Nevada Family Law Conference
Stateline, Nevada – 2024

Law Clerk Panel | Eighth Judicial District Court – Clark County

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PROCEDURAL OVERVIEW

- Adoption rules changed. **NRS 127**
  - New requirement for petition, subsection (j).
    - "That there are no known signs that the child is currently experiencing victimization from human trafficking, exploitation or abuse." **NRS 127.110(2)(j)**
  - "One or more adults may petition the district court of any county in this state for leave to adopt a child." **NRS 127.030**
- Child Support, NAC 425
  - Stipulated Child Support per **NAC 425.110**
    - To be binding, such a stipulation must be in writing and: (a) Set forth the current monthly gross income of each party; (b) Specify what the child support obligation would be under the guidelines; (c) Provide notice to both parties that, if either party seeks a review of the stipulated child support obligation for any authorized reason, the court will calculate the child support obligation in accordance with the child support guidelines in effect at the time of the review; (d) Contain a certification by the obligee that he or she is not currently receiving public assistance and has not applied for public assistance; (e) Certify that the basic needs of the child are met or exceeded by the stipulated child support obligation; and (f) Be approved and adopted as an order of the court. **NAC 425.110(1)(a)-(f)**
    - A court may reject this stipulation if it determines the stipulation is the product of coercion or the child support obligation does not meet the needs of the child. **NAC 425.110(2)**
- EDCR 5 was amended and effective as of June 2024 (ADKT 0612)
  - EDCR II, III, IV, and VII "are *inapplicable* to matters heard in the family division, and the rules set out in Party VIII are superseded where in conflict with Part V". **EDCR 5.100(b)**
  - Filing and Service of Papers
    - A copy of any papers filed must be served on all other parties to an action within 3 days of submission for filing. If, after serving copies, the filing party receives a hearing time not contained in the original service,

and notice of that hearing time has not been provided by the clerk, the filing party must serve a notice of hearing on all other parties to the action within 3 days of receiving the hearing time. **EDCR 5.205(b)-(c)**

- Communications with the Court
  - The court *"may impose sanctions upon a finding"* that communication with the court was made to improperly gain a procedural or tactical advantage in a case. **EDCR 5.211(c)**
- Discovery Disputes
  - "A discovery motion must set forth **by separate affidavit of moving counsel** that after a discovery dispute conference or a good faith effort to confer, the parties were unable to resolve the matter satisfactorily, detailing with specificity what attempts to resolve the disputes were made…" **EDCR 5.402(d)**
- Early Case Conference Report
  - Within 14 days after each case conference, but not later than 7 days before a scheduled case management conference, the parties must file a joint early case conference report, or, if the parties are unable to agree upon the contents of such, each party must serve and file an individual early case conference report. **EDCR 5.403**
- Service on Orders Shortening Time
  - Unless otherwise ordered by the court, an order shortening time must be served on all parties upon issuance and at least 1 day before the hearing. An order that shortens the notice of a hearing to less than 14 days may not be served by mail. **EDCR 5.606(d)**
- Unopposed Motion
  - "The Court may grant all or any part of a motion after an opposition has been filed or *21 days after service of the motion if no opposition was filed*." **EDCR 5.702(b)**
- No Countersignature **EDCR 5.706(b)**
  - After 7 days with no countersign or response, counsel may submit proposed order to Court without countersignature
  - CC opposing party/counsel on submission email
  - Attach/write in email an explanation of the attempts made to obtain countersignature

- Nevada Electronic Filing and Conversion Rules
  - Repealed and replaced as of July 2024 **(ADKT 0615)**
- Electronic signatures
  - "All documents requiring a signature of another person may be electronically signed; however, the party submitting the document must obtain e-mail verification of the other person's agreement to sign electronically. That verification must be embedded in the document or attached as the last page of the document." **AO 22-07**, pg. 3, lns. 19-26

RECENT COURT CASES

- Sole Physical Custody Findings

- *Roe v. Roe*, 139 Nev. Adv. Op. 21, 535 P.3d 274, 295 (Nev. App. 2023)
  - "Sole physical custody is a custodial arrangement where the child resides with only one parent and the noncustodial parent's parenting time is restricted to no significant in-person parenting time. A district court entering an order for sole physical custody creates tension with a parent's fundamental rights, Nevada's public policy, and future modification rights. Thus, a district court must first find that either the noncustodial parent is unfit for the child to reside with, or it must make specific findings and provide an adequate explanation as to the reasons why primary physical custody is not in the best interest of the child. Afterwards, the district court must enter the least restrictive parenting time arrangement possible consistent with a child's best interest. Should it enter a more restrictive order, it must explain how the greater restriction is in the child's best interest. Moreover, it must retain its decision-making authority over future custodial modifications and parenting time allocations, as well as enter orders with sufficient specificity to allow enforcement. These steps are to ensure that when a district court enters an order for sole physical custody, it does so equitably and in accordance with Nevada's statutes and jurisprudence, thereby preserving the noncustodial parent's fundamental rights to the greatest degree possible."

- Medical Decisions re: Joint Legal Custody
  - *Kelley v. Kelley*, 139 Nev. Adv. Op. 39, 535 P.3d 1147, 1154 (2023)
    - "When parents with court-ordered joint legal custody of a minor child disagree on medical decisions regarding that child, the district court breaks the tie by determining which course of action is in the best interest of the child. In determining which medical decision is in the child's best interest, the district court should consider (1) the seriousness of the harm the child is suffering or the substantial likelihood that the child will suffer serious harm; (2) the evaluation or recommendation by a medical professional; (3) the risks involved in medically treating the child; and (4) if the child is of a sufficient age and capacity to form an intelligent preference, the expressed preference of the child. We emphasize that a medical professional's recommendation is not necessarily conclusive in every dispute, as each case turns on its particular circumstances. Because the district court's finding of best interest aligns with the factors we now adopt, we affirm its order."

- Prima Facie Case for Setting an Evidentiary Hearing
  - *Myers v. Haskins*, 138 Nev. Adv. Op. 51, 513 P.3d 527, 537 (Nev. App. 2022)
    - "District courts wield substantial discretion in child custody cases. *See* NRS 125C.0045(1). This includes the discretion to deny a motion to modify custody without holding an evidentiary hearing. *Rooney*, 109 Nev. at 542-43, 853 P.2d at 124-25. To exercise that discretion, however, the district court must first find that the movant has failed to demonstrate a prima facie case for modification. *See id.* And today, we further require that—subject to the exception announced—district courts must make that determination by looking solely to the movants proper allegations,

generally presented in the movant's verified pleadings, declarations, or affidavits."

- Modification of Joint Physical Custody
    - *Romano v. Romano*, 138 Nev. 1, 9, 501 P.3d 980, 986 (2022)
        - "A district court may modify a joint physical custody arrangement, like a primary physical custody arrangement, only when (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) the modification would serve the child's best interest.
- Residency Requirement for Divorce
    - *Senjab v. Alhulaibi*, 137 Nev. 632, 635, 497 P.3d 618, 621 (2021)
        - "Under NRS 125.020, "residen[ce]" means mere residence—not domicile—and NRS 10.155 defines residence as "physical[ ] presen[ce]."
- Relocation re: Primary Physical Custody
    - *Monahan v. Hogan*, 138 Nev. 58, 65, 507 P.3d 588, 594 (Nev. App. 2022)
        - "We do not interpret NRS 125C.007(1)(b) as requiring a custody best interest analysis and findings because primary custodians would essentially be forced to re-prove that they should have primary custody when they already have it. Doing so might obfuscate the distinction between NRS 125C.0065, which requires a custody best interest analysis, and NRS 125C.006, which does not.
        - "Reasonably, every custody best interest factor need not be applied anew when the relocating parent is already a primary physical custodian."

