We appreciate this opportunity to receive feedback on the draft sections of the Gender Justice Study related to gender bias in civil proceedings as they relate to family law including divorce, maintenance, property division, custody, and child support. Please note: this is a very early draft that we are still researching and editing. At this point, we are looking for substantive feedback rather than copy editing. We have provided comments throughout the document (highlighted and in brackets) to point out areas where we are still conducting research.

Thank you for taking the time to review this section. There are a few areas that we are particularly interested in in hearing your feedback:

1. Is this topic (economic consequences of divorce) as important in 2020 as it was in 1989?
2. What non-economic issues are important to address in this section and why?
3. Is there research or discussion that is still missing from this section?

Sincerely,

David Ward, Study Lead for Section 2.2
Rob Mead, Task 1 Lead for the Gender Justice Study and Co-Author of Section 2.2

Economic Consequences of Divorce

In the 1989 Final Report, the Task Force's Subcommittee on the Consequences of Divorce evaluated the family law system as it relates to economic and child custody decisions during divorce and whether there was a gender bias against fathers in child custody decisions.[1] The Subcommittee reviewed national and state data on the economic status of women and children, maintenance and child support awards, and residential time decisions and conducted a case file study of 700 dissolutions finalized in 11 Washington counties from September to November, 1987. Unfortunately these files provided only limited data on maintenance, child support, and residential time decisions. The Subcommittee also gathered data from public hearings and written testimony submitted to the Task Force and included 34 questions regarding fairness and gender bias in family law in the surveys sent to judges and lawyers.

The Task Force found an "existence of strong cultural traditions tending to minimize the role of women as economic producers and to minimize the role of men as fathers" such that "women may not always be treated fairly in economic decisions and men many not receive equal consideration in custody decisions." (p. 13) This is despite the fact that the Subcommittee found that "Washington's community property laws and dissolution statutes reflect a stated public policy of fair and equitable treatment" and that "[w]omen's legal rights in Washington compare favorably to any other state in the country." (p. 49). Further, the Subcommittee found a paucity of uniform data on the consequences of divorce in Washington. Nonetheless, it was clear in 1989 that the "adverse economic consequences of marital dissolutions on women and children are a

[1] The 1989 report recognized that "Washington's new Parenting Act replaces the terms 'custody' and 'visitation' with the concept of 'residential time,'" but nonetheless continued to use the term "custody" in the report because "most speakers referred to the more familiar terms used in the past." (p. 67). However, it should now generally be considered anachronistic in the context of discussing Washington State family law to use the term "custody" instead of terms like "residential time" or "parenting plans."

matter of significant national and statewide concern" (p. 49) with 25 percent of white women and 55 percent of black women falling below the poverty line after their marriages ended and 46.1 percent of children in families headed by a female being in poverty in the United States in 1987.

This "feminization of poverty" (p. 49), a term coined by Dr. Diana Pearce of the University of Washington School of Social Work, continues today, although there has been some improvement since 1989:

- women in Washington make $0.79 cents for every dollar paid to men, lower than the national figure of $0.82;[2]
- in Washington, black women make $0.62 for every dollar paid to white men and Latina women make $0.48 cents for every dollar paid to white men;[3]
- 22 percent of women divorced in the previous 12 months are below the poverty level compared to 11 percent of men;[4]
- in 2015, 36.5 percent of families headed by a woman in the U.S. living with minor children were below the poverty line compared to 22.1 percent of male-headed households and 7.5 percent for families headed by married couples;[5]
- 23 percent of unmarried women in Washington with one or more minor children received child support in the date range 2016 to 2018;[6]

[2] National Women's Law Center, *Washington*, https://nwlc.org/state/washington/
[3] Id.
[4] U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY REPORTS: MARITAL EVENTS OF AMERICANS 2009 (August 2001), https://www.census.gov/library/publications/2011/acs/acs-13.html.
[5] Jasmine Tucker and Caitlin Lowell, *National Snapshot: Poverty Among Women & Families*, NAT'L WOMEN'S LAW CENTER (Sept. 2015).
[6] Annie E. Casey Foundation, Kids Count Data Center, *Female Headed Families Receiving Child Support in Washington*, https://datacenter.kidscount.org/data/tables/10453-female-headed-families-receiving-child-support?loc=49&loct=2#detailed/2/49/false/1687/any/20156,20157

- in 2018, 13 percent of Washington children were in poverty, down from 19 percent during the last recession;[7]
- from the last U.S. Census study during the period 2009-2013, 31.7 percent of American Indian and Alaskan Native children in Washington lived in poverty as did 34.3 percent of African American kids and 34.4 percent of Latino kids;[8]
- 6.9 percent of children under 18 were in extreme poverty during the 5-year average from 2013-2017;[9]

It remains to be seen how the COVID-19 recession will affect the economic status of women and children, but if what's past is prologue, women and children will be increasingly economically vulnerable.

