Washington State Bar Association
Family Law Section

Family Law Newsletter

Spring 2011

Chair's Column - Ruth Edlund

The Roman god Janus (after whom our month of January is named) faced in two directions at once: backwards and forwards. Although I am unlikely to be mistaken for a Roman god, as your Section Chair in the beginning of my term I write this column looking backwards and forwards at the work of the Section as well.

CLEs: In October 2009 we co-sponsored a CLE with the Elder Law Section on the intersection of family and elder law. In October 2010, we co-sponsored a CLE on the subject of adoption law. Our Midyear event, which rotates to venues throughout the state from year to year, travelled to Vancouver for Father's Day weekend in June 2010. We continued the popular "breakout" format for our Saturday sessions, giving participants a choice of two different tracks depending on their interests. Thanks to our hardworking co-chairs, **Jim Cathcart** and **Tracy Flood**.

This year the midyear will return to Spokane and the Davenport Hotel for the weekend of June 17-19, 2011. Yes, this is Father's Day weekend again. The size of our event limits our choice of dates at our preferred venue, and planning an event in Spokane is made more complicated by Hoopfest; Mid-year 2011 co-chairs **Kevin Stewart** and **Pete Karademos** are hard at work assembling what promises to be another outstanding program. Attendees can satisfy close to a year's CLE credits by attending the Midyear, and your Section membership entitles you to reduced tuition.

For new lawyers, the Section's popular low-cost Skills Training was held on April 15-16, 2010, in Montesano.

Honors: During the 2010 Midyear Saturday luncheon, the Section presented awards to the Honorable **James Rulli**, Clark County Superior Court, as Jurist of

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the Year, to Spokane County Superior Court Commissioner **James Triplett** as Professional of the Year, and to attorney **Mary H. Wechsler** *in absentia* for Lifetime Achievement for a distinguished career as a leader of the family law bar.

Legislation and Court Rules: The Section continued to play a vital role in 2010 in shaping legislation pertinent to the area of family law. The Executive Committee's tireless legislative liaison, **Rick Bartholomew**, who is also the current chair of the WSBA Legislative Committee, guided us through last year's session. This year's session promises to be interesting as well; with budgetary woes on everyone's mind it is uncertain if any substantive changes will be made in family law.

Liaisons and Committees: Section members and members of the Section's Family Law Executive Committee provided assistance on the Pattern Forms Committee (**Shelley Brandt**), Child Support Commission (**Kathleen Schmidt**), and the WSBA Local Court Rules Task Force (**Jean Cotton** and **Pete Karademos**), just to name a few, as well as assuming leadership roles in county bar organizations. For the upcoming year, former FLEC chair our current Family Law Section newsletter editor **Kathleen Schmidt** has been appointed to represent the Section on the reconvened Child Support Workgroup.

The Section, via former chair **Jean Cotton,** continued to provide a presence at all Board of Governors meetings and **Teresa Neudorfer** provided a presence at Access to Justice Board meetings.

In both November 2009 and November 2010 the Section's Executive Committee also continued its tradition of meeting with the Superior Court Judges' Association Family and Juvenile Court subcommittee so as to keep open communication with the courts and facilitate meaningful dialogue between both groups in an endeavor to resolve common issues and problems.

Member Outreach: The members-only list serve continues to thrive under the watchful eye of Webmaster **Doug Becker**, who also posts regularly updated versions of his fabulous QuickCites to the yahoogroups website and numerous model forms. All attorney members of the Family Law Section can join the list serve, and the ongoing conversation, by contacting Doug. The Section has made outreach to young lawyers doing family law one of this year's priorities, with WYLD and Family Law Section member **Jenny Anderson** our new liaison from WYLD to the Section. The Family Law Section was well-represented at the first-ever Sections Night in November sponsored by WYLD to familiarize new lawyers with the work of the various sections.

I would like to take this opportunity to acknowledge the diligent work and service of our 2009-2010 chair, **Kevin Stewart**, who provided steady leadership during difficult times. We are sorry to say goodbye to **Jim Cathcart** as he retires again and **Tracy Flood** as she joins the Board of Governors. On the other hand, we are pleased to see the re-election of **Kevin Stewart, Ben Winkelman** (next year's chair of the Section), **Teresa Neudorfer**, and **Kathleen McCann** for new three-year terms. We'd also like to welcome new member **Michael Vannier** for a three-year term, and previous member **Danni Liebman** to serve the remainder of Governor Tracy Flood's unexpired term.

Ruth Edlund

Prenuptial Agreements

By Christina Meserve

Chris Meserve has been practicing family law in Thurston County since 1979 and has handled literally thousands of family law cases in that time, including arbitration, divorce, custody and support, mediation and prenuptial agreements.