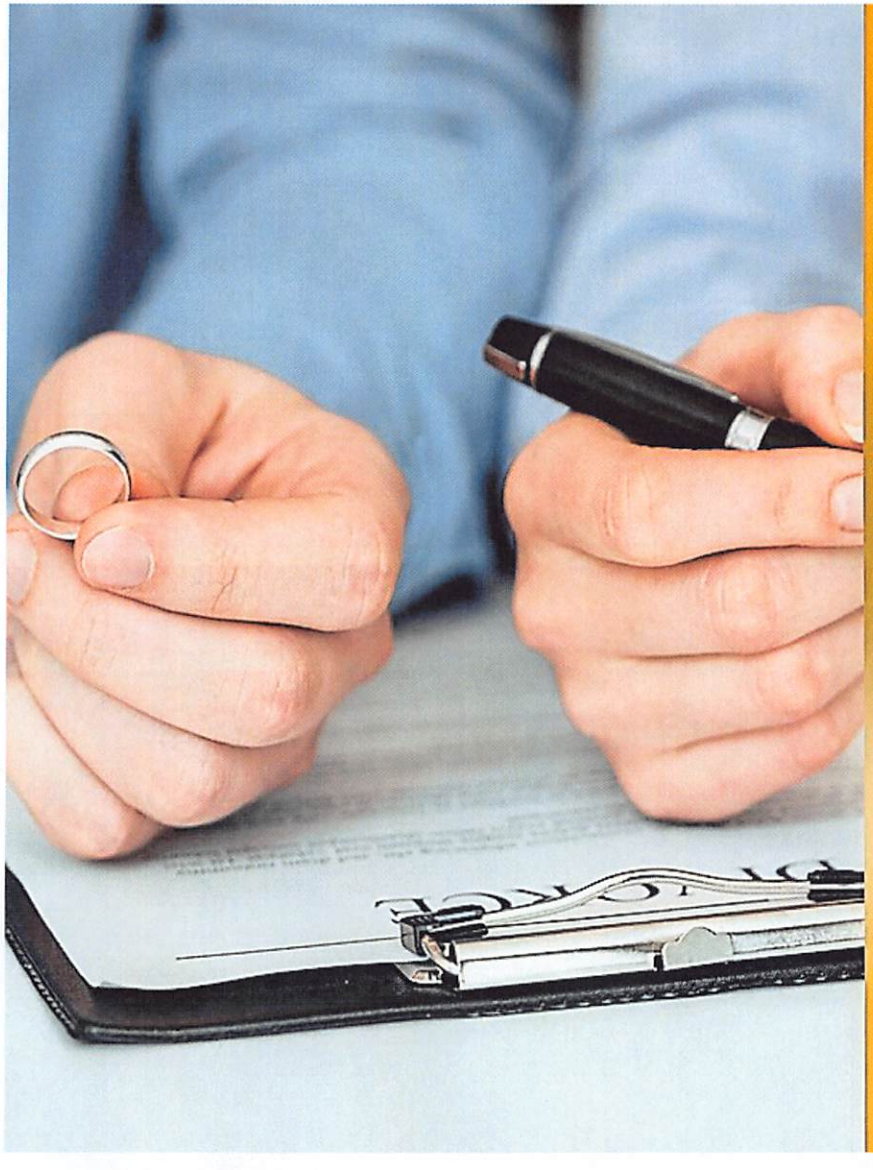
ORDER TO SHOW CAUSE

1. **Notice of Entry of Order, NRCP 58(e)**
    a. (2) "Failure to serve written notice of entry does not affect the validity of the judgment, but *the judgment may not be executed upon until notice of its entry is served*."
2. **Clear and Unambiguous Order**:
    a. "An order on which a judgment of contempt is based must be clear and unambiguous, and must spell out the details of compliance in clear, specific and unambiguous terms so that the person will readily know exactly what duties or obligations are imposed on him." *Div. of Child & Fam. Servs., Dep't of Hum. Res., State of Nevada v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 120 Nev. 445, 454–55, 92 P.3d 1239, 1245 (2004) (citing, *Cunningham v. District Court*, 102 Nev. 551, 559–60, 729 P.2d 1328, 1333–34 (1986)).
3. **Affidavit**:
    a. NRS 22.030(2)
        i. "If a contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit must be presented to the court or

judge of the facts constituting the contempt, or a statement of the facts by the masters or arbitrators."

b. ***Awad v. Wright***, 106 Nev. 407, 409–10, 794 P.2d 713, 715 (1990)
    i. "sufficient affidavit"
    ii. "allege all essential facts"
c. **EDCR 5.509**
    i. "detailed affidavit"
        1. Specific provisions
        2. Pages and lines of existing order(s) alleged to have been violated
        3. Acts or omissions constituting the alleged violation
        4. Any harm suffered or anticipated, and
        5. The need for a contempt ruling

4. **Ex parte motion**, **EDCR 5.509(b)**
    a. Cuts hearings in half
5. **Financial issues for OSC?**
    a. File
        i. GFDF **EDCR 5.507**
            1. "must be filed" or,
            2. "court may construe any motion, opposition, or countermotion not supported by a timely, complete, and accurate financial disclosure as admitting that the positions asserted are not meritorious and cause for entry of orders adverse to those positions, and as a basis for imposing sanctions."
        ii. Schedule of Arrearages **EDCR 5.508**
            1. "shall be accompanied by a separately filed schedule" of arrearages



Seminal Nevada Family Law Cases, Practical Tools and a Brief Case Law Update

Alexander C. Morey

Lorien Cole

Biography

ALEXANDER C. MOREY

Alexander C. Morey, Esq., is a partner with Silverman Kattelman Springgate Morey, Chtd., in Reno, Nevada. A graduate of Gonzaga University in 2005 with a dual degree in Mathematics and Philosophy, Alex received his juris doctorate from the Northwestern College of Law, Lewis and Clark, in 2008. Alex is a Certified Family Law Specialist, chairs the Family Law Specialization Board, and sits on the Executive Counsel for the Family Law Section of the Nevada Bar. After serving as a law clerk for the Honorable Deborah Schumacher, Alex entered private practice in August of 2010 with Silverman, Decaria, & Kattelman, Chtd. and became a shareholder in the firm in 2015. Alex is, luckily for him, married to his wife Dawn who ignores she is too good for him, has two lovely daughters—Mara and Livia—and spends his limited free time enjoying the outdoors, usually tennis, mountain biking, and skiing.

Biography

LORIEN K. COLE

Lorien K. Cole, Esq. is an attorney for Cole Family Law Firm, in Las Vegas, Nevada, and has practiced family law for the last 12 years. She is a Certified Specialist in Family Law and is a member of the Family Law section of the Nevada State Bar. Lorien has participated in hundreds of divorce, custody, and family law-related cases, serves as a pro bono attorney representing minors in foster care through the Children's Attorney Project through the Legal Aid Center of Southern Nevada, and serves as a Transitioning Into Practice ("TIP") mentor for newly licensed attorneys with emphasis on family law practice. Lorien Cole received her B.A. in business finance from Central Washington University, studied Spanish at the Universidad de Monterrey, and earned her J.D. from Gonzaga University School of Law in 2010. Before entering private practice, she served as a Judicial Law Clerk before the Honorable Dan Papez and Honorable Steve Dobrescu in the Seventh Judicial District Court of Nevada.

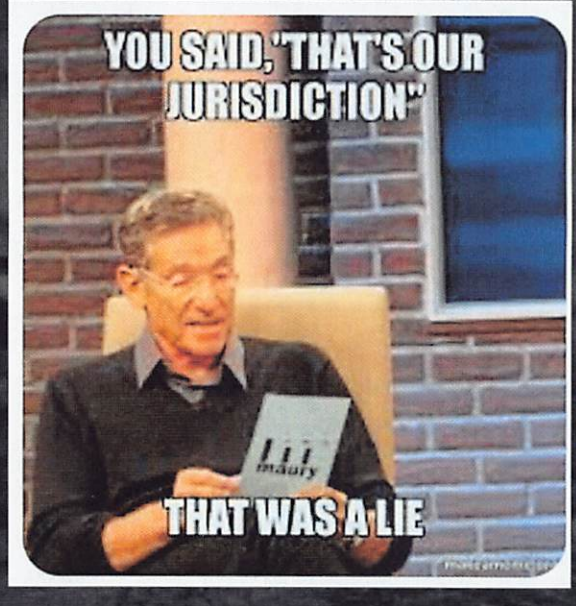
INTRODUCTION

- *Jurisdiction*
- *Custody*
- *Child Support*
- *Spousal Maintenance (alimony/support)*
- *Property & Post-Divorce Issues*
- *Marital Waste*
- *Attorney's Fees*

JURISDICTION

Proof of physical presence for the six weeks before filing the complaint / counterclaim

- *NRS 125A*
- *Senjab v. Alhulaibi – physical presence only required for divorce residency.*
- *Lamb v. Lamb – six-week period does not have to be continuous.*



CUSTODY

- ***Custody Jurisdiction***
  - *UCCJEA Declaration*
- ***Legal Custody***
  - *Rivero v. Rivero*
  - *Roe v. Roe*
- ***Physical Custody***
  - *Rivero v. Rivero*
  - *The Bluestein Decision Clarified the Rivero Rule*
- ***Modifying Custody or Custodial Issues***
  - *Romano v. Romano*
- ***Relocation and Other Custody Issues***
  - *Blanco v. Blanco*

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  - *NRS 125.040*
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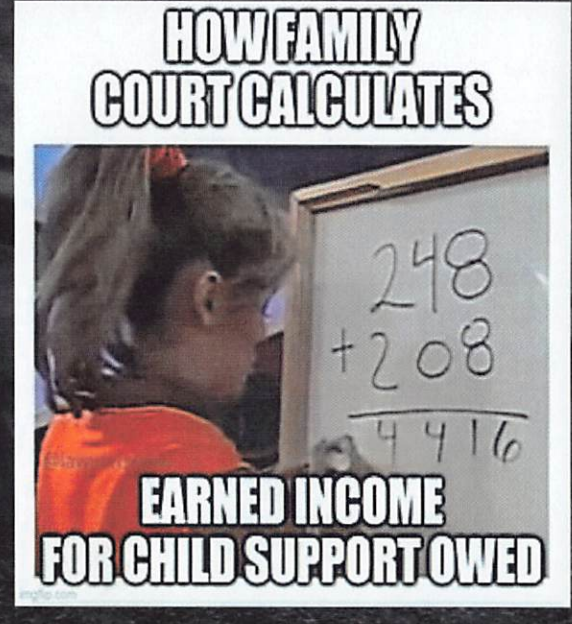
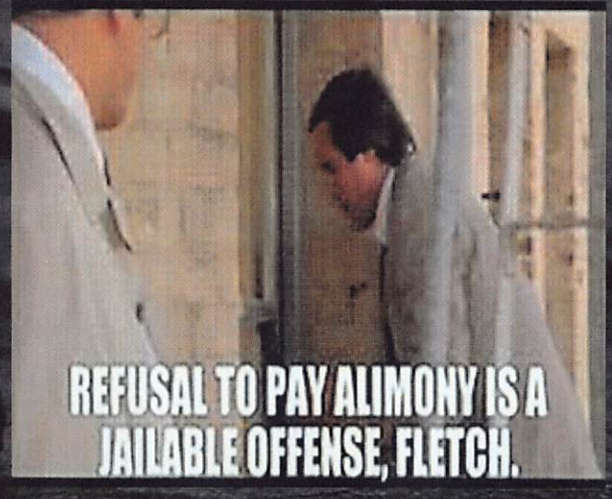
- ***NRS 125B Governs a Few Remaining Child Support Issues***
  - *NRS 125B*
- ***Other Child Support Issues***
  - *Constructive Arrears*
  - *Parkinson v. Parkinson, "Parkinson Waiver"*



