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DISILLUSION, DISSOLUTION & SOLUTION

App. C

This is different from the mandatory Family Law Department settlement conference, as required in King County, where, prior to trial, the parties meet with a Superior Court judge in a formal attempt to resolve issues. The mandatory King County settlement conference concept can be utilized outside King County. Ask your local Superior Court judge to allocate forty-five minutes for a late afternoon conference in his or her chambers or jury room. At the conference, everyone is given an opportunity to look at the case objectively. The judge acts as an advisor and each side, including the parties themselves, presents its point of view, sets forth contested issues, and presents an argument on how the issues could be resolved. Legal points at issue are also discussed and evaluated, and detailed information is given regarding community assets and obligations.

After hearing both presentations, the judge weighs the issues and evidence and gives an advisory opinion on what might be a likely result at trial. This opinion is often persuasive and may encourage a settlement.

To encourage frank and candid discussion in the conference, the parties should stipulate that the settlement judge cannot hear the matter if trial is necessary. Such is the case by local rule in King County.

Conclusion

One of the most valuable assets of a lawyer who recognizes the importance of counseling in domestic relations law is the ability to recognize when and to whom the client should be referred for other professional help. The lawyer should be sufficiently aware of the mental health resources available in the community to advise the client on how to select a counselor to avoid the uncertain outcome associated with sending a client to the yellow pages.[11]

The attorney should realize the dynamics of the client's problem and a lawyer's own limitations in the counseling role. While these limits are debatable, it can be argued that the lawyer's objective should be to play a more active counseling role. The question has often been raised whether an interested lawyer who is untrained in the mental health field should even attempt counseling. The very nature of a lawyer's activities forces the lawyer into the role. The family law attorney has an obligation to learn and improve counseling skills. Law schools and CLE programs need to offer more clinical training to further that end.

A lawyer who has an intellectual interest in understanding human behavior, who is sensitive to human problems, and who is willing to analyze his or her own actions in the attorney-client relationship, can and should perform this valuable counseling role. It is sheer fiction that a lawyer plays a neutral role, merely implementing the wishes of one of the parties. Efforts are expended by every conscientious attorney to ensure that the decision to obtain a divorce is an appropriate one. A lawyer needs a special temperament to be a competent practitioner of family law. A client's needs must be acknowledged, understood, and supported. The goal I advocate is to reach a fair and equitable settlement.[12]

[11]The Seattle-King County Bar Association Family Law Section has published a list of mental health professionals who are interested and experienced in marital counseling.

[12]I give thanks to Ruth Nelson, Marywave Van Deren, and John Gadon for research help and to those lawyers and associates who took valuable time to review this article and offer constructive comments that improved its content and overall quality.

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Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions

by Robert W. Winsor

[Prefatory Note: In September 1980, the King County Superior Court created a Family Law Department. Five judges (Gerard Shellan, presiding, Nancy Ann Holman,

Norman Quinn, Anthony Wartnik, and I) were the first assigned to that Department. We all served until June 1981 when we began, one every two months, to be replaced by successor judges. The Family Law Department is assigned all marital dissolution matters. The judges have alternated their time between settlement conferences (mandated prior to assignment of trial date) and trials. In an effort to become better informed and more predictable the judges have held weekly breakfast meetings, primarily devoted to discussion of a concluded case, to compare ideas about what each of the others might have done with the same facts. This article has developed out of those experiences. I first submitted it to the other judges for comment. It is my perception that there was substantial agreement with the views here expressed.]

Under the law in Washington the trial judge has a wider discretion in making decisions in dissolutions of marriage than in any other area of his or her work. That this rule applies most obviously in a case of child custody is well known and is not the topic of this memorandum. Rather, this paper will deal with the problem presented by the fact that this very broad discretion applies also in matters of division of properties, setting of maintenance and child support, as well as attorneys' fees.

