MINUTES

EXECUTIVE COMMITTEE OF THE
OREGON STATE BAR FAMILY LAW SECTION

March 15, 2012

Present:	Laura Rufolo	-	Chair
	Marcia Buckley	-	Treasurer
	Lauren Saucy	-	Secretary

Members at large: Sean Armstrong, Debra Dority, Andrew Ivers, Richard Funk, Christopher Eggert, Gregory Oliveros, Scott Leibenguth

Also participating:	Ryan Carty	-	Legislative Subcommittee Co-Chair
	Susan Grabe	-	Bar Liaison
	Theresa Kohohoff	-	BOG Liaison

The meeting took place by teleconference.

Call to Order. The Chair called the meeting to order at 3:17 p.m. A quorum was present.

Business: The following items of business came before the Committee:

1. **Approval of Minutes.** Upon motion duly made, seconded and unanimously approved, it was:

   RESOLVED: The minutes of the Executive Committee meetings held October 14, 2011, and October 15, 2011, are approved as written.

   RESOLVED: The minutes of the Executive Committee meeting held February 16, 2012, are approved as written.

2. **Treasurer's Report**.

   Account Balances. As of the end of 2011, the Section's bank account balance is $54,808.

   Membership: The Section had 1118 members as of the end of 2011. Current membership is 985.

3. **Salishan Conference 2012, Committee Report.** Planning for the conference is moving forward. The majority of speakers have been acquired. The committee's main work at present is focused on finalizing topics and presenters. Suggestions from the FLEC are welcome.

Policies and procedures regarding expense reimbursement and room compensation are being reduced to writing and will be approved by the subcommittee prior to implementation.

Discussion was held on the merits of establishing a reduced fee structure for new attorneys to attend the conference.

4. **Legislation, Committee Report.** The subcommittee presented a slate of proposed legislation for the 2013 legislative session. The subcommittee's report is attached hereto and by this reference incorporated into the Section minutes. As a summary, the proposals are as follows:

1. Housekeeping Bill

a. ORS 107.105(1) (language regarding taxability of alimony)

This change was approved with the following amendment: The word “payee” will be replaced with the phrase “either party.”

b. ORS 109.135 (expanding where case may be filed)
c. ORS 109.135(1) (replacing archaic use of "suit")
d. ORS 36.236 & 107.785 (conforming mediation confidentiality standards as applicable to family law cases)

Discussion was held on the appropriateness of this proposal in light of mandatory reporting and domestic violence issues.

The FLEC agreed that more discussion will be had on this prior to a vote as to how to move forward. A final vote will be had by email.

2. Insurance Bill

a. ORS 107.810 (life insurance requirements made applicable to unmarried parents)
b. ORS 107.820 (include specific statutory authority to request attorney fees in dealing with life insurance issues)

3. Pension Plans - ORS 237.600 & 238.465 (preserving survivor benefit awarded to plan participant's ex-spouse)

4. Automatic Restraining Order - ORS 107.093 (strict application to ORS 109 cases is too broad; requires restructuring)

Two options were proposed to the FLEC as to how to deal with this issue. Discussion was held as to whether to pursue one or both

proposals by the Legislative Committee. FLEC suggested that both proposals be pursued.

Upon motion duly made, seconded and unanimously approved, it was:

RESOLVED: The Legislative Committee shall pursue implementing its proposed legislative amendments to ORS 107.105(1), 109.135, 107.810, 107.820, 237.600, 238.465, and 107.093 after incorporating suggestions made by the FLEC.

RESOLVED: The Legislative Committee will continue further discussion on proposals to change ORS 36.236 and 107.785.

5. **Child Support Calculator, Committee Report.** The workgroup is still finalizing its recommendation. Timing should put public hearings on the proposed rules in November 2012, and implementation of the new version of the child support calculator will likely occur in early January 2013.

6. **Family Law Section Website, Committee Report.** A prototype of the website is now available for review. Updates will be made to reflect the current makeup of the committee and upcoming dates. The site is on track to be transferred to the OSB shortly. Tony Wilson will contact the company used by the MBA for their website development for a proposal.

7. **Professionalism Award, Committee Report.** A draft policy in selecting award recipients was circulated. Gregory Oliveros will join the subcommittee.

There being no further business to come before the meeting, the meeting was adjourned at 4:10 p.m.

