FAMILY LAW NEWSLETTER

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Practice Tips for Optimizing Divorce Judgment Terms of Retirement Asset Division[1]

By Jan Atwill

QDRO lawyers like myself are called on after a dissolution to implement judgment terms of retirement asset allocation. This next step of preparing a supplemental judgment and qualified domestic relations order ("QDRO") to divide retirement assets can be complicated by ambiguities or inadequacies in the General Judgment of Dissolution ("GJ"). Often, these problems could have been avoided by the family law attorney. Here's a quick review of key GJ terms and issues to successfully and efficiently divide retirement assets:

1. ***Be clear and specific.*** Many reasons explain why family law attorneys might leave judgment terms vague concerning retirement assets. Yet, lack of specificity may end up costing your client more down the road and undermine the property award the client thought was secured. It can also increase your risk of future claims of malpractice or violations of the rules of professional responsibility.

2. ***Identify the retirement assets and plans.*** Surprisingly, this is often not done in practice. Ideally, all retirement assets are discovered and considered so that the best allocation can be made between the parties. Identify each retirement plan or benefit by its legal name in the GJ and explain its disposition. Being specific makes it less likely for assets to be hidden or disposed of in violation of the GJ, or for arguments later. Proper discovery might involve contacting the plan, deposing employer representatives, plan fiduciaries and the opposing party. It might require document requests, a release or subpoena. A list of all former employers is helpful to understand the plans involved. Repeatedly, parties do not accurately report what retirement assets exist, whether due to deceit or lack of knowledge, and it's up to the lawyers to ferret this out.

3. ***Obtain current account statements.*** Negotiations based on outdated retirement account statements or no statements at all are problematic. When account balances differ from what was expected, this can pose a significant obstacle to settlement plans already in place. Account statements can reveal substantial withdrawals and may justify putting holds on accounts so that balances are not depleted more.

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1 I would like to acknowledge the valuable contributions of Ann Mercer, retired QDRO and pension law attorney, to the preparation of this article.

4. ***Know your client's needs.*** Does the client need cash quickly? Are the retirement assets protected during the pendency of the divorce, and later, while the QDRO is being processed? Has your client fully understood the available options with retirement assets and those options that are unavailable, such as whether a pension annuity could be payable for the client's lifetime.

5. Know the special issues that arise for the two main types of retirement plans, defined contribution and defined benefit plans. These plans are distinct and handled differently. Here are practical reminders for these plans (note: this discussion does not cover retirement plans not subject to ERISA such as IRAs, governmental retirement like PERS, OPSRP, federal, including railroad retirement plans, and other non-qualified plans):

a. ***Defined contribution plans.*** ERISA created the exception that qualified retirement plans are required to pay alternate payees ("AP") under 'qualified' domestic relations orders. Examples of some defined contributions plans are 401(k) plans, 403(b) plans sponsored by educational institutions and non-profit employers, and 457(b) deferred compensation plans. Participants (the employees enrolled in the plan) have individual accounts with an account balance and so valuation is usually straightforward. Some common issues for defined contribution plans when drafting the GJ are the following (and see the table following that gives sample language):

1) *Investment gains (or losses)*. Generally, AP is awarded gains or losses on their share from the date of division, and the GJ should specify this. The GJ should also state the date of division or date of valuation if different.

2) *Vested account balance*. Plans generally will not award an AP a portion of an unvested account balance.

3) *Loans*. Loans may have been taken out against the balance and need to be addressed (i.e., language should state if a loan exists, if the loan was marital and if the loan balance is to be excluded or included in the marital portion that is divided). Know the plan methodology for reporting loan balances.

4) *Marital portion*. Best practice is to define in the GJ the method whereby the marital portion will be determined, which will be carried forward in the QDRO, minimizing dispute. In Oregon, the marital portion of benefits under a defined contribution plan is the increase in account balance during the marriage. *See Hester and Hester*, 122 Or. App. 147, 856 P.2d 1048 (1993). Pre-marital contributions need to be considered. Account balances at the time of the marriage may be unavailable.

