Chapter 7

Gender Impact in Family Law Proceedings

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Contents

I. Summary

Gender bias in family law proceedings[1] in Washington State is seldom obvious. Washington's family law statutes are gender neutral, and do not on their face provide parties with an advantage or disadvantage based on their gender. It is also extremely uncommon today for Washington courts in family law proceedings to make statements that explicitly demonstrate bias against a party based on their gender. Nonetheless, there continue to be serious concerns about gender bias in family law cases, particularly implicit biases that may not be recognized by judicial officers, guardians ad litem (GAL), parenting evaluators, mediators, lawyers, or the parties themselves. Gender bias should be broadly understood to include bias based on sexual orientation and gender identity.

Researchers have noted the difficulties in attempting to measure gender bias in family law proceedings, resulting in few comprehensive studies on the topic. However, research and data suggest that gender bias in family law proceedings remains a concern, which may influence judicial decision-making in dividing property and ordering maintenance; crediting allegations of domestic violence, sexual abuse, or child abuse; making residential time decisions in parenting plans; and ordering and enforcing child support obligations. For example, a national study found that courts often do not credit mothers' claims of child abuse by fathers; and in 14% of cases where a court credited a mother's claim of abuse by the father, the mother nonetheless lost residential time with the child to the father. Implicit biases based on race, ethnicity, and other factors may also exacerbate the problems caused by biases based on gender. Data is also unavailable on the consequences to a parent who fails to pay child support – specifically, on the extent to which such parents – usually men – are named in bench warrants or incarcerated for failure to appear or failure to pay.

Increasingly, couples in Washington and nationwide are forming committed intimate relationships without marrying. However, Washington law provides fewer remedies to help

[1] For the purposes of this chapter, "family law proceedings" generally refer to actions that arise under Title 26 of the Revised Code of Washington or that involve the application of the committed intimate relationship doctrine. This chapter does not address gender bias in child welfare proceedings under Title 13 of the Revised Code of Washington.

ensure the economic stability of both partners when an unmarried couple ends a committed intimate relationship, compared to the remedies available when a couple in a marriage or state-registered domestic partnership ends a relationship. Because women are more likely to be economically disadvantaged after a committed intimate relationship ends, this lack of remedies tends to have a greater impact on women, particularly Black, Indigenous, and women of color.[2] Nationally, in 2020, the poverty rate for families with children headed by unmarried mothers was 31%, compared to 15% for families with children headed by unmarried fathers. The poverty rates were even higher for Black (35%), Latinx (34%), and Native American (43%) families headed by an unmarried mother. In addition, only 30% of Washington families headed by a woman with one or more minor children received child support between 2017 to 2019.

Like most other civil cases, the vast majority of family law cases are resolved by agreement of the parties, rather than by contested trials. Unlike most other civil cases, however, contested family law cases are always decided by a judicial officer, rather than by a jury. These cases are decided under laws that give considerable discretion to the trial court, which has the authority to appoint third-party professionals such as GALs, court appointed special advocates (CASA), and parenting evaluators to make recommendations to the court regarding parenting plans. In most family law cases, neither party has legal representation. In addition, even when the parties resolve family law cases by agreement, women may face pressure to make economic concessions in order to avoid or resolve disputes over parenting plans.

All of these points are important considerations in developing recommendations to prevent gender bias in family law cases and to ensure that Washington's gender-neutral family laws are free of gender bias in their application. Recommendations include expanding funding to provide greater legal representation for both parties in family law cases, particularly in cases that involve allegations of domestic violence; evaluating which types of implicit bias and domestic violence trainings are most effective for court actors; improving data collection related to family law cases;

[2] The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of terminology used throughout the report.

and providing increased remedies when unmarried partners in committed intimate relationships separate.

II. Treatment of this Topic in the 1989 Gender and Justice in the Courts Study

The 1989 Gender and Justice in the Court Task Force examined gender bias in family law proceedings primarily through its Subcommittee on the Consequences of Divorce. The Subcommittee "studied family law issues including divorce, maintenance, property division, child custody, and child support."[3] The Subcommittee summarized its work as examining "gender bias as it relates to economic and child custody decisions during divorce," with its concerns including "whether women and children were economically disadvantaged post-dissolution because of inadequate maintenance, property division, and child support awards and whether there was gender bias against fathers in child custody decisions."[4] Reflecting its focus on the economic consequences of "divorce," the 1989 Study did not examine gender bias in family law cases involving unmarried couples or parents. It also did not examine issues of bias in cases involving same-sex couples or relationships in which one or both partners were transgender or gender non-binary, nor did it consider how bias based on race, ethnicity, or other factors may intersect with gender bias.

The Subcommittee reviewed national and state data on the economic status of women and children, maintenance and child support orders, and residential time decisions. It also conducted a case file study of 700 dissolutions finalized in 11 Washington counties from September to November of 1987; however, the Subcommittee found that those files provided only limited data

[3] WASH. STATE TASK FORCE ON GENDER & JUST. IN THE CTS., GENDER AND JUSTICE IN THE COURTS 3 (1989), http://www.courts.wa.gov/subsite/gjc/documents/Gender%20and%20Justice%20in%20the%20Courts--Final%20Report,%201989.pdf [hereinafter "1989 Study"].

[4] *Id.* at 13. The 1989 Study 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." *Id.* at 67. However, the term "custody" should now generally be avoided in favor of using the term "residential time," the term used in the Revised Code of Washington. However, child support law still continues to use the term "custodial parent" to refer to a parent with whom a child resides the majority of the time and the term "noncustodial parent" to refer to the other parent.

on maintenance, child support, and residential time decisions.[5] The Subcommittee also gathered data from public hearings and from written testimony submitted to the Task Force, as well as from data from surveys sent to judges and lawyers that included 34 questions on fairness and gender bias in family law issues.[6]

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 may not receive equal consideration in custody decisions."[7] These concerns existed despite the fact that "Washington's community property laws and dissolution statutes reflect a stated public policy of fair and equitable treatment" and the Subcommittee's assessment that "[w]omen's legal rights in Washington compare favorably to any other state in the country."[8] Although the Subcommittee found a lack of uniform data on the consequences of divorce in Washington, it noted the "adverse economic consequences of marital dissolutions on women and children are a matter of significant national and statewide concern," with 25% of white women and 55% of Black women falling below the poverty line after a divorce and 46.1% of children in families headed by a female being in poverty in the United States in 1987.[9]

The Subcommittee found that "a disturbing picture has emerged concerning the economic status of women and children following dissolutions in Washington."[10] The individual elements of this picture included:

- Limited maintenance awards, which were generally available only to women in divorce cases involving very long-term marriages.[11]
- Inadequate property awards that failed to take disparate earning capacities into account.[12]

[5] *Id.* at 13.
[6] Id.
[7] Id.
[8] *Id.* at 49.
[9] *Id.*
[10] *Id.* at 51.
[11] Id.
[12] Id.

- Child support orders that appeared to be inadequate.[13]
- Lack of affordable legal representation for low- and middle-income people with family law problems.[14]
- Child custody decisions that may be impacted by stereotypical thinking about traditional family roles.[15]

Ultimately, the Subcommittee found a "widespread perception" that gender stereotyping in divorce proceedings operated to frustrate the goal of equal justice under law; however, the Subcommittee also noted that "[h]ard data to validate such perceptions is not as complete as is desired."[16] For example, the Subcommittee indicated that the 700 case files it reviewed "contained scant data on the parties' incomes, employment situations, education, or property distributions."[17] However, the Subcommittee did find that of the case files it reviewed, only ten percent of divorced women received maintenance, which was lower than the national average; in addition, it found that 84% of those women who were awarded maintenance only received payments for a limited duration of time.[18] Additionally, the Subcommittee found that the child support orders it reviewed provided lower support than the national average, while the percentage of Washington fathers who had sole custody exceeded the national average.[19]

More generally, the Subcommittee found that both state and national data substantiated the existence of economic disparities by gender following divorce.[20] 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.[21]

[13] Id.
[14] Id.
[15] Id.
[16] Id.
[17] *Id.* at 52.
[18] *Id.* at 54.
[19] Id.
[20] *Id.* at 53.
[21] *Id.* at 55.

The Subcommittee made a number of recommendations for judges, the Washington State Legislature, the Washington State Bar Association, and the Gender and Justice Implementation Committee.[22] However, relatively few of those recommendations have been fully implemented.[23]

III. Current Status of this Topic in Washington

A. The feminization and racialization of poverty is a continuing problem

In the 1989 Study, the Subcommittee on the Economic Consequences of Divorce discussed the "feminization of poverty,"[24] a term coined by Dr. Diana Pearce,[25] who now serves on the faculty at the University of Washington School of Social Work. The 1989 Study did not delve substantially into racial or ethnic disparities in poverty levels among women, although it noted that 55% of Black women fall below the poverty line after a divorce, compared to 25% of white women.

Both the feminization and racialization of poverty continue to today, despite some improvement since 1989. Current statistics show:

- Employers in Washington pay women $0.79 cents for every dollar paid to men, lower than the national figure of $0.82.[26]
- Employers in Washington pay Black women $0.62 for every dollar paid to white men and pay Latina women $0.48 cents for every dollar paid to white men.[27] National data also shows that many Asian, Native Hawaiian, and other Pacific Islander populations experience dramatic pay inequities which are often masked when datasets combine

[22] *Id.* at 81–82. In 1994, the Gender and Justice Implementation Committee became the Washington State Supreme Court Gender and Justice Commission. *See* WASH. COURTS, GENDER AND JUSTICE COMMISSION 1999-2000 ANNUAL REPORT: HIGHLIGHTS OF A DECADE OF WORK (2000), https://www.courts.wa.gov/committee/?fa=committee.display&item_id=142&committee_id=85.
[23] *See* Appendix I to this chapter for a chart listing the recommendations and identifying which recommendations have been implemented.
[24] 1989 Study at 49.
[25] Diana M. Pearce, *The Feminization of Poverty: Women, Work, & Welfare*, 11 URB. & SOC. CHANGE REV. 28 (1978).
[26] *Washington*, NAT'L WOMEN'S LAW CTR. (2021), https://nwlc.org/state/washington/.
[27] Id.

diverse populations into one category. For example, nationally, employers paid Burmese women only $0.52 for every dollar paid to white, non-Hispanic men.[28]

- Nationally, 22% of women who divorced in the previous 12 months are below the poverty level, compared to 11% of men.[29]
- In 2020, the poverty rate for families with children headed by unmarried mothers was 31%, compared to 15% for families with children headed by unmarried fathers and five percent for families with children in married couple families.[30] The poverty rates were even higher for Black (35%), Latinx (34%), and Native American (43%) families headed by an unmarried mother.[31]
- Only 30% of Washington families headed by a woman with one or more minor children received child support between 2017 to 2019.[32]

The demographic literature suggests that both remaining unmarried and getting divorced produce a disproportionate economic strain on women in different-sex relationships that amplifies societal gender bias.[33] The Washington State Department of Health's (DOH) 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

[28] NAT'L P'SHIP FOR WOMEN & FAMILIES, QUANTIFYING AMERICA'S GENDER WAGE GAP BY RACE/ETHNICITY (Mar. 2021), https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/quantifying-americas-gender-wage-gap.pdf.
[29] Diana B. Elliott & Tavia Simmons, U.S. Census Bureau, American Community Survey Reports: Marital Events of Americans: 2009 10 (2011), https://www2.census.gov/library/publications/2011/acs/acs-13.pdf.
[30] Amanda Fins, Nat'l Women's Law Ctr., National Snapshot: Poverty Among Women & Families, 2000 3 (2020).
[31] Id.
[32] *Female Headed Families Receiving Child Support in Washington*, ANNIE E. CASEY FOUND., KIDS COUNT DATA CTR. (2021), https://datacenter.kidscount.org/data/tables/10453-female-headed-families-receiving-child-support?loc=49&loct=2#detailed/2/49/false/1757,1687/any/20156,20157.
[33] Commentators have noted the need for more research regarding the post-divorce economic outcomes of same-sex couples and couples with at least one spouse who is transgender. Suzanne A. Kim & Edward Stein, *Gender in the Context of Same-Sex Divorce & Relationship Dissolution*, 56 FAM. CT. REV. 384, 387–88 (2018).

> cumulative effects of lower life-time earnings, longer life expectancies and higher likelihood of widowhood.[34]

National studies indicate that divorce also frequently leads to serious economic impacts for women. Although women increase their participation 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% of women live in poverty if they divorce after age 50 and do not re-partner, compared to only 12% of men with the same relationship status.[35] For women with children who divorce, "women are more likely than men to be faced with the dual role of being a family's sole caregiver and primary breadwinner."[36] Historically, the average household income for women drops substantially after divorce, although the average drop in income post-divorce decreased from 44% during the 1980s to 23% in the 2000s.[37] Child support, maintenance, and property transfers after a divorce may help offset some of their spouse's lost earnings, acting as a safety net but one that "offered little extra cushion for cohabiting mothers in the wake of a dissolution."[38]

B. Same-sex couples now have the right to marry and divorce, as well as greater legal protections as parents

In 1989, Washington State law provided no legal recognition for same-sex couples.[39] In addition, when same-sex couples had children in 1989, the only potential way for both parents to be recognized as legal parents of the child under Washington law was a newly-developed legal procedure known as a "second-parent adoption," which commentators at the time described as

[34] WASH. STATE DEP'T OF HEALTH, SOCIOECONOMIC POSITION IN WASHINGTON (2016), https://www.doh.wa.gov/Portals/1/Documents/1500/Context-SEP2016-DU.pdf.
[35] R. Kelly Raley & Megan M. Sweeny*, Divorce, Repartnering, and Stepfamilies: A Decade of Review*, 82 J. MARRIAGE & FAM. 81 (2020).
[36] Cynthia Osborn et al., Family Structure Transitions and Changes in Maternal Resources and Well-Being, 49 DEMOGRAPHY 23 (2012).
[37] Laura M. Tach & Alicia Eads, Trends in the Economic Consequences of Marital and Cohabitation Dissolution in the United States, 52 DEMOGRAPHY 401 (2015).
[38] *Id*. at 426–27.
[39] In 1974, the Washington Court of Appeals rejected a same-sex couple's constitutional challenge to the refusal of King County to issue them a marriage license. *Singer v. Hara*, 11 Wn. App. 247, 522 P.2d 1187 (1974).

"the adoption of a child by the partner of the child's natural or legal parent."[40] Since 1989, however, the law in Washington and nationally has changed substantially to provide same-sex couples with the same right to marry and to divorce as different-sex couples. In addition, Washington law now provides multiple ways for LGBTQ+[41] parents to establish their legal rights as parents.

1. Relationship recognition

In 1998, the Washington State Legislature passed a "Defense of Marriage Act" to specifically bar same-sex couples from marrying in the state.[42] In the 2006 case of *Andersen v. King County*, the Washington Supreme Court upheld this law, holding by a five to four margin that it was constitutional under Washington law to prohibit same-sex couples from marrying.[43]

Prior to the 2006 decision in *Andersen*, other Washington appellate decisions had provided some legal rights for same-sex couples in the state. In 2004, the Washington Court of Appeals 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.[44] And in 2005 the Washington Supreme Court recognized the common law doctrine of de facto parentage, which provided a 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.[45] In addition, the Washington State Legislature

[40] Carrie Bashaw, *Protecting Children in Nontraditional Families: Second Parent Adoptions in Washington*, 13 U. PUGET SOUND L. REV. 321, 322 (1990) (noting that "[i]n 1988 and 1989, three Washington courts joined the courts of three other states in granting second parent adoptions").
[41] Lesbian, gay, bisexual, transgender, queer, or questioning
[42] Laws of 1998, ch. 1.
[43] *Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006) (finding Washington's Defense of Marriage Act 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). The Washington Supreme Court has since recognized that *Andersen* has been abrogated by the U.S. Supreme Court's 2015 decision in *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). *See, e.g.*, *In re Marriage of Black*, 188 Wn.2d 114, 129, 392 P.3d 1041 (2017).
[44] *Gormley v. Robertson*, 120 Wn. App. 31, 83 P.3d 1042 (2004).
[45] *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005).

passed a law in 2006 that prohibited discrimination based on sexual orientation, gender identity, or gender expression in employment, housing, and places of public accommodation.[46]

Following the *Andersen* decision, the Washington State Legislature passed a series of domestic partnership laws, culminating in a bill passed in 2009 that provided state-registered domestic partners with nearly all the rights and obligations under state law that applied to married couples.[47] The 2009 domestic partnership law was approved by the voters in November 2009,[48] after opponents of the legislation gathered enough signatures on a referendum petition (Referendum 71) to require voter approval before the law could take effect.[49]

In 2012, same-sex couples gained the right to marry in Washington. That year, the Legislature passed a bill that amended RCW 26.04.010(1) to provide: "Marriage is a civil contract between ~~a male and female~~ two persons who have each attained the age of eighteen years, and who are otherwise capable."[50] Opponents of the bill once again 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% to 46.3%.[51] Three years later, the U.S. Supreme Court in *Obergefell v. Hodges*[52] held that it was unconstitutional for any state in the country to refuse to permit same-sex couples to marry.