These minutes were prepared by Lauren Saucy, 2012 Secretary to the Oregon State Bar Family Law Section Executive Committee

Lauren Saucy

* * * * * * * * * *

The schedule of future meetings is:

Thursday	April 19 , 2012	3:00 p.m.
Thursday	May 17, 2012	3:00 p.m.
Thursday	June 21, 2012	5:00 p.m. *in Salem*
Saturday	October 20, 2012	7:00 a.m. *in Salishan*

ORS 107.105 (1)

Existing statute:

ORS 107.105(1). Whenever the court renders a judgment of marital annulment, dissolution or separation, the court may provide in the judgment:

[...]

(d) For spousal support, an amount of money for a period of time as may be just and equitable for one party to contribute to the other, in gross or in installments or both. The court may approve an agreement for the entry of an order for the support of a party. In making the spousal support order, the court shall designate one or more categories of spousal support and shall make findings of the relevant factors in the decision. The court may order...."

Proposed change:

AMEND ORS 107.105(1)(d) by inserting the following underlined and bold face text:

ORS 107.105(1). Whenever the court renders a judgment of marital annulment, dissolution or separation, the court may provide in the judgment:

[...]

(d) For spousal support, an amount of money for a period of time as may be just and equitable for one party to contribute to the other, in gross or in installments or both. **Unless otherwise expressly provided in the judgment, liability for the payment of spousal support shall terminate on the death of the payee spouse and there shall be no liability to make any payment (in cash or property) as a substitute for such payments for any period after the death of the payee spouse.** The court may approve an agreement for the entry of an order for the support of a party. In making the spousal support order, the court shall designate one or more categories of spousal support and shall make findings of the relevant factors in the decision. The court may order...."

Explanation (care of Larry Gorin):

To qualify as alimony under IRC § 71(b)(1)(D), there must be no liability to make any payment (in cash or property) after the death of the recipient (payee) spouse.

Prior to 1987, IRC § 71(b)(1)(D) required the divorce or separation instrument to expressly declare the payor's nonliability for continuation of the payment obligation after the payee's death. Omission of such an express declaration from the divorce or separation instrument effectively disqualified the payment obligation from being deemed as alimony, thus eliminating the payments from being tax deductible to the payor. However, section 1843(b) of the Tax Reform Act of 1986, Pub L 99-514, amended 26 USC § 71(b)(1)(D) so as to delete from the statute the words "and the

divorce or separation instrument states that there is no such liability."

Under present IRC § 71(b)(1)(D), all that is required is that there be no liability to make any such payment for any period after the death of the payee spouse and no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse. This requirement will be deemed as satisfied if (1) the dissolution judgment expressly so declares or (2) the payor's payment liability ceases upon the death of the payee spouse by operation of state law. Either or both.

There are at least two Oregon appellate cases that address the issue of spousal support liability afer the death of the payee spouse. In *Kemp v. Dept. of Rev.*, OTC-RD No 4241, WL 477958 (July 27, 1998) (unpublished opinion), the Oregon Tax Court said that spousal support under Oregon law is deemed to terminate upon the death of payee spouse absent a provision in the judgment providing otherwise). And in *Miller and Miller*, 207 Or App 198, 203, 140 P3d 1172 (2006), the Court of Appeals observed that "a hallmark of spousal support is that the beneficiary's death terminates the obligation." (This appears to be quite reasonable, given that a deceased spouse or former spouse generally has no further need for spousal support.)

Nonetheless, confusion and uncertainty appears to abound, particularly in light of *Fithian v. US*, 45 Fed Appx 700, 90 AFTR2d 6210 (9th Cir. 2002), an officially unpublished (but nonetheless widely circulated) opinion in which the 9th Circuit Court of Appeals viewed the spousal support provisions of an Oregon dissolution judgment as being ambiguous on the question of whether the husband's spousal support obligation terminated upon wife's death. Although the federal court opinion did not make a definitive determination of Oregon law nor does it serve as any binding precedent on the legal issue involved, the existence of the opinion certainly suggests the need for a definitive statutory declaration providing, in essence, for automatic termination of spousal support upon the payee spouse's death.

The proposed amendment to ORS 107.105(1) echoes the wording of IRC § 71(b)(1)(D). It codifies but does not change presently-existing Oregon case law. It will eliminate any lingering confusion that may otherwise exist, eliminate potential malpractice trips for lawyers, and avoid potential conflicts between Oregon taxpayers and the IRS. It is an statutory amendment that is long overdue.

ORS 107.810

Existing statutes:

ORS 107.810. It is the policy of the State of Oregon to encourage persons obligated to support other persons as the result of a dissolution or annulment of marriage or as the result of a legal separation to obtain or to cooperate in the obtaining of life insurance adequate to provide for the continued support of those persons in the event of the obligor's death.