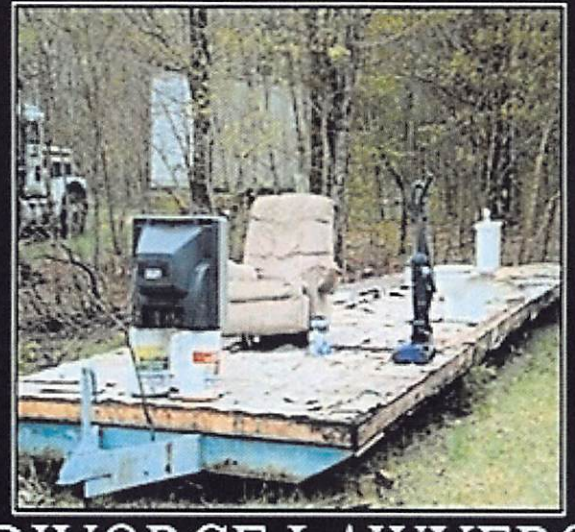
SPOUSAL MAINTENANCE

- ***Temporary Spousal***
  - *NRS 125.040*
- ***Alimony Factors***
  - *NRS 125.150(9)*
- ***Rehabilitated Alimony Terms***
- ***Alimony and Taxes***
- ***Recent Case Law***
  - *Kogod v. Kogod*



PROPERTY & POST-DIVORCE ISSUES

- *Division of Property in a Divorce*
- *NRCP 16.2*
- *NRCP 16.21*
- *Uniform Act on Enforcement of **Foreign** Judgments (NRS 17.330 et. seq.)*



MARITAL WASTE

- ***Seminal Cases***
  - *Putterman v. Putterman*
  - *Lofgren v. Lofgren*
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  - *Kogod v. Kogod*
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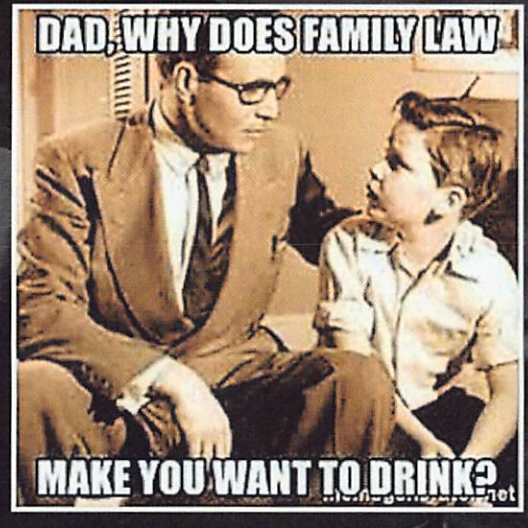
- **NRS 18.015**
- *Brunzell v. Golden Gate National Bank*
- *Miller v. Wilfong*
- *Argenta Consolidated Mining Co.*
- *Fredianelli v. Price*



THANK YOU!

Seminal Nevada Family Law Cases, Practical Tools and a Brief Case Law Update

Speakers: Lorien K. Cole, Esq. and Alex C. Morey

BIOGRAPHY

Lorien K. Cole, Esq. is an attorney for the Cole Family Law Firm, in Las Vegas, Nevada, and has practiced family law for the last 14 years. She is a Certified Specialist in Family Law, and is a Fellow of the American Academy of Matrimonial Lawyers (AAML). Lorien has participated in hundreds of divorce, custody, and family law-related cases, serves as a pro bono attorney representing minors in foster care through the Children's Attorney Project through the Legal Aid Center of Southern Nevada, and serves as a Transitioning Into Practice (TIP) mentor for newly licensed attorneys with emphasis on family law practice.

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Ms. Cole can be reached at the Cole Family Law Firm in Las Vegas, phone number is (702) 720-0114, and at lorien@colefamilylawfirm.com.

1. Introduction

The concepts discussed are intended to be a general overview and discussion of the seminal cases, concepts, and general practice for jurisdiction, custody, child support, spousal maintenance (alimony/support), division of property, marital waste, post-divorce enforcement, and attorney's fees. This course is intended to provide only a brief overview of each topic, although there are many more issues that will befall a paralegal during their career.

Aside from the general legal concepts outlined herein, those in the legal profession must understand that the "law" that applies to a family lawyer is only one facet of family law. Family law issues inherently are colored by unique needs of the family served by those in the legal profession, and the personalities involved (opposing counsel, opposing party, client, and Judge included) so the method of handling a case will vary case-by-case. It is important to first analyze your case keeping in mind the general legal principles, but also considering the goals of your litigant, how their goals affect the family dynamic, and the specific and unique needs of the children.

While practicing family law, it is important to keep in mind that a family law case will affect that family's future and could change the family dynamic and trajectory of the family in terms of who raises the children, the resources that support their lifestyle, the family's and parent's resources, and their future financial welfare. Family law is driven by deadlines, documents, and procedure, and support staff plays a crucial role in the success of a case.

2. Custody

a. Custody Jurisdiction

The first thing a practitioner needs to do when analyzing an issue involving child custody is to determine whether Nevada has child custody jurisdiction. Child custody in Nevada is governed by the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). The UCCJEA has been adopted by every state in the United States except for Massachusetts, and has been adopted by the District of Columbia, the U.S. Virgin Islands, and Guam.

Although the test for determining child custody jurisdiction is very fact-specific, one of the most basic rules is that if this is an initial child custody determination, Nevada must have "home state jurisdiction" to exercise jurisdiction. Home state is defined as the state where the child resides within six months before the commencement of the proceedings.[1]

Outside of the laws governing child custody jurisdiction, Nevada can exercise temporary, emergency jurisdiction if the child is present within the state, and the circumstances warrant an exercise of emergency jurisdiction.[2]

The UCCJEA in Nevada is adopted in NRS Chapter 125A, which governs the various tests for custody jurisdiction, depending on the facts of the case.

b. Custody Definitions

In 2017, the Nevada legislature enacted Chapter 125C of the Nevada Revised Statutes that governs custody and visitation in Nevada. NRS 125C.001 states that it is the policy of the State to:

1) Ensure that minor children have frequent associations and a continuing relationship with both parents after the parents have ended their relationship, become separated or dissolved their marriage;

2. To encourage such parents to share the rights and responsibilities of child rearing; and

3) Establish that such parents have an equivalent duty to provide their minor children with necessary maintenance, health care, education and financial support.[3]

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1 NRS 125A.305.

2 NAC 125A.335.

3 NRS 125C.001(3) also provides "As used in this subsection, "equivalent" must not be construed to mean that both parents are responsible for providing the same amount of financial support to their children."

c. Best Interests

In any action for determining custody of a child, ***the Court's sole consideration is the best interest of the child.***[4] In determining the best interest of the child, the Court "shall consider and set forth its specific findings" concerning, among other things:

> (a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her physical custody.
>
> (b) Any nomination of a guardian for the child by a parent.
>
> (c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.
>
> (d) The level of conflict between the parents.
>
> (e) The ability of the parents to cooperate to meet the needs of the child.
>
> (f) The mental and physical health of the parents.
>
> (g) The physical, developmental and emotional needs of the child.
>
> (h) The nature of the relationship of the child with each parent.
>
> (i) The ability of the child to maintain a relationship with any sibling.
>
> (j) Any history of parental abuse or neglect of the child or a sibling of the child.
>
> (k) Whether either parent or any other person seeking physical

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4 NRS 125C.0035(1); NRS 125C.0045(1).

> custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.
>
> (l) Whether either parent or any other person seeking physical custody has committed any act of abduction against the child or any other child.[5]

There are two types of custody in the State of Nevada; legal custody and physical custody. Legal custody refers to the right to make major decisions regarding the child, primarily medical and educational decisions, and the right to access the child's records, while physical custody is defined by the amount of time physically spent with the child.

d. Legal Custody

The Nevada Supreme Court case *Rivero v. Rivero*[6] provides the following definition of legal custody:

> Legal custody involves having basic legal responsibility for a child and making major decisions regarding the child, including the child's health, education, and religious upbringing.[7] Sole legal custody vests this right with one parent, while joint legal custody vests this right with both parents.[8]
>
> Joint legal custody requires that the parents be able to cooperate,

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5 NRS 125C.0035(4).

6 *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).

7 *Id*., citing *Mack v. Ashlock*, 112 Nev. 1062, 1067, 921 P.2d 1258, 1262 (1996) (Shearing, J., concurring); Hearing on S.B. 188 Before the Senate Judiciary Comm., 61st Leg. (Nev., Feb. 12, 1981).

8 *Id*., citing *Mack*, 112 Nev. at 1067, 921 P.2d at 1262 (Shearing, J. concurring); Cal. Fam. Code §§ 3003, 3006 (West 2004) (defining sole and joint legal custody).

communicate, and compromise to act in the best interest of the child.[9] In a joint legal custody situation, the parents must consult with each other to make major decisions regarding the child's upbringing, while the parent with whom the child is residing at that time usually makes minor day-to-day decisions.[10]

Joint legal custody can exist regardless of the physical custody arrangements of the parties.[11] Also, the parents need not have equal decision-making power in a joint legal custody situation.[12] For example, one parent may have decision making authority regarding certain areas or activities of the child's life, such as

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9 *Id*., citing *Mosley v. Figliuzzi*, 113 Nev. 51, 60-61, 930 P.2d 1110, 1116 (1997) (stating that if disagreement between parents affects the welfare of the child, it could defeat the presumption that joint custody is in the best interest of the child and warrant modifying a joint physical custody order); Hearing on S.B. 188 Before the Assembly Judiciary Comm., 61st Leg. (Nev., Apr. 2, 1981) (discussing that joint legal custody requires agreement between the parents).

