FAMILY LAW NEWSLETTER

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www.osbfamilylaw.homestead.com/

Evidence and Family Law

by Charles H. Vincent

The Oregon Academy of Family Law Practitioners recently presented a short seminar entitled "Evidence in Family Law - Ignored. Neglected. Necessary." For some of us, "Forgotten" should have been added to the title. The seminar was a primer, covering just the tip of what we should be reviewing on a regular basis.

The seminar was presented as a factual pattern at trial, with specific objections and offers of proof. At its heart was a refresher of the rules of evidence and some fundamental case law.

Hearsay. Rule 801 sets out the definition of hearsay, and some definitions of statements that are non-hearsay. "Non-hearsay" includes a prior consistent statement that rebuts an express or implied charge of recent fabrication or improper motive or bias. For instance, what someone in authority (one example was an accountant) told someone to do might explain motive when an improper one is implied.

In *Fromdahl and Fromdahl*, 314 Or 496 (1992), the trial court had excluded certain evidence proffered by mother to show that her perception that the children had been abused and her responses thereto were rational and appropriate. The Court of Appeals affirmed. The Oregon Supreme Court reversed, because the trial court had excluded relevant evidence, including mother's knowledge of the results of a polygraph test that the father had taken, as well as statements a detective made to the mother. The Court held that, given the purpose and narrow scope of her offer, the evidence was relevant and admissible.

Rule 803 sets out the exceptions for hearsay, including a statement to show the state of mind of the declarant, or the effect on the listener. For instance, "I just love being a mom. I'm so happy right now," made by the mother in a custody case is relevant under the state of mind and emotion exception (OEC 803(3)). The speakers provided as an example of this exception a citation to *Sana v. Hawaiian Crusies, Ltd*, 181 F3d 1041 (9th Cir 1999).

Hearsay can also be admissible to refresh a testifying witness' memory or to impeach a witness. However, if you plan to impeach someone with extrinsic evidence, confront the witness first and allow the witness an opportunity to admit or deny the statement before offering further impeachment evidence. OEC 613(2).

Character evidence. Propensity evidence is generally not admissible. However, when someone's character is an essential part of the claim, not only is character admissible, but specific instances of character are relevant and admissible. Pursuant to Rule 404(1) and Rule 405(2), the questions "Do you have an opinion as to mother's reputation for parenting", "Do you have an opinion as to her parental fitness" and "Can you give specific examples of why you and others think she's a great mom" are proper and relevant.

Recent Developments

Diagnosis of Sex Abuse. The panel spoke briefly about *State v. Southard*, 347 Or 127 (2009). Southard held that it was error to allow an expert to testify to a diagnosis of "sexual abuse" in the absence of any physical findings supporting the diagnosis, because the low probative value of such testimony is substantially outweighed by the danger of unfair prejudice under OEC 403.

A question implicit in *Southard* is, does the holding apply in a bench trial? The panel concluded the diagnosis would probably come in and could be weighed appropriately, and that could be correct in a custody case. However, in *State v. Davilia*, 239 Or App 468 (2010), the court reversed a conviction in a criminal case after a bench trial, finding that the diagnosis in that case was "impermissible vouching" and should not have been admitted. *But see State v. Childs*, _Or App _(Oregon Court of Appeals 2011).

Facebook. The speakers touched briefly on information in Facebook accounts as evidence. While there is an issue as to authenticity under Rule 901, the threshold is not very high. The panel cited *Griffin v. State of Maryland*, 192 Md App 518, 995 A2d 791 (2010). There have not been many reported problems in admitting Facebook pages into evidence.

Pattern of Abuse and Reports of Abuse. A relevant pattern of abuse is admissible pursuant to OEC 404-1. A report now be admissible pursuant to OEC 803(26)(a), which allows a report made within 24 hours of an incident of domestic abuse, made to a peace officer, corrections officer, parole and probation officer, emergency medical technician or a firefighter having sufficient indicia of reliability.

Thanks to the Honorable Jeff Jones and the Honorable Keith Meisenheimer for the presentation. Tom Bittner is the current president of the OAFLP. The academy holds several excellently delivered CLE's each year, often in Tualatin. Members of the OAFLP are provided with notice of new case decisions from the Oregon appellate courts. Membership is renewed annually and anyone can join.

