A Trauma-Informed Approach to Justice: Understanding Litigant Presentation

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What even is trauma?

APA - an emotional response to a terrible event (accident, crime, natural disaster, physical/emotional abuse, neglect, experiencing/witnessing violence, death of a loved one, war, etc.)

Immediately - shock and denial are typical.

Longer term - unpredictable emotions, flashbacks, strained relationships, and even physical symptoms like headaches or nausea.

What are the problems with this definition?

“Shock” Trauma
Vs.
“Strain” Trauma

Trauma
Vs.
Complex Trauma

Trauma

Immediate effects of trauma on adults were not recognized until the early 1900's:

- diagnosis of 'shell shock' gained popularity after World War I
- it was acknowledged throughout the 20th century that trauma, particularly combat trauma, could have an impact BUT not until after the Vietnam War that Western society began to recognize the long-term consequences for adults
- Until the 1980's, it was believed that traumatic experiences did not leave lasting damage on children; due to the "resilience" of childhood, children would "bounce back" from traumatic experiences

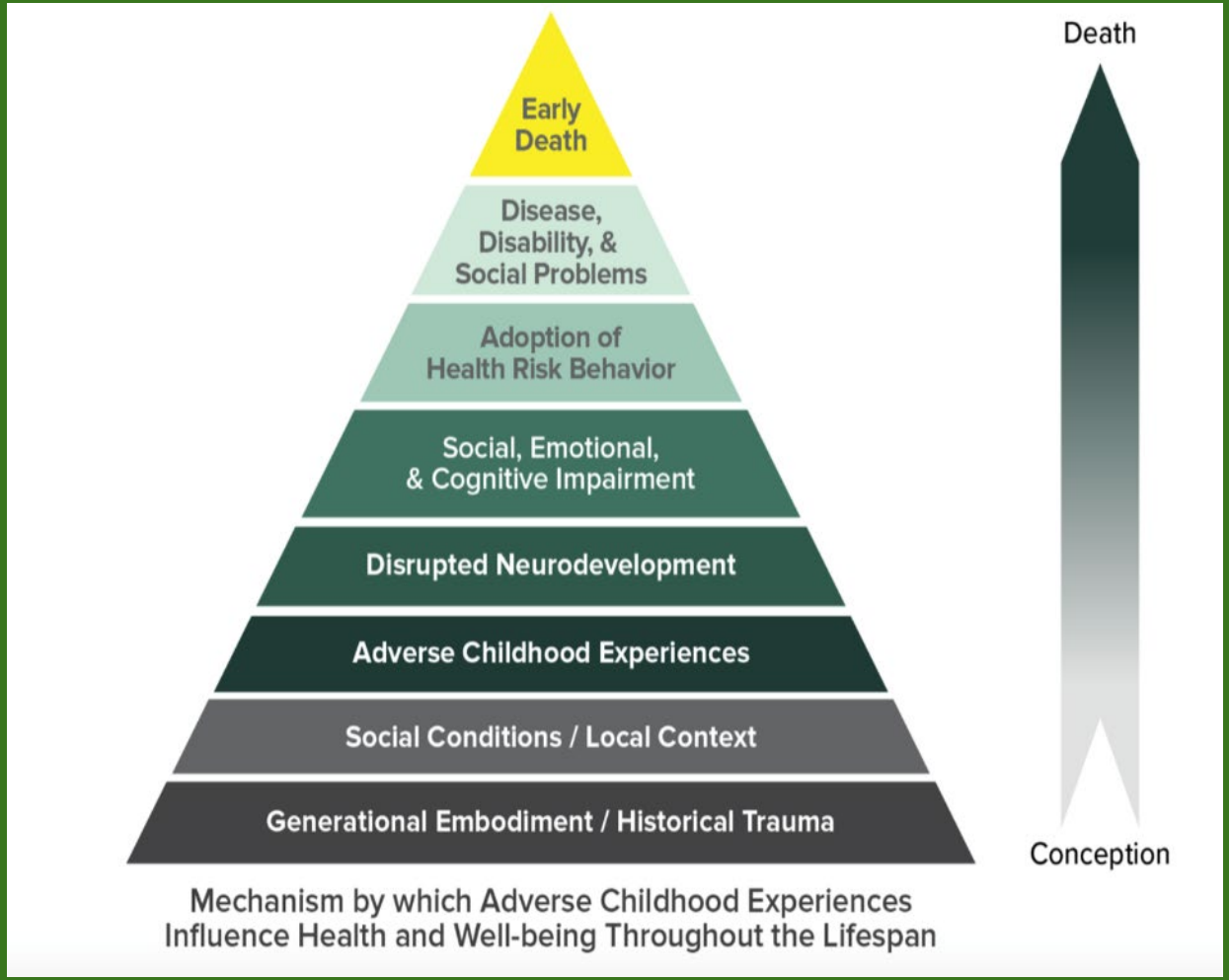
ACEs & Other Traumas

CDC-Kaiser Permanente Adverse Childhood Experiences (ACE) study:

- “clear majority of patients …who were exposed to one category of childhood abuse or household dysfunction were also exposed to at least one other.”
- “Disease conditions including: ischemic heart disease, cancer, chronic lung disease, skeletal fractures, and liver disease… suggest that the impact of these adverse childhood experiences on adult health status is **strong** and **cumulative**.”

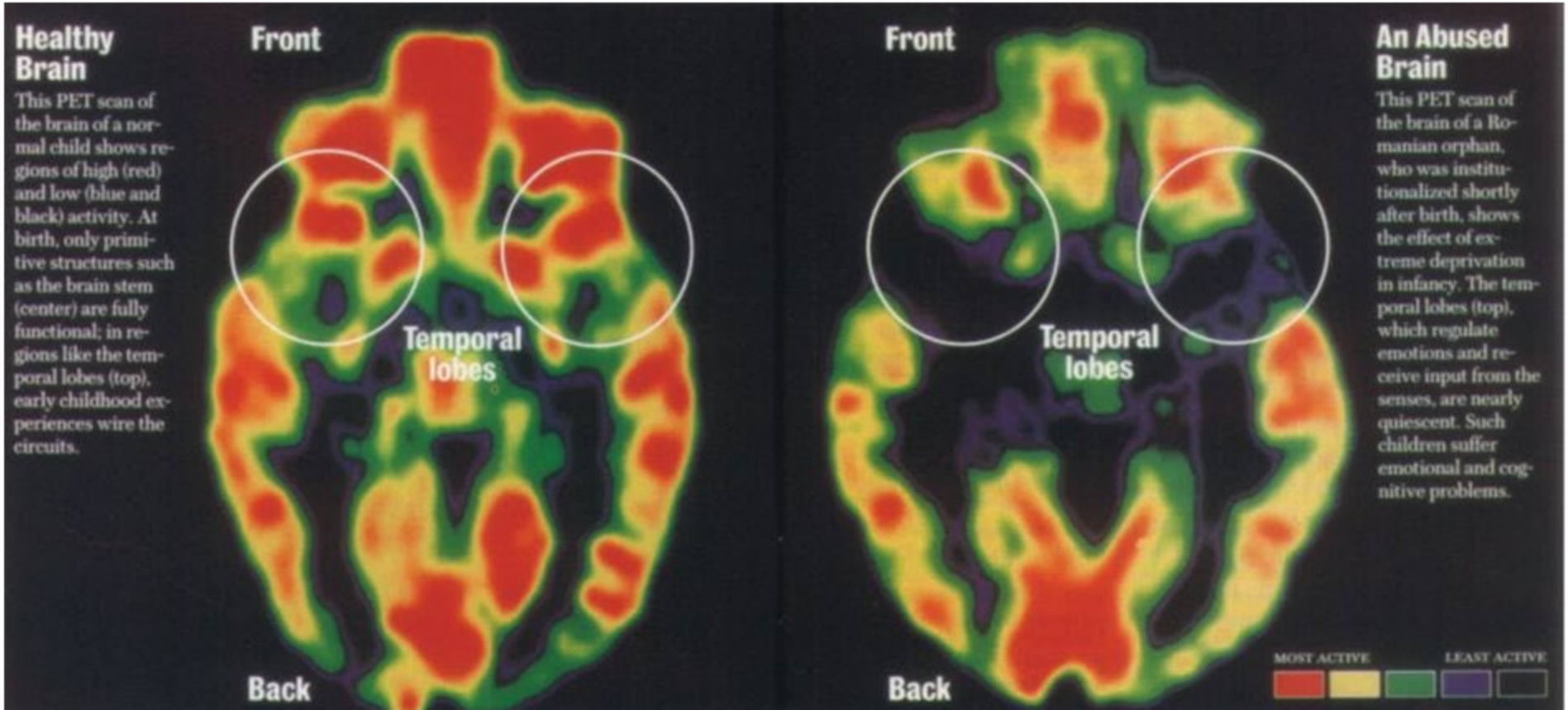
WHO:

- Around 70% of people globally will experience a potentially traumatic event during their lifetime.
- Most people exposed to such events will experience distress but will recover naturally with time.
- Acute Stress Disorder develops in 6% to 33% of people within one month of an event.
- About 6% of people globally will meet criteria for PTSD at some point in their lives.

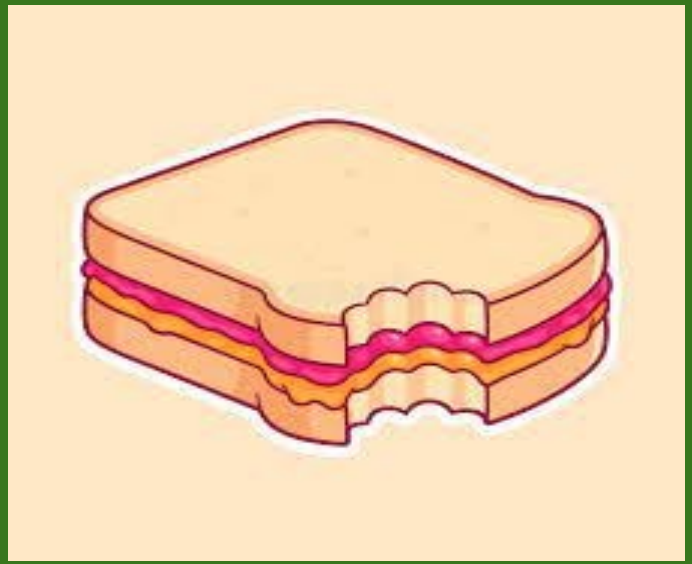


Mechanism by which Adverse Childhood Experiences Influence Health and Well-being Throughout the Lifespan

Impact of ACEs on Early Brain Development



The Jam Sandwich Problem



Trauma affects everyone differently

Traumatic stress reactions are normal reactions to abnormal circumstances.

Common Effects of Trauma

Some individuals may clearly display symptoms associated with post-traumatic stress disorder (PTSD), but most individuals will exhibit **resilient** responses or **brief subclinical** symptoms outside of diagnostic criteria.

Impacts of trauma can be **subtle**, insidious, or outright **destructive.**

How an event affects an individual depends on many factors: characteristics of the individual, the type and characteristics of the event(s), developmental processes, the meaning of the trauma, and sociocultural factors.

Reactions range in severity:

- even the most acute responses are **natural responses** to manage trauma— they are not a sign of psychopathology
- Coping styles vary from action oriented to reflective and from emotionally expressive to reticent

Reactions to Trauma

Exhaustion, confusion, sadness, anxiety, agitation, numbness, dissociation, confusion, physical arousal, and blunted affect are all common.

Reactions vary widely:

- People engage in behaviors to **manage the aftereffects**, the intensity of emotions, or the distressing aspects of the traumatic experience.
- Some people reduce tension or stress through **avoidance**, self-medicating (e.g., alcohol abuse), compulsivity (e.g., overeating), **impulsivity** (e.g., high-risk behaviors), and/or self-injurious behaviors.
- Others may try to **gain control** over their experiences by being aggressive or subconsciously reenacting aspects of the trauma.

Immediate Physical Reactions

Nausea and/or gastrointestinal distress
Sweating or shivering
Faintness
Muscle tremors or uncontrollable shaking
Elevated heartbeat, respiration, and blood pressure
Extreme fatigue or exhaustion
Greater startle responses
Depersonalization

Immediate Cognitive Reactions

Difficulty concentrating
Rumination or racing thoughts (e.g., replaying the traumatic event over and over again)
Distortion of time and space (e.g., traumatic event may be perceived as if it was happening in slow motion, or a few seconds can be perceived as minutes)
Memory problems (e.g., not being able to recall important aspects of the trauma)
Strong identification with victims

Immediate Reactions

Immediate Emotional Reactions

Numbness and detachment
Anxiety or severe fear
Guilt (including survivor guilt)
Exhilaration as a result of surviving
Anger
Sadness
Helplessness
Feeling unreal; depersonalization (e.g., feeling as if you are watching yourself)
Disorientation
Feeling out of control
Denial
Constriction of feelings
Feeling overwhelmed

Immediate Behavioral Reactions

Startled reaction
Restlessness
Sleep and appetite disturbances
Difficulty expressing oneself
Argumentative behavior
Increased use of alcohol, drugs, and tobacco
Withdrawal and apathy
Avoidant behaviors

Delayed Reactions

Delayed Physical Reactions

Sleep disturbances, nightmares
Somatization (e.g., increased focus on and worry about body aches and pains)
Appetite and digestive changes
Lowered resistance to colds and infection
Persistent fatigue
Elevated cortisol levels
Hyperarousal
Long-term health effects including heart, liver, autoimmune, and chronic obstructive pulmonary disease

Delayed Emotional Reactions

Irritability and/or hostility
Depression
Mood swings, instability
Anxiety (e.g., phobia, generalized anxiety)
Fear of trauma recurrence
Grief reactions
Shame
Feelings of fragility and/or vulnerability
Emotional detachment from anything that requires emotional reactions (e.g., significant and/or family relationships, conversations about self, discussion of traumatic events or reactions to them)

