

## CHAPTER 12

### DISSOLUTION OF MARRIAGE

Judges play a vital role in settling conflicts associated with separation and the dissolution of marriages. Research shows that approximately half of couples who are separating or divorcing include a party reporting having been a target of physical violence by their partner at least once during the time they lived together, and in over 75% of couples a party reports having been emotionally abused.<sup>1</sup> In addition, the risk of domestic violence may increase when victims take steps to end a marriage. Many studies have documented that physical violence either started, continued, or escalated after separation.<sup>2</sup>

Courts can play an important and effective role in preventing and reducing domestic violence during and following the termination of marriages by structuring processes and orders that recognize the dynamics of domestic violence. Families in the court system in which domestic violence has taken place who are terminating marriages present special issues and concerns.

When the issue of family violence is found to exist in the context of a dissolution of marriage, domestic relations case of any kind, or in a juvenile court case[,] . . . [j]udges should be aware that there may be an unequal balance of power or bargaining capability between the parties which calls for more careful review of the custody and financial agreements before they are approved by the court.<sup>3</sup>

Effective intervention by the court can promote the abused party's safety, independence, and freedom of decision-making, and the accountability of the abusive party by working to ensure that orders for support, property distribution, and child custody are equitable. Many abusive partners are skilled at exercising control by threatening the victim's financial independence and financial security.<sup>4</sup> For example, an abusive partner may control all of the money in the household, no matter who earns it. The abuser may give his or her partner a certain allowance to purchase food and household goods that must be accounted for to the dollar. An abuser may stop making house payments or paying the rent and threaten to leave the victim and the children without a home. In addition, abusive partners often engage in economic sabotage, including interfering in victims' ability to maintain employment or housing, or ruining their credit ratings.<sup>5</sup> Courts can play a

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<sup>1</sup> D. Ellis, *Divorce And The Family Court: What Can Be Done About Domestic Violence?*, Family Court Review 46 , 531-536 (2008)

<sup>2</sup> R. Walker, T. Logan, C. Jordan & J. Campbell, *An Integrative Review of Separation in the Context of Victimization: Consequences and Implications for Women*. Trauma, Violence & Abuse, 5, 143-193 (2004).

<sup>3</sup> *Family Violence: Improving Court Practice* (National Council of Juvenile and Family Court Judges, 12.

<sup>4</sup> J. Postmus, S.B. Plummer, S. McMahon, N.S. Murshid, & M. Kim, *Understanding Economic Abuse in the Lives of Survivors*, Journal of Interpersonal Violence, 27, 411-430 (2012).

<sup>5</sup> A. Adams, C. Sullivan, D. Bybee, & M. Greeson *Development of the Scale of Economic Abuse*, Violence Against Women 14, 563-588 (2008).

significant role in reducing the power and control a domestic violence abuser has by providing for an equitable distribution of assets and orders for support. Specifically, the existence of domestic violence may need to be a factor to consider in determining:

1. Length of time an abused party may require financial support for self and children;
2. Job training or reeducation costs for an abused spouse who is not able to work due to the effect of abuse and/or isolation;
3. Length of time before an abused party may be capable of or able to work;
4. Allocation of debts and expenses incurred related to domestic violence, such as intentional waste by one party as a means to manipulate the other;
5. Relocation or security related costs;
6. Fees for a third party to provide supervised visitation for the children;
7. Whether healthcare expenses such as counseling and/or other forms of intervention will be required for a party or for children who may have been traumatized by observing or sustaining injuries at the hands of the abusive parent; or
8. Allocation of attorney fees, in particular where an abusive party attempts to assert control in the form of protracted litigation.