5) *Employer contributions*. Find out when the Participant's employer matching contributions are calculated and credited to the account and consider if the AP will receive a portion of these for the married time of the current year. If the AP's portion will not be included in the account by the division date, the QDRO lawyer can calculate the amount.

6) *Profit sharing contributions*. The same applies here as for employer contributions.

7) *Dissipation of funds*. Include language prohibiting the account holder from borrowing, withdrawing or encumbering the account. Consider if putting a hold on the account is the best course and possible.

b. ***Defined benefit plans.*** These plans provide a fixed, pre-established benefit for employees at retirement. The benefit is usually determined based on a formula, which varies between plans. The formula may take into account length of work service and the Participant's salary. The benefits usually consist of a form of periodic payment for the Participant's life beginning at the plan's normal retirement age. The stream of payments is known as an "annuity." These annuities are very different from an account-based plan; therefore, different issues arise for division and the GJ. Common issues for these plans when drafting the GJ are:

1) ***V****aluation*. Unlike 401(k) plans, defined benefit plans do not have an account balance that accurately reflects its value, and if an account balance is shown, as with a PERS member account balance, that in itself does not establish the value of the asset. Generally, the value of an annuity is determined based on an actuarial analysis, which looks at assumptions of life expectancy and when the Participant will retire. Valuation often does not need to be nailed down if the marital portion of the benefit is to be divided equally and not offset.

2) *"Coverture" or "time rule."* In Oregon, this approach is still favored to calculate the "marital portion" of benefits under a defined benefit retirement plan. See Owens-Koenig & Koenig, 194 Or. App. 573, 95 P.3d 1152 (2004); Kiser and Kiser, 176 Or. App. 627, 631-32, 32 P.3d 244 (2001). Using the time rule ensures that only the portion of the benefit attributable to the married years is divided between the parties while also allowing

the nonparticipant spouse to share in the entire accruing benefit.

3) *Retired status*. Actual retirement changes the analysis. Usually if the employee has retired and is receiving a benefit, then the AP's award must be a shared interest and may not be a separate interest. This means that when the benefit is in payout, the AP may only receive a portion of the retiree's benefit. The benefit is further limited by the former employee's elections prior to retiring, such as the election made for survivorship. If the retiring employee elected a benefit for only his lifetime, then the AP's interest will end then also.

4) *Shared interest award*. If this type of interest is intended by the GJ, and the employee has not retired, then include a requirement for the employee to elect and maintain a joint and survivor benefit for the AP.

5) *Pre-retirement death of the AP or Participant*. The death of the AP prior to benefit commencement usually causes the AP's benefit to revert to the Participant or back to the plan. Plan terms differ here and control despite what the GJ terms might state. With most ERISA defined benefit plans, if the Participant dies before benefits commence to either party, then the retirement benefit is no longer available, but ERISA does provide for the "Qualified Preretirement Survivor Annuity" (QPSA) for the surviving AP. The QPSA is often about 45% of what the Participant's retirement benefit would have been. Consider if the AP should get 100% of the marital portion of the QPSA or all of the QPSA if there is not another eligible beneficiary for the Participant at his death. GJ should be clear and can cover both possibilities.

6) *Valuation of Survivorship*. Valuation of the defined benefit plan for purposes of offset or division at dissolution also considers whether a survivor benefit is in place. If the Participant is in pay status, and elected a survivor benefit for AP, the Participant's attorney will want to value the benefit including the survivor benefit. See Forney & Forney, 239 Or. App. 406, 244 P.3d 849 (2010); Miller & Garren, 208 Or. App. 619, 623, 145 P.3d 285 (2006).

7) *Benefit increases*. The plan may allow for cost-of-living increases to the benefit amount and provide other post-retirement enchancements. Determine if these are to be secured in the GJ for AP.

FAMILY LAW NEWSLETTER

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

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Publication Deadlines

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

Deadline	*Issue*
5-15-2021	June 2021
7-15-2021	August 2021
9-15-2021	October 2021
11-15-2021	December 2021
1-15-2022	February 2022
3-15-2022	April 2022

8) *Gap payments*. If the annuity is in pay status, the GJ should also protect the AP in the gap period until the QDRO is completed and benefits to the AP commence. Getting the facts straight here is sometimes difficult.