ORS 107.820(1). A court order for the payment of spousal or child support * * * constitutes an insurable interest in the party awarded the right to receive the support. In any case of marital annulment, dissolution or separation, the issue of life insurance shall be determined as follows * * * .

Explanation (care of Larry Gorin):

Apparently, when support is ordered in cases of marital annulment, dissolution or separation, it is the policy of the State of Oregon to allow (or require) the use of life insurance adequate to provide for the continued support of those persons in the event of the obligor's death.

However, it is apparently NOT the policy of the State of Oregon to do likewise when support is ordered for a child who was born to an unmarried woman, since the policy as expressed in ORS 107.810 and 107.820 omits any reference to such children.

Perhaps it is time for the Legislature to revise the "policy of the State of Oregon" as expressed in these statutes so as to bring an end to this rather blatant (and perhaps unconstitutional) discriminatory policy the presently applies to children born to unmarried parents.

Comment:

Perhaps it would be appropriate to simply reference ORS 107.810 and 107.820 in ORS 109.103? A similar issue was raised in the 2011 legislative session in that ORS 109.103 had not been updated to include various additions to ORS Chapter 107. HB 2686 swept up those changes and included them in ORS Chapter 109.

ORS 109.135 (1)

Existing statute:

ORS 109.135 (1). All filiation proceedings shall be commenced in the circuit court and shall for all purposes be deemed suits in equity. Unless otherwise specifically provided by statute, the proceedings shall be conducted pursuant to the Oregon Rules of Civil Procedure.

Explanation (care of Larry Gorin):

As explained by the Court of Appeals in Maresh and Maresh, 193 Or. App. 69, 87 P3d 1154 (2004),

> *"The term 'suit,' like 'decree,' is a vestige from the era preceding the abolition of the procedural distinction between actions at law and suits in equity. Cf.* Welsh v. Case, *180 Or.App. 370, 375, 43 P.3d 445, rev. den., 334 Or. 632, 54 P.3d 1042 (2002) (observing that a distinction between 'law' and 'equity' nonetheless persists in determining, for example, whether the right to jury trial exists in an action). The current proper descriptive terms are 'action' and 'judgment.' As we said in* State ex rel Olson v. Renda, *171 Or.App. 713, 715 n. 3, 17 P.3d 514 (2000):*
>
> *n 1979, ORCP 2 abolished all procedural distinctions between actions at law and suits in equity at the trial level, including the distinction between judgments and decrees. 'Judgment' is the proper term for the final determination of the rights of the parties in an action. ORCP 67 A;* Webber v. Olsen, *330 Or. 189, 190 n. 1, 998 P.2d 666 (2000). Although 'decree' retains no independent legal meaning, its use has persisted, especially in domestic relations practice. For the dual sakes of consistency and clarity, its decent burial is long overdue.*
>
> *The 2003 legislature enacted numerous statutory amendments that deleted usages of the word 'decree' and substituted in its place the word 'judgment.'See, e.g., Or. Laws 2003, ch. 576, § 109 (amending ORS 107.105(5) to make that change). However, those amendments generally did not replace the term 'suit' with 'action.' Id. We encourage the legislature to make appropriate amendments to ORS 107.105 and other statutes that retain the archaic usage of 'suit.'"*

The Family Law Section should join with the Court of Appeals in encouraging the legislature to make the "appropriate amendment" to ORS 109.135.

ORS 109.135

Existing Statute:

ORS 109.135(2). All filiation proceedings shall be commenced and tried in the county where either the initiating party or the child resides.

Proposed change:

Amend ORS 109.135(2) by deleting the words "the initiating." Thus, as amended, the statute would read: “All filiation proceedings shall be commenced and tried in the county where either [the initiating] party or the child resides.”

Explanation (care of Larry Gorin):

Strict application of this statute presents a persistent and patently perplexing procedural predicament in cases in which mother and her out-of-wedlock child both reside out-of-state and mother seeks to initiate a filiation proceeding in Oregon against the child's putative Oregon father. If neither mother nor child reside in any Oregon county, ORS 109.135(2) as presently enacted effectively bars the action from being filed in Oregon.