Chris is the only attorney in Thurston County to have been elected as a fellow of the American Academy of Matrimonial Lawyers, a national organization dedicated to promoting excellence in the field of matrimonial law. She is the 20th AAML member in Washington state.

Prenuptial Agreements: Why Everyone Should Have One

Many attorneys, and even more of our clients, subscribe to the notion that a prenuptial agreement is only necessary or desirable if (a) one or both parties have lots of money or assets, (b) one or both parties have children, or (c) one or both parties had a particularly nasty divorce.

It is true that these individuals are the ones most likely to contact you to discuss the need for a prenuptial agreement. However, the truth is that virtually everyone, even the 20 year-old with nothing but student loan obligations to her name, could benefit from at least a discussion about a proposed prenuptial agreement. The reason is that the drafting of a prenuptial agreement is an opportunity for a person about to marry to obtain clear and unbiased legal advice about community property, separate property, and the impact of Washington's property laws on his or her own financial circumstances. It is also an opportunity for a couple to disclose what they have and make financial plans.

It is a constant source of surprise to me how uninformed our clients are. They know that "Washington is a community property state" but they really have no idea what that means. And, in more cases than not, they believe it means that all of their property is community in nature once the minister or judge says the magic words.

What Your Client Should Know About a Prenuptial Agreement

Case law tells us that it is important to advise the client (and perhaps even the unrepresented other side) what the prenuptial agreement does, what the law in Washington is if a prenuptial agreement is not signed, and why it is important for both parties to have independent legal counsel.

You should make sure that the agreement is provided sufficiently far in advance to allow both sides the opportunity to discuss, negotiate, and review the terms of the proposed prenuptial agreement.

I have a form letter that I provide to my clients that explains the law in Washington regarding community and separate property, and explains the ways in which a prenuptial agreement can change the provisions of Washington divorce and death laws.

So, if a prenuptial agreement is necessary or desirable, what should it include or not include?

Components of a Prenuptial Agreement

a. Disclosure of Assets

For some reason, the "full disclosure" requirement seems to present the greatest hardship for the clients. The truth is that all of our clients, whether they are 19 or 89, should be able to put together a balance sheet. What do they own and where is it located and what is it worth? What do they owe and to whom do they owe it? If the client was divorced (last week or 10 years ago), they will be accustomed to creating that sort of a balance sheet and they will usually have a pretty good sense of their assets. If they have never been married, it may be a more difficult task. However, I always tell clients that they should regularly update their "balance sheets" as the marriage progresses not to identify separate or community property, or change the nature of their agreement, but just to have an ongoing sense of their net worth.

b. Creation of a Community Estate

In virtually every case in which a prenuptial agreement has been invalidated by the appellate courts, the agreement itself failed to allow for the creation of a community estate. Generally, the parties agreed (with or without benefit of legal counsel) that income from a separately owned business would be the separate property of the business owner. I always tell clients that the creation of a community estate is important, not just to protect the enforceability of the prenuptial agreement, but also because both parties will be jointly acquiring assets that are the fruit of their efforts and their marriage.

The income received from salaries is community property under Washington law. If the prenuptial agreement changes that characterization, you need to make sure that the party who earns less is somehow compensated. If the income of one or both parties comes from a separately owned business, there is a component of that income which is equivalent to a salary and paid as a result of the community effort. It is a rare case in which a

Prenuptial Agreements (continued)

business generates substantial income without any labor being provided by the business owner.

c. Waiver of Maintenance

I think this is a really delicate area. When I see a prenuptial agreement that purports to waive maintenance, I really question the parties' intentions and agendas. In my opinion, a prenuptial agreement that waives maintenance, when there is a possibility that one of the parties will be out of the work force for an extended period of time for whatever reason, is a dubious paragraph. Why include it at all? Is your client so anxious to avoid a maintenance obligation that he wants to jeopardize the enforceability of the prenuptial agreement? Is your client so anxious to marry the wealthy guy that she is willing to forego her right to receive spousal maintenance in order to march down the aisle?

The truth of the matter is that a prenuptial agreement that purports to waive spousal maintenance for one of the parties puts the agreement at risk. An attorney may advise the putative recipient not to sign. A court could find that the agreement did not make a reasonable provision for the challenging spouse. I think it is better to leave those paragraphs out. When I see a prenuptial agreement that has been drafted with a waiver of maintenance clause, I am reluctant to sign it on behalf of my client.

d. Parenting Plan and Child Support

In my judgment, these provisions have no place in a prenuptial agreement. The parties can make whatever kind of side deal they want, but an agreement regarding their children is not going to be enforceable in the courts.