9) *Preventing retirement*. Where the Participant is working and the settlement terms anticipate an awarded benefit for AP that requires the Participant to make certain elections, then it may be essential to cover in the GJ that the Participant cannot retire until the QDRO is processed, or the expectations of the GJ terms could be thwarted.

With so many variables affecting the value and nature of the retirement benefit under a defined benefit plan, it's obvious that much preparatory work needs to be done by the family law attorney. Ideally, this happens far ahead of any settlement negotiations or drafting of the GJ. QDRO lawyers can be helpful in this process and in garnering the information about benefits involved.

6. ***Optimize your GJ language to achieve the desired division for the client.*** Highly technical language is required to implement the retirement asset division contemplated by the parties at dissolution. QDRO lawyers can assist in drafting the dissolution judgment. Here are a few general reminders and some examples of language when drafting these divisions:

Issue	Example of Judgment Language for Defined Contribution (DC) Plan	Potential Problems/Related Issues
Party Awarded	"Wife is awarded…"	"Parties will divide the retirement benefits equally" can create problems down the road.
% or $ Amount of the Award	"50% of Husband's vested account balance…"	Account balances change with market fluctuations and distributions taken by the Participant. GJ can specify that AP's account shall be established proportionately in the same core investments as Participant holds.
Legal Name of the DC Plan	"in the Smith Company 401(k) Plan…"	Sometimes the GJ is inadequate and omits the specific plan name. This can raise disputes later.
Date of Division	" as of November 30, 2020..."	Using a date that corresponds to a recent account statement gives certainty. Date of dissolution works but often statements are not obtained that late to confirm balances.
Investment Gains (or Losses)	"adjusted to include investment gains (or losses) from November 30, 2020, until the separate account is established for Wife"	Specify period for calculation (valuation date to segregation date).
Loans	"For purposes of this calculation, any loan balance against Husband's account shall be included for purposes of calculating the account balance to be divided."	State if Participant has any outstanding loans. If the loan was marital, the marital portion of the account balance should probably be determined excluding the loan balance. If the loan was marital, the marital portion of the account balance should probably be determined excluding the loan balance
Employer Contributions	"Wife shall also receive a proportionate share of any employer contributions attributable to Husband's compensation earned through the date of dissolution, even if not funded or credited as of the dissolution date"	Appropriate to still include a proportionate share of employer contributions not yet credited to the account as of date of dissolution if agreed upon in the GJ.

Issue	Example of Judgment Language for Defined Contribution (DC) Plan	Potential Problems/Related Issues
Prohibitions on Disbursement	"Participant shall take no steps to circumvent the terms and provisions of the GJ and this paragraph and is prohibited from borrowing, withdrawing or taking distributions…."	Prohibition should apply through the divorce and finalization of the QDRO. Consider if a hold on the account is the best way to protect assets and AP's award.
Preparation of QDRO	"Wife shall retain a QDRO attorney and ensure that the QDRO is processed promptly. The parties shall share equally the attorney fees for preparing the QDRO and any administrative fees charged by the plan for division "	Specify which party is responsible to get QDRO done and how QDRO attorney fees will be split and if parties will split any additional fees charged by the plan for division of the asset.
Retaining Jurisdiction	"This court retains jurisdiction to enter such supplemental judgment as may be necessary or appropriate to divide benefits under the plan and to carry out the intent of the parties stipulated herein…"	Retain jurisdiction to amend the supplemental judgment as necessary to secure its status as a QDRO, to carry out the intent of the GJ, and to supervise payment to AP pursuant to the supplemental judgment.
Issue	**Example of Judgment Language for Defined Benefit (DB) Plan (not in payout status)**	**Potential Problems/Related Issues**
Party Awarded	"Husband is awarded…"	"Parties will divide the retirement benefits equally" is insufficient and creates problems post-judgment.
% or $ Amount of the Award	"50% of the marital portion of Wife's accrued retirement benefits…"	• Do not use account language because it is not applicable to a pension • Awarding dollar amount of a pension is often not in AP's best interest • Investment gains are not applicable because there is no account balance
Legal Name of the DB Plan	"in the Jones Company Pension Plan…."	Discovering the legal name of a plan is helpful and can lead you to other additional information, such as a second undisclosed retirement plan.
Specify how the marital portion is to be determined and the date of division	"The 'marital portion' of Wife's accrued benefit and benefit rights under the plan shall be determined by multiplying Wife's benefit amount as of the benefit commencement date by a fraction, the numerator of which is the Wife's creditable service earned during the marriage, and the denominator of which is Wife's total creditable service under the plan earned as of the benefit commencement date...."	Oregon law supports calculating the denominator as of the benefit commencement date (either the Participant's or the AP's benefit commence date if earlier) and not the date of dissolution. The date of division may be different than the date of dissolution but should be specified in the GJ.