The unguided burden that falls upon the trial judge is stated as well in the case of *Baker v. Baker,* 80 Wn.2d 736 (1972) as in any other case. One of the issues concerning the Court in that case was whether certain properties were separate or community, and it was argued that the answer to that question is determinative of the distribution of the properties by the judge. The Court stated:

> "The court in a divorce action must have in mind the correct character and status of the property as community or separate before any theory of division is ordered . . . Characterization of the property, *however,* is not necessarily controlling; the ultimate question being whether the final division of the property is *fair, just and equitable* under all the circumstances." (page 745) (emphasis added)

Likewise, in the same case, the Court enunciated the trial judge's discretion in the case of maintenance:

> "The court should, when awarding alimony at the divorce of a long marriage, consider and weigh the future earning capabilities of both parties and allow the wife such sums for whatever period of time *seems right* under all the circumstances." (page 744) (emphasis added).

The Marriage and Dissolution Act of 1973, RCW 26.09, specifies factors that must be considered by the trial judge in making property divisions (26.09.080) and maintenance (26.09.090) but does not change the prior law, leaving to the discretion of the trial judge the problem of what resulting award is appropriate after considering all of the required factors. *Marriage of Nicholson,* 17 Wn. App. 110 (1977); *see also* "Property Dispositions in Dissolution Proceedings: The Criteria in Washington", 12 Gonzaga Law Review 492 (1977).

It is perhaps flattering and maybe even comforting sometimes to a trial judge to know that so much trust is placed in her or him. On the other hand, it is almost always a dilemma to know what direction to take with all that discretion. It is this dilemma that has led me to believe that it may be useful to try to lay down some general principles that seem applicable in broad categories of cases. That is to say, in what general direction lies "fairness" or, how are we to know what should "seem right"?

General Considerations Affecting Property Division and Maintenance

I have found it helpful to establish three categories of

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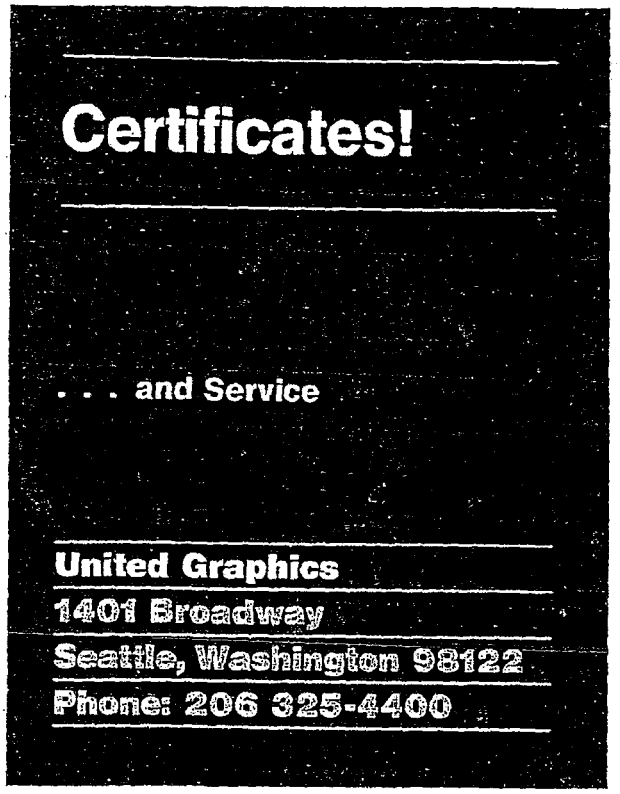

cases, based upon the duration of the marriage:

1. Short Marriage: Those lasting approximately 5 years or less.
2. Long Marriage: Those lasting approximately 25 years or more.
3. Mid-range: All the others.

In the case of a short marriage, the marriage has in fact not been the significant event that normally is presumed. Particularly, there has not been a long reliance on the marital partnership. Therefore, the emphasis should be to look *backward* to determine what the economic positions of the parties were at the inception of the marriage and then seek to place them back in that position, including provision for interest or inflation, if feasible. After doing that, if there are properties left over they presumably would be divided about equally. Presumably in a short marriage maintenance would not be paid, except in extraordinary circumstances or perhaps for a very brief adjustment where necessary, *e.g.*, if one of the parties gave up a job to relocate or otherwise accommodate to the marriage, that would be an extraordinary reason to either adjust the decision regarding property or allow brief maintenance during a relocation period.