e. Disposition of Community Estate

Frequently I will see prenuptial agreements that require a 50/50 division of the community assets. As a practical matter, one spouse is not generally going to receive the lion's share of the community assets unless there is substantial separate property owned by the other spouse. So why require a 50/50 split? There is always the possibility that this paragraph could be overreaching. It is not a part of my form prenuptial agreement. On the other hand, many clients who have been on the "losing end" of a dissolution property division will insist upon this type of clause. Like the waiver of maintenance, this paragraph is meant to contravene the law in Washington. As a result, it puts the overall enforceability of the agreement at risk.

f. Attorneys' Fees

I have reviewed prenuptial agreements that require each party to pay his or her own attorney fees in the event of a dissolution, or require the party challenging the prenuptial agreement to pay the attorney fees of the party defending it. You can include a provision about attorney fees if you want, but I think you run the risk that the entire agreement will be invalidated if it appears that you were overreaching on behalf of your client.

g. Family Home

My prenuptial agreement letter to clients specifically identifies the issue of the family home as the issue which needs the most thorough discussion. I personally subscribe to the notion that the parties embarking upon a new marriage should live in a home that they acquire together. However, that may not always be practical or desirable, particularly if one of the parties has children. I think it is really important for the parties to a prenuptial agreement to have a candid and wide-ranging discussion about their intentions with respect to the family home. Will the equity in the home in which the parties intend to reside be awarded to the spouse who owned it at the time of the marriage? Will future appreciation be owned by the marital community, or will it belong to the owner? What happens if the parties refinance the house and the mortgage company requires the execution of a quitclaim deed to the marital community? What about improvements paid for with community funds? And what is an improvement anyway? Is it a new roof? A new rhododendron?

Why Everyone Needs a Lawyer

You already know this, but your client does not. Part of your job is to advise the client why his or her betrothed needs an attorney. And remember that you may not be doing a friend any favors when you refer a prenuptial opposing party to him or her.

Prenuptial Agreements (continued)

What to Do When the Wedding Is Next Sunday (or Tomorrow)

This is where the wheels come off the wagon. Is it possible to execute a valid prenuptial agreement on the eve of the wedding? Of course it is. But this is also your opportunity to educate your client about what Washington community property law really means.

People have seen too many movies. The wedding does not magically change the character of the property. The parties' assets will still be separate the week after the honeymoon.

If the draft of the agreement raises any red flags, tell the client to go forward with the wedding and come back next month to discuss the terms. And this is where you and the opposing counsel need to be on the same page: the agreement will be more enforceable if it is signed after the wedding. Check out the Supreme Court's concerns in *Marriage of Bernard*, 165 Wn.2d 895 (2009), where Tom and Gloria signed a prenup:

> *With draft agreement in hand, Gloria stepped up the search for an attorney. During the same period, however, she was also preparing Tom's financial statement, moving out of her home and into Tom's, preparing for her daughter's graduation and trip to Mexico, finalizing the wedding plans, and working at Bernard Development Company. After many inquiries, Gloria was referred to attorney Marshall Gehring by a worker.*
>
> *Gehring first received a draft copy of the agreement from Keefe on July 5, three days before the wedding. Keefe's cover letter to Gehring cautioned that Tom had not yet seen that version of the agreement. Gehring reviewed the document, and on the day before the wedding he wrote a letter to Gloria and advised her not to sign it. He cited five major concerns with the agreement; these were not the only problems he noted, but time was short. He also acknowledged that refusing to sign was probably not practical. Gehring did not tell Gloria that they could have waited until later to negotiate a more equitable agreement. Keefe and Tom quickly drafted a "side letter" in which both parties agreed to amend the prenuptial agreement with respect to the five issues raised in Gehring's advice letter.*

The court refused to enforce the Bernard prenuptial agreement.

Cases You Should Know

Marriage of Matson, 107 Wn.2d 479 (1986). In determining the validity of a prenuptial agreement, if the agreement is economically fair on its face, the analysis ends. Otherwise, the court must determine whether there has been full disclosure and whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by both spouses of their rights.

Estate of Crawford, 107 Wn.2d 493 (1986). The burden of proving voluntary and intelligent execution of contract is on the party seeking enforcement.

Marriage of Fox, 58 Wn. App. 935 (1990). The spouse seeking to enforce the agreement must demonstrate strict compliance with agreement's terms. If commingling occurs, the parties have rescinded agreement.

Marriage of Foran, 67 Wn. App. 242 (1992). Where the prenuptial agreement precludes the acquisition of a community estate (or where that is a possibility as a result of the agreement), the first prong (that the agreement provides a fair and reasonable provision for the party not seeking enforcement) fails.

Marriage of Foran, 67 Wn. App. 242 (1992). The attorney must advise why independent counsel is important and how the prenuptial agreement may adversely affect the non-client's interests.

Marriage of Foran, 67 Wn. App. 242 (1992). Evidence of abuse is admissible to show circumstances surrounding the execution of a prenuptial agreement.

