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When Same-Sex Partners Marry: Tips for the Practitioner

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On March 2, 2004, Multnomah County announced that it would begin issuing marriage licenses to same-sex couples the following day. Within five days, and amid the glare of national media attention, about one-third of Multnomah County's same-sex couples married.

In the ensuing litigation, on April 20, Circuit Court Judge Frank L. Bearden upheld the marriages, but stayed the issuing of further licenses pending action by the legislature. Absent any legislative response, 90 days after the session begins, the judge has ordered Multnomah County to begin issuing the licenses again. He also ordered the state to register the weddings that had already taken place. All parties have appealed, and the Supreme Court has scheduled oral arguments for December 15.

Complicating the legal issues, on November 2, the people approved Ballot Measure 36. The complete text of the measure reads: "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." The precise scope of the measure is still unclear. The Supreme Court has requested briefing. One of the issues for the court to address will be the measure's impact upon the Oregon marriages that have already occurred.

While they await the court's decision, family law practitioners are seeing clients who are trying to find solutions to various legal issues that have arisen. This article highlights various legal scenarios and possible responses for practitioners to consider as they maneuver this legal quagmire.

Joe and Tom: How is Their Relationship Dissolved?

Joe and Tom have been living together for five years. They purchased a house together when they decided to enter into a committed relationship. Shortly after they moved in together, Tom gave up his career as a computer programmer to support Joe in launching his dental practice. A few months later, Tom's father died, leaving him a substantial inheritance. As the stay-at-home partner, Tom used his inheritance to refurbish the house, raising the value of the house considerably.

Over the last five years, Joe's dental practice has become quite profitable. Joe and Tom were married in March. Joe then had an affair with his dental hygienist. Tom is devastated. He comes to see you seeking representation to dissolve his marriage.

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Question: Can Tom file for dissolution of his marriage to Joe?

Answer: Yes. Judge Bearden has held that the marriages are valid. Although the state requested a stay from the appellate court, none was granted. And Ballot Measure 36 contains no explicit language that would give it retroactive effect. For the time being, at least, the proper legal course is to file for dissolution.

Question: What if the Supreme Court later holds that the marriages are void?

Answer: The difference to Tom's legal case may be one of procedure more than substance. Whether it is dissolving or annulling a marriage, the court has all of the same equitable powers under ORS 107.105. In *Dents and Dents*, 153 Or App 655, 958 P2d 199 (1998), the court held that the same powers applied even where the marriage was void in its inception.

Tom could plead for dissolution, and for annulment in the alternative; or he might simply amend his petition to state a claim for annulment should it become necessary at a later time. In either event, the same principles apply as upon the dissolution of any marriage. The court should look to the entire length of the parties' financial relationship, not merely the time that they have been married. It should apply a presumption of equal contribution to the acquisition of assets during the marriage and should not discount Tom's contributions because they took place primarily in the home. The court should distribute the assets equitably in light of Tom's contribution of his inheritance. And the court should consider whether an award of spousal support might be appropriate in light of Tom's sacrifices and his contributions to Joe's earning capacity.

Caveat: The grounds for annulment set forth in ORS 107.005 and ORS 107.015 do not include a marriage contracted by members of the same sex. Conventional wisdom holds that such marriages form another class of void marriages even though they are not listed explicitly in ORS 106.020. See *Li v. State of Oregon*, Multnomah County Circuit Court No. 0403-03057 (Opinion and Order of April 20, 2004); Attorney General's Letter of Advice to Governor Ted Kulongoski (March 12, 2004).

Jane and Shelly: Who's the Mom?

Jane and Shelley were together for 15 years, and they established a solid life together. Jane was a high-profile corporate executive. Shelley supported Jane in her career, spending her free time as a sculptor and art collector. Shelley does not have any independent income from her work. Jane and Shelley were married in March.

One month after their marriage, Shelley was inseminated using sperm from one of Jane's cousins. Jane and Shelley made a joint decision to start a family, and they selected the donor together.

During the pregnancy, Jane and Shelley's relationship broke down. An early test showed that the baby was going to have Down's syndrome. Jane desperately wanted Shelley to abort the pregnancy. She didn't want to parent a child with disabili-

ties. Shelley couldn't imagine aborting the baby that she was carrying. She was bonded to the baby. Jane was furious. She left Shelley and moved into an apartment. Jane has not provided any support to Shelley, who is about to give birth. Shelley comes to you 8 months pregnant, with no income and a house about to go into foreclosure.