To achieve the goals of [RCW 26.09.080](#) and [.090](#), providing for a just and equitable distribution of property, liabilities, and maintenance, the court must craft orders that address the safety needs of the battered party and the children and that take into account the unequal power balance between the abused party and the perpetrator.<sup>6</sup>

## I. Washington Dissolution Statute and Domestic Violence

### A. No Fault Grounds - Statutory Authority

No grounds for dissolution are required. An allegation that the marriage or domestic partnership is irretrievably broken is sufficient under [RCW 26.09.030\(1\)](#) unless the other party contests. If there is a contest, the court “shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospects for reconciliation.” The court must then find that the marriage or domestic partnership is irretrievably broken and enter the decree or transfer the matter for reconciliation counseling. (See Section VII, C, Motions for Reconciliation.)

### B. Evidentiary Issues: Admissibility of Evidence of Abuse

Allowing testimony of abuse during premarital relationship was upheld as related to issue of coercion in signing a prenuptial agreement. *In re Marriage of Foran*, 67 Wn. App. 242, 259, 834 P.2d 1081 (1992).

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<sup>6</sup> For more information, see A. Farney and R. Valente, *Creating Justice Through Balance: Integrating Domestic Violence Law Into Family Court Practice*, 54 JUV. & FAM. CT J. 35 (NCJFCJ, Fall 2003).

Evidence of physical and psychological abuse was admissible on issue of post-traumatic stress disorder from abuse, present employability, and prospective earning capacity. Spouse who is physically abused during marriage is not limited to tort claim for damages resulting from abuse; trial court could consider all factors relevant to economic circumstances of the parties in making its disposition of property and maintenance. *In re Marriage of Foran*, Supra.

*See also In re Marriage of Steadman*, 63 Wn. App. 523, 528 n.8, 821 P.2d 59 (1991) (marital misconduct that court may not consider in dividing property refers to immoral or physically abusive conduct within the marital relationship; this is not to say that court may not consider abuse by one spouse where that abuse has affected economic circumstances of abused spouse).

## **II. DOMESTIC VIOLENCE AS A FACTOR TO CONSIDER IN PROPERTY DISTRIBUTION**

### **A. Special Considerations**

Domestic violence is a pattern of controlling behavior that often includes control over marital property and financial matters. As a result, the abused party may know little about the family business, the abuser's salary, or the marital assets and debts. Courts assessing credibility should consider the strong possibility that the abused party may have been denied, and therefore lacks, basic financial information about household income, assets, and liabilities.

Equitable property distribution, which takes into account the effect of the abuse on the victim, can promote the independence of that party, and thus achieve the goals of effective court intervention.

### **B. Fault and Property Distribution**

#### **1. Washington precludes consideration of marital fault but domestic violence may be relevant to economic circumstances.**

[RCW 26.09.080](#) provides:

[T]he court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) the nature and extent of the community property;
- (2) the nature and extent of the separate property;
- (3) the duration of the marriage; and
- (4) the economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time.

Washington allows consideration of fault if it causes dissipation of assets. *See In re Marriage of Williams*, 84 Wn. App. 263, 271, 927 P.2d 679 (1996), *review denied*, 131 Wn.2d 1025, 937 P.2d 1102 (1997); *In Re Marriage of Clark*, 13 Wn. App. 805, 809, 538 P.2d 145, *review denied*, 86 Wn.2d 1001 (1975). Although fault may not be considered when disposing of property in a dissolution, conduct (e.g., husband's drinking, wife's gambling) that had a dissipative effect on the marital property may be considered to arrive at a fair and equitable distribution.

However, negatively productive conduct may be balanced against economically productive conduct such as working extra jobs to bring in extra income. Conduct of concealment of assets by husband may also be considered in making disproportionate award to wife. *In re Marriage of Nicholson*, 17 Wn. App. 110, 117, 561 P.2d 1116 (1977). *See also In re Marriage of Steadman*, 63 Wn. App. 523, 528 n.8, 821 P.2d 59 (1991). Though the court may lack the authority to set aside a spouse's fraudulent transfer of marital property to a third party, the court, using its equitable powers, may allocate the remaining separate and community property or enter judgment against the spouse to account for the wrongful transfer. *In re Marriage of Angelo*, 142 Wn. App. 622, 646, 175 P.3d 1096 (2008).