The demographic literature suggests that both remaining unmarried and getting divorced produce a disproportionate economic strain on women that amplifies societal gender bias. The Washington Department of Health's 2016 update to the report *Socioeconomic Position in Washington* explains the effect of remaining unmarried:

> In addition to the wage gap, being unmarried with children likely contributes to the large poverty differences between females and males in the younger age groups. Among unmarried Washington residents ages 25–34 years with children in the home, 40% (±2%) of women lived in poverty compared to 21% (±2%) of men. For residents ages 75 and older, higher poverty rates among women reflect cumulative effects of lower life-time earnings, longer life expectancies and higher likelihood of widowhood.[10]

[7] Annie E. Casey Foundation, Kids Count Data Center, *Children in Poverty (100 Percent Poverty) in Washington*, https://datacenter.kidscount.org/data/tables/43-children-in-poverty-100-percent-poverty?loc=49&loct=2#detailed/2/49/false/37,871,870,573,869,36,868,867,133,38/any/321,322
[8] Id.
[9] Id.
[10] Washington Department of Health, *Socioeconomic Position in Washington* (2016 updated), https://www.doh.wa.gov/Portals/1/Documents/1500/Context-SEP2016-DU.pdf.

Divorce, however, also leads to serious economic effects. Although women participate more in the labor force after divorce and show increased earnings, divorce is associated with decreased accumulation of wealth in older women and higher poverty rates. For example, 27 percent of women who divorced after age 50 and who did not repartner live in poverty, compared to only 12 percent of men with the same relationship status.[11] For women with children facing divorce, "women are more likely than men to be faced with the dual role of being a family's sole caregiver and primary breadwinner."[12] This fact is especially impactful as the average household income for women drops, from 44 percent in the 1980s to 23 percent in the 2000s, by the one year point after a divorce.[13] Child support and property transfers after a divorce may help offset some of their spouse's lost earnings, acting as safety net but one that "offered little extra cushion for cohabiting mothers in the wake of a dissolution."[14]

In 1989, the Subcommittee found that "a disturbing picture has emerged concerning the economic status of women and children following dissolutions in Washington." (p. 51). The individual elements of this picture included limited maintenance awards available only to women in cases involving very long-term marriages, inadequate child support, property awards that failed to take disparate earning capacities into account, and child support decisions that may be impacted by stereotypical thinking about traditional family roles. Ultimately, the Subcommittee found "widespread perception that gender stereotyping in divorce proceedings" frustrated the goal of equal justice under law, but that the court records did not contain enough data to fully support the findings. The case study did find that Washington women were awarded maintenance

[11] R. Kelly Raley and Megan M. Sweeny*, Divorce, Repartnering, and Stepfamilies: A Decade of Review*, pre-print Journal of Marriage and Family (January 5, 2020), https://onlinelibrary.wiley.com/doi/full/10.1111/jomf.12651.
[12] Cynthia Osborn et al., *Family Structure Transitions and Changes in Maternal Resources and Well-Being*, 49 Demography 23 (Jan. 4, 2012).
[13] Laura M. Tach and Alicia Eads, *Trends in the Economic Consequences of Marital and Cohabitation Dissolution in the United States*, 52 Demography 401 (Mar. 7, 2015).
[14] Id., at 426-7.

less often than the national average, with only ten percent of divorced spouses receiving maintenance (and 84 percent of those who were awarded maintenance only received payments for a limited duration of time). (p. 54). Additionally, the study found that child support orders were lower than the national average and that the percentage of Washington fathers who have sole custody exceeded the national average. In addition to the study, the Subcommittee found that gender economic disparity was substantiated by both state and national data. The Subcommittee concluded by acknowledging that while "the judicial system cannot end poverty for women and children, it can through understanding avoid contributing to it" by addressing the issues of property division, maintenance awards, custody and visitation, child support, and attorney fees in dissolution cases.

These issues are updated below to reflect the changes that have happened since 1989. In addition, we also discuss the substantial changes that have occurred since 1989 in terms of recognizing the legal rights of same-sex couples in Washington State and throughout the country.

Marriage and Same-Sex Couples

In 1989, Washington state law provided no legal recognition of same-sex couples. Indeed, in 1974, the Washington Court of Appeals had rejected a same-sex couple's constitutional challenge to the refusal of King County to issue them a marriage license.[15] But over the past 30 years, the law has changed to provide same-sex couples with the same right to marry (and to divorce) as different-sex couples.

In 2015, in *Obergefell v. Hodges*[16], the U.S. Supreme Court, held that it is unconstitutional for states not to recognize marriages of same-sex couples. Two years earlier, in

[15] *Singer v. Hara*, 11 Wn. App. 247 (1974).
[16] __U.S.__, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015).

U.S. v. Windsor[17], had declared a provision of the 1996 federal "Defense of Marriage Act" (DOMA)[18] unconstitutional because its definition of marriage as being between a man and woman was a deprivation of Fifth Amendment liberty interests.

Washington voters had previously approved the right of same-sex couples to marry in 2012, following years of advocacy by LGBTQ community members and allies in the courts, in the legislature, and through ballot measure campaigns. In 2012, the Legislature passed Engrossed Substitute Senate Bill 6239 to allow same-sex couples to marry. Among other things, the bill amended RCW 26.04.010(1) to provide: "Marriage is a civil contract between ((~~a male and a female~~)) two persons who have each attained the age of eighteen years, and who are otherwise capable." Opponents of this bill gathered enough signatures on a referendum petition (Referendum 74) to require a vote of the people to approve the legislation before it could take effect. In November 2012, Washington voters approved Referendum 74 by a margin of 53.7 percent to 46.3 percent.