Delayed Cognitive Reactions

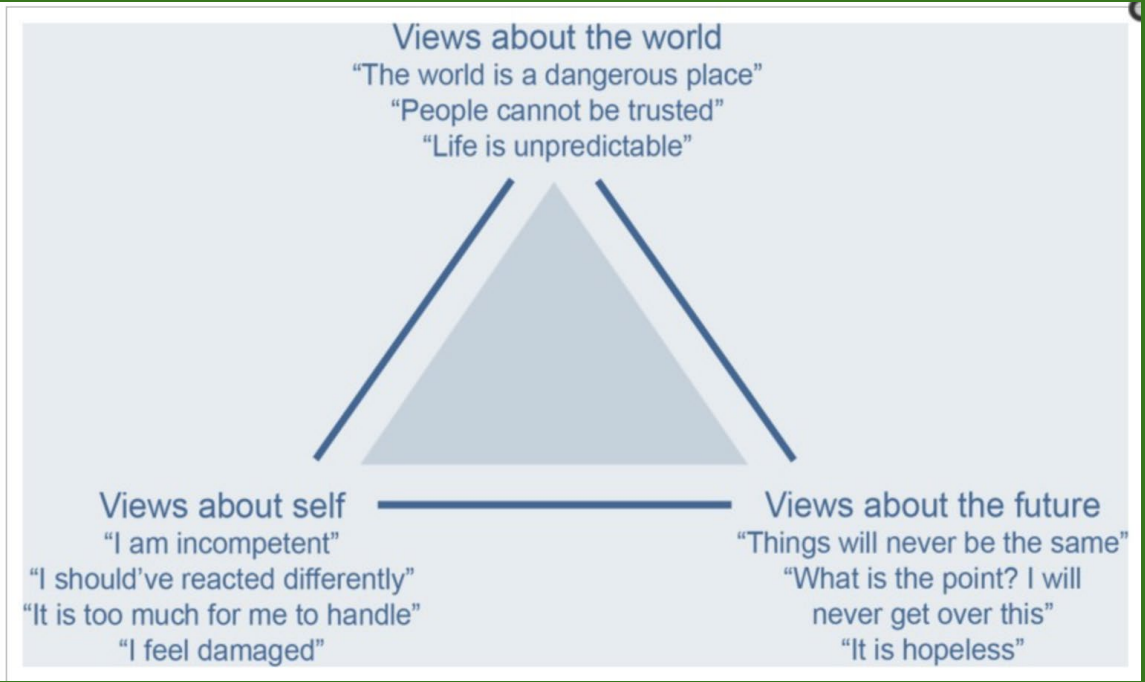
Intrusive memories or flashbacks
Reactivation of previous traumatic events
Self-blame
Preoccupation with event
Difficulty making decisions
Magical thinking: belief that certain behaviors, including avoidant behavior, will protect against future trauma
Belief that feelings or memories are dangerous
Generalization of triggers (e.g., a person who experiences a home invasion during the daytime may avoid being alone during the day)
Suicidal thinking

Delayed Behavioral Reactions

Avoidance of event reminders
Social relationship disturbances
Decreased activity level
Engagement in high-risk behaviors
Increased use of alcohol and drugs
Withdrawal

Distorted Cognition/Memory

Trauma challenges the **"just-world"** or core life assumptions that help individuals navigate daily life



Negative automatic and erroneous thoughts about the self, environment, and future

Impact a person's sense of intimacy, safety, trust, esteem, and power/control

Memories of traumatic events can be more **fragmented** and **disorganized**

People tend to remember experiencing even more trauma than they actually did

Flood of emotion/cognitive dissonance overloads the processing necessary for memory formation. The brain attempts to close the loop with additional elements, real or imagined

Dissociation

A mental process that **severs connections** among a person's thoughts, memories, feelings, actions, and/or sense of identity.

Happens because the person is engaged in an automatic activity and is not paying attention to his or her immediate environment.

Dissociation can also occur during severe stress or trauma as a **protective element** whereby the individual incurs distortion of time, space, or identity. This is a common symptom in traumatic stress reactions.

Dissociation helps distance the experience from the individual.

People who have experienced severe or developmental trauma may have learned to separate themselves from distress to survive.

Re-Enacting/Re-Experiencing

A hallmark symptom of trauma

Can occur through reenactments (literally, to “redo”)

Trauma survivors repetitively relive and recreate a past trauma in their present lives.

Attempts to understand reenactments are very complicated, as reenactments occur for a variety of reasons, including to master them. To name a few:

- self-injurious behaviors
- hypersexuality
- walking alone in unsafe areas or other high-risk behaviors
- driving recklessly
- involvement in repetitive destructive relationships (e.g., repeatedly getting into romantic relationships with people who are abusive or violent)

Problems Throughout the Lifespan

Young children may display: generalized fear, nightmares, heightened arousal and confusion, and physical symptoms, (e.g., stomachaches, headaches).

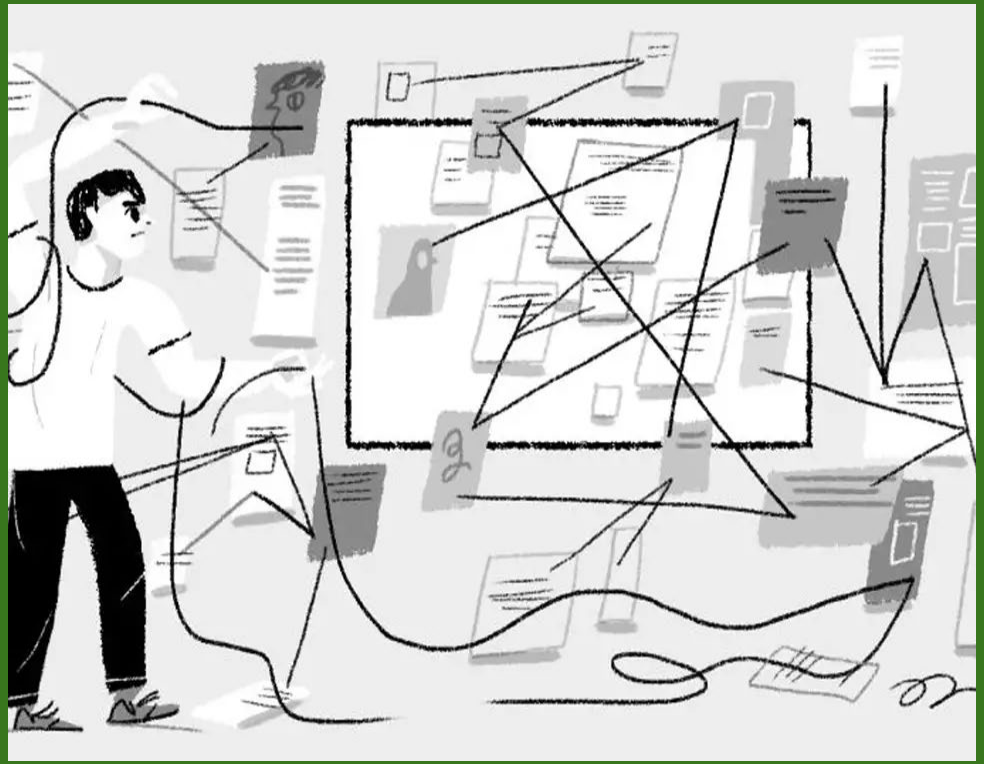
School-age children may exhibit: aggressive behavior and anger, regression to behavior seen at younger ages, repetitious traumatic play, loss of ability to concentrate, and worse school performance.

Adolescents may display: depression and social withdrawal, rebellion, increased risky activities such as sexual acting out, wish for revenge and action-oriented responses to trauma, and sleep and eating disturbances

Adults may display: sleep problems, increased agitation, hypervigilance, isolation or withdrawal, and increased use of alcohol or drugs.

