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Divorce and What It Means for A Child's Special Education

By Diane Wiscarson

"More than 80 percent of marriages between couples with one or more special needs children end in divorce." This is an often touted statistic, but recent research shows it may not be accurate.[1] Whether true or not, we do know that about 40-50 percent of all marriages in the United States end in divorce.[2] According to the 36th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (IDEA), there were more than 6.9 million children between the ages of birth and 21 who received special education services from school districts in 2012. With the number of children in the United States who have special needs, it seems obvious that some of those couples who divorce will have children with special needs. Therefore, family law attorneys need to know how to address the unique situation of divorce for a family including children with special needs.

As well as the everyday issues that must be addressed in a divorce, families with special needs children have additional factors that should be taken into consideration. Parents must carefully craft parenting plans, child support arrangements, and medical care decision-making plans (including addressing potential special therapies and other contingencies) so that the divorce process minimizes any possible harm to the special needs child. Attorneys should also remember that these special needs children have educational rights that must be taken into consideration when handling a divorce.

Special Education

Public schools are subject to the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973, which provide for special education and related services and reasonable accommodations in public schools, respectively. The IDEA governs the individualized services that must be provided to eligible students, with their parents' participation and collaboration. The IDEA also establishes rights and protections for children with disabilities and their parents.

The IDEA's primary goal is to protect the rights of children with disabilities by ensuring they have access to a free, appropriate public education (FAPE) in the least restrictive environment (LRE). A FAPE is provided when all of a child's educational needs are met so that he or she can make progress in the educational environment and achieve appropriate

access to the general education curriculum. The LRE means that a child with special needs is provided access to the general education curriculum and general education peers to the extent appropriate to enable the student to receive educational benefit. The IDEA also gives parents a voice in their child's education, meaning parents are part of the team that makes the educational decisions that affect their child.

A child who is eligible for special education services under the IDEA will have an Individualized Education Program, or IEP. An IEP is the document that sets forth information about the child in all areas that are educationally relevant. This includes academics, functional skills, social skills, behavior, and emotional health. If needed an IEP may provide speech-language, occupational and/or physical therapy, as well as nursing services. Essentially, whatever a child needs to benefit from his or her education must be addressed via the IEP. The child's educational goals (which are taught through specially designed instruction, or SDI) and the services and supports that the school will provide so the child can receive a FAPE must all be included on the IEP. The IEP also identifies the disabilities that qualify the student for special education and how those disabilities impact the child at school.

Parents work with the school team to develop the child's IEP and review it at least once per year, as well as re-evaluate the student once every three years. A parent can also request an IEP meeting any time there are changes and an updated IEP is needed. For example, a child may make faster progress than expected, or have problems that need to be resolved to help the child get more benefit from his or her education.

Children with special needs who are not eligible for special education under IDEA may still be eligible for support under another law: Section 504 of the Rehabilitation Act of 1973 (Section 504). Section 504 prohibits discrimination against people with disabilities in programs that receive federal funds, including public schools. Section 504 works together with the IDEA and the Americans with Disabilities Act (ADA) to protect children with disabilities from exclusion and unequal treatment in schools, jobs, and in the community.

Students who do not need SDI but still need reasonable accommodations may be given a "504 Plan." A 504 Plan can provide accommodations to help a student in school. The big difference, and the easiest way to explain the difference between an IEP and a 504 Plan, is that an IEP provides SDI and any accommodations necessary for a student with special needs to have appropriate access to the general education curriculum. A 504 Plan generally only provides accommodations, not SDI. The process to qualify for a 504 Plan is similar to the process to qualify for an IEP: the child is referred for evaluation by the school or parents, evaluated, determined eligible, and then a 504 Plan is drafted by a team that includes school staff and the parents.

Parents also have rights under Section 504 that are similar to those under the IDEA. The standard currently used by the courts to determine if a student is receiving appropriate accommodations under a 504 Plan is very similar to the standard used to determine if a student is receiving a FAPE under the special education laws.

Divorce and Special Education

A divorce itself will not affect student or parent educational rights. However, any divorce decree should clearly describe relationships and decision making authority between the parents, the child, and the school district.

The IDEA stresses that parents are the decision makers for their children and have a right to be involved in educational decision making. Parents are guaranteed those rights unless a court order or legally binding instrument revokes or alters them. In other words, each parent retains equal rights to make educational decisions for their children after a divorce unless the divorce decree or other court action specifically removes or alters those rights.

Why is it important that a child's educational rights be considered during a divorce and addressed in the divorce decree? If there is no plan establishing which parent can make educational decisions or what to do in cases of an impasse between parents with different views, the situation may become difficult for the child and extremely complicated for the school district.

For example, only one parent is needed to consent to evaluate a student for special education services or agree to an IEP. If both parents have legal custody of the child, either parent can sign the documents or revoke consent for special education all together. What happens when one parent consents to an evaluation but the other parent revokes consent? The school must stop the evaluations as soon as the consent to evaluate is revoked. The, the first parent could go back to the school and sign a consent for the evaluations to begin again. This can be a terrible cycle that harms the child and delays the process of putting in place services necessary for that child to benefit from his or her education.