In the case of a long marriage, the goal should be to look *forward*[1] and to seek to place the spouses in an economic position where, if they both work to the reasonable limits of their respective earning capacities, and manage the properties awarded to them reasonably, they can be expected to be in roughly equal financial positions for the rest of their lives. Long term maintenance, sometimes permanent, is presumably likely to be used unless the properties accumulated are quite substantial, so that a lopsided award of property would permit a balancing of the positions without (much) maintenance. *In re Marriage of Rink*, 18 Wn.App. 549 (1977) (In a 24-year marriage 2/3 of the property was awarded to the wife, along with maintenance for a brief time.)

In the traditional marriage relationship where one spouse devotes prime energies outside of the home earning money for the family and the other devotes prime energies raising children and maintaining a nurturing household, there is in a sense a contractual relationship entered into at the time of the marriage where the parties understand their respective primary obligations and undertake them willingly in the understanding that they both expect that the marriage is a long term (presumably life-time) commitment and that each will be protected and provided for by the other. When a traditional long marriage fails, however, one of the spouses usually is stranded in a situation where she (sometimes he) is very much behind the other in earning capacity. The judge should redress the balance.

For example, in a long marriage where H has an annual income of $50,000 and W probably will be

unable to earn more than $10,000 annually, W should either have substantial permanent maintenance (perhaps $15,000 annually) in addition to an equal division of property, or (if there is very substantial property) a disproportionate share of the property. It is often argued by H's lawyer in such a case that since W can earn $10,000 annually there is no "need" to justify maintenance. "Need" is a relative term and must be judged in the context of the circumstances of the particular parties.

Mid-range marriages will partake more or less of the long or short marriage considerations and goals as set forth above, depending primarily upon the length of the marriage and the necessities. Maintenance, where appropriate, is likely to be used only for fixed terms of months or years in these settlements. The term "rehabilitative maintenance" applies most generally to mid-range cases.

Where child support must be assessed, regardless of the length of the marriage, there should be a two-step process in the decision making. First, the considerations set forth above should be applied to achieve a preliminary decision about division of property, maintenance and related items. Then, as hereafter discussed, the needs of the respective households to provide for the children should be overlaid and adjustments made, if necessary, in light of the child support that seems feasible.

Lawyers Fees

The law of course permits the judge to order that one party pay the lawyer fees of the other party if there is a "need" on the one hand and an "ability to pay" on the other. RCW 26.09.140. However, it is ordinarily a desirable goal to avoid doing so for several reasons.

1. It is often a bitter pill—one that can make an otherwise acceptable decision unacceptable—to force the one party to pay the (very often disliked) other lawyer.
2. It interferes with the natural control (check and balance) on lawyer fees that exists in the normal lawyer-client relationship, *e.g.*, no way for the payor to blow a whistle or take his business elsewhere if it begins to appear from monthly or other periodic billings that fees are getting out of hand; no control that inheres in the normal situation where the lawyer may decide to reduce extraordinary fees in the hope that the client will leave on a happy basis and return with other cases or refer friends to the lawyer.
3. If one party is left by the judge's decision substantially more "in need" of help to pay a lawyer than the other party it is presumably evidence that the judge's decision regarding property and maintenance is ill advised. At least in all long marriages, and in most mid-range marriages, the parties should be equally able (or, more often, unable) to pay lawyer fees and court costs.

The obvious exception is the modification action where it may appear that one party is the more stubborn and has long delayed an obvious need for adjustment of child support and thereby necessitated the other party's having to hire a lawyer.