10 *Id.,* citing *Mack*, 112 Nev. at 1067, 921 P.2d at 1262 (Shearing, J., concurring) (discussing that the parents can bring unresolved disputes before the court); Hearing on S.B. 188 Before the Senate Judiciary Comm., 61st Leg. (Nev., Feb. 12, 1981) (comments of Senator Wagner and Senator Ashworth) (discussing that both parents are involved with making major decisions regarding the children, and if they cannot agree, the courts will settle their disputes); *Fenwick v. Fenwick*, 114 S.W.3d 767, 777-78 (Ky.2003) (explaining that in a joint legal custody arrangement, the parents confer on all major decisions, but the parent with whom the child is residing makes the minor day-to-day decisions), superseded by statute on other grounds as stated in *Fowler v. Sowers*, 151 S.W.3d 357, 359 (Ky.Ct.App.2004), overruled on other grounds by *Frances v. Frances*, 266 S.W.3d 754, 756-57 (Ky.2008), and *Pennington v. Marcum*, 266 S.W.3d 759, 768 (Ky.2008).

11 *Id.,* citing NRS 125.490(2); *Mack*, 112 Nev. at 1067, 921 P.2d at 1262 (Shearing, J. concurring).

12 *Id.,* citing *Fenwick*, 114 S.W.3d at 776.

> education or healthcare.[13] If the parents in a joint legal custody situation reach an impasse and are unable to agree on a decision, then the parties may appear before the court "on an equal footing" to have the court decide what is in the best interest of the child.[14]

It is uncommon for a Court to award either party sole legal custody, and much more widely accepted to award joint legal custody. It is viewed that legal custody provides a parent with the minimum legal rights to have a say in their child's major educational and medical welfare, and to have information relating to their child's education and development.

There are times when sole legal custody is ordered, or seems to be appropriate, and those situation primarily concern a parent who is absent in the child's life, when parents live in very different geographical location, or when one parent is viewed as being unfit or unable to exercise joint legal custody due to incarceration, history of abuse or neglect, or medical or mental infirmity.

Another emerging trend related to joint legal custody orders is referred to as the "hybrid" joint custody order, which typically allows parties to have the right to access their children's information and records, but vests the right to make major decisions on behalf of the children to one of the parties. This can occur to soften the "sole legal custody" implications when it is impractical to have the parties jointly make major decisions.

The following is a sample of "joint legal custody" terms and conditions that could be used in custody decrees, divorce decrees, and parenting plans, although some terms may be adjusted to the children's needs, their age, the family's circumstances, or upon mutual agreement:

> Neither parent shall do anything which shall estrange the children from the other parent or impair the natural development of the children's love and respect for each of the parents, or disparage the other parent or undermine the parental authority or discipline of the other's

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13 *Id*.

14 *Id.,* citing *Mack*, 112 Nev. at 1067, 921 P.2d at 1262 (Shearing, J., concurring); *Fenwick*, 114 S.W.3d at 777 n. 24.

household. Additionally, each parent shall instruct their respective family and friends that no disparaging remarks are to be made regarding the other parent in the presence of the children.

Neither parent shall use contact with the children as a means of obtaining information about the other parent.

All schools, health care providers, and counselors shall be, when possible, selected by the parties jointly. In the event that the parties cannot agree to the selection of a school, the children shall be maintained in their present school pending mediation and/or further order of the Court.

Each parent shall be empowered to obtain emergency health care for the children without the consent of the other parent. Each parent shall notify the other parent as soon as reasonably possible of any illness requiring medical attention, or any emergency involving the children.

Each party shall have independent access to all information concerning the well-being of the children, including, but not limited to, copies of report cards; school meeting notices; vacation schedules; class programs; requests for conferences; results of standardized or diagnostic tests; notice of activities involving the child; samples of school work; order forms for school pictures; and all communications from health care providers. The parents shall exchange the names, addresses, and telephone numbers of all schools, health care providers, regular day care providers, and counselors who have contact with their children.

Each parent shall provide the other parent, upon receipt, information concerning school, athletic, church, and social events in which the children participate. Both parents may participate in activities for the children, such as open house, attendance at an athletic event, etc.

Each parent shall provide the other parent with the address and telephone number at which the minor children reside, and shall notify the other parent within 10 days prior to any change of address and provide the telephone number as soon as it is assigned.

Each parent shall provide the other parent with a travel itinerary and, whenever reasonably possible, telephone numbers at which the children

> can be reached whenever the children will be away from the parent's home for any period in excess of two days.
>
> Each parent shall be entitled to reasonable telephone and/or audiovisual communication with the children. Each parent is restrained from unreasonably interfering with the children's right to privacy during such telephone and/or audiovisual communications with the other parent.
>
> Neither parent shall be permitted to use illicit drugs, including prescription drugs that have been obtained illegally, in the presence of the minor children and/or during such periods when they are responsible for the minor children. Further, the children will not be exposed to excessive alcohol consumption in either parties' home. The parties will exercise prudent safety precautions in both households concerning any consumption of alcohol and neither party shall operate a motor vehicle and/or transport the children after consuming alcohol.

Legal custody terms and conditions that require one parent to provide the other parent with information regarding the child that is equally accessible to both parents should be discouraged. For example, grades and progress reports are typically available to both parents on a school portal with a minimum level of effort, so it is not reasonable to require one parent with joint legal custody to provide that information to the other parent.

Parenting apps are commonly used by parents to facilitate communication and document-sharing, and enrollment is renewed on a yearly basis for a low fee or no fee (depending on the app used, and the features activated). Parenting apps have a method for communication similar to email, they have a calendaring function for medical appointments and extracurricular activities, and they allow parties to upload documents relating to medical bills and other expenses relating to the children. Some of the more popular apps used by parties in Clark County are Our Family Wizard and Talking Parents, although there may be others available in the marketplace.

e. Physical Custody

Physical custody is defined by the amount of time each parent spends with the

children. There are two forms of physical custody awarded in custody actions, primary physical custody, or joint physical custody. Primary physical custody has been defined as one party having custody of a minor child more than 60 percent of the time, and the other parent having visitation rights to the child for less than 40 percent of the time. Joint custody has been defined as both parties each having at least 40 percent of the time with the children.

The *Rivero v. Rivero*[15] decision outlines a bright line rule defining the difference between primary physical custody and joint physical custody, holding that primary physical custody requires one parent to have physical custody more than 60% of the time, and joint physical custody as each parent having custody between 40-60% of the time. *Rivero* also clarifies the purpose of the custody designations, stating in relevant part:

> Physical custody involves the time that a child physically spends in the care of a parent. During this time, the child resides with the parent and that parent provides supervision for the child and makes the day-to-day decisions regarding the child. Parents can share joint physical custody, or one parent may have primary physical custody while the other parent may have visitation rights.[16]
>
> The type of physical custody arrangement is particularly important in three situations. First, it determines the standard for modifying physical custody. Second, it requires a specific procedure if a parent wants to move out of state with the child.[17] Third, the type

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15 *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).

16 *Id.,* citing *Ellis v. Carucci,* 123 Nev. 145, 147, 161 P.3d 239, 240 (2007) (describing the mother as having primary physical custody and the father as having liberal visitation); *Barbagallo v. Barbagallo*, 105 Nev. 546, 549, 779 P.2d 532, 534 (1989) (discussing primary and secondary custodians); Cal. Fam.Code §§ 3004, 3007 (West 2004) (defining joint and sole physical custody).

17 *Id*, citing *Potter v. Potter*, 121 Nev. 613, 618, 119 P.3d 1246, 1249 (2005) (the standards for relocation are now codified in NRS Chapter 125C).

> of physical custody arrangement affects the child support award.[18] Because the physical custody arrangement is crucial in making these determinations, the district courts need clear custody definitions in order to evaluate the true nature of parties' agreements.
>
> ... [Defining joint physical custody]: if each parent has physical custody of the child at least 40 percent of the time, then the arrangement is one of joint physical custody.
>
> Joint physical custody is "[a]warding custody of the minor child or children to BOTH PARENTS and providing that physical custody shall be shared by the parents in such a way to ensure the child or children of frequent associations and a continuing relationship with both parents."[19] This does not include divided or alternating custody, where each parent acts as a sole custodial parent at different times, or split custody, where one parent is awarded sole custody of one or more of the children and the other parent is awarded sole custody of one or more of the children.[20]

The timeshare to calculate custody for purposes of the primary vs. joint physical custody designation is calculated over one calendar year.[21] Each parent having joint physical custody must have at least 146 days per calendar year to reach the 40% threshold. The Court should not focus on the exact number of hours the child is with the parent, whether the child is sleeping, or where the child is in the care of a third party caregiver, or time spent with a friend or relative during the day in question.

When one parent has primary physical custody, the other parent has visitation.

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18 *Barbagallo,* 105 Nev. at 549, 779 P.2d at 534.

19 *Id.*, citing [5] the Hearing on S.B. 188 Before the Assembly Judiciary Comm., 61st Leg. (Nev., Apr. 2, 1981) (summary of supporting information).

20 *Id.*

21 *Id.* at 225.