Issue	Example of Judgment Language for Defined Benefit (DB) Plan (not in payout status)	Potential Problems/Related Issues
Separate Interest or Shared Interest Award	* Call your QDRO attorney (different language depending on the choice)	Separate interest award allows a separate benefit based on AP's lifetime and actuarial factors. Some plans do not allow separate interest.
Cost-of-Living increases or retirement subsidies	"Husband is awarded a proportionate share of any cost-of-living increases or retirement subsidies"	GJ should specifically mention these and the method for calculating the proportionate share.
Pre-retirement death benefit	"Husband is entitled to the entire marital portion of the QPSA if Wife has an eligible beneficiary. Husband shall receive 100% of the QPSA if Wife has no eligible beneficiary at the time of her death"	If the Participant has an eligible beneficiary, then awarding AP the marital portion of the QPSA is appropriate. If that is not the case, awarding 100% of the QPSA might be justified.
Survivorship elections	Call your QDRO attorney	If a shared interest award is being chosen, the GJ should require Participant to elect and maintain some form of joint and survivor benefit to protect AP or Participant's death may result in AP's termination of benefit.
Prohibitions on Retirement until QDRO processed	"Participant shall not retire or make a claim for benefit payment until after the QDRO is processed"	Since Participant's retirement changes the options allowed, a hasty retirement should not be allowed to invalidate terms the parties agreed on in the GJ.
Prohibitions on Circumventing Terms of the GJ	"Participant shall take no steps to circumvent the terms and provisions of the GJ and this paragraph…."	Consider other steps that might be taken to thwart the GJ terms and prohibit those too (eg. changing survivorship)
Preparation of QDRO and allocation of costs and fees	"Husband shall retain a QDRO attorney and ensure that the QDRO is processed promptly. The parties shall share equally the attorney fees for preparing the QDRO and any administrative fees charged by the plan for division."	Specify which party is responsible to get the QDRO done and how QDRO attorney fees and any costs charged by the plan for processing the division will be split.
Retain Jurisdiction	"This court retains jurisdiction to enter such supplemental judgment as may be necessary or appropriate to divide benefits under the plan and to carry out the intent of the parties stipulated herein…"	Retain jurisdiction to amend the supplemental judgment as necessary to secure its status as a QDRO, to carry out the intent of the GJ, and to supervise payment to AP pursuant to the supplemental judgment.

Jan Atwill was admitted to the Oregon State Bar in 1989. She is a graduate of the University of Oregon Law School. She is a sole practitioner with an emphasis in preparing Qualified Domestic Relations Orders (QDROs) and advising on dissolution judgments related to retirement benefits. She also has experience with disability benefits, representing individuals under private and employer-sponsored plans. She is treasurer of the Disability Law Section of the Oregon State Bar, and a member of the Family Law Section.

