Family Law

Section Newsletter

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Chair's Column

The Role of the Family Law Section and Family Law Legislation: 2007 and Beyond

by Sara Ainsworth

Each year, the Family Law Executive Committee carefully considers potential legislation that would affect the practice of family law in this state. From time to time, the Executive Committee takes a proactive role as well, drafting legislation to submit to WSBA and then to the Legislature. The Relocation Act of 2000 resulted from such a process. This year, the Executive Committee drafted no bills on behalf of the Section. However, in addition to reviewing pending bills related to family law, we are actively engaged in analyzing and drafting proposals for the 2008 session.

The first would, if we had our way, address the problems with the existing child support schedule. After extensive involvement in a workgroup led by the Division of Child Support in 2005 and 2006, and after holding an all-day meeting seeking input from members of the entire Section last year, the Executive Committee identified several areas in which change is necessary to ensure appropriate child support orders. We published our recommendations in detail in our Winter 2006 newsletter. Highlights of the proposals include a recommendation that the child support schedule make provision for higher-income families, starting at an income level commensurate with the federal poverty level and topping out at a combined monthly income of $15,000, and that the two-tiered system based on age of the child be eliminated as it is not supported by economic data. Further, the mathematical formula used in the schedule should be updated to comport with the real cost of child-rearing. Other problems include the lack of guidance on how to treat the existence of children from other relationships, leaving significant opportunity for conflict and wide deviations from order to order, and the confusing provisions regarding extraordinary medical expenses that result in little or no assistance to parents.

While the Executive Committee recommended these and other changes to the DCS-convened workgroup, that process did not result in proposed legislation other than a request to continue a task force. Given the obvious need for a timely statutory update, the Executive Committee has determined to draft its own proposal, and seek the support of the WSBA in taking leadership on the issue.

In addition to carefully considering child support changes, the Executive Committee has formed a task force to review the Uniform Parentage Act. Washington's version of the UPA, amended in 2002, is not at all "uniform" – in fact, our 2002 version was changed by the National Conference of Commissioners on Uniform State Laws in the year immediately following its adoption here. Few states have as onerous provisions for addressing possible inaccuracies with paternity affidavits. Further, there is no obvious process through which a child can challenge or bring a parentage action. These and other concerns are currently under review by the task force toward drafting an improved bill.

Once the Family Law Executive Committee, on behalf of the Section, has drafted proposed legislation, the proposal

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is submitted to the WSBA Legislative Committee for review by June of each year. That Committee, made up of up to 33 members of the bar and designed to include a broad cross-section of expertise, reviews legislative proposals and makes recommendations to the Board of Governors in December of each year. For more information on the WSBA's work in the Legislature, and the role of the Sections, see the WSBA Legislative Process Roadmap on the WSBA's website.

Finally, the Executive Committee wants to hear from Section members regarding pending legislation. While there have been many bills dropped so far this session that affect dissolution practice, dependency practice, and more, there is one bill in particular that, if passed, would have far-reaching effects on the current family law system. Senate Bill 5470, recently amended, seeks millions of dollars from the state budget to improve family law systems including courthouse facilitator services, the availability and cost of mediation services, supervised visitation centers, and more. It would also change the factors used to guide the court in designating a primary residential parent – a very significant change that, if passed, will certainly affect the practice of family law. You can view this bill and its history at the Washington State Legislature's website, www.leg.wa.gov. Many of the proposed changes would be, to our minds, very positive, but the Executive Committee continues to work with the bill's sponsor to ensure that the bill would have no negative impact on family law litigants but would instead fulfill its goal of improving the family law system. As Chair of the Executive Committee, I urge all Section members to review and pay careful attention to this bill. The Executive Committee will continue to solicit your comments through the Hot Sheet and would like to hear from you regarding this and other proposed bills. Our voice is critical in ensuring that the Legislature makes only positive changes to family law in this state.

2007 Family Law Mid-Year Seminar

The Family Law Mid-Year Seminar is scheduled for June 22 – 24, 2007 in Spokane WA this year. The seminar is being held at the historic Davenport Hotel. A block of rooms are set aside under Washington State Bar Association. Please refer to these rooms when making reservations through the Davenport at 1-800- 899-1482 or 509-455-8888. In addition to the excellent line up of CLE's, a cruise on Lake Coeur d' Alene Idaho is being offered for your entertainment on Saturday evening. Spots on the cruise will go fast. To reserve your spot on the boat, send $75.00 per person by April 30, 2007 to: Peter J. Karademos, 422 W Riverside, Suite 518, Spokane WA 99201, or call for more information at 509-624-5338 or email p.karademos@comcast.net.

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Collaborative Law: The Evolution of a Revolution

The Emerging Trend of the Inter-disciplinary Team Model in the Collaborative Process

by Rachel Felbeck

The collaborative process movement continues to grow and gain momentum throughout the world. Similarly, the available tools and the recognized processes have also experienced growth and change. As a result, the way the collaborative model is being used has expanded to cover a wide variety of options, depending on the locale of the case, the availability of trained professionals and the needs of the individual clients.