Charles H. Vincent practices family and criminal law since 1994 from Eugene, Oregon. His firm Vincent and Associates includes attorneys Wendy Levy and Laurel Johnson.

When is a Divorce Settlement Binding?

By Gil Feibleman

In a recent list-serve posting, a question was raised about how to get out of a settlement which was no longer fair by the time it was being presented to the judge for signature. This generated some comments which suggested there is a misunderstanding of what ORS 107.104 (Policy Regarding settlement) means.

The starting place for any analysis of when is a settlement binding is ORS 107.105 (provisions of judgment) which defines the trial courts responsibilities regarding it's authority to grant relief in a divorce. That statute lists custody, parenting time, child support, spousal support, division of property, creation of trusts, name change, money awards for unpaid judgments and attorney fees as the relief the court can statutorily grant.

ORS 107.105(1)(f) addresses property rights. The court is legislatively directed to divide the property "...as may be just and proper in all the circumstances." When property awards are challenged on appeal it is generally because the courts division has not met this standard. This standard is supported by the case of *Wrona and Wrona*, 66 Or. App. 690 (1984), which cited *Barone and Barone*, 207 Or. 26 (1956). In *Wrona*, the parties entered into a settlement agreement. It was even read into the record in open court and was orally approved by the parties and the court. However, the next day the wife asked the judge to reconsider the fairness of the agreement in the light of the fact that she was unable to obtain the loan she required to "cash out" husband's interest in the house. Thus the argument was although the agreement may have been fair when agreed to, a change had occurred not anticipated by a party, and the trial court was asked to reject the settlement as not being "just and proper" under the changed circumstances. Note that at this stage a judgment had not yet been entered.

The appellate court cited *Barone* and held that a court is not required to accept a property settlement agreement between the parties. It may, on consideration, reject an agreement as unfair to one or the other of the parties. The court stated that "[t]he role of the trial judge in a dissolution case is to ensure the fairness of the property division. If, after the parties have reached an agreement on a property settlement, the judge does not agree that it is fair, he may disregard it, or treat it as evidence, and order a contested hearing at any time until the judgment has been signed by the judge and entered."

The court went on to reaffirm that "...the oral pronouncement of the judge from the bench may be looked to and be considered as controlling on the question whether the judgment as entered conforms to the actual decision. But such a pronouncement is not in itself a judgment, for it is not a final determination of the rights of the parties. ORS 18.010... A judge may change his mind half a dozen times after announcing his decision and take additional testimony, as was done here, which may throw a new light on the problem before him, and, until a formal judgment or decree is finally entered of record, the case remains in the bosom of the court, and no question can arise of modification of the judgment after the expiration of the term." If one thinks about it, this is why a settlement or ruling might address 10 items but the judgment may have 30 paragraphs the judge never uttered. It is the authority for the court to add language in the form of judgment that was not spoken on the record.

Now, some attorneys believe that *Wrona* is no longer good law because of the passage of ORS 107.104 but that is a misreading of the statute. ORS 107.104 and ORS 107.135(14) were enacted in response to an appellate case that said that a settlement attached to the judgment merges into the judgment and therefore cannot be enforced contractually. The statutes

were merely a cure to that sole problem. A careful reading of ORS 107.104 makes it clear that the statute is designed "...to enforce the terms of settlements described in section (2) of this section..." ORS 107.104(2) specifically limits its applicability to a "signed stipulated judgment," a "judgment resulting from a settlement on the record," or a "judgment incorporating a marital settlement agreement." The key word is "judgment." The statute then goes on to state that such judgments can be enforced as contracts or as judgments. The statute is actually very consistent with the Wrona case in that he even refers to judgments resulting from settlements on the record which implies that the settlement on the record is not the agreement which can be so enforced, only the judgment can.

So rest assured that there is authority for a court to reject a settlement if it is not just and proper. However, once the judgment is signed, you are no longer looking at *Wrona* but rather ORS 107.104 (enforcement of settlements) or ORCP 71 (motions to set aside judgments).