Justice Mary Yu (then serving as a King County Superior Court judge) performed the first legal marriage of a same-sex couple in Washington State shortly after midnight on December 9, 2012,

[46] Laws of 2006, ch. 4.
[47] 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).
[48] Janet I. Tu, *Voters Approve Referendum 71*, SEATTLE TIMES (Nov. 5, 2009), https://www.seattletimes.com/seattle-news/voters-approve-referendum-71/.
[49] 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. *See* RCW 26.60.100(3).
[50] LAWS OF 2012, ch. 3, § 1.
[51] Alexa Vaughn & Brian M. Rosenthal, *A License to Marry: It's Official*, SEATTLE TIMES (Dec. 6, 2012), https://www.seattletimes.com/seattle-news/a-license-to-marry-its-official/.
[52] 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

the first day marriages of same-sex couples were permitted in the state.[53] Thousands of same-sex couples have married in Washington since then[54] – and of course, some same-sex couples have also divorced, while others have chosen to maintain committed intimate relationships without marrying.

2. Parental rights

The Washington State Legislature has also taken substantial steps to provide greater legal protections for LGBTQ+ parents over the past ten years. In 2011, the Legislature amended Washington's version of the Uniform Parentage Act (UPA) to reduce the unnecessary use of gendered terms in the statute in order to recognize that a child may have parents of the same sex.[55] The law also provided that state-registered domestic partners would be treated the same under the law as married couples when a child was born during their relationship, including a presumption that both state-registered domestic partners are legal parents of the child when a child is born during the domestic partnership.[56] In 2018, the Legislature adopted an even more sweeping revision of the UPA that provided additional ways for parents in same-sex relationships to obtain legal recognition of their parental rights, including authorization of voluntary acknowledgements of parentage by same-sex parents, statutory adoption of the de facto parent doctrine, and legalization and regulation of compensated surrogacy agreements.[57]

Despite these advances, LGBTQ+ parents still may face concerns that their parental rights established under Washington law will not be recognized if they travel to other states or countries with less protective laws. As a result, Washington courts may still see LGBTQ+ parents seeking second-parent adoptions (also known today as "co-parent adoptions") – the first legal innovation developed in the 1980s to protect the rights of LGBTQ+ parents – because an adoption

[53] Julie Bolcer, *It's Wedding Day in Washington*, ADVOCATE (Dec. 9, 2012), https://www.advocate.com/politics/marriage-equality/2012/12/09/couples-begin-marry-washington.
[54] *See, e.g.*, Daniel DeMay, *Legal Gay Marriage Marks 5 Years in Washington*, SEATTLE P-I (Nov. 6, 2017), https://www.seattlepi.com/local/article/gay-marriage-Seattle-Washington-5-years-12336215.php#photo-4761789 (noting that more than 15,750 same-sex couples married in Washington between December 9, 2012 to the end of 2015).
[55] LAWS OF 2011, ch. 283.
[56] *See, e.g.*, *id.* at §§ 6, 8.
[57] LAWS OF 2018, ch. 6.

decree is considered to provide the greatest assurance that their parental rights will be recognized in other states or countries.[58]

C. Divorce and marriage rates have declined since 1989, while nonmarital births have increased

Between 1989 to 2017, Washington's population grew 54.6% (from 4,728,080 in 1989 to 7,310,300 in 2017).[59] However, the number of couples who marry each year in the state has changed little over the past 30 years. DOH reports that there were 45,960 marriages performed in Washington in 1991, compared to 45,456 in 2016.[60] This slight decline in the number of marriages in the state occurred despite substantial population growth; in addition, as noted above, same-sex couples have been able to marry in Washington since December 2012, which increased the number of people who were eligible to marry in the state. Of the 45,456 marriages performed in Washington in 2016, 2,091 (4.6%) were marriages of same-sex couples.[61]

The number of divorces that occur each year in Washington has declined significantly since 1989. DOH reported 29,428 divorces in the state (including at least 14,800 with children) in 1991, compared to 24,499 divorces (with at least 11,901 involving children) in 2016.[62] This is a 16.75% decrease in the number of divorces, even with a substantial increase in the population of the state over the same time period as well as the new eligibility of same-sex couples to obtain divorces.[63]

[58] *See, e.g.*, Sabra L. Katz-Wise*, Co-Parent Adoption: A Critical Protection for LGBTQ+ Families*, HARV. HEALTH BLOG (Feb. 25, 2020), https://www.health.harvard.edu/blog/co-parent-adoption-a-critical-protection-for-lgbtq-families-2020022518931 (noting that "[b]ecause adoption decrees must be honored in all US states and jurisdictions, they are the best way to ensure that the legal status of both parents is recognized").
[59] WASH. STATE OFF. OF FIN. MGMT., FORECASTING & RESEARCH DIV., 2019 POPULATION TRENDS 7 (August 2019), https://ofm.wa.gov/sites/default/files/public/dataresearch/pop/april1/ofm_april1_poptrends.pdf.
[60] *All Marriage Tables by Year*, WASH. STATE DEP'T OF HEALTH, https://www.doh.wa.gov/DataandStatisticalReports/HealthStatistics/Marriage/MarriageTablesbyYear.
[61] *Marriage Tables by Topic Years 1991-2016*, WASH. STATE DEP'T OF HEALTH, https://www.doh.wa.gov/DataandStatisticalReports/HealthStatistics/Marriage/MarriageTablesbyTopic.
[62] *All Divorce Tables by Year*, WASH. STATE DEP'T OF HEALTH, https://www.doh.wa.gov/DataandStatisticalReports/HealthStatistics/Divorce/DivorceTablesbyYear.
[63] The Washington State Department of Health's website does not provide figures on the number of same-sex couples who obtained divorces in 2016.

The number of children born each year in Washington State has increased since 1989. Overall, the number of children born in Washington increased from 79,962 in 1991 to 90,489 in 2016.[64]

Washington's decline in divorce and increase in the number of births corresponds to the national trend of declining rates of both divorce and marriage, along with an increase in nonmarital births. The Centers for Disease Control and Prevention reported that 39.6% of all U.S. births in 2018 were to unmarried women, down from a peak of 41% in 2009.[65] The 2018 nonmarital birth rates were 11.75% for Asian women, 28.2% for non-Hispanic white women, 51.8% for Hispanic-origin women, 68.2% for American Indian-Alaskan Native women, and 69.4% for non-Hispanic Black women.[66] In 1990, the percentage of nonmarital births was 28%.[67] It is important to note that datasets that lack granularity, such as those that combine all Asian, Native Hawaiian, and other Pacific Islander populations, often mask differences within those diverse populations. It is not uncommon for datasets to completely exclude data for Native Hawaiian and other Pacific Islanders or people who identify with more than one race, which is a form of erasure in the data that prevents us from understanding the full picture.

The Congressional Research Service explains this trend in nonmarital births and some of the policy implications that affect 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.

[64] *All Birth Tables by Year*, WASH. STATE DEP'T OF HEALTH, https://www.doh.wa.gov/DataandStatisticalReports/HealthStatistics/Birth/BirthTablesbyYear.
[65] Joyce A. Martin et al., *Births: Final Data for 2018*, 68 NAT'L VITAL STAT. REPS., no. 13, 2019, at 1, 5, https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_13-508.pdf.
[66] Id.
[67] Carmen Solomon-Fears, Cong. Rsch. Serv., R43667, Nonmarital Birth: An Overview 13 (2014), https://fas.org/sgp/crs/misc/R43667.pdf.

> 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 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.[68]

Nonmarital births can amplify poverty for women and children. At the national level in 2012, 45.5% of never-married mothers with minor children were below the poverty line, with 23.9% with a family income below $10,000.[69]

Although Washington State does not recognize common-law marriages, the Washington Supreme Court has recognized legal rights that arise in the context of "committed intimate relationships" (formerly referred to as "meretricious relationships") between unmarried couples,

[68] *Id.* (quotation is from unpaginated "Summary" section of report).
[69] *Id.* at 15.

which is defined as a "stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist."[70] Duration of the relationship is a "significant factor" in determining the existence of a committed intimate relationship, but it is not determinative by itself.[71] In 1995, the Court held that the income and property acquired during a committed intimate relationship is subject to equitable division by courts, analogous to community property for married couple.[72]

However, in contrast to the statutes governing divorce in Washington, courts have not permitted separate property (i.e., property acquired by a partner before a relationship began) to be distributed from one partner to another in an action brought under the committed intimate relationship doctrine.[73] In addition, neither maintenance nor attorney fees may be awarded to parties in cases brought pursuant to the committed intimate relationship doctrine, even though such relief is available in divorce cases in Washington.[74] This disparity in the legal remedies exists despite research indicating that "the dissolution of cohabiting unions has an impact upon the economic welfare of women and children comparable to that of divorce, leaving a substantial number of former cohabitants in poverty," with a "particularly severe impact" on Black and Hispanic women.[75]

[70] *In re Marriage of Lindsey*, 101 Wn.2d 299, 678 P.2d 328 (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, 168 P.3d 348 (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).
[71] *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995).
[72] Id.
[73] *Id.* at 350 ("We conclude a trial court may not distribute property acquired by each party prior to the relationship at the termination of a [committed intimate] relationship."); *see also Soltero v. Wimer*, 159 Wn.2d 428, 150 P.3d 552 (2007).
[74] *W. Cmty. Bank v. Helmer*, 48 Wn. App. 694, 699, 740 P.3d 359 (1987) ("Without a specific holding from our Supreme Court that RCW 26.09.140 applies to a [committed intimate] relationship, we conclude that it is for the legislature to change or amend the statute which now grants attorney fees only where there is or has been a marital relationship between the parties."); *Rowe v. Rosenwald*, No. 74659-1, 2017 WL 2242301, at *4 (Wash. Ct. App. May 22, 2017) (noting that no court has applied statutes authorizing maintenance or attorney's fees in dissolutions of marriage to dissolutions of committed intimate relationships).
[75] Cynthia Grant Bowman, Social Science & Legal Policy: The Case of Heterosexual Cohabitation, 9 J.L. & FAM. STUD. 1, 26 (2007).

Despite the fact that the committed intimate relationship doctrine has been recognized in Washington for many years, very few petitions to divide property from committed intimate relationships are filed each year in the state. In 2019, for instance, only 159 committed intimate relationship petitions were filed in the state, compared to more than 20,000 dissolution petitions and 1,147 petitions for legal separation.[76] Parties may find it difficult to bring an action under the committed intimate relationship doctrine for several reasons. First, as noted above, a court may not award attorney's fees to parties in such actions. Second, the committed intimate relationship doctrine is based on case law rather than statute, making it more complex for unrepresented parties to understand their legal rights. In addition, Washington courts have not developed mandatory pattern forms for parties to use in such cases.

D. Maintenance law in Washington has changed little since 1989

The 1989 Subcommittee on the Consequences of Divorce examined the economic inequalities that occur in dissolution cases. From its examination of dissolution case files from 11 counties, the Subcommittee found that women were awarded maintenance in only ten percent of those cases, compared to a national average of 15%.[77] Maintenance tended to range from zero to five years, with a mean duration of 2.6 years in the 700 cases analyzed in the 1989 Study. 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."[78]

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

[76] WASH. CTS., SUPERIOR COURT 2019 ANNUAL CASELOAD REPORT 118 (2019), https://www.courts.wa.gov/caseload/content/archive/superior/Annual/2019.pdf.
[77] 1989 Report at 54.
[78] *Id.* at 55.

The Washington State Legislature implemented one recommendation in the 1989 Study regarding maintenance. The 1989 Study recommended that the Legislature "[a]mend RCW 26.18.010 *et seq.* (or ch. 26.18 RCW) to authorize mandatory wage assignments for maintenance payments to the same extent as is currently provided for child support obligations."[79] In 1993, the Legislature took this step.[80] The 1993 legislation also amended RCW 26.18.010 to add the underscored language to this provision: "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.[81] In addition, the 1993 bill explicitly provided that courts may use their contempt authority to enforce maintenance orders.[82]

Otherwise, the Legislature has made few other changes to the statutes regarding maintenance since the 1989 Study. Indeed, the only change that the Legislature has made since 1989 to RCW 26.09.090 (the statute that outlines the factors courts must consider in deciding whether to order maintenance) has been an amendment adopted in 2008 to make state-registered domestic partners eligible for maintenance.[83] Otherwise, RCW 26.09.090 continues to provide, as it did in 1989, that the factors that courts must consider in determining whether to award maintenance are:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to that party, and their ability to meet their needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to their skill, interests, style of life, and other attendant circumstances;
(c) The standard of living established during the marriage or domestic partnership;

[79] *Id.* at 81.
[80] LAWS OF 1993, ch. 426, § 7 (amending RCW 26.18.090).
[81] LAWS OF 1993, ch. 426, § 1 (amending RCW 26.18.010).
[82] LAWS OF 1993, ch. 426, § 5 (amending RCW 26.18.050).
[83] LAWS OF 2008, ch. 6, §1012 (amending RCW 26.09.090).

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet their needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

The statute also continues to provide, as it did in 1989, that courts have wide discretion in determining whether to order maintenance (i.e., "the court may grant a maintenance order for either spouse or domestic partner," which "shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct").[84]

Several Washington cases since 1989 illustrate the basic legal issues that currently govern property distribution and maintenance. The court in *In re Marriage of Estes*[85] 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 *In re Marriage of Anthony*[86] 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*,[87] the court applied this standard noting that the only limitation is that the "award must be just."

Other decisions since 1989 have emphasized 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*,[88] 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

[84] RCW 26.09.090(1).
[85] 84 Wn. App. 586, 929 P.2d 500 (1997).
[86] 9 Wn. App. 2d 555, 564, 446 P.3d 635 (2019).
[87] 179 Wn. App. 257, 319 P.3d 4 (2013).
[88] 73 Wn. App. 201, 868 P.2d 189 (1994).

condition, and financial obligations of the spouse seeking 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 affects maintenance law in Washington State is the federal Tax Cuts and Jobs Act of 2017,[89] which provided that for maintenance orders entered or modified after December 31, 2018, maintenance payments are not tax deductible by the payor and are not taxable income for the payee. Removing the federal tax implications from Washington maintenance orders and agreements should simplify negotiations in many cases.

E. Property distribution law in Washington has changed little since 1989

Other than the inclusion of state-registered domestic partners in 2008, the statute that authorizes courts to distribute property in a dissolution (RCW 26.09.080) has not changed since the 1989 Study.[90] As it did in 1989, this statute today continues to instruct courts to distribute property and liabilities "without regard to misconduct…as shall appear just and equitable after considering all relevant factors."[91] The factors include the nature and extent of both community and separate property,[92] the duration of the marriage or domestic partnership, and the economic circumstances of each spouse or domestic partner.[93] The statute specifically directs trial courts to consider "the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time."[94]

[89] Pub. L. No. 115-97, 131 Stat. 2054.
[90] LAWS OF 2008, ch. 6, §1011 (amending RCW 26.09.080).
[91] RCW 26.09.080.
[92] *In re Marriage of Kaplin*, 4 Wn. App. 2d 466, 421 P.3d 1046 (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).
[93] RCW 26.09.080(1)–(4).
[94] RCW 26.09.080(4).