The approval of Referendum 74 reversed the Legislature's 1998 "Defense of Marriage Act," which had found a "compelling interest of the state of Washington to reaffirm its historical commitment to the institution of marriages as a union between a man and a woman as husband and wife and to protect that institution."[19] The Washington Supreme Court had upheld the constitutionality of the state's DOMA in *Andersen v. King County*[20] in 2006 in a five to four decision.

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[17] __U.S. __, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013).
[18] Pub. L. 104-199, codified in relevant part at 1 U.S.C. § 7 ("the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife").
[19] Laws of 1998, ch. 1.
[20] 158 Wn.2d 1 (2006) (finding Washington's DOMA was rationally related to the state's interests in procreation and children's well-being thus the prohibition against marriages of same-sex couples did not violate the state constitution's privileges and immunities or due process clauses). In *State v. Arlene's Flowers, Inc*., 187 Wn.2d 804

However, other court decisions prior to *Andersen* had provided some legal rights for same-sex couples in Washington. For example, in 2005 the Washington Supreme Court recognized the common law doctrine of de facto parentage, which provided a potential means for both partners in a same-sex relationship to be legally recognized as parents of a child they had parented together, even though only one partner was biologically related to the child.[21] In 2004, the Washington Court of Appeals also held that partners in a same-sex relationship could seek an equitable division of property after a relationship ended, a remedy that had long been available to unmarried different-sex couples in Washington.[22].[23]

Following the *Andersen* decision, the Legislature also passed a series of domestic partnership laws, culminating in a bill passed in 2009 that provided domestic partners with nearly all the rights and obligations under state law that applied to married couples.[24] The 2009 domestic partnership law was approved by the voters in November 2009, after opponents of the legislation gathered enough signatures on a referendum petition (Referendum 71) to require voter approval before the law could take effect.[25]

Justice Yu, the first open member of the LGBTQ community to serve on the Washington Supreme Court, performed the first legal marriage of a same-sex couple in the state when she was a Superior Court judge in King County, marrying Sarah and Emily Cofer shortly after

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(2017), the Washington Supreme Court unanimously recognized that the holding in *Obergefell v. Hodges* abrogates the equal protection and due process holdings in *Andersen*.

[21] Prior to this decision, many courts in Washington had also granted second-parent adoptions to recognize the legal rights of non-biological parents. [Add cite]

[22] *Gormley v. Robertson*, 120 Wn. App. 31 (2004).

[23] *In re Parentage of L.B.*, 155 Wn.2d 679 (2005).

[24] Laws of 2009, ch. 521; *see also* Laws of 2007, ch. 156 (2007 domestic partnership law, which provided a handful of legal rights to domestic partners); Laws of 2008, ch. 6 (2008 expansion of rights and responsibilities of domestic partners).

[25] Under the 2012 law approved by voters as Referendum 74, same-sex registered domestic partnerships were automatically converted to marriages effective June 30, 2014 unless there were on-going proceedings for dissolution, annulment, or separation of the partnership, or unless one of the domestic partners was 62 or older as of June 30, 2014. RCW 26.60.100(3).

midnight on December 9, 2012, the first day marriages of same-sex couples were permitted in Washington.[26] Thousands of same-sex couples have married in Washington since then – and of course, some couples have also divorced.

Divorce

Domestic relations case filings in Washington State have significantly declined since 1989. The Washington Administrative Office of the Courts records that there were 47,226 domestic relations cases filed in 1989 versus 37,150 in 2017. This 21.34 percent decline in filings is amplified by the fact that Washington's population grew 54.6 percent, from 4,728,080 in 1989 to 7,310,300 in 2017.[27] The Washington Department of Health reports that there were 45,960 marriages performed in Washington in 1991 and 45,456 in 2016[28], slightly fewer despite the large increase population. For the same years, they report 29,428 divorces, including at least 14,800 with children, in 1991 versus 24,499 divorces, with at least 11,901 including children, in 2016.[29] This is a 16.75 percent decrease in the number of divorces, not taking the population increase into account and a decrease in divorces that included children from 50.3 percent in 1991 to 48.6 percent in 2016. Overall, the number of children born in Washington increased from 79,962 in 1991 to 90,489 in 2016.[30]

Declining divorce rates do not indicate a corresponding increase in healthy committed adult relationships. Washington's decline in divorce and increase in the number of births

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[26] Julie Bolcer, *It's Wedding Day in Washington*, The Advocate, Dec. 9, 2012, available at https://www.advocate.com/politics/marriage-equality/2012/12/09/couples-begin-marry-washington

[27] Office of Financial Management, Forecasting & Research Division, *2019 Population Trends* (August 2019), 7 https://ofm.wa.gov/sites/default/files/public/dataresearch/pop/april1/ofm_april1_poptrends.pdf

[28] Washington State Department of Health, All Marriage Tables by Year, https://www.doh.wa.gov/DataandStatisticalReports/HealthStatistics/Marriage/MarriageTablesbyYear

[29] Washington State Department of Health, All Divorce Tables by Year, https://www.doh.wa.gov/DataandStatisticalReports/HealthStatistics/Divorce/DivorceTablesbyYear.

