Family Law

Section Newsletter

Summer 2007 *Published by the Family Law Section of the Washington State Bar Association*

Chair's Column

This will be the last column from Sara Ainsworth as the Chair of FLEC. As most of you know, Sara resigned her position earlier in the year when she had her second child. Sara was in her sixth year on FLEC. Everyone on FLEC wants to express their appreciation for her devotion and hard work not only as the Chair, but as a FLEC member, and extend our best wishes to Sara and her family. Sara wrote this article for the Newsletter prior to her resignation. Jean Cotton took over as the Chair-Elect and will continue as the Chair for the 2007/2008 year. We look forward to many articles from Jean.

The WSBA Family Law Section as Friend of the Court: Our Role as Amicus Curiae

by Sara Ainsworth

The Washington State Bar Association is routinely asked to contribute briefs of amicus curiae to the appellate courts of this state. Over the last several years, many of those cases have pertained to family law. While the WSBA does not always oblige when asked by a party to share our position in an amicus brief, the Family Law Section has filed briefs in important family law cases. This article will explain the WSBA's process and requirements regarding the Section's amicus participation, and highlight a few of the cases in which the Family Law Section has participated.

The Request for Amicus Participation

A request that the WSBA, and/or one of its sections, file an amicus brief can come from several sources. Usually, an attorney for one of the parties recognizes an important public policy issue in a case, and seeks our involvement directly. At other times, the members of the section themselves raise a concern about a pending case and seek involvement as amicus. Perhaps the most compelling requests, however, come directly from the appellate courts of this state.

The Process of Approval or Rejection of Amicus Participation

As a section of the WSBA, we may not, understandably, decide on our own to file a brief and represent our position as that of the entire WSBA. Rather, the WSBA determines whether or not to file an amicus brief through its Amicus Committee and through careful review of a request in light of its amicus policy. This policy requires as a preliminary matter that a case be of "substantial interest" to the WSBA. A case is determined to be of substantial interest to the Bar Association under the following circumstances:

> Cases are considered to be in an area of substantial interest to the WSBA when issues in the case: (a) concern the independence or integrity of the judiciary or the bar; (b) concern the effectiveness or accessibility of the legal system; (c) concern the practice or business of law; (d) concern diversity or equality in the legal profession; or (e) are determined by 75% of the total membership of the governing body of a section of the WSBA to be of substantial interest to the WSBA.

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See WSBA Amicus Policy, at *http://www.wsba.org/lawyers/groups/amicus/default.htm.* After considering the criteria above, the Amicus Committee also considers whether there is significant time and expertise to file a brief of quality, and whether the WSBA's amicus participation would bring a unique perspective not available to the court without its involvement. This policy reflects the Rules of Appellate Procedure, which demand that any amicus brief filed not merely reiterate the arguments of the parties, but offer a perspective that assists the court in analyzing the matter before it. *See, e.g.,* RAP 10.3(e) and RAP 10.6. Further, the WSBA Amicus Policy recognizes the significance of direct requests for amicus participation from the appellate courts, and provides that the WSBA will comply with such requests absent "exceptional circumstances."

The Family Law Section and Amicus Curiae Participation

In the last several years, the Family Law Section received approval from the WSBA to file amicus briefs in a few very important family law cases. Members of the Family Law Executive Committee volunteered their time to research, write, and edit those briefs.

In *Marriage of Furrow,* 115 Wn. App. 661 (2003), the Court of Appeals, Division One, invited the Family Law Section to respond to a specific question: "Did the trial court have authority to order the termination of parental rights under these circumstances, and may the order be attacked through a motion to vacate under Civil Rule 60(b)?" In that case, a mother voluntarily relinquished her parental rights in the context of a parenting plan modification proceeding under RCW 26.09. Despite the relinquishment, she continued her relationship with her children and eventually filed a motion collaterally attacking the termination of her parental rights.

