FAMILY LAW NEWSLETTER

Published by the Family Law Section of the Oregon State Bar

Oregon State Bar

Vol. 31, No. 5 October 2012

CONTENTS

ARTICLES

MILITARY FAMILY LAW

CASENOTES

WEBSITE

Check out the Section Website at:
http://osbfamilylaw.wordpress.com/

Evidence and Family Law: Medical Records

By Charles H. Vincent

Psychiatric problems, alcohol and drug use, criminal history including domestic abuse and DUII - all are issues that may arise in a custody situation. Will a judge admit these records into evidence?

The medical records of a party are admissible pursuant to Rule 803(3), statements of then-existing physical, emotional or mental condition; Rule 803(4) statement made for diagnosis or treatment; and Rule 803(6), records of regularly conducted activity (business records). The records are also admissible for the purposes of impeachment, admissions of a party-opponent, and to refresh a witness' memory.[1]

OEC 401 - 402

Rule 401 defines relevant evidence as that having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 is a rule of admissibility, and not one of exclusion. The rule states that "(a)ll relevant evidence is admissible, except as otherwise provided...."

> This means, the minute that a party has passed the test in Rule 401, the evidence comes in unless there is a specific rule of law or case that says that it should not - and the burden then shifts to the other side to establish that it does not come into evidence. Herbert J. Stern, Trying Cases to Win: Evidence, Exhibits and Experts at Trial, Professional Education Systems Inc. (1989).

The spirit of the rule is to welcome and usher in evidence, and not to keep it out. *Id.*

OEC 803(3) Then existing mental, emotional or physical condition.

Rule 803 states, in relevant part that the following ***is not excluded***, even though the declarant is available as a witness:

> A statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain or bodily health . . ."

Kirkpatrick in Oregon Evidence Fifth Edition, page 732 states that:

---

1 This article does not address the issue of privilege or obtaining the records in the first place. As a practical matter, it may be helpful to draft a stipulated protective order, and to review ORCP 55 before trying to obtain the records.

"Statements reflecting the declarant's state of mind often will be admissible apart from this exception because they do not constitute hearsay under Rule 801(3). For example, a statement by an allegedly mentally ill person, 'I am Napoleon,' may be admitted as not hearsay * * * (but) only to prove that the declarant is suffering from an insane delusion. * * *."

OEC 803(4) Statements for purposes of medical diagnosis and treatment.

Pursuant to Rule 803(4), statements for purposes of medical diagnosis and treatment are not excluded even though the declarant is available as a witness:

"Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." OEC 803(4).

Kirkpatrick at 737 - 738 states that:

"This subsection does not require that statements be made to a physician to be admissible. Statements to hospital attendants, ambulance drivers or even members of the family or friends may be within the scope of the exception." *Id*. at 737.

"This exception broadens Oregon law. It allows statements made to physicians for purposes of medical diagnosis as well as medical treatment. It allows statements of past as well as present medical condition. It allows statements for the purpose of treatment or diagnosis even though made to a person other than a physician, such as a nurse, family member, or ambulance driver. It allows statements by persons other than the person who is the subject of the diagnosis or treatment. See *State v. Pfaff*, 164 Or App 470, 481 - 484, 994 P.2d 147 (1999) (to satisfy OEC 803(4), person making statements need not be a patient and person to whom statements made need not be a physician). Finally, it authorizes receipt of statements concerning the general character or the cause of the injury 'in so far as reasonably pertinent to diagnosis or treatment.' *Kirkpatrick* at 738 (citations omitted).

"Some statements that may be received under this subsection may also be received under Rule 803(3). Statements of present mental, emotional, or physical condition made for purposes of treatment would be admissible under either rule." *Kirkpatrick* at 738.

The Court in *State v. Moen*, 309 Or 45, 54-65 set forth three requirements under Rule 803(4): (1) the statement must be made for the purpose of medical diagnosis or treatment; (2) it must describe medical history, current symptoms, or the cause or external source of the injury; and (3) the statement must be reasonably pertinent to treatment.

OEC 803(6). Records of Regularly Conducted Activity.