Visitation must be sufficiently defined to ensure the rights of the noncustodial parties are properly enforced, and that the best interest of the child is achieved.[22]

f. The *Bluestein* Decision clarifyied the *Rivero* Rule

In 2015, the Nevada Supreme Court *Bluestein v. Bluestein* decision made an important clarification to *Rivero's* bright line rule defining primary vs. joint physical custody.[23] In *Bluestein*, the lower court strictly applied the *Rivero* 40 percent guideline, concluding that the mother had primary physical custody when the father was exercising slightly less than 40% of the timeshare. The Nevada Supreme Court reversed and remanded, holding that the *Rivero* decision was intended to provide consistency in child custody determinations, but was never meant to abrogate the court's focus on the child best interest. Thus, even though the father did not *quite* have 40% timshare, *Bluestein* held that the lower court should still have considered awarding joint physical custody if it was in the child's best interest.

Thus, according to *Bluestein*, *Rivero's* guidelines should not be so rigidly applied that it would preclude joint physical custody when the court has determined in its exercise of broad discretion that such a custodial designation would be in the child's best interest. This is especially important in a case with similar underlying facts as *Bluestein,* where one parent has the child almost 40 percent of the time, and the timeshare allows the child frequent associations with both parents.

g. Roe vs. Roe clarified standards for "sole custody"

Roe v. Roe, 139 Nev. ___, ___ (Nev. App. Adv. Opn. No. 21, July 27, 2023)

The COA clarified the definition of sole physical custody, and outlined what a district court must consider when ordering sole physical custody. The COA also directed district courts to retain their substantive decision-making authority

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22 NRS 125C.010(1).

23 *Bluestein v. Bluestein*, 131 Nev. 106, 345 P.3d 1044 (2015)

over custodial modifications and parenting time allocations.

Next, the COA reiterated that being a prevailing party alone is not a sufficient basis for an award of attorney fees under NRS 18.010.

Finally, the COA clarified when reassignment to a different judge on remand is appropriate when fairness demands it in ongoing child custody proceedings.

In this case, the district court erred by improperly characterizing custody as primary physical custody when it was actually sole physical custody. The district court erred by overly restricting Mom's parenting time without adequate findings, failing to consider less restrictive arrangements, and delegating its substantive decision-making to a therapist.

The COA affirmed modification of physical custody, but reversed the parenting time-allocation and vacated the award of attorney fees and costs. Based on substantive fairness the COA directed reassignment to a different judge in the ongoing custody proceedings.

h. Modifying Custody or Custodial Issues

Any terms included in a custody order may be modified by the Court at any time upon the request of a party if it appears in the child's best interest, so long as the child is under the jurisdiction of the court (i.e the child is in his or her minority, or the child is handicapped for purposes of child support). This may include, but may not be limited to, access to information, medical issues, mental health/counseling requests, transportation issues, exchange protocol, the physical timeshare, the child's special needs, school choice, extracurricular activities, and financial issues relating to the child. For this reason, no child custody decision is truly a "final" or "permanent" decision.

Once a parent has primary physical custody of a child, the Nevada Supreme Court case *Ellis v. Carucci*[24] holds that an order modifying primary physical custody of the child to any other custodial designation, (i.e. modify to joint physical custody, or modify to the other parent having primary physical

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24 *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007)

custody), is only warranted when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the modification would serve the child's best interest. The *Romano* decision expanded the scope of that standard to a modification of joint physical custody as well. Therefore, it is important to counsel your client that modifying primary physical custody requires these burdens of proof during the initial consultation.

i. Relocation of Minor Children

When there has been a custody order establishing the physical custody rights parents have to a child, one parent may not relocate with the children without the other parent's consent, or without a court order granting relocation.[25] Whether or not the parent has primary physical custody or joint physical custody, they must first attemp to obtain written consent form the noncustodial parent, and if that parent fefuses to consent, petition the Court for permission to relocate.[26] If the parties have joint custody, the parent requesting relocation must also petition the Court for primary physical custody for the purpose of relocating.[27]

When determining whether to grant a party's request to relocate with a minor child after a custody determination has been made (and the other parent has not consented to the relocation), the relocating parent must demonstrate to the Court that:

> (a) There exists a sensible, good-faith reason for the move, and the move is not intended to deprive the non-relocating parent of his or her parenting time;
>
> (b) The best interests of the child are served by allowing the relocating parent to relocate with the child; and

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25 NRS 200.359(4) or (5).

26 NRS 125C.006; NRS 125C.0065.

27 NRS 125C.0065.

(c) The child and the relocating parent will benefit from an actual advantage as a result of the relocation.[28]

When the parents do not have a custody order and no court has ever made an initial custody determination, NRS 200.359 does not apply to require consent or court order granting permission to relocate out of the State of Nevada.[29] However, the Court must still decide "whether it is in the best interest of the child to live with parent A in a different state or parent B in Nevada," and may consider, among other factors, whether one parent has *de facto* primary physical custody.[30] Under these facts, the Court must incorporate the relocation factors codified in NRS 125C.007 into its best interest analysis.[31]

j. Other Custody Issues

There are a number of important custodial issues that are outside the scope of this primer on custody. They include legal parentage and related paternity issues, domestic violence issues, temporary orders, third-party custody and visitation rights, and decisions regarding same-sex parental rights, to name a few. There are also child abduction issues that are under the "custody" purview, which may require Hague Convention litigation, or a wrongful removal action under NRS 125D.120.

All custody orders must contains the following language pursuant to NRS 125C.0045(6):

> PENALTY FOR VIOLATION OF ORDER: THE ABDUCTION, CONCEALMENT OR DETENTION OF A CHILD IN VIOLATION OF THIS ORDER IS PUNISHABLE AS A

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28 NRS 125C.007(1). If those initial threshold factors are met, then the Court must weigh additional factors as outlined in NRS 125C.007(2).

29 *Druckman v. Ruscitti*, 130 Nev. 468, 327 P. 3d 511 (2014)

30 *Id.*

31 *Id.*

> CATEGORY D FELONY AS PROVIDED IN NRS 193.130. NRS 200.359 provides that every person having a limited right of custody to a child or any parent having no right of custody to the child who willfully detains, conceals or removes the child from a parent, guardian or other person having lawful custody or a right of visitation of the child in violation of an order of this court, or removes the child from the jurisdiction of the court without the consent of either the court or all persons who have the right to custody or visitation is subject to being punished for a category D felony as provided in NRS 193.130.

In addition to the language required pursuant to subsection 6 above, all custody orders must specify that the terms of the Hague Convention of October 25, 1980, adopted by the 14th Session of the Hague Conference on Private International Law, apply if a parent abducts or wrongfully retains a child in a foreign country.

k. The *Blanco* Decision

The *Blanco vs. Blanco* decision involved whether a discovery violation could be a "case ending sanction." The Supreme Court made it clear in *Blanco* that best interest of the child determinations must be decided on their merits, and that discovery violations could not result in "case ending" sanctions leading to final decisions for cases involving custody of minor children.

2. Child Support

a. Child Support Jurisdiction

The test for child support jurisdiction differs from child custody jurisdiction, although they often overlap. Child support jurisdiction is governed by the Uniform Interstate Family Support Act ("UIFSA"), codified in NRS Chapter 130.

NRS 130.201 provides that Nevada may exercise personal jurisdiction over a non-resident to establish or enforce a child support order, or to determine parentage of a child, if:

(a) The nonresident is personally served with a summons or other notice of the proceeding within this State;

(b) The nonresident submits to the jurisdiction of this State by consent in a record, by entering a general appearance or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;

(c) The nonresident resided with the child in this State;

(d) The nonresident resided in this State and provided prenatal expenses or support for the child;

(e) The child resides in this State as a result of the acts or directives of the nonresident;

(f) The nonresident engaged in sexual intercourse in this State, and the child may have been conceived by that act of intercourse; or

(g) There is any other basis consistent with the Constitution of this State and the Constitution of the United States for the exercise of personal jurisdiction.

Nevada retains continuing and exclusive jurisdiction to modify its child support order so long as this State is the residence of the obligor, the obligee, or the child for whose benefit the support order is issued.

If no party or the child reside in the originating state, Nevada may exercise jurisdiction to modify a support order if the obligor resides within the State.

Other jurisdiction rules and analyses under UIFSA are contained within NRS Chapter 130.

b. Temporary Child Support

Temporary child support during the pendency of a divorce case is governed by

NRS 125.040, which provides that in any divorce the court may, in its discretion, upon application by either party and notice to the other party, require either party to provide temporary support for the minor children.

The Court typically reviews income and expenses of the parties to calculate a temporary financial orders, including temporary child support, which is outlined in the parties' *Financial Disclosure Forms*. A *Financial Disclosure Form* is one of the first forms the client in a divorce or custody case should complete, and is due within 30 days of service of the summons and complaint, pursuant to Nevada Rules of Civil Procedure 16.2 (divorce) or 16.205 (custody). In Clark County, the failure to complete and file a *Financial Disclosure Form* may preclude a party from receiving an order for temporary financial support.

c. Nevada Administrative Code chapter 425

In 2020, NRS chapter 125B was replaced by administrative regulations set out as Chapter 425 of the Nevada Administrative Code, ("NAC"), which governs child support, and other issues relating to the support of children in Nevada. The administrative regulations made substantial and sweeping changes to the former child support laws, including changing the formula to calculate child support. One of the most significant changes was the removal of the "statutory cap" that formerly applied when calculating child support.

Child support is calculated using the obligor's (the paying party) gross monthly income. NAC 425.620 governs the definitions of "gross income" for child support purposes, and also defines what is *not* considered income for child support purposes.

NAC 425.140 sets forth the formula for calculating child support, which defines the obligation for one child, two children, three children, four children, and any additional children. By way of example, one child is calculated as follows:

> (a) For the first $6,000 of an obligor's monthly gross income, 16 percent of such income;

(b) For any portion of an obligor's monthly gross income that is greater than $6,000 and equal to or less than $10,000, 8 percent of such a portion; and

(c) For any portion of an obligor's monthly gross income that is greater than $10,000, 4 percent of such a portion.[32]

There are several child support calculators online that will automatically calculate the child support obligation with the input of basic information regarding custody and number of children.