With the approval and participation of the Amicus Committee, the Family Law Section filed a brief arguing that, while the trial court had proper jurisdiction over the parties, it did not have the authority under RCW 26.09 to terminate parental rights. The Section further argued that public policy would not support such a termination, as the availability of terminations in divorce proceedings would encourage litigants to trade their parental rights for relief from child support obligations or other incentives-something that we as family law practitioners routinely advise our clients is both unlawful and not in the best interest of children.

In its decision, the Court of Appeals disagreed that the court did not have the inherent authority to terminate parental rights, but agreed that the order was voidable for failure to comply with the usual statutory requirements

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Editorial Contributions

Please send letters and other editorial contributions, preferably in Word format to:

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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 Pam Inglesby at 206-727-8226 or *pami@wsba.org*.

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regarding termination of parental rights and for violating public policy. 115 Wn. App. at 678. Further, the Court of Appeals specifically credited the arguments of the Family Law Section, as follows:

> This appeal also raises serious issues of public policy that go beyond the impact of the procedural irregularities on the children involved in this particular case. As helpful as the legal analyses provided by amici have been, their eloquent articulation of the public policy at stake has been even more helpful. The Family Law Executive Committee wrote:
>
> On a regular basis, we as practitioners disabuse clients of the notion that parenting plan provisions and child support can be tied to one another and bartered off one for the other. Not infrequently, we encounter proposals by parties for one parent to have his or her rights terminated so that we will not have to address contentious issues related to the children. For years we have told clients that a stipulated parental rights termination within the context of a family law action is not possible – that a parent's rights can only be terminated within the framework of an adoption (stepparent or otherwise) or dependency proceedings.
>
> As practitioners who work on a daily basis "in the trenches" with family law litigants, members of the Family Law Executive Committee are well aware of the pressures that operate on our clients. There is not one of us who has not, at some point in our practice, had a client who was willing "to give up everything" in order to achieve his or her one critical goal. …
>
> If the court were to uphold stipulations such as the one between the parties in this case, entered without participation by a guardian *ad litem* or meaningful judicial scrutiny, there will be many instances where children's rights will be bartered away by parents to achieve their own ends or surrendered by one parent acting under duress. Such a practice is clearly contrary to public policy and tramples on children's fundamental rights to have their parent-child relationships protected.
>
> Amicus Curiae Br., Wash. State Bar Ass'n Family Law Section, at 16-17.

Id. at 677.

In a second and equally important case involving third-party visitation, the Washington Supreme Court invited the Family Law Section to file an amicus brief. In that case, *Parentage of C.A.M.A.*, 154 Wn.2d 52 (2005), the Court asked the Section to respond to two specific questions: "1) Does the current version of RCW 26.09.240 survive the Washington State Supreme Court's decision in *Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998), and 2) if this statute remains viable, can it be applied constitutionally under the methodology set forth in the plurality opinion in *Troxel v. Granville,* 530 U.S. 57 (2000)?"

The Family Law Section was grateful for the opportunity to respond to those questions, questions that had been plaguing us all as family law practitioners in the years since *Smith* and *Troxel* came down. In our response, we argued unsuccessfully that the version of RCW 26.09.240 – which allowed certain third parties to raise claims of visitation during pending family law proceedings – could in fact be constitutionally applied, as long as courts complied with the requirements of both *Smith* and *Troxel*. Those cases, in short summary, required that a court give deference to the decisions of a fit parent and that the party seeking visitation must make a showing that a child is harmed by the denial of visitation.

However, as family law practitioners know, the Washington Supreme Court determined that RCW 26.09.240 was too constitutionally flawed to be accurately applied, and would require the court to rewrite the statute in a way that it could not be assured would have been passed by the legislature. 154 Wn.2d at 69.

The Family Law Section and Continued Involvement in Amicus Participation

As noted by the policy above, cases that do not meet the other criteria for WSBA involvement require a vote of 75% of the membership of the Executive Committee in order to assure the Amicus Committee that the case is one of substantial interest to the WSBA. Thus, the Family Law Executive Committee carefully weighs every request that is related to family law – not just for substance, but also as to whether we have the expertise, resources, and time available to file a well-written brief that will, as the Rules of Appellate Procedure require, "assist the court." We urge family law practitioners involved in appellate cases to be mindful of the WSBA's Amicus Policy, and to consider making requests for Family Law Section involvement when appropriate.