This view was recently affirmed by the Court of Appeals in *Patterson and Kanaga*,(slip opinion, April 27, 2011, A137597). The *Patterson* court clearly addressed the question by stating that "…this case requires us to determine the relationship between ORS 107.104(1)(b), which provides that courts are to enforce the terms of marital settlement agreements "to the fullest extent possible, except when to do so would violate the law or would clearly contravene public policy," and ORS 107.105(1)(f), which provides that courts are to divide parties' property at dissolution in a manner that is "just and proper in all the circumstances."

In *Patterson* the parties had entered into a settlement agreement which had been incorporated into a Judgment of Legal Separation. At the time of divorce, the divorce court determined that the parties had intended the separation agreement, as incorporated in the separation judgment, was intended to bind the parties in a later divorce. This was thus an agreement approved by the court in a judgment and therefore was entitled to later enforcement regardless of its current "fairness" or the fact that it left the parties in "dramatically different" financial circumstances.

The *Patterson* court went on to cite *McDonnal and McDonnal*, 293 Or 772, 778, 652 P2d 1247 (1982) which predated ORS 107.104 and *McInnis and McInnis*, 199 Or App 223, 230, 110 P3d 639, *rev dismissed*, 338 Or 681 (2005) which post dated it. The court stated that "[p]arties "may and often do enter into separate agreements regarding the terms of the dissolution," and a trial court "is not obligated to approve such agreements; they always are subject to the court's review for fairness and equity under the circumstances." *McInnis and McInnis*, 199 Or App 223, 230, 110 P3d 639, *rev dismissed*, 338 Or 681 (2005). But, once approved by the court, "'agreements entered into by the parties are to be enforced as a matter of public policy.'" *Id*. (quoting *McDonnal*, 293 Or at 779)."

The message to take from the statutes and *Patterson* is that parties are free to negotiate an agreement that may appear "unfair" or beyond the trial court's normal authority to grant relief, and that, in of itself, does not make the agreement violative of public policy. As the court stated, "[a]s we have repeatedly held, the fact that a marital settlement agreement contains terms other than those that a court could order absent the agreement does not necessarily mean that the agreement violates the law or is clearly contrary to public policy." ORS 107.104(1)(b) "establishes a strong policy in favor of the enforcement of settlement agreements that have been reduced to judgment in the context of separation and dissolution disputes…" *Patterson*, 206 Or App at 351-52.

The time to argue ORS 107.105 "just and proper" is before a judgment is entered. Once you have a court ratify the agreement by adopting it as part of a Judgment, ORS 107.104 takes precedence over ORS 107.105 and the focus will be on enforcement of agreements reduced to judgment.

See also Lemley, 188 P.3d 468 (2008) where the court specifically enforced a post-judgment agreement.

See also Baldwin, 168 P.3d 1233 (2007) where the court, in a post judgment settlement, held that the lack of a signed agreement is not dispositive, "[w]hen parties agree on the essential terms of a contract and there is nothing left for future negotiations, the fact that they also intended there to be a future writing that expresses their agreement more formally does not affect the immediately binding nature of the agreement."

The distinguishing facts of those two cases is that the settlements were not bound by ORS 107.105(1)(f) requiring a court to enter a judgment that was "just and proper in all the circumstances." They were post judgment settlements of disputes.

Gilbert Feibleman has been in practice for 35 years, has recognized by his peers in the "Best Lawyers in America" since 2002, is a Fellow of the American Academy of Matrimonial Lawyers (AAML), a Fellow of the International Academy of Matrimonial Law (IAML), a Founding and current Board member of the Oregon Academy of Family Law Practitioner's (OAFLP) & a former Chair of the Oregon State Bar Family & Juvenile Law Section. He was appointed by the Oregon Supreme Court to serve as the 2010 chair of the Oregon State Bar Disciplinary Board, a pro-tem Circuit Court Judge and Reference Judge throughout Oregon. He is also a well respected speaker and author on matters of Family Law and Legal Ethics, both nationally and locally.

Oregon State Bar Family Law Section 2011 Annual Conference

October 13-15, 2011
Salishan Resort – Gleneden Beach

Registration Brochures will be e-mailed to section members the week of Aug. 12th and will be sent to all section members via mail by Wednesday, Aug. 17, 2011.