If one parent has primary physical custody, that parent is defined as the "obligee" for child support purposes, and the other parent is defined as the "obligor." In that case, the child support formula is applied only to the obligor's income for support of the children. [33]

If both parents have joint physical custody, child support must be determined by applying the formula to both parent's income individually. Once each party's respective child support obligation is determined, the child support obligations must be offset so that the parent with the higher obligation pays the other parent the difference.[34]

Parties may stipulate to any child support amount pursuant to NAC 425.110, so long as specific terms are included within the stipulation, including the current monthly income of each party, what the child support obligation would be under the guidelines, notice that if either party seeks a review of the child support obligation, the Court will calculate the obligation in accordance with the child support guidelines in effect at the time of review, a certification by the obligee that he or she is not currently receiving public assistance, and that the basic needs of the child are met or exceeded by the stipulated obligation.

If the Court determines an obligor is underemployed or unemployed without

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32 NAC 425.160(1).

33 NAC 425.115(2).

34 NAC 42.115(3); for more than one child, *see* NAC 425.115(4).

good cause, the Court may impute income of the obligor, while taking into consideration the circumstances listed in NAC 425.125(2).

The Court may make adjustments to the child support obligation, which may include one of the adjustments listed in NAC 425.150.

If an order pertains to more than one child and does not allocate a specific amount of the total child support obligation to each child must include the following notice:

> NOTICE: If you want to adjust the amount of child support established in this order, you MUST file a motion to modify the order with or submit a stipulation to the court. If a motion to modify the order is not filed or a stipulation is not submitted, the child support obligation established in this order will continue until such time as all children who are the subject of this order reach 18 years of age or, if the youngest child who is subject to this order is still in high school when he or she reaches 18 years of age, when the child graduates from high school or reaches 19 years of age, whichever comes first. Unless the parties agree otherwise in a stipulation, any modification made pursuant to a motion to modify the order will be effective as of the date the motion was filed.

Child support orders must contain a provision that medical support is required to be provided to the child. This includes insurance coverage, and the payment of the premiums for accessible medical, vision, or dental coverage. Custody orders also contain a provision for the payment of uncovered medical expenses for the children's benefit, and are typically divided pursuant to the 30/30 rule.[35]

After a Court has established a child support obligation, any subsequent modification or adjustment of a child support obligation must be based on a

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35 The 30/30 rule provides that a party who receives a bill for uncovered medical/vision/dental expenses for the child's benefits must present the bill to the other parent within 30 days, and upon receipt, the receiving parent must make arrangements to pay their portion within 30 days.

change in circumstances.[36]

Child support terminates when the child reaches 18 years of age or, if the child is still in high school, when the child graduates from high school or reaches 19 years of age, whichever comes first.[37]

c. NRS 125B Governs a Few Remaining Child Support Issues

There are some portions of NRS 125B that survived after NAC 425 was implemented, including the law related to the obligation for supporting handicapped dependent children. Pursuant to NRS 125B.110, "[a] parent shall support beyond the age of majority his or her child with a handicap until the child is no longer handicapped or until the child becomes self-supporting. The handicap of the child must have occurred before the age of majority for this duty to apply.

NRS 125B governs rules related to the Court's ability to review child support orders. Either party can request a review of a child support not less than once every three years pursuant to NRS 125B.145 (3), and any time upon changed circumstances pursuant to NRS 125B.145(4). A change of 20 percent or more in the gross monthly income of a person subject to the payment of support is deemed to constitute changed circumstances requiring a review for modification of the order for support.[38]

d. Other Child Support Issues

In Nevada, child support cases can be brought in either the district court for that county, or through the child support courts of limited jurisdiction, if available in that county. For example, Clark County has its own court for child support cases overseen by Hearing Masters, and that court can only hear issues relating to child support only. By contrast, the district court can hear all issues related to child custody and child support. For cases brought in the child support

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36 NAC 425.170.

37 NAC 425.160(1).

38 NRS 125B.145(4).

courts, either the District Attorney or the Child Support Enforcement case workers appear to oversee the child support case and make recommendations to the Hearing Master.

Child support arrears are subject to interest, and if incurred before February 1, 2020, when the new regulations were implemented, are subject to penalties.

Child support arrears can be requested for up to four years from the date the child support case is opened, and if granted, are considered a claim for "constructive arrears," given they were not arrears from an existing court order.

e. Parkinson Waiver

The Nevada case *Parkinson vs. Parkinson* holds that child support arreats an be waived by an express or implicit agreement. It is important to note that future child support cannot be waived by parties because it is against public policy.

3. Spousal Maintenance

a. Types of Alimony and Legal Factors for Calculating Alimony

In Nevada, the term "spousal maintenance" is commonly referred to as "alimony" or "spousal support." Alimony remains one of the most difficult parts of the family law components to define and quantify, because it does not have a specific formula (like child support), and therefore grants the fact-finder wide discretion for considering types of alimony to award, the length of the award, and the amount of the total award.

NRS 125.150(9) contains a list of factors the Court "shall" consider when determining alimony, in addition to any other factors the Court wishes to consider:

> (a) The financial condition of each spouse;
>
> (b) The nature and value of the respective property of each spouse;

(c) The contribution of each spouse to any property held by the spouses pursuant to NRS 123.030;

(d) The duration of the marriage;

(e) The income, earning capacity, age and health of each spouse;

(f) The standard of living during the marriage;

(g) The career before the marriage of the spouse who would receive the alimony;

(h) The existence of specialized education or training or the level of marketable skills attained by each spouse during the marriage;

(i) The contribution of either spouse as homemaker;

(j) The award of property granted by the court in the divorce, other than child support and alimony, to the spouse who would receive the alimony; and

(k) The physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse.

In addition to the above factors, the Court is to consider what is referred to a "rehabilitative alimony" which is alimony for purpose of obtaining training or education relating to a job, career or profession.[39]

In addition to any other factors the court considers relevant in determining whether such alimony should be granted, the court shall consider:

(a) Whether the spouse who would pay such alimony has obtained greater job skills or education during the marriage; and

(b) Whether the spouse who would receive such alimony provided

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39 NRS 125.050(10).

financial support while the other spouse obtained job skills or education.

If the court determines that rehabilitative alimony should be awarded, the court, in its order, shall provide for the time within which the spouse who is the recipient of the alimony must commence the training or education relating to a job, career or profession. The spouse who is the recipient of the alimony may be granted, in addition to any other alimony granted by the court, money to provide for:

(1) Testing of the recipient's skills relating to a job, career or profession;

(2) Evaluation of the recipient's abilities and goals relating to a job, career or profession;

(3) Guidance for the recipient in establishing a specific plan for training or education relating to a job, career or profession;

(4) Subsidization of an employer's costs incurred in training the recipient;

(5) Assisting the recipient to search for a job; or

(6) Payment of the costs of tuition, books and fees for:

(I) The equivalent of a high school diploma;

(II) College courses which are directly applicable to the recipient's goals for his or her career; or

(III) Courses of training in skills desirable for employment.[40]

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40 NRS 125.150(11).

b. Alimony Terms

Unless alimony is made unmodifiable (typically by stipulation), it can be modified upon changed circumstances. Specifically a spouse who is ordered to pay alimony may file a motion to modify the alimony order upon changed circumstances, and 20 percent or more change in income is deemed to constituted a change of circumstances requiring a review for modification of alimony.

Unless parties agree to "nonmodifiable alimony," periodic payments of alimony cease upon the death of either party, or upon subsequent remarriage by the party receiving the alimony.

A spouse's separate property can be used to provide for the support of his or her spouse, including to pay alimony, as provided for in NRS 125.150(5).

c. Alimony and Taxes

The tax laws related to alimony changed significantly in 2019 as part of a federal tax reform bill, and made alimony non-deductible by the payor, and non-includable by the recipients, making the effect like that of child support. This eliminated the need of practitioners to take the parties' tax brackets into consideration when calculating alimony.

d. *Kogod vs. Kogod*

The Nevada Supreme Court case *Kogod vs. Kogod* holds (among other concepts) that factors to consider in the alimony analysis are the standard of living of the parties during the marriage and the amount of investment income that is awarded to the spouse receiving alimony.

4. Valuation & Division of Property

a. Defining Community Property vs. Separate Property

There are two types of property in a Nevada divorce; separate property and

community property.

Separate property is defined as all property of a spouse owned by him or her before the marriage, and that was acquired by him or her afterward by gift, bequest, devise, or by an award for personal injury damage, along with rents, issues, and profits thereof.[41]

Community property in the State of Nevada is defined as all property acquired after marriage by either spouse or both spouses, unless specifically defined as separate property, unless provided by an agreement in writing between spouses, or unless otherwise defined by a decree of separate maintenance issued by a court of competent jurisdiction.[42]

b. Division of Property in a Divorce

In granting a divorce, the Court must make an equal disposition of the community property of the parties, except that the Court may make an unequal disposition of the community property in such proportions as it deems just if the Court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal division.[43]

c. Discovery and Tools for Division of Property

The discovery period is a very important part of determining the extent of the marital estate. Practitioners use the Financial Disclosure Form, which lists assets and debts, as well as a Marital Balance Sheet, which also lists the assets and debts in more detail, to assist with their analysis of the marital estate.

d. Assets that may have Community and Separate Components

Some of the most complex property issues in divorce cases arise when there are

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41 NRS 123.130.