Estate of Hansen, 128 Wn.2d 605 (1996). Even if the prenuptial agreement is invalid due to lack of disclosure, it qualifies as a marriage settlement under will revocation statute, RCW 11.12.050.

Marriage of Dewberry, 115 Wn. App. 351 (2003). An oral prenuptial agreement to treat income earned during marriage as separate property is enforceable. Such an agreement must be supported by clear, cogent and convincing evidence.

Marriage of Bernard, 137 Wn. App. 827 (2007). If the agreement restricts the accumulation of community property in early years, it is substantially unfair.

Marriage of Bernard, 165 Wn.2d 895 (2009). Enforceability of a prenuptial agreement is analyzed using a two-prong test. If the agreement is substantively fair to the spouse not seeking enforcement, it is enforceable. If not, court must determine procedural fairness. If procedurally unfair, it will not be enforced.

10 Good Books for Family Law Lawyers

Here are some books, some classics, some new, that can help with the problems family law lawyers face, can give you a welcome boost of energy or bring you back on the high road.

Negotiation and Communication.

Bogged down with particularly difficult clients or opposing counsel? The three classics from the Harvard Law School Negotiation Project can help. These books are small but dense and give great tips for honing your conflict resolution and communication skills.

Fisher, Roger, Ury, William, *Getting to Yes* (1981)

Ury, William*, Getting Past No (1991)*

Stone, Douglas, Bruce Patton, Sheila Heen. Difficult *Conversations: How to Discuss What Matters Most.* (1999)

Writing.

Because we have to write all the time and because the craft of writing and "the story" is a big part of the craft of persuasion.

Strunk, William Jr. and White, E.B., *Elements of Style* (1979). This is a classic you probably should have in your library. Though it's been around since 1935, it is still the definitive book about writing in a clear and dynamic style.

King, Stephen, *On Writing*, A Memoir of the Craft (2000). What fun! To read something by Stephen King that could apply to the practice of law.

Bruce, Harry, *Page Fright: Foibles and Fetishes of Famous Writers* (2010). A new book about writing. This book assembles stories and case studies about how famous writers have dealt with writer's block, how they write, and what keeps them going.

Dealing with Conflict.

If you are going through a bad patch with your current stable of clients or with opposing counsel, these can help.

Eddy, William, *High Conflict People in Legal Disputes* (2006).

Eddy, William, *Splitting: Protecting Yourself While Divorcing a Borderline or Narcissist.* Eggshells Press: Milwaukee (2004).

Motivation and Inspiration.

For motivation and to keep perspective about the meaning of this work in the long run.

Harr, Jonathan, *A Civil Action*. (1996). The lawyer as hero, a true story. This is a case study of a civil suit 9 years of bitter legal warfare where the plaintiff's lawyer, against all odds, won the day. This book is exciting, entertaining and what they call a page-turner.

Burnett, Nan, *Calm in the Face of the Storm.* (2010) What family law lawyer doesn't need more calm in the Face of the Storm? This book has meditations for people who want to cultivate mental peace and a place of rest.

We invite you to let us know and to let each other know what you think about these books and what you are reading. Cynthia First-Everett and Kathleen McCann-Vancouver.

"The wise man needs both books and life itself."

~ Lin Yutang ~

Text Messages and E-mails: The Law Governing Admissibility Inches Forward by Karl B. Teglund

Introduction

Text messages: Text messages, composed and sent by cell phone, present difficult evidentiary issues. Assuming a text message is relevant to the issues at trial, how can it be proved? How is it authenticated? Is it hearsay, thus requiring the proponent to find an exception to the hearsay rule for the content of the message?

If the content of a text message is recounted by a witness from memory (the usual situation), does this create a second level of hearsay, in addition to the content of the message being hearsay? Is the proponent thus required to find two exceptions to the hearsay rule?

And what about the best evidence rule? Is the content of the text message an electronic document, and if so, is the best evidence rule violated if a witness recounts the content of a text message from memory?

And in a criminal case, what about the Sixth Amendment right to confrontation? If the prosecution offers a text message against the defendant, and if the author of the message is not present in court, can the defendant object on the basis of the Sixth Amendment?

Washington's appellate courts have not yet had an opportunity to rule on these issues, and the issues remain largely unresolved in other jurisdictions as well.

E-mails: E-mails raise the same evidentiary concerns as text messages, except that with an e-mail a printed copy is usually available, thus eliminating any objection under the best evidence rule.

North Dakota case: State v. Thompson

The admissibility of text messages was recently addressed in North Dakota in *State v. Thompson,* 2010 N.D. 10, 77 N.W.2d 616 (2010), hereinafter *Thompson.* In *Thompson*, D was accused of punching her husband several times in the face. She was convicted of domestic violence assault. The jury rejected D's claim of self-defense. D appealed, claiming a variety of errors with respect to text messages and a picture of a text message that had been admitted as evidence against her at trial. The State alleged, and the jury found, that the text messages had been sent by D to H during the day that ended with the assault at approximately 11:00 p.m.