In Utah, a mother tried to exit her daughter from special education services but was unable to do so, even after filing a due process complaint which resulted in a hearing before an Administrative Law Judge. The problem? The parents' state divorce court order required the consent of both parents to exit the child from special education services, and

the father did not agree with the mother's request. The divorce court's order limited the educational decision-making authority of the mother, and seemingly provided no resolution method when the parents' disagreed.[3]

These examples show why it is important for divorcing parents to have a divorce decree that clearly states which parent has the power to make educational decisions. Some parents may choose to share those decisions, and in those cases there needs to be an explicit process for resolving a disagreement. That process should allow for quick and final decision making for the sake of their child's educational needs and program.

Beginning with the IEP that will be in place when the student turns 16, schools must look at transition services. Transition services coordinate the student's transition between high school and pursuits and activities thereafter, such as secondary education, vocational training, employment, and independent living. Transition decisions should be based on the individual student's preferences, interests, needs, and skills.

In addition, unlike students who graduate with a regular high school diploma in the typical four years (or sometimes five), some special education students receive services from a school district until they earn such a diploma or until the summer after their 21st birthday, whichever occurs first. This means that parents will often be part of teams working to make education and transition decisions for students over the age of 18. These contingencies need to be considered and planned for in advance when parents divorce, to maximize the child's ability to access necessary services that he or she can use to participate in the community as an adult and be as independent as possible upon leaving the public school system.

Planning for the future of a child with special needs is also important because some special needs children will need at least some support for the rest of their lives. As children with special needs grow into adulthood, many may still require help making everyday decisions about where to live, medical decisions, financial decisions, etc. If a divorcing couple has a child who may need this type of future help, the parents may want to consider a guardianship once the child turns 18. In that case, the parents will need to work together to figure out who should be the child's legal guardian or whether a joint guardianship of the adult child is desirable. Parents may also need information about estate planning, health insurance, Social Security benefits, and other agency and community supports.

As with any area of law, consult with a local practitioner in your state about the specifics of implementation for special education, guardianship, and other related legal matters. Although laws such as the IDEA and Section 504 of the Rehabilitation Act are federal laws, each state is responsible for promulgating and implementing laws, state statutes, and administrative rules to enforce those federal laws. The implementation of federal laws can vary significantly between states. For example, in Oregon a school district has 60 school days from the date a parent signs the consent form to evaluate a student for special education eligibility.[4] Just across the Columbia River, Washington state regulations require that a special education evaluation generally be completed within 35 school days after the date written consent for an evaluation is provided by the parent.[5] As an attorney working with parents to finalize divorce agreements, consider consulting a local special education lawyer to review any provision of the final divorce agreement that will impact the education and life thereafter of a child with special needs.

Children with special needs will need the support of both parents long after a divorce. Family law practitioners should be aware of these needs, and deal with potential issues head-on when counseling clients and drafting dissolution documents. These issues should be discussed and addressed while a marriage is coming to an end to ensure that the child gets maximum benefit from his or her educational experience. Having a plan in place when a divorce is finalized will help resolve disagreements over issues, both large and small, as they arise in the future.

Diane Wiscarson worked her way through the special education system on behalf of her son, and in so doing, found her passion for helping other families navigate special education and the law. Since graduating from law school in 1996, and founding Wiscarson Law, she has helped thousands of Oregon and Washington families obtain appropriate services and placements for their special needs children in public schools and education service districts in both states. For more information call 503.727.0202, or go to www.wiscarsonlaw.com.

Footnots:

1. 80 Percent Autism Divorce Rate Debunked in First-Of-Its kind Scientific Study, http://www.kennedykrieger.org/overview/news/80-percent-autism-divorce-rate-debunked-first-its-kind-scientific-study (May 19, 2010); Madison Park, Parents of kids with autism not more likely to divorce, study suggests, CNN (May 19, 2010 2:14 p.m. EDT), http://www.cnn.com/2010/HEALTH/05/19/autism.divorce.rates/.
2. http://www.apa.org/topics/divorce/ (last visited December 14, 2015)
3. See Provo City Sch. Dist., 65 IDELR 58 (SEA UT 2015)
4. OAR 581-015-2110(5).
5. WAC 392-172A-03005(3)(a). There are exceptions to the general rule listed in WAC 392-172A-03005(3)(b)-(e).

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Editor: Daniel R. Murphy
P.O. Box 3151
Albany, OR 97321
(541) 974-0567
murphyk9@comcast.net

Publication Deadlines

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

Deadline	Issue
October	9/15/16

FROM THE BENCH
Tips For Drafting Judgments

By Deanne Darling, Judge

1. Be sure that the names of the parties are spelled properly and that their party status is properly reflected – like who is petitioner and who is respondent
2. Double check the county and the case number
3. Properly label the document- ie: limited; general; supplemental; or order
    a. Using the word *stipulated* in the caption is not really necessary but it you insist- it only applies to judgments that in fact bear the signature of all the parties/ attorneys and says somewhere on it : IT IS SO STIPULATED.
        i. This is really no different than making a stipulation in court
        ii. Do not confuse this with a judgment that follows a settlement. Whether that settlement is on the record or not, the existence of a settlement does not render the judgment stipulated. At best the facts may have been stipulated to, or the terms, but not the judgment itself; unless you really had the judgment in court and the judge inquired of the party if they stipulated to the document
4. Be descriptive in the beginning of the document about when the hearing occurred – which judge it was before and the dates on which it was heard. Reciting what matters or motions were before the court is also helpful.
    a. Best practice in ecourt filings is to include the judges name that it is to be directed to for signing *in the caption* under the listing of the type of document it is. This speeds up the process. If you get into the habit of using introductory language in your judgments that include the judges name – that is a double check for the entry clerks and saves time.
        i. Suggested language: Respondents motion to modify custody and parenting time came before Judge Darling for trial on May 10, 12 and 15, 2016.
            1. Having said it was for trial – it is not necessary to add (the often present language) *and testimony was taken, exhibits received*, or the *court having been fully informed* (which is often an

issue of great debate)

a. Do not just keep adding all these words. Words are important and should be there for a reason and tell a story to all whom come after, like a good history book. I recall the rules of my journalism class: who- what – when – where and why. Same for judgments.

