1.0 Law & Legal CLE Credit – A/V Approval #1050973

Recording Date – April 7, 2017
Recording Availability – October 18, 2017

Meeting Location	Date	Time	Topic
King County Bar Association 1200 Fifth Avenue - Suite 700 Seattle, WA	**Friday, April 7, 2017**	12:10 PM to 1:30 PM	Appellate Update

---

AGENDA

12:10 PM Introductions/Lunch

12:20 PM Presentation: 'Appellate Update', by Shelby Lemmel, Masters Law Group

1:30 PM Evaluations & Adjourn

SPEAKER BIOGRAPHY:

Shelby Lemmel, Masters Law Group - Shelby Lemmel is a partner at Masters Law Group, previously Wiggins & Masters, PLLC, which she joined in 2003. Her practice is almost exclusively appellate. Ms. Lemmel represents clients in Washington's three appellate courts; the Washington Supreme Court; the Ninth Circuit; and the United States Supreme Court. She also represents clients in trial litigation matters regarding potential appellate issues and remand proceedings, and partners with trial counsel engaged in litigation or alternative dispute resolution. Shelby's practice covers all areas of civil law, including family law, general torts and medical negligence, real property, constitutional law, and contracts. She received her J.D., magna cum laude, from Seattle University School of Law, and was a judicial extern for the Honorable Barbara J. Rothstein, Western District of Washington, and for Justice Charles W. Johnson, Washington State Supreme Court. Ms. Lemmel is a member of the Washington Appellate Lawyers Association, and a contributing editor to the Washington Appellate Practice Deskbook and the Washington State Association for Justice Medical Negligence Deskbook. She regularly presents at CLE on a range of topics.

HOW DO I EARN CREDIT FOR SELF-STUDY OR AUDIO/VISUAL (A/V) COURSES?

For pre-recorded A/V (self-study) programs, although the sponsor should apply for accreditation, **lawyers need to report the credits earned for taking the course.**

To add an approved course to your roster, follow the procedures below:

- Go to the "mywsba" website at www.mywsba.org/.
- Log in.
- Click on the "Access MCLE" link in the "MCLE Info" box on your home profile page.
- Click on "Add Activity." Search to find the approved course in our system. (See search suggestions on the screen.)

Adding a Recorded Course

Select Recorded Course from the Add New Activity screen.

This will prompt you to search for the activity in case the activity has already been accredited in the MCLE system.

You can search by Activity ID or by specific Activity Details. For the Activity Details search, you can use keywords for the title, sponsor name and date.

After entering your search criteria and selecting Search at the bottom of the screen, a list of possible activities will be provided.

You can select the correct one by clicking the Activity ID. This will take you to the specific activity. Entered the date(s) on which you began and ending viewing this recorded activity.

Then claim the correct credits for which you attended this activity in the Credits Claimed fields and click the Submit button at the bottom of the page.

You will receive a confirmation message at the top of your screen stating, “The activity has been added to your roster.

Appellate Update

Prepared for
KCBA Family Law Section meeting

April 7, 2017

Shelby R. Frost Lemmel

Masters Law Group
241 Madison Avenue North
Bainbridge Island, WA 98110
206.780.5033

Email: shelby@appeal-law.com
URL: www.appeal-law.com

Parentage Cases

In re Custody of M.W., 185 Wn.2d 803, 374 P.3d 1169 (July 2016).

Linda and Greg Minium are the maternal grandparents and legal guardians to seven-year-old M.W., whose parents died in a car accident when she was less than one year old. M.W.'s paternal grandmother Patti had visitation pursuant to an agreed third-party custody order with the Miniums. Under the agreed plan, M.W. was with Patti and her husband John for six hours two days a week, for overnights on alternating weekends, and on some holidays. Although Patti and John were married when the agreed third-party custody order was entered, John was not a named party, did not seek to intervene, and has no visitation or custody rights under the order. John maintained a relationship with M.W. through Patti's visitation.

When M.W. reached school age, Patti petitioned the superior court to modify the agreed custody order, naming both herself and John as "requesting parties." The Miniums asked the court to terminate Patti's visitation rights, contending that third-party visitation is unconstitutional and that Patti is not entitled to visitation under the "equitable doctrine" of *de facto* parentage. The trial court's final orders provided that Patti would continue to have midweek visits with M.W. during the school year, as well as other visitation during certain weekends, holidays, and vacations.