D and H were separated at the time, and the text messages concerned money. D repeatedly asked H for money, and H repeatedly refused to give her money. In at least one of the messages, D used what the court called "profane and threatening language."

The court's opinion in *Thompson* contains a wealth of citations to cases in other jurisdictions, especially on the issue of authenticating text messages and e-mail.

Relevance: On appeal, D first argued that the messages were simply irrelevant. The court quickly disposed of this argument, saying that the messages helped explain D's "state of mind and the circumstances of the events" on the day in question. The court added that the messages "could reasonably and actually help to prove or disprove factual matters pertaining to the charge against [D] and her self-defense claim."

Authentication: D also argued on appeal that since text messages are relatively anonymous, the proponent must present foundation testimony of authenticity. In the present case, D said, the messages should have been excluded because there was no way to establish who actually sent the text messages.

At trial, the foundation testimony had consisted of H's testimony that he knew the messages were from D because the messages were preceded with "Fr: Jen" which was the way he listed D's name in his own cell phone's memory. Also, H said, her messages concluded with her telephone number and her digital nickname, both of which he recognized.

The appellate court in *Thomson* held that the foundation testimony was sufficient. Citing traditional principles of authentication, the court said that under Rule 901, the proponent is required only to present evidence "sufficient to supporting a finding" of authenticity. In other words, the proponent is required only to make a *prima facie* showing of authenticity. Thereafter, the opponent's challenges to authenticity go only to weight, not admissibility.

The court said that the foundation testimony offered in the present case was sufficient under traditional principles of authentication, and thus it saw no error in this regard. The appellate court rejected D's invitation to establish special, more rigorous requirements for the authentication of text messages and e-mails.

With respect to the most damaging message from D, the message containing profane language and threatening H. the State presented a photograph of the message on H's cell phone. The appellate court's opinion mentioned the photograph only briefly, saying rather cryptically that "there was no testimony from the person who took the picture … to show the picture was what it purported to be."

In any event, the appellate court concluded that the photograph was sufficiently authenticated by the same testimony from H that authenticated the other text messages.

Hearsay: D also argued on appeal that the text messages were objectionable as hearsay. The court quickly disposed of this argument, saying that D's

Text Messages & E-mails (Continued)

statements were admissions by party opponent, and thus were outside the definition of hearsay, per Rule 801.

Best evidence rule: During the trial, H was allowed to testify about most of the text messages from memory. From the appellate court's opinion, it is not crystal clear whether D raised any objection under the best evidence rule. (In theory, if a printed version can be obtained, the best evidence rule requires that a printed version be introduced as an exhibit.)

The court did note a ruling by the trial court that H would be allowed to testify from memory because the messages were "akin to verbal statements" by D.

Author's comments With *Thompson* and cases cited therein, the rules of evidence with respect to text messages and e-mails may be summarized as follows.

1. The message must be relevant to be admissible.

2. The message must be authenticated to be admissible.

Most courts, including *Thompson,* have applied traditional principles of authentication as defined in Rule 901, making the process of authentication relatively easy. The proponent is required only to present a prima facie showing of authenticity. Thereafter, challenges to authenticity go to weight, not admissibility.

A few courts have established special, more rigorous requirements for the authentication of text messages and e-mails.

The Washington courts have not yet addressed this issue.

3. The hearsay rule applies, but if the message was sent by a party (including the defendant in a criminal case), it is admissible against that party as an admission by party-opponent.

4. The courts have not yet spoken definitively on the effect, if any, of the best evidence rule. As mentioned above, the best evidence rule says that if a printed version *can* be obtained, a printed version must be obtained and introduced as an exhibit. However, if no printed version can be obtained, then Rule 1004 allows testimony in lieu of a printed version.

The best evidence rule is satisfied by production of a printed copy of an e-mail. Text messages may be more problematic because printing is sometimes impracticable.

Karl B. Tegland is the author or co-author of several volumes of West's Washington Practice, including Evidence, Civil Procedure, Rules Practice, the Courtroom Handbook on Washington Evidence, and the Washington Handbook on Civil Procedure. He also writes and publishes Litigation Today, a monthly newsletter for Washington judges and practitioners, and is a member of the Washington Supreme Court's Committee on Pattern Jury Instructions.

Mr. Tegland is a graduate of the University of Washington School of Law. He is a former member of the Law School's faculty and was the 1994 Shefelman Distinguished Lecturer on Evidence. He is a frequent speaker at educational programs for Washington judges and practitioners, and teaches bar review courses on evidence and civil procedure for Rigos Professional Education Programs.

Mr. Tegland is a member of the Washington Bar and maintains a law office in Mill Creek, Washington. His private practice is limited to consulting with other attorneys on issues of evidence and civil procedure.