For room reservations please contact Salishan Spa & Golf Resort @ (800)452-2300 or on the web @ www.salishan.com.

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

The purpose of this Newsletter is to provide information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities. The opinions and recommendations expressed are the author's own and do not necessarily reflect the views of the Family Law Section or the Oregon State Bar.

Layout and technical assistance provided by the Information Design & Technology Center at the Oregon State Bar.

Publication Deadlines

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

Deadline	Issue
September 15, 2011	October 2011
November 15, 2011	December 2011

Schedule of Events

Moderator:
Honorable Jack L. Landau
Justice, Oregon Supreme Court
Conference Chair:
Kristen L. Sager-Kottre
Conference Committee Members:
Laura Rufolo, Debra Dority, Laura Graser

THURSDAY, OCTOBER 13, 2011 – EVENING

6:00 – 8:30 pm
Registration Table Open
Council House

6:00 – 9:00 pm
Vendors Available
Council House

7:00 – 9:00 pm
President's Reception (No-Host Bar)
Council House

FRIDAY, OCTOBER 14, 2011 – MORNING/AFTERNOON

6:30 – 8:00 am
Lap Swimming Available
Pool

7:00 – 10:30 am
Registration Table Open
Council House

7:00 – 8:25 am
Vendors Available
Council House

7:00 – 8:25 am
Breakfast Buffet Available
Cedar Tree Restaurant and Council House

7:00 – 8:00 am
Access to Justice – CLE VIDEO REPLAY
Pine Room

8:00 – 9:15 am
Oregon Family Courts – What the Future Holds: A Conversation With SFLAC
Honorable Maureen McKnight
Multnomah County Circuit Court, Portland
William J. Howe III
Gevurtz, Menashe, Larson & Howe, P.C., Portland
Linda Scher
Family Mediator and Facilitator, Portland

9:15 – 10:15 am
Tax Returns 101 – How To Read a Tax Return
Paul Saucy
Saucy and Saucy, PC, Salem

10:15 – 10:30 am
Morning Break: Beverages and Snacks
Council House

10:30 – 11:15 am ***Slater and Slater*, Where Do We Go from Here? How Individual Goodwill Factors Into Business Valuation.**
Robert C. McCann Jr.
Long, Delapoer, Healy, McCann and Noonan, P.C., Albany
Dean Allen, CPA, CVA, CFFA
Pacific Valuation and Forensics, LLC

11:15 – 12:00 am
Taking Your Paperless Office to the Next Level: Leveraging Technology to Improve Work Flow and Profits
Kristin LaMont
Kristin LaMont, P.C., Salem

12:00 – 1:30 pm
Luncheon and Keynote Address: It Takes a Village to raise a Divorce Lawyer: The Future of Family Law Education in Law School and Beyond
Cedar Tree Restaurant (Live) and Council House by Teleconferencing
Professor Andrew Schepard
Hofstra University School of Law School, Director of the Center for Children, Families and the Law, N. Y.

1:30 – 2:30 pm
Navigating Your Way Through the Administrative Hearing Process
Donna Moursund Brann
Presiding Administrative Law Judge, Eugene
Monica Whitaker
Sr. Administrative Law Judge, Tualatin

2:30 – 3:15 pm
Separate But Not Equal: Current Insights Into the Criteria For Establishing and Modifying Spousal Support
Kimberly Quach
Lechman-Su & Quach, P.C., Portland
Saville Easley
Gevurtz, Menashe, Larson & Howe, P.C., Portland

3:15 – 3:30 pm
Afternoon Break: Beverages and Snacks
Council House

3:30 – 4:15 pm
Questions and Answers w/Professor Gorin
Lawrence D. Gorin
Lawrence D. Gorin, Beaverton

4:15 – 4:45 pm
Trying Cases to the Bench
William Barton
Barton & Strever, P.C., Newport

4:45 – 5:00 pm
Legislative Update
Ryan Carty, *Saucy and Saucy, PC, Salem*

5:00 – 5:20 pm
Family Law Section Business Meeting
Anthony Wilson, *Chair, Oregon State Bar Family Law Section*