Pursuant to Rule 803(6), records of regularly conducted activity are not excluded by Rule 802 even if the declarant is available as a witness. These include chart notes, reports, diagnosis, tests and other hospital records. Rule 803(6) allows:

"A memorandum, report, record, or data compilation, in any form, or acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

"Multilevel Statements." *Kirkpatrick* at 752 states:

"A record is admissible under this exception, even though it contains multilevel statements involving a number of different employees of the business organization, if these employees were all acting within the course of their business duties in making, transmitting, or recording the statements. For example, the statement of a night nurse to a day nurse transmitted to a treating physician and recorded in the patient's hospital chart is admissible as part of a business record, if the other requirements of the rule are satisfied."

"Opinions or Diagnosis." *Kirkpatrick* at 753 states:

"Rule 803(6) expressly authorizes the receipt of opinions and diagnoses contained in business records. The Commentary makes clear, however, that the legislature did not intend 'automatically to allow into evidence all business records containing opinions or diagnoses. A trial judge retains discretion under this rule to exclude an opinion or diagnosis on the ground that the record does not exhibit the necessary degree of trustworthiness.' Routine opinions formed in the course of professional activity, e.g., 'Plaintiff has a broken leg,' are likely to be admitted. However, more speculative, controversial, or complicated

opinions, particularly when they directly relate to a central, contested issue in the case, e.g., 'Plaintiff if permanently disabled,' are more likely to be excluded. ***Streight v. Conroy***, 279 Or 289, 294-95, 566 P2d 1198, 1201 (1977).

"It has been held that the qualifications of the expert whose opinion is contained in the business record do not necessarily have to be established before the record may be received. See ***United States v. Licavoli***, 604 F2d 613 (9th Cir 1979), ***cert. denied***, 446 US 935 (1980)." ***Kirkpatrick, Oregon Evidence*** Fifth Edition 2007, page 753.

In ***Hansen v. Abrasive Engineering and Manufacturing, Inc***., 317 Or 378 (1992), the trial court had allowed portions of a written report from a psychiatrist who had examined plaintiff to be read into evidence. The report contained statements made by plaintiff and the doctor's diagnosis. The Court of Appeals originally had held that the report was not admissible under the business records exception. The defendant appealed to the Oregon Supreme Court, arguing that the trial court had correctly concluded that the report was a business record under OEC 803(6). The Oregon Supreme Court held that the records were admissible:

"The reports prepared by Dr. Holland contained opinions and diagnoses and were made from information transmitted by plaintiff. They were kept in the regular course of Dr. Holland's practice. Plaintiff pointed to nothing regarding the circumstances of their preparation to indicate lack of trustworthiness, except the fact that the examination was conducted at the request of an insurer in contemplation of future litigation. By its express terms, OEC 803(b) covers diagnoses. Dr. Holland's diagnosis was admissible under OEC 803(6)." 317 Or 388.

The Court said that the records were also admissible as statements of a party opponent:

"Plaintiff's statements to Dr. Holland were statements of a party opponent, OEC 801(4)(b)(A), contained within a business record, OEC 803(6), and therefore were admissible. See OEC 805. The Court of Appeals erred in holding that the defendant should not have been permitted to read those excerpts from Dr. Holland's report into evidence." 317 Or 388-389 (footnotes omitted).

In ***Polbrook v. Precision Helicopters, Inc***, 162 Or App 538 (1999), defendant objected to laboratory reports as evidence after the trial court had concluded the reports fell under the "business records" exception to the hearsay rule. Defendant asserted that no one with personal knowledge had testified how the laboratory work was done, nor how the reports were prepared. The Court of Appeals said:

"OEC 803(6). The rule requires that the record be made by a 'person with knowledge' but does not require that the authenticating witness to be the same person who made the record. . . . The trial court did not err in admitting the evidence over the defendant's objection." 162 Or App 538.

In ***Brown v. J.C. Penney Company, Inc***, 297 Or 695 (1984), the Court held that a printout of a report that had been stored in a computer was admissible under the business records exception.

Impeachment/Refresh Memory

A party or witness can be impeached by prior inconsistent statements. OEC 613. Pursuant to OEC 801, an admission of a party opponent is not hearsay. Statements in the medical reports made by a party, inconsistent with testimony in court, or admissions of an opponent are relevant and admissible.

Use of or dependency on intoxicants is relevant if the witness was under the influence at the time of the occurrences as to which she testifies, or at the time of trial, or that her mind or memory or powers of observation were effected by the habit. ***State v. Batchelor***, 34 Or App 47, 50 (1978). ***State v. Longoria***, 17 Or App 1 (1974) (impeachment by defect of memory).