The case law interpreting and applying RCW 26.09.080 since 1989 is complex and often fact-driven, making it 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.[95] Equity rather than economic equality in dissolution property distribution is the goal. Washington's case law balances this "just and equitable" division with the legislative prohibition of consideration of "marital misconduct." Thus squandering of assets by one spouse,[96] concealment of assets,[97] or the sole generation of tax liabilities where the spouse has "a long history of not paying taxes"[98] may be considered by the trial court, but immoral or physically abusive conduct may not, even a finding that one spouse sexually assaulted and molested the couple's children.[99]

F. There have been significant changes in the law and in the data for parenting plans in Washington since 1989

1. Washington's Parenting Act

In general, parenting plans in Washington are governed by chapter 26.09 RCW, a section of the code that is known as the Parenting Act of 1987. This law was a major revision of prior Washington law and introduced the concept of "parenting plans" in Washington State, largely replacing previously used terms such as "custody" and "visitation." As the Washington Supreme Court has explained:

> The legislature invented the "parenting plan" in 1987 when it adopted the parenting act. The parenting act of 1987 fundamentally changed the legal procedures and framework addressing the parent-child relationship in Washington. The legislature explained the policy underlying the act: "The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent

[95] *In re Marriage of Leland*, 69 Wn. App. 57, 847 P.2d 518 (1993).
[96] *In re Marriage of Mathews*, 70 Wn. App. 116, 853 P.2d 462 (1993).
[97] *In re Marriage of Wallace*, 111 Wn. App. 697, 45 P.3d 1131 (2002).
[98] *In re Marriage of Steadman*, 63 Wn. App. 523, 527–28, 821 P.2d 59 (1991).
[99] *Urbana v. Urbana*, 147 Wn. App. 1, 195 P.3d 959 (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 be fostered unless inconsistent with the child's best interests." To realize its policy objective, the legislature significantly changed the legal terminology applicable to parenting. Previous statutes couched much of the parent-child relationship in terms of which parent had "custody" and which parent was allowed "visitation." As the drafting committee on the parenting act noted, these terms tended to treat children as a prize awarded to one parent and denied the other.[100]

The Parenting Act of 1987, as amended in 1989, provided that courts must consider the following seven factors when establishing a parenting plan, with the requirement that the first factor must be given the greatest weight:

(i) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;

(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;

(iii) Each parent's past and potential for future performance of parenting functions;

(iv) The emotional needs and developmental level of the child;

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with their physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to their residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.[101]

[100] *State v. Veliz*, 176 Wn.2d 849, 855, 298 P.3d 75 (2013) (internal citations omitted). *See also In re Marriage of Kovacs*, 121 Wn.2d 795, 800–01, 854 P.2d 629 (1993) (noting "Washington's Parenting Act represents a unique legislative attempt to reduce the conflict between parents who are in the throes of a marriage dissolution by focusing on continued 'parenting' responsibilities, rather than on winning custody/visitation battles. The Act replaced the terms 'custody' and 'visitation' with the concepts of 'parenting plans' and 'parental functions.'") (internal citations omitted).

[101] LAWS OF 1989, ch. 375, §10(3)(b) (codified at RCW 26.09.187).

The Parenting Act of 1987 also provided that a parent's residential time with a child must be limited for several different reasons, including "a history of acts of domestic violence" by a parent, unless the court "expressly finds that the probability that the conduct will recur is so remote that it would not be in the child's best interests to apply the limitation or unless it is shown not to have had an impact on the child."[102]

In 1993, the Washington Supreme Court interpreted the Parenting Act of 1987 for the first time in the case of *In re Marriage of Kovacs,* a dissolution case where a mother who had been the primary caregiver for the couple's children challenged the trial court's decision to make the father the children's primary residential parent.[103] The Court rejected the mother's argument that the Parenting Act of 1987 created a presumption that a child's primary caregiver should be the child's primary residential parent after a couple divorced. After tracing the legislative history and language of the Parenting Act at length, the Court held that it was "clear to us from the legislative history that the Legislature not only did not intend to create any presumption in favor of the primary caregiver but, to the contrary, intended to reject any such presumption."[104] The Court further held that "[i]n establishing the seven statutory factors set forth in RCW 26.09.187(3)(a), the Legislature has provided the trial court guidance, along with the flexibility it needs, to make these difficult decisions."[105] Consistent with prior case law, the Court also held that "[a] trial court's ruling dealing with the placement of children is reviewed for abuse of discretion," which occurs when a trial court's decision is "manifestly unreasonable or based on untenable grounds."[106]

In the late 1990s, the Washington State Supreme Court Gender and Justice Commission contracted with researcher Diane N. Lye to "conduct a study of the Washington State Parenting Act," which had the "overarching goal . . . to gather information about how parents seeking a dissolution of marriage make arrangements for parenting, and how those arrangements operate

[102] LAWS OF 1987, ch. 460, §10(2) (codified at RCW 26.09.191).
[103] *Kovacs*, 121 Wn.2d at 800.
[104] *Id*. at 809.
[105] Id.
[106] *Id*. at 801.

after the marriage is dissolved."[107] This study, which was more than 200 pages, drew upon information gathered from ten focus groups with parents with a court-approved parenting plan; interviews with 47 professionals with experience in working with the Parenting Act (including judges, court commissioners, attorneys, family law facilitators, mental health professionals, parenting evaluators, guardians ad litem, and activists); a "standardized analysis of the contents of a representative sample of nearly 400 recently approved final parenting plans" from eight counties; and a critical review of over 100 peer-reviewed articles and monographs on post-divorce parenting and child well-being.[108] The author indicated that the study's three most important findings were: (1) the Parenting Act works well for most Washington State families; (2) there is widespread, strong support for the policy goals of the Parenting Act; and (3) the provisions of the Parenting Act are consistent with the findings of scholarly research about post-divorce parenting and child well-being.[109]

The 1999 Parenting Act Study was not intended to assess gender bias in the application of the Parenting Act. However, the author noted that "[a]ll of the male focus group participants and many of the female participants believe that the civil justice system is biased in favor of mothers so that mothers are more likely to become residential parents."[110] But the author also indicated:

> This study was not designed to assess the extent of gender bias in the system, and thus we do not know whether this perception is accurate or not. To be sure, mothers are the primary residential parent in 75% of first parenting plans. But mothers and fathers are almost equally likely to be primary residential parent in modified parenting plans. Furthermore, the prevalence of mothers as primary residential parents does not by itself provide evidence of gender bias. The high prevalence of mothers as primary residential parents may reflect other factors such as the parents' preferences.

[107] DIANE L. NYE, WASHINGTON STATE PARENTING PLAN STUDY i (1999), https://www.courts.wa.gov/newsinfo/content/parentingAct/parentingplanstudy.pdf.
[108] *Id.* at i–iii.
[109] *Id.* at i.
[110] *Id.* at 1-21.

> Even so, the fact that most parents believe the civil justice system to be stacked in favor of mothers is worthy of note and attention. There may be widespread, systematic bias. Or the belief in bias could be based on parents hearing about a few isolated events, the behavior of a few individuals in the system, or events that happened in the past. Even when fathers had successfully become the primary residential parents, they still viewed the system as biased.[111]

In addition, the author also observed that "[d]omestic violence survivors . . . point out that there are countervailing biases that favor men and that abusive men are often able to exploit the civil justice system to continue their abuse."[112]

Among providers in the family law system (such as attorneys, guardians ad litem, parenting evaluators, and activists), the author noted that "[m]any providers agree that there is a gender bias in favor of mothers in the civil justice system.[113] Providers who held such views blamed numerous factors, including gender bias by judges, reluctance of attorneys to represent men, larger social patterns of parenting, and the language of the Parenting Act that gave "emphasis on who gave primary care in the past."[114] At the same time, the author also noted that "[p]roviders who work with domestic violence survivors, like the survivors themselves . . . tend to point to other more subtle patterns of gender bias in the civil justice system that work against women."[115] Such providers expressed views that "courts are much less likely to believe women than men" and that "in general the courts take women's problems much more seriously than men's."[116] In general, the author also noted that "providers tend to view gender bias in favor of mothers as far less automatic than do parents and as far weaker than it was before the Parenting Act."[117]

[111] Id.
[112] *Id.* at 1-22.
[113] *Id.* at 2-16.
[114] *Id.* at 2-16 to 2-17.
[115] *Id.* at 2-17.
[116] *Id.* (quoting an attorney: "I think in general the courts take women's problems much more seriously than men's. If a mother drinks or uses drugs it's a big deal. But they don't look at why she drinks—at the whole picture. That maybe that's how she copes with being abused and battered.")
[117] *Id.*

2. Major amendments to the Parenting Act Since 1989

The Parenting Act has undergone a number of changes since 1989. In particular, two bills made substantial revisions to the Parenting Act.

First, in 2000, the Washington State Legislature passed the Child Relocation Act, RCW 26.09.405 – 560, to establish rules when a person who is a child's primary residential parent wishes to relocate with the child. The Child Relocation Act establishes a rebuttable presumption that a primary residential parent will be permitted to relocate with the child; however, the presumption in favor of relocation may be rebutted by a parent opposing relocation after the court considers 11 non-exclusive factors.[118] The bill also included provisions intended to help ensure that domestic violence survivors may safely relocate with their children.[119]

In 2007, the Legislature passed another bill that made a number of important changes to the Parenting Act.[120] Perhaps most significantly, this bill amended the factors that courts must consider in establishing a parenting plan. As noted above, the original Parenting Act of 1987 provided that the factor that must be given the greatest weight was "[t]he relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child."[121] The 2007 bill removed the underscored language from this factor, and moved it further down the list of factors that courts must consider; this change had the effect of continuing to require courts to consider whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child, but no longer making this consideration one that must be given the "greatest weight" in establishing a parenting plan.[122]

Some of the other provisions of the 2007 bill included:

- Providing that courts may order that a child frequently alternate their residence between the households of the parents for brief and substantially equal periods of time "if such

[118] RCW 26.09.520.
[119] RCW 26.09.460.
[120] LAWS OF 2007, ch. 496.
[121] LAWS OF 1987, ch. 460, §9(3)(a)(i).
[122] LAWS OF 2007, ch. 496, §603(3)(a).

provision is in the child's best interests," taking geographic proximity into account.[123] Previously, the Parenting Act had only permitted such a provision if the parents agreed to it, or if they had "a satisfactory history of cooperation and shared performance of parenting functions."[124] This provision had the effect of potentially expanding the number of cases where courts could order a residential schedule in which both parents had substantially equal residential time with a child.

- Providing that "[i]n establishing a permanent parenting plan, the court may consider the cultural heritage and religious beliefs of a child."[125]
- Expressing the Legislature's view that "[m]ediation is generally inappropriate in cases involving domestic violence and child abuse."[126]
- Requesting that the Supreme Court convene a task force to establish statewide protocols for dissolution cases.[127]
- Required parties to a divorce to file a "residential time summary report" on a form developed by the Washington Administrative Office of the Courts (AOC). This form was required at a minimum to include: a breakdown of how much time the child spends with each parent; whether each parent had legal representation; whether domestic violence, child abuse, chemical dependency, or mental health issues existed; and whether the case was resolved by agreement or was contested. The AOC was also required to provide an annual report on the compiled information from the residential time summary reports.[128]

3. Residential time summary report data

As noted immediately above, the 2007 amendments to the Parenting Act included a requirement for parties in divorce cases involving minor children to file "residential time summary reports." This requirement had the potential to provide information about changing trends in allocation of

[123] RCW 26.09.187(3)(b).
[124] LAWS OF 2007, ch. 496, 603(3)(b).
[125] RCW 26.09.184(3).
[126] RCW 26.09.016.
[127] LAWS OF 2007, ch. 496, § 306. The Task Force issued a final 79-page report on December 1, 2008. *See* WASH. STATE SUP. CT. DISSOLUTION TASK FORCE, FINAL REPORT (2008), https://www.courts.wa.gov/newsinfo/content/pdf/SupremeCourtDissolutionTaskForceReport_December2008.pdf
[128] LAWS OF 2007, ch. 496, §§ 701–02.

residential time in parenting plans. It also had the potential to provide information about how many family law cases are resolved by agreement or default compared to by trial, and what difference having legal representation may have in family law case outcomes.

However, there has consistently been very low compliance with the requirement that parties must submit residential time summary reports in divorce cases, which in turn has limited the reliability of the data collected from those who do comply with the requirement. Perhaps as a result, the Legislature relieved AOC of the duty of compiling annual reports in 2017.[129]

For example, the most recent "Residential Time Summary Report" published by the Washington State Center for Court Research, which covered the year 2016, included the following cautionary note titled "Limitations of the Data":

> It is known that the amount of RTSR [Residential Time Summary Report] filings is below the number of cases of dissolutions with children filed in Washington Superior Courts and that some information contained with the individual filings may be inconsistent. There were 11,726 dissolutions with children filed in Washington State during the 2016 calendar year, and every dissolution filed should be accompanied by a completed RTSR form, but no more than 31.2% of the expected number were processed. Analysis of the RTSR data at the court level shows that compliance with the request to complete and submit the RTSR form varied from court to court, with rates of RTSR forms per case ranging from a high of .769 per case filed in Lincoln County to a low of .000 per case in Columbia, Garfield, and Okanogan Counties during 2016. There is some possible bias in the data presented here, based upon which individuals actually submitted the RTSR. Perhaps, a more accurate assessment of residential time in Washington State would emerge from record review based on a sample of cases, which would likely result in a lower total cost in addition to a more accurate view of what happens in dissolution cases with children.[130]

[129] LAWS OF 2017, ch. 183, § 3.
[130] WASH. STATE CTR. FOR CT. RSCH., RESIDENTIAL TIME SUMMARY REPORT 3 (2016), http://www.courts.wa.gov/subsite/wsccr/docs/ResidentialTimeSummaryReport2016.pdf.

With that cautionary note in mind, it nonetheless appears from the most recent Residential Time Summary Report that residential time decisions in Washington parenting plans have changed significantly since 1989, particularly with respect to the amount of residential time that fathers receive in cases involving different-sex parents.

To provide historical context: In the 1989 Study, the Subcommittee on the Consequences of Divorce surveyed case files for 700 dissolution cases in 11 Washington counties.[131] The Subcommittee's review of these cases found that mothers "received the residential care" of children in 79% of the cases; fathers "received the residential care" in 18% of the cases; and "joint residential care" was provided in only three percent of the cases.[132]

By contrast, information from the 2016 Residential Time Summary Report indicates a substantial increase in the residential time of fathers in cases involving different-sex parents, particularly in terms of the number of cases where both parents have equal (i.e., "joint") residential time with children. The 2016 report indicated that both parents have equal amounts of residential time in 20.9% of cases, up from just three percent in the survey from the 1989 Study.[133] In 64% of the cases, mothers received more residential time, while fathers received the majority of residential time in 15.1% of cases.[134]

The disparity in residential time between women and men in parenting plans may result in part from the requirement in the Parenting Act for courts to consider whether one parent has "taken greater responsibility for performing parenting functions relating to the daily needs of the child" when establishing a parenting plan.[135] Studies show that, on average, women continue to spend more time than men on child care duties.[136] In families with children under age six, women spend

[131] 1989 Study at 67.
[132] Although not entirely clear, it would appear that the Subcommittee's use of the term "received the residential care" was related to which parent was the "primary residential parent" (i.e., the parent with more residential time with the child).
[133] WASH. STATE CTR. FOR CT. RSCH., *supra* note 130, at 3.
[134] Id.
[135] RCW 29.09.187(3)(a)(iii).
[136] U.S. DEP'T OF LABOR, BUREAU OF LABOR STAT., AMERICAN TIME USE SURVEY—2019 RESULTS 9 (Table 1) (2020), https://www.bls.gov/news.release/pdf/atus.pdf#:~:text=AMERICAN%20TIME%20USE%20SURVEY%20%E2%80%94%202019%20RESULTS%20In,the%20U.S.%20Bureau%20of%20Labor%20Statistics%20reported%20today

over twice as much time as men providing childcare.[137] The trend of women shouldering more childcare exists even among dual-income couples.[138] See "Chapter 4: The Impact of Gender on Courtroom Participation and Legal Community Acceptance" for more data on the distribution of childcare and domestic responsibilities by gender.

The 2016 Residential Time Summary Report also indicated that 86.9% of the cases included in the report had been resolved by agreement of the parties, 10.7% of the cases had judgments entered by default, and only 2.4% of cases were decided after a contested hearing or trial.[139] This statistic underscores a point from the 1989 Study, in which only a very small fraction of divorce case files reviewed in a random sample indicated that a case was ultimately resolved through trial, rather than by agreement or default.[140] As a result, it appears that only a very small fraction of dissolution cases in Washington State are ultimately decided by judicial officers through contested trials.

4. Abusive litigation in family law cases

Another key ongoing issue in family law cases involving children is the use of litigation as a tool for abuse by domestic violence perpetrators. As one commentator from the Seattle Journal for Social Justice noted in 2011, "if a batterer wants to, he can turn 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."[141] The 2015 Washington State Domestic Violence Manual for Judges includes an appendix that analyzes the issue of abusive litigation against domestic violence survivors in depth.[142] It notes that courts have many tools available to prevent abusers from misusing family law cases against survivors, and suggests a number of steps that courts can take to curb abusive litigation while still upholding the right of access to the courts.