**Although fault is not a ground, domestic violence may still play a part in considering the economic circumstances of the abused party.**

As a result of the abuse, the abused party may be isolated, and physically or emotionally incapacitated so as to be unable to support himself or herself and the children. Wife's needs due to a chronic health problem caused by husband's abuse during the marriage may be considered. Court may consider domestic violence as it bears on present employability and prospective earning capacity for purpose of determining maintenance. *In re Marriage of Foran*, 67 Wn. App. 242, 259, 834 P.2d 1081 (1992).

The court may not economically punish one spouse for obtaining a protection order. *In re Marriage of Muhammed*, 153 Wn.2d 795, 108 P.3d 779 (2005) (Trial court improperly considered wife's decision to obtain a protection order as marital fault).

Court may also determine property division in the context of the amount of maintenance it intends to grant. *In re Marriage of Rink*, 18 Wn. App. 549, 571 P.2d 210 (1977). For further discussion, see Chapter 2.

## 2. Debt distribution

- a. Debts incurred during marriage are presumed community and subject to equitable distribution. [RCW 26.09.080](#).
- b. Sole benefit rule

Debts may be assessed to the spouse who incurred debt without the other spouse's knowledge. A wife was held solely responsible for debts incurred without knowledge of husband during marriage. Although she claimed community purpose, she refused to provide documentation, uniquely in her control. *In re Marriage of Manry*, 60 Wn. App. 146, 150-1, 803 P.2d 8 (1991). Application of the sole benefit rule in a domestic violence case may lead to inequitable results when the debt is incurred due to the acts of the abusive partner.

- c. The abused party may have had little or no control over what debts were being incurred.

It may be very difficult for a victim of domestic violence to enforce a court order requiring the abuser to pay debts. In these cases, the court may want to include language in court orders that holds the abused party harmless from claims ordered paid by the perpetrator. (See also Section VI, Bankruptcy Issues.)

## C. Unmarried Cohabitants

Where the court finds parties engaged in a long-term pseudo-marital relationship, an equitable division of jointly held property may be made using similar factors as applied to married partners. *Foster v. Thilges*, 61 Wn. App. 880, 812 P.2d 523 (1991); *In re Marriage of Lindsey*, 101 Wn.2d 299, 304, 678 P.2d 328 (1984); *Connell v. Francisco*, 127 Wn.2d 339, 351, 898 P.2d 831 (1995); *In re Pennington*, 142 Wn.2d 592, 602, 14

P 3d 752 (2000). However, a meretricious relationship is not the same as marriage and laws involving distribution of marital property do not directly apply, nor may separate property or maintenance be awarded. *In re Sutton and Widner*, 85 Wn. App. 487, 492, 933 P.2d 1069 (1997). *But see, Koher v. Morgan*, 93 Wn. App. 398, 968 P.2d 920 (1998) (assets purchased with commingled separate and community-owned property were subject to equitable distribution.) In *Gormley v. Robertson*, 120, Wn. App. 31, 38, 83 P.3d 1042 (2004), the Court held that the meretricious relations doctrine should be extended to same-sex couples.

### III. MAINTENANCE/SPOUSAL SUPPORT

#### A. The Economic Consequences of Marital Dissolution

The economic consequences of marital dissolution can be more detrimental to women than men. Women still have not achieved economic equality in the paid labor market and, in 2012, women were 32 percent more likely to be poor than men in the United States. The U.S. Department of Labor reports overall women's earnings were 80 percent of men's earnings.<sup>7</sup> The foregoing realities apply to all women regardless of whether they have been subject to domestic violence or not. When domestic violence is superimposed onto the economic realities, the need for spousal maintenance is even more apparent.

#### B. Due to Long-Term Physical, Psychological, and Economic Effects of Domestic Violence, the Abused Party May Require Long-Term Rehabilitation in Order to Become Fully Self-Supporting.

[RCW 26.09.090](#) provides that a court shall award maintenance “such amounts and for such periods of time as the court deems just, without regard to marital misconduct.” Nonetheless, issues of domestic violence may be relevant in determining whether the statutory factors of [RCW 26.09.090\(1\)\(a\)-\(f\)](#) have been satisfied.