In Sickness (not in health), When (but not until) Death Do Us Part

A Look at Washington's Domestic Partner Registration Law and Its Impact on Family Law Clients and Practitioners

by Janet M. Helson, Skellenger Bender, P.S.

On April 21, 2007, Governor Christine Gregoire signed into law Senate Bill 5336, which creates a domestic partner registry for eligible couples, and affords couples who register certain recognition and rights under Washington state law. Much of the media coverage and many of the public statements by legislators and pundits – both proponents and detractors of the law – analogized to marriage and spoke in either hopeful or fearful terms about how the bill represented a first step toward "gay marriage." A number of the Seattle television stations simply recycled footage taken the previous July when the Supreme Court announced in its *Andersen* decision that same-sex couples did not have a constitutional right to marry, suggesting by implication that the domestic-partner legislation did for same-sex couples what the Supreme Court had not done in *Andersen*[1].

So it is no wonder that many people – both those directly affected by the law and those who are not – have come away with the impression that, by registering as domestic partners, couples will receive a wide array of rights and benefits, and will have secured the same types of protection afforded by marriage. That is simply not the case. In reality, while the domestic partner registry and the existence of the status of "registered domestic partner" creates an underlying structure which has the potential to be used in the future to secure additional rights for registered couples,[2] and which could evolve over time and through additional legislation into a more complete, marriage-like set of rights, the current law provides only a few rights related to health care and death. Moreover, even those few rights likely have little or no portability to other jurisdictions.

What that means for family law practitioners is that we will spend a lot of time explaining to clients what the law does *not* do and why it is still important for same-sex and older unmarried couples to take all of the steps to protect their families that they should have taken before the domestic-partner law, including (as appropriate to each case) but not limited to:

- wills and trusts
- durable powers of attorney (medical and financial)
- advance medical directives/living wills
- instructions re autopsy and disposition of remains
- hospital visitation authorization
- second parent adoptions
- nominations of a guardian/authorizations for consent to medical treatment of a minor (in situations where one partner is legally a parent of a child they are raising and one is not)
- cohabitation/domestic-partnership agreements
- titling of property and accounts in appropriate names
- naming of partner as beneficiary

In addition to educating our clients, family law attorneys will also have to educate the bench regarding the limitations of the law and what evidentiary and legal significance the court can or should attach either to a couple's registration or failure to register as domestic partners.

Who Is Eligible to Register

Domestic partner registration will be available to same-sex couples and to different-sex couples in which at least one partner is over 62 years of age. The intent section of the legislation explains that the law includes older, different-sex couples, as well as same sex couples, so that such older couples can have the recognition and rights of domestic partnership without losing important benefits such as Social Security or pension payments. For both groups, the legislature determined that allowing for domestic partner registration would "further Washington's interest in promoting family relationships and protecting family members during life crises."

In addition to the qualifications set out above, in order to register as domestic partners the couple must meet the following requirements:

- Both must share a common residence
- Both must be at least eighteen years of age
- Neither may be married to someone other than the party to the domestic partnership
- Neither may be in a state-registered domestic partnership with another person
- Both must be capable of consenting to the domestic partnership
- The members of the couple may not be nearer in kinship than second cousins

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Effective July 22, 2007, couples who qualify and wish to become domestic partners may do so by filing with the Washington Secretary of State's Office a declaration signed by both parties and notarized indicating that they are registering as domestic partners.