[137] *Id.* at 3, 20 (Table 9).
[138] Jill E. Yavorsky et al., *The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood*, 77 J. MARRIAGE & FAMILY 662 (2015).
[139] WASH. STATE CTR. FOR CT. RSCH., *supra* note 130, at 6.
[140] 1989 Study at 67 (noting that a maximum of five of the 700 dissolution cases studied were contested cases).
[141] 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).
[142] Legal Voice Violence Against Women Workgroup, Wash. State. Admin. Off. of the Cts., 2015 DV Manual for Judges, Appendix H, Abusive Litigation and Domestic Violence Survivors (2015), https://www.courts.wa.gov/content/manuals/domViol/appendixH.pdf.

The Washington Legislation also responded to this problem by passing a bill in the 2020 legislative session to provide additional tools to curb abusive litigation against domestic violence survivors.[143]

G. Child support laws have changed at both the state and federal level since 1989

The 1989 Study indicated that "[i]nadequate child support orders and lack of enforcement of those orders reinforce the cycle of poverty for women and children after divorce."[144] The Subcommittee on the Economic Consequences of Divorce highlighted the following findings regarding child support:

- Although data was incomplete, it appeared the average child support in Washington ($198 per month) was below the national average of $218 per month.[145]
- Enforcement of child support orders was a continuing problem. The report noted that 94% of lawyers surveyed indicated that "judges never or only occasionally jail respondents for failure to pay child support."[146]
- An area of "particular concern" was "the fact that mothers barter child support in order to avoid child custody disputes." Almost half of judges also noted situations where mothers conceded property in order to avoid child custody disputes.[147]

Notably, the 1989 Study was issued shortly after Washington had adopted a statewide child support schedule, which was "presumptive, may not be varied by private agreement alone, and is subject in all cases to court review."[148] The new schedule also provided courts with discretion to depart from the child support schedule (known as a "deviation"[149]) if they make findings as to the reason.[150]

[143] LAWS OF 2020, ch. 311.
[144] 1989 Study at 16.
[145] Id.
[146] Id.
[147] Id.
[148] *Id.* at 73.
[149] RCW 26.19.011(4).
[150] 1989 Report at 73.

The Washington State Legislature adopted this new child support schedule in 1988[151] in response to a law passed by Congress in 1984 that required states to adopt child support guidelines.[152] Prior to the adoption of this law, Washington did not have uniform statewide child support guidelines, although many counties had adopted guidelines approved by the Washington Superior Court Judges Association.[153] In adopting the child support schedule, the Legislature expressed its intent that "child support obligation should be equitably apportioned between the parents."[154] The Legislature found that adopting a statewide child support schedule would benefit children and parents by: "(1) Increasing the adequacy of child support orders through the use of economic data as the basis for establishing the child support schedule; (2) Increasing the equity of child support orders by providing for comparable orders in cases with similar circumstances; and (3) Reducing the adversarial nature of the proceedings by increasing voluntary settlements as a result of the greater predictability achieved by a uniform statewide child support schedule."[155]

Washington's child support statutes are facially gender neutral. Generally speaking, a parent's presumptive child support obligation under Washington law is based on their percentage of the parents' combined net incomes; in cases where the court finds that a parent is voluntarily unemployed or underemployed or where a parent does not provide records of their actual earnings, the court imputes income to the parent.[156] Under Washington law, a parent with whom a child resides the majority of the time (referred to as the "custodial parent") presumptively satisfies their child support obligation by providing for the child in their home, and the other parent (referred to as the "noncustodial parent" or the "obligor") makes a child support transfer payment.[157]

[151] The child support schedule is codified at RCW ch. 26.19.
[152] Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305, codified at 42 U.S.C. § 667 (1988).
[153] Wash. Child Support Schedule Workgroup, Recommendations to the Washington State Legislature for Washington's Child Support Schedule Pursuant to RCW 26.19.025 8 (2019).
[154] RCW 26.19.001.
[155] Id.
[156] RCW 26.19.071.
[157] *In re Marriage of Holmes*, 128 Wn. App. 727, 739, 117 P.3d 370 (2005).

As noted earlier, women on average remain more likely than men to have the majority of residential time under parenting plans, and also are more likely to have lower incomes than men. As a result, it is more common for fathers to be the obligors for child support and mothers to be the recipient of child support transfer payments in cases involving different-sex parents. At the national level in 2017, the U.S. Census Bureau reported that mothers are custodial parents for child support purposes in approximately 80% of cases.[158] Similarly, a random sample of child support orders entered in Washington State between 2014-2018 indicated that fathers are the noncustodial parent in 78.6% of child support orders.[159]

Washington's child support laws were amended fairly often in the years immediately following the adoption of the new child support schedule in 1988, but have changed less frequently in recent years. The Legislature has periodically made changes to child support laws in response to recommendations by a gubernatorially-appointed workgroup that is required by statute to convene every four years to review Washington's child support guidelines and schedule.[160] This Child Support Schedule Workgroup last convened in 2019, and will convene again in 2023.[161]

The Legislature recently made changes to the child support statutes to help ensure that child support orders more accurately reflect an obligor's ability to pay. In 2020, the Legislature modified the factors that courts must consider in determining when a parent is voluntarily unemployed or underemployed for purposes of imputing income to a parent for child support purposes.[162] The new factors added to the statute include, but are not limited to, the parent's job skills, educational attainment, literacy, and criminal record, as well as the availability of employers willing to hire the parent and "other employment barriers."[163] This change was recommended by the 2019 Child Support Schedule Workgroup with the goal of ensuring that

[158] Timothy Grall, U.S. Census Bureau Current Population Reps., Custodial Mothers & Fathers and Their Child Support: 2017 3 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-269.pdf.
[159] WASHINGTON STATE 2018 CHILD SUPPORT ORDER REVIEW 3 (2019), https://www.dshs.wa.gov/sites/default/files/ESA/dcs/documents/2018%20Child%20Support%20Order%20Review%20NEW.pdf.
[160] RCW 26.19.025.
[161] *2019 Child Support Schedule Workgroup*, WASH. STATE DEP'T OF HEALTH & SOC. SERVS. (Sept. 27, 2019), https://www.dshs.wa.gov/esa/division-child-support/2019-child-support-schedule-workgroup.
[162] LAWS OF 2020, ch. 227, §2 (amending RCW 26.19.071).
[163] Id.

"child support orders are closer to a parent's actual or predictable earning potential, to avoid creating support orders that will likely only lead to increased arrears."[164]

The 2020 legislation also created a presumption (which may be challenged by the parent seeking child support) that an incarcerated parent is unable to pay child support.[165] In adopting this provision, the Legislature found that "a large number of justice-involved individuals owe significant child support debts when they are released from incarceration" and that such debts "are often uncollectible and unduly burdensome on a recently released justice-involved individual, and that such debts severely impact the ability of the person required to pay support to have a successful reentry and reintegration into society."[166]

Changes in federal law since 1989 have also significantly impacted child support policies at the state level. One sea change was the passage in 1996 of the federal Personal Responsibility and Work Opportunity Reconciliation Act,[167] which made major changes to social welfare programs and replaced the Aid to Families with Dependent Children program with the Temporary Assistance to Needy Families (TANF) program. Among other things, this law required states to create in-hospital paternity acknowledgment programs and provided that voluntary acknowledgments of paternity are 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% of unmarried fathers willingly sign an acknowledgment of paternity at birth or shortly after.[168] The federal policy of identifying biological fathers without resorting to litigation in every case has increased the number of potential payers of child support. The law also required recipients of TANF to cooperate in child support enforcement requirements, including paternity establishment.[169] In

[164] Wash. Child Support Schedule Workgroup, Recommendations to the Washington State Legislature for Washington's Child Support Schedule Pursuant to RCW 26.19.025 23 (2019).
[165] LAWS OF 2020, ch. 227, § 4 (codified at RCW 26.09.320).
[166] LAWS OF 2020, ch. 227, § 3 (not codified).
[167] Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.).
[168] Paul K. Legler, The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act, 30 FAM. L. Q. 519, 528 (1996).
[169] *Major Provisions of the Welfare Law*, OFF. OF FAM. ASSISTANCE (Dec. 16, 1996), https://www.acf.hhs.gov/ofa/policy-guidance/major-provisions-welfare-law.

addition, the federal Child Support Performance and Incentive Act of 1998[170] 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.

Child support orders may be entered by Superior Courts or by administrative proceedings by the Washington State Division of Child Support.[171] A random sample of child support orders entered between 2014-2018 found that 57% of orders were entered by courts, while 43% were entered in administrative proceedings.[172] This random sample found that the median net income of a noncustodial parent in Washington is $1,789.50 per month and the median order amount is $285 per month, representing 15.9% of the noncustodial parent's income.[173] These relatively low median figures reflect the fact that child support orders often involve low-income parents. In 23% of cases, the trial court or administrative law judge exercised its discretion to deviate from the presumptive child support obligation under Washington's child support schedule; in 98% of these cases involving deviations, the noncustodial parent's child support obligation were reduced rather than increased, which the average downward amount being $262.90 per month.[174] Most child support orders in the random sample covered only one child (64.9%) or two children (24.5%).[175]

As noted above, the 1989 Study noted a concern that that mothers "barter" child support in order to avoid child custody disputes.[176] Judicial officers consulted for this report continue to note this concern, observing that they frequently observe parties submitting agreed orders in family law cases in which mothers agree to substantially reduce the presumptive child support obligations that the father would otherwise owe under Washington law. The judicial officers emphasize that courts must review such proposed orders carefully and cannot under Washington law grant a

[170] Pub. L. No. 105-200, 112 Stat. 645.
[171] WASHINGTON STATE 2018 CHILD SUPPORT ORDER REVIEW, *supra* note 159, at 3.
[172] *Id.* at 10.
[173] Id.
[174] *Id.* at 4.
[175] *Id.* at 10.
[176] 1989 Study at 16.

deviation from a parent's presumptive child support obligation based solely on the agreement of the parties.

As of 2018, the U.S. Census Bureau reported that 26.5% of U.S. children under age 21 have one of their parents living outside of their home.[177] Of those children, 30.1% (6.6 million children) were in poverty; by comparison, the poverty rate of children in households where both parents were present was 11.1%.[178] The study found that nationally, 69.8% of custodial parents who were supposed to receive child support received some payments, but only 45.9% received full payment and 30.2% received no payments at all.[179] In addition, approximately one-half of all parents who served as the custodial parent for a child did not have a legal or informal child support agreement.[180] Of the total $30 billion of child support that was supposed to have been received, only $18.6 billion (or 62.2%), was actually received.[181] This problem of unawarded or uncollected child support was noted in the 1989 Study. As of 2018, total child support arrearages in Washington totaled more than $1.9 billion.[182]

Child support enforcement is a complex area of the law. At the federal level, Congress enacted the Child Support Enforcement (CSE) program in 1975.[183] The CSE program has been described by the Congressional Research Service as a federal-state program "intended to help strengthen families by securing financial support for children from their noncustodial parents on a consistent and continuing basis and by helping some of those families to remain self-sufficient and off public assistance."[184] The CSE program operates in all 50 states, and provides "seven major services on behalf of children: (1) locating absent/noncustodial parents, (2) establishing paternity, (3) establishing child support orders, (4) reviewing and modifying child support orders, (5) collecting

[177] GRALL, *supra* note 158, at 1.
[178] *Id.* at 1, 5. The Census Bureau report does not break down poverty levels by the race or ethnicity of children.
[179] *Id.* at 13, 16.
[180] *Id.* at 1.
[181] *Id.* at 10.
[182] *State-by-State Child Support Data*, NAT'L CONF. OF STATE LEGISLATURES (June 25, 2019), https://www.ncsl.org/research/human-services/state-data-on-child-support-collections.aspx (under "Total Amount of Arrearages" tab).
[183] Carmen Solomon-Fears, Cong. Rsch. Serv., R44423, The Child Support Enforcement Program: A Legislative History (2016), https://crsreports.congress.gov/product/pdf/R/R44423/4.
[184] *Id.* (quoting unpaginated "Summary").

child support payments, (6) distributing child support payments, and (7) establishing and enforcing support for children's medical needs."[185]

In Washington, the Division of Child Support (DCS) provides child support enforcement services.[186] DCS provides child enforcement services to parents who are recipients of public assistance, as well as to other parents who request child support enforcement services.[187] DCS may refer child support enforcement actions to the Attorney General or a county prosecuting attorney, particularly when judicial action is required.[188] The collection tools used by DCS include, but are not limited to, payroll deductions, withholding, or assignments from the obligor's wages; suspension of the obligor's licenses, which may include suspension of a driver's license; asset seizures; liens; and referral for contempt proceedings.[189]

Under Washington law, a parent may be incarcerated under the civil contempt statutes for failure to pay child support obligations if the parent is capable of complying with the child support order.[190] Washington law also provides that if "the obligor contends at the hearing that he or she lacked the means to comply with the support or maintenance order, the obligor shall establish that he or she exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering himself or herself able to comply with the court's order."[191]

In a 1975 case involving a parent's failure to pay child support obligations, the Washington Supreme Court held that "wherever a contempt adjudication may result in incarceration, the person accused of contempt must be provided with state-paid counsel if he or she is unable to afford private representation."[192] There has also been at least one appellate decision in

[185] Id.
[186] WAC 388-14A-1000.
[187] RCW 74.20.040.
[188] RCW 74.20.040(4), WAC 388-14A-1025(2)(a).
[189] WAC 388-14A-4020.
[190] *See, e.g.*, *State ex rel. Daly v. Snyder*, 117 Wn. App. 602, 72 P.3d 780 (2003) ("We hold that the court's authority to use contempt proceedings against recalcitrant child support obligors . . . includes incarceration"); RCW 7.21.030 (including imprisonment as a remedial sanction if a person "has failed or refused to perform an act that is yet within the person's power to perform"); *see generally* RCW 26.18.050 (authorizing contempt proceedings to be initiated for failure to comply with a child support or maintenance order).
[191] RCW 26.18.050(4).
[192] *Tetro v. Tetro*, 86 Wn.2d 252, 255, 544 P.2d 17 (1975). In 2011, the United State Supreme Court held that "the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a

Washington since 1989 when a trial court failed to comply with the right-to-counsel requirement in the context of ordering imprisonment of a parent for failure to pay child support.[193] In addition, Washington law provides that if a child support obligor is ordered to show cause why they should not be held in contempt for failure to pay child support and fails to appear at the show cause hearing, the court may issue a bench warrant for the obligor's arrest if the order to show cause includes a warning that an arrest warrant could be issued for failure to appear.[194] In such cases, an obligor is then subject to arrest without representation by counsel.

There does not appear to be any data collected since 1989 indicating how often incarceration is ordered in Washington State for failure to pay child support. Indeed, researchers and commenters have noted the lack of data on this issue nationwide. The National Conference of State Legislatures indicates that "the majority of states use civil contempt to enforce child support orders, though limited data is available on how often it is used and the costs associated with subsequent incarceration."[195] Others have observed that "[t]he extent to which noncustodial parents in the United States are jailed for failure to pay child support has not been extensively studied"[196] and that "[c]hild support agencies do not routinely report data on the use of arrest and incarceration as an enforcement tool."[197] Nationwide, estimates of how many parents are civilly incarcerated for failure to pay child support have ranged from 10,000 to 50,000.[198] Researchers have also raised "concerns about the demographics of delinquent parents incarcerated for failure to pay support," with a study in Wisconsin indicating "a higher rate of

year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings)." *Turner v. Rogers*, 564 U.S. 431, 448, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011).

[193] *State ex rel. Schmitz v. Knight*, 142 Wn. App. 291, 174 P.3d 1198 (2007).

[194] RCW 26.18.050(3).

[195] *Child Support & Incarceration*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 4, 2019), https://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx.

[196] Tonya L. Brito, Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers & Their Families, 15 J. GENDER RACE & JUST. 617, 651 (2012).

[197] *Id.* at 652; *see also* Elizabeth Cozzolino, *Public Assistance, Relationship Context, and Jail for Child Support Debt*, 4 SOCIUS 1 (2018) ("Jailing for child support nonpayment is just one of many mechanisms of child support enforcement, but little is known about how frequently this tactic is used or against whom.").