With respect to the movement itself, the collaborative model has spread to Canada, England, Ireland, New Zealand, Australia, and now to Europe including Austria, Switzerland, Germany and France. In recognition of the international expansion of this movement, for the first time ever, there will be an international collaborative law symposium in Vienna this upcoming March 23-24, 20071.

At the International Academy of Collaborative Professionals Annual Forum this past October, 2006, over 650 attendees from all over the world came together in San Diego for four days of education, networking and information sharing. In recognition of the growth and development of collaborative practice, this year's Forum was aptly entitled, "Taking Collaborative Practice to the Next Level: The Care and Feeding of a Revolution."

As with any emerging ADR method, the collaborative model continues to evolve. Depending on the professional resources of the jurisdiction where this form of dispute resolution is being practiced, a variety of models have emerged. One of the most exciting models to gain popularity and enthusiasm is the multi-disciplinary team model2. This model is comprised of a team of collaborative professionals who assist the divorcing couple throughout their process. The team typically includes an attorney for each party, a neutral financial planner, a neutral child specialist, and-either one coach/facilitator for both parties, or an advocate coach for each party.

Collaborative Professionals

Regardless of how the legal profession assists couples getting a divorce - either through litigation, arbitration, mediation, or collaborative law - there are professionals and experts available to provide information and guidance in how to handle the specific issues the separating couple is facing. Using the collaborative model, instead of each party hiring an expert, the couple jointly hires a neutral expert who will provide guidance and assistance to the couple as they work through the myriad of issues to be resolved. These experts are typically grouped as follows: Financial Specialists, Child Specialist and Mental Health/Coach/Facilitators. Each specialist has a clearly defined role to assist the couple.

The Financial Specialist

The financial specialist is the individual most intimately involved in assisting the couple with the disentanglement of their property, and helping them to create the maintenance and child support scenarios to ensure that both parties' interests are met. Financial specialists often include a Certified Divorce Financial Analyst, business evaluators, divorce mortgage brokers, accountants or other individuals who provide financial advice and assistance to the couple. Having been retained as a neutral by both clients, the financial specialist does not advocate for one over the other or represent either. Under the IACP Professional Protocols, financial specialist, including financial planners, are prohibited from providing investment advice to either party following separation to ensure their neutrality.

The Certified Divorce Financial Analyst (CDFA) will evaluate the parties' assets, investments, debts, income, budgetary needs, etc. He will listen to each party's short and long terms goals to help create a financial plan which will meet each party's goals. These specialists create model scenarios to show both parties what a proposed property division will look like for each individual one year in the future, five years and ten years in the future. Cost for education or re-training for either party can be incorporated into the final property and support calculation. Issues of maintenance, income equalization and child support are analyzed to ensure that there is sufficient income in both party's households as they move forward into their new lives. This individual does not advocate for either party or represent either party. Under the IACP Professional Protocols, the financial planner is prohibited from providing investment advice to either party post-separation, to ensure his neutrality.

Business evaluators are often employed to examine and calculate the estimated value of the business at issue. Unlike conventional litigation which pits experts against experts, in the collaborative model the business evaluator, having been retained by both parties will work with both

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parties, not just the individual who is running or managing the business. By being able to talk and work with both parties, the evaluator is able to develop a far more accurate understanding, assessment and valuation of the business.

Divorce mortgage brokers are often brought into a collaborative case during the early part of the process. If either or both parties wish to buy a house, refinance the current house to remove the other spouse from the mortgage, or sell and then purchase a new residence, the mortgage broker can provide invaluable insight as to how a proposed property division will affect the ability of either party to qualify for mortgages. The mortgage broker can often make recommendations for how to maximize the existing property to protect each party's interests in home ownership. Since only one broker is working with both parties, he can look at the entire community estate and the parties' incomes to assist them in finding the most advantageous way through the real estate market.

Accountants always provide invaluable assistance such as valuing defined benefit plans, providing explicit tax advice on property issues, and the like. Again, the ability to look at the entire package and provide insight for both parties is invaluable and helps to ensure that they move forward in their soon-to-be separate lives collaboratively.

Child Specialists

The child specialist can be used in a variety of ways to assist the family through the divorce transition. The extent of involvement depends on the specific needs of the family. The child specialist can simply act as a sounding board to answer the parent's questions, and to work with them to create a parenting arrangement that makes sense for that individual family. In more complex cases, which may involve impairment of one parent, the specialist can perform limited investigations, review medical records, request testing and make recommendations.

The child specialist can assist parents in developing a collaborative and effective co-parenting style that strengthens the family system both during and after the divorce process. The child specialist also acts as an advocate for the children, focusing on their needs during and after the divorce process. They can assist parents in supporting their children through grief and loss and can help the family embrace the concept of a "binuclear family." They can be used as a "voice for the child," providing a unique and safe environment for the child's input to be valued and considered during the creation of the parenting arrangement.