Benefits of Domestic Partnership

By registering as domestic partners in Washington, the couple will attain in Washington state the right to:

- Visit an ill or injured partner in the hospital and receive health care information about the partner
- Provide informed consent for certain medical procedures for an incapacitated partner
- Bring a civil action for the wrongful death of a partner
- Be listed on a partner's death certificate
- Authorize an autopsy on a deceased partner
- Control the disposition of a deceased partner's remains
- Have rights regarding family cemetery plots
- Make anatomical gifts on behalf of a deceased partner
- Inherit from a partner in the absence of a will
- Administer a partner's estate in the absence of a will

Because domestic partnership is a creature of state statute, a registered domestic partner will have these rights so long as the couple remains in Washington state; but couples should not and cannot rely on the partnership and attendant rights being recognized in other states. Indeed, in states with super-DOMAs[3] it is clear that the domestic partnership will not be accorded any recognition. While it is possible that states such as California or Connecticut, which have broad domestic-partnership laws themselves, will afford some sort of reciprocal recognition to Washington domestic partnerships, it is difficult to know how reciprocity would work as a practical matter.[4] You would not want the doctor to delay surgery so that the hospital's attorney could analyze what decision-making authority Washington law confers on registered domestic partners. In short, couples registered as domestic partners in Washington should not rely on that status being given any recognition outside the boundaries of Washington state.

Terminating the Partnership

In order to terminate a domestic partnership, one or both members of the partnership must file a notarized "notice of termination" with the secretary of state. If both partners have not joined in and signed the notice, the partner seeking termination must also file an affidavit of service showing that personal service has been obtained or that the partner could not be located with reasonable effort and notice has been made by publication as outlined in the statute. Once the notice of termination has been filed (with affidavit of service, if necessary) the partnership is automatically terminated 90 days after filing, with no further inquiry or process. The second way a partnership may be terminated is if either or both of the partners enters into "a marriage that is recognized as valid in this state, either with each other or with another person." Such marriage terminates the domestic partnership immediately and automatically, without a requirement of any notice to the other partner.

Members of the Family Law Executive Committee were troubled both by the provision for automatic termination of the partnership upon marriage of one partner and by the non-judicial, very cursory process for terminating partnerships. In light of the very limited benefits and rights currently afforded to domestic partners by the statute, the consequences of having such a summary process may not be dire. However, there are clearly circumstances in which a partner could be adversely affected by having the partnership terminated automatically or with little notice. This would include situations in which, for example: 1) one partner provides health insurance for the other through employment and either the policy or employer requires them to be registered domestic partners to receive benefits; or 2) one or both partners' will or the parties' property holdings have been structured based on the assumption that there is a domestic partnership in effect. Certainly, as we look forward to the future, when more substantial rights may be added, it is clear that the termination process will have to be augmented so that parties do not lose substantial rights without opportunity for due process.

Effect on Existing Remedies and Community Property Law

The statute, by its terms, provides that it "does not affect marriage *or any other ways in which legal rights and responsibilities* between two adults may be created, recognized or given effect in Washington" (emphasis supplied). Both that language and the legislative history make clear that the drafters did not intend to supplant or preempt common law meretricious relationship remedies. Indeed, it would be difficult to argue that the domestic partnership law preempts meretricious relationship case law since, in its current form, the domestic partnership law does not in any way address the property rights of living unmarried partners.

Still, one can anticipate that litigants in meretricious relationship cases will argue that the fact of registration supports a finding of meretricious relationship or that the parties' non-registration should undermine such a finding. While the positive may be true (i.e., registration is evidence

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of the existence of a meretricious relationship), the negative is not. There are many reasons why a couple might choose to forego registration other than lack of commitment to one another. Currently the only right that couples acquire through registration which cannot be secured, and arguably more effectively secured, through executing legal documents, is the right to sue for wrongful death. Couples who already have their legal documents in place may choose not to register in order to avoid the possible need to re-draft and re-execute those documents; they may be philosophically opposed to registering as domestic partners based on a perception that domestic partnership is a second-class status; or they may already be married in another jurisdiction and believe that registration in Washington would be duplicative and confusing. In addition, same-sex couples have many legitimate reasons (e.g., fear of job discrimination, desire to adopt internationally, one or both members' military service and the existence of "Don't Ask, Don't Tell"), not to create a public record of their relationship. Thus, there are strong arguments why the fact that a couple is *not* registered should *not* be viewed as persuasive evidence that a meretricious relationship does not exist.