[198] Tonya L. Brito, *Producing Justice in Poor People's Courts: Four Models of State Legal Actors*, 24 LEWIS & CLARK L. REV. 145, 156 n.34 (2020) (collecting estimates and studies).

arrests for nonpayment of child support for low-income minority parents than for other parents."[199]

In the 1989 Study, the Subcommittee on the Economic Consequences of Divorce noted a finding that 94% of lawyers surveyed in Washington indicated that "judges never or only occasionally jail respondents for failure to pay child support."[200] This finding could be read to suggest that incarceration for non-payment of child support was viewed by many at the time as an underutilized enforcement mechanism. However, the limited research available today raises concerns that incarceration for failure to pay child support is often counterproductive and disproportionately impacts low-income Black, Indigenous, and men of color.[201] Efforts should be made to collect reliable data about how often parents in Washington are incarcerated for failure to pay child support, whether such parents were afforded the right to counsel, and whether racial, ethnic, and gender disparities exist in the application of this remedy.

H. Accessibility of legal representation remains a problem

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."[202] Although not quantified in the 1989 Study, lack of access to justice remains a significant problem today in family law cases. As noted earlier, women on average continue to have lower earnings than men, with even greater disparities in earnings by Black, Indigenous, and women of color. As a result, women in general and women of color in particular are less able to afford the costs of legal representation in family law cases.

The 2016 Residential Time Summary Report by the Administrative Office of the Courts (the last report available) collected information about whether parties in dissolution cases had legal representation.[203] As noted above, there are limitations on the usefulness of the data in this

[199] Brito, *Fathers Behind Bars*, *supra* note 196, at 651.
[200] 1989 Study at 16.
[201] *See generally* Brito, *Fathers Behind Bars*, *supra* note 196. Brito also notes that incarceration for non-payment of child support also impacts women, pointing to a study in South Carolina that showed 12% of parents incarcerated for non-payment of child support were women. *Id.* at 618 n.8.
[202] 1989 Study at 75.
[203] WASH. STATE CTR. FOR CT. RSCH., *supra* note 130, at 6.

report due to substantial non-compliance with reporting requirements. Nonetheless, this report is consistent with other reports in demonstrating that most parties involved in divorce cases in Washington State do not have legal representation.

The report indicates that both parties were self-represented in 76.3% of dissolution cases where data was submitted by parties to the case, while only one party had a lawyer in 16.2% of cases and both parties had lawyers in only 7.5% of cases.[204] The report also notes that "[r]esults indicate that when either side had a lawyer, they were likely to get more residential time than when both parties were self-represented."[205] In addition, the report notes that when both sides have an attorney, "there are fewer extreme splits in residential time."[206]

In terms of breakdown of the results by gender, the report indicated:

> When fathers had an attorney and mothers were self-represented, fathers had the majority of residential time in 25.6% of cases and there was an even distribution of time in 35.0% of cases. When mothers had an attorney and fathers were self-represented, mothers received the majority of residential time in 72.5% of cases and there was an even distribution of time in 18.0% of cases. When both parties had an attorney . . . mothers receiv[ed] a majority of residential time in 62.8% of cases, and an even distribution of time in 23.7% of cases.[207]

The continuing need for legal representation is also illustrated by the 2015 Washington Civil Legal Needs Study Update,[208] which includes the following data points:

- 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 2014.[209]

[204] *Id.*
[205] *Id*. at 7.
[206] *Id*.
[207] *Id*.; See "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for an analysis of legal representation by gender as provided by residential time summary form data and for a further discussion of the financial barriers to accessing legal representation.
[208] Civil Legal Needs Study Update Comm., Wash. State Sup. Ct., 2015 Washington State Civil Legal Needs Study Update (2015).
[209] *Id.* at 3.

- The vast majority of low-income people in Washington face their legal problems alone. More than three-quarters (76%) of those who have a legal problem do not get the help they need (down from 85% in 2003).[210]
- 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.[211]

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.[212] The Washington State Bar Association's Moderate Means Program may help meet the needs of some domestic relations clients who fall between 200% and 400% of the federal poverty guidelines.[213]

Other data shows that a high percentage of domestic relations litigants represent themselves pro se. A 2001 study found that during the 1995 to 2001 sample period, "pro se litigant incidence in dissolutions with children has increased by less than 1% per year on average (42.7% in 1995-Q3 to 46.7% in 2001-Q1); dissolutions without children has a slightly higher trend (55.8% in 1995-Q3 to 62.3% in 2001-Q1)."[214] 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 [] that in about 50% of the cases, neither side is represented by an attorney, and that in about 80% of the cases, one side is not represented."[215]

[210] *Id.* at 15.
[211] *Id*. at 13; See "Chapter 8: Consequences of Gender-Based Violence: Domestic Violence and Sexual Violence" for more information on gender-based violence.
[212] The Northwest Justice Project (NJP) is Washington's largest publicly funded civil legal aid program and provides representation to low-income people in family law cases. *About Us*, NW. JUST. PROJECT (2021), https://nwjustice.org/about. NJP's priorities include providing legal representation in "disputed custody cases involving domestic violence or children at risk of harm," but is unable due to limited resources to provide representation to all low-income people who request assistance. *Priorities*, NW. JUST. PROJECT (2021), https://nwjustice.org/priorities. And of course, NJP cannot provide representation to both parties in a family law matter due to conflict of interest rules.
[213] *Clients of Moderate Means*, WASH. STATE BAR ASS'N (Jan. 4, 2021), https://www.wsba.org/connect-serve/volunteer-opportunities/mmp/mmpclients.
[214] WASH. ADMIN. OFF. OF THE CTS., JUDICIAL SERVS. DIV., AN ANALYSIS OF PRO SE LITIGANTS IN WASHINGTON STATE 1995-2000 (2001), http://www.courts.wa.gov/wsccr/docs/Final%20Report_Pro_Se_1_101.pdf.
[215] 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 n.1 (2013).

The bench and bar have sought to address this lack of counsel with a number of initiatives, including statewide plain language divorce forms,[216] courthouse facilitators who assist self-represented parties in family law cases,[217] and volunteer lawyer programs.[218] Nonetheless, the unavailability of legal counsel for a large percentage of domestic relations litigants in Washington remains a problem that was highlighted in 1989 by the Subcommittee.

It also should be noted that since 1989, there were at least two significant initiatives aimed at increasing access to legal services in family law cases in Washington that were unsuccessful.

First, the Washington Supreme Court considered a case in 2007 that the Court described as presenting the question of "whether an indigent parent has a constitutional right, primarily under the Washington State Constitution, to appointment of counsel at public expense in a dissolution proceeding."[219] The case reached the Court at a time when the American Bar Association had "spearheaded a national movement to consider whether, in certain noncriminal cases, the issues for litigants are so fundamental or critical to their lives and well-being that governments ought to be providing those litigants with lawyers as a matter of right when faced with adversarial judicial proceedings."[220] However, by a seven to two margin, the Court held that indigent parents do not have a constitutional right to appointment of counsel in such cases.[221]

Second, in 2012 Washington became the first state in the country to approve a Limited License Legal Technician (LLLT) rule, which authorized non-lawyers who meet certain educational requirements to advise and assist clients in approved practice areas of law.[222] Under this rule, LLLTs were authorized to provide assistance to clients in certain domestic relations cases.[223]

[216] *Id.*
[217] *Courthouse Facilitators*, WASH. CTS. (2020), https://www.courts.wa.gov/committee/?fa=committee.home&committee_id=108.
[218] *Pro Bono Council*, THE ALL. FOR EQUAL JUST. (2021), http://allianceforequaljustice.org/for-the-alliance/statewide-pro-bono-council/.
[219] *King v. King*, 162 Wn.2d 378, 381, 174 P.3d 659 (2007).
[220] Deborah Perluss, *Civil Right to Counsel:* In re Marriage of King *and the Continuing Journey*, 9 SEATTLE J. SOC. JUSTICE 15, 17 (2010).
[221] Id.
[222] Anna L. Endter, *Washington Limited License Legal Technician (LLLT) Research Guide*, UNIV. OF WASH. SCH. OF L. (Aug. 20, 2015), https://lib.law.uw.edu/ref/wa-lllt.html.
[223] WASH. CTS., WASHINGTON ADMISSION TO PRACTICE RULE 28, REGULATION 2(B), http://www.courts.wa.gov/court_rules/pdf/APR/GA_APR_28_00_00.pdf.

However, in June 2020 the Washington Supreme Court announced that it was sunsetting the program. In a letter announcing the decision, Chief Justice Debra Stephens noted that while the program "was an innovative attempt to increase access to legal services," a majority of the Court "determined that the LLLT program is not an effective way to meet these needs."[224]

In 2015, a research project funded by a grant from the U.S. Department of Justice reported on the results of a study in King County, Washington, that sought to "test the hypothesis that legal representation of the IPV [intimate partner violence] victim in child custody decisions leads to greater legal protections being awarded in child custody and visitation decisions compared to similar cases of unrepresented IPV victims."[225] The study examined dissolution cases filed in King County from 2000 – 2010 where there was a "history of police- or court-documented intimate partner violence."[226] The study concluded that "[a]ttorney representation, particularly by legal aid attorneys with expertise in IPV cases, resulted in greater protections being awarded to IPV victims and their children" and that "[i]mproved access of IPV victims to legal representation, particularly by attorneys with expertise in IPV, is indicated."[227]

Researchers have also noted that providing legal representation to parents in family law cases is important to help to prevent parents from later facing possible incarceration for failure to pay child support. Noting that states generally only provide a right to counsel in family law cases when a parent faces incarceration for non-payment of child support, Professor Tonya Brito has observed that "[t]o provide counsel only at this eleventh hour is, to put it mildly, too little too late."[228] Professor Brito indicates that her "research examining the experiences of noncustodial parents in child support proceedings reveals that attorney representation earlier in the case and covering a broader scope of legal issues would substantially change cases outcomes" and that "[m]ost noncustodial parents in these cases are very low-income black fathers."[229] She notes:

[224] Letter from Chief Justice Debra L. Stephens to Stephen R. Crossland et al. (June 5, 2020), https://www.abajournal.com/files/Stephens_LLLT_letter.pdf.
[225] Mary A. Kernic, Final Report of the "Impact of Legal Representation on Child Custody Decisions Among Families with a History of Intimate Family Violence Study" ii (2015), https://www.ojp.gov/pdffiles1/nij/grants/248886.pdf.
[226] Id.
[227] *Id.* at iii.
[228] Tonya L. Brito, *The Right to Civil Counsel*, 148 DAEDALUS 56, 59 (2019).
[229] Id.

> [L]awyers-by-right are not made available when a child support order is established. They are also not provided when a parent must file a motion to modify an existing order to reflect a significant change in circumstances, such as losing one's job and income. In both instances, the timing and the scope of representation matter, whether the attorney provides full representation or is limited to performing only specific tasks. Having access to a full-service attorney earlier would ensure that initial orders are for appropriate amounts and are modified when circumstances warrant. Without counsel at these junctures and for broader purposes, pro se defendants are likely to fall behind in their child support payments and face mounting debts that result in contempt proceedings with a risk of civil incarceration and other harsh penalties.[230]

Professor Brito concludes that providing a right to counsel in family cases only when a parent faces a contempt action that may result in incarceration is "woefully insufficient."[231]

IV. Gender Bias in Trial Courts is Difficult to Address Through the Appellate Process

From a review of case law since 1989, it appears that there has not been a single case in which a Washington appellate court has found that a trial court exhibited bias based on gender against a party in a family law case, although there is one case in which an appellant successfully proved bias based on sexual orientation.[232] Indeed, a review of case law has identified only a few appellate cases in Washington since 1989 where a party explicitly raised concerns of gender bias

[230] Id.
[231] *Id.* at 61.
[232] The review of case law was conducted using several different searches of caselaw in Westlaw, focusing in particular on identifying cases that included: (1) citations to the primary family law statutes in Title 26 of the Revised Code of Washington; (2) the terms "bias" or "prejudice"; and (3) and either the term "gender" or "sex." It is possible that these searches did not identify every appellate case in Washington since 1989 in which a party alleged gender bias by the trial court.

by the trial court in a family law case; in each of such cases that have been identified, the concerns of gender bias were raised by the father.[233]

However, the lack of appellate cases finding gender bias in family law cases should not be construed to mean that family courts in Washington are free of gender bias. Instead, it suggests that it is rare for courts to express gender bias explicitly. It should also be noted that family law appeals are difficult to pursue, particularly for low or moderate-income parties, meaning that the vast majority of family law decisions by Washington trial courts are never reviewed on appeal.

A. Appellate cases involving LGBTQ+ parents

In the case of *In re Marriage of Black*,[234] the Washington Supreme Court found that bias against a lesbian parent when she sought a divorce from her different-sex spouse had "permeated the proceedings," pointing to a number of statements by the trial court and by the court-appointed guardian ad litem (GAL). Although the Court indicated that bias was based on the mother's sexual orientation, courts across the country have increasingly recognized that discrimination based on sexual orientation (as well as discrimination based on transgender status) is a form of discrimination based on sex. Indeed, the U.S. Supreme Court recently noted that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[235] The Court made this statement in the context of holding

[233] *See In re Marriage of Langford*, No. 35702-3-III, 2018 WL 6333858 (Wash. Ct. App. Dec. 4, 2018) (unpublished) (rejecting father's claim that a commissioner's decision "was the result of implicit gender bias"); *In re Parenting of A.C.*, No. 73897-6-I, 2016 WL 4184365 (Wash. Ct. App. Aug. 8, 2016) (unpublished) (rejecting father's suggestion that trial court "was influenced by gender bias"); *In re Marriage of Webster*, No. 63834-3-I, 2009 WL 4761600 (Wash. Ct. App. Dec. 14, 2009) (unpublished) (rejecting father's claim of gender bias by a court-appointed investigator and general claims of bias by the trial court judge); *In re Marriage of Fisher*, Nos. 36828-5-II, 36875-7-II, 37505-2-II, 2009 WL 2469282 (Wash. Ct. App. Aug. 13, 2009) (unpublished) (refusing to consider father's belief the trial court was "biased against him because of his gender" because it was unsupported by citation to authority); *In re Marriage of Presley*, No. 46129-0-I, 2001 WL 537883 (Wash. Ct. App. May 21, 2001) (unpublished) (rejecting father's claim that trial court "acted with prejudice and abused its discretion based upon gender" and alleging he was the victim of "a well orchestrated effort on the part of the court, government, radical feminists [and] society at large, to 'skew' recommendations and resulting court orders" in favor of mothers).

[234] 188 Wn.2d 114, 392 P.3d 1041 (2017).

[235] *Bostock v. Clayton County, Georgia*, __ U.S. __, 140 S.Ct.1731, 1741, 207 L. Ed. 2d 218 (2020). The U.S. Supreme Court's holding in the *Bostock* case stands in contrast to the Washington Supreme Court's now-abrogated decision in *Andersen v. King County*, 158 Wn.2d 1, 48, 138 P.3d 963 (2006), in which the Court held by a five to four margin that Washington's law prohibiting same-sex couples from marrying "does not discriminate on account of sex."

that discrimination based on sexual orientation or transgender status constitutes discrimination based on sex under federal Title VII employment law.