The child specialist takes into consideration the unique temperaments of each child, along with their stages of development and diverse cultural factors. The agreements which emerge are therefore more unique and creative since they include the child's perspective in the shaping of the parenting plans.

Most child specialists that are involved in this process appreciate the fact that they do not need to prepare a lengthy written evaluation. Instead, they are able to work directly with the parties and attorneys to assist the family in creating their parenting arrangement. Since the parenting specialist is directly involved with the parties, their input and comments during the negotiations for the parenting plan are provided real time and in a context of resolution, not litigation.

Mental Health/Divorce Facilitator/Coach

As the use of collaborative law has spread, the collaborative professionals are discovering that the cases we are handling are becoming more challenging. The issues are more complex and the emotions are higher. The mental health professionals are typically brought in as Family Systems Facilitators and Coaches. Their role provides education and coaching about many levels of the divorce and related life transition issues. In addition, they may provide assistance to the parties and attorneys during the collaborative process. Their role is to assist the parties with stress management, grief counseling, improving communication skills, explore parenting concerns and to help ensure that each of the parties' needs, concerns and feelings are understood and expressed in positive ways. This can be particularly helpful during 5 way meetings, held with the parties, attorneys and facilitator, particularly when the couple is still in need of emotional containment. The facilitator works either jointly or individually with the parties and to advise the attorneys as to when the parties are ready to proceed with negotiations or when things should slow down.

Though the Facilitator/Coach does not provide therapy in the traditional sense, they do employ therapeutic modalities in their work to assist in the healing, visioning and empowerment of each member of the family. Because emotions are addressed and guidance is given during the unfolding of the divorce process, decisions made about living separately, co parenting and even financial issues are more durable. The impact of this role is to support and help the process move forward in a productive and efficient manner.

Facilitative mediators can be employed to help the collaborative team and their clients hold the difficult conversations that are part of any collaborative process. As third-party neutrals, facilitative mediators bring a variety of mediation tools that foster productive discussions, minimize the risk of positional bargaining and impasse and model new ways of communication and negotiation.

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Other Potential Collaborative Professionals

As in any case, there are numerous other professionals who can be brought in to assist either or both parties making this transition. For example, a vocational rehabilitation specialist may be extremely helpful and important if either party has been out of the workforce for any period of time. If either party is already receiving counseling or therapy, that work can, and should, certainly continue. Any other expert who could be brought into a litigation case, can and when appropriate, should be utilized. Again, remember, however, that typically only one expert is hired for both parties to jointly use.

COLLABORATIVE MODELS

There are several different models which have emerged as the collaborative movement has developed and changed.

Attorney Referral Model

The initial model, frequently used by attorneys in small jurisdictions is the *attorney referral model*. The attorney referral model is one in which the attorneys control the process. They meet with their clients and work through the case in a series of four way meetings. The attorneys assist the clients with each of the legal and emotional issues facing the parties, including the creation and implementation of the parenting plan, child support, maintenance and property items. When the attorneys believe that an outside professional can provide assistance to the parties, they will refer the individuals to the specific neutral professional. This is the standard model which is used throughout the country as a baseline for parties using the collaborative law process.

Team Model

In this model, the attorneys work with a series of known experts who provide a team structure for the clients. Usually the attorneys will work together to assemble a team consisting of the financial specialist, child specialist and coach, which the attorneys believe will best suit the needs of the parties. The number of specialists on the team is determined between the attorneys and the parties. One team may consist of only the attorneys and a financial specialist. Another team may have attorneys, a coach or coaches, financial specialists and parenting specialists. The parties are intimately involved in helping to create the team that is going to support and work with them. In some cases, the parties will rely heavily on the advice and recommendations of the attorney or coach. In other cases, they may wish to interview several independent specialists and bring them onto the team.

The Interdisciplinary Team

The evolution of the collaborative model includes several organizations which put into place for the client a full team for every case. This model creates a strong structure for the client. The initial meeting involves an 8-way meeting with the clients, attorneys, coaches, and specialists. The meeting is designed to allow the clients to establish relationships with the team simultaneously. Homework projects for each phase of the case are assigned to clients or professionals and a roadmap is clearly established for how the case will unfold. Typically this model requires a "team manager" to help the case run smoothly, stay on track, communicate concerns or issues, keep contact information, forms, reports, set agendas, etc. The benefit of the interdisciplinary team model is it that allows for maximum use of a broad mix of skills and knowledge to assist the parties during their life transition.

Evolution of the Models

As collaborative attorneys, we have learned that the most effective way to help our clients is to be flexible and open to new adaptations and options. Most of us started with the attorney referral model. The first several years of case work involved attorney referrals based on a specific as-needed basis. We were limited by the lack of availability of trained collaborative professionals and by our own desire to help our clients in what we perceived was a cost efficient manner.