Finally, OEC 612 allows either party to refresh the recollection of any witness. Generally, anything, from documents, pictures or objects, can be used to refresh the witness' recollection. Rule 612 is silent about whether a showing of loss of memory is necessary before a witness' recollection may be refreshed, but according to ***Kirkpatrick***, "(t)he better view is that no such foundation is required."

So be creative. There are multiple ways to get in relevant records. Further, if the records are inconsistent with the current testimony or include admission of a party opponent, or can refresh a witness' memory, they can be admitted or used at trial.

Charles H. Vincent practices family and criminal law from his office in Eugene, Oregon. He practices with his associates Wendy Levy and Laurel Johnson.

FAMILY LAW NEWSLETTER

Published Six Times a Year by the Family Law Section of the Oregon State Bar.

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

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
December	11.15.12

Reflections of a First-Year Associate

By Jen Costa

Editor's Note: Our young attorneys are the future of the profession and of our justice system. I applaud the willingness of new attorneys like Ms Costa to share her impressions and reflections with us all. Many of today's young attorneys face difficulties in the profession not known since the Great Depression. They deserve our support, but perhaps most of all we should listen to their unique perspective.

October marks my one-year anniversary as an attorney. It is shocking how fast this year has passed, and I wonder whether this will be the course of things from now on—will I soon be gray-haired and contemplating retirement, reading an article by some other young attorney forty years my junior?

I am one of the few among my peers who have found a satisfying and fulfilling job in the field in which we wish to work, and in the community in which I want to live. I am sure the readership of this newsletter is well-informed and realizes that so many of my peers, however well-deserving, intelligent, and hard-working, continue to struggle to find employment. But perhaps every generation of young professionals feels that it is unique in its suffering.

In contemplating whether the previous generations of attorneys understand our plight, I am reminded of a conversation I had with another attorney several decades my senior in which he said to me, "Don't work too hard. I know you want to pay off your loans, but you don't want to burn out." I replayed the dialogue to one of my peers, and he responded "man, I just want to pay ON my loans." I shared his sentiment.

I practice in a small town. Like many attorneys in small towns, my practice is a bit varied, but family law comprises a significant portion of my workload. When I was in law school, I was convinced that I wanted to practice family law, and I still think it is considerably more intellectually stimulating than many other practice areas. Family law is also a natural fit for me, because it was my experience in family law that led me to this vocation. You see, like so many other kids, I had parents who were divorced. As a result of their disputes, I testified in court the summer before my eleventh birthday. Granted, my parents had been divorced for a decade by the time of this trial, but you know as well as I that sometimes parents' fights continue long beyond the dissolution decree.

I had been living with my father for about three years, and I hated it. I don't know for certain why I came to be in the courthouse that day—presumably one of my parents wanted me to testify. The judge came into the hallway of the courthouse without her robe. She sat

down next to me and said, "I have to decide who you will live with, you know that?" I did. Then she told me that she would consider what I wanted, but if she chose what I said I wanted, it would not be just because of what I said. It would be for other reasons too. Well, that took the pressure off.

I remember our conversation vividly. I knew what I wanted, and I know I conveyed it to her. I have no idea where the lawyers were at the time. There were many people in the hallway, and I'm sure they were standing within the vicinity. To my immense relief, the judge decided exactly how I begged her to decide. I felt empowered and I thought: when I grow up, I want to be part of this world. Had she not decided the issue the way she did, who knows where I would be? I know I would not be a lawyer.

On the other side of my youth, I now find myself working in the field I set my eyes on more than half my lifetime ago. In some ways, it is what I expected. The judges I have encountered are thoughtful and work tirelessly to make impossible determinations. With that said, I am disheartened that children have virtually no voice in the affairs of their own lives. Our system assumes that two parents are able to put on their cases and from that a judge can determine what is best for the child. But, in the stress of a family law case, I do not put much stock in the ability of many parents to know and demonstrate what is best for the children.

We new family law attorneys are handed those cases that so many experienced attorneys do not want: the messy custody cases of clients who, quite frankly, cannot afford our services, even at our discount rate. I have never studied sociology, and I am not an expert on the relation between poverty and familial instability. Perhaps it is a chicken and egg problem, one follows the other, but I'm not sure which leads. What little I do know is that some correlation exists. The result is that the cases where the Court might benefit the most from having a case analyzed, organized, and presented by an attorney is more often the case that appears before the Court with two pro se parties. When these parties are not pro se, they are often represented by young attorneys, like myself, who are willing to work, research, analyze, and present the case, but who have not yet mastered how to avoid that emotional rollercoaster with the client. The end result for the attorney, win or lose, is exhaustion, fees that will never be paid, and experience, lots of experience.