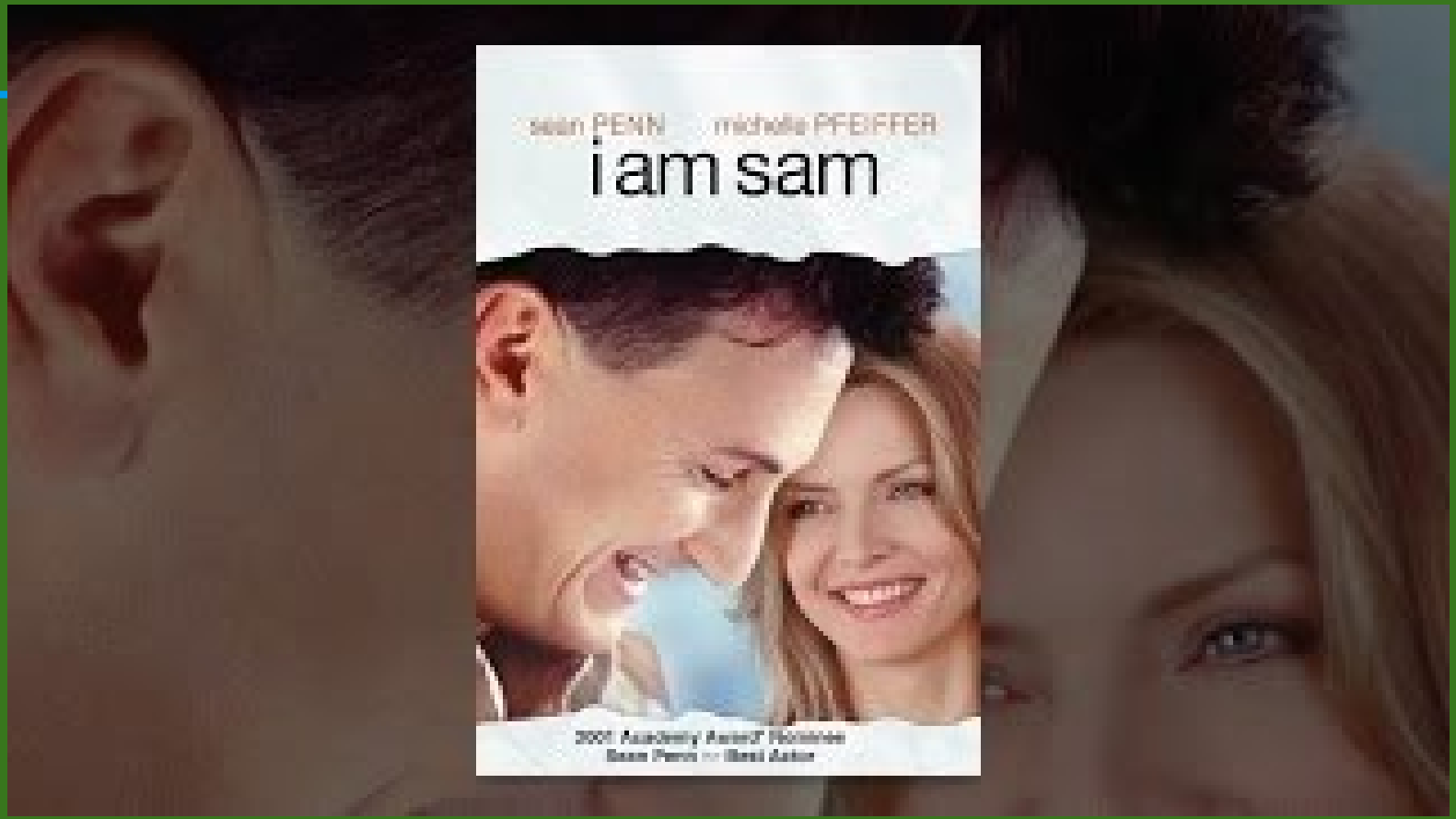
Older adults may exhibit: increased withdrawal and isolation, reluctance to leave home, worsening of chronic illnesses, confusion, depression, and fear

Time-Keeper



Confused??

What About Your Witness



Divorce as a Traumatic Event

Divorce alone doesn't fit the clinical definition of a traumatic event.

However, for some people, going through a divorce may lead to trauma-related symptoms.

Divorce can be painful, even when you want it. It's natural and valid to feel hopeless, sad, or let down if you're going through a divorce.

In a divorce, there is the first, immediate trauma, and then the longer-term trauma which may not fully resolve until long after the legal divorce is over.

There are many triggers of divorce trauma.

As one navigates the legal divorce process, feelings intensify.

- Extremely negative thoughts: “I am a failure.” “I will never be happy again.” “No one will ever want me.”
- Worry about your children, “They will be permanently scarred by the divorce.”
- Try to cope in negative ways, such as drinking or risky behaviors.
- Trauma leads to a loss of faith, the future looks dim.
- Feeling unsafe in the world, and can’t let go of your anxiety and fears.
- May self-isolate.

Trauma-Informed Justice

- Trauma-informed practice is when the practitioner puts the realities of the client's trauma experiences at the forefront in engaging with the client and adjusts the practice approach informed by the individual client's trauma experience. (Marshall, T., *Comment, Trauma Informed Mediation*)
- Recent reports have highlighted the **considerable/multiple** ways people experience the justice system as **exacerbating** the impact of their prior experiences of trauma, and the negative impact this has on their ability to effectively participate in the process, and to recover.
- Responding in a trauma informed way is **necessary but not sufficient** for a fair and effective justice system.

Case Study

Susan has discovered that Mark has been cheating on her with his golf caddy. She tells him that she wants a divorce. Mark is humiliated and embarrassed by the break up of his picture perfect family. There will be substantial financial issues, as Susan gave up her career as an accountant when they married 20 years ago to raise their family. Mom says Cindy feels rejected by her father, who mocks her for her activism and her weight. David simply wants everyone to get along. The parties also don't agree on custody.

Asking the Right Questions

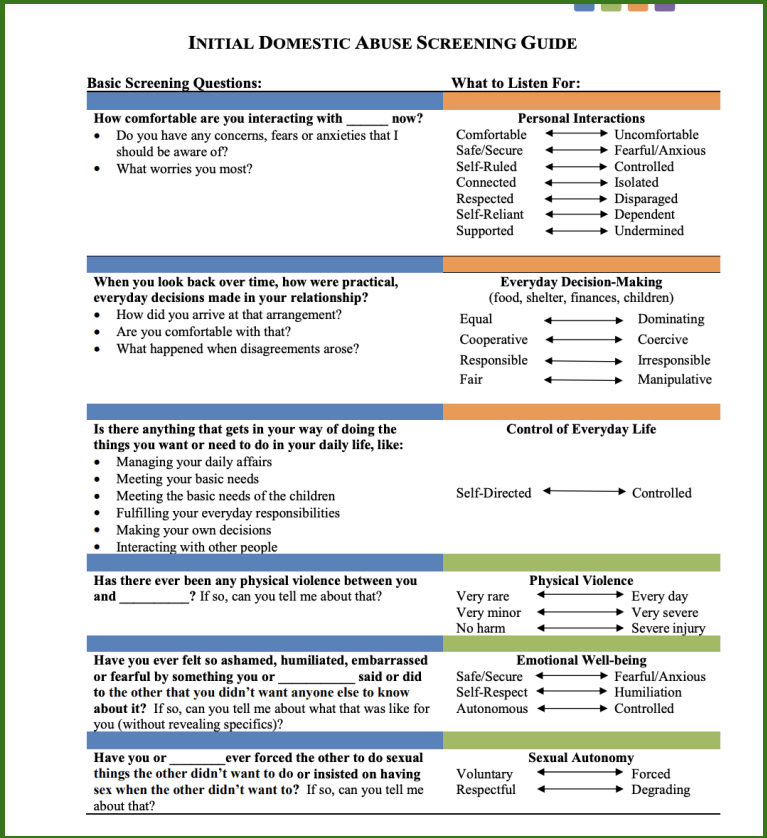
- ★ Getting Your Prospective Client to Open Up
  - Give them space to tell their story
  - Open Ended Questions
  - Reassurance
  - Personal Connection (with boundaries)
- ★ Using the Right Words
  - Structure questions to avoid self judgment and defensiveness
- ★ Watching Body Language