The trial court also denied Patti's motion to join her husband as an additional party to the underlying nonparental custody proceeding, but indicated that it would permit John to state the factual basis for bringing his own third-party custody or *de facto* parentage claim. Although the court indicated that John's claim would be consolidated

with Patti's petition, it also made clear that John's action, if any, would have to stand on its own.

John then brought a petition for nonparental "custody," asking the trial court to modify the existing order to give him visitation rights. Although the trial court found that John's petition lacked legal basis, it ruled that he could proceed under a *de facto* parent framework and ordered him to file an amended petition. The court later found adequate cause to move forward on the *de facto* parent issue, but also stated that it would certify the issue for immediate interlocutory review.

Recognizing, as he had to, that the Court had long-since invalidate Washington's third-party visitation statutes, John argued on appeal that RCW 26.10.030 and .040 still provide a statutory basis for third-party visitation, attempting to capitalize on the fact that M.W. had no "natural parents." Making rather quick work of that argument, the Supreme Court held that John's proposed interpretation of the third-party custody statutes was contrary to their plain language, which makes no mention of third-party visitation.

The Court held that RCW 26.10.040 "plainly considers visitation only within the context of custody proceedings," without creating an independent right to third-party visitation. That is, the statute mandates that in issuing a custody order, the court must consider visitation provisions. But the statute does not does not confer a right to seek visitation outside of a third-party custody proceeding.

As far as the *de facto* parent claim, John conceded at oral argument that he never intended to establish *de facto* parentage, and was requesting only visitation rights. He pursued a *de facto* parent claim only because that was the remedy the trial

court left open to him. He admitted that *de facto* parentage is “a rough fit for the case at bar.”

The Court held that John would not be able to meet the factors adopted in ***In re Parentage of L.B.**,* 121 Wn.App. 460, 487, 89 P.3d 271 (2004). And the Court was troubled by the idea that if a *de facto* claim were successful, then John would be the only legal *parent*, with rights exceeding the Miniums’ and Patti’s. The Court refused to create an equitable remedy, under the *de facto* parent doctrine or otherwise, distinguishing ***L.B.***, where the Legislature had failed to respond to changing family structures.

Finally, the Court awarded the Miniums fees under a provision in the third-party custody statutes making fee awards discretionary. The Court seemed reluctant to do so, but was faced with little financial information from John to rebut the Miniums’ request for fees.

Asset divisions and maintenance

In re Marriage of Aiken, 194 Wn. App. 159, 374 P.3d 265 (May 2016).

The parties divorced in 2010 and mother was designated the primary parent of their three children, ages 10, 8, and 6. Their son J has autism and Down syndrome, so needs one-on-one attention to remain safe and appropriately stimulated. Since mother returned to work fulltime in 2014, her ability to provide J sufficient supervision and stimulation changed markedly. She moved to modify child support in October 2014.

The primary issue on appeal was the child support calculation, specifically whether father’s purchase of stock from his employer Sellen Construction was a normal business expenses deduction allowed under RCW 26.19.071(5)(h). RCW 26.09.071(5)(h) provides

that "[n]ormal business expenses and self-employment taxes for self-employed persons" shall be "deducted from gross monthly income to calculate net monthly income." The statute does not define "normal business expenses."

Before ***Aiken***, the lead case on "normal business expenses" was ***In re Marriage of Mull***, 61 Wn. App. 715, 812 P.2d 125 (1991). There, the father accepted a partnership position in a law firm, requiring him to buy into the firm "as part of the 'requirements and commitments' of his partnership position." Father was also required to make capital contributions to the firm. Mother argued on appeal that the trial court should not have allowed the father to deduct his "contributions" to the firm or his partnership "buy-in" as normal business expenses for purposes of calculating his child support obligation. The appellate court disagreed, holding that "when a parent *is required* to make capital contributions in order to maintain his or her source of income and when such contributions are not made to evade greater support obligations, those contributions qualify as 'normal business expenses.'" 61 Wn. App. at 169 (quoting ***Mull***). That is, the father was required to make the contributions to his firm in order to become a partner and to receive increased compensation.

The appellate court held that ***Mull*** was distinguishable where father's stock purchases were entirely voluntary. Father was not required to purchase Sellen stock to become or to remain CFO of the company. And while the partnership distributions in ***Mull*** were plainly compensation, father's stock purchase was more akin to an investment. The stock incentive plan expressly states that its "purpose" "is to retain and motivate employees, officers and directors of the Company by providing them the opportunity to purchase shares of the Company's common stock … and acquire a

proprietary interest in the Company." The appellate court held that holding a proprietary interest is not necessarily a form of compensation.