2. Other suggestions: the matter came before Judge Darling on June 15, 2016 for hearing on mothers show cause motion signed on May 12, 2016 by Judge Murphy seeking to enforce parenting time.

ii. By including the dates and the judges- it helps a clerk or a subsequent lawyer locate the FTR quicker and makes it easier to connect the pleadings.

5. Include as many findings as you can so that when the matter comes back (and they usually do) the next set of eyes knows what the parameters were. Even if there is unresolved controversy- describe it. For instance: "Mother asserted her income was $2,450 per month. Father asserted her income was $3300 per month. This dispute was not resolved; however, for the purpose of resolving the dispute the sum of $2800 per month is agreed to be mother's income. " This is a very different agreement than just agreeing she has the income.

6. Make sure the document is internally consistent and that any numbering system is accurate and simple. If you can't easily recite it out loud and have someone follow you- change it. A good test would be to give it to your 16 year old- verbally tell them what paragraph to locate (by reference to the paragraph) and see how long it takes to find it. Over 5 seconds- you've likely exceeded my patience.

7. Make sure attachments that are referenced – really are attached.

8. The numbers used in the child support work sheet match the findings of fact.

9. Confirm that the name of the document on the bottom of each page is correct and the same throughout the document

10. Leave enough room for the judge to sign- and be sure there is some text on the signature line

11. Review UTCR chapter 2

12. Insure compliance with UTCR 5.100 and attach the proper certificate of readiness or service.

13. If money is involved, include a judgment summary. Be careful to match the summary to the body- or vice versa. In the event of a discrepancy- they summary controls

AUTHOR'S NOTE: Judges differ in how they like things- I speak only for my self – not my bench – not OJD and I reserve the right to disagree with me later. I hope to continue a tips column on varying topics. I encourage other judges to join in and or respond or tackle their own topic. If a reader has a question or topic for a future column- submit it to me at deanne.darling@ojd.state.or.us

Hon. Deanne Darling, Circuit Court Judge, Clackamas County, since 1995. 16 years of private practice prior to that.

Family Support, Garnishment and Military Retired Pay (Part 1)

By Mark E. Sullivan

Introduction

The Uniformed Services Former Spouses' Protection Act,[1] also known as USFSPA, is not just for allocation and distribution of military retired pay in divorce and property division cases. It also specifically provides for the withholding of family support (child support and alimony) from the pension of a military retiree; after effective service of the support order on the designated agent, the specified amount will be disbursed to the payee (within certain monetary limitations, as will be discussed below) for alimony or child support.[2] Additionally, Congress provided for the garnishment of military retired pay for support in Title 42, U.S. Code, Section 659 (a) and (b).[3]

Most attorneys and judges in alimony and child support and alimony cases would consider the income of each party derived from all sources in determining the amount of support. Retired pay will be one of the sources of income to use in determining support, since it is a regularly recurring payment of taxable moneys. In fact, even tax-free payments from the military (*e.g.*, Combat-Related Special Compensation, or CRSC) are subject to garnishment,[4] and non-taxable income derived from military sources (*e.g.*, disability compensation from the Department of Veterans Affairs, or VA) are usually considered in the setting of spousal support and child support.[5] Garnishment of child support payments from military retired pay may be mandatory under a state's child support guidelines, statutes and rules.[6]

Retired Pay Scenarios and Issues

Military retired pay is disbursed once monthly to each retiree of the armed forces (Army, Navy, Air Force, Marine Corps and Coast Guard). It is usually based on at least 20 years of creditable service, with payments starting immediately for those who retire from active duty and have at least twenty active-duty years of service; for those in the National Guard or Reserves, retired pay usually begins at age 60. Payments are made by direct deposit to the financial institution account of the retired individual by the retired pay center.[7] An example of a Retiree Account Statement is shown at ATCH 1 below.

Cases involving military retired pay and support generally fall into two categories. The first category is the situation in which there is no division of military retired pay as property. In this situation, the retiree may never have been married to the support claimant, or the parties were previously married but there was no military pension division because the parties' retirement rights were approximately equal, or because the non-military spouse waived military pension division in order to obtain other assets from the marriage. In any of these scenarios, the *full retired pay* of John Doe, the retiree, would be at stake in setting the amount of support.

In other cases, there may have already been a division of military retired pay. When Mary Doe, the former spouse, is receiving a share of the pension, the court may usually take into account the remainder of John Doe's retired pay as income for him, and it would consider the share of his former spouse as income for her.[8] Since both are considered "income," both would be considered in most states as available funds in setting the amount of support.