1. The abused party's diminished earning capacity due to any permanent or temporary physical injury caused by the violence. [RCW 26.09.090\(1\)\(e\)](#). *See, e.g., In re Marriage of Foran*, 67 Wn. App. 242, 258, 834 P.2d 1099 (1992) (Court properly considered evidence of abuse in assessing wife's present employability and prospective earning capacity in light of the post-traumatic stress disorder from

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<sup>7</sup> U.S. Department of Labor, Bureau of Labor Statistics, “Highlights of Women's Earnings in 2012,” (October 2013), <http://www.bls.gov/cps/cpswom2012.pdf>; T. Casey, “Women's poverty in the United States, 2012-Poverty Rates Remains High, Gender Poverty Gap Exists,” (September 2013), Legal Momentum at <http://www.legalmomentum.org/resources/womens-poverty-united-states-2012>.

which she suffered as a result of the abuse.). *See also, Brossman v. Brossman*, 32 Wn. App. 851, 650 P. 2d 246 (1982).

2. The abused party's lost career opportunities as a result of the perpetrator preventing the other spouse from working outside the home, or from obtaining education or training enabling employment. [RCW 26.09.090\(1\)\(b\)](#).
3. The abused party's diminished earning capacity because the perpetrator's harassment at the abused spouse's job harmed work record or caused a loss of job.
4. The fact that the violence may have caused psychological harm to the abused party, resulting in counseling costs, loss of confidence, and/or loss of ability to work. [RCW 26.09.090\(1\)\(e\)](#).
5. Costs associated with the abused party's need to stay in hiding for safety reasons. [RCW 26.09.090\(1\)\(e\)](#).
6. Desirability of making maintenance award in lump sum to minimize contact, enforcement costs, and vindictive non-payment.

#### C. **Mandatory Assignments**

Where there has been domestic violence the court should provide that periodic payments for maintenance be paid by a wage assignment or direct payment from public retirement pursuant to the authority of [RCW 26.09.138](#) and [RCW 41.50.560](#), so that the abusive party does not have to increased opportunity to manipulate the abused party through inconsistent payment of maintenance.

### IV. **PAYMENT OF ATTORNEY FEES AND COSTS**

Payment of costs and attorney fees may be awarded considering the respective needs and ability to pay of both parties (including appellate costs) pursuant to [RCW 26.09.140](#). That statute allows payment directly to an attorney for a party and allows the attorney to enforce in his or her own name. Use of this provision may insulate a battered spouse from enforcement proceedings as to such fees. Equitable factors such as intransigence may also support an award of attorney fees without balancing the parties' financial resources. *In re Marriage of Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999).

In addition, [RCW 4.84.185](#) provides for orders in cases where a party has abused the legal system by providing for an award of expenses and legal fees to any party forced to defend against meritless claims advanced for harassment, delay, nuisance, or spite.” *Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707 (2004). The court may consider “the extent to which one spouse’s intransigence caused the spouse seeking a fee award to require additional legal services.” *In re Marriage of Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). *See also, In re Marriage of Wallace*, 111 Wn. App. 697, 708, 45 P.3d 1131 (2002), *review denied*, 148 Wn.2d 1011 (2003); *Schumacher v. Watson*, 100 Wn. App.208, 212, 997 P.2d 399 (2000). Intransigence includes the abusive use of discovery, including four days of deposition of the opposing party. *In re Marriage of Cooke*, 93 Wn. App. 526, 528, 969 P.2d 127 (1999. )

In addition, intransigence does not have to be within the current litigation; it can be found for failing to follow a final order, thereby forcing an unnecessary return to court. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120, *review denied*, 120 Wn.2d 1002 (1992); *In re Marriage of Fleckenstein*, 59 Wn.2d 131, 133, 366 P.2d 688 (1961).