The court quickly rejected father's argument that his participation in the stock incentive plan became involuntary because he purchased the stock by taking loans from Sellen that he was required to replay. The court held simply that the same would be true for any loan taken for investment purposes.

The court noted that it would hold the same if father had borrowed funds to purchase another investment vehicle, such as stock in a publicly-traded company or a rental property. In short, an investment does not become a business expense merely because one choses to invest in the company he works for.

Finally on this point, the court rejected father's argument that is was inequitable to include in the income calculation the income he received from the stock purchase, without deducting the cost of generating that income. The court held simply, "this premise is not recognized in the child support statute; the statute does not offset the 'costs' of acquiring any income-producing asset against the income generated by that asset." 61 Wn. App. at 171-72.

In re Marriage of Zandi, Slip Opinion No. 92296-9 (February 2017).

At issue on appeal was whether out-of-network health care costs incurred by the mother for T.Z., qualify as uninsured medical expenses, where the child support order required father to pay all uninsured medical expenses. T.Z. was insured under the father's Kaiser Permanente policy, which covered emergency care at non-Kaiser facilities if a Kaiser facility was not available. While visiting her aunt in Ohio, T.Z. developed kidney stones, and her aunt took her to a non-Kaiser emergency room, where she was treated

and released. T.Z needed follow-up surgery to remove a large kidney stone, but the nearest Kaiser facility was 4 to 8 hours away. The aunt took T.Z. to a non-Kaiser facility for the follow-up surgery.

Kaiser paid for the emergency care, but refused to pay the approximately $13,000 in medical bills, even though a doctor at the surgery facility stated that Kaiser would cover the costs of the surgery. The father appealed through the Kaiser appeal process failed.

During a hearing on mother's petition to modify child support, the trial court ordered mother to pay 25% of the Kaiser bill despite the prior support order making father 100% responsible for extraordinary healthcare costs, ruling that as the primary residential parent, mother was in a superior position to secure coverage for the treatment through a Kaiser facility. Mother appealed, arguing that the trial court lacked the authority to apportion payment of uninsured medical expenses other than as provided in the support order.

The Court held that costs Kaiser refused to cover were uninsured medical expenses under RCW 26.18.170(18)(d), defining "Uninsured medical expenses as "premiums, copays, deductibles, along with other health care costs not covered by insurance." The Court further held that WAC 388-14A-1020 clarifies that this includes costs "not paid" by insurance, even if those costs would be covered in other circumstances. Where the child support order allocated uninsured health care costs to the father, the trial court could not modify the order to require mother to contribute to the expense absent a showing of a substantial change in circumstances.

The Court held this its statutory interpretation is consistent with the Legislature's intent to meet "an urgent need for vigorous enforcement of child support and maintenance

obligations." RCW 26.18.010. If the obligor parent fails to meet his obligations – including his obligations to pay uninsured medical expenses, then either the State or the other parent may enforce the child support order.

The Court rejected father's argument, adopted by a dissenting judge in the appellate court, that "basic fairness" required mother to share in the uninsured health care costs she acquired for the child. The Court held that the obligor parent has no right to insist that the other obtain the most cost-effective health care, and that so holding would overlook that parental authority is a fundamental right and is not based on financial responsibility. Making father responsible for uninsured health care costs did not diminish mother's right to make parenting decisions as the primary residential parent. The court concluded, "it is not difficult to imagine the complications that would arise if courts recognized the 'right' of a paying parent to interfere with the other parent's authorized decision-making." Slip Op. at 10-11.

In re Marriage of Doneen, Slip Op. No 34064-3-III (February 2017).

The parties were married for 45 years when they divorced. They had lived in a home husband inherited, which they had improved over the years. Husband later inherited several hundred thousand dollars. Both parties earned modest incomes during the marriage. When they divorced, wife had $1,100 monthly income from a pension and social security. Husband had $1,900 monthly income from a pension and a federal crop reclamation program.

The court found that husband's separate property was worth just over $1 million, and awarded $795,000 to husband and $228,000 to wife. The court divided the $97,000

community property $96,000 to wife and $11,250 to husband. Thus, wife received 90% of the community property and 22% of husband's separate property.

Wife appealed, arguing that under ***Rockwell***, the court erred in declining to distribute all property roughly equally, regardless of character. Wife did not challenge the characterizations.

The appellate quickly rejected wife's argument that ***Rockwell*** "requires" a roughly equal distribution of assets in a long-term marriage, even where most of the assets are separate. The court held that wife mistakenly relied only on the duration of the marriage, ignoring that the court must also consider the character of the assets before it.