General Rules for Garnishment

The rules for Army, Navy, Air Force and Marine Corps retired pay, including garnishment and income withholding restrictions, are found in the Department of Defense Financial Management Regulation, or DoDFMR.[9] The Defense Finance and Accounting Service, or DFAS, which is responsible for administering retired pay division and garnishment for these four branches of military service, has promulgated rules for withholding money from a retiree's military pension for the payment of alimony and child support. The U.S. Coast Guard, a component of the Department of Homeland Security, administers retired pay for the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration (both of which are considered "uniformed services" under 10 U.S.C. § 1072) as well as its own retirees, through its Pay and Personnel Center in Topeka, Kansas. In general, it follows the rules set out by DFAS. This section will explain how the rules are implemented.

The rules for collecting alimony, child support or both from an individual's military retired pay are found at 42 U.S.C. § 659 and 5 C.F.R. Part 581. The money from which family support may be withheld is termed "remuneration for employment." This includes military retired pay, and even military disability retired pay.[10]

The support garnishment rules specify that alimony means the periodic payment of money for the support and maintenance of a spouse or former spouse. Depending on state law, it may be called separate maintenance, alimony pendent lite, maintenance or spousal support. "Alimony" also includes attorney fees, interest, and court costs when these items are specifically stated in the court order. It does not include payments or transfers of property made in compliance with a property settlement, equitable distribution of property, or other division of property between the spouse(s) or former spouse(s).[11]

"Child support" means periodic payments for the support of a child or children. Depending on state law, it may include payments for health care, education, recreation, clothing, or other specific needs. It also includes attorney fees, interest, court costs, and other relief which may be awarded by the court in connection with the establishment and enforcement of child support.[12]

Money for support is withheld from "disposable earnings."[13] This means gross retired pay minus certain deductions. It also means Combat-Related Special Compensation, a disability payment from the Department of Defense, in connection with wounds, illnesses or conditions that were incurred in regard to combat or training for combat.[14] The first deduction is for debts owed to the federal government.[15] There is also a deduction for payments required by law, such as premiums for the Survivor Benefit Plan or waivers of retired pay to qualify for tax-free disability compensation from the VA.[16] The final deduction is for federal and state income tax withholding.[17] The remaining funds are subject to support withholding based on "legal process."

Legal process means court orders, writs, judgments or other similar documents to effectuate a garnishment, so long as the document is issued by a court of competent jurisdiction within any state, territory, or possession of the United States.[18] The order is transmitted to the designated agent for the branch of service involved.[19]

Starting the Process

When the order or other "legal process document" has been served on the designated agent, that office will review it to be sure that "it is regular on its face, appears to conform to the laws of the jurisdiction from which it was issued, was issued to enforce a member's legal obligation to provide child support and/or alimony, and contains sufficient information to accurately identify the member."[20]

A garnishment order is *regular on its face*[21] if there are no glaring errors or obvious inconsistencies. In *United States v. Morton,*[22] the U.S. Supreme Court held that the retired pay center is not required to look behind the order to determine whether the trial court had personal jurisdiction over the defendant-servicemember, that this would provide an insurmountable burden for the limited personnel at the agency, and that subject-matter jurisdiction was the proper scope of the agency inquiry upon receipt of a garnishment order.

An order will not be honored, as an exception to the *regular-on-its-face* rule, if the garnishment notice or order:

1. Is for an impermissible purpose;
2. Does not comply with 5 C.F.R. Part 581;
3. Is barred because the government has been served with an order enjoining or suspending the garnishment order; or
4. Is on appeal by the obligor, and state law requires suspension of the garnishment pending appeal.[23]

When the above requirements are met, the designated agent will send a copy of the order to the retiree, notifying him or her of the garnishment, explaining the effect of the order on his or her pay and advising the retiree that he or she has the burden of raising any available defenses to enforcement, which should be lodged in the appropriate court, not with the designated agent.[24]

Next the designated agent will, within 30 days of service of the order, determine the amount of the retiree's disposable earnings (see below) and establish deductions from the member's disposable earnings in an amount sufficient to comply with the order. An answer to the legal process will be filed if one is required.[25] Allotments may be stopped or suspended if the member does not have enough retired pay to comply with the order.[26]

How Much?

The limits on garnishment are imposed by the Consumer Credit Protection Act.[27] This statute limits payments to 50% of the retiree's disposable earnings if the retiree can prove that he or she is providing more than half of the support for family members other than those to whom the garnishment order pertains. Otherwise the maximum is 60%. An additional five percent may be added to the 50 (or 60) percent above if the arrearage is for 12 or more weeks.[28]

When an individual owes support under two or more orders, then current support will be paid before arrears. Child support has priority over legal process to enforce current alimony. When there are multiple child support orders and not enough disposable earnings to pay in full all of the orders, then funds will be apportioned among the obligations in proportion to the amounts of current child support due. Alimony obligations are paid on a first-come, first-served basis. [29]

Appeals, Priorities

Sometimes the individual involved appeals the order issued for child support or alimony through state courts. When this happens, collection from the member's retired pay and disbursement to the

appropriate payee (e.g., individual, support collection agency, clerk of court) will continue when state law requires continued compliance with the underlying order during an appeal; otherwise the collection will continue but disbursements will be suspended.[30]

If the retired pay center receives both a support garnishment under 42 U.S.C. § 659 and an order for monthly payments from the same member pursuant to USFSPA, the orders would be honored on a "first-come, first-served" basis.[31] The maximum which the retired pay center can disburse for both obligations is 65 percent of the disposable earnings payable to the retiree that is considered to be remuneration for employment.[32] If DFAS receives the garnishment decree first, then that would be paid in full, and the balance of the available funds would then be applied to the second obligation. Neither obligation would affect the calculation of disposable pay (since neither obligation is an "authorized deduction" for that purpose). Thus, if the retired pay center is already honoring an alimony garnishment and then receives a military pension division order, dividing retired pay as property, the pension division decree would not affect what the center pays pursuant to the garnishment. The alimony garnishment would have first payment priority.