Perhaps this article is a bit less organized and focused than it should have been. I must say, in my defense and in defense of the legal research and writing program at the University of Oregon, my legal memos are exceptionally clean by comparison. But this article is written in great part as a reflection of my first year of practice as an attorney—it is busy, hectic even. It is comprised of varied topics and ideas, none of which I could bring myself to exclude. It is a bit sentimental. And after all that, for better or worse, it has concluded.

Jen Costa is an associate attorney at Barnhisel, Willis, Barlow & Stephens, PC in Corvallis, Oregon. She is especially grateful for Adam Shelton's valuable feedback on this article.

Jennifer A. Costa
Associate Attorney
Barnhisel, Willis, Barlow & Stephens
123 NW Seventh Street
PO Box 396
Corvallis, OR 97339-0396
www.bwbslaw.com

Caution Re: Dividing Disability Payments on Divorce

Under IRC §104, certain disability payments are tax-free to the recipient. This can include early or supplemental payments from a qualified retirement plan due to a "service-connected" disability, which are divisible pursuant to a QDRO.

However, the tax-free nature of the disability payments can be lost if divided on divorce. The U S Tax Court recently ruled that disability payments divided on divorce, which were tax-free to the participant, are taxable to the alternate payee. The case is *Fernandez v. Commissioner*, 138 TC No. 20 (May 14, 2012). In that case, husband was a deputy sheriff with Los Angeles County and his tax-free disability payments from the county retirement plan were divided with wife under a QDRO-type order. Wife argued that the tax-free character of the payments should flow to her. However, the Tax Court disagreed, since she was not the disabled party. Thus, wife was held responsible for paying income tax on the share of ex-husband's disability payments paid to her.

The lesson here is to avoid dividing tax-free disability payments except as a matter of last resort, and then only if the alternate payee understands and is willing to accept that the payments will be taxable.

Submitted by:
Clark B. Williams, Lawyer
Heltzel, Williams, Yandell, Roth, Smith, Petersen & Lush, P.C.
117 Commercial Street NE, Fourth Floor
PO Box 1048 Salem, OR 97308-1048
clark@heltzel.com
Ph: (503) 585-4422, ext. 309 Fax: (503) 370-4302
www.heltzel.com

MILITARY FAMILY LAW

Getting Government Records into Evidence

*by Mark E. Sullivan**

1. Q. How do you get government records into evidence if you have to go to trial and the other side won't stipulate to their admissibility?

A. You'll need to check your state's rules of evidence to find out the requirements for admission of business records. Each state is different. Some have adopted the Federal Rules of Evidence (FRE), and some have their own evidence codes. The business records rule is contained at FRE 902 (11), but your rule might be slightly or entirely different. Make sure you know what is needed as essential statements in the affidavit.

2. Q. Don't these agencies have a template they can use for the affidavit? I'm being told that I have to submit to the agency a sample of what the wording should be.

A. "One size fits all" is not the rule in this area. There are no standard affidavits which are universally used among the agencies. It is a common practice to require the applicant's attorney to draft the affidavit, which is they reviewed and revised by the legal office in the agency. You must submit the wording to the federal office which has the records, which can adopt or adapt the language as needed.

3. Q. So do they just say that they've provided the records and they're accurate?

A. In terms of trial practice, that would be a major mistake. How will the court know what records were provided? How will the judge know that the documents which you have are the ones that the agency sent to you? The records must be attached to the affidavit, not merely referred to.

4. Q. But the agency sends the affidavit to me, right? Or is it sent to the court?

A. That's your decision. If the records and affidavit – the "packet" – is sent to the court under seal, then there can be no legitimate question as to whether you have substituted documents or altered them. The judge is the one who will open the packet and determine what records have been provided. On the other hand, unless you get an extra copy of what's in the packet, you won't know what is in the records until the court opens them. This leads to three alternatives:

Get a copy from the agency (by consent of the individual concerned or by court order or judge-signed subpoena). Then request the documents again, along with a business records affidavit that accompanies your request.