FRIDAY, OCTOBER 14, 2011 – EVENING

5:45 – 8:00 pm
Buffet Reception/Dessert Reception (No-Host Bar) *Council House and Terrace Room*

5:45 – 7:00 pm
Vendors Available *Council House*

SATURDAY, OCTOBER 15, 2011 – MORNING

6:30 – 8:00 am
Lap Swimming Available *Pool*

7:00 – 8:00 am
Child Abuse – CLE VIDEO REPLAY
Pine Room

7:00 – 10:30 am
Registration Table Open
Council House

7:00 – 8:25 am
Vendors Available
Council House

7:00 – 8:25 am
Breakfast Buffet Available
Council House

7:00 – 8:25 am
Executive Committee Meeting
Sitka Room (Committee Members Only)

8:00 – 9:00 am
Paternity Law Today and New Issues on the Horizon
Professor Leslie Harris
University of Oregon School of Law, Eugene

9:00 – 10:00 am
Bankruptcy Issues for the Family Law Attorney
Craig R. McMillin
Craig R. McMillin, Salem
Lauren Saucy
Saucy and Saucy, PC, Salem

10:00 – 10:15 am
Morning Break: Beverages and Snacks
Council House

10:15 – 11:15 am
Ethics – Avoiding the Disciplinary Spotlight
John Barlow
Barnhisel, Willis, Barlow & Stephens, P.C., Corvallis

11:15 – 12:15 pm
Appellate Review
Honorable David V. Brewer
Chief Judge, Oregon Court of Appeals

12:15 pm
Conference Adjourns

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.

OREGON COURT OF APPEALS

FAPA Restraining Order

Tara Liza Maffey v. Daniel Perry Muchka, __Or App__, (2011) A145759

http://www.publications.ojd.state.or.us/A145759.pdf

Trial Court: Hon. Mustafa T. Kasubhai, Lane County Circuit Court

Opinion: Duncan, J.

Respondent appeals the trial court's continuation of a restraining order that petitioner had obtained against him under the Family Abuse Prevention Act (FAPA), ORS 107.700 to 107.735. On appeal, respondent contends that there was insufficient evidence to support the trial court's continuance of the restraining order, arguing that petitioner failed to prove either that he had committed abuse or that there was an imminent danger of further abuse. ORS 107.718(1).

Held: Evidence that, on one occasion, respondent angrily chased petitioner down stairs and pushed her against a wall was sufficient to establish that respondent recklessly placed petitioner in fear of imminent bodily injury, constituting abuse. Furthermore, evidence of respondent's past and continuing pattern of controlling, aggressive, and intimidating behavior toward petitioner was sufficient to establish that petitioner was in imminent danger of further abuse. Affirmed CA 07.13.11

Spousal Support

Tracy Lynn Cassezza and Jason Todd Cassezza and Braeden Allen Cassezza, __Or App__, (2011) A144200

http://www.publications.ojd.state.or.us/A144200.htm

Trial Court: Hon. Keith Raines, Washington County Circuit Court

Opinion: Brewer, C. J.

Husband appeals a dissolution judgment, arguing that the trial court erred in awarding wife transitional spousal support for which she was ineligible by the terms of ORS 107.105(1)(d)(A) and in awarding wife too much maintenance spousal support for too long a period of time. Husband argues that, because wife presented no evidence that she intended to attain education and training necessary to allow her to prepare for reentry into the job market, or for advancement therein, the trial court's award of transitional spousal support was error.

Held: The trial court erred in awarding transitional spousal support in the absence of evidence from wife that she intended to attain education and training necessary to allow her to prepare for reentry in the job market or for advancement therein, as required by ORS 107.105(1)(d)(A). On de novo review, the Court of Appeals increased the maintenance spousal support award to take into account wife's chronic poor health, which significantly impaired her earning capacity. Judgment of dissolution modified to delete award of transitional spousal support and to award wife maintenance spousal support in the amount of $2,000 per month for 18 months, commencing November 1, 2009, and continuing through and including April 30, 2011, and $1,500 per month indefinitely thereafter; otherwise affirmed. CA 06.15.11

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.