[30] Washington State Department of Health, All Birth Tables by Year, https://www.doh.wa.gov/DataandStatisticalReports/HealthStatistics/Birth/BirthTablesbyYear

corresponds to the national trend of declining rates of both divorce and marriage along with an increase in nonmarital births, especially to women of color. The Centers for Disease Control and Prevention reported that 39 percent of all U.S. births in 2018 were to unmarried women, down from a peak of 41.0 percent in 2009.[31] The 2018 nonmarital birth rates were 11.75 percent for Asian women, 28.2 percent for non-Hispanic white women, 5.18 percent for Hispanic-origin women, 68.2 percent for American Indian-Alaskan Native women, and 69.4 percent for non-Hispanic black women.[32] In 1990, the percentage of nonmarital births was 28 percent.[33] The Congressional Research Service explains this trend and some of the policy implications that effect women:

> In the United States, nonmarital births are widespread, touching families of varying income class, race, ethnicity, and geographic area. Many analysts attribute this to changed attitudes over the past few decades about fertility and marriage. They find that many adult women and teenage girls no longer feel obliged to marry before, or as a consequence of, having children. With respect to men, it appears that one result of the so-called sexual revolution is that many men now believe that women can and should control their fertility via contraception or abortion and have become less willing to marry the women they impregnate. Factors that are associated with the historically high levels of nonmarital childbearing include an increase in the median age of first marriage (i.e., marriage postponement), decreased childbearing of married couples, increased marital dissolution, an increase in the number of cohabiting couples, increased sexual activity outside of marriage, participation in risky behaviors that often lead to sex, improper use of contraceptive methods, and lack of marriageable partners. The data indicate that for all age groups, a growing share of women are having nonmarital births. Women ages 20 through 24 currently have the largest share of nonmarital births.
>
> Although there has been a rise in nonmarital births, it does not mean that there has been a subsequent rise in mother-only families. Instead, it reflects the rise in the number of couples who are in cohabiting relationships; in fact, recent data indicate that more than half of nonmarital births are to cohabiting parents. Because the number of women living in a cohabiting situation has increased

[31] Joyce A. Martin et al, Births: Final Data for 2018 68(13) National Vital Statistics Reports (November 27, 2019), https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_13-508.pdf
[32] Id.
[33] Carmen Solomon-Fears, Nonmarital Birth: An Overview Congressional Research Service (July 30, 2014), https://fas.org/sgp/crs/misc/R43667.pdf

> substantially over the last several decades, many children start off in households in which both of their biological parents reside. Nonetheless, cohabiting family situations are disrupted or dissolved much more frequently than married-couple families. Moreover, the family complexity that sometime starts with a nonmarital birth may require different public policy strategies than those used in the past for mother-only families.

Nonmarital births can amplify poverty for women and children. In 2012, 45.5 percent of never-married mothers with minor children were below the poverty line, with 23.9 percent with a family income below $10,000.[34]

In the absence of a common-law marriage statute in Washington, the Supreme Court has recognized unmarried "committed intimate relationships," (formerly referred to as "meretricious relationships"), defined as a "stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist."[35] Duration of the relationship is one factor in determining the existence of a meretricious relationship but it is not dispositive.[36] In 1995, the Court clarified the doctrine, holding that the property each party brought into a relationship is not subject to judicial division, but the income and property acquired during the relationship is subject to equitable property division, analogous to community property for married couples, to avoid unjust enrichment at the end of the relationship.[37] Unlike a marriage, however, if there is no community-like property, the Court has held that is nothing for a court to justly and equitably distribute—a court cannot distribute separate property from one partner to the other at the end of the relationship [Add line here to note that courts also cannot award

[34] Id.
[35] *In re Marriage of Lindsey*, 101 Wn.2d 299 (1984). In 2007, the Washington Supreme Court began using the term "committed intimate relationship" instead of "meretricious relationship." *See Olver v. Fowler*, 161 Wn.2d 655, 658 n.1 (2007) ("While this court has previously referred to such relationships as 'meretricious,' we, like the Court of Appeals, recognize the term's negative connotation. Accordingly, we too substitute the term 'committed intimate relationship,' which accurately describes the status of the parties and is less derogatory.") (internal citations omitted).
[36] Id.
[37] *Connell v. Francisco*, 127 Wn.2d 339(1995).

maintenance or attorney's fees in committed intimate relationships cases]. The facts *in Soltero v. Wimer,* 159 Wn.2d 428 (2007), illustrate the impact of this holding on the poorer, often female, partner [summarize block quote below so it is not so lengthy]:

> Kenneth Wimer and Patricia Soltero began dating in a nonexclusive relationship in 1983. In 1992 they moved in together. They stayed together through 2001, and the trial judge found that their relationship was monogamous and exclusive during that time. Wimer owned Westside Honda in Spokane, Washington, and several associated motorcycle-all terrain vehicles-snowmobile businesses and properties. A few years into their relationship Soltero left a job with the Cheney Federal Credit Union to work for Wimer's motorcycle dealership. Soltero was paid $18,000 a year. Wimer's salary during that time was approximately $42,000 a year, though he was compensated in other ways as well, and he retained capital in the business itself. During this time, Soltero moved into Wimer's house. Wimer did not charge Soltero rent. Every month Wimer deposited $400 into Soltero's personal checking account to cover household expenses, which were minimal because most were paid for by Wimer's businesses. Wimer purchased another home and business in Priest Lake, Idaho. Soltero decorated the homes, worked in the gardens, and cooked for the couple and their guests. The trial court found that Soltero did not contribute financially to the relationship but undertook "all of the marital-like duties and obligations of the household." Clerk's Papers (CP) at 5. Although Soltero and Wimer lived together and held themselves out to be a couple, they never purchased any personal or real property jointly nor did they commingle any money. Instead, they maintained their finances separately in separate bank accounts Soltero did add Wimer to her checking account, but Wimer never drew money from it. During their nine-year relationship Wimer's net worth increased from $1.5 million to more than $4.5 million, while Soltero's net worth does not appear to have materially grown. In 2001, Wimer terminated the relationship via letter. Not long afterward he remarried his former wife.

Id. at 430-31. The Supreme Court reversed the trial and appellate court, holding that the award of $135,000 to Ms. Soltero from Mr. Wimer's separate property was in error. *Id.* at 434-35.

In general, marriage is likely to provide some economic protection for women, but outside of the issues of child support and parenting plans and custody, discussed below, the dissolution laws have changed only marginally since 1989.

[ADD ADDITIONAL PARAGRAPHS FOR ANY OTHER IMPORTANT BUT NON-ECONOMIC CHANGES TO DIVORCE LAW IDENTIFIED BY COMMISSION MEMBERS HERE]

Maintenance

The Subcommittee examined the economic inequalities that occur in dissolution cases. The last in-depth examination of alimony (referred to as "maintenance" in Washington law) by the U.S. Census Bureau was published in 1985, so the Subcommittee had data available that showed Washington women were awarded maintenance in ten percent of cases compared to the fifteen percent national average. The Subcommittee suggested that some judges pejoratively viewed maintenance as akin to welfare that perpetuated female dependency. Hence, maintenance tended to range from zero to five years, with a mean duration of 2.6 years in the 700 cases analyzed in the Report. The Subcommittee found that this was unjust, arguing that "the ability of one or both spouses to earn income, developed through the course of the marriage, often represents one of the family's most important economic assets – one that is not easily equalized by property division….the awards of property and maintenance ought to be recognized as a proper tool to address the imbalance." (p. 55)

Careful study and analysis of maintenance awards in Washington State, or nationally, has been woefully under-examined by legal and economic scholars and the data is difficult to collect, a problem noted in the 1989 Report. More study is needed, especially regarding whether maintenance is equitably distributed in cases across racial and economic subpopulations.

Interestingly, the Legislature has acknowledged the need for vigorous enforcement of maintenance obligations. In 1993, the Legislature amended RCW 26.18.010, first passed in 1984, which reads "The Legislature finds that there is an urgent need for vigorous enforcement of child

support and maintenance obligations, and that stronger and more efficient statutory remedies need to be established to supplement and complement" the statutory remedies.[38] The underlying maintenance statute, RCW 26.09.090, has not changed since 1989 except for the inclusion of domestic partners in 2008.

Several Washington cases since 1989 illustrate the basic legal issues that currently govern property distribution and maintenance and update the 1989 Final Report's analysis of *In re Marriage of Washburn* and *In re Marriage of Morrow*. The court in *In re Marriage of Estes*, 84 Wn. App. 586 (1997), noted that the trial judge may consider marital property division when determining maintenance with the goal of equalizing the parties' standard of living for an appropriate period of time. The court in *Matter of Marriage of Anthony*, 9 Wn App. 2d 555, 564 (2019) notes that "an award of maintenance is a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time" and that "ultimately, the court's main concern must be the parties' economic situations post dissolution" but the court must still take into account the ability of one party to pay maintenance to the other. In a high asset dissolution in *In re Marriage of Wright*, 179 Wn. App. 257, 319 P.3d 4 (2013), the court applied this standard noting that the only limitation is that the "award must be just."

In contrast, other courts since 1989 have held that the purpose of maintenance is to support a spouse until the spouse is able to become self-supporting. In *In re Marriage of Luckey*, 73 Wn. App. 201 (1994), a 61 year-old plastic surgeon and his 51 year-old wife who was a nurse in his practice were getting divorced. She had worked without compensation except for reimbursement of her expenses in the family business. The court applied the analytical factors of "age, physical and emotional condition, and financial obligations of the spouse seeking

[38] Laws of 1993, ch. 426, § 1.

maintenance; the standard of living during the marriage; the duration of the marriage; and the time needed by the spouse seeking maintenance to acquire education necessary to obtain employment." It concluded that because the husband was 61 and approaching retirement and experiencing diminished earning capacity and the wife received child support and unequal favor in the property division and she would be able to find full-time work soon, maintenance was not warranted beyond the first year of their separation.