After handling these cases for a couple of years, we discovered that, for example, bringing in a parenting specialist whenever there were parenting plan issues in dispute made a lot of sense. It was far more cost effective for two clients to meet in a 3-way meeting with one specialist to discuss the specific concerns about the parenting arrangements with the person who's skill and expertise could best help them. The attorneys were consulted for the legal information and were brought back into to help create the final parenting plan structure once the parties had worked through a schedule that met the needs of that exact family. The parenting plans became more creative, more flexible and met the needs of the children and parents in a far more deliberate manner. Our client's reported back that, by not using the attorneys to work through the specifics of the parenting arrangement, their cost savings were significant.

Similarly, when we started using a CDFA who was trained in the collaborative model, he was able to work with the clients directly to gather the necessary records, to create reasonable budgets and to look at short and long term goals. After the information had been received and input, a 5-way meeting with the attorneys and the financial

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planner is scheduled to begin to analyze the data, ask questions, and ensure that both parties have a complete understanding of their financial picture. The attorneys and financial planner work in tandem as the division of assets, debts, structure for maintenance and child support are each discussed, analyzed and negotiated. Usually, an agreement on the financial division of the marital estate happens within just a couple of meetings. Again, clients report greater satisfaction as they understand their asset division more, and understand each person's needs and interests as they create a financial division that will meet their goals and expectations. Further, by working primarily with the financial planner and only bringing the attorney in for the discussion and negotiations, clients again report a cost savings.

Finally, in the evolution of our use of team members, many of our cases became much more complex. Although many of our clients were clear in their strong desire to avoid using court, or the threat of court, they were unable to work together, to communicate with their partner or to resolve their disputes. As a result, we began to seek out collaboratively trained mental health professionals and facilitative mediators to serve as coaches and facilitators.3 In doing so, the collaborative attorneys have discovered a whole new level of assistance and benefit to their clients. Although many clients prefer not to use a facilitator, those that do agree to this model, find themselves supported and helped through the challenges of a divorce in a new and proactive way. They are able to not only work on stress management, but they also learn communication techniques to help move their case forward. On occasion, the communication techniques include communication problems which they may have with the other team members, including their own attorney or the other attorney.

The team gains valuable insight into how to best assist the clients when there is a facilitator/coach involved in the case. The facilitator is usually able to determine underlying issues or areas of concern that the attorneys would not typically be aware of as part of their legal analysis. The facilitator can make recommendations as to when to slow a case down and when to move it forward. They help the other team members communicate with the parties in a way that is most effective and efficient and allows the clients to feel heard and understood.

WHERE DO WE GO FROM HERE?

Each type of case management has its strengths and weaknesses. The beauty of a flexible and evolving model such as collaborative law is that the professionals can choose the approach that best serves the needs of the clients in creating a cost effective, time efficient process that is going to ensure the best solution to the client's individual and joint needs and interests. Most attorneys who are practicing the team model still have cases which are attorney referral only. Some cases have a full interdisciplinary team and some have only specific team members.

In her presentation to attorneys in Washington State last winter, Pauline Tesler, an early founder of the collaborative law movement, indicated that

> There are no conflicting or competing models. It is simply a question of when a community is ready for collaborative interdisciplinary resources and what resources that the community can offer the clients will accept. Collaborative lawyers can work with or without interdisciplinary teams. Similarly interdisciplinary teams always work with and refer to collaborative attorneys. Either way, what the lawyers do is the same – collaborative law.4

1 *See www.avm.co.at* for more information about this Symposium.

2 Also known as the interdisciplinary team model.

3 Many areas do not have qualified, trained collaborative coaches. A well trained facilitative mediator who can act as a communication facilitator is often an excellent choice to work with couples in this somewhat unique role. Facilitative mediators do not engage in evaluative negotiation techniques as is often the case in conventional litigation when "mediation" means settlement conferencing. The role of facilitative mediator is facilitate the communication between the couple and among the collaborative team to ensure that the needs of the clients are identified and recognized and that all participants are provided opportunities to speak, are effectively heard and are genuinely understood. An added benefit is that using a mediator invokes the privilege and confidentiality protections of the Uniform Mediation Act, chapter 7.07 RCW.

4 "Achieving the Collaborative Paradigm Shift: Retooling Yourself from Traditional to Collaborative Family Law Advocacy." By Pauline Tesler, 2002.

Suggestions for Better Mediation

by Marc Christianson

What material do I provide to the mediator?

Good mediators can mediate without reviewing advance written materials by developing and focusing on issues identified by the parties at the start of the mediation. Through that process, documents and proof may be exchanged related to the issues being discussed. Counsel need to have the records available. Either bring your entire file to the mediation or have your office be ready to email/fax you the documents needed to provide the proof of the fact or value being discussed. Since mediation is confidential and if a good faith effort is to be made to settle the case, all the facts need to be laid on the table. It is always helpful to agree to exchange the information each party will provide to the mediator. What I typically submit is mentioned below. I find this helpful because by the time of the mediation, both opposing counsel and their client have read and are familiar with our materials and proposals and vice versa and we can get right to the issues. If material is not submitted until the first session, valuable mediation time is wasted by everyone reviewing and digesting the data. Agree to submit your material to the mediator and opposing counsel 7-10 day in advance of the mediation session. I know it is very difficult with busy practices but force yourself to do it. Exchange your material with the other side so data is exchanged contemporaneously.