Question: What is the first step toward dissolving Jane and Shelley's relationship?

Answer: File for divorce and seek a temporary support order as well as an order requiring Jane to bring the mortgage payments current.

Question: Who are the parents of Shelley's baby?

Answer: This scenario suggests application of the various filiation provisions of ORS Chapter 109. As a preliminary matter, the sperm donor in all likelihood has no rights in this situation. See ORS 109.239; *Leckie v. Voorbies*, 128 Or App 289, 875 P2d 521 (1994); but cf. *McIntyre v. Crouch*, 98 Or App 462, 780 P2d 239, *rev den*, 308 Or 593 (1989), *cert den*, 495 US 905 (1990) (agreement with sperm donor).

Oregon's artificial insemination statute states that "[t]he relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination." ORS 109.243. The California Court of Appeal has applied that state's similar statute to egg donation as well as sperm donation and has observed that the statute, by its nature, creates filiation in a person who cannot possibly be the child's biological parent. *Buzzanca v. Buzzanca*, 72 Cal Rptr 280, *rev den* (Ct App 1998). In other words, despite the statute's use of the word "husband," there is nothing about the sex of the person that is crucial to giving the statute effect.

Similarly, ORS 109.070 sets forth presumptions to be applied in determining filiation. Under ORS 109.070(1)(a), "[t]he child of a wife cohabiting with her husband who was not impotent or sterile at the time of the conception of the child" is the child of the mother's husband by operation of law. And under ORS 109.070(1)(b), a child born in wedlock is "presumed to be the child of the mother's husband." Each rule applies without regard to biological fact and "whether or not the marriage of the husband and wife may be void."

An argument should be made that Jane and Shelley are both the legal parents of the baby once it is born.

Caveat: It remains to be seen whether Oregon courts will interpret the filiation statutes in gender-neutral terms. If they do not, then a fair question can be raised about the statutes' constitutionality, but that dispute likewise has yet to be adjudicated. Shelly's child will be left without support if Jane's maternity cannot be established, but Shelly's custody of the child may affect the amount of spousal support that Jane is ordered to pay.

Mike and John: Can Trevor Have Two Dads?

Mike and John met seven years ago when Mike was coaching his son Trevor's baseball team. John was dating another player's mom and decided to volunteer to coach along with Mike. Mike and John fell madly in love. Mike left his wife and John left his girlfriend. Mike and John established a household. Trevor lived weekdays with his mom and spent two evenings a week and every other weekend with Mike and John. When Trevor was seven, his mother was tragically killed in a car accident, so he went to live full time with Mike and John.

Mike had a very demanding career as a doctor, so he was often working evenings and weekends. John was a mystery writer and he spent his time at home writing during the day. When Trevor came home from school, John was the stay-at-home parent, making sure that Trevor had play dates with friends, kept up with his homework and cleaned his room. John also was the carpool dad, shuffling Trevor and all of his friends to their various activities such as baseball and soccer.

John nurtured in Trevor an interest in literature. They spent countless hours reading classical works. By the age of 11, Trevor had been recognized for his own talents, winning a statewide contest for a poem that he composed about his unique family.

When Trevor was 12, Mike decided that he was unhappy and wanted to leave John. He simply felt disconnected. Trevor was devastated when he heard the news and eventually had to see a medical doctor for depression. Mike recognized Trevor and John's relationship as critical to Trevor's health. Mike comes to you asking what legal remedies may be available to assure his son, even though Mike is not with John anymore, that John will continue to be a critical person in Trevor's life. He also expresses a desire to ensure that Trevor will go to John's custody in the event that Mike should die.

Question: How can Mike's goals be accomplished?

Answer: The easiest way to establish a legal relationship between John and Trevor is through a stepparent adoption. A divorcing stepparent may petition for adoption under ORS 109.119(5). The state home study process will be waived in these circumstances and the legal process is straightforward. The parents should have independent counsel, and Mike should be advised carefully about the loss of control represented by a second parent. With an adoption, Trevor will be the legal responsibility of both Mike and John. The issues of custody, parenting time, and child support can be negotiated with the help of counsel.

Question: Does John have any custodial rights in the absence of Mike's consent to an adoption?

Answer: John has a good case for continued visitation under ORS 109.119. The same statute also provides for a right of custody in some circumstances. A stepparent's claim under ORA 109.119 may be pleaded as a part of the divorce. ORS 109.119(5).