Asking the Right Questions - Screening

Available

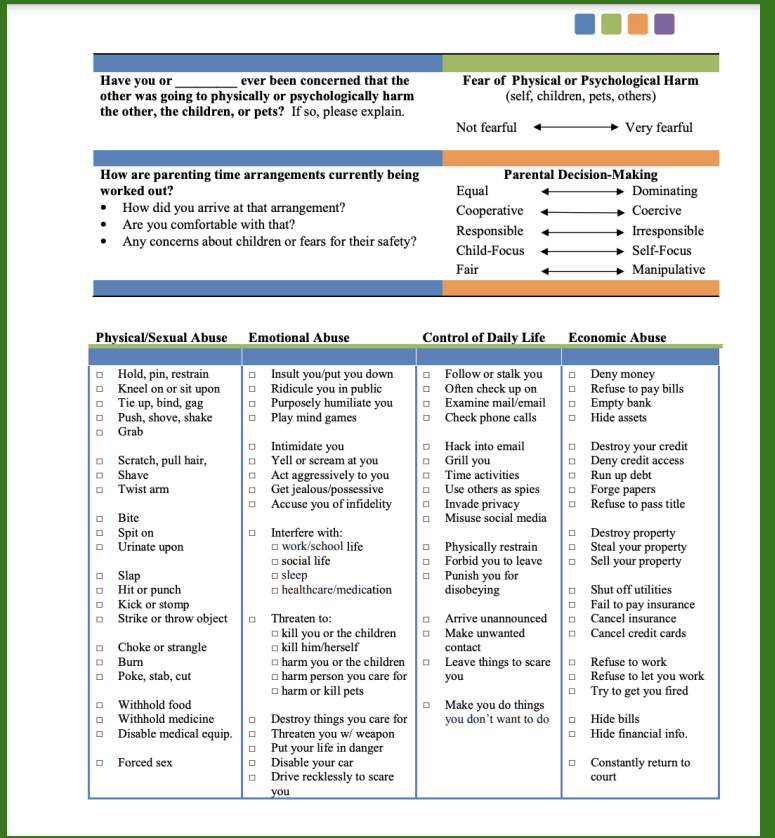
Tools:

- SAFeR



INITIAL DOMESTIC ABUSE SCREENING GUIDE

Basic Screening Questions:	What to Listen For:
How comfortable are you interacting with _____ now? • Do you have any concerns, fears or anxieties that I should be aware of? • What worries you most?	**Personal Interactions** Comfortable ⟷ Uncomfortable Safe/Secure ⟷ Fearful/Anxious Self-Ruled ⟷ Controlled Connected ⟷ Isolated Respected ⟷ Disparaged Self-Reliant ⟷ Dependent Supported ⟷ Undermined
When you look back over time, how were practical, everyday decisions made in your relationship? • How did you arrive at that arrangement? • Are you comfortable with that? • What happened when disagreements arose?	**Everyday Decision-Making** (food, shelter, finances, children) Equal ⟷ Dominating Cooperative ⟷ Coercive Responsible ⟷ Irresponsible Fair ⟷ Manipulative
Is there anything that gets in your way of doing the things you want or need to do in your daily life, like: • Managing your daily affairs • Meeting your basic needs • Meeting the basic needs of the children • Fulfilling your everyday responsibilities • Making your own decisions • Interacting with other people	**Control of Everyday Life** Self-Directed ⟷ Controlled
Has there ever been any physical violence between you and _____? If so, can you tell me about that?	**Physical Violence** Very rare ⟷ Every day Very minor ⟷ Very severe No harm ⟷ Severe injury
Have you ever felt so ashamed, humiliated, embarrassed or fearful by something you or _____ said or did to the other that you didn't want anyone else to know about it? If so, can you tell me about what that was like for you (without revealing specifics)?	**Emotional Well-being** Safe/Secure ⟷ Fearful/Anxious Self-Respect ⟷ Humiliation Autonomous ⟷ Controlled
Have you or _____ever forced the other to do sexual things the other didn't want to do or insisted on having sex when the other didn't want to? If so, can you tell me about that?	**Sexual Autonomy** Voluntary ⟷ Forced Respectful ⟷ Degrading



Have you or _____ ever been concerned that the other was going to physically or psychologically harm the other, the children, or pets? If so, please explain.

Fear of Physical or Psychological Harm
(self, children, pets, others)
Not fearful ⟷ Very fearful

How are parenting time arrangements currently being worked out?
• How did you arrive at that arrangement?
• Are you comfortable with that?
• Any concerns about children or fears for their safety?

Parental Decision-Making
Equal ⟷ Dominating
Cooperative ⟷ Coercive
Responsible ⟷ Irresponsible
Child-Focus ⟷ Self-Focus
Fair ⟷ Manipulative

Physical/Sexual Abuse	Emotional Abuse	Control of Daily Life	Economic Abuse
□ Hold, pin, restrain □ Kneel on or sit upon □ Tie up, bind, gag □ Push, shove, shake □ Grab □ Scratch, pull hair, □ Shave □ Twist arm □ Bite □ Spit on □ Urinate upon □ Slap □ Hit or punch □ Kick or stomp □ Strike or throw object □ Choke or strangle □ Burn □ Poke, stab, cut □ Withhold food □ Withhold medicine □ Disable medical equip. □ Forced sex	□ Insult you/put you down □ Ridicule you in public □ Purposely humiliate you □ Play mind games □ Intimidate you □ Yell or scream at you □ Act aggressively to you □ Get jealous/possessive □ Accuse you of infidelity □ Interfere with: □ work/school life □ social life □ sleep □ healthcare/medication □ Threaten to: □ kill you or the children □ kill him/herself □ harm you or the children □ harm person you care for □ harm or kill pets □ Destroy things you care for □ Threaten you w/ weapon □ Put your life in danger □ Disable your car □ Drive recklessly to scare you	□ Follow or stalk you □ Often check up on □ Examine mail/email □ Check phone calls □ Hack into email □ Grill you □ Time activities □ Use others as spies □ Invade privacy □ Misuse social media □ Physically restrain □ Forbid you to leave □ Punish you for disobeying □ Arrive unannounced □ Make unwanted contact □ Leave things to scare you □ Make you do things you don't want to do	□ Deny money □ Refuse to pay bills □ Empty bank □ Hide assets □ Destroy your credit □ Deny credit access □ Run up debt □ Forge papers □ Refuse to pass title □ Destroy property □ Steal your property □ Sell your property □ Shut off utilities □ Fail to pay insurance □ Cancel insurance □ Cancel credit cards □ Refuse to work □ Refuse to let you work □ Try to get you fired □ Hide bills □ Hide financial info. □ Constantly return to court

Others:

- Spouse Abuse Identification Questionnaire (Geffner & Pagelow)
- Danger Assessment (www.dangerassessment.org)

These are all tools designed to be utilized in non-clinical settings.

Main Characters

Mom (Susan)

40 years old. Susan is first generation American. Her mother's family had emigrated from Germany at the start of the Holocaust. She grew up with a father who physically disciplined his children harshly and a mother who was very invested in imparting traditional gender roles and values.