ORS 107.138

Existing statute:

> 107.138 Temporary status quo order regarding child custody. (1)(a) A court, upon the motion of a party, may enter a temporary status quo order to either party in a proceeding to modify a judgment that awards custody of a child after:
>
> [...]
>
> (2) A temporary status quo order restrains and enjoins each parent from:
> (a) Changing the child's usual place of residence;
> (b) Interfering with the present placement and daily schedule of the child;
> (c) Hiding or secreting the child from the other parent;
> (d) Interfering with the other parent's usual contact and parenting time with the child;
> (e) Leaving the state with the child without the written permission of the other parent or the permission of the court; or
> (f) In any manner disturbing the current schedule and daily routine of the child until the motion for modification has been granted or denied.
> (3) For purposes of this section:
> (a) "Child's usual place of residence" means the place where the child is living at the time the motion for the temporary order is filed and has lived continuously for a period of three consecutive months, excluding any periods of time during which the noncustodial parent did exercise, or would otherwise have exercised, parenting time.
> (b) "Parent's usual contact and parenting time," "present placement and daily schedule of the child" and "current schedule and daily routine of the child" mean the contact, parenting time, placement, schedule and routine at the time the motion for the temporary order is filed.

Explanation (Care of Paul de Bast):

Recently I have had a spate of modification of judgment cases where there has been a need to restore an existing status quo. In appearances before three different judges to secure show cause hearing dates on the status quo issue under ORS 107.138, the judges have bemoaned the fact that it is often difficult to deal with the statute in relation to the various fact patterns. For example, a judge from Washington County made the comment that he wished the statute could be amended to provide that if the Court cannot determine what the status quo is ,the court could have the power to enter a temporary order which would be in the "best interests of the child" under the circumstances. The same judge made the comment that he didn't understand why the family law section did not get more proactive in dealing with this problem.

Part of the problem is the perceived inconsistency between "child's usual place of residence" which references the past three consecutive months versus "parent's usual contact and parenting time [...] at the time the motion for temporary order is filed" which seems to reference what the schedule was on the day the motion was filed. What often happens is that, for the prior three months, the child has been in the care of a noncustodial parent and then the parent with custody takes the child away under

the authority of the original judgment. By the time the aggrieved noncustodial parent files a motion to restore the status quo, some days have passed and the child's "usual contact and parenting time as of the time the motion for the temporary order is filed" is different than the child's usual residence - - - or at least that's how some judges see it.

ORS 107.093

Existing Statute:

ORS 107.093 (2). The restraining order issued under this section shall restrain the petitioner and respondent from:

(a) Canceling, modifying, terminating or allowing to lapse for nonpayment of premiums any policy of health insurance, homeowner or renter insurance or automobile insurance that one party maintains to provide coverage for the other party or a minor child of the parties, or any life insurance policy that names either of the parties or a minor child of the parties as a beneficiary.

(b) Changing beneficiaries or covered parties under any policy of health insurance, homeowner or renter insurance or automobile insurance that one party maintains to provide coverage for the other party or a minor child of the parties, or any life insurance policy.

(c) Transferring, encumbering, concealing or disposing of property in which the other party has an interest, in any manner, without written consent of the other party or an order of the court, except in the usual course of business or for necessities of life. This paragraph does not apply to payment by either party of:

(A) Attorney fees in the existing action;

(B) Real estate and income taxes;

(C) Mental health therapy expenses for either party or a minor child of the parties; or

(D) Expenses necessary to provide for the safety and welfare of a party or a minor child of the parties.

(d) Making extraordinary expenditures without providing written notice and an accounting of the extraordinary expenditures to the other party. This paragraph does not apply to payment by either party of expenses necessary to provide for the safety and welfare of a party or a minor child of the parties.

Explanation (care of Michael Fearl):

So what parts of the automatic statutory restraining order under 107.093 apply in a custody case brought under 109.103? My guess is that only the parts that deal with insurance for the kiddies apply, but it's not at all clear from the statutes. Because how can the court say you can't dispose of property in a case where property division is not before it? This might be a housekeeping issue for this year's legislative session.

Comment:

It is unclear from the text of ORS 109.103 whether ORS 107.093 would apply whatsoever to a custody action between unmarried parents. ORS 109.103 provides that only those provisions of ORS 107.093 that relate to custody, support and parenting time apply to the custody proceeding. The insurance terms presumably apply because health insurance directly relates to support via the ORS 25.275 computation. Life insurance relates to support because of the provisions of ORS 107.810:

"*It is the policy of the State of Oregon to encourage persons obligated to support*

> *other persons as the result of a dissolution or annulment of marriage or as the result of a legal separation to obtain or to cooperate in the obtaining of life insurance adequate to provide for the continued support of those persons in the event of the obligor's death.*"

ORS 107.820 provides that, "A court order for the payment of [...] child support [...] constitutes an insurable interest in the party awarded the right to receive the support."

The provisions of ORS 107.093(c) presumably do not apply because they deal with transferring, encumbering, concealing or disposing of property in which the other party has an interest. An unmarried parent who has an interest in the other parent's property would file a Dissolution of Domestic Partnership proceeding under ORS Chapter 106.