Intransigence includes “litigious behavior, bringing excessive motions, or discovery abuses,” or pursuing meritless appeals for the purpose of delay and expense. *In re Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002); *In re Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989); *In re Matter of Kelley*, 170 Wn. App. 722, 740, 287 P.3d 12 (2012); *review denied*, 148 Wn.2d 1011 (2003); *Gamache v. Gamache*, 66 Wn.2d 822, 829-30, 409 P.2d 859 (1965). Intransigence also includes repeatedly filing unnecessary motions. *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985).

Intransigence includes making “unsubstantiated, false, and exaggerated allegations against [the other parent] concerning his fitness as a parent, which caused him to incur unnecessary and significant attorney fees.” *In re Marriage of Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007 (2003).

## **V. CHILD SUPPORT**

### **A. Overview**

Child support plays a crucial role in enabling an abused parent to live and raise children in a nonviolent home. The lack of adequate, enforced child support may force an abused parent to return to or remain in a violent situation in order to provide for the children. In addition, the payment or non-payment of child support may serve as another vehicle for the abusive parent to control or manipulate the abused parent. While federal legislation has improved the level and enforcement of child support, unpaid child support and inadequate awards still pose a major problem in domestic violence cases.

Although this chapter deals primarily with dissolution, child support issues arise in a number of legal contexts including dissolution, temporary support in dissolution, temporary support in restraining order statutes, support in unmarried parents' custody situations, modification of child support, and enforcement of child support orders through contempt motions. Most of the general issues regarding domestic violence and child support apply to all of these situations.<sup>8</sup>

## B. Federal Statutes

### 1. Federal statutes require states to improve levels and enforcement of child support orders.

*See* Child Support Enforcement Amendments of 1984 (42 U.S.C. § 651 et seq.); Family Support Act of 1988: Pub. L. 100-485; 45 C.F.R. § 301 et seq., implementing Family Support Act of 1988; Full Faith and Credit for Child Support Orders Act; Uniform Interstate Family Support Act (UIFSA) adopted in Washington at [Chapter 26.21 RCW](#); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) Pub. L. 104-193, 110 Stat. 2105, Pub. L. 104-208, 110 Stat. 3009, Pub. L. 104-327, 110 Stat. 4002, 4003, Pub. L. 105-18, 111 Stat. 191, Pub. L. 105-33, 111 Stat. 595, 597-602, 618-621, 623, 637-642, Pub. L. 105-185, 112 Stat. 578-580, Pub. L. 105-200, 112 Stat. 657, Pub. L. 105-277, 112 Stat. 2681-337, 2681-419, 2681-429, Pub. L. 105-306, 112 Stat. 2926, 2927, Pub. L. 105-336, 112 Stat. 3149, Pub. L. 106-78, 113 Stat. 1169, Pub. L. 106-169. *See* <http://www.gpoaccess.gov/plaws/index.html>

### 2. Persons applying for Temporary Assistance for Needy Families (TANF, formerly AFDC) assign rights to child support to state. *See* 42 USC § 602(a)(2); 45 C.F.R. § 232.11; [WAC 388-422-0005](#) and [388-422-0010](#).

Violence can be the basis for a “good cause” exception to assignment of rights to state. (*See also* Chapter 10, Section XI.)

- a. *See* 42 U.S.C. § 654(26) (proof of physical or emotional harm to child or harm to parent which compromises ability to care for child, or child conceived by incest or forcible rape is “good cause”); 45 C.F.R. § 232.42.

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<sup>8</sup> For further information, see M. R. Henry and V. S. Schwartz, *A Guide for Judges in Child Support Enforcement*, 2d ed. (U.S. Dept. of Health and Human Services, Office of Child Support Enforcement, Child Support Technology Transfer Project, NCJFCJ).

- b. See [WAC 388-422-0020](#) (if cooperation is against the best interest of the child), which states:

(1) You can be excused from cooperating with DCS when you have a good reason. A good reason not to cooperate is also called good cause. You have a good reason when you can prove that:

(a) Cooperating with DCS would result in serious physical or emotional harm to you or the child in your care.