The most recent change that affect maintenance law in Washington is the federal Tax Cuts and Jobs Act of 2017[39] which eliminated the federal tax deduction for alimony for dissolutions entered after December 31, 2018. The law allows alimony in cases completed before January 1, 2019 to continue to be deducted. Recipients of alimony ordered from January 1, 2019 will not need to claim it as income. Removing the federal tax implications from Washington maintenance agreements will simplify negotiations in many cases.

Property Division

Other than the inclusion of domestic partners in 2008, the property division statute, RCW 26.09.080, has not changed since the 1989 Final Report. The statute instructs courts to divide property, including both community and separate property, and liabilities "without regard to misconduct…as shall appear just and equitable after considering all relevant factors" including the nature and extent of both community and separate property[40], the duration of the marriage, and the economic circumstances of each spouse or domestic partner. The statute specifically directs trial courts to consider "the desirability of awarding the family home or the right to live

[39] Pub. L. 115-97.
[40] *Matter of Marriage of Kaplin*, 4 Wn. App. 2d 466 (2018) (under appropriate circumstances in a marital dissolution case, the trial court need not divide community property equally, and it need not award separate property to its owner).

therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time."

The caselaw interpreting and applying RCW 26.09.080 since 1989 is complex and often fact driven and difficult to generalize. Future earning potential is not an asset to be divided at dissolution but can be considered when determining the just and equitable division of property and award of maintenance.[41] Equity rather than economic equality in dissolution property division is the goal, even to the degree that an immediate imbalance of $3.7 million dollars in the wife's favor is acceptable where husband had a $4 million annual future earning capacity.[42] Washington's caselaw balances this "just and equitable" division with the legislative prohibition of consideration of "marital misconduct." Thus squandering of assets by one spouse,[43] concealment of assets,[44] or the sole generation of tax liabilities where the spouses has "a long history of not paying taxes"[45] may be considered by the trial court, but immoral or physically abusive conduct may not, even a finding of that one spouse sexually assaulted and molested the couple's children.[46]

Parenting Plans & Parentage

[Should discuss Relocation Act of 2001. That was a big change to the Parenting Act and it has significant economic impacts.]

[41] *In re Marriage of Leland*, 69 Wn. App. 57, *review denied*, 121 Wn.2d 1033 (1993).
[42] *In re Marriage of Wright*, 179 Wn. App. 257 (2013).
[43] *In re Marriage of Mathews*, 70 Wn.App. 116 *review denied*, 122 Wn.2d 1021 (1993).
[44] *In re Marriage of Wallace*, 111 Wn.App. 697 (2002), *review denied*, 148 Wn.2d 1011 (2003).
[45] *In re Marriage of Steadman*, 63 Wn.App. 523, 527-8 (1991).
[46] *Urbana v. Urbana*, 147 Wn. App. 1 (2008) (20/80 division of community property in favor of wife was abuse of discretion where trial court took husband's sexual assault and molestation of wife's children into account).

[Should also discuss 2007 revisions to the Parenting Act. This was quite a battle. The bill also required the collection of data regarding residential time in WA parenting plans (but compliance with that law has been spotty).]

It appears that residential time decisions in Washington parenting plans have changed significantly since the 1989 Final Report. The Subcommittee found that mothers were awarded sole legal custody 61 percent of the time compared to fathers who were awarded sole custody 13 percent of the time. [Authors are going back to original source to better define what was meant by "sole custody" here] The most recent reported numbers from the Administrative Office of the Court's Washington State Center for Court Research show that in 2016, mothers were awarded sole custody only 11.1 percent of the time compared to fathers 2.7 percent of the time. [47] [Authors going back to original source to better define what "sole custody" means here; add language indicating that WSCCR notes that the underlying data has many limitations]. Today, parenting plans on average give fathers more residential time than in 1989. In 19.5 percent of cases, both parents have equal amounts of residential time. In 65.4 percent of children were scheduled to spend more time with their mother than their father.[48] In 1989, the Subcommittee found that "child custody decisions may be impacted by stereotypical thinking about traditional family roles" and it recommended that "judges and lawyers conscientiously assess each family situation presented in the light of the factors required by the[1987] Parenting Act, without assumptions based solely on gender."

One key on-going issue in child custody is the use of litigation as a tool for abuse by domestic violence perpetrators Mary Przekop noted that "if a batterer wants to, he can turn

[47] Washington State Center for Court Research, *Residential Time Summary Report* (2016), https://www.courts.wa.gov/subsite/wsccr/docs/ResidentialTimeSummaryReport2016.pdf.
[48] Id.

dissolution, child support, custody, and visitation proceedings into a nightmare, he can turn the courts into a new forum that allows his abusive behavior to continue."[49] The ABA Section of Family Law's Domestic Violence Committee suggests a partial remedy:

> Once an abusive litigant's tactics are recognized, attorneys and courts have remedies available to curb the abusive behavior. One such remedy is the ability to request attorney's fees and costs when litigation is being misused as a tool of abuse. If the attorney is able to prove to the court that the abuser's requests and motions are being filed without a good reason and are intended to harass the survivor, then the abuser could be ordered to pay the survivor for the fees and costs related to responding to the litigation. An order of attorney's fees can also incentivize attorneys to retain survivors as clients despite the threat of litigation abuse by the opposing party.[50]

