filing of the dissolution petition.

Held: The Court of Appeals held that, based on the record, it could not say that the amount or duration of spousal support, or the property division, was an abuse of discretion. Affirmed. CA 05.16.12

STALKING ORDER

S. A. B. v. Emmy M. Roach, 249 Or App __ (2012) A142587

http://www.publications.ojd.state.or.us/Publications/A142587.pdf

Trial Court: Cindee S. Matyas, Judge, Clatsop County Circuit Court

Opinion: Duncan, J.

Pursuant to ORS 30.866, petitioner sought and obtained a stalking protective order against respondent, her neighbor. Respondent appeals, arguing that the court erred in concluding that she engaged in repeated, unwanted contacts that caused petitioner subjective and objectively reasonable alarm and coercion, as required under ORS 30.866.

Held: The insults and obscenities that respondent directed toward petitioner and her family and the statement, "We know what to do with your type," were not "threats" as required by *State v. Rangel*, 328 Or 294, 303, 977 P2d 379 (1999). As to respondent's act of picking up an axe or hoe, because the record did not indicate when--or whether--petitioner learned of that incident or what her reaction was, the incident was not an actionable "contact."

Finally, while respondent's act of spraying petitioner's family with a hose while they attempted to remove her fence may have been annoying and harassing, in light of the ongoing property dispute between the parties, it did not give rise to an objectively reasonable apprehension or fear of physical injury, either at the time of the spraying or in the future. Reversed. CA 05.02.12

C. L. C. v. Rory Grey Bowman, 249 Or App __ (2012) A143679

http://www.publications.ojd.state.or.us/Publications/A143679.pdf

Trial Court: Ronald E. Cinniger, Senior Judge, Multnomah County Circuit Court

Opinion: Duncan, J.

Petitioner appeals a judgment terminating a stalking protective order, arguing that the trial court erred in failing to consider statements that respondent had posted on the Internet.

Held: A court may terminate a stalking protective order issued under ORS 30.866 when, on the respondent's motion, it finds that the criteria for issuing the order under ORS 30.866(1)(a) to (c) are no longer present. The proper inquiry for the court on a motion to terminate a stalking protective order is whether, in view of all of the circumstances, including the respondent's speech, the conduct that gave rise to the issuance of the stalking protective order continues to cause the petitioner to have a subjective apprehension regarding personal safety and that apprehension continues to be objectively reasonable. Reversed and remanded. CA 05.02.12

J. L. B. v. Karla Prescott Braude, 250 Or App __ (2012) A146464

http://www.publications.ojd.state.or.us/Publications/A146463.pdf

Trial Court: A. Michael Adler, Judge, Deschutes County Circuit Court

Opinion: Hadlock, J.

Respondents appeal the trial court's entry of two stalking protective orders (SPOs), arguing that petitioner's evidence did not satisfy the requirements of ORS 30.866. That statute requires, in part, that a respondent's unwanted contacts with a petitioner cause the petitioner objectively reasonable apprehension regarding her own personal safety or the safety of a member of her immediate family or household.

Held: Although respondent's behavior in driving by petitioner's house and photographing it was unwelcome and unsettling to petitioner, in the circumstances of this case, that behavior would not have caused a reasonable person in petitioner's position to feel apprehension for her personal safety. The trial court therefore erred in entering the SPOs against respondents. Reversed. CA 05.16.12

Note on Opinions Reviewed:

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