In re Marriage of Cheng, Unpublished Op. No. 47937-1-II (November 2016).

The parties divorced after a 17-year marriage. They had substantial community assets, including the business husband developed during the marriage. Though both were highly educated, wife had not worked for the majority of the marriage, focusing on the parties' three children.

The trial court awarded the business, FFM, to husband, and valued it at $3.6 million. The trial court divided the marital property equally, including awarding half of FFM's value to wife, payable over a 15-year term at six percent interest. The trial court also awarded wife $640,000 in spousal maintenance over 44 months, and child support above the standard calculation, reflecting the family's standard of living. Husband challenged nearly every aspect of the final orders on appeal.

The appellate court held that the maintenance award based on husband's FFM income does not duplicate her award of half of FFM's value. The court distinguished the controlling cases on double-dipping, ***In re Marriage of Barnett*** and ***In re Marriage of***

Mathews, holding that FFM is not a fixed asset, but a going concern that would generate annual income for husband into the foreseeable future at a rate of about $927,000. Further, unlike in ***Barnett*** and ***Mathews***, husband's receipt of income from FFM would not diminish its value, thus husband did not need to erode FFM's value in to pay maintenance.

Relying on ***In re Marriage of Valente***, husband also argued the maintenance award was too high, as it exceeded his reasonable compensation, so was necessarily – and impermissibly – based on FFM's income stream. The court summarily rejected this argument, holding the ***Valente*** does not create a rule that maintenance may be based only on reasonable compensation.

Regarding child support, the appellate court held that the trial court erred in not treating the interest wife will receive on the equalizing payments as income for child support purposes. Under the plain language or RCW 26.19.071(1) the child support calculation must include all income from any source including interest. Since the statute did not include any exception for interest from deferred payments, it was error not to include the interest in the child support calculation.

Rights of incarcerated parents / terminations

In re Parental Rights to B.P., 186 Wn.2d 292, 376 P.3d 350 (July 2016).

Mother suffered from drug addiction, depression and other mental health issues, and the effects of childhood trauma. Her child B.P. was born addicted to methamphetamine, endured withdrawal, was abandoned by mother during infancy. After several attempts, mother got sober and successfully parented another child, A.

She engaged in partially supervised, therapeutic visitation with B.P., and they began to form a social relationship with an emerging emotional attachment.

That attachment was the sole issue on appeal. Before a court can terminate a parent's rights, the State must prove the following six statutory elements by clear, cogent, and convincing evidence:

> (a) That the child has been found to be a dependent child;
> (b) That the court has entered a dispositional order pursuant to RCW 13.34.130;
> (c) That the child has been removed … from the custody of the parent for a period of at least six months pursuant to a finding of dependency;
> (d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;
> (e) That there is little likelihood that conditions will be remedied so that [***30] the child can be returned to the parent in the near future; … [and]
> . …
> (f) That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

RCW 13.34.180(1). The only statutory prerequisite at issue on appeal was (d).

Mother argued that B.P. would have formed a stronger attachment to her if the Department of Social and Health Services had fulfilled its duty to provide "necessary services," RCW 13.34.180(1)(d), to facilitate reunification. It was undisputed that DSHS provided B.P.'s foster parents with attachment therapy services. DSHS argued that it fulfilled this obligation to provide services to mother to no avail. The trial court adopted DSHS's argument that in the absence of a stronger attachment bond and with mother's risk of relapse, mother was unfit to parent B.P.

The Supreme Court reversed the trial court and the court of appeals. It was undisputed that Mother's substance abuse and mental health issues did not make her

unfit to parent A. As to A, the State conceded that mother was fit. Thus, the Court held that the trial court seemed to place on mother the burden to prove the reunification services would have succeeded if offered. That is not her burden. Absent a showing of futility, mother was entitled to any available services necessary to facilitate reunification with B.P.

The record did not support a finding that attachment services would have been futile. While the testimony raised concerns about reunification, none suggested that services were withheld because they would have failed or taken too long. No witness testified to that effect. Instead, the record indicates that the State never considered offering any attachment services to mother.

In re Parental Rights to K.M.M., 186 Wn.2d 466, 379 P.3d 75 (September 2016).

At issue before the Supreme Court was whether parental rights may be terminated where the father was unable to parent his child due to a lack of attachment, and continuing the parent-child relationship will be detrimental to the child's emotional development and mental well-being. K.M.M. had been in foster care since she was six and a half years old. She was removed from her biological parents' custody when their substance abuse problems resulted in a neglectful home environment. She was 11 years old at the time of trial. She had been in two foster care placements and was physically abused in one them.