Estimating Military Retired Pay

by Mark E. Sullivan

Introduction

From time to time, divorce practitioners run across a case involving military pension division and one of the parties asks how to estimate the military retired pay of a member of the uniformed services.[1] The rules for calculating retired pay for an active-duty member of one of these service components, technically called "Regular Retirement" pay, are set out in 10 U.S.C. § 1407 and 1409 for the Army, Navy, Air Force, Marine Corps and Coast Guard, and at equivalent sections of the U.S. Code for PHS and NOAA officers. Below is a simplified explanation of the rules for calculation.

"What's the Formula?"

The basic formula for determining one's retired pay is Retired Pay Base times Retired Pay Multiplier, or RPB x RPM. This can be illustrated as:

Retired Pay Base	x	Retired Pay Multiplier

To be more specific, let's fill in some details to these general terms, defining the Retired Pay Base (for those entering service on or after September 8, 1980), the years of service, and the 2.5% part of the Retired Pay Multiplier shown below.[2]

High-3 Pay	x	Years of Service x 2.5%

High-3 Pay

"High-3 Pay" is the average of the highest three years (not necessarily continuous) of the base pay for a member, expressed on a monthly basis.

- How to obtain the documents and do the calculations is set out in the Silent Partner infoletter, "Military Pension Division and the *Frozen Benefit Rule*: Nuts 'n' Bolts," found at www.nclamp.gov > Publications.
- The quick way to estimate this is to find the current base pay of the servicemember, obtained from his or her pay statement. This is the Leave and Earnings Statement, or "LES" for those in the Army, Navy, Air Force and Marine Corps; the title is "PaySlip" for Coast Guard members. Multiply the base pay times 98%.[1]3 Thus if Major Jane Doe receives $8,000 per month as her base pay, the *estimate* for her High-3 Pay would be $8,000 x 98%, or $7,840.

How to Get the Pay Statement

Those who represent the servicemember can easily obtain the pay statement. It's available on-line for the client, and it takes less than a minute to retrieve and print it.

Those representing the spouse or former spouse should first ask for a copy; sometimes opposing counsel will cooperate and produce the document. Discovery from the other side is another option.

Finally, there's "discovery from the government." The Defense Finance and Accounting Service (DFAS) is the pay center for the Army, Navy, Air Force and Marine Corps. The Department of Defense regulation governing the Privacy Program, DoD 5400.11-R, states that the Defense Department will release the following information regarding a servicemember: *date of rank, gross salary, length of military service* and *Basic Pay Entry Date*. Para. C4.2.2.5.2.1, DoD 5400.11-R (May 14, 2007). Other items may also be disclosed.

Years of Service

"Years of service" can be determined by asking Major Jane Doe, if she is your client. Otherwise the figure can be determined by review of her LES (look at the "Pay Date" or "Pay Entry Base Date" as well as the DIEMS, or Date Initially Entered Military Service). The LES may be provided voluntarily by Jane or her attorney, or it may be obtained otherwise through discovery. This information is also available through a request pursuant to DoD 5400.11-R, as noted above. If you know Jane's pay grade[2] and years of service, you can determine her present base pay by using the pay tables at the DFAS website, https://www.dfas.mil > Military Members.

Example of the Calculation

The last task is to do the calculations for Major Jane Doe, using the data set out above. Here are the steps:

Jane's estimated High-3 pay is $7,840.

The Retired Pay Multiplier (assuming that she has just finished serving 20 years) is 20 x 2.5%, or 50%.

The combination of these is $3,920.

Thus is the projected retired pay for Major Jane Doe, if she were to retire at the 20-year mark with the above as her High-3 pay, would be about $3,920 per month for the military pension.

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1 This is the author's estimate of one's "High-3" pay, based on the base pay shown on a pay statement.

2 Pay grade - not rank - is what's needed for the pay tables. Rank can be confusing: a master sergeant in the Air Force is pay grade E-7, but it's E-8 in the Army; a Navy captain is pay grade O-6, but a Marine Corps captain is pay grade O-3!

Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina, and is the author of The Military Divorce Handbook *(Am. Bar Assn., 3rd Ed. 2019) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law for over 30 years. He works with attorneys nationwide as a consultant on military divorce issues in drafting military pension division orders. He can be reached at 919-832-8507 and at* mark.sullivan@ncfamilylaw.com.

