

**Testimony before the House Judiciary Committee
on behalf of the OSB Family Law Section
in opposition to House Bill 2559**

Dear Members of the Committees:

My name is Ryan Carty. I am an attorney in private practice limited to family law. I am the legislative liaison for the Family Law Section of the Oregon State Bar for the current legislative session and am currently serving as Chair of the Family Law Section's Legislative Subcommittee. I appear today in that capacity. The Family Law Section was originally formed in 1978, and today is made of up of over 1,000 attorneys who practice family law in Oregon. We have members from 30 different Oregon counties, representing a wide variety of clients each with their own unique problems and concerns. Our membership includes attorneys in both public and private practice. Our executive committee is comprised of 12 members from 8 different counties, from the coast, to the Willamette Valley, to Central Oregon, and includes Deputy District Attorneys from both Multnomah and Lincoln Counties. We come from very different backgrounds, and represent a wide variety of viewpoints on family law issues, but are in agreement that the proposed reforms to spousal support set forth in HB 2559 are steps in the wrong direction.

What the Bill Includes

The reforms set forth in HB 2559 include the following:

- Automatic cap on duration of spousal support – one-half the duration of the parties' marriage or 10 years, whichever is less;
- Spousal support terminates at "good faith" retirement;
- Exclusion of payor's new spouse's or partner's income and assets from any initial determination or subsequent modification action;
- Termination of spousal support upon the payee's remarriage *or* cohabitation for three months;
- Spousal support limits equaling 30% of the difference in each party's income at the time of the order; and
- Spousal support must be reduced by the amount of retirement or pension benefits the payee receives.

Spousal Support in Oregon, generally

ORS 107.105(1)(d) provides that the court may award spousal support for an amount of money and period of time "as may be just and equitable" under the particular circumstances of the case. Three different types of spousal support may be awarded: Transitional, Compensatory, or Maintenance.¹

¹ *Transitional support* is typically awarded for a limited duration in order to assist a former spouse prepare for reentry into the job market or to gain marketable skills that would improve his or her earning potential. *Compensatory support* is appropriate in cases where the court determines one spouse should

Oregon courts are granted broad discretion to take particular factors in individual cases in to consideration when awarding, modifying, or terminating spousal support. This is a positive aspect of spousal support law in Oregon because many of these cases present factual scenarios without an obvious answer.

- *If a payor spouse retires early and, therefore, has a significant reduction of income, should spousal support terminate? What if the retirement is because the payor spouse has remarried an individual with significant assets who can independently support the payor spouse? What if the payor spouse retires and then later returns to work?*
- *If a payee spouse receives limited spousal support from a high wage earning ex-spouse, but then later remarries or cohabits with someone who has no income, should the spousal support terminate? What if the spousal support was designed to offset the payee spouse's high cost of uninsured medical expenses on account of a chronic disease or terminal illness?*

There are many fact scenarios such as these, but the bottom line is that judicial discretion is a positive aspect of spousal support law. There are *many* reasons why spousal support might or might not be appropriate, and it is beneficial for the court to have the authority to make individual determinations in individual cases, rather than imposing a one-size-fits-all approach as set forth in HB 2559.

Recent History of Alimony Reform in Oregon

The Oregon Legislature recently took up the task of reviewing spousal support in Oregon in response to legislation proposed in the 2005 session that would have impacted ORS 107.136 (reinstatement of terminated spousal support). The Legislature approached the Oregon State Bar Family Law Section and requested that a Task Force be assembled to review ORS 107.136, and to specifically make a recommendation on what impact, if any, remarriage of a spouse ought to have on an underlying award of spousal support.

The members of the 2005 Task Force were selected by the Executive Committee of the Oregon State Bar Family Law Section and represented a broad range of views on the existing statute, the remarriage issue, and whether changes (if any) ought to be made.² The Task Force's ultimate recommendations dealt only with ORS 107.136, but the Appendix attached to the report provides a brief analysis of spousal support, as well as a specific look at Oregon's treatment of remarriage or cohabitation as it affects support awards. Appendix D of the report contains the Task Force's research on statutory factors in making an initial award of spousal support, basis for modification

receive compensation on account of making a significant contribution to the education, training, vocational skills, career or earning capacity of the other party. *Maintenance support* is a contribution by one spouse to the other (typically in long-term marriages) in order to maintain the standard of living of the spouse who has significantly less earning capacity than the payor spouse.

² ORS 107.136 Task Force Report is attached as Exhibit 1.

of a support award, effect of remarriage and cohabitation, and reinstatement of support after termination.

Judicial Discretion

ORS 107.136 was completely rewritten consistent with the Task Force's recommendations, which were largely based on the idea that judicial discretion is desirable. The Task Force recommended that the reinstatement statute should require courts to look at spousal support through a "totality of the circumstances" lens, and to order a reinstatement only if it would be just and equitable under all the circumstances.

Remarriage

The Supreme Court of Oregon has stated that, "Public policy does not require that a woman whose first marriage has been dissolved be free to remarry only if her new husband is able to support her."³ In other words, automatic termination of spousal support upon remarriage is against public policy because such an arbitrary rule would leave payee spouses in a position that might preclude a subsequent remarriage unless the new spouse is able to financially replace the anticipated loss of spousal support. While termination of spousal support upon remarriage *might* be appropriate, this is a fact-based question that requires a review of the entire case. If there is an automatic termination (penalty) for a payee spouse remarrying, would it make sense to impose a similar penalty on a payor spouse (*i.e.*, spousal support increases because the payor spouse now has more available resources?).

Retirement or Pension Benefits

The Court of Appeals of Oregon recently ruled that retirement accounts *must* be treated as property.⁴ The court *may* also treat such assets as income streams (particularly in cases in which the accounts are already in pay status). The court is directed, however, to determine a "just and proper" division of the parties' property in each dissolution case that takes into consideration payment of spousal support. Such divisions are necessarily dependent on unique facts.

HB 2559 would mandate that retirement and pension benefits act as automatic reduction factors in an award of spousal support. This type of "two bites at the same apple" dynamic can lead to unfair results. For example, if the only appreciable asset is a payor spouse's PERS Tier One account, and that account is divided equally between the parties, why should the payee spouse now receive less spousal support based on an asset that was already equally divided? Would not the fairest approach be to require that retirement and pension benefits for *both* spouses should be considered in determining whether a spousal support award is appropriate? That second approach is, in fact, consistent with current law.

³ *Grove and Grove*, 280 Or 341, 355, 571 P2d 477, 486, opinion modified on denial of reh'g sub nom. *Grove and Grove*, 280 Or 769, 572 P2d 1320 (1977).

⁴ *Rushby and Rushby*, 247 Or App 528, 530, 270 P3d 327, 328 (2011) review denied, 352 Or 33, 281 P3d 611 (2012).

Conclusion

The Family Law Section of the Oregon State Bar represents both husbands and wives and is neither pro-spousal support nor anti-spousal support. The section's focus is on achieving fair results in difficult cases. HB 2559 does not support those goals.

The Family Law Section supports judicial discretion in family law cases and recommends *against* trying to legislate individual families with specific guidelines, rather than giving judges flexibility in individual cases. We deal in a fact-specific area of the law and ask that the legislature continue providing courts with the tools to approach these unique cases uniquely.

On behalf of the Family Law Section of the Oregon State Bar, I thank the members of the committees for their consideration and urge the committee to not move the bill forward

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