The intestate succession provision also raises an interesting legal issue. As is the case for many of the benefits conferred by the statute, registered partners are included in the intestate succession provisions simply by adding "or state registered domestic partner" following the provision relating to spouses. Thus, the law will now provide that:

The net estate of a person dying intestate … . shall be distributed as follows: ….

(1) Share of surviving spouse *or state registered domestic partner*. The surviving spouse *or state registered domestic partner* shall receive the following share:
   (a) All of the decedent's share of the net community estate; and
   (b) One-half of the net separate estate if the intestate is survived by issue; or
   (c) Three-quarters of the net separate estate if there is no surviving issue, but the intestate is survived by one or more of his parents, or by one or more of the issue of one or more of his parents; or
   (d) All of the net separate estate, if there is no surviving issue nor parent nor issue of the parent.

This obviously raises the question as to whether there is a "net community estate" in a state-registered domestic partnership and how one establishes what it is. Through a meretricious relationship case, a petitioner can establish the existence of a "quasi-community" and "quasi-community property," but nothing in existing statute or case law creates a "community estate" for unmarried partners, and nothing in the domestic-partnership statute itself provides that a "community estate" is created by domestic partner registration. On the other hand, the clear intent of many, if not all, of the statute's provisions is to treat registered domestic partners as if they were spouses, which suggests that the intent of the intestate succession provision may also be to treat registered domestic partners equally to spouses. Interpreting "community estate" to apply to married couples only would mean in some cases that the registered domestic partner would inherit only half of the total estate when a similarly situated spouse would receive 100 percent. While both the Elder Law Section and the Family Law Section brought this issue to the attention of the drafters and the reviewing committees, the legislature chose not to address it; thus, it will be left to the courts and creative attorneys to resolve.

Looking to the Future: California's Evolution

As we look toward the future, it may be instructive to look at the evolution of California's domestic-partnership law. In 1999, California established the domestic partner registry, the platform upon which its now-comprehensive domestic-partnership statute rests. That initial legislation provided only two substantive benefits: hospital visitation privileges and domestic-partner benefits for certain state employees. In 2000, California passed legislation allowing registered domestic partners to qualify for specially designed accessible housing for seniors. In 2001, in the wake of the horrendous nationally publicized case in which a woman's long-time domestic partner was killed by vicious dogs, and it appeared that there would be no civil available remedy, California passed legislation allowing domestic partners to bring wrongful-death cases and added many of the other death-related provisions which are part of Washington's statute. The 2001 legislation also allowed registered domestic partners to use streamlined stepparent adoption procedures (Washington does not have such a two-track process); provided continued health insurance for domestic partners of deceased state employees; and provided that the value of domestic partner benefits would not be taxed as income by the state. In 2002, there were six pieces of legislation, sponsored by six different legislators, which continued to add rights for domestic partners on a piecemeal basis.

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Finally, in 2003, California passed AB 205, which provided domestic partners with nearly[5] all of the rights, benefits, and responsibilities granted to spouses under state law. At that time, the legislature also amended the process for terminating a domestic partnership so that termination in California now requires a judicial process equivalent to filing for divorce. AB 205 had a delayed effective date until January 2005 in order to give the Secretary of State time to send out notices to all registered domestic partners informing them of the change in the law so that they could dissolve their domestic partnership if they did not wish to have new rights and responsibilities.