When you are going to offer varied settlement proposals in your materials, in order to avoid confusion, I suggest you lay out the facts in your materials and advise that specific proposals will be raised and discussed during the mediation. There may be some time wasted but if you shotgun 3-5 different proposals in your materials, I think you'll spend a lot more time explaining each proposal rather than using the course of the negotiations to narrow and refine your offers based on the alternatives acceptable to your client.

Where do I start with my settlement position? Do I start asking for more than any court is likely to give my client and work down or do I start with a centrist/compromise settlement position?

Consider that if you are too far off with the first offer, you risk losing credibility with the mediator and opposing counsel. Such a position may provide a disincentive to work hard to settle the case; the thinking being you will always be too far apart. Start with what's at the higher end of a trial outcome, state you and your client are committed to settlement and will be open and willing to discuss all issues. You have left some room to move in the negotiations. Even when I'm told the other spouse has a "bottom line, cut to the chase" personality, I still leave room to negotiate.

What do I send to the mediator and the opposing attorney?

In cases with more than just a couple of assets and issues, I'll prepare a cover letter explaining the history and background of the parties, their educational and work history, information about the children, their support and the parenting plan and then provide a detailed description of the assets and how the values were derived as well as the debts and any other areas that need additional explanation for a clear understanding. I think 5-7 pages for this is optimal to keep the mediator interested. I also attach a spreadsheet, which will feature the typical columns for each party, assets and liabilities, values, totals and percentages to each party. Consider providing your spreadsheet electronically to the mediator and opposing counsel so when you exchange offers all of you are working from the same spreadsheet with the same format. If values are in issue then send the spreadsheet with no values and fill them in during the negotiations. So many times each attorney has his or her own form and listing order that time is wasted trying to compare offers from different spreadsheet formats. When there is a lot of documentation I also include a column containing a page reference to the accompanying exhibits which support the spreadsheet entry. Clearly, you would need to number your exhibits. It's tedious to set up if there is a lot of documentation but it's very helpful to the mediator and my client's position as we discuss and establish facts and values. Prepare your material in an easy to read and understand format. I also find that a well produced settlement brochure, while perhaps not impressing opposing counsel, can impress the opposing party that you are organized and prepared and have your act together. If the opposing attorney has slap-dashed something together, we look very good. A complete and indexed settlement brochure is also a terrific trial preparation tool, if trial is necessary.

When do I schedule the mediation?

Schedule the mediation when you have all necessary underlying information to support your client's position on unresolved issues. Little progress can be made if there is no value data other than the parties' opinions of value. If your position is that the values should be determined as of the settlement conference date then make sure you have

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written proof of value at that time. If your position is that all should be valued at the date of separation then be sure you have written documentation for support. As noted above, either bring your entire file to the mediation or have your office be ready to email the documents needed to supply the proof needed.

How do I prepare my client?

Review the process; what happens and when. Review the concept of compromise to reach an "acceptable" result. Tell your client neither they nor you are allowed to degrade the opposing party or counsel. Hot buttons will be avoided because it sidetracks settlement, increases the time spent and the fees the client will ultimately pay. Advise your client that frequently both parties are very nervous, fearful and acutely aware of power imbalances and "fairness," as they define it. Your presentation will be calm and evenhanded. The mediator will appreciate it and the opposing party may get the idea that you are trying to be fair and reasonable in the process.

Remind the client that the process can take a number of hours, it will be hard work and emotions often run high. It is critical to review with your client the ranges of possible results at trial plus the strengths of your opponent's case and the weaknesses of yours. Unless your client accepts the fact that there are weaknesses in their case, that a given trial result is not guaranteed and/ or that movement from a prior position will be necessary, it will very, very hard for the client to offer or accept compromise in settlement. Do not let the mediation be the first time they learn of weaknesses in their case or that the likely outcome you have been discussing with them for the past several months is now improbable or impossible.

Use your clichés so your client understands both parties are typically very upset with a negotiated settlement because neither receives everything they wanted. That's what a negotiated settlement is all about. I tell my client's that if they can look in the mirror and say, "I do not like the settlement terms, but I can live with them," then, in my view, they've achieved a good result. They have settled on terms they can live with, they have avoided the costs of trial, they have avoided the risks of trial and, most importantly, they have retained control over their case and their family.

Is yours to be a "pure" mediation or a guided mediation?