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The purpose of this Newsletter is to provide information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities. The opinions and recommendations expressed are the author's own and do not necessarily reflect the views of the Family Law Section or the Oregon State Bar.

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Publication Deadlines

The following deadlines apply if a member wants an announcement or letter included in the newsletter.

<u>Deadline</u>	<u>Issue</u>
January 1, 2005	February 2005
March 1, 2005.....	April 2005

Annual Conference
October 20, 21 and 22, 2005

Jill and Shelby: End of Life Issues

Jill and Shelby have been together for 20 years and were married in March. Neither of them has children. Shelby contracted meningitis and slipped into a coma. Shelby had always told Jill that she did not want artificial life support. There is no living will. Shelby is brain dead and there is no chance that she will revive. Shelby's parents are devoutly Catholic. They want Shelby to be kept on life support indefinitely.

Question: Can Jill have life support withdrawn over the objection of Shelby's other relatives?

Answer: Without an advance health care directive, no spouse in Oregon, regardless of sexual orientation, can order life support withheld if there is disagreement amongst the family members. In situations like this, the court may need to appoint a guardian to better assure that the rights of the patient are prioritized.

It is important to advise all clients to prepare an advance health care directive to make sure that their end-of-life wishes will be followed. For married same-sex couples, this need is magnified because of the current legal uncertainties surrounding the marriages.

Question: Eventually Shelby dies intestate with a substantial estate. How will the estate be divided?

Answer: Since Shelby did not prepare a will, her estate will pass by intestate succession. There are no children, so the estate should pass in its entirety to Jill. ORS 112.035. Unlike the earlier examples, here the validity of the marriage will be crucial. Litigation in the probate court is the likely outcome unless Shelby's family supports the relationship.

A marriage that is merely voidable is not subject to attack by third parties. *Johnston v. Georgia-Pacific Co.*, 35 Or App 231, 581 P2d 108 (1978). If the marriage is void in its inception, on the other hand, the estate will pass to Shelby's parents. ORS 112.045(2). Oregon law no longer makes any provision for intestate succession to an unmarried partner.

Despite the legal uncertainty regarding the future of marriage equality for gay and lesbian couples, it is important to remember that the marriages that occurred in March have been upheld and are recognized by the state of Oregon. Until the court determines otherwise, the practitioner should proceed by applying the same laws that would apply to any other married couple. And some laws apply even if the marriages are later held to be void.

Confidential Information in Child Support Judgments

The Department of Justice, Division of Child Support (DCS) is required by federal law to maintain a case registry of all child support judgments in Oregon (regardless of whether services are being provided). Additionally, DCS provides enforcement services whenever requested by a party. Often this request for services occurs automatically by including enforcement language in the judgment. The court administrator forwards a copy of any child support judgment to DCS. Using information contained in the judgment, DCS puts the case information onto the system. If enforcement language is included in the judgment, DCS or the appropriate District Attorney office begins enforcement.

DCS can only successfully complete these functions if certain required information is contained in the judgment. These pieces of information are the parties' names, addresses, telephone numbers, social security numbers, driver license numbers, and name, address, and telephone number of employers. Although not specifically required by statute, the names and dates of birth of the children are also necessary to recording the duration of the judgment.

Inconsistent implementation of ORS 107.840 and UTCR 2.100, which allows personal information to be kept confidential if submitted on a segregated information sheet, has made completing DCS' obligations difficult. To assist in addressing these problems, the State Court Administrator's office amended UTCR 8.010(B) to provide the following:

(8) Parties who have been requested to submit a proposed judgment must submit to the trial court administrator the following so the court may comply with its obligation to forward copies of these documents to the DCS:

- (a) The original and one copy of the proposed judgment; and
- (b) If personal information has been segregated pursuant to the UTCR 2.100, one copy each of the affidavit and information sheet required by UTCR 2.100(4)(b) and (c).

To comply with UTCR 8.010 and ensure that a child support judgment is recorded quickly and accurately, please make sure to submit an extra copy of the judgment AND segregated information sheet to the court. Again, a copy of ANY child support judgment must be submitted to DCS; not just those on which DCS enforcement is requested or planned. Some practitioners also send a copy of these documents directly to DCS for quicker processing. Documents can be sent to:

Division of Child Support
Data Support Unit
1495 Edgewater St. NW, Ste 120
Salem, OR 97304