Get the documents (as above) from the agency, and then send them back to the agency with your business records affidavit, so they can certify that these are indeed the records provided, and then can attach them to the affidavit.

Have the agency send the packet to the court but also send copies to the attorneys.

5. Q. This is all so complicated. Do you have an example that I can use for these affidavits?

A. Of course. It's on the next page…

**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 nationwide as a consultant on military divorce issues and to draft military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.*

From Your Editor

It is again time for me to call upon the many great family law attorneys and mediators to submit articles for the Family Law Newsletter for 2013. If there is an area of law you have recently researched or worked with you may want to share what you have learned. There is no better way to become known and respected among your peers than to publish a well written article here. If you would like to submit an article in the coming year please contact me with your questions and offer to submit at the contact email below.

Letters to the Editor

We would welcome submissions of short notes, observations, and other submissions that would fall in this category for future issues. Sound off about what concerns you or what impresses you. Just submit by email to the contact below.

Young Attorneys

We have had some great submissions this year from newer members of the bar providing their impressions of the profession and the work we do. If you are a newer attorney please consider submitting something. It is a great way to introduce yourself to your colleagues. Don't keep yourself a secret – let us hear from you.

Contact your Editor at: murphyk9@comcast.net

DEPARTMENT OF VETERANS AFFAIRS
Regional Office
123 Green Street
Blacksboro, North Carolina
Phone: 919-832-6677

BUSINESS RECORDS DECLARATION
Pursuant to 28 U.S.C. § 1746

This is a certification of authenticity of domestic business records pursuant to Federal Rules of Evidence 902 (11).

I, Larry G. West, attest under the penalties of perjury (or criminal punishment for false statement or false attestation) that:

1) I am employed by the United States Department of Veterans Affairs (DVA).
2) My official title is Paralegal.
3) I am a custodian of records for the DVA.
4) Each of the records attached hereto is the original record or a true and accurate duplicate of the original record in the custody of the DVA, and I am a custodian of the attached records.
5) The records attached to this certificate were made at or near the time of the occurrence of the matters set forth.
6) The records attached were made by (or from information transmitted by) a person with knowledge of those matters.
7) Such records were kept in the course of a regularly conducted business activity of the DVA.
8) Such records were made by the DVA as a regular business practice.

The enclosed records are:

- Letter to Jacob Harris Stein, XXX-XX-5566, dated April 12, 2010, titled "Your Original VA Disability Rating and Reasons for the Rating" and
- Letter to Jacob Harris Stein, XXX-XX-5566, dated June 15, 2012, titled "Your Revised VA Disability Rating and Reasons for the Rating."

Dated: July 13, 2012

Larry G. West
Larry G. West, Paralegal

Subscribed and sworn to before me this ____ day of _____, 2012.

_____
Notary signature My commission expires: _____

CASENOTES

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

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

OREGON COURT OF APPEALS

Attorney Fees

Caroline V. Berry and Noel Bruce Huffman, 251 Or App ___ (2012)

http://www.courts.oregon.gov/Publications/docs/A146307.pdf

Trial Court: Maureen H. McKnight, Multnomah County Circuit Court

Opinion: Nakamoto, J.

Husband appeals a supplemental judgment awarding attorney fees to wife under ORS 107.104, which grants the court authority to enforce stipulated judgments of dissolution by imposing "any remedy available to enforce a judgment." On appeal, husband contends that there was no statutory authority and no contractual basis under the stipulated judgment to award attorney fees.

Held: Although ORS 107.104 allows the court to impose remedies in general, it does not specifically authorize an award of attorney fees or state that an attorney fee award is a remedy, and it does not itself create a right to fees. Also, the stipulated judgment did not contain a provision for attorney fees; thus, wife was not entitled to attorney fees. Reversed. CA 08.15.12

Custody

Brian Phillip Turner and Katherine Leanne Muller, 251 Or App __ (2012)

http://www.courts.oregon.gov/Publications/docs/A148663.pdf

Trial Court: William M. Horner, Polk County Circuit Court

Opinion: Duncan, J.