There are many terms for these concepts but pure mediation is facilitative only and does not involve the mediator's opinion in the process. A guided mediation involves the mediator in the process, typically in caucus, where the attorney or the party will ask and receive input from the mediator. This is really not mediation but more akin to a traditional settlement conference where the judge opines the likely trial outcome based on the facts presented. Some cases settle through pure mediation while some cases need nudging in caucus. The mediator's exact role is discussed with both attorneys' and agreed upon prior to the start of mediation so there is no surprise.

Any tips for negotiating?

Focus on the underlying needs rather than the stated position, i.e., "I need $4,287.28, per month in child support and spousal maintenance," versus, "I am worried that I will not have enough money to meet my needs and those of my family," which then leads to the question, "How can we utilize the available assets and income so both parties can meet their reasonable living expenses." What is the opposing party really worried about? What does she/ he really need? What is really important to them and can it realistically be achieved? You cannot accommodate an unreasonable position. However, you can present your position through the mediator to address the real or perceived needs of the other party.

Anticipate your opponent's position and arguments and speak to them in your materials so as to defuse their impact. If you have problems with your case or your client, be candid. It's going to come out anyway.

Be prepared!

Draft settlement documents in advance. Bring them to the mediation along with a laptop and portable printer. I use a portable Canon iP90 color printer that is small, light, performs well, and is rechargeable and wireless. (There may be other/ cheaper alternatives on the market). Import your spreadsheet(s), deeds, releases, QDRO's, promissory notes, etc., plus your draft settlement pleadings to your laptop. Bring your notary seal. As figures and asset divisions change in the negotiation process, you can keep track of them on your spreadsheet and clearly show your client the dollar and percentage changes in each offer being discussed. Sometimes a copy of the spreadsheet will be attached to the final pleadings as confirming proof of assets and values to be awarded each party.

It may take a capital outlay to purchase a laptop, portable printer and related software, but think of what is gained. You can leave the mediation with the final pleadings and related documents fully executed by parties and counsel, ready for filing/ recording. You avoid the time delay and cost of exchanging competing pleadings and arguing over wording differences. I have had cases where it took weeks if not months to get opposing counsel to respond or resolve wording issues, etc. There are a myriad of reasons which cause delay in getting final pleadings

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completed. In some cases a second trip to the mediator or binding arbitration is needed. All that hassle is avoided if you can expeditiously produce settlement documents at the mediation. In the end your client will be very pleased to leave the mediation knowing that everything has been prepared and signed and the case is basically over.

Look out!

After a long mediation session where the case is close to settling or has been settled and your client says, "I just want to tell my spouse…"; or, "I just want to give this sealed envelope/ letter/ to my spouse…," look out! If not handled properly you may kiss a settlement goodbye or create very negative long term feelings if the case has been settled. It does happen. I just had it happen in a case I recently mediated. Don't get me wrong, I have witnessed wonderful, touching moments between spouses that were extremely positive and affirming. When it works it's great, when it doesn't it is ugly. I suggest counsel for the party hears the message from the other spouse or review the letter before the client hears or sees it, just for the sake of protection. It it's positive and heartfelt, no problem. If not, it does not need to be.

Good luck and enjoy the experience! There is nothing better than settling a case for a client who understands what it takes to settle, fully engages in the process with reasonable positions and appreciates the emotional and financial savings that a negotiated settlement can bring. It does happen!

Family Law Practitioners Alert: Please Use Current Domestic Violence Protection Order Forms!

The Washington State Patrol and the Washington State Gender & Justice Commission have asked for the help of family law practitioners. The Domestic Violence Protection Order forms, located at:

http://www.courts.wa.gov/forms/index.cfm?fa=forms.contribute&formID=16

were updated in June of 2006. These forms were updated at that time to ensure ease of use for law enforcement and to make it clear whether or not federal firearms laws are implicated. The use of the wrong form can affect your client's rights and/or safety. The state patrol reports that despite the change, many courts are still issuing orders using the outdated forms. Please be sure you and your clients use the correct, current form. Thank you for your assistance.

Ask Nancy

NANCY KOPTUR, a staff attorney with the DSHS Division of Child Support (DCS), is a member of the Family Law Executive Committee. If you have general questions about support enforcement in Washington State, please send them to her at nkoptur@dshs.wa.gov and she'll answer them in future issues of the Newsletter.

Dear Nancy:

How does DCS decide what administrative support notice to serve when they want to establish an order? How does that process work, anyway?

When DCS opens a case and there has never been a support order entered, perhaps DCS can enter an administrative order. It all depends on whether the parents were married (to each other!), how old they are, and which one is the noncustodial parent.