Dad (Mark)

45 years old. Mark's parents were both married before. While he has older half siblings, he is is his parents' only child. His parents were older when he was born, and very wealthy. Mark was the "favorite" child, and followed his father's steps into the family business.

Daughter (Cindy)

15 years old. Cindy is a very imaginative and artistic child. She has developed very different views of the world from her parents and is an activist for the causes she believes in. She recently announced to her parents that she is vegan and refuses to eat any animal products.

Son (David)

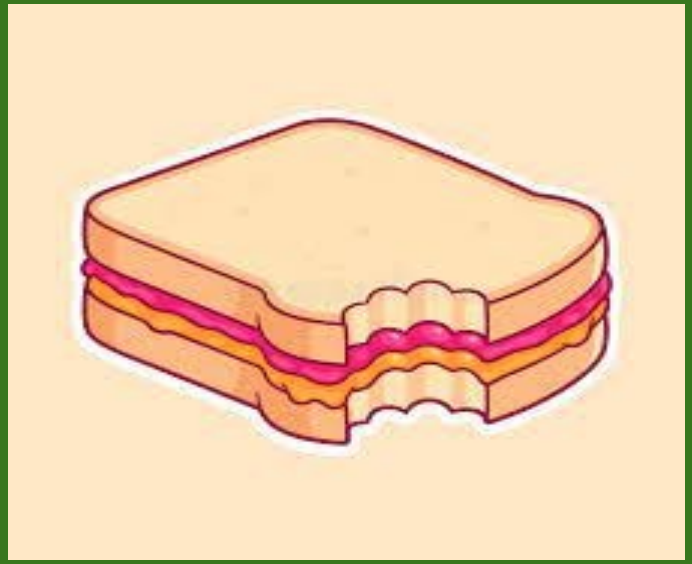
10 years old. David is an active, sporty kid. He molds himself to fit in wherever he is. David is rarely in trouble and still seeks the guidance of his parents for every decision he makes.

Mom on the Stand

Mom’s Focus:

- Custody
  - Primary to her
  - Dad’s mean jokes and expectations are damaging to the children’s self esteem
- Financial
  - She should be entitled to the life she had with him.
  - She gave up her career to become his wife and a stay at home mother

What's Going & What Can You Do



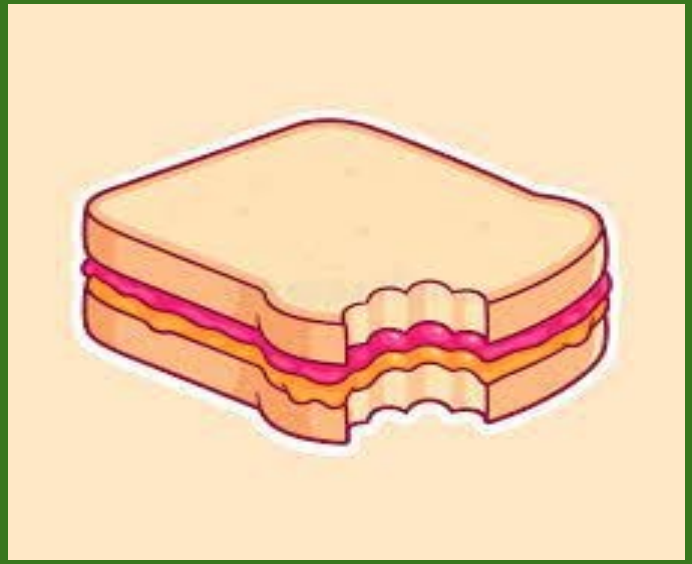
- Stay calm.
- Listen actively - paraphrase and clarify.
- Validate emotions: Acknowledge feelings to avoid triggering increased behaviors.
- Ask questions.
- Use body language.
- **Avoid arguing.**
- Reduce stimulation.
- Use their first name, unless they've specifically asked you not to. (CONSENT)

Dad on the Stand

Dad's Focus

- Custody
  - Primary to him
  - They're my kids, they (should) love me more. I can provide better opportunities and futures
- Financial
  - As little property & support as possible
  - She's ungrateful, I gave her enough, she's on her own now. I earned everything we have.

What's Going & What Can You Do



- **Stay calm** and respectful
- Set boundaries
- Use humor
- Express gratitude
- Focus on the facts
- **Avoid direct confrontation**

Daughter/Son

Note: It is almost never worth putting children on the stand (Even Teenagers) -
But if you have to…

Child's Focus:

- Getting in and out as painlessly as possible.
- Don't rock the boat OR explode everything all at once.

How Children May Present:

- Nervous
- Angry
- Evasive
- Sullen
- Playful

How Can You Help

Maintain a nonjudgmental, relaxed attitude

Listen to what a child is saying and indicate verbally or with nonverbal cues that you understand the child

Use language intelligible to the child

During the recess, supporting, comforting, and grounding the child is essential

Basic needs of the children should be attended to in a solicitous way: bathroom, water, snack, a blanket, a cool room, to increase sense of safety and security

Grounding techniques and comfort items

Courthouse Support Dogs

Main Characters

Susan

Does not display her love in a tactile way with her kids.. She places a lot of value on status, and believes that the best she can do for her kids is ensure that they are successful. However the divorce has driven her to be hyper protective of their perceived emotional wellbeing. She gives off helicopter-parent vibes.

Mark

Relies heavily on external approval for his self esteem. He needs to come out of the divorce as the “better parent,” and the “wronged party.” It is important to him that everyone to take his side, including the kids, and he will use all of the tools at his disposal to “win.”

Cindy

Already going through those awkward teenage years. Now her parents are asking her to choose ,and pulling her into this court process. Neither parent really seems to understand her, but her dad’s jokes seem hurtful and he’s less tolerant of her differences.

David

He wants to focus on the upcoming sports season. His dad likes that he plays sports, and his mom approves because of the college opportunities it opens. However, he is getting the push-me-pull-you on who to live with. His dad has doubled down and tried to disrupt his relationship with his mom. His mom is making sure he knows it.

Crafting The Right Orders

A good Order can work and last

What to Consider?

- Who is expressing what trauma?
- Is there a present or future danger of harm?
- What are the least invasive means of mitigating the trauma or fear response?
- Can we lower the tension and conflict through compromise?
- How are you helping or hindering the process?
- Model language.

Takeaways

Questions?

To Learn More...

Timekeeper

https://youtu.be/gFwZF2YeDEI?si=zi0dc5be5OKE0DpZ

Comment, Trauma-Informed Mediation: A Path to Healing and Resolution, American Academy of Matrimonial Lawyers Journal, Vol. 37 (October 2024)

www.aaml.org (Resources)

SAFeR - Battered Women's Justice Project

https://bwjp.org/introduction-to-the-safer-approach/

Trauma-Informed Justice: A Knowledge & Skills Framework for Working with Victims & Witness (NHS, Scotland)

https://transformingpsychologicaltrauma.scot/media/2tzbc0lf/trauma-informed-justice-knowledge-and-skills-framework.pdf

Comment, Trauma-Informed Mediation: A Path to Healing and Resolution

Rather than being dangerous, conflict holds within it vital messages, regarding unmet needs and areas of necessary change. Given this understanding, safety is increased not by avoiding conflict, but by moving toward it with the intention of hearing the messages within.