In the 2007 case of *Magnuson v. Magnuson*,[236] the Court of Appeals considered a case in which a parent alleged that the trial court had improperly taken her transgender status into account when establishing a parenting plan that made her former spouse the children's primary residential parent, contrary to the recommendations of the GAL assigned to the case. In a 2-1 decision, a majority of the Court held that trial court had not abused its discretion in establishing the parenting plan, finding that the trial court's focus in determining residential placement had been the needs of each child rather than the parent's transgender status.[237] The dissent disagreed, expressing its view that the residential time decision was not supported by substantial evidence and that the trial court had impermissibly based the residential time decision on the parent's transgender status.[238]

B. Cases involving misapplication of laws protecting domestic violence survivors

There have also been cases in Washington since 1989 in which appellate courts have found that trial courts have misapplied the law in dissolution cases to the detriment of domestic violence survivors. Because domestic violence survivors are disproportionately women,[239] such failures to follow the law also disproportionately impact women. Examples of such cases include:

- *In re Parenting & Support of L.H. & C.H.*,[240] in which the Court of Appeals reversed a trial court's failure to enter a finding required under RCW 26.09.191 based on the father's history of domestic violence.[241] The trial court stated that it had declined to make such a

[236] 141 Wn. App. 347, 170 P.3d 65 (2007).
[237] *Id.* at 352.
[238] *Id.* at 352–55.
[239] *See, e.g.*, Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER SOC. POL'Y & L. 229, 242–57 (2009) (setting forth statistical evidence showing that women are disproportionately victims of domestic violence).
[240] 198 Wn. App. 190, 391 P.3d 490 (2016).
[241] When a court finds that a parent has a history of domestic violence, RCW 26.09.191(1) prohibits the court from ordering mutual decision-making in a parenting plan and requires that any disputes over a parenting plan must be resolved by the court, rather than through alternative means like mediation. In addition, RCW 26.09.191(2)(a)(iii) provides that if the court finds a history of domestic violence by a parent, the court must limit that parent's residential time with the child, unless the court makes express findings pursuant to RCW 26.09.191(2)(n) that the

finding because it would "hate to have this record follow him around like some ghost" and that such findings would "haunt him, and [it didn't] think that's necessary."[242]

- *In re Marriage of Muhammad*,[243] in which the Supreme Court reversed a trial court's decision to unequally divide retirement benefits in favor of a husband because the wife had obtained a domestic violence protection order against him, which resulted in the husband losing his job in law enforcement. The Court held that the record showed "a clear inference that the [trial] court improperly considered [the wife's] decision to obtain a protective order against [the husband] as 'marital misconduct'" by the wife, in violation of RCW 26.09.080 which explicitly prohibits the consideration of "martial misconduct" in distributing property.[244] In reaching this conclusion, the Court noted that "[m]ost striking of all are the written findings of fact, which read like a logical syllogism linking [the husband's] unemployment and purported unemployability to [the wife's] decision to obtain the protective order."[245]

C. Family law appeals are difficult to pursue

Parties in family law cases have a right to appeal final decisions to the Washington Court of Appeals.[246] However, there are considerable barriers for parties who may seek to exercise their right to appeal, particularly for parties without the financial resources to pay for legal representation and the costs of pursuing an appeal (e.g., filing fees and transcription of trial court proceedings).

Parties may seek to represent themselves on appeal if they cannot afford legal counsel or obtain free representation by civil legal aid or pro bono counsel; however, "[t]here is no question that pro se appeals are generally less successful than the average."[247] Even if a party is able to pursue

child would not be harmed by the parent's contact with the child and that the probability that such conduct with recur is so remote that it would not be in the child's best interests to apply the limitation.

[242] *Id.* at 195.

[243] 153 Wn.2d 795, 108 P.3d 779 (2005).

[244] *Id.* at 806.

[245] Id.

[246] RAP 2.2.

[247] Colter L. Paulson, Will a Judge Read My Brief? Prejudice to Pro Se Litigants From the Staff Attorney Track, 76 OHIO ST. L.J. FURTHERMORE 103, 106 (2015).

an appeal, the length of time that it takes for appeals to be heard and decided poses additional barriers to obtaining effective relief through the appellate process. In addition, commentators have noted that few family law appeals are ultimately successful, particularly in light of the trial court's considerable discretion in such cases.[248] The Washington Supreme Court has emphasized that "trial court decisions will seldom be changed upon appeal," noting that "[s]uch decisions are difficult at best" and that "[t]he emotional and financial interests affected by such decisions are best served by finality."[249]

As one commentator has noted, the "costs, delays, and further uncertainty involved in bringing cases up for appeal means that as a practical matter, few family law matters will reach the appellate courts for adjudication and establishment of judicial precedent."[250] As a result, even parties who have meritorious claims of gender bias in family law proceedings may not be able to pursue appeals of the trial court's decisions. The challenges of seeking appellate review and the amount of discretion placed in trial courts in family law cases make it particularly important that: (1) parties have effective legal representation at the trial court level in contested family law cases; and (2) that trial courts are well-trained on domestic violence and on how implicit bias may impact their decision-making.

V. Implicit Bias in Family Law Cases is an Underexamined Subject of Academic Research

There is not a large body of research concerning implicit or explicit gender bias in family law cases. As Professor Jennifer Bennett Shinall of Vanderbilt University School of Law recently noted, "[r]esearch on implicit and explicit bias has abounded in the legal scholarship of the past two decades, yet remains noticeably absent from the family law literature."[251] Similarly, Professor Solangel Maldonado of Seton Hall Law School has noted that "[w]hile few scholars have examined

[248] See generally Ronald W. Nelson, Approaching the Appeal: If I Lose, I'll Just Appeal, 36 FAM. ADVOC. 10 (2014).
[249] *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985).
[250] Adrienne Hunter Jules & Fernanda G. Nicola, *The Contractualization of Family Law in the United States*, 62 AM. J. COMPAR. L. 151, 166 (2014).
[251] Jennifer Bennett Shinall, Settling in the Shadow of Sex: Gender Bias in Marital Asset Division, 40 CARDOZO L. REV. 1857, 1862 (2019).

the role of implicit bias in family law decisions, unconscious biases may influence a judge's or custody evaluator's perception of a parent's behavior as defensive, passive, or impulsive based on racial or cultural stereotypes."[252]

The lack of research may be due to the difficulties in measuring bias; as Professor Shinall noted, "[t]esting for the presence of bias (whether explicit or implicit) in legal decision-making is difficult, if not impossible, using data collected from reported case outcomes. Although disparities in case outcomes experienced by historically disadvantaged litigants might be attributable to bias, they might also be attributable to other unobservable differences between disadvantaged and nondisadvantaged litigants, such as disparities in the quality of representation."[253] Furthermore, "[f]rom an empirical standpoint, the difficulty in resolving this debate stems from an inability to source reliable and representative data on divorces. Divorce cases are generally subject to simple, non-extensive filing requirements, particularly if they settle; the divorce cases in which more extensive filings and judicial opinions are available are highly contested, and arguably less representative, divorce cases."[254]

Seeking to address this lack of data in the context of gender bias in property distributions following divorce, Professor Shinall recruited 3,022 subjects throughout the country to divide assets between divorcing male and female spouses.[255] The study found that the subjects "consistently favored the male spouse over the similarly situated female spouse," results that were "consistent with gender bias."[256] Professor Shinall summarized the study and the results as follows:

> Subjects were randomly assigned to view one of several highly similar scenarios where a couple is divorcing after a long-term marriage, and asked to divide marital assets between them. In half of the scenarios, the male spouse was the sole breadwinner and the female spouse was the principal caretaker, consistent with

[252] Solangel Maldonado, Bias in the Family: Race, Ethnicity, & Culture in Custody Disputes, 55 FAM. CT. REV. 213, 214 (2017).
[253] Shinall, *supra* note 251, at 1879.
[254] *Id.* at 1869.
[255] *Id.* at 1885.
[256] *Id.* at 1858.

> traditional gender roles. But in the other half of the scenarios, the situation was reversed, with the female as the sole breadwinner and the male as the primary caretaker. Comparing results across subjects reveals that subjects consistently favored the male spouse over the similarly situated female spouse. On average, both male and female subjects assigned a greater share of the marital assets to the male breadwinner than to the female breadwinner. Male and female subjects also assigned a greater share of the marital assets to the male caretaker than to the female caretaker. The results are consistent with gender bias, as subjects penalize the female spouse in both the stereotypic (male-breadwinner/female-caretaker) and the nonstereotypic (female-breadwinner/male-caretaker) scenarios.[257]

Professor Shinall also noted that while "[t]he bias exhibited by male subjects was more than three times as large as the bias exhibited by female subjects," female subjects also penalized the female spouse "even though, in theory, they should have been empathetic towards the female spouse's position."[258]

Based on these results, Professor Shinall concluded not only that "[j]udges and mediators may be unconsciously biased towards awarding a greater share of the property to male spouses, regardless of the spouses' breadwinning status," but also that "lawyers and litigants may not demand as great of a share for female spouses as they demand for male spouses due to gender bias."[259] She noted that "[b]ecause litigants are not, for the most part, repeat players in the divorce process, the most promising interventions to counteract gender bias should be directed towards judges, mediators, and lawyers."[260]

In the context of gender bias in parenting plan decisions (also commonly referred to in studies as "child custody" decisions), there is a larger body of research, particularly in cases where there

[257] Id.
[258] *Id.* at 1902.
[259] Id.
[260] *Id.*

are allegations of domestic violence. As one commentator noted in summarizing research in the context of custody decisions in cases involving domestic violence:

> There is fairly substantial evidence that custody outcomes do not fall along rational lines and may well be distorted by gender bias. Despite a general recognition of the harm domestic violence has on children, as well as its general prevalence in family court cases, several studies show that individuals with a documented history of violence against their partners are at least as likely, if not more likely, to be granted custody or generous visitation rights than those without such a history.[261]

This commentator noted that researchers have several hypotheses for this outcome, including: (1) judicial officers "may favor stable, higher-earning parents, and victims of domestic violence often appear unstable"; (2) some judicial officers "remain unconvinced that violence by one parent against another parent is significant when deciding custody if the child was not directly abused"; and (3) "[p]reconceptions that fathers are typically less engaged parents may cause judges to see the effort of fighting for custody as an unexpectedly welcome sign of engagement by a father, instead of a possible continuation of a history of exercising control."[262]

A recent study, funded by a grant by the U.S. Department of Justice, examined child custody outcomes in cases involving allegations of parental alienation or abuse, based on a review of over 2,000 published court opinions over 15 years.[263] The authors indicated that the study was "aimed to gather data on how family courts across the United States are deciding child custody cases when parents accuse each other of abuse and/or parental alienation."[264] The authors noted that when a parent alleges that the other parent has engaged in domestic violence or child abuse, the accused parent in response often alleges that the accusing parent is engaged in "parental alienation" (i.e., that the claims of dangerousness or harm are not true, but are due to the

[261] Amy Barasch, Gender Bias Analysis Version 2.0: Shifting the Focus to Outcomes and Legitimacy, 36 N.Y.U. REV. L. & SOC. CHANGE 529, 548 (2012).
[262] *Id.* at 549.
[263] Joan S. Meier et al*., Child Custody Outcomes in Cases Involving Parental Alienation & Abuse Allegations*, GWU L. SCH., Public Law Research Paper No. 2019-56 (2019), https://ssrn.com/abstracte=3448062.
[264] *Id.* at 4.

accusing parent's anger or hostility, or pathology).[265] The authors summarized the results of the study as follows:

> Analysis of over 2000 court opinions confirms that courts are skeptical of mothers' claims of abuse by fathers; this skepticism is greatest when mothers claim child abuse. The findings also confirm that fathers' cross-claims of parental alienation increase (virtually doubling) courts' rejection of these claims, and mothers' losses of custody to the father accused of abuse. In comparing court responses when fathers accuse mothers of abuse, a significant gender difference is identified. Finally, the findings indicate that where Guardians Ad Litem or custody evaluators are appointed, outcomes show an intensification of courts' skepticism toward mothers' (but not fathers') claims, and custody removals from mothers (but not fathers).[266]

In addition, the report found that in 14% of cases where a court credited a mother's claim of abuse by the father, the mother nonetheless lost custody of the child to the father.[267]

It is also important to recognize that implicit bias based on racial and cultural stereotypes may impact judicial decision-making in family law cases. The Washington Supreme Court has also noted the importance of taking cultural factors into account in family law cases and the substantial potential for biases to impact decision-making. The Court has held that "[w]ithout a doubt, a trial court must consider cultural factors when imposing a parenting plan" and has emphasized that trial courts must identify specific harms to a child before ordering parenting plan restrictions to prevent leaving "families vulnerable to a trial court's biases."[268]

In the context of an individual's immigration status, scholars have observed biased outcomes for child custody cases, especially when one or more of the parents are undocumented, detained, or in deportation proceedings. Soraya Fata and other scholars note that immigration status is often

[265] *Id.* at 4.
[266] *Id*. at 3.
[267] *Id.* at 12.
[268] *In re Marriage of Chandola*, 180 Wn.2d 632, 655, 327 P.3d 644 (2014).

used to assert that the parent is not capable of adequately providing for their child.[269] Further, when immigration status is used and disclosed in a hearing, it often results in bias in the custody decision.[270] The National Immigrant Women's Advocacy Project highlights this as well in comments submitted to the courts supporting ER 413, an evidentiary rule to limit the introduction of immigration evidence into court for civil and criminal cases. The authors note that abusers often "raise lack of legal immigration status in a custody case in order to win custody of the children despite the perpetrator's history of abuse."[271]

Children of immigrants suffer tremendously in these processes. Of the 464,374 children under the age of 18 with one or more foreign-born parents in the state of Washington, 86% are U.S. citizens.[272] In custody disputes, custody is usually granted to the parent with a more secure lawful status.[273] Professor David Thronson and Judge Frank Sullivan cite an example where the courts did not allow the parent who was in deportation proceedings to attend her child's custody hearing despite being geographically nearby, noting: "The barriers to parent participation in such instances are often created by immigration detention policies and practices. That said, family courts enable immigration actors by failing to demand means to communicate with and ensure the participation of detained parents."[274]

In a recent essay examining caselaw from across the country involving child custody decisions, Professor Solangel Maldonado concluded:

> The facts in custody cases are often disputed and the best interests standard grants judges wide discretion so these decisions may be particularly susceptible to judges' feelings about the litigants. As illustrated by the cases discussed above,

[269] Soraya Fata et al., Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings, 47 FAMILY L. Q. 191, 193–96 (2013).
[270] *See, e.g.*, *In re Welfare of Churape*, 719 P.2d 127 (Wash. Ct. App. 1986). For a discussion of the case, see Fata et al., *supra* note 269, at 198.
[271] Letter from Leslye E. Orloff & Tarja Cajudo, Nat'l Immigrant Women's Advoc. Project, Am. U. Wash. Coll. of L., to Susan L. Carlson, Clerk, Wash. State Sup. Ct., (Sept. 15, 2017), https://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Leslye%20Orloff.pdf
[272] *Immigrant Population by State, 1990-Present*, MIGRATION POL'Y INST. (2017), https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-state-1990-present.
[273] David B. Thronson & Frank P. Sullivan, *Family Courts and Immigration Status*, 63 JUV. & FAM. CT. J. 1, 9–11 (2012).
[274] *Id.* at 17.

> custody evaluators, guardians ad litem, and judges make assumptions about parents based on race, ethnicity, and culture. Implicit biases may influence perception of a parent's behavior and attitude based on stereotypes about the parent's race, ethnicity, or culture. Thus, legal actors must take steps to minimize the influence of implicit biases in their assessments and decisions.[275]

These studies suggest that implicit bias in family law cases, while an underexamined topic of research, remains a serious concern.

VI. Efforts to Address Gender Bias in Family Law Cases Must Include Non-Judicial Officers Who Play a Role in Family Law Cases

Parties in family law cases may be required to engage with a variety of different third-party professionals in addition to judges, court commissioners, and lawyers.[276] Efforts to address gender bias in family law cases must recognize the important role that these professionals can play, particularly court-appointed experts who make recommendations to the court about parenting plans. Commentators have noted that "[c]ourts follow an expert's custody recommendation up to 90% of the time," giving these experts considerable influence in family law proceedings.[277]

A. Family Law Facilitators

In 1993, the Washington State Legislature authorized counties to create "courthouse facilitator programs" to "provide basic services to pro se litigants in family law cases."[278] In 2002, the Washington Supreme Court adopted General Rule 27 (GR 27), which provides that the "basic services" courthouse facilitators may offer include, but are not limited to, referral to legal and social services resources; assistance with calculating child support; assistance in selecting forms and standardized instructions for family law matters, and assistance completing those forms;

[275] Maldonado*, supra* note 252, at 227.
[276] Wash. State Admin. Off. of the Cts., A Guide to Washington State Courts, 12th Ed. 12, 15, 21-22 (2011).
[277] Stephen J. Yanni, Experts as Final Arbiters: State Law & Problematic Expert Testimony on Domestic Violence in Child Custody Cases, 116 COLUM. L. REV. 533, 550 (2016).
[278] RCW 26.12.240.

processing requests for interpreters; explaining legal terms and court procedures; reviewing family law forms for completeness; assistance preparing court orders under the direction of the court; attending hearings to assist the Court with *pro se* matters; and preparing *pro se* assistance packets under the direction of the AOC.[279]

Counties may impose user fees to parties who use the facilitator program.[280] Counties may also require pro se parties in family law cases to use the facilitator program for certain tasks; for example, King County requires pro se litigants in uncontested family law cases to have a Courthouse Facilitator review their final orders before the orders are presented to the court.[281] See "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more information on how this can pose financial barriers to accessing the courts that have disparate impacts by race, ethnicity, and gender.