42 NRS 123.220.

43 NRS 125.150(1)(b).

assets that have both separate property and community property components. Although the case law and statutory law is less than clear or streamlined, there are various tests for how to calculate community property for mixed assets depending on the facts of the case. This includes separate property with community contributions, and community property with separate contributions and all variations of the above. This course is not designed to teach the nuances of these complex assets, or even to cover every possible scenario, so it is important to research the facts of your individual case, or reach out for help from an experienced family law practitioner when faced with these issues in a divorce case.

The title of an asset is an important consideration when starting the analysis for determining the community value of an assets. In addition, the type of asset is equally important as different test apply to different assets. All assets deserve consideration of separate and community components, including real property, retirement benefits, vehicles, bank and investment accounts, and businesses.

e. Real Property Assets

Real property assets that have separate and community claims or components are subject to their own tests for calculating community interest. NRS 125.150(2) provides a test for when a real property asset is in joint tenancy, providing that if a party made a contribution of separate property to the acquisition or improvement of property held in joint tenancy, the court may reimburse that party for their contribution.

However, this statute must be read with special consideration that there are many properties that are titled differently than "joint tenancy," and those properties may not apply to this section. In addition, the Nevada Supreme Court case *Schmanski* held that separate property placed into joint tenancy is presumed to be a gift to the community, unless the presumption is overcome by clear and convincing evidence.[44]

This applies to real property not held in joint tenancy as well; the Nevada Supreme Court has consistently held that "a spouse to spouse conveyance of

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44 *Schmanski v. Schmanski*, 115 Nev. 247, 984 P.2d 752 (1999).

title to real property creates a presumption of gift that can only be overcome by clear and convincing evidence."[45]

When a spouse's separate property benefits from payments made by the community, there is a separate and distinct test. First, if the community shares in acquiring separate property, the community is entitled to a *pro rata* ownership share in that property.[46]

When the community contributes monthly mortgage payments that reduce the principal of a loan on one spouse's separate property residence, the Nevada Supreme Court adopted a formula in the *Malmquist v. Malmquist* case.[47]

The formula is quite complicated, but there is a calculator on willicklawgroup.com website to determine the community interest pursuant to *Malmquist*. The formula requires the following data: down payment (assumed to be separate funds), original loan balance, original cost, principal balance on loan at marriage, principal balance on loan at divorce, principal reduction before marriage, principal reduction after marriage, fair market value at the time of divorce, and total net equity at divorce. Then, Principal payments are quantified both during the marriage and before the marriage. Once the data is inputted into the calculator, it produces a "value" for the community interest in the real property separate asset.

f. Improvements on Separate Property

The Nevada Supreme Court has held that separate property or community property improvements to real property should, in most cases, be treated as a simple reimbursement without interest. While reimbursement is the general rule, the district court may deviate from the reimbursement measure where necessary to effectuate a proper apportionment. For example, where the improvements actually decrease the value of the property, or where the vast

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45 *Kerley v. Kerley*, 112 Nev. 36, 910 P.2d 279 (1996).

46 *Malmquist v. Malmquist,* 106 Nev. 231, 792 P.2d 372 (1990), (citing *Robison v. Robison*, 100 Nev. 668, 670, 691 P.2d 451, 454 (1984)).

47 *Id.*

bulk of appreciation is due to the improvement.[48]

g. Commingled Funds

This is certainly beyond the scope of this preliminary course regarding community property division, but when community and separate funds are commingled into joint accounts, there are two ways to rebut the presumption that commingled funds are community property (or that the purchase of property was made with community funds from that account): 1) direct tracing of the source of a particular purchase to the separate property portion of the account ("direct tracing method"), or 2) proof that at the time of the purchase all community income was exhausted by family expenses ("exhaustion method").

To attempt to make a claim to separate community from separate commingled funds, all funds spent during the marriage for the community's benefit may first deducted from the accounts, and compared to the community's contributions to the accounts. The same is done for separate property. Depending on the unique facts of the case, claims can sometimes be made to characterize a portion or all of the remaining funds as "community" or "separate." As stated above, this can also be applied when determining the source of funds that may have purchased assets, or transferred into other accounts or investments. Typically, a forensic accountant is retained to analyze the accounts, and quantify the claims made in an expert witness report.

h. Valuation of Property

In the absence of an agreement, property requires an appraisal or similar method to determine value. Real property requires a real property appraisal, unless the property is being sold by the parties as part of the terms of the divorce. If that occurs, the value is the sale price, and typically requires both parties to mutually accept any "reasonable" offer.

Vehicles typically are valued using their Kelly Blue Book value, or by using comparison values of similar vehicles for sale, especially when they are older

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48 *Id.*

or classic vehicles, equipment, boats, trailers, or ATVs.

There are times when appraisals of personal property is appropriate, such as custom art collections, fine jewelry, valuable collectibles, etc. In most cases where the division of personal property is an issue, the Court will order one of the parties to create an A/B list, which is two lists that together contain a list of all of the person property of the parties (furniture, appliances, tools, etc.) Once the two lists are created, referred to as an "A" list and a "B" list, the other party may choose one of the lists.

5. Retirement Accounts and QDROs

The term "QDRO" refers to a "Qualified Domestic Relations Order," which is a court order that outlines the division of retirement benefits between spouses, and is often required to divide the retirement benefits in a divorce.

Ignoring pension or retirement benefits in a divorce case is not an option – it leaves the divorce attorney subject to malpractice liability. It is likewise critical for the benefits to not just be mentioned, but to be addressed competently. A vague reference such as "benefits divided per the time rule," or "wife may submit a QDRO" are not sufficient.

Most people in this country earning retirement benefits work for private employers. Most private employee-benefit plans, or "pension plans"[49] in the United States today are qualified under, and governed by, the Employee Retirement Income Security Act of 1974, known as "ERISA,"[50] codified at 29

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49 A plan providing for retirement benefits or deferred income, extending to or beyond the end date of covered employment. *See* 29 U.S.C. § 1002(2)(A). This includes pension plans, profit sharing plans, "401(k)" plans, and some employee stock ownership plans. It does ***not*** include any kind of government plans – Civil Service, Military, state or local government, etc. It also does not include certain other types of private-employer benefits, such as severance pay benefits and vacation plans, or IRAs or SEP-IRAs, which are governed by other laws.

50 Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974).

U.S.C. § 1001 *et seq*.

a. Defined Benefit Types of Plans

A defined benefit plan (often called a pension plan or retirement plan) is usually funded by employer contributions (although in some plans employees can contribute) and is intended to provide certain specified benefits to the employee after retirement, usually for life. Often, the benefit is determined by a formula taking into account the highest salary received and the total number of years worked for the employer (such as a "high-three" or "high five" plan).

For example, a plan might pay one-tenth of an employee's average monthly salary over the three years before retirement, multiplied by one-fourth the number of years that the employee worked. A twenty-year employee earning an average of $2,000 per month during his last years would get $1,000 per month (i.e., $2,000 x .1 x 20 x .25). Generally, no lump-sum distributions can be distributed from defined benefit plans.

In addition to traditional private-employer plans governed by ERISA, the primary retirement benefits provided by the Civil Service under CSRS and FERS, military retired pay, and most PERS plans are all variations of defined benefit plans.

The marital share of a defined benefit plan is calculated pursuant to the "time rule." The standard "time rule" formula seems simple enough – the spousal share is determined by taking the number of months of service during marriage as a numerator, and the total number of months of service as a denominator, and multiplying the resulting fraction by first one-half (the spousal share) and then by the retirement benefits received.

b. Defined Contribution Type Plans

A defined contribution plan is one in which a specified amount is contributed by the employer and/or the employee into an individual account and invested on the employee's behalf. Such plans usually provide a statement of each participant's account at least annually. Defined contribution plans generally pay lump sums, but they may offer other forms of benefits.

The most common examples of defined contribution plans are discretionary profit-sharing plans and formula plans (e.g., money purchase and target benefit pension plans). Other examples are employee stock ownership plans (ESOPs), simplified employee pensions (SEPs), and SIMPLE 401(k) plans. The key concept for such plans is that they have a specific balance of funds belonging to each particular employee.

c. Your Job As An Attorney

Whenever you are representing a party in a divorce, it is your responsibility to first determine if there are any retirement accounts or pensions. After that, you have to determine whether the plan is a defined benefit or contribution plan. If you are unsure, obtain a copy of the Summary Plan Description from the plan. This document will clearly spell out if the plan is "qualified" by the IRS and what type of plan it is.

Many attorneys employ the services of a QDRO preparation service to complete their client's QDROs, or refer their clients to one of those services. I recommend QDRO Masters, a division of the Willick Law Group, a respected QDRO preparation service. Using a competent QDRO preparer will help avoid any malpractice pitfalls that could exist if the practitioner attempts to do the QDRO themselves.

d. The QDRO Itself

In dealing with any retirement program, the practitioner should pay attention to the following essential elements:

1. ***What*** will be available (and the form – whether a monthly annuity, or with a lump sum option), and whether there might be more than one plan associated with a particular wage-earner.
2. The ***amount*** of the benefit that is divisible community property, under the time rule, direct tracing, or some other analysis.
3. ***When*** that sum is to be ***first available*** for distribution, and what steps might be taken by either party to accelerate or delay that

availability.

4. What, if any, ***survivor benefits*** might be accorded to a former spouse in addition to or in place of the retirement benefits, and who will pay for them.
5. Whether any ***ancillary*** benefits are available (most importantly, medical benefits).

After these basics come a few other matters that should be consciously addressed in every divorce case involving pension benefits before the case is over:

1. What ***notices*** are required to be given, within what time limits, to which authorities, in order to make sums payable to the spouse or permit the transfer of other interests.
2. What effect a present or future ***disability*** claim by the retiree or the former spouse could have on payment of benefits (and what, if anything, you can do about it in advance).
3. Whether and what post-divorce actions of either of the parties (such as nomination of the wage-earner of a second spouse as beneficiary, or remarriage of the former spouse) could affect the distribution of benefits provided by the Decree, and what can or should be done about those possibilities.