Child Support and Maintenance Levels

Human nature being what it is, we all have, or can easily develop, legitimate needs and uses for all the income available to us. For this reason, detailed itemizations of living expenses, now routinely required by our local rules, are not very helpful to the judge in deciding what support is appropriate, and they are a time-consuming and costly burden for the parties and lawyers. In the rare situations where the total of the detailed expenses adds up to less than the actual income of the party, it usually means that he or she has not taken enough time to carefully compile the list. It would probably be more helpful if we made such a listing

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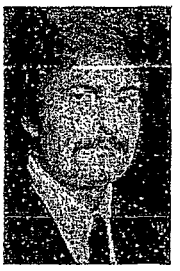

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optional but required that the parties respond to a statement such as the following:

> "If you believe that certain of your expenses of living are extraordinary, such as daycare for a child, orthodontia, psychiatric care, extraordinarily large housing expenses, or the like, give the details thereof."

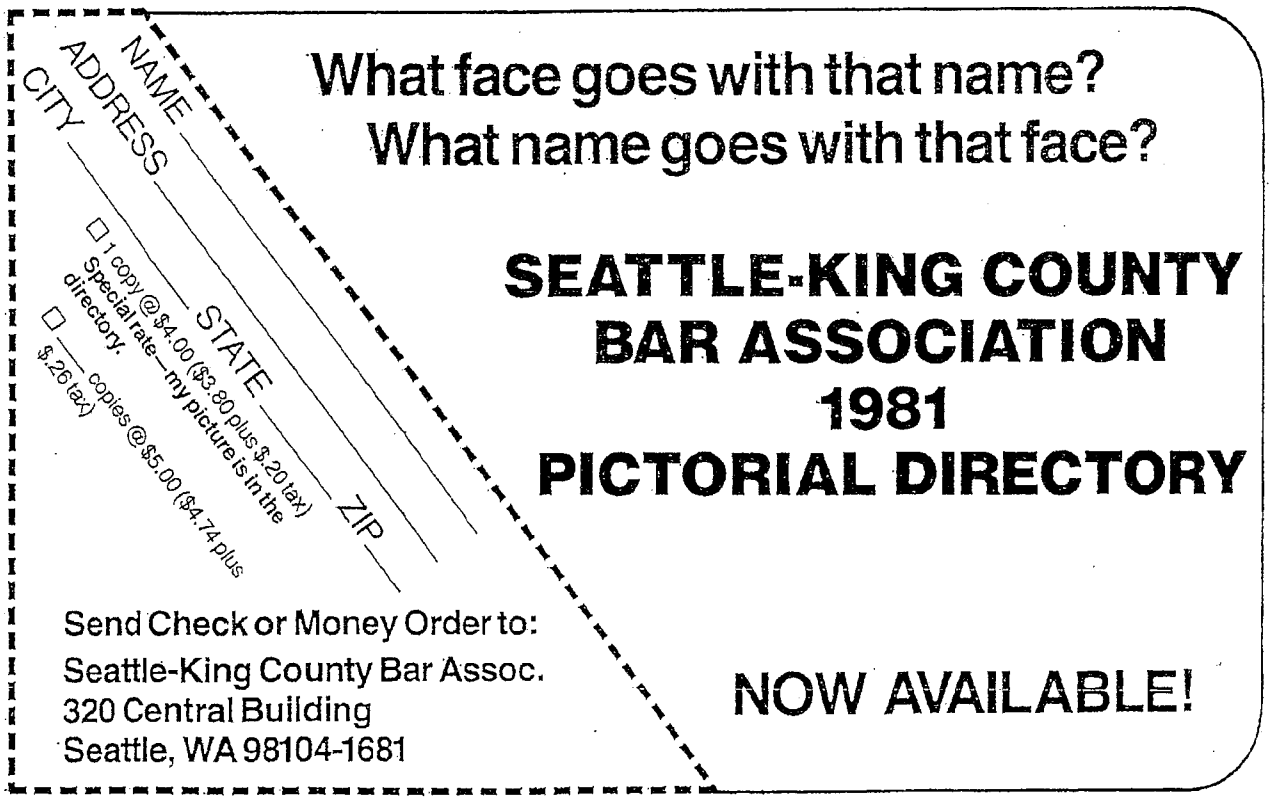
Child support for more than one child should never be stated in terms of a multiple of one amount "per child." For example, if there are four children, the needs of the custodial spouse for child support are not reduced by 25% when the first child is emancipated. As hereafter suggested, child support schedules have their considerable limitations, but the King County support schedule has an important positive feature in that it posits that the level of support for four children (termed as a percentage of the income of the noncustodial parent) reduces from 48% for four to 42% for three children; 34% for two; and 24% for one. Those differentiations between the various levels are probably pretty close to the mark. Accordingly, if there are four children a total sum should be stated for the four and then provision made for reduction by about 12% (6/48) when the first is emancipated, thereafter a further reduction of 20% (8/42) when the second is emancipated, and a third reduction of 30% (10/34) when the third is emancipated.