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

Footnotes:

1. 10 U.S.C. § 1408.
2. 10 U.S.C. § 1408(d).
3. The treatment herein deals with the specific topic of garnishment for family support obligations; other types of garnishments (e.g., commercial garnishments, involuntary allotments and garnishment from active-duty pay) involve different rules and are not within the scope of this article.
4. "CRSC is subject to a Treasury offset to recover a debt owed to the United States as well as to garnishment for child support or alimony." DoD 7000.14-R, Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures –Retired Pay, Vol. 7B, ch. 63, para. 620101.C.3.
5. *See, e.g., Womack v. Womack,* 307 Ark. 269, 818 S.W.2d 958 (1991); *Murphy v. Murphy,* 302 Ark. 157, 787 S.W.2d 684 (1990); *In re Marriage of Nevil,* 809 P.2d 1122 (Colo. App. 1991); *Mims v. Mims,* 442 So.2d 102 (Ala. Civ. App. 1983); and *Riley v. Riley,* 82 Md. App. 400, 571 A.2d 1261 (1990).
6. *See, e.g., Horine v. Horine,* 2014 Tenn. App. LEXIS 764 (Tenn. Ct. App. Nov. 24, 2014) (Ruling on the issue of income assignment or wage withholding for a retiree, the appellate court upheld trial court's ruling requiring that the father's child support payments must be withheld from his military pension.)
7. For the Army, Navy, Air Force and Marine Corps, garnishments are handled by Garnishment Operations at DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas. Throughout this article, the author uses "DFAS," "retired pay center" or "designated agent" to refer to both of these offices.
8. *See, e.g., Rucker v. Rucker,* 82 So. 3d 189 (Fla. Dist. Ct. App. 2012) (Court cannot double-count pension in its alimony calculations. Here, the court added parties' retirement incomes to their monthly net incomes, which already included retired pay. But court can include each one's share of military pension when determining income); *Hautala v. Hautala,* 417 N.W.2d 879 (S.D. 1988) (Ex-husband's military pension, once divided with his former spouse, may be considered as a source of income in determining alimony for her); Marriage of Haynie and Kemp, 1997 Kan. App. Unpub. LEXIS 601 (Ex-wife appealed the judge's inclusion of her share of former husband's military retired pay into "income" for child support purposes; appellate court affirmed trial court's ruling). *See* also *Santiago v. Santiago,* 122 So. 3d 1270 (Ala. Civ. App. 2013) (Father filed motion to modify his child support payments because, in part, the mother was now receiving part of his military pension and he believed that he was entitled to a reduction in child support and modification of his share of uncovered medical expenses. The mother filed a counter-motion, asking that the court modify the child support by increasing it, which is what the court did. The appellate court affirmed the ruling, stating that the father had asked for modification, and had asked for the court to take into account the parties' incomes and earnings, and that is just what the trial court did).
9. DoD 7000.14-R, Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures –Retired Pay, Vol. 7B, ch. 27.
10. DoDFMR, Vol. 7B, ch. 27, para. 270102.
11. DoDFMR, Vol. 7B, ch. 27, para. 270201.
12. *Id.* at para. 270202.
13. *Id.* at para. 270203.
14. CRSC is authorized at 10 U.S.C. 1413a. For a full explanation of CRSC, see Mark E. Sullivan and Charles R. Raphun, Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension, 24-1 J. AM. ACAD. MATRIMONIAL LAW. at 147 (2011).
15. There is an exception. The rules states that all debts to the United States must be deducted, "except that an indebtedness based on a levy for income tax under 26 U.S.C. 6331 shall not be excluded in complying with legal process for the support of minor children if the legal process was entered prior to the date of the levy." DoDFMR, Vol. 7B, Ch. 27, Para. 270203.A.
16. *Id.* at para. 270203.B.
17. *Id.* at para. 270203.C. The rule requires that amounts withheld cannot greater than the allowable amount if the individual claimed all dependents to which he or she were entitled. Additional federal withholding will be authorized when the individual presents evidence of a tax obligation which supports this.
18. *Id.* at para. 270204. If the order is entered by a proper court of a foreign nation, there must be an agreement binding the United States to honor such an order. Id. at para. 270204.B.
19. *Id.* at para. 2703. Legal process may be served by regular mail or by fax to: Director, Garnishment Operations DFAS Cleveland P.O. Box 998002, Cleveland OH 44199-8002. Fax: 216-522-6960; toll-free fax 877-622-5930. The Coast Guard administers retired pay garnishments through its Retiree and Annuitant Services office at: U.S. Coast Guard Pay and Personnel Center, ATTN: Commanding Officer (RAS), 444 S.E. Quincy St., Topeka, KS 66683-3591.
20. DoDFMR, Vol. 7B, ch. 27, at para. 270401.
21. 42 U.S.C. § 659(f).
22. United States v. Morton, 467 U.S. 822 (1984).
23. 5 C.F.R. § 581.305(b).
24. DoDFMR, Vol. 7B, ch. 27, at para. 270402.
25. Id. at para. 270403.
26. Id. at para. 270405.
27. 15 U.S.C. § 1673.
28. DoDFMR, Vol. 7B, ch. 27, at para. 270404.
29. *Id.* at para. 270406.
30. *Id.* at para. 2705.
31. 10 U.S.C. § 1408 (e)(4)(A).
32. "Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act [42 U.S.C. § 659] with respect to a member may not

exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act [42 U.S.C. § 662] to be remuneration for employment that is payable by the United States." 10 U.S.C. § 1408 (e)(4)(B). See note 13 *supra* as to "disposable earnings" as defined in the DoDFMR.