– Elaine Shpungin and Dominic Barter[1]

Mediators are often trained to treat family law matters like any other conflict – to impartially facilitate communication and negotiation, promote voluntary decision-making by parties to the dispute, help parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.[2] However, anyone who has participated in a contested domestic mediation will say it is not always that simple. In practice areas such as family law, immigration, child welfare, and criminal law, the goals of mediation are particularly strained since the parties utilizing mediation services are often in a highly vulnerable or emotional state.

Many domestic litigants are survivors of intimate partner violence, have spent years in protracted custody litigation, or have experienced other significant traumatic events that are relevant to their family court matters. Simply being in a state of prolonged stress can be a trauma.[3] A recent study about custody at divorce showed that 93 percent of divorcing parents tried some form of alternative dispute resolution.[4] However, only 82 percent of

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1 Elaine Shpungin & Dominic Barter, *The Fight Room*, Tikkun Mag., Jan. 10, 2012, https://tikkun.org/the-fight-room/.

2 Model Standards of Conduct for Mediators 2 (American Arbitration Association, American Bar Association, Association for Conflict Resolution, Sept. 2005), https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf.

3 Dawn Kuhlman, *Trauma Informed Mediation*, 4:23 (Ted talk x Overland Park, Overland Park, Kansas, Nov. 2018), https://www.ted.com/talks/dawn_kuhlman_trauma_informed_mediation [hereinafter "Kuhlman TedTalk"].

4 Ben Coltrin, *What the Statistics Tell Us About Divorce and Custody Mediation*, Mediate.com (July 14, 2022), https://mediate.com/what-the-statistics-tell-us-about-divorce-and-custody-mediation/.

low-income respondents of the same study reported using an alternative dispute resolution method, compared to 93 percent for middle and high-income respondents, likely due to actual or perceived costs associated with it.[5] In some states, divorce mediation is a mandatory first step, particularly if there are custody or visitation issues.[6] Many states have exemptions from mandatory mediation in divorce proceedings if there are allegations of domestic abuse. However, the appropriateness of mediation within the context of domestic violence generally continues to be a hotly contested issue.[7] Therefore, it is still quite possible that mediators will come into contact with parties who have been victims of or perpetrated domestic violence and thus must be equipped with the tools and skills necessary to address traumatic responses in such a situation.

Outside the realm of domestic violence, many family mediations will be impacted by trauma. By necessity, mediating parties must share some of the most intimate and painful details of their lives, which often can be retraumatizing and trigger responses that inhibit the mediation process. Domestic mediations, therefore, command greater attention to the impact that trauma plays on the behavior of the parties, compelling mediators to train themselves in trauma-informed principles and practices that will drive parties toward settlement and, perhaps, even genuine resolution and healing.

This comment provides information necessary for mediators to begin understanding and adopting trauma-informed practices. It sheds light on the ethical and practice implications of trauma, and addresses ways to support mediators and legal professionals encountering trauma, especially in alternative dispute resolution settings. Part I provides a brief introduction to the historical and philosophical underpinnings of trauma-informed mediation. Part II explains what trauma is, the biology behind it, and how it affects the brain, body, and behavior of an individual, and specifically, a mediating party. Part III provides an overview of the principles

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5 *Id*.

6 Donna Saadati-Soto, *An Innovative Alternative or an Institutional Failure of Family Courts?: A Critical Perspective on the Experience of Latinx Families in an Anglo-Centric Mediation Process*, 31 Berkeley La Raza L.J. 25, 26 (2021).

7 Richard McCutcheon, *Addressing Domestic Violence in Mediation: The Need for More Uniformity and Research*, Harv. Negotiation L. Rev. (May 2021), https://journals.law.harvard.edu/hnlr/2021/05/addressing-domestic-violence-in-mediation-the-need-for-more-uniformity-and-research/.

of trauma-informed mediation. Part IV addresses the reasons to adopt trauma-informed mediation. Part V acknowledges both the social challenges to implementing such an approach and concerns about preventing the mediator's secondary trauma.

I. Introduction to Trauma-Informed Mediation and Practice

A. *Historical Framework and the Prevalence of Trauma*

First established in the public and mental health context, the principles of trauma-informed care have been adopted in other professional service contexts, such as education, healthcare, and substance abuse treatment, and now legal practice is joining the list.

Birthed from the ad hoc efforts of the feminist, domestic violence, and child abuse recognition movements of the 1970s and 1980s, and later implemented by veteran service providers after the Vietnam War, the concept of trauma-informed care has evolved significantly over the past forty years and is now applied to a wide range of settings, including public health, education, substance abuse, child welfare, and the criminal justice system.[8] Since the 1990s, research on the individual and collective experiences of and responses to trauma has rapidly increased, "ranging from customized health and wellbeing support for the physical or mental-emotional impact of trauma to government policies and new legislation addressing trauma at the federal or regional level."[9] In 2018, the U.S. House of Representatives unanimously approved House Resolution 443, acknowledging that millions of Americans have experienced trauma that negatively impacts their mental, physical, spiritual, economic, and social wellbeing.[10] The Resolution encouraged the use of trauma-informed care in federal

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8 Charles Wilson, Donna M. Pence, & Lisa Conradi, *Trauma-Informed Care*, Encyclopedia of Social Work (Nov. 4, 2013), https://doi.org/10.1093/acrefore/9780199975839.013.1063.

9 Trauma-Informed Law: A Primer for Lawyer Resilience and Healing 18 (Helgi Maki, Marjorie Florestal, Myrna McCallum, & J. Kim Wright, eds. American Bar Association: Law Practice Division, 2023) [hereinafter Trauma-Informed Law].

10 H. Res. 443, *Recognizing the Importance and Effectiveness of Trauma-informed Care* (Feb. 2018), https://www.congress.gov/bill/115th-congress/house-resolution/443/text?q=%7B%22search%22%3A%5B%22gallagher%22%5D%7D.

agencies and programs, finding that trauma-informed care could effectively assist individuals, children, and families in overcoming trauma and leading healthy lives.[11]

A greater awareness of the prevalence of trauma in American society can be credited to the Adverse Childhood Experiences (ACE) study, performed in 1996 and 1997, which found a connection between traumatic adverse childhood experiences and many of the leading causes of death in adults.[12] Almost two-thirds of the general population of the United States report experiencing at least one indicia of trauma (such as domestic violence or abuse) before adulthood.[13] Trauma has been labeled a "public health epidemic."[14]

Over the last decade, there has been a movement to implement trauma-informed principles in the legal field, with the America Bar Association's Law Practice Division producing *Trauma-Informed Law: A Primer for Lawyer Resilience and Healing* in just 2023.[15] In recent years, there has been a growing recognition of the profound impact trauma has on individuals involved in mediation processes.[16] However, while the subject has garnered attention from major players like Congress and the American Bar Association, efforts to teach trauma-informed practice in the mediation context remain largely ad hoc, with local and regional bar associations and community leaders sharing materials

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11 *Id*.

12 *See generally* Vincent J. Felitti et. al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14(4) Am. J. Prev. Med. 245 (1998).

13 Centers for Disease Control and Prevention, *Fast Facts: Preventing Adverse Childhood Experiences* (updated Apr. 6, 2022), https://www.cdc.gov/violenceprevention/aces/fastfact.html#:~:text=Preventing%20ACEs%20could%20potentially%20reduce,or%20more%20ACEs%20than%20others (indicating 64% of American adults reported experiencing at least one traumatic event in their childhood).

14 Trauma-Informed Law, *supra* note 9, at 32.

15 *Id*. at 17-18.