There seems to be a consensus that in the normal case some form of escalation clause should be built into the support award in the hopes that it will obviate the expense and trauma of the parties' having to return to court for adjustments for inflation or normally-anticipated income appreciation of the noncustodial parent. Some judges use the Consumer Price Index. Others prefer a percentage of income. Some use a combination.

Child support schedules, particularly those that do not relate to the income of both parents, are of only limited value. Rather, the most important test of the propriety of support is a comparison of the spendable dollars in the two households affected, together with consideration of the number of people to be supported in each household.

For example, assume that H has a gross wage of $2,000 per month and a net (after income tax and social security) of $1,500, and then assume that W is given custody of two children in three different situations:

(a) The children are ages 1 and 3. W is needed at home and not employed. It might be appropriate that undifferentiated maintenance and child support be set at $1,000 with the assumption (estimated) that thereby H's income taxes will be reduced leaving a revised net of $1750 and therefore leaving him with $750 to support



himself alone and an estimated $900 for W to support herself and the two children, after she deducts the (estimated) $100 income tax she must pay on the $1000.

(b) If the children are ages 6 and 8 and W is employed part-time earning a net of $400, there would be perhaps no maintenance but there might be child support at $650, as that would give W a total of $1,050 to support herself and the two children and leave $850 for H alone.

(c) Finally, if the children are ages 12 and 14 and W is employed fully and earns a net of $1250, child support might be set at $400, as that would provide $1650 in the home where W and two children live and allow $1200 in the home where H resides alone.

Conclusion

Washington case law and statutes lay down many factors that the trial judge must consider in exercising her or his discretion in marital dissolutions, but I know of no comprehensive statement of the goals that are to be achieved. There will doubtless be considerable disagreement with the specific examples and perhaps the goals as I have stated them, but at least it is a beginning that may be helpful in searching for a consensus.

[1]In re Marriage of Clark, 13 Wn. App. 805 (1975) which involved a 34-year marriage, the court said: "The key to an equitable distribution of property is not mathematical preciseness, but fairness. This is attained by considering all of the circumstances of the marriage, past and present, with an eye to the *future* needs of the person involved. Fairness is decided by the exercise of wise and sound discretion, not by set or flexible rules." (emphasis added) (page 810)

Family Law: Strategy and Tactics

by Maryalice Norman

Conventional wisdom among lawyers holds that family law practice doesn't amount to much, that anyone with the stomach for it can do it.

Wrong. There may be more bad domestic relations law practiced than any other kind, largely because of the widespread belief that there's nothing to it.

Conventional wisdom is right about one thing, though. You need to have a taste for family law. If you do not have it, you have to develop it. If you only handle a family law case once in a while, you will need to work at it hard, or face the fact that you will do a poor job for your client.

Strategy

1. Your client is where your overall strategy begins. What does your client want? Is it reasonable; is it too much or too little? Some spouses (male and female) are so stricken by the break-up of a marriage that they withdraw from the battle. If your client wants to give away the farm, is that reasonable for the long haul? Sometimes it is, but usually it hurts everyone to allow a one-sided settlement.

On the other hand, if your client wants revenge, do you go along with that? A settlement based on revenge will cause widening circles of damage, often engulfing your client along with the other spouse and children.

So your first step is to decide what is to be achieved and whether you can handle your client. If you cannot or do not want to, then withdraw and let the client find another more simpatico lawyer.

2. The goals to be achieved should be specified, in writing, so both you and your client know where you are headed. These goals should be realistic, that is, founded

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