The Courthouse Facilitator program was subject to a comprehensive review in 2007 by Washington State Center for Court Research (WSCCR).[282] The report notes that as of 2007, Courthouse Facilitator programs were operating in 35 of 39 Washington State counties. As part of their review, the authors gathered demographic data on the participants making use of the program and determined that the Facilitator programs' clients are overwhelmingly women (69% of all parties served).[283] It was also popular among users: 82% of respondents "strongly agreed" that their meeting with the facilitator was helpful, while 88% strongly agreed that the facilitator treated them with respect.[284] It should be noted that when this study was conducted, same-sex couples had considerably fewer legal rights in family law cases than today. In WSCCR's demographic survey of users of the facilitator program, the authors did not inquire as to sexual orientation or gender identity of participants.[285]

[279] GR 27(4).
[280] RCW 26.12.240.
[281] *See, e.g.*, King County Local Family Law Rule 5(2)(C).
[282] Thomas George & Wei Wang, Washington Courthouse Facilitator Programs for Self-Represented Litigants in Family Law Cases (2008), http://www.courts.wa.gov/subsite/wsccr/docs/Courthouse%20Facilitator%20Program.pdf.
[283] *Id.* at 26.
[284] Id.
[285] *Id.* at 27 (listing demographic information collected).

Pursuant to GR 27, the AOC supports a "Courthouse Facilitator Advisory Committee."[286] The Advisory Committee exists to "establish minimum qualifications and administer a curriculum of initial and ongoing training requirements" for family law courthouse facilitators.[287] This Committee has a very small public profile and it is difficult for members of the public to monitor the current status of its work from readily available public sources; for example, there does not appear to be a list available online of the Advisory Committee members, nor does it appear that the "curriculum of initial and ongoing training requirements" for facilitators is posted online.[288] As a result, it is not possible to determine from sources available online whether the training curriculum for Courthouse Facilitators includes training on gender bias or other forms of bias.

In 2015, the Washington State Access to Justice Board and the State Office of Civil Legal Aid submitted a proposed rule change to General Rule 27 that would have significantly expanded the oversight and certification process for courthouse facilitators.[289] The proposed rule changes would have expanded training and support for courthouse facilitator programs.[290] However, the rule was not considered or published for comment in light of the lack of available resources to implement the proposal.[291]

B. Guardians ad Litem

Washington law authorizes courts to appoint guardians ad litems (GALs) in family law cases to investigate the best interests of children whose care and support is at issue in the matter.[292] GALs in family law cases are sometimes referred to as "Title 26" GALs (the title of the Washington code that includes domestic relations law) to distinguish them from GALs who may serve in other types of cases, such as dependencies or guardianships. Family law GALs report factual information from

[286] GR 27(b).
[287] Id.
[288] A Google search of the term "Courthouse Facilitator Advisory Committee," the term used in GR 27, yielded only six results, none of which listed the members of the Advisory Committee or any training materials for facilitators.
[289] Jim Bamberger, *Email to BJA re AOC Courthouse Facilitator Funding Decision Package*, at 44 (June 9, 2016), http://www.courts.wa.gov/content/publicUpload/bja_meetings/BJA%202016%2006%2017%20MTG%20MTP.pdf (contained within Board for Judicial Administration Meeting Packet).
[290] Id.
[291] *Id.* (noting "in light of the lack of available resources, and without any comment on either the substance of the rule itself or its merits, the Court's Rules Committee has declined to consider or publish the proposed rule for comment").
[292] RCW 26.12.175(1)(b).

their investigations to the court and may make recommendations to the court about issues relating to the child's interests; this may include recommendations about parenting plans and residential schedules.[293]

Family law GALs are subject to statutes and court rules that regulate their functions.[294] A statute establishes that the courts are to determine their rates of compensation, which are generally paid by one or both parents unless both parents are indigent.[295] There are statutory training and professional qualification requirements uniformly imposed across the state.[296]

As noted earlier, the Washington Supreme Court recognized in the case of *In re Marriage of Black* that bias on the part of a family law GAL (in that case, bias based on a parent's sexual orientation and religion) can permeate the entire proceeding and require a new trial.[297] In *Black*, the Court noted that GALs are "unlike a typical witness," pointing to the fact that they are "appointed by the court, endowed with statutory powers, and required to engage in fact-finding and produce a final report on the court's behalf," act as "an arm of the court," and are "accorded quasi-judicial status."[298]

GALs have access to a curriculum designed by AOC, as required by law.[299] The statute requires this curriculum to include "specialty sections on child development, child sexual abuse, child physical abuse, child neglect, domestic violence, clinical and forensic investigative and interviewing techniques, family reconciliation and mediation services, and relevant statutory and legal requirements."[300] The statute does not require that GALs receive training on gender bias or any other form of bias.

The AOC's curriculum for GALs was originally developed and released in 1997, and was then ordered amended in 2007 when the Washington State Legislature added "domestic violence" to

[293] *Id*.; *see also* RCW 26.09.220.
[294] RCW 26.12.175–187; *Washington State Superior Court Guardian ad Litem Rules*, WASH. CTS., https://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=sup&set=GALR.
[295] RCW 26.12.183.
[296] RCW 2.56.030(15).
[297] *In re Marriage of Black*, 188 Wn.2d 114, 392 P.3d 1041 (2017).
[298] *Id.* at 134.
[299] RCW 2.56.030(15).
[300] *Id.*

the list of specialty sections the statute requires be included.[301] The 312-page guidebook for Title 26 GALs currently on the AOC website dates from 2008.[302] The guidebook includes a chapter on Cultural Competency, which includes a two-page discussion about "avoiding gender, same-sex, and transgender biases."[303] It should be noted that since the guidebook was lasted updated in 2008, Washington law has changed to provide greater legal recognition for same-sex couples and parents. Judicial officers who have been consulted for this report indicate that a new GAL training curriculum has been developed but not yet fully implemented; however, there is currently no information available to the public about the new training curriculum online.

In addition to the basic standards established by statute and the minimum training requirements included in the AOC curriculum, each individual county has its own GAL registry that may include additional qualifications. Several counties, including King, Pierce, Snohomish, Spokane, Thurston, Wahkiakum, and Yakima have dedicated GAL program administrators. Most other counties throughout the state have delegated the task of administering their GAL registry to the administrator for the Superior Court, or in some cases to an office specifically engaged in Juvenile and Family Court, as in Walla Walla County. See Appendix II to this chapter for a survey of Superior Court Alternative Dispute Resolution (ADR), CASA and Family Law Rulemaking by County. Judicial officers who were consulted for this report express concern that GAL programs and training vary widely by county, resulting in a lack of uniformity and consistency in services that families receive.

C. Court Appointed Special Advocates

Washington law also authorizes counties to establish a "court appointed special advocate" (CASA) program to provide services in family law cases.[304] Family Law CASAs are similar to Title 26 GALs and work in family court on cases involving the safety and best interests of children

[301] *Guardian ad Litem (GAL) Education & Training*, WASH. CTS., https://www.courts.wa.gov/committee/?fa=committee.display&item_id=317&committee_id=105.
[302] Wash. State Admin. Off. of the Cts., Washington State Title 26 Family Guardian ad Litem Guidebook (2008), http://www.courts.wa.gov/content/manuals/domviol/appendixe.pdf.
[303] *Id.* at 289–290 (chapter 12, pp. 7–8).
[304] RCW 26.12.175(2)(b). The nation's first CASA program was established in Seattle by Judge David W. Soukup in 1977. *Our History*, NAT'L CASA/GAL ASS'N FOR CHILDREN (2021), https://nationalcasagal.org/about-us/history/.

involved in family law cases.[305] Family law CASAs serve as volunteers and do not charge a fee for their services.[306] CASAs are also not required by statute to complete the same training requirements as GALs, but "may comply with alternative training requirements approved by the administrative office of the courts that meet or exceed the statewide requirements" for GALs.[307]

D. Parenting or mental health evaluators

Washington law also permits courts in family law cases to "appoint an investigator in addition to a guardian ad litem or court-appointed special advocate . . . to assist the court and make recommendations."[308] Washington law provides that "investigators" are third-party professionals "ordered or appointed by the court to provide an opinion, assessment, or evaluation regarding the creation or modification of a parenting plan."[309] These investigators are often referred to as "parenting evaluators," although that term is not used in the statutes. In terms of training requirements, Washington law provides that "[i]nvestigators who are not supervised by a guardian ad litem or by a court-appointed special advocate program must comply with the training requirements applicable to guardians ad litem or court-appointed special advocates as provided under this chapter and court rule."[310] In cases where a parenting evaluator is a psychologist, the Washington State Board of Health has adopted a rules that provides that the psychologist "shall not discriminate based on age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, socioeconomic status, or any basis prohibited by law" in performing the parenting evaluation.[311]

Parenting evaluators may be asked by the court to investigate and file a report on a wide variety of issues, including mental health issues for one or both parents. Courts may also order a party in a family law case to undergo a mental health evaluation without appointing a parenting evaluator. Domestic violence advocates have noted a number of concerns with mental health evaluations in family law cases involving survivors of domestic violence, including the training of

[305] RCW 26.12.175; RCW 26.09.220(1)(a).
[306] *See* RCW 26.12.183 (authorizing fees for GALs and "investigators" appointed by the court, but not for CASAs).
[307] RCW 26.12.177(1).
[308] RCW 26.12.188(1); *see also* RCW 26.12.050(1)(b).
[309] RCW 26.12.188(2).
[310] RCW 26.12.188(3).
[311] WAC 246-924-445.

evaluators on domestic violence and its connections with trauma, substance abuse, and mental health.[312] Other concerns include evaluators failing to take into account the domestic violence or the other parent's abusive and coercive behaviors, use of psychological tests that were not designed to evaluate parenting or to take into consideration domestic violence, and failure of evaluations to accurately reflect survivor's parenting abilities.[313]

E. Family court services programs

Washington law also authorizes counties to establish family court services programs.[314] The authorizing statute provides that such programs "may hire professional employees to provide the investigation, evaluation and reporting, and mediation services, or the county may contract for these services, or both."[315] The statute does not specifically establish minimum training requirements for professionals employed by county family court services programs.

F. Mediators

Washington State law allows, but does not require, mediation in family law cases.[316] Mediation is a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.[317] Washington State law also provides that "[m]ediation is generally inappropriate in cases involving domestic violence and child abuse," although it may be permitted in such cases if requested by the victim and the court finds that mediation is appropriate under the circumstances and the victim is permitted to have a supporting person present during mediation proceedings.[318] Most counties in Washington State have adopted court rules that require mediation between the parties in family law cases – although, as noted above, mediation should not be required in cases involving allegations of domestic violence or child abuse.[319]

[312] Domestic Violence & Mental Health Collaboration Project of the Coal. Ending Gender-Based Violence, Family Law Toolkit for Survivors 3 (2016).
[313] *Id.* at 4.
[314] RCW 26.12.220.
[315] RCW 26.12.220(3).
[316] RCW 26.09.015.
[317] *Mediation*, BLACK'S LAW DICTIONARY 1176 (11th ed. 2019).
[318] RCW 26.09.016.
[319] *See* Appendix II to this chapter: Survey of Superior Court ADR and CASA Rulemaking by County, *infra* p. 75.

Washington law also authorizes courts, upon a majority vote of the Superior Court judges in the county, to require arbitration to be used to decide cases in which the "sole relief sought is the establishment, termination, or modification of maintenance or child support payments."[320] While mediation is a form of alternative dispute resolution (ADR) where the parties may seek to voluntarily resolve a dispute but are under no obligation to reach a final agreement, arbitration is a form of ADR in which a third-party – the arbitrator – decides the case, subject under Washington law to limited judicial review.[321]

Requiring mediation or other forms of ADR in family law cases raises concerns about possible gender and intersectional bias due to power imbalances between the parties. As one commentator has noted:

> Successful mediation assumes that the parties to the mediation begin from equal positions of power. Power comes in a number of forms; economic, intellectual, physical, emotional, and procedural. But many women are trapped in relationships—familial, employment, or contractual—that are characterized by power imbalances. Mediating in the face of these power imbalances undermines the premise that mediation gives the parties greater control and self-determination than traditional litigation.[322]

In domestic violence cases, for instance, "typically the batterer demands compromises that seem innocent to the mediator but speak only of power, control, and safety issues to the battered mother."[323]

It should be noted that some studies estimate that over half of all cases referred for mediation in divorce and child custody cases involve issues of domestic violence, even if they are not labeled as such cases.[324] Mediators often push parties towards compromise and joint custody agreements without considering the inability of the parties to work together in light of the domestic violence and may even tell the parent who has been a victim of domestic violence that

[320] RCW 7.06.020(2).
[321] *Davidson v. Hensen*, 85 Wn. App. 187, 192–93, 933 P.2d 1050 (1997).
[322] Leigh Goodmark, Alternative Dispute Resolution & the Potential for Gender Bias, 39 JUDGES J. 21, 22 (2000).
[323] *Id.* at 23.
[324] *Id.* at 24.

unwillingness to accept joint custody may result in awarding custody to the other parent.[325] Power imbalance created by one spouse's access to economic resources over the economically dependent spouse can have similar impact on the mediation.[326] As a result, the sensitivity and awareness of a mediator to gender bias is crucial in family law proceedings.

VII. Findings about the Existence or Non-Existence of Gender Disparities in Washington in Family Law Cases

There is little data related to the existence or non-existence of gender disparities in family law cases in Washington State. Washington's family law statutes are gender-neutral and do not facially exhibit bias based on gender. As discussed above, collecting data related to gender disparities as well as disparities based on race or ethnicity in family law cases is challenging and such disparities can be difficult to discern through reviews of case files. In addition, there do not appear to be any appellate court decisions in Washington since 1989 which explicitly held that a trial court exhibited gender bias in deciding a family law case, although there is one case in which the Washington Supreme Court recognized that a guardian ad litem in a case was biased against a parent based on her sexual orientation.

However, in the area of property distribution in divorce cases, the recent study by Vanderbilt Law Professor Jennifer Bennett Shinall illustrates continuing concerns about gender bias in dividing property when a couple separates, a decision where courts have broad discretion under Washington law. As discussed above, this study found that participants—both male and female—were more likely to favor men in distributing property in various hypothetical scenarios. And as Professor Shinall noted, this concern about gender bias applies not only to judicial officers in the relatively small number cases where property distribution is decided after a contested trial; it applies as well to lawyers, mediators, and litigants in reaching settlements of family law cases.

In the area of parenting plan decisions, the Residential Time Summary Reports that the Legislature required in legislation adopted in 2007 had the potential to provide more

[325] Id.
[326] Id.

comprehensive data about gender disparities in residential time decisions in Washington. However, as discussed above, there has been poor compliance with the requirement of parties to file RTSRs in dissolution cases, which raises questions about the reliably of such data. Nonetheless, the RTSR data collected through 2016 shows that while there has been a trend toward more equal division of residential time between men and women in cases involving different-sex parents, women in general continue to have more residential time than men in parenting plans for which RTSR data was collected.

However, it is not clear from the RTSR data why women, in general, are more likely than men to have a majority of the residential time in parenting plans entered in Washington. As noted above, the Parenting Act requires courts to consider whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child, and studies continue to indicate that mothers on average spend more time caring for children than fathers. In addition, the vast majority of parenting plans entered in Washington are the result of agreement of the parties, rather than the result of contested trials; as a result, the parties themselves appear to continue to be more likely to agree to a parenting plan where the mother has more residential time than the father. And as noted above, the RTSR reports suggest that having legal representation is a key factor in residential time decisions, with results indicating that "when either side had a lawyer, they were likely to get more residential time than when both parties were self-represented," and that "there are fewer extreme splits in residential time" when both parents have an attorney.[327]

Research indicates that men, particularly low-income Black, Indigenous, and men of color, are more likely to face possible incarceration for non-payment of child support than women. However, there is a lack of data both in Washington and nationally on how often parents are incarcerated for non-payment of child support and whether parents were afforded their right to counsel in such proceedings.

There have been appellate court decisions since 1989 which have held that trial courts improperly failed to apply Washington laws with respect to survivors of domestic violence, who are more

[327] WASH. STATE CTR. FOR CT. RSCH., *supra* note 130, at 7.

likely to be women. National studies raise similar concerns about the improper application of the law when women allege domestic violence in family law cases, as well as concerns that women's allegations of domestic violence or child abuse are less likely to be credited than a man's allegation of "parental alienation" by the mother.

In family law cases, the court may appoint third-party professionals to investigate and make recommendations to the court, particularly with respect to parenting plans. These professionals have differing levels of training and experience in domestic violence and bias based on gender, sexual orientation, or gender identity.