CASENOTES

OREGON APPELLATE DECISIONS

April 2021 Edition, OSB Family Law Newsletter

Family Law Opinions: Feb. 2021 and Mar. 2021

Editor's Note: these are brief summaries only. Readers should read the full opinion. A hyperlink is provided to the on-line opinion for each case.

You can find the full decisions at the following links. The decisions are all rendered in the two months previous to this issue so should be easy to find.

Oregon Supreme Court Decisions
Oregon Court of Appeals Decisions

SUPREME COURT

There were no Supreme Court cases in family law during this period.

OREGON COURT OF APPEALS

Domestic Relations

Modification – Custody

Thomas Charles Ellis v. Shannon Marie Kyker (Lagesen, P. J.) In this child custody proceeding, father appeals a supplemental judgment that changed custody of the parties' minor child, A, from father to mother and adjusted the parties' parenting time. Father contends that there was insufficient evidence to support the trial court's determination--made after mother had withdrawn her motion to change custody--that there was a qualifying change of circumstances allowing for a change of custody.

Held: The trial court erred in changing custody of A from father to mother. The evidence presented at the hearing was insufficient to support a determination that, since the last custody award, a change had injuriously affected either A or father's capacity or ability to care for A in the best possible manner. Reversed and remanded. COA 02.03.2021

Amy Johnson and Rick Johnson (Aoyagi, J.) In this appeal of a judgment modifying child custody, mother contends that the trial court erred in changing legal custody of the parties' child, J, from mother to father. When J was an infant, mother was awarded sole legal custody. When J was eight years old, the trial court gave father sole legal custody. At that time, the court determined that there had been a substantial and unanticipated change of circumstances and that, on the whole, it was in J's best interests that father have legal custody rather than mother. In her first assignment of error, mother argues that the trial court erred in its change-of-circumstances determination, because the evidence was legally insufficient to establish a material change of circumstances for purposes of custody modification. Alternatively, in her second assignment of error, mother argues that the trial court erred in its best-interests analysis by failing to give mother the statutory presumption for the primary parent.

Held: On this record, the trial court erred in modifying the custody judgment, because the evidence was legally insufficient to establish a material change of circumstances for purposes of a change of legal custody. Reversed. COA 03.10.21.

Protective Proceedings

Elderly Persons with Disabilities Act

A K. F. v. Paul Andrew Burdette (Lagesen, P. J.) Respondent appeals the trial court's continuance of the restraining order issued against him under the Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA), ORS 124.005 to 124.040. Respondent argues, among other things, that the record was insufficient to establish that petitioner qualified as a "person with a disability" under the EPPDAPA definition found in ORS 124.005(9). Specifically, respondent argues that there was insufficient evidence to find that, at the time of the hearing, petitioner was a "person with a mental or physical impairment that substantially limits one or more major life

activities." See ORS 124.005(9) (incorporating the definition of "person with a disability" in ORS 410.040(7)).

Held: Petitioner's claim of a substantial limitation in the major life activity of sleeping was insufficiently developed and insufficiently supported by the evidence. Thus, she failed to present evidence sufficient to meet her burden of proof on the "disability" element of her prima facie case under the EPPDAPA and ORS 124.005(9). Accordingly, the trial court erred in continuing the restraining order. Reversed. COA 03.17.20.

FAPA Orders

J. N. D. v. Hamed Shirvan Dehkordi (Armstrong, P. J.) Respondent seeks reversal of an order under ORS 107.725 renewing a restraining order under the Family Abuse Prevention Act (FAPA), ORS 107.700 to 107.742, contending that the trial court's findings that respondent continues to pose an imminent danger of further abuse and a credible threat to petitioner's physical safety are not supported by the record.

Held: Evidence that petitioner remains subjectively fearful of respondent after four years, however genuine, is not enough to support the renewal of the FAPA order. The fear must be objectively reasonable--that is, it must be based on evidence that respondent continues to pose an imminent danger of further abuse and a credible threat to petitioner's physical safety. Evidence that respondent continues to be angry at petitioner does not meet the statutory standard. The court erred in renewing the FAPA order, and the Court of Appeals therefore reversed the order. Reversed. COA 02.10.2021.