In the 2015 DV Manual for Judges, the Legal Voice Violence Against Women Workgroup[51] analyzes this issue in great depth and concludes that courts have the inherent authority to "facilitate the orderly administration of justice" under RCW 2.28.010(3) and Civil Rule 1 can fashion the necessary injunctive relief and prohibit further proceedings until attorneys' fees awards for intransigence have been paid.[52] Frivolous actions or defenses can result in attorney fee awards under RCW 4.84.185 and several sections of RCW Chapter 26.09 allow for or direct the court to award attorney fees including RCW 26..09.140, 26.09.160(7), RCW 26.09.184(4)(d),

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[49] Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims through the Courts*, 9 Seattle J. Soc. Just. 1053, 1055 (2011).
[50] Maleaha Brown, *De-Weaponizing the Courts: Attorney's Fees may Help Deter Litigation Abuse against Domestic Violence Survivors*, American Bar Association, Section of Family Law, Domestic Violence Committee (October 29, 2019), https://www.americanbar.org/groups/family_law/committees/domestic-violence/litigation-abuse/
[51] 2015 DV Manual for Judges, Appendix H, Legal Voice Violence Against Women Workgroup, *Abusive Litigation and Domestic Violence Survivors*, https://www.courts.wa.gov/content/manuals/domViol/appendixH.pdf.
[52] *In re Marriage of Lily*, 75 Wn. App. 715, 720 (1994).

and RCW 26.09.260(13). [Also need to note that the Legislature passed a bill on this issue in the 2020 session, and it takes effect on January 1, 2021. The bill is SB 6268.]

Child Support

For child support, one sea change since the 1989 Final Report is the passage in 1996 of the federal Personal Responsibility and Work Opportunity Reconciliation Act.[53] The law required states to create in-hospital paternity acknowledgment programs so that if voluntarily acknowledgment of paternity goes unchallenged, it is entitled to full faith and credit in other states. The federal change was based, in part, on a 1991 report entitled *Paternity Acknowledgment Program* from Washington State's Office of Support Enforcement which showed that 37 percent of unmarried fathers willingly sign an acknowledgment of paternity at birth or shortly after.[54] The federal policy of identifying biological fathers without resorting to litigation in every case has increased the number of potential payers of child support.

Using the 2016 Current Population Survey, the U.S. Census Bureau found that 27 percent of U.S. children age under 21 have one of their parents living outside of their home, and 31.1 percent, 7 million children, of those were in poverty, including 51.9 percent of Black children who had a parent who lives outside of their household.[55] The study found that 69.3 percent of custodial parents who were supposed to receive child support received some payments, but only 43.5 percent received full payment and 30.7 percent received no payments at all.[56] Worse, nearly

[53] Pub. L. 104-193.
[54] Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 Fam. L. Q. 519, 528 (1996).
[55] Timothy Grall, U.S. Census Bureau Current Population Reports, *Custodial Mothers and Fathers and Their Child Support: 2015* (Revised January 2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-262.pdf.
[56] Id., at 12.

one-half of all custodial parents did not have a child support agreement.[57] 4 out of 5 custodial parents were mothers and the poverty rate for custodial mothers with three or more children was 52.3 percent.[58] Of the total $33.7 billion of child support that was supposed to have been received, only $20.1 billion, or 59.8 percent, was actually received.[59] This problem of unawarded or uncollected child support was noted in the 1989 Final Report. Little has changed in the past 31 years, although the Washington child support arrearages did drop three percent between 2015 and 2018, from $1.9759 billion to $1.9195 billion.[60]

In Washington, the Division of Child Support of the Washington State Department of Social and Health Sciences is charged with child support enforcement, in lieu of custodial parents who receive public assistance. In 1984, Congress passed the Child Support Enforcement Amendments of 1984,[61] requiring states to adopt child support guidelines. Washington enacted its first child support guidelines in 1988,[62] immediately prior to the 1989 Final Report. The federal Child Support Performance and Incentive Act of 1998[63] (CSPIA), restructured federal incentives for states to have highly performing child support recovery laws and implementation by tying federal funding to performance measures including paternity establishment, support order establishment, current support collections, and arrears collections. Good data is available from the states thanks to CSPIA.

[57] Id., at 11.
[58] Id., at 10.
[59] Id., at 12.
[60] National Conference of State Legislatures, *State-by-State child Support Data* (June 25, 2019), https://www.ncsl.org/research/human-services/state-data-on-child-support-collections.aspx.
[61] Pub. L. 98-378, codified at 42 U.S.C. § 667 (1988).
[62] Laws of 1988, ch. 275.
[63] Pub. L. 105-200

On September 27, 2019 the intergovernmental 2019 Child Support Schedule Workgroup released its Final Report[64] to the Legislature. The Workgroup noted that the current law provides for a deviation based on the residential schedule of the children and there has been little success in legislative attempts to amend RCW 26.19.075 to tie child support deviations to changes in residential schedules between co-parents.[65] The 2019 Workgroup noted their lack of consensus on this issue and that is "too big" to be solved by a Workgroup, especially since a solution may result in limiting the discretion of trial courts.[66] [Authors considering removing this paragraph or add information about how often the workgroup is convened, purpose of the workgroup, etc.]