The evolution of California's domestic partnership law is now complete, at least from a substantive perspective. However, as one California advocate notes, California legislators and lawyers are still engaged in "cleaning up what seem to be an endless array of quasi-technical issues and unexpected complications," which underscores how difficult it is to create an alternate status which functions similarly to marriage when marital status permeates so many aspects of the law.[6]

Conclusion

In Washington State, we are just at the beginning of our process. The existence of a domestic partner registry and the possibility of having same sex relationships recognized and afforded some legal protection is clearly of historic moment and of importance to Washington family law practitioners and clients. Some decades from now, if there comes a time when all couples may marry in all fifty states, we may look back and view the domestic partner law as akin to *Plessy v. Ferguson* and "separate but equal." Or we may still have a domestic-partner registry and a domestic-partner status which affords just a limited number of protections. For now, however, our clients who choose to register need to realize that domestic partnership is not only separate but it is decidedly unequal. Unmarried couples, whether registered or not, should and will continue to look to lawyers for assistance in drafting documents to protect their families and relationships.

1 *Andersen v. King County,* 158 Wn.2d 1, 138 P.3d 963 (2006).

2 For example, SB 5069, which was introduced but did not pass during the last legislative session, would have extended state retirement benefits to surviving domestic partners on the same basis that they are available to surviving spouses.

3 Congress passed the federal Defense of Marriage Act (DOMA) in 1996 and a majority of states, including Washington, have enacted state DOMAs. A number of states have enacted more extreme versions of DOMA ("super-DOMAs") which not only prevent the recognition of marriage between same sex couples but declare as void any public act, record or judicial proceeding that extends any of "the specific statutory benefits of legal marriage to nonmarital relationships."

4 Other states which afford legal benefits to domestic partners include Vermont, New Jersey, Hawaii, Illinois, Iowa, New Mexico, New York, Oregon, Maine and Rhode Island. While Vermont, New Jersey, Connecticut, California and Oregon (effective in 2008) provide a full panoply of state marriage rights to registered partners, the other states provide a range of coverage, with some, like Washington, only addressing a handful of benefits.

5 As part of a political compromise, tax equality was not addressed but has since been addressed in legislation that passed in 2004 and 2005 related to property and income tax respectively.

6 There are at least 438 Washington laws which provide rights or responsibilities based on marital status.

2007 Legislative Changes Affecting Child-Support Enforcement

by Nancy Koptur†

Even though Rick Bartholomew is the official FLEC Legislative Liaison and guru of all things legislative, I thought I'd take this opportunity to let you know about this year's legislative changes that affect child-support enforcement, my favorite topic.

SSB 5244

You may have heard of the federal Deficit Reduction Act of 2005 (DRA), PL 109-171. The state legislature enacted SSB 5244 (Chapter 143, Laws of 2007) to amend Washington law to conform with the DRA. At DCS, we are now feverishly working on policy and procedures to implement this legislation. Highlights of that bill include:

- Starting in October 2007, DCS will charge an annual fee of $25 on any case where we collect and disburse at least $500 to the family, if the custodial parent (CP) on the case never received TANF, AFDC or tribal TANF. The fee is "paid" by the CP because we will withhold it from support collected after the first $500 on a case is disbursed
- Starting in October 2008, the nature of the public assistance assignment changes so that the family will assign its right to support only for those months in which public assistance is actually paid. (Right now, if I go on TANF, I temporarily assign any support arrears that are owed as well.)
- Also starting in October 2008, up to the first $100 of support collected in a month can be passed through to a one-child family on TANF, and up to the first $200 collected in a month can be passed through to a two-or-more-child TANF family
- Effective July 22, 2007, child-support orders entered in Washington must provide that *either or both* parents have an obligation to provide health insurance coverage for the children covered by the order. The Pattern Forms Committee is working on this change. Under appropriate circumstances, DCS may enforce the CP's obligation to provide health insurance coverage.
- Effective July 22, 2007, a parent can ask DCS to establish and enforce the other parent's obligation under a support order to pay for uninsured medical expenses, which includes deductibles and co-pays incurred on behalf of a child, under RCW 26.23.110. Where we used to say, "We'd be happy to enforce the obligation if you just get it reduced to a judgment," we can now also use the administrative process to come up with that amount. Administrative regulations will be effective in July, specifying that the parent must provide proof of payments of at least $500, incurred after the effective date of the legislation

2SHB 1009

This bill establishes work groups to periodically review and update the Washington State Child Support Schedule (WSCSS), Chapter 26.19 RCW.