(b) Establishing paternity or getting support would be harmful to the child who:

(i) Was conceived as a result of incest or rape; or

(ii) Is the subject of legal adoption proceedings pending before a superior court; or

(iii) Is the subject of ongoing discussions between you and a public or licensed child placement agency to decide whether you will keep the child or put the child up for adoption. The discussions cannot have gone on for more than three months.

The standard for good cause for medical assistance is broader and may consider the best interests of the person who is being asked to cooperate.

### 3. **Child support guidelines as rebuttable presumption**

Federal legislation requires states to apply child support guidelines as a rebuttable presumption in determining the amount of child support, 42 U.S.C. § 667. Washington State's are found at [RCW 26.19](#).

### 4. **Confidentiality**

Federal and state law strictly limit the disclosure of any information except for criminal enforcement or cooperation with other entitlement programs. Disclosure of information about an abused parent is not authorized, including her or his address. [RCW 26.23.120](#), 45 C.F.R. § 303.21.

### 5. **Tax exemptions for dependents**

Federal tax exemptions for dependents: See 26 U.S.C. § 152 (support test in case of child of divorced parents).

The custodial parent (parent with the longer residential time annually) gets the dependency exemption unless that parent signs a waiver allowing the non-custodial parent the exemption. Care should be taken to minimize the need for interaction on a regular basis over such

details as tax exemptions where there is domestic violence.

## C. State Statutes

### 1. No fault support

[RCW 26.09.100\(1\)](#) provides that in any proceeding where child support is sought “after considering all relevant factors but without regard to marital misconduct,” the court shall order support paid by either or both parents, in accordance with the child support schedule ([Chapter 26.19 RCW](#)). Such support awarded may be subject to automatic periodic adjustment or, upon a showing of substantial change of circumstances, modification as to amounts to be paid. [RCW 26.09.100\(2\)](#).

### 2. Reasons for deviation

As noted above, the needs of children who have lived in a household where domestic violence has been present may be greater. Special assessment, medical, counseling, schooling, tutoring, or self-esteem building activities may be especially important for children who have witnessed domestic violence.<sup>9</sup> [RCW 26.19.075\(1\)\(c\)](#).

An abusive parent may argue that the cost of supervised visitation due to battering should be a reason for deviation downward. This justification should be examined carefully to assure the child is assured adequate support.

### 3. Future support orders

Where there has been domestic violence, the court should strive to craft an order of support that will minimize the need for ongoing contact between the parents over support issues in the future.

### 4. Mandatory assignments

Washington has wage assignment provisions found at [RCW 26.18.070](#), (as mandated by 42 U.S.C. § 666) to prevent nonpayment or late payment of support. These should be incorporated in the support order. A provision for payment of attorney fees to the spouse required to seek assignment should also be made to provide access to

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<sup>9</sup> P. Van Horn and B. McAlister Groves, *Children Exposed to Domestic Violence: Making Trauma-Informed Custody and Visitation Decisions*, 57 JUV. & FAM. CT. J. 51 (NCJFCJ, Winter 2006); A. Summers, *Children’s Exposure to Domestic Violence: A Guide to Research and Resources* (NCJFCJ and Office of Juvenile Justice and Delinquency Programs, 2006).

the court for the spouse owed support that is not timely paid.

**D. Medical insurance**

The court should require that the custodial parent have direct access to the insurer. An abusive non-custodial parent may not cooperate with making insurance claims and reimbursement payments.

As the impact of violence by one parent against another can have long-range and devastating effects on children, orders regarding unreimbursed medical costs should include the cost of psychological counseling and/or treatment.

The order establishing the medical insurance obligation should also provide for attorney fees to the obligee spouse if such spouse has to resort to enforcement proceedings for health insurance as provided in [RCW 26.18.170](#).