Members-Only Pages and List serve Valuable

Section Membership Benefits

The Section's email list serve is focused exclusively on Washington family law topics. Over 700 attorneys subscribe, posting hundreds of messages a month. The archive of over 50,000 messages can be easily key-word searched at our website. If you have not signed up for the list serve you are missing out on an incredible Family Law Section member benefit. Everyday family law attorneys are posting and responding to messages from one another about various topics-both simple and complex. Through the Family Law Section's members only and list serve you will have access to specialized forms (such as interrogatories, briefs, client questionnaires, escrow instructions, sample trial questions for experts, and "Quickcites," with quick citations to relevant cases). Contact Douglas Becker at dpb@site7000.com to obtain access to this private website (restricted to attorney members of the Section).

Examples of recent postings:

If you can't post list serve messages

From time to time I get inquiries from members saying they can receive list serve messages, but can't post them. The key is to make sure the email address in the "From:" line of your posts is the same email address where you receive them. That's how Yahoo Groups recognizes that an incoming message is coming from a member of our group. If that is the case, you will typically receive an "Unable to deliver your message" notice from Yahoo Groups, saying it doesn't recognize you as a member. If you have this problem, go into the settings control panel of whatever service or program you send emails from to be sure it's a match. If you need more assistance, let me know how you view your list serve email. Do you get it in Outlook, Outlook Express, gmail, hotmail. Yahoo mail...? It's easy to forget to change that setting when you change email addresses.

Posted by Doug Becker March 2011

CPS Records Request

I've just posted under Files>Forms>Dissolution>Discovery the forms for obtaining CPS records. Those are the request form, client's authorization form and a list of locations of where to send them. If anybody has tips about this procedure, please post! This right does not extend to people who were not subjects of the report.

Posted by Doug Becker March 2011

Domestic Violence Fatality Review

Improve Family Court Identification of Domestic Violence and Address Safety Issues of Parties and Their Children

The Honorable Anne Hirsch

Thurston County Superior Court Judge/Panel Member

I served on the Thurston County Domestic Violence Fatality Review ,panel and one of the recommendations of the most recent report was greater education of the bar and the court on domestic violence issues. As a Superior Court Judge it is not my purview or intention to discuss policy issues; as part of my role in improving the administration of justice, however, I wanted to share a bit about my experience in participating on the panel.

According to the Washington State Domestic Violence Fatality Review (DVFR), a total of 755 people died in domestic violence-related fatalities in Washington state between January 1, 1997, and June 30, 2010.

Since its inception in 1997, the DVFR has conducted in-depth reviews of 84 domestic violence fatality cases involving 135 deaths in 15 Washington counties. 625 professionals from a wide range of disciplines have been brought together to perform detailed examinations of domestic violence fatalities, focusing on the events leading up to the homicide in order to identify problems in the community response to domestic violence: gaps in services, policy, practice, training, information, communication, collaboration, and resources.

Panels include a cross section of the effected community and are multidisciplinary. Panels, including the one in which I participated, include members of the courts and local attorneys, prosecutors and law enforcement, community-based domestic violence advocates, doctors and other medical professionals, hospital staff, educators, mental health therapists, CPS workers, military personnel, batterer intervention treatment providers, substance abuse treatment providers and religious community leaders. For particular cases, others are invited to join as well. It is believed that the best information and analysis about domestic violence fatalities is generated at the local level, by people who are closely involved in the community response to domestic violence. (see, 2010 Fatality Report, at p. 6)

The concept of the Domestic Violence Review came about, according to Jake Fawcett, author of the 2010 fatality review report, “as a result of concern on the part of domestic violence victim advocates about the significant number of women murdered each year by current or former intimate partners. Advocates believed that careful examination of these deaths could yield important insights into the response to domestic violence. They hoped that domestic violence fatality reviews would serve as a powerful tool to create knowledge and catalyze action from tragedy….” (2010 Fatality Report at p. 6)

When fatality review panels are convened, members must commit to keep confidentiality until the results of the review are published. Further, each member must agree to participate in the review with an intention not to blame any professional or any agency for the tragedy, but rather to look at systems as a whole, to see where things might be done differently in the future, and by so doing, prevent further tragedies. People who read the reviews, (six written reports have been generated from the statewide fatality review panels and can be accessed online at www.wscadv.org) will see that there was no one way these deaths occurred, no single “take away”, no simple or pat answers to this complicated community-safety issue. I encourage readers to take the time to go online and read the reports.