The provisions of ORS 107.093(d) might apply. This part of the statute restrains each party from making extraordinary expenditures without providing written notice and an accounting of such expenditures of the other party. Extraordinary expenditures would theoretically impact the obligor's ability to pay support and the obligee's need for support. These two factors would be most applicable in determining whether a rebuttal is appropriate. Both factors, therefore, arguably do relate to support, although I suspect most practitioners would say unmarried couples need not be restrained from making extraordinary expenditures because the question is one of income, not of resources.

ORS 107.465

Current Statute:

ORS 107.465 Conversion of judgment of separation into judgment of dissolution.

[...]

[T]he court may, within two years after the entry of a judgment of separation, convert a judgment of separation into a judgment of dissolution of marriage.

Explanation (Care of Russ Lipetzky):

Can anyone identify a good reason for the two year window within which to "convert" that is imposed by 107.465, or what negative consequences might flow from the repeal of that limitation?

Response (Care of Gil Feibleman):

No it's pretty dumb. Another problem is that the statute should define what is "vested" and what that means.

> "*A supplemental judgment of dissolution entered under [ORS 107.465] does not set aside, alter or modify any part of the judgment of separation that has created or granted rights that have vested.*"

ORS 36.236 and ORS 107.785

Current Statutes:

> ORS 36.236 Effect on other laws. (1) Nothing in ORS 36.220 to 36.238 affects any confidentiality created by other law, including but not limited to confidentiality created by ORS 107.755 to 107.795.
>
> ORS 36.220(5) Any mediation communication relating to child abuse that is made to a person who is required to report child abuse under the provisions of ORS 419B.010 is not confidential to the extent that the person is required to report the communication under the provisions of ORS 419B.010. Any mediation communication relating to elder abuse that is made to a person who is required to report elder abuse under the provisions of ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under the provisions of ORS 124.050 to 124.095.
>
> ORS 107.785(2) All communications, verbal or written, made in mediation proceedings shall be confidential. A party or any other individual engaged in mediation proceedings shall not be examined in any civil or criminal action as to such communications and such communications shall not be used in any civil or criminal action without the consent of the parties to the mediation. Exceptions to testimonial privilege otherwise applicable under ORS 40.225 to 40.295 do not apply to communications made confidential under this subsection.

Proposed change:

Amend ORS 107.785 to specifically provide mediators with an exclusion to the confidentiality mandate in order to permit a report of suspected child abuse. This exclusion is present in ORS Chapter 36 (relating to Mediation and Arbitration), but that exception is not applicable in the face of the more rigorous confidentiality standards set forth in ORS 107.785.

Explanation (care of Julia Rice):

In my view, the main issue as a domestic relations mediator is the conflict between certain provisions contained in ORS chapter 36 (general mediation provisions) and ORS chapter 107 (domestic relations mediations). As applicable to your question, ORS 36.220 and ORS 107.785 both start with the premise that all mediation communications shall be confidential. However, as you aptly pointed out, ORS 107.785 does not provide for any exceptions to that confidentiality, whereas ORS 36.220 provides numerous exceptions, including the exception regarding having to report child abuse and elder abuse if you have a duty to report.

It would appear that ORS 36.236 dictates that ORS 107.785 would supersede ORS 36.220 because it provides more confidentiality. The issue is that there would then be absolutely no exceptions to confidentiality in domestic relations mediations. Personally, I think it was simply an oversight by the legislature to not have those exceptions specifically apply. Apparently ORS 36.236 was added as an amendment, and the ramifications of it were probably not thought out fully.

Otherwise, it would mean that domestic relations mediators could not report child abuse and elder abuse (unless provided for in the Agreement to Mediate), parties could not communicate confidential mediation communications with their therapists or attorneys, and parties could not agree in writing that they do not want some or all of the mediation communications to be confidential (among other things).

It just doesn't make sense, but that's the way I read it. In all honesty, I think most domestic relations mediators ignore it or aren't even aware of the issue. However, I think it's best to play it safe until the statute is revised. Therefore, I include a provision in my Agreement to Mediate that states, "The parties understand that the mediator is required to disclose otherwise confidential mediation communications if the mediator suspects child abuse, elder abuse, or abuse to someone with a disability." I also added back many of the other exceptions contained in ORS 36.220. There is then the question as to whether the parties can even agree in writing that those confidential mediation communications may be disclosed, but I have chosen to do it that way anyway. Otherwise, I honestly don't know how you would get around it!

So, the short of it is that I think it is smart for attorneys doing domestic relations mediations to include a provision in their Agreement to Mediate advising the parties of the obligation to report child abuse.