- If the parents were married to each other, DCS can serve a Notice and Finding of Financial Responsibility (NFFR) on either parent under RCW 74.20A.055, WAC 388-14A-3115.
- If the parents weren't married to each other, DCS can serve an NFFR on Mom.
- If Dad is the NCP, we make further inquiries: did Dad sign a paternity affidavit (also known as an acknowledgment of paternity)?
  - Perhaps we can serve a Notice and Finding of Parental Responsibility (NFPR) under RCW 74.20A.056, WAC 388-14A-3120.
  - If the parties signed and filed a paternity affidavit after a certain date, we might be able to serve an NFFR. WAC 388-14A-3102.
- If no affidavit was signed, DCS will refer the case for establishment of paternity in court. If an affidavit was signed but either parent is under 18, we will usually refer the case to court; however, see RCW 26.26.315(4). If the parents weren't married and Mom was a minor, under appropriate circumstances we refer the case for prosecution for rape of a child. RCW 26.44.030.
- Finally, if the kids are on Medicaid and the custodial parent waives support enforcement services, we will serve a Notice and Finding of Medical Responsibility under WAC 388-14A-3125, to establish a medical support obligation.

Establishing an Administrative Support Order

The administrative support establishment process is authorized by statute (RCW 74.20A.055, 74.20A.056). The statute provides that DCS may set support administratively "if there is no order that establishes the responsible parent's support obligation or specifically relieves the responsible parent of a support obligation or pursuant to an establishment of paternity under chapter 26.26 RCW …" RCW 74.20A.055(1).

The procedures are set forth in WAC 388-14A-3100 through 388-14A-3140. Having consulted WAC 388-14A-3100 to determine which notice should be used, DCS serves a support establishment notice on both the noncustodial parent (NCP) and the custodial parent (CP).

> REMEMBER: The term CP is used to refer to both a biological parent and a nonparental caretaker of the minor child. In DCS lingo, it just means the person with whom the child resides.

Either parent may object to the support establishment notice. This objection may be timely (WAC 388-14A-3130) or untimely (WAC 388-14A-3135)'. An administrative hearing will then be scheduled. It is in each party's best interest to appear whether or not they objected to the notice. If nobody shows up, DCS may ask the administrative law judge (ALJ) to enter a default order. WAC 388-14A-3131.

If just one party shows up, DCS and that party can proceed to hearing or reach an agreement after the ALJ enters a default against the nonappearing party. WAC 388-14A-3132. The best result is going to occur when both parties appear for the hearing. WAC 388-14A-3133.

> NOTE: The ALJ may enter a support order which is higher or lower, or otherwise different from, the notice amount, depending on the evidence admitted at the hearing. If a party does not appear at the hearing, that party cannot assume that the ALJ will enter an order exactly like the notice. So, if your client says s/he is not going to attend the hearing because the notice looks like the right amount, warn the client this is a *bad* idea.

If an administrative hearing is continued, either party may ask for the entry of a temporary support order. WAC 388-14A-3850. This temporary order is not binding on the ALJ who enters the final order, but is a way to get support flowing to the family while the decision is pending.

Once the hearing is held, the ALJ will issue an order. See WAC 388-14A-6110 and 388-14A-6115 to determine whether the ALJ will enter an "initial order" or a "final order." In most DCS cases, except for address disclosure hearings, the ALJ will issue a final order.

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CP or NCP (but not DCS) may take the case to the superior court for judicial review.

Establishment Variables

A lot of things can happen after DCS serves an administrative support establishment notice.

NCP or CP may choose to ignore the notice. *This is not the recommended method!* The notice becomes an order by operation of law if neither party objects. WAC 388-14A-3110.

- The danger of this approach is found when one party ignores the notice and the other party objects, because the final order is not limited by the amount in the notice. See WAC 388-14A-3132.

NCP or CP can object to the notice, either in writing (there will be an objection form included with the notice) or orally. WAC 388-14A-6100.

- An objection may be:

timely, that is, within 20 days of service (60 if served on the NCP out of state) [NOTE: A CP's objection will be timely only if it is received within 20 days of service], or

untimely, which can be within a year of service or after one year from service. After one year, the objecting party must show good cause for waiting so long to object.

- For timely/untimely objections, see WAC 388-14A-3110. For what happens at a hearing on an untimely objection, see WAC 388-14A-3135. For a definition of good cause, see WAC 388-14A-3500.

Once either the CP or the NCP (or sometimes both) has objected, the matter will be set for hearing and one of the following will happen:

Everybody shows up for hearing, and the administrative law judge (ALJ) holds a hearing and then enters an order –OR-

Both CP and NCP fail to appear for hearing, so the ALJ enters a default order in the notice amount –OR-

Either CP or NCP shows up for hearing and the other fails to appear. The ALJ enters a default order against the nonappearing party and either:

(a) ALJ holds a hearing and enters an order; or

(b) DCS and the party who appeared reach an agreement and settle without a hearing, entering into an agreed settlement (not signed by ALJ) or consent order (signed by ALJ), see WAC 388-14A-3600 -OR-

At some time before the hearing date or even on the day of hearing, all three parties agree and settle the case with a consent order or agreed settlement.

What if the NCP or CP files an untimely objection?

The first question is: what happened before this objection was received?

If the other party never objected either, then it depends on how long after service of the notice the objection is received:

(1) If it's between day 21 and day 365, the objecting party does not have to show good cause for the late hearing request. The party has an absolute right to have a hearing on the merits of the notice.