## **VI. BANKRUPTCY ISSUES**

The court, in making custody, support, and property distribution orders, attempts to achieve what it believes is a just and equitable resolution. Some parties may defeat the goals of the judgment by filing petitions for bankruptcy. In particular, domestic violence abusers may attempt to sabotage their ex-partner's economic stability by attempting to discharge their obligations under family court orders. Because many types of debts are dischargeable in bankruptcy court, parties ordered to pay certain debts can avoid financial responsibility for them. Because the debts arose during the marriage, creditors may seek payment from the party not declaring bankruptcy.

Courts can take actions that reduce the likelihood of such results.

**A. Debts Dischargeable in Bankruptcy**

Lien for payment of debt is dischargeable in bankruptcy. *See, e.g., In re Stone*, 119 B.R. 222, 228 (Bankr. E.D. Wash. 1990). *See also In re Cloud*, 215 B.R. 870, 873 (Bankr. E.D. Ark. 1997), and *In re Husky*, 183 B.R. 218, 224 (Bankr. S.D. Cal. 1995).

A property division in a decree of dissolution without a monetary award “does not establish a creditor/debtor relationship” between the parties, and the party who is not awarded the property cannot subject the property to later bankruptcy proceedings. *In re Marriage of Penry*, 119 Wn. App. 799, 803, 82 P.3d 1231 (2004).

Under the Bankruptcy Reform Act of 1994, judgments received in a family law decree are non-dischargeable, but not automatically. 11 U.S.C. § 523(a)(15) (discharge does not apply to debt to a “spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit”). The creditor spouse must file an adversary complaint in the bankruptcy action within 60 days of the creditors meeting.

## **B. Not Dischargeable in Bankruptcy**

### **1. Maintenance and Support**

As provided in 11 U.S.C. § 523(a)(5), alimony, maintenance and child support payable to a spouse, former spouse or child are not dischargeable in bankruptcy. The assignment of a support obligation makes it dischargeable unless the assignment is to the government for entitlement to public assistance. Amounts, which are not clearly labeled as support such as a parent’s obligation for a portion of schooling, day care, medical or other expenses, may be discharged unless established as support. The establishment must be done in the bankruptcy court within 60 days and cannot be extended.

An amount paid as spousal maintenance in a lump sum may be subject to challenge in bankruptcy court. The mere label may not be sufficient. If the maintenance is awarded in a lump sum due to domestic violence, a finding to that effect may help insure against discharge.

### **2. Marital Liens**

*See, e.g., Farrey v. Sanderfoot*, 111 S. Ct. 1825, 114 L. Ed. 2d 337 (1991) (11 U.S.C.A. § 522(f)(1) is not intended to thwart creditors who, sensing a bankruptcy, rush to file liens. A lien on real estate awarded to a divorcing spouse to equalize the distribution of assets cannot be avoided by filing for bankruptcy. *See also In re Marshall*, 300 B.R. 507 (Bankr. C.D. Cal. 2003).

## **C. Court Practices Which May Reduce Chances of Debt Discharge**

1. Make sure all parties are familiar with bankruptcy lien laws.
2. Clearly indicate what is truly an order for support or maintenance.

3. Do not accept stipulated orders that label debts as orders for support or maintenance without making appropriate finding as to the need for support.
4. Where bankruptcy may be considered, avoid issuing liens to an abused spouse. Rather, order assets be liquidated and cash paid to the abused spouse who would otherwise be given the lien.
5. Make a written finding that the debtor spouse is able to pay the debts he or she is obligated to pay under the decree and that it is fair to require the debtor spouse to pay those debts.

#### E. **Automatic Stay**

Pursuant to 11 USC 362(a), most civil litigation is automatically stayed when a party has filed for bankruptcy. The automatic stay provision, however, is inapplicable to most aspects of a dissolution proceeding: Section (b)(2)(A) of the §362 provides that the stay provisions do not apply to:

the commencement or continuation of a civil action or proceeding:

- (i) for the establishment of paternity;
- (ii) for the establishment or modification of an order for domestic support obligations;
- (iii) concerning child custody or visitation;
- (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
- (v) regarding **domestic violence** [emphasis added];

(B) of the collection of a domestic support obligation from property that is not property of the estate;