Mother appeals from a supplemental judgment of modification entered on remand following the Court of Appeals' decision in *Turner v. Muller*, 237 Or App 192, 238 P3d 1003 (2010), rev den, 350 Or 231 (2011) (Turner I), which reversed a judgment of the trial court changing custody of the child, M, from mother (who lives in Bend) to father (who lives in Dallas). On remand for reconsideration of child support and parenting plan provisions, the trial court awarded father--the noncustodial parent--parenting time with M from Sunday evening to Friday evening each week and one weekend a month during the school year and two weeks during the summer, with all exchanges to occur at father's house. The supplemental judgment also granted father the ability to claim M as a dependent for state and federal tax purposes; ordered each parent to purchase life insurance, with M as the beneficiary; and determined that father was entitled to an offset against his future child support obligation, and a money award against mother, as a result of his past overpayment of $17,388.16 in child support. Mother challenges each of those rulings.

Held: (1) Because the parenting plan ordered by the trial court effectively changes custody of M during the school year from mother to father, in contravention of the court's decision in Turner I and in the absence of a substantiated request for change of custody, the trial court exceeded its discretion and de novo review is justified under the circumstances. (2) The parenting time schedule in Polk County Local Rule 8.075, Appendix 2, with one modification to account for the distance between the parents' homes, is in M's best interests. (3) The trial court's calculation of father's past overpayment of child support is supported by the evidence--the admission of which mother stipulated to--and therefore will not be disturbed. (4) Mother's assignments of error relating to the income tax dependency exemption and the requirement for life insurance are not preserved for appeal. Reversed and remanded with instructions to enter SLR 8.075 (as modified by this opinion) as the parenting plan for M and to recalculate father's child support obligation consistently with that plan and taking into account that father was granted the right to claim M as a dependent for tax purposes; otherwise affirmed. CA 08.15.12

Family Abuse Prevention Act

C. J. P. v. Michael Todd Lempea, 251 Or App __ (2012)

http://www.courts.oregon.gov/Publications/docs/A147965.pdf

Trial Court: Phillip L. Nelson, Clatsop County Circuit Court

Opinion: Wollheim, J.

Respondent appeals an order continuing a restraining order that petitioner obtained against him under the Family Abuse Prevention Act (FAPA), ORS 107.700 to

107.735. Respondent contends that petitioner failed to present sufficient evidence to support continuation of the order. Petitioner did not file a brief or appear on appeal.

Held: The trial court erred in continuing the order because there is no evidence that there is an imminent danger of further abuse to petitioner and that respondent represents a credible threat to the physical safety of petitioner. Reversed. CA 08.15.12

Property

Cynthia R. Morton and Ronald E. Morton, 251 Or App __ (2012)

http://www.courts.oregon.gov/Publications/docs/A146005.pdf

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

Opinion: Hadlock, J.

Husband appeals a judgment of dissolution, challenging the trial court's division of the parties' property and debts. Throughout the marriage, husband worked as a lumber broker and was paid strictly on commissions, earning more than $150,000 per year until 2008, when the housing market began to suffer, at which point his income decreased sharply. Wife's father died intestate, and, in 2008, wife received an inheritance worth nearly $1.25 million. Both parties spent inheritance money freely. When the parties separated in 2010, only about one-third of the inheritance remained unspent.

The trial court concluded that wife had rebutted the presumption that husband had contributed equally to the acquisition of the inheritance, and it awarded wife virtually all of the marital assets that were directly traceable to the inheritance. The court divided the remaining property and debts equally, except to assign to husband alone a debt to his employer. On appeal, husband argues that the court erred in concluding that wife rebutted the presumption of equal contribution, in failing to conclude that wife had commingled the inheritance with the marital estate, and in failing to divide evenly the inheritance and the debt to husband's employer.

Held: The trial court correctly concluded that wife had rebutted the presumption of equal contribution; evidence in the record supports the court's finding that wife's father did not intend to benefit husband, and husband did not influence her father to leave wife a portion of his estate. The court properly considered commingling, and its treatment of the inheritance fell within the range of permissible outcomes. Notwithstanding that substantial portions of wife's inheritance may have been commingled with the parties' other assets, the court acted within its discretion in determining that it was equitable to award what remained of the inheritance to wife, who has significant mental-health difficulties and essentially no income-earning capacity, and who undoubtedly needs those assets for her financial support. The court also acted within its discretion in making husband solely responsible for the debt to his employer, given that assigning half of it to wife would only have made her position more precarious. Affirmed. CA 09.26.12

Note on Opinions Reviewed:

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

WEBSITE

Check out the Section Website at:
http://osbfamilylaw.wordpress.com/