Mental Commitments

State of Oregon v. S. S. (Kamins, J.) Appellant seeks reversal of an order involuntarily committing him to the Oregon Health Authority for up to 180 days, arguing that the record was legally insufficient for a rational factfinder to conclude that he suffers from a mental disorder such that he is a danger to himself. The state responds that the record contained evidence that appellant's impulsive and aggressive behavior nearly provoked others to use violence against him on multiple occasions in the recent past.

Held: The record was sufficient to support the trial court's determination that appellant is dangerous to himself. The record contains evidence that appellant has consistently, persistently, and repeatedly put himself in harm's way, including one incident where he aggressively brandished a metal baseball bat at police officers, prompting one officer to draw his gun, and another where he nearly provoked a fistfight with his neighbor. Affirmed. COA 02.03.2021

State of Oregon v. K. R. B. (Armstrong, P. J.) Appellant appeals a judgment committing him to the custody of the Mental Health Division for a period not to exceed 180 days based on the trial court's determination that appellant is a person who, because of mental illness, cannot care for his basic needs and would not comply with voluntary treatment. Appellant does not challenge the determination that he has mental illness. He contends only that the judgment should be reversed because the trial court served him with a citation at the commencement of the hearing rather than before the hearing commenced, in violation of ORS 426.090. Appellant acknowledges that he did not preserve his assignment of error but asks the Court of Appeals to review and correct the error as plain error.

Held: The Court of Appeals assumed, without deciding, that the service of the citation at the commencement of the hearing rather than before the hearing commenced was plain error. But the court declined to exercise its discretion to correct the error. The court concluded that the error was harmless, because there was no basis on which to conclude that the service of the citation at the commencement of the hearing caused appellant not to receive the benefits of a full and fair hearing. Affirmed. COA 03.03.21

State of Oregon v. R. L. M. (Aoyagi, J.) Appellant appeals a judgment committing him to the custody of the Oregon Health Authority, for a period not to exceed 180 days, under ORS 426.005(1)(f)(B). The trial court determined that, due to a mental disorder, appellant was unable to provide for his basic personal needs. Specifically, the trial court determined that, due to his schizoaffective disorder, appellant was unable to manage his heart condition, atrial fibrillation, in that he was not taking the medication prescribed for that condition. In challenging that determination, appellant does not contest that he has a mental disorder, but he argues that the evidence was legally insufficient to meet the standard for a basic-needs commitment.

Held: The trial court erred in civilly committing appellant. To support a basic-needs commitment, the state had to prove that, due to a mental disorder, appellant was unable to provide for basic personal needs that were necessary to avoid serious physical harm in the near future and that he was not receiving such care as was necessary to avoid such harm. Viewed in the light most favorable to the state, the minimal evidence in the record regarding the risk to appellant from not taking his atrial-fibrillation medication was legally insufficient to meet the basic-needs standard. Reversed. COA 03.03.21.

State of Oregon v. L. D. (Kamins, J.) Appellant appeals from a judgment involuntarily committing her to the Oregon Health Authority for up to 180 days. She argues that the record was legally insufficient to support the trial court's conclusion that, due to a mental disorder, she is dangerous to herself under ORS 426.005(1)(f)(A).

Held: The record was legally sufficient to support the trial court's conclusion. The record reflects that shortly before appellant's hospitalization, appellant attempted to take her own life by running into traffic. It also reflects that, throughout her hospitalization, appellant continued to express a desire to commit suicide and repeatedly articulated a plan to do so by running into traffic again. A present threat to commit suicide, coupled with a recent attempt to enact that threat through overt action, is sufficient to permit a rational factfinder to conclude by clear and convincing evidence that appellant is a danger to herself. Affirmed. COA 03.31.21.

Note on Opinions Reviewed

The Editor tries to include all the Family Law related decisions of the Oregon Appellate Courts in these Notes. Some cases do not have holdings that have precedent significance however they are included to insure none are missed.