Washington law generally requires that ancillary matters (such as residential schedule of children, child support, and property and debt distribution) be decided at the time of the entry of a decree of dissolution. *In re Marriage of Little*, 96 Wn.2d 183, 634 P.2d 498 (1981). *Little* involved a consolidated appeal. In one case, the Supreme Court concluded that the trial court appropriately entered temporary child custody orders in conjunction with a decree of dissolution because bifurcation was in the best interest of the child. However, in the other consolidated matter, the Court was satisfied that the trial court abused its discretion in entering a decree and reserving issues of distribution of assets and liabilities until a future date, when no children were involved. *Accord, In re Marriage of Sedlock*, 69 Wn. App. 484, 84 P.2d 1243 (1993). The failure to address

issues of property and debt distribution in the decree, however, does not deprive the court of the jurisdiction to address the issues at a future time. *In re Marriage of Possinger*, 105 Wn. App. 105 Wn. App. 326, 332, 19 P.3d 1109, *review denied*, 145 Wn.2d 1008 (2001) (Quoting *Little*)

Although there are no cases directly on point, it would appear that at least where the parties so stipulate, it would be appropriate to enter a decree of dissolution addressing all issues other than property and debt distribution while a bankruptcy proceeding is pending.

## **VII. TEMPORARY ORDERS, PENDENTE LITE ORDERS**

### **A. Order for Exclusive Use of Marital Premises**

Under [RCW 26.09.060](#), it can be argued that the court can award exclusive use of the family home or vehicle pending further litigation to either of the parties without regard to the respective interests of the parties in the home or vehicle.

### **B. Order for Temporary Spousal Maintenance or Child Support**

1. Temporary support can play a critical role in protecting the abused party and the children by freeing the abused party from the financial control of the perpetrator.

[RCW 26.09.060](#) allows the court to provide for temporary child support and maintenance. An award of attorney's fees during the pendency of a dissolution is authorized by [RCW 26.09.140](#).

2. Injunctive Relief Available Under [RCW 26.09.060](#)

- a. The court may enjoin disposition of property or liabilities except in the ordinary course of business or for necessities of life and require notification to the moving party of proposed extraordinary expenditures after the order is issued.

The notice provision should require notice to be made to the attorney for the moving party where a no-contact order exists.

- b. The court may enjoin disturbing the peace of the other party or child.
- c. Upon a finding that a party's possession of a dangerous weapon presents a serious and imminent threat to public safety

or to an individual's health or safety, the party may be required to surrender any deadly weapon in his or her immediate control to the sheriff, counsel, or another person designated by the court. [RCW 9.41.800\(4\)](#).

Such an order may be entered without notice to the party only upon a finding that irreparable injury could result. Violation of such restraining order with knowledge of the content **is a criminal offense** under this statute and subjects the violator to arrest. Orders issued under [RCW 26.09.060](#) do not require any additional warning of possible criminal penalties, unlike orders under [RCW 26.50](#). *State v. Turner*, 118 Wn. App. 135, 141, 74 P.3d 1215 (2003).

### C. **Motions for Reconciliation**

1. The court may want to evaluate whether a motion for conciliation or reconciliation in a domestic violence case will compromise the abused party's safety.

These motions can force the abused party to meet with the perpetrator, and may be used by the perpetrator to delay a divorce, force an attempt at reconciliation, or force the abused party to attend marital counseling.

2. [RCW 26.09.030\(3\)](#) provides that:

If the other party denies that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospects for reconciliation and shall:

- (a) Make a finding that the marriage is irretrievably broken and enter a decree of dissolution of the marriage; or
- (b) At the request of either party or on its own motion, transfer the cause to the family court, refer them to another counseling service of their choice, and request a report back from the counseling service within sixty days, or continue the matter for not more than sixty days for hearing.

Although counsel may argue that the word "shall" requires the court to make a transfer for reconciliation services on demand, it is clear from [RCW 26.09.030\(1\) and \(a\)](#) that the court may conclude that the marriage is irretrievably broken without such a transfer.