- By August 1, 2007, DCS must convene a work group, whose membership is determined by the bill, to continue the work of the 2005 child support guidelines work group and produce findings and recommendations to the legislature, including recommendations for legislative action, by December 30, 2008. The work group must consider, at a minimum, certain specified issues, including looking at the economic table, residential credit and the $5,000 cap on the schedule.
- Starting in 2011 and every four years thereafter, DCS is to convene a work group (again, membership is determined by the bill) to review the WSCSS and determine if the application of the child support guidelines results in appropriate support orders. The work group must report findings and recommendations to the legislature, including any recommendations for legislative action, by October 1 of the year of the work group.
- The WSCSS worksheet will be re-configured to include the data elements required in the child support order summary report. DCS is charged with collecting the required data from the order summary report and producing a report at least every four years, to be used in the quadrennial review of the WSCSS.
- **NOTE:** This bill was signed by the Governor on May 3, 2007 (Chapter 313, Laws of 2007).

SB 5429

This bill, which was signed by the Governor on May 8th (Chapter 365, Laws of 2007), amends RCW 72.09.480, regarding withholding done by the Department of Corrections from inmate funds (in addition to wages and gratuities, with the exception of settlements or awards resulting from legal action):

- DOC will now withhold twenty percent (up from 15%) for any child support owed under a support order
- If an inmate who owes child support receives funds from an inheritance, those funds go first to pay off child support debt before being subject to the usual DOC withholding.

† Nancy Koptur is a staff attorney with the DSHS Division of Child Support who is a member of the Family Law Executive Committee.

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 the need standard limitation work when calculating child support? How do I find out what the need standard is? Why does my unnamed support calculator program have different numbers from what I see when I look up the WAC? Oh, yeah, and what's this 45% limitation thing?

Signed, Perplexed

Dear Perplexed:

You have asked a lot of good questions, and I will try to answer them all in the space allotted to me here in the Newsletter. If you still have questions remaining, then we can talk about this more at the Family Law Midyear in Spokane in June, where Paul Cornelius and I will be presenting a session concerning questions regarding child-support issues.

The Washington State Child Support Schedule is found in Chapter 26.19 RCW. The standards for establishing lower and upper limits on child support amounts are set out in RCW 26.19.065. Those of you with rich clients can worry about (3), which deals with how to establish support when the parties' income is above $5,000 and $7,000 per month. Today I want to talk about what to do with low-income parents. WAC 388-14A-3400 asks the question, "Are there limitations on how much of my income is available for child support?" (Don't confuse this with the ever-popular question, "Is there a limit on how much you can take from my paycheck?")

There are two basic limitations that come into play when you are dealing with a low-income parent: (1) the total support obligation cannot be more than 45% of the parent's net monthly income *except for good cause*, and (2) the support obligation cannot reduce the noncustodial parent's net income below the need standard for one person, except for the presumption minimum payment of $25 per month per child, or if the court finds reason to deviate.

For a visual aid, pull out your blue Washington State Child Support Schedule booklet and look at Part V: Standard Calculation/Presumptive Transfer Payment, which consists of Line 15 a – e. After determining the parents' net income and their percentage share of the standard calculation, we look at whether the limitations apply.

Forty-five percent limitation

If my net monthly income is $1,000, my monthly support obligation may not exceed $450 (that's 45% for those of you who can't do math in your heads) unless the court finds good cause to go higher. Under RCW 26.19.065(1), good cause includes, but is not limited to, possession of substantial wealth, children with daycare expenses, special medical need, educational need, psychological need, and larger families.

When could we exceed the 45% limitation? Let's say I come from an incredibly wealthy family and I own lots of real estate and jewels, etc., but have minimal income based on advice from my incredibly clever financial adviser. Or, no matter what my income is, I have ten children and have abandoned them with their father. This would be "good cause" to set my support obligation at more than 45% of my net monthly income.