(2) If it's after day 365, the objecting party must show good cause for failing to request a hearing in a timely manner. If good cause is not found by the ALJ, the hearing request is treated as if it were a request for prospective modification.

If the other party previously objected and there has already been an administrative order entered, the objecting party must file a petition to vacate the administrative order under WAC 388-14A-3700. The ALJ must apply civil rule 60 to determine whether the petitioner has good cause. Before vacating an order of default at the request of the NCP or CP, the ALJ must consider the prejudice to the non-DCS party that did appear for hearing. WAC 388-14A-3700(7).

Defenses to Liability – What if There is Already a Court Order in Effect? It Depends on Where the Child Is!

It is an unfortunate fact of life that parties do not always live their lives in an ordered fashion, especially if there is a court order which sets out the details of how they will deal with their children. Sure, at the time the order was entered they thought they could do it, but DCS sees a lot of families where the actual living arrangements are the exact opposite of what the court orders set out. Sometimes this is just because the parties changed things around but couldn't afford to go back to court to fix the order. Sometimes this is because one party unilaterally decided that the court order wasn't working and decided to change the arrangement, maybe even by kidnapping the child.

So, what if one parent has court-ordered custody, or is the primary residential parent under the parenting plan, but the child resides most of the time with the other parent? If the parent who now has the child either goes on TANF or applies for nonassistance child support services, DCS will establish an administrative support obligation against the

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court-ordered custodial parent. It's *where the kid is* that's important, not what the papers say.

DCS has authority to set child support administratively unless there is a court order that sets the parent's child support obligation or specifically relieves that parent of a child support obligation. So, if the only court order that exists says that Dad must pay Mom $400 per month but the child now lives with Dad, Dad can ask DCS to set Mom's support obligation using a Notice and Finding of Financial Responsibility.

The parent with court-ordered custody may claim the other parent stole the child, or won't give the child back. This is called "wrongful deprivation of custody." Wrongful deprivation of custody is almost always a defense that will require an administrative hearing, where the administrative law judge will put both parties under oath, take testimony, and make appropriate findings. Or, the NCP can go to superior court.

How Do We Decide How Much Support the NCP Should Pay?

In Washington, child support obligations are calculated based on the Washington State Child Support Schedule (WSCSS), which is found in Chapter 26.19 RCW. The statute sets forth standards for application, and economic table on which calculations are based, and requires that all orders be based on WSCSS worksheets.

You may have heard that the Child Support Schedule is being changed. It is actually being *reviewed* to see if any changes are needed. This means there are workgroups and a lot of public interest, but no actual changes have been made. There have been recommendations to the Legislature, and lots of studies, but until the Legislature acts, there will be no changes to the Support Schedule.

Child support is based on each parent's ability to pay. We look at what the parent's earnings are, but don't stop there. It's not just how much you make, it's how much you *could* make that's important. Generally speaking, the courts want to base a child support obligation on a parent's full-time wages. Most of us work for the best wages we can get. But sometimes, a parent will be underemployed (less than full-time, or for less than they could earn elsewhere) or unemployed (we ask, is this voluntary or involuntary?). The court will then impute earnings and set support on what the parent could or should be earning, not what the parent is actually earning.

How do we know what the "right" amount is? Ask yourself, did this change of income occur conveniently close to the date of separation? Does this person have a history of earning big bucks but now works 20 hours a week for minimum wage? Why did that happen? I am a licensed attorney in the state of Washington and have had the same job for over ten years. Wouldn't you wonder what was going on if all of a sudden when it's time to set my child support obligation, I am now working in a fabric store for minimum wage? Did I do this on purpose to get out of paying child support, or is this the only job I can get after being disbarred and sent to prison for some unspeakable crime? What if I'm not working at all? Is it disbarment or the fact that I now have a rich boyfriend? Cases where we impute income need a lot of factual inquiry.

The facts of your particular case will determine how the parents' incomes are determined. The WSCSS contains directions on when and how to impute income. See RCW 26.19.071(6) for more details.

Information for Your Clients

Did you know that easy-to-understand pamphlets on a wide variety of legal topics are available from the WSBA? For a very low cost, you can provide your clients with helpful information. Pamphlets cover a wide range of topics:

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Writers Wanted for Articles in the Newsletter

We are always looking for articles to publish in the Section's newsletters. Articles need to be well-written and of interest to family law lawyers. Length should be no more than 1,500 words. Submit your articles to Shelley Brandt at *shelley@cordesbrandt.com* .

Speak Out!

Wanted: Lawyers to volunteer to speak to schools and community groups on a variety of topics. For more information about the WSBA speakers bureau contact Dené Canter at 206-727-8213 or *denec@wsba.org*.

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For further information contact Sharlene Steele, WSBA Access to Justice Liaison, at 206-727-8262 or *sharlene@wsba.org*.

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