At trial, it was undisputed that father had completed court-ordered services and remedied the deficiencies identified by the dependency court. The trial court nonetheless terminated his parental rights, concluding that he remains "unable to

parent" due to K.M.M.'s lack of attachment to him. The Supreme Court affirmed the termination, holding that there was substantial evidence to support the trial court's conclusion that DSHS had provided all necessary services, and that providing any more would be futile. The record also supported the trial court's finding of current parental unfitness based on father's inability to parent the child.

The Court rejected father's claim that DSHS had to offer family therapy based on a DSHS policy not to offer family therapy until the parent has resolved his own issues. DSHS first addresses a parent's individual-level issues before providing services to address family-level issues. Thus, family therapy to address father's relationship with K.M.M. would not be appropriate until his underlying mental health issues had improved. Succinctly put, "as long as [father's] mental health issues remain untreated, attachment and bonding therapy would be ineffective."

Additionally, further services would be futile where K.M.M. felt strongly that she did not want a relationship with either parent. K.M.M.'s unwillingness to participate in any therapeutic services with her father made further services futile.

The futility of any additional services was also supported by father's lack of empathy for K.M.M.'s needs. He focused exclusively on himself and DSHS, failing to understand that that K.M.M. did not want to have a connection with him any longer.

Father next claimed that so long as his parental deficiencies had been cured, he could not be unfit to parent K.M.M. He claimed that the trial court erred in focusing on the lack of a bond between he and K.M.M., where that consideration looked at factors beyond his personal characteristics. The Court quickly rejected this argument, holding

that "The parent-child relationship necessarily involves *both* the parent and the child; thus, it is necessary to consider whether a parent is capable of parenting the particular child given the child's specific, individual needs."

Adequate Cause

In re Custody of L.M.S., ____ Wn.2d ____, 387 P.3d 707 (January 2017)

At issue before the Court was the threshold requirement of "adequate cause" a nonparental custody petition, requiring a petitioner to show that the biological parent is either unfit or that placing the child in the parent's custody would result in actual detriment to the child's growth and development. RCW 26.10.032(2). The grandparents sought custody of L.M.S., arguing that placing L.M.S. with her biological father would cause actual detriment because the father has been mostly absent from her life. But father maintained a positive relationship with L.M.S. and was willing and able to raise her. Thus, the Court held that the grandparents failed to present sufficient facts demonstrating a specific detriment to L.M.S. if placed with her father.

L.M.S. was essentially raised by her grandparents. Father left when she was one or three. Mother suffered from untreated drug addiction. While mother at times moved out with L.M.S., both principally resided with mother's parents, who were L.M.S.'s primary caretakers.

In September 2012, the court legally established paternity, ordering father to pay child support, including back support, and gave custody of L.M.S. to mother. Two years later, father learned that mother had been incarcerated. He returned to Washington to obtain custody of L.M.S., filing a motion to modify the 2012 order determining

parentage, and asking the court to designate him as L.M.S.'s primary parent. The grandparents filed a nonparental custody petition, seeking custody of L.M.S.

The grandparents' adequate cause argument was based principally on father's absence during L.M.S.'s life and a domestic violence incident occurring before L.M.S. was born. They argued too that L.M.S. considered them her parents.

Affirming both lower courts in concluding that grandparents failed to show adequate cause, the Court took the opportunity to definitively articulated the standard of review that applies to consideration of a trial court's adequate cause determination on a nonparental custody petition. Although the Court of Appeals in ***B.M.H.*** applied a *de novo* standard (which no party appealed), the Court typically applies a more deferential standard of review to adequate cause determinations in similar contexts. The Court held, "[t]oday, we articulate that we review a trial court's adequate cause determination on a nonparental custody petition for an abuse of discretion, like we do in other custody determinations."

The Court rejected grandparents' argument that their parent-like relationship with L.M.S. is sufficient to infer actual detriment. The Court distinguished ***Allen*** in ***Stell***, in which the child's psychological attachment to a nonparent was based in part on the child's special needs that the non-parent was most adapt at meeting. By contrast, L.M.S. had no special needs. Grandparents relied principally on their own declarations asserting that L.M.S. has lived with them for her entire life and that she calls them "mom" and "dad." L.M.S.'s strong bond with her grandparents does not establish a showing that any specific detriment that would ensue if father assumed primary custody.