Need standard limitation

In my experience, this limitation is used much more frequently than the 45% limitation. RCW 26.19.065(2) says that "A parent's support obligation shall not reduce his or her net income below the need standard for one person …., except for the presumptive minimum payment of twenty-five dollars per child per month or in cases where the court finds reasons for deviation."

How do you find the one person need standard? Look at WAC 388-14A-3400:

> **WAC 388-14A-3400**
> **Are there limitations on how much of my income is available for child support?**
>
> 1) There are two kinds of limitations based on your income when we set your child support obligation:
>
> (a) The monthly support amount cannot exceed forty-five percent of your monthly net income, unless there are special circumstances as provided in chapter 26.19 RCW; and
>
> (b) The monthly support amount cannot reduce your net monthly income below the one person need standard (WAC 388-478-0015), unless there are special circumstances as provided in chapter 26.19 RCW.
>
> (2) RCW 74.20A.090 limits the amount that can be withheld from your wages for child support to fifty percent of your net monthly earnings.

(continued on next page)

ASK NANCY from previous page

WAC 388-478-0015 is amended on an almost-annual basis. The rule provides two different kinds of need standards for cash assistance: one for an assistance unit with an obligation to pay shelter costs (currently $1016 per month) and one for an assistance unit with shelter provided at no cost (currently $546 per month).

The way you apply the need standard to your case is to look at the net monthly income of the noncustodial parent (NCP) and subtract the appropriate need standard. That result is the amount of income available for child support. How do you choose which standard to use? You always use the one-person need standard, no matter how many people are in the NCP's household. Why? Because that's what the statute says. If the NCP is living with someone without contributing to the rent, use the smaller "shelter-provided" need standard. If NCP is responsible for rent, use the bigger one.

Example: NCP's monthly net income is $1200. After the need standard, there is $184 available for support. But if NCP is living with his or her parents, there is $654 available for support. Of course, this doesn't mean you get to take all of the amount above the need standard! Sometimes this is referred to as the "self-support reserve."

Another example: What if the NCP who earns $1200/month net has 8 children? Support will be set at $200/month, even though that's more than $184, because the statute provides for a presumptive minimum obligation of $25 per month per child.

Keeping up with WAC changes

Because the need standard changes on an almost-annual basis, you have to keep track of what the current version should be. Usually, you can trust the amounts you find on the general WAC website located at *apps.leg.wa.gov/wac/default.aspx?cite=388*. However, you may want to make sure you have the current version by checking the DSHS rulemaking webpage at *www1.dshs.wa.gov/msa/rpau/index.html.* This will show you if DSHS is in the process of amending the rule.

This year was particularly fun (and hard to track) because DSHS adopted an emergency rule to make the rule change effective on January 1, 2007. The regular rulemaking process just ended up with the change effective April 5th. You can find emergency rules at *www1.dshs.wa.gov/msa/rpau/recentlyadoptedrules.html#ESA.* They never go to the "regular" web page until they are adopted through the regular rulemaking process. Probably more rulemaking information than you ever wanted to know, sorry!

How do I know this is an issue? Because I got several inquiries from folks who were getting different information from their child-support-calculation program than they got from DSHS/DCS, where we use our own child-support-calculation program. The programs were using different numbers for the need standards.

Other percentage limitations

Oh, and finally, how much can I take from your paycheck? Despite the higher amounts (up to 65%) under the federal law, Washington law limits a payroll withhold to 50% of net disposable income.

If you have questions about this or any other child support topic, Paul and I will try to address them at the Midyear in June. Keep those cards and letters coming!

CLE Credits for Pro Bono Work?

Limited License to Practice with No MCLE Requirements?

Yes, it's possible!

Regulation 103(g) of the Washington State Board of Continuing Legal Education allows WSBA members to earn up to six (6) hours of credit annually for providing pro bono direct representation under the auspices of a qualified legal services provider.

APR 8(e) creates a limited license status of Emeritus for attorneys otherwise retired from the practice of law, to practice pro bono legal services through a qualified legal services organization.

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

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 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.

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