RETIREE ACCOUNT STATEMENT

STATEMENT EFFECTIVE DATE	NEW PAY DUE AS OF	SSN
DEC 16, 2005	**FEB 01, 2006**	123 – 45 – 6789

PLEASE REMEMBER TO NOTIFY DFAS IF YOUR ADDRESS CHANGES

Major John Q. Doe, USAF (Ret.)
123 Green St
Apex, NC 27511-1234

DFAS-CL POINTS OF CONTACT

DEFENSE FINANCE AND ACCONTING SERVICE
US MILITARY RETIREMENT PA
PO BOX 7130
LONDON KY 40742-7130
COMMERCIAL (216) 522-5955
TOLL FREE 1-800-321-1080
TOLL FREE FAX 1-800-469-6559
myPAY
https://myPay.dfas.mil
1-877-363-3677

PAY ITEM DESCRIPTION

ITEM	OLD	NEW	ITEM	OLD	NEW
GROSS PAY	2,746.00	2,746.00	FITW	191.31	209.05
VA WAIVER	591.30	473.04	ALLOTMENTS/BONDS	40.00	40.00
SBP COSTS	179.28	179.28	NET PAY	1,744.11	1,844.63
TAXABLE INCOME	1,975.42	2,093.68			

PAYMENT ADDRESS

YEAR TO DATE SUMMARY (FOR INFORMATION ONLY)

DIRECT DEPOSIT

TAXABLE INCOME: 1,975.42 FEDERAL INCOME TAX WITHHELD: 191.31

TAXES

FEDERAL WITHHOLDING STATUS: SINGLE
TOTAL EXEMPTIONS: .01
FEDERAL INCOME TAX WITHHELD: 209.05

SURVIVOR BENEFIT PLAN (SBP) COVERAGE

SBP COVERAGE TYPE: SPOUSE AND CHILD(REN)
SPOUSE COST: 176.78
CHILD COST: 50

ANNUITY BASE AMOUNT: 2750.50
55% ANNUITY AMOUNT: 1,512.77
40% ANNUITY AMOUNT: 1,100.20
SPOUSE DOB: 12 DEC 1945
CHILD DOB: 13 MAR 1996

THE ANNUITY PAYABLE IS 55% OF YOUR ANNUITY BASE AMOUNT UNTIL YOUR SPOUSE REACHES AGE 62. AT AGE 62, THE ANNUITY MAY BE REDUCED DUE TO SOCIAL SECURITY OFFSET, OR UNDER THE TWO-TIER FORMULA. THAT REDUCTION MAY RESULT IN AN ANNUITY THAT RANGES BETWEEN 40% ($1100.20) AND 55% (1512.77) OF THE ANNUITY BASE AMOUNT. THE COMBINATION OF THE SBP ANNUITY AND THE SOCIAL SECURITY BENEFITS WILL PROVIDE TOTAL PAYMENTS FROM DFAS AND THE SOCIAL SECURITY ADMINISTRATION OF AT LEAST 55% OF YOUR BASE AMOUNT. THE ACTUAL ANNUITY PAYABLE IS DEPENDENT ON FACTORS IN EFFECT WHEN THE ANNUITY IS ESTABLISHED.

CASENOTES

OREGON APPELLATE DECISIONS

October 2016 Edition, OSB Family Law Newsletter
Family Law Opinions: August – September 2016

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

SUPREME COURT

No Supreme Court decisions during this period.

Oregon Court of Appeals

Custody - Parenting Time – International Move

In the Matter of the Marriage of Jane FINNEY-CHOKEY, Petitioner-Respondent, and Shane Russell CHOKEY, Respondent-Appellant. 280 Or App 347 (2016) *http://www.publications.ojd.state.or.us/docs/A157466.pdf*

Multnomah County Circuit Court 130665898; A157466 Beth A. Allen, Judge.

Lagesen, J.

Father appeals a general judgment of dissolution of marriage that granted mother's request to move to the United Kingdom with child. That judgment also provided that all of father's parenting time would be in the United Kingdom until child turned eight, at which point father would be entitled to have half of his parenting time in the United States (if father had not opted to move to the United Kingdom himself). Father contends that the trial court erred by approving the move, and by imposing the geographic restriction on father's parenting time.

Held: The trial court correctly applied the applicable law in approving the relocation, and did not abuse its discretion in determining that the move to the United Kingdom was in child's best interests. The trial court did, however, abuse its discretion by requiring that father exercise all of his parenting time in the United Kingdom until child turns eight; although the record would permit the imposition of a geographic restriction of a more limited duration, nothing in it permits the conclusion that it is in child's best interests for the restriction to extend until she reaches age eight. Reversed and remanded for reconsideration of Parenting Plan Provision 2.1.1; otherwise affirmed. COA 08.24.16

Custody – Troxel Requirement – Grandmother

Tanya KENNISON, Petitioner-Respondent, v. Whitney DYKE, Respondent-Appellant, and Dray WILLIAMS, Respondent below, 280 Or App 121 (2016) *http://www.publications.ojd.state.or.us/docs/A157378.pdf*

Marion County Circuit Court, 14C30151; A157378 Tracy A. Prall, Judge

Egan, J.