The child support statute, RCW 26.09.100 and the accompanying tables at RCW 26.19 was modernized in 1988, immediately prior to the 1989 Final Report. After a few years of early amendments, it has been relatively static except for the addition of domestic partners in 1991 and occasional updates to the dollar amounts on the Monthly Basic Support Obligation tables. The statute is facially gender neutral, requiring either or both parents to pay child support pursuant to the child support tables in RCW 26.19. RCW 26.19.001 explains that it is the Legislature's intent that "child support obligation should be equitably apportioned between the parents."

The child support modification statute, RCW 26.09.170 was amended in 2010 to allow modification every two years unless there is a "showing of substantially changed circumstances based upon: (i) Changes in the income of the parents; or (ii) Changes in the economic table or standards in chapter 26.19 RCW." It was amended again in 2019, to remove the ability of an order to be modified one year or more after it has been entered if the adjustment was based on the child's age. The amendment also allows DSHS to seek modification of an order when the

[64] Child Support Schedule Workgroup September 2019, *Final Report*, https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-262.pdf.
[65] Id., at 36.
[66] Id.

order is at least 15 percent below or above the appropriate standard rather than 25 percent.[67] It was amended again in 2020, when the Legislature modified the standard for determining when a parent is voluntarily unemployed or underemployed and creates a rebuttable presumption than an incarcerated parent is unable to pay child support.[68]

In 2015, Washington enacted the 2008 version of Uniform Interstate Family Support Act, codified at RCW 26.21A.010,[69] which replaces the older 2001 versions in the Washington Statute. The law standardizes the jurisdiction and substantive requirements for establishing, enforcing, or modifying child support orders such that only one state has jurisdiction at a time. Enforcement actions across state lines are enhanced by 18 U.S.C. § 228, first passed in 1992, and amended by the Deadbeat Parents Punishment Act of 1998, which makes it illegal to cross state lines or flee the country to avoid paying child support that either exceeds $5,000 or is over one year past due. Failure to pay child support for a child who lives in another state is a felony if the payment is overdue for longer than two years or exceeds $10,000.

Availability of Legal Assistance

In 1989, the Subcommittee found that "the problem of the lack of legal representation (and thus lack of equal access to the legal system) appears to be considerably greater for women than for men." Although not quantified in the 1989 Report, lack of access to justice remains a significant problem today. The 2015 Washington Civil Legal Needs Study Update[70] shows the following sobering data points:

[67] Laws of 2019, ch. 275.
[68] Laws of 2020, ch. 227.
[69] Laws of 2015, ch. 214.
[70]

- Seven in ten low-income households in Washington State face at least one significant civil legal problem each year. The average number of problems per household increased from 3.3 in 2003 to 9.3 in the latest, 2014 survey.
- Justice Gap - The vast majority of people face their problems alone. More than three-quarters (76 percent) of those who have a legal problem do not get the help they need (down from 85 percent in 2003).
- Victims of domestic violence or sexual assault have the highest number of civil legal problems with an average of 19.7 per household, twice the average experienced by the general low-income population.

Even if a civil legal services attorney is available for one of the spouses, it is unlikely that the other will get assistance due to conflicts of interest and the lack of alternatives. The Washington State Bar Association's Moderate Means Program may help meet the needs of some domestic relations clients who fall between 200 percent and 400 percent of the federal poverty guidelines.

Because of the lack of affordable legal assistance, a high percentage of domestic relations litigants represent themselves. A 2001 study by the predecessors of the Washington State Center for Court Research in the Administrative Office of the Courts found that during the 1995 to 2001 sample period "pro se litigant incidence in dissolutions with children has increased by less than 1 percent per year on average (42.7 percent in 1995-Q3 to 46.7 percent in 2001-Q1); dissolutions without children has a slightly higher trend (55.8 percent in 1995-Q3 to 62.3 percent in 2001-Q1)."[71] In 2013, the plain language family law forms project of the Washington State Plan for Integrated Pro Se Services, a joint project of the Access to Justice Board, the Administrative Office of the Courts, and the Office of Administrative Hearings worked on the "general presumption based on the statistics is that in about 50 percent of the cases, neither side is represented by an attorney, and that in about 80 percent of the cases, one side is not

[71] Judicial Services Division, Washington Administrative Office of the Courts, *An Analysis of Pro Se Litigants in Washington State 1995-2000* (2001), available at http://www.courts.wa.gov/wsccr/docs/Final%20Report_Pro_Se_1_101.pdf.

represented."[72] The bench and bar have addressed thislack of counsel with a number of initiatives, including statewide plain language divorce forms, courthouse facilitators, and volunteer lawyer events. Nonetheless, the unavailability of legal counsel for roughly half of domestic relations litigants in Washington remains a problem that was highlighted in 1989 by the Subcommittee.

[72] Charles R. Dyer, et al, *Improving Access to Justice: Plain Language Family Law Court Forms in Washington State*, 11 SEATTLE J. FOR SOC. J. 1065, 1122 (2013), at note 1.