VIII. Recommendations

- Stakeholders should convene to consider proposing to the Washington State Legislature that it increase funding for civil legal aid in the 2022 legislative session to provide greater access to legal representation for both parties in family law cases, particularly cases involving minor children.
- Stakeholders should convene to propose to the Washington State Legislature during the 2022 legislative session that it fund a pilot project, in selected counties, that would provide appointed counsel at public expense to indigent parents in family law cases in which one or both parents are seeking restrictions on the other parent's residential time with a child. The pilot project should be tailored to the needs of the chosen county(ies), should provide metrics to evaluate the fiscal and justice impact by gender, race, ethnicity, and LGBTQ+ status, and should include a public report on the findings.
- In order to make Washington law's recognition of committed intimate relationships more accessible and understandable to people who cannot afford a lawyer, the AOC should develop forms to be used to file petitions brought under that doctrine.
- In the 2022 legislative session, the Washington State Legislature should consider repealing requirements related to the filing of "residential time summary reports" in dissolution cases involving children (RCW 26.09.231, RCW 26.18.230). In its place, the Legislature should consider adopting a requirement that an appropriate entity conduct

an annual record review based on a sample of cases to collect the data currently required by RCW 26.18.230, and to publish an annual report based on the data collected.

- In 2022, the AOC, in consultation with the Gender and Justice Commission and other relevant stakeholders, should develop and implement a plan to regularly collect data from Washington's Superior Courts to determine how often parents who owe child support are: (1) named in a bench warrant for failure to appear at a hearing for alleged failure to pay child support; (2) arrested and incarcerated, even temporarily, on that bench warrant; and (3) arrested and incarcerated for failure to pay child support. This data should include information about the gender, race, and ethnicity of the parent and whether the parent was represented by counsel before the bench warrant issued.
- In 2022, the Gender and Justice Commission should convene stakeholders to evaluate what evidence-based programs are most effective in educating judicial officers, attorneys, and third-party professionals in family law cases about domestic violence and racial or gender bias, including training on bias based on gender, sexual orientation, gender identity, and intersecting implicit biases.
- Based on the results of this evaluation, AOC should update and continue to publicize its training curricula for Title 26 Guardian ad Litem (GALs) and Courthouse Facilitators to include or expand training on domestic violence and on bias based on race, ethnicity, gender, sexual orientation, gender identity, and intersecting implicit biases. Training curricula should also be updated as needed to reflect changes in Washington law that have increased legal recognition and protections for gay and lesbian couples and parents.

Appendix I. Summary of Which 1989 Recommendations by the Subcommittee on the Consequences of Divorce Were Implemented[328]

Recommendations for Judges:

No.	Recommendation	Implemented?
1	The Superior Court Judges' Association and the Legislature should jointly study maintenance and property division to recommend changes which will achieve greater economic equality among family members following dissolution.	Yes.
2	The Superior Court Judges should consider whether maintenance guidelines or a maintenance schedule should be developed, and if so, develop one for use by the trial courts statewide.	No formal maintenance guidelines or a maintenance schedule were developed.
3	Judges should require and enforce dissolution decrees to explicitly address the following: a. Security for the child support obligation, such as maintenance of life insurance with a particular named beneficiary; b. The responsibility for maintaining medical insurance on behalf of the children, as required by statute; c. The responsibility for educational support of children beyond high school; and d. A specific provision for the allocation of employment related day-care expenses between the parents, as required by statute.	No studies have attempted to measure this recommendation.
4	Develop education programs for judges in the area of custody, to reinforce the concept of addressing each case on its merits, avoiding percentage goals and presumptions, and recognizing the diversity of the families who present themselves. Both judges and lawyers should conscientiously assess each family situation presented in the light of the factors required by the Parenting Act, without assumptions based solely on gender.	The extent to which this recommendation has been implemented is not clear.

[328] This chart is set forth for historical purposes and should not be construed as the renewal of these recommendations from 1989 by this study.

Recommendations for the Legislature:

No.	Recommendation	Implemented?
1	Enact legislation which makes the issue of a spouse's earning capacity a specific statutory factor in awarding maintenance or property division.	No
2	Consider replacing the term "rehabilitative" maintenance, with its negative connotation, with "compensatory" maintenance, reflecting the importance of evaluating the respective standard of living each party will experience after divorce in light of the contributions each has made to the marriage, whether financial or otherwise.	No. It should be noted that neither the term "rehabilitative" or "compensatory" maintenance were used in the Revised Code of Washington in 1989; as such, this recommendation appears to be geared toward use of these terms by courts. A search of Washington appellate decisions indicates that the term "rehabilitative maintenance" has been used occasionally by Washington courts since 1989.[329]
3	Reevaluate that portion of RCW 26.09.170 which automatically terminates maintenance upon the remarriage of the party receiving maintenance.	This provision of RCW 26.09.170 not been substantively changed.
4	Amend RCW 26.18.010 et seq. (or ch. 26.18 RCW) to authorize mandatory wage assignments for maintenance payments to the same extent as is currently provided for child support obligations.	Yes
5	Immediately address the need for reasonably affordable quality day-care for working parents. Consider incentives for public and private sector employer sponsored day-care facilities.	It is difficult to evaluate the extent to which this recommendation has been implemented; however, access to affordable child care remains a problem for many families.

[329] *See, e.g.*, *Moore v. Moore*, No. 70439-7-I, 2014 WL 4347591, at *7 (Wash. Ct. App. Sept. 2, 2014) (quoting trial court's use of term "rehabilitative maintenance"); *Floyd v. Floyd*, No. 20822-9-II, 1998 WL 97212, at *3 (Wash. Ct. App. Mar. 6, 1998) (use of term "rehabilitative maintenance" by Court of Appeals).

No.	Recommendation	Implemented?
6	Consider alternative dispute resolution methods for addressing marital dissolutions in appropriate cases.	Yes
7	Review the issue of divided military benefits and the *McCarty*[330] decision to determine if case law adequately addresses the problem or if additional legislative action is necessary.	Unknown whether this was reviewed.
8	The Superior Court Judges' Association and the Legislature should jointly study maintenance and property division to recommend changes which will achieve greater economic equality among family members following dissolution.	Yes[331]

Recommendations for the Washington State Bar Association:

No.	Recommendation	Implemented?
1	Develop continuing education programs on the effects of gender stereotyping in family law matters and the need for lawyers to provide adequate economic data and expert witnesses to the judges in marital dissolution cases.	Unknown[332]
2	Develop more programs for free or low cost counsel and use of expert witnesses in family law areas.	Moderate Means program established.

[330] *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981).
[331] This study does not appear to be available online. However, the records of the Gender & Justice Commission indicate that "[t]he study was conducted at the request of the Legislature at the recommendation of the Gender and Justice Task Force. The report was distributed to the state judiciary and legislators." *Gender and Justice Commission*, WASH. CTS. (2020), https://www.courts.wa.gov/committee/?fa=committee.display&item_id=144&committee_id=85.
[332] However, it should be noted that in 1998, a national report on implementation efforts by the 40-plus state task forces on gender bias in the courts stated that "[t]he Washington State Bar Association and Washington Women Lawyers were represented on the Task Force and have utilized Implementation Committee members in continuing legal education programs." NAT'L JUD. EDUC. PROGRAM, THE GENDER FAIRNESS STRATEGIES PROJECT: IMPLEMENTATION RESOURCES DIRECTORY 151 (1998), https://www.legalmomentum.org/node/213.

Recommendations for Judges, the Legislature, County Government, and Bar Associations:

No.	Recommendation	Implemented?
1	Address the barriers to court access which may significantly bar meaningful and equal participation by litigants, including: a. The lack of adequate legal assistance in family law matters; b. The high cost of attorney fees; c. The lack of alternative methods for addressing marital dissolutions; d. The lack of child care at courthouses; and e. Transportation difficulties for litigants in getting to the county courthouse.	In part. For example, funding for civil legal aid has increased since 1989, while the Moderate Means program has been established. Child care centers have been established at two Washington Superior Courts (Kent and Spokane). However, this recommendation has not been fully implemented.

Recommendations for the Gender and Justice Implementation Committee:

No.	Recommendation	Implemented?
1	Work with the Board for Trial Court Education and the Bar to develop and provide further education for judges and lawyers about the economic consequences for families following dissolution.	No
2	Develop a standard economic data form for inclusion in all dissolution decrees which the Supreme Court should require be filed by adoption of court rule.	No
3	Implement a prospective study of contested dissolution cases which will gather data on property division which could not be done in the retrospective dissolution case study.	No
4	Study and make recommendations for the court's use of contempt powers to enforce family law decrees.	No
5	Review the effects of the Parenting Act on maintenance and child support awards.	No

Appendix II. Survey of Superior Court ADR, CASA, and Family Law Rulemaking by County

Compiled by Laura Edmonston, Deputy Law Librarian (Reference),
Washington Law Library

County	CASA	ADR	Family Court	Source
Adams	Not Found	Not Found	LCR 5(B); 14; 15	https://www.clark.wa.gov/sites/default/files/dept/files/superior-court/LOCAL%20RULES%202020.pdf
Asotin/ Columbia/ Garfield	LGALR 2(d); LGALR 7(2)	LCR 16(f)	LGALR 2; 7; LCR 7(9); LCR 16(7)(g)	http://www.courts.wa.gov/court_rules/pdf/LCR/02/SUP/LCR_Asotin_Garfield_Columbia_SUP.pdf
Benton/ Franklin	LGAL 2; LJCR 9.4	LMAR 1.1 - 8.7	LCR 94.04W - 96.00W;	http://www.benton-franklinsuperiorcourt.com/local-rules/current-local-rules/
Chelan	LSPR 94.04(F)(d)(iv)	Not Found	LSPR 94.04; 96.04; LGALR 98.10 -11	http://www.courts.wa.gov/court_rules/pdf/LCR/04/SUP/LCR_Chelan_SUP.pdf
Clallam	LGALR 7 (II)(a)	Not Found	LCR 94 (a-f)	http://www.courts.wa.gov/court_rules/pdf/LCR/05/SUP/LCR_Clallam_SUP.pdf
Clark	LGALR 7.0	LAR 0.2 (b)(4)	LAR 0.2 (b)(4); LAR 0.6; LCR 4.1; 40 (b) (7)	https://www.clark.wa.gov/sites/default/files/dept/files/superior-court/LOCAL%20RULES%202020.pdf
Cowlitz	CCLGALR 3, 7	LMAR 1.1 - 8.6	CCLGR 22; CCLCR 92; Civil Rule 91, 92	http://www.courts.wa.gov/court_rules/pdf/LCR/08/SUP/LCR_Cowlitz_SUP.pdf
Douglas	Not found	LR 94.04 (c)(1); LMAR 1.1-8.6)	LR 94.04, 96.04	http://www.courts.wa.gov/court_rules/pdf/LCR/09/SUP/LCR_Douglas_SUP.pdf
Ferry/Pend Oreille	LRGAL 1 - 10	LCR 16	LAR 4; LCR 16; LCR 93.04; 94.04	http://www.courts.wa.gov/court_rules/pdf/LCR/10/SUP/LCR_Ferry_Pend_Oreille_Stevens_SUP.pdf

County	CASA	ADR	Family Court	Source
Grant	LAR 5 (II)	LRMA 1.1 - 5.7; LRMM 1-5	LCR 7; 16 A, B, C; 26F (c); 79	http://www.courts.wa.gov/court_rules/pdf/LCR/13/SUP/LCR_Grant_SUP.pdf
Grays Harbor	LGALR 1 (c)	LFLCR 16	LFLCR 1, 16; LCR 1	http://www.courts.wa.gov/court_rules/pdf/LCR/14/SUP/LCR_Grays_Harbor_SUP.pdf; http://www.courts.wa.gov/court_rules/pdf/lcr/14/sup/LCR_Grays_Harbor_SUP_ER01.pdf
Island	SPR 94.04 (2)(iv); GALR (7)(d)	SPR 94.04(F)	SPR 94.04	https://www.islandcountywa.gov/SuperiorCourt/Documents/Local%20Court%20Rules%202020%20Final.pdf
Jefferson	LGALR 13 (VII)	LCR 16.2	LCR 7.12.4	http://www.courts.wa.gov/court_rules/pdf/LCR/16/SUP/LCR_Jefferson_SUP.pdf
King	LJuCR 2.3 (f); 3.8 [c](1); 4.2 [c]; 4.5 (d)(1)	LCR 4.2(b); LFLR 13(b); LFLR 15(f); LFLR 16	LFLR 1 - 21	https://www.kingcounty.gov/courts/clerk/rules.aspx
Kitsap	KCLGALR	KCLFLR 6	KCLFLR	https://www.kitsapgov.com/sc/Documents/2019-2020_Kitsap_County_Local_Court_Rules_Effective_Dec_1_2019.pdf
Kittitas	Not found	LCR 40 (E)(1)	LSPR 94.04	http://www.courts.wa.gov/court_rules/pdf/LCR/19/SUP/LCR_Kittitas_SUP.pdf
Klickitat/ Skamania	Not Found	Domestic Relations 7 - V(B)	Rules 7, 17, 20	http://www.courts.wa.gov/court_rules/pdf/LCR/20/SUP/LCR_Klickitat_Skamania_SUP.pdf
Lewis	Not Found	LMMR 1 - 12; LMSCR 1	LMPSR 1.1 - 6.1	https://lewiscountywa.gov/offices/superior-court/local-court-rules/
Lincoln	Not Found	Not Found	Not Found	http://www.courts.wa.gov/court_rules/pdf/LCR/22/SUP/LCR_Lincoln_SUP.pdf

County	CASA	ADR	Family Court	Source
Mason	Not Found	LCR 40	LSPR 94.04	http://www.courts.wa.gov/court_rules/pdf/LCR/23/SUP/LCR_Mason_SUP.pdf
Okanogan	Not Found	LSPR 94.04.03; Appendix B	LSPR 94.04.01 - .03	http://www.courts.wa.gov/court_rules/pdf/LCR/24/SUP/LCR_Okanogan_SUP.pdf
Pacific/ Wakiakum	Not Found	LCR 11	LCR 7-9; 13	Westlaw
Pierce	PCLSPR 94.04 (5)(d)	PCLSPR 94.04 (f)(3); (g)(3)	PCLSPR 93.04; 94.04; .05	https://www.co.pierce.wa.us/DocumentCenter/View/82768/Local-Rules---effective-September-1-2019?bidId=
San Juan	LJuCR 1.6	SPR 94.08.3	SPR 94.08.1; .2; .3	https://www.sanjuanco.com/DocumentCenter/View/104/Local-Court-Rules-2019-PDF?bidId=
Skagit	Not Found	SCLSPR 94.04.2 [c]	SCLSPR 94.04.1 - .5	https://www.skagitcounty.net/SuperiorCourt/Documents/LOCAL%20COURT%20RULES.pdf
Snohomish	SCLJuCR 11.4; 11 Supp. (X)(1)	SCLSPR 94.04[c] et seq.	SCLSPR 93.04; 94.04; 94.05	https://www.snohomishcountywa.gov/DocumentCenter/View/4225/Snohomish-County-Superior-Court-Local-Rules-PDF?bidId=
Spokane	LJuCR 2.3 (a)(b); 3.4 (f)	LSPR 92.0 (b); 94.04 (p)(q)	LSPR 93.04; 94.04; .05; 96.04	https://www.spokanecounty.org/DocumentCenter/View/26690/2019-Final-Local-Court-Rules-with-Amendments?bidId=
Thurston	LJuCR 4 (a)(5); LGALR (5)[c], 7 (k)(2)	LSPR 94.05	LSPR 94.00 - 94.14	https://www.thurstoncountywa.gov/sc/scdocuments/thurston-county-local-court-rules.pdf
Walla Walla	WWLJuCR 1.6; WWLGALR 2	WWLDRR 99.04W B	WWLAR 1E; WWLDRR; WWLGALR 4	https://www.co.walla-walla.wa.us/document_center/clerk/Local%20Court%20Rules%20-%20Walla%20Walla%20County.pdf

County	CASA	ADR	Family Court	Source
Whatcom	Not Found	WCSPR 94.08 (h)(i)(j)(k)(l)	WCSPR 93.04; 94.04 et seq.	http://www.co.whatcom.wa.us/DocumentCenter/View/569/Court-Rules-PDF?bidId=
Whitman	Not Found	WCLCR 2	WCLCR 2; 4	http://whitmancounty.org/DocumentCenter/View/595/Local-Court-Rules-PDF
Yakima	LSPR 94.04W (H)(1)(a)	LSPR 94.04W (A)(4)	LSPR 94.04W	https://www.yakimacounty.us/553/Local-Rules