Mother appeals from the trial court's judgment granting grandmother's petition for visitation with mother's child, arguing that the court erred in failing to make a finding that grandmother rebutted the statutory presumption, under ORS 109.119(3)(b), that mother acted in the best interest of the child when she denied grandmother visitation with the child.

Held: The trial court failed to make the requisite finding that grandmother rebutted, by clear and convincing evidence, the statutory presumption that mother acted in the best interest of the child. Vacated and remanded. COA 08.03.16.

Property Division

In the Matter of the Marriage of Barbara JOHNSON, Guardian ad litem and Conservator for Joanne M. Price, Petitioner-Respondent, and Gari W. PRICE, Respondent-Appellant, and PRICE FAMILY TRUST and Peter A. Price, Successor Trustee of Price Family Trust, Respondents below. 280 Or App 71 (2016)

http://www.publications.ojd.state.or.us/docs/A154023.pdf

Union County Circuit Court 110747171; A154023 Russell B. West, Judge.

Ortega, P. J.

Husband appeals a general judgment of dissolution, challenging the spousal support award and property division.

Held: As to the spousal support award, it was legal error for the court to provide for spousal support in the manner that it did. As to the property division, it was proper for the court to dispose of the revocable trust's marital assets; however, the court erred by discounting the anticipated tax liabilities from wife's share of the property division and by not crediting wife with $22,000 in proceeds from the sale of her piano. Spousal support award reversed; property division vacated and remanded; otherwise affirmed. COA 08.03.16

In the Matter of the Marriage of Patrick T. CODE, Petitioner-Appellant, and Sonna CODE, Respondent-Respondent. 280 Or App 266 (2016)

http://www.publications.ojd.state.or.us/docs/A154916.pdf

Jackson County Circuit Court 111250D9; A154916 Benjamin M. Bloom, Judge.

Egan, J.

In this marriage dissolution case, husband argues that the trial court erred in calculating the value of his podiatry practice that was subject to marital division and in awarding attorney fees to wife.

Held: The trial court's determination of the enterprise goodwill value of husband's practice was supported by evidence in the record; the trial court did not abuse its discretion in concluding that it was "just and proper" to equally divide that entire value between the parties. And the trial court did not abuse its discretion in awarding attorney fees to wife based on the parties' disparate incomes. Affirmed. COA 08.17.16.

Spousal Support

In the Matter of the Marriage of Barbara JOHNSON, Guardian ad litem and Conservator for Joanne M. Price, Petitioner-Respondent, and Gari W. PRICE, Respondent-Appellant, and PRICE FAMILY TRUST and Peter A. Price, Successor Trustee of Price Family Trust, Respondents below. 280 Or App 71 (2016)

http://www.publications.ojd.state.or.us/docs/A154023.pdf

Union County Circuit Court 110747171; A154023 Russell B. West, Judge.

Ortega, P. J.

Husband appeals a general judgment of dissolution, challenging the spousal support award and property division.

Held: As to the spousal support award, it was legal error for the court to provide for spousal

support in the manner that it did. As to the property division, it was proper for the court to dispose of the revocable trust's marital assets; however, the court erred by discounting the anticipated tax liabilities from wife's share of the property division and by not crediting wife with $22,000 in proceeds from the sale of her piano. Spousal support award reversed; property division vacated and remanded; otherwise affirmed. COA 08.03.16

In the Matter of the Marriage of Lauren Victoria VANLANINGHAM, Petitioner-Respondent, and Larry Emil VANLANINGHAM, Respondent-Appellant. 280 Or App 472 (2016)

http://www.publications.ojd.state.or.us/docs/A155102.pdf

Washington County Circuit Court C093864DRB; A155102 Rita Batz Cobb, Judge

Egan, J.

Husband appeals a supplemental judgment modifying spousal support. Husband sought a reduction or termination of indefinite maintenance spousal support due to wife's receipt of an inheritance and husband's reduced income after their divorce. The trial court modified the judgment, reducing the indefinite maintenance spousal support award to wife from $5,500 per month to $4,700 per month. On appeal, husband assigns error to the amount and duration of the modification.

Held: The trial court erred when it only considered a portion of wife's inherited assets and when it found that wife's financial decision to invest the inherited funds to earn two to three percent is reasonable as the basis on which it relied to modify the spousal support award. Vacated and remanded. COA 08.31.16

In the Matter of the Marriage of Julie A. HAGGERTY, nka Julie Ann Blair, Petitioner-Respondent, and Ancer L. HAGGERTY, Respondent-Appellant. 280 Or App 733 (2016)

http://www.publications.ojd.state.or.us/docs/A157822.pdf

Multnomah County Circuit Court 100463778; A157822 Paula J. Kurshner, Judge.

DeVore, J.

Husband appeals a judgment awarding spousal support. During a rehearing on remand, the trial court was required to determine whether the parties had reached a settlement agreement and, if so, whether the terms of that settlement were within the range of agreements that are just and equitable under the circumstances. The trial court ruled that the parties had not reached a settlement agreement and that, even if they had reached an agreement, the agreement was outside the range of permissible agreements. On appeal, husband contends that the court erred in those determinations because, in light of the evidence adduced at the rehearing, the parties had reached a settlement agreement and that agreement was enforceable and permissible. Wife denies that she unambiguously agreed to a settlement and asserts that any agreement was only the result of duress or unilateral mistake and that any agreement is not enforceable because it is outside the range of permissible agreements.