Failure to deal with ***all*** of those factors in litigation or negotiations, and especially in the court orders, could lead to unforeseen and unfortunate results for parties, or counsel, or both.

e. Taxes and other Considerations

Although the scope of this course is too limited to go into all of the important issues related to retirement account division, here are a few other important highlights.

First, it is important to find out if the defined contribution retirement account is "pre-tax dollars," like many standard IRAs and 401(k)s, or "post-tax dollars," like Roth IRAs or Roth 401(k)s. If parties are attempting to "exchange" or "offset" assets when negotiating a resolution, the pre-taxed retirement account

cannot be valued at 100% of its value, and taxes must be considered. If a litigant, for example, is in a 20% tax bracket, they can estimate a 20% reduction on the actual value sitting in their defined contribution plan.

The present value of defined benefit plans are even harder to quantify if parties are attempting to "offset" assets in a divorce. They require an estimation of the life of the pension recipient, which is done by using actuarial tables, and an estimation of the pension benefits at retirement age. The true present value of pension benefits, or defined benefit plans, can never be accurately calculated as there are too many unknown variables.

A litigant that is the beneficiary, or "alternate payee," of a retirement account may roll their portion of the benefits over to a retirement account in their name, or they can cash out the retirement account. If the alternate payee elects to cash out their portion of a pre-tax retirement account, they will be taxed on those benefits. QDROs typically make each party responsible for their own taxes associated with their portion of the retirement benefits.

A party with retirement benefits that exist at the time of marriage have a separate property claim to those benefits. It is important to remember that all "rent, issues, and profits" on separate property are due to the holder of that property, so if you represent a party with a separate property interest in a retirement account, calculate the average rate of return on the separate property benefits, and ensure those are also awarded to your client and deducted from the marital share of the account.

Retirement benefits are often distributed after the date the parties' *Decree of Divorce* is entered. Sometimes, parties wait years to complete their QDROs, although they should always be counseled to complete their QDROs as soon as possible, even at the same time the *Decree* is entered, if possible. Because that time lapse can occur, ensure the *Decree* awards your client "gains and losses" that accrue from the date of the *Decree of Divorce*, so they benefit from any interest that accrues in the retirement account on their portion of the benefits from the date of the *Decree of Divorce* to the date the funds are distributed to them.

Finally, never forget about the survivorship interest in a retirement account.

Although this is a complex topic that deserves its own course, the short answer is that survivorship options are available in many retirement plans, and should be discussed and can be negotiated at the time of divorce.

6. Marital Waste

Marital waste is a claim that can be made when parties use marital funds for nonmarital purposes, therefore financially harming the other spouse. If the Court finds marital waste was committed, it can make specific findings of waste and award an unequal disposition of the community property in the divorce to the harmed spouse. It is important to note that Nevada law does not recognize waste when parties are irresponsible with money (i.e. gambling problem) during the marriage if both parties are aware of the wasteful behaviors. Only concealed waste or waste during the pendency of the separation or divorce are recognized as "marital waste" in Nevada.

There are several cases that are relevant to waste:

Lofgren vs. Lofgren - holds that dissipation or waste can provide a compelling reason for the unequal distribution of community property.

Putterman vs. Putterman - holds that waste committed after the separation or breakdown of the marriage is different than under-contributing or over-consuming community assets during the marriage.

Kogod vs. Kogod - Generally dissipation refers to "one spouse's use of marital property for selfish purposes unrelated to marriage in contemplation of divorce or at a time when the marriage is in serious jeopardy or is undergoing an irretrievable breakdown." Kogod also holds that evidence of waste must show it specifically did not benefit the marital community (i.e. gifts to an affair partner are waste, but evidence of dining out in the State of California, where the affair partner lived, was held to be too vague to constitute waste).

Eivazi vs. Eivazi - The party claiming waste must raise a reasonable inference that a particular transaction (or perhaps a series of transactions) constitutes waste; the burden of proving the absence of waste then shifts to the other party.

7. Post-Decree Enforcement Issues

Motions for enforcement and/or Order to Show Cause for Contempt are methods of enforcing post-Decree orders.

Contempt is governed by NRS Chapter 22.

NRCP 16.21 governs post-Decree civil rules of procedure and states discovery does not open until an evidentiary hearing is set or the Court opens discovery (i.e. you cannot start sending out subpoenas after you file a post-Decree motion unless one of those two conditions are met).

See also Uniform Act on Enforcement of Foreign Judgments (NRS 17.330 et. seq.)

8. Attorney's Fees

It is important for any lawfirm and their clients (or on behalf of their clients) to advocate for their attorney's fees. The following authority supports this endeavor:

NRS 18.015

Brunzell vs. Golden Gate National Bank - factors required to present in a motion or memorandum requesting fees)

Wright vs. Osburn - fee requests must acknowledge disparity of income)

Miller v. Wilfong - pro bono counsel can request fees regardless of having collected fees before the request is made

Argenta Consolidated Mining Co.

Fredianelli v. Price

9. Recent Published Cases

Draskovich vs. Draskovich,140 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 17, Mar. 21, 2024)

Husband owned a 65% stake in a law firm at the time of marriage in 2012. In 2018, Husband opened his own law firm and kept the same office, staff, and clients. The parties hired a forensic accountant who did not provide a separate property valuation because neither party hired her to allocate the separate and community property interests. At trial, the court concluded Robert failed to overcome the community property presumption becuase he did not offer clear and convincing evidence regarding the value of the separate property interest in his law firm. Additionally, the Court did not award the Wife alimony because it determined the share of community property assets would provide sufficient support through passive income.

Valuation: At oral argument, both counsel conceded there was a separate and community component of the business. The Supreme Court concluded the totality of hte circumstances need to be considered for whether a business was brought into the marriage as separate property (and not just considering the date the business was incorporated to determine the date it began for community/separate purposes). Therefore, the business was separate and it was the wife's burden to show the community increased the value of the business through talent or toil during the marriage. Therefore, the case was remanded to determine whether wife can show community interest. The denial of alimony denial was also reversed and remanded given the decision on the business.

Lopez v. Lopez, 139 Nev. ___, ___ (Nev. App. Adv. Opn. No. 54, Nov. 30, 2023)

Husband and wife were co-settlors, co-trustees, and beneficiaries of a revocable inter vivos family trust. The Court held that the trust did not need to be named in the divorce action or joined as a necessary party, and that the district court had authority to distribute the trust's assets between the parties as community property. Additionally, the wife failed to overcome the community property presumption by clear and convincing evidence and therefore the trial court had

authority to equally divide the family trust's assets. Judgment affirmed.

Kelley vs. Kelley, 139 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 39, Sept. 28, 2023)

The Supreme Court affirmed the district court's determination that when parents with court-ordered joint legal custody of a minor child disagree on medical decisions concerning that child, the district court breaks the tie by determining which course of action is in the child's best interest.

The SC adopted non-exhaustive factors for district courts to consider when making such determination:
(1) the seriousness of the harm the child is suffering or the substantial likelihood that the child will suffer serious harm;
(2) the evaluation or recommendation by a medical professional;
(3) the risks involved in medically treating the child; and
(4) if the child is of a sufficient age and capacity to form an intelligent preference, the expressed preference of the child.

Here, the Court found that the child should receive the COVID-19 vaccination based on the child's pediatrician's recommendation, government guidelines, and professional groups' research results.

Candelaria vs. Kelly, 139 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 30, Sept. 14, 2023)

In *Obergefell v. Hodges* 576 U.S. 644, 675-76, 681 (2015), the United States Supreme Court held that same-sex couples have the fundamental right to marry and that states must recognize same-sex marriages lawfully performed in states that already permitted them.

The SC found that *Obergefell* does not require Nevada courts to backdate a marriage. Further, the SC declined to craft a judicial remedy because Nevada enacted a statutory prohibition (NRS 122.010) on common-law marriage in 1943 so a "but for" factor-based test would contradict Nevada law.

Here, the parties began dating in July 1991. When California legalized same-sex marriage in 2008, the couple married. In 2020, a divorce was filed. A dispute over two assets, Michael's 401(k) account and Michael's shares of stock from employment, was initiated.

One party argued that he acquired the assets before the 2008 marriage so it was his separate property. However, the other party argued that their marriage actually began in either November 1991 or July 1992 as that is when they would have married but for Nevada's prohibition on same-sex marriage.

The district court declined to backdate the marriage and awarded the assets to the one party as his separate property. The Supreme Court affirmed.

Davitian-Kostanian v. Kostanian, 139 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 27, Aug. 31, 2023)

Parties divorced after 25 year marriage. Decree required alimony for ten years and child support until the minor child turned 18.

One day before alimony payments were to cease, wife filed a motion to modify alimony and reinstate child support payments as the child -- who was over 18 -- was handicapped. The district court denied the motion finding it lacked jurisdiction under NRS 125C.0045(1)(a) as the child was beyond the age of majority. Spousal support was also denied.

The Supreme Court found NRS 125C.0045(1)(a) generally requires that modifications to child support be made while the child is still a minor but there is a statutory exception for adult handicapped children in certain circumstances. The district court erred in finding no jurisdiction. Upon remand, the district court is required to make several findings under NRS 125B.110 when evaluating a request for adult child support.

The district court did not abuse its discretion in denying to modify alimony. It was clarified that while a 20-percent change in monthly income may constitute a change in circumstances under NRS 125.150(8), it does not require the district court to make a modification. NRS 125.150(8) merely permits the court

to determine whether modifying alimony is appropriate.