The 2010 Report, “Up To Us: Lessons learned and goals for change after thirteen years of the Washington State Domestic Violence Fatality Review,“ contains 11 “Key Goals to Improve the Response to Domestic Violence in Washington State.” Some of those goals pertain to the legal system, courts and family law attorneys. One of the goals, and some related comments, are included below, verbatim from the report. It is my hope that this article, and the fatality review reports, will encourage thoughtful discussion and debate, in the manner envisioned by the panels themselves: not as blaming any one or any agency or idea, but rather to see whether there is anything each of us, as individuals, as professionals, as parents, as siblings, as

Domestic Violence Fatality Review

Improve Family Court Identification of Domestic Violence and Address

Safety Issues of Parties and Their Children (continued)

partners and as neighbors, can do to improve the communities in which we live.

Goal Six in the 2010 report is: **Improve the ability of family courts to identify domestic violence and appropriately address victims' and children's safety and well-being**.

The comments relating to this goal begin by stating: "Victims in seventeen reviewed cases were in the process of dissolution or child custody disputes at the time of the fatalities. When victims and abusers had children in common, victims' fears that they would lose custody of their children were a great obstacle to escaping the abuse. In reviewed cases in which the victims did leave, abusers were able to use dissolution and child custody proceedings and the resulting parenting plans to force contact long after the relationships had ended…ongoing contact, without sufficient protection from the courts, left victims and children vulnerable…Over the course of twelve years in fifteen Washington counties, review panels repeatedly found that courts failed to adequately address victims' safety concerns or to understand how abusers' violence and controlling behavior threatened the safety and well-being of their children…[Further] Attorneys in reviewed cases were reluctant to raise the issue of domestic violence in dissolution and custody cases for a range of reasons." (2010 Fatality Report, at pp. 33-34).

The above is only one of the goals contained in the 2010 report. Again, readers are encouraged to read the report in full, along with the reports from earlier years, for a more in-depth discussion of the work of the fifteen Fatality Review Panels convened in Washington state since 1998. Although there will be differing opinions on many issues, the reports make an important contribution to the discussion of the community response to domestic violence. As stated earlier in this article, panels were convened not to point fingers, but rather to try to make some sense of a tragedy, with the hope of preventing future deaths.

I had the privilege of serving on the Thurston County Domestic Violence Fatality Review Panel for approximately four years. My own experience as a member of that panel was quite powerful and educational. One of the reasons for that was having many different people, with different backgrounds and perspectives and training, all review the same set of circumstances and arrive at common conclusions. I invite and encourage others to review all of these reports for the purpose of learning how each of us might play a more positive role in helping to make sure that there are no more such fatalities. As a judge, it is not my intention to say how a court will or should address or perceive the issue of domestic violence in any particular case; rather, my intention in writing this article is to help people understand this issue, improve the response of our communities, and by doing so to help improve the administration of justice.

Judge Anne Hirsch was first elected to the Thurston County Superior Court in 2006, after serving over 14 years as a part-time Family and Juvenile Court Commissioner for the Court. Prior to and during much of the time she served as a court commissioner, Judge Hirsch maintained a private law practice, which included work as a mediator and guardian ad litem. Before opening her private practice, Judge Hirsch worked for many years as a legal services attorney, representing senior citizens and low-income families needing civil legal assistance.

Judge Hirsch was an original member of the Advisory Committee that created the programs at Thurston County's Family and Juvenile Court. She supports the use and creation of therapeutic, or problem solving, courts, and presides over Family Dependency Treatment Court. Judge Hirsch began a three-year rotation at Family and Juvenile Court in January 2010.

Over the years, Judge Hirsch has participated as a trainer and volunteer for many community projects, including her current work with Capital High School students as a Street Law instructor. She graduated from National Judicial College and has participated in national training on issues of concern to families and children. She has served on local community boards including the Thurston County Bar Association, Friends of the Olympia Farmer's Market and was a founding Board member of Thurston County Volunteer Legal Services. Judge Hirsch currently serves on the boards of the Child Care Action Council, the Thurston County Domestic Violence Fatality Review Board and the Thurston County Food Bank.

Ask Nancy

NANCY KOPTUR is a member of the Family Law Executive Committee. Although she still volunteers every month at the legal clinic, she recently retired from the Board of Directors of Thurston County Volunteer Legal Services; she can't remember when she joined the TCVLS board, but it can't have been before 1996, when she moved to Olympia. Now she's on only two boards: SafePlace (the only advocacy agency and confidential shelter for survivors of domestic violence and sexual assault in Thurston County) and Family Education and Support Services (an organization that serves families of all kinds in many different ways). She recently celebrated her twenty-first anniversary at her day job as a staff attorney with the DSHS Division of Child Support. Please be aware that any opinions expressed in this column are those of the author and are not intended as an official statement of policy by DSHS or DCS.

Dear Nancy:

My firm expects all associates to do a certain amount of pro bono work, so I signed up for my neighborhood legal clinic. I'm not really thrilled about this but I figured I had to do it. Since this is just volunteer work, do I have to worry about whether my "client-for-the-night" has the correct versions of the court forms to file for divorce?