Held: The trial court erred in the standard that it applied to determine assent to the agreement; whether wife assented to the settlement requires the trial court to make a determination using an objective, not subjective, standard of assent, based on the evidence already in the record. The putative agreement is within the range of agreements that are just and equitable. As a matter of law, wife's defenses of duress and unilateral mistake are unavailing on this record. Supplemental judgment for

spousal support reversed and remanded; supplemental judgment for attorney fees vacated and remanded. COA 09.08.16

In the Matter of the Marriage of Claudia PORTER, Petitioner-Respondent Cross-Appellant, and Harry H. PORTER, III, Respondent-Appellant Cross-Respondent. 281 Or App 169 (2016)

http://www.publications.ojd.state.or.us/docs/A154656.pdf

Multnomah County Circuit Court 111172446; A154656 Kathryn L. Villa-Smith, Judge.

Duncan, P. J.

Husband appeals from a dissolution judgment that included an award of spousal support to wife and a division of property, asserting that the trial court erred in concluding that the parties' prenuptial agreement was unenforceable because wife signed it involuntarily. Wife cross-appeals, contending that the trial court did not make a just and proper division of the marital assets.

Held: Writing only to address husband's contentions on appeal, the Court of Appeals concluded that the trial court correctly ruled that the prenuptial agreement was unenforceable because wife signed it involuntarily. Affirmed on appeal and on cross-appeal. COA 09.21.16

Protective Proceedings

K. L. D., Petitioner-Respondent, v. Daniel J. DALEY, Respondent-Appellant. 280 Or App 448 (2016)

http://www.publications.ojd.state.or.us/docs/A160411.pdf

Josephine County Circuit Court 15PO01945; A160411 Pat Wolke, Judge.

Sercombe, P. J.

Respondent appeals an order continuing a restraining order that petitioner obtained against him under the Family Abuse Prevention Act. ORS 107.700 - 107.735. Respondent contends that petitioner failed to present sufficient evidence to support continuance of the order and that one of the factual findings underlying the order was unsupported by any evidence in the record.

Held: The evidence, viewed objectively, is legally insufficient to establish that respondent's conduct put petitioner at imminent risk of further abuse or credibly threatened her physical safety. Reversed. COA 08.31.16

FAPA Protective Orders – Attorney fees

C. R., Petitioner-Respondent, v. William GANNON, Respondent-Appellant. 281 Or App 1 (2016)

http://www.publications.ojd.state.or.us/docs/A156763.pdf

Deschutes County Circuit Court 13AB0325; A156763 Roger J. DeHoog, Judge.

Ortega, P. J.

Respondent appeals a supplemental judgment denying him attorney fees and costs, asserting that the trial court "held a hearing pursuant to" ORS 107.718(10), and, therefore, erred in concluding that it lacked authority under ORS 107.716(3) to award attorney fees and costs. Petitioner sought and received an ex parte restraining order against respondent under ORS 107.710. Respondent requested a hearing under ORS 107.718(10) to contest the factual basis for issuing the restraining order. On the day set for that hearing, petitioner's counsel appeared before the court and asked the court to dismiss her petition and restraining order without prejudice. After the court dismissed the restraining order without prejudice, respondent sought attorney fees and costs under ORS 107.716(3), which authorizes a fee award "[i]n a hearing held pursuant to" ORS 107.718(10). The court concluded that, because it had not held a "contested" hearing regarding the merits of petitioner's petition and restraining order, it had not held a hearing pursuant to ORS 107.718(10) and, therefore, it was not authorized to award attorney fees to respondent.

Held: A hearing is held pursuant to ORS 107.718(10) for purposes of an attorney fee award under ORS 107.716(3) when the parties involved have an opportunity to be heard on issues of law or fact that are related to relief available under ORS 107.718, and the court is asked to make a determination on those issues. The court did not reach the issues of law or fact implicated by respondent's request for a hearing under ORS 107.718(10), and the court therefore correctly concluded that it lacked statutory authority under ORS 107.716(3) to award attorney fees and costs. Affirmed. COA 09.14.16

Elder Abuse Protective Order – Due Process – Right to Cross Examine

K. M. J., Petitioner-Respondent, v. John S. CAPTAIN, III, Respondent-Appellant. 281 Or App 360 (2016)

http://www.publications.ojd.state.or.us/docs/A159123.pdf

Harney County Circuit Court 1409418AB; A159123 W. D. Cramer, Jr., Judge.

Shorr, J.

Respondent appeals from the entry of a temporary restraining order pursuant to the Elderly Persons and Persons With Disabilities Abuse Prevention Act, ORS 124.005 to 124.040. He argues, inter alia, that the court erred by denying him the opportunity to cross-examine the only witness against him, petitioner. Respondent acknowledges that he did not object or assert his right to cross-examination but argues that statements he made were sufficient to preserve the issue. Respondent urges

that, should the Court of Appeals conclude that the error was not preserved, the court should nevertheless reach and correct the error under plain error review, ORAP 5.45(1).

Held: The trial court erred by entirely prohibiting respondent from questioning or cross-examining petitioner. Respondent did not preserve the error, but the error was plain, and the Court of Appeals exercises its discretion to correct it. Reversed and remanded. COA 09.28.16

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.