Signed, Reluctant Volunteer

Dear RV:

Well, RV, I know you didn't ask about this, but I think the first thing you might want to consider is whether you have picked the right volunteer activity. Not everyone enjoys the legal clinic experience. Maybe there is some other kind of pro bono service you could find that would be a better match for your talents, skills and interests? For instance, I know an attorney/CPA who volunteers to do the books for a non-profit organization. Two attorney residents created the Risk Management Committee for my condo association, something I wouldn't do for love or money!

However, while you're at the legal clinic, please do make sure that your clients are using the current versions of mandatory forms, especially the Family Law forms. Most volunteer programs and legal services providers have some kind of Internet access so you can download forms at the clinic, or you can provide websites so your clients can download forms at home or the library.

Depending on the level of help that a client may need, or the level of confidence the client may have, volunteer attorneys with Thurston County Volunteer Legal Services (TCVLS) offer various suggestions to our clients, such as: (1) a great website called Washington Law Help, which you can find at www.washingtonlawhelp.org or www.washingtonlawhelp.com (both get you to the same place), with downloadable packets with forms and instructions; (2) www.courts.wa.gov, with forms, but no instructions; (3) our county's Family Court Clerk's Office (they have packets of forms, with instructions available for purchase); or (4) the local Family Court Facilitator. I usually recommend that my legal clinic client go get the forms, fill them out to the best of his/her ability, and then come back to the clinic to go over the parts that were confusing. Then, repeat as necessary.

To use my favorite subject as an example, consider the requirements for every child support order entered in a court proceeding in Washington state: (1) it must be based on the Washington State Child Support Schedule (Chapter 26.19 RCW); (2) it must be on a form approved by the Administrative Office of the Courts (AOC), although you can delete "unnecessary portions" and add additional material as necessary (RCW 26.09.006, 26.18.220); (3) it must provide for medical support (RCW 26.09.105); and (4) it must comply with RCW 26.23.050 (RCW 26.09.135).

The family law world is still reeling from two bills that took effect in October 2009 and combined to make significant changes in the laws dealing with child support. ESHB 1794 (Chapter 84, Laws of 2009) made the first major changes to the Washington State Child Support Schedule in almost twenty years. SHB 1845 (Chapter 476, Laws of 2009) revised the requirements for medical support obligations based on changes in federal law. Because of the enormity of these changes, all users of the support schedule are still struggling with the implementation of the changes seventeen months after the effective date!

Ask Nancy

In June 2010, the third version of the Order of Child Support (WPF DR 01.0500) was released, along with the second version of the Washington State Child Support Schedule (WSCSS) Worksheets and the Booklet with the Definitions and Standards, Instructions and Economic Table. You can find these on the AOC website (www.courts.wa.gov) if you click on the "Court Forms" link and then look in the "Child Support" category.

Another way of making sure that unrepresented parties are using the correct forms is to require a pre-filing review. Very often *pro se* parties will file the whole shebang, Petition through Decree, when they come in to file for a dissolution. In Thurston County, where I live and volunteer, the Superior Court adopted Local Special Proceeding Rule (LSPR) 94.04 concerning finalizing family law actions, in 1999. This rule provides that before the final papers for a family law case can be presented to a judicial officer by an unrepresented party, the pleadings must be "reviewed for form and completeness" by an attorney, the Courthouse Facilitator or the Thurston County Volunteer Legal Clinic. In our supply box at each TCVLS clinic, we have an LSPR 94.04 rubber stamp with blanks for the attorney to initial and date; one of the things we always check for is that the current versions of the proper forms are included.

So, if you think you might enjoy volunteering at the neighborhood legal clinic, please sign up. If you are already doing it, consider signing up more often! It's a great way to use your legal training to help others. What seems simple and straightforward to you is often incredibly complicated and scary to a clinic client.

Somebody once asked me if I found it depressing to spend time helping people whose lives were falling apart, but I don't see it that way at all. I get so much personal satisfaction from giving my clinic clients the information and tools that empower them to help themselves along the road to putting their lives back together again.

I want to give a shout-out to the Thurston County Family Court Clerk's Office, which sells packets that have a "No returns" warning. Every now and then a client will come into the legal clinic having already purchased the wrong packet. I send the client back with a handwritten letter saying this client came to the TCVLS legal clinic and we decided that the client really needs to get a different packet, so would the clerk please *exchange* Packet A for Packet B? I give my name and phone number, give the TCVLS contact info. I have never had a client come back and say the Clerk's Office wouldn't do the exchange.

"You are not merely here to make a living. You are here in order to enable the world to live more amply, with greater vision, with a finer spirit of hope and achievement. You are here to enrich the world, and to impoverish yourself if you forget the errand."

~ Woodrow Wilson ~

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