16 In-Person Interview with Dawn Kuhlman, in Liberty, Missouri (Sept. 7, 2023) [hereinafter "Kuhlman Interview"]. Dawn Kuhlman is the executive director of M.A.R.C.H. Mediation, a Missouri Nonprofit that provides free mediation services to families that are IV-D recipients. She has spent the last ten years crafting her own trauma-informed mediation model that she now teaches to mediators all over Missouri and in programs around the United States. Her work has informed much of this paper.

and training as the concept becomes popular in their community. Because of this, there is no single definition or guidebook for "trauma-informed mediation." One goal of this Comment is to sort through an abundance of methodologies, philosophies, and practices employed by attorneys nationwide, especially those relevant to family law mediators.

B. *Underpinnings and Goals of Trauma-Informed Mediation*

Simply put, trauma-informed practice is "when the practitioner puts the realities of the client's trauma experiences at the forefront in engaging with the client, and adjusts the practice approach informed by the individual client's trauma experience."[17] It is "grounded in an understanding of and responsiveness to the impact of trauma, that emphasizes physical, psychological, and emotional safety" and provides "opportunities for survivors to rebuild a sense of control and empowerment."[18] This approach also encompasses the practitioner employing modes of self-care to counterbalance the effect the client's trauma experience may have on the practitioner.

Applied to the context of mediation, trauma-informed practice acknowledges and addresses the traumatic experiences of participants, fostering a safe and supportive environment that empowers them toward healing and resolution. It seeks to inform mediation participants and make them more mindful of their own cognitive, behavioral, and emotional responses as a result of trauma. Traditional mediation often fails to consider the underlying trauma that parties may have experienced. This oversight can exacerbate feelings of powerlessness, fear, and retraumatization during the process. By contrast, trauma-informed mediation recognizes that unresolved trauma can significantly impede effective communication and decision-making.

Through a trauma-informed lens, an individual's behaviors are viewed more compassionately as a response to surviving trauma, reframing the opening question from: "What is wrong with you?" to

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17 Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 Clin. L. Rev. 359, 360 (2016). This article discusses how to teach trauma-informed lawyering through direct examples of pedagogical approaches.

18 Laura Athens, *Trauma-Informed Care in Mediation*, Oakland Cnty. Legal News (May 30, 2023), https://mediate.com/trauma-informed-care-in-mediation/.

"What has happened to you? or "What did you experience?"[19] The first question pathologizes trauma when it can be an expected or even predictable response to an overwhelming situation, while the second question ensures that a person's lived experience and environment are specifically included when considering the factors that influence behavior.[20] Mediating parties frequently experience trauma in the form of a divorce, an accident, an assault, malpractice, death of a loved one, loss of employment, or other injury. Litigation itself can be a traumatic experience, forcing parties to relive the pain and anguish that led to the lawsuit.[21] As one mediator notes, "the pervasive and harmful impact of traumatic events on individuals, families, and communities and the unintended but similarly widespread retraumatizing of individuals within our public institutions and service systems makes it necessary to rethink doing 'business as usual.'"[22]

The impact of trauma can show up in responses and behavior that do not fit with the way legal processes, and more specifically, the mediation process, are designed to work, thus complicating the mediator's role. The psychobiological impacts of trauma can limit a mediator's capacity to resolve conflict and the parties' abilities to advocate for their own best interests. Understanding the prevalence of trauma can change the perspective of mediators, who can then approach each situation with a presumption that one or both parties may exhibit a traumatic response during mediation. Mediating parties, especially in the realm of family law, often face adversity that rises to the level of trauma, which is exacerbated by issues involving race, gender, religion, child custody, domestic violence, substance abuse, mental health, poverty, access to opportunities, and more.

Having a better understanding of trauma, as well as clear tools for addressing it in practice, can help lawyers and mediators reconsider that a so-called difficult client may instead be reacting out of trauma. Understanding this, the mediator can endeavor to prevent retraumatization, improve communication, increase

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19 Kuhlman Interview, *supra* note 16. *See also* Bruce D. Perry & Oprah Winfrey, What Happened to You?: Conversations on Trauma, Resilience, and Healing (2021).

20 Trauma-Informed Law, *supra* note 9, at 20. *See also* Liz Wall, Daryl Higgins & Cathryn Hunter, *Trauma-informed Care in Child / Welfare Services* (CFCA Paper No. 37) (2016), https://www.researchgate.net/publication/294775580_Trauma-informed_care_in_childwelfare_services_CFCA_Paper_No_37.

21 Athens, *supra* note 18.

22 *Id.*

litigant satisfaction with the legal process and outcomes, and expand access to justice by removing trauma-related barriers. At its core, legal practice is a helping profession. Mediators therefore must work to meet the needs of clients and mediating parties with compassion and competency and be willing to bear discomfort and inconvenience in the service of justice and resolution. Due to the pervasiveness of trauma, it is highly likely that practicing attorneys and mediators have already encountered trauma in their practice and their personal lives and will continue to do so in the future. However, integrating a trauma-informed approach can help mediators anticipate and respond to trauma appropriately, potentially mitigating vicarious trauma as a result.

II. The Effects of Trauma on the Brain, Body, and Behavior

A. *Trauma Defined*

Originating from the Greek word for "wound,"[23] trauma denotes injuries that are often unseen or misinterpreted. There is no one definition of trauma,[24] and the various fields employing a trauma-informed approach disagree on the most appropriate way to frame the issue. From a public health perspective, trauma can be defined as a person's response to a situation, whether an acute or chronic situation, whether personal or systemic, that overwhelms their human ability to cope effectively.[25] Traumatic experiences can

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[23] Amar Dhall, *The Neuro-Somatic Approach to Trauma-Informed Lawyering: From Survival of the Fittest to Fittest for Survival*, *in* Trauma-Informed Law, *supra* note 9, at 43. Dr. Dhall says "The essence of trauma is that the experience encounters an event that they cannot integrate into their body-mind (e.g. they experience a disintegration), which leads to some form of either rigidity or chaos." *Id.*

[24] The Substance Abuse and Mental Health Services Administration defines trauma as resulting from "an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being." SAMHSA's Trauma and Justice Strategic Initiative, *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach*, HHS Publ'n No. (SMA) 14-4884 (2014), https://store.samhsa.gov/sites/default/files/d7/priv/sma14-4884.pdf.

[25] Trauma-Informed Law, *supra* note 9, at 19 ("To facilitate the growing practice of trauma-informed lawyering and the evolving nature of this

emerge from everyday life, such as divorce and infidelity, or can result from more significant events, such as abuse and neglect.[26] Even prolonged stress can become a source of trauma, which is especially prevalent among family court litigants, some of whom have been in litigation for years. Trauma is not the experience of the event itself, but rather the body and mind's response to the event; thus, even people's thoughts can become a trauma trigger.[27] Kate Porterfield, a psychologist who works at the Bellevue Program for Survivors of Torture,[28] describes trauma as a "biopsychosocial" experience in which the deep distress of trauma disrupts people's ability to engage all of their biological, psychological, and social skills and resources and puts people in survival mode.[29]

Anyone can be impacted by trauma. Responses to trauma may be emotional, physical, cognitive, or behavioral and may be temporary, prolonged, acute or chronic, mild or severe.[30] No two people experience trauma in precisely the same way. Thus, consequences of the same traumatic experience will differ as "their past accumulated traumas, histories, backgrounds, and childhoods all factor into how exhausted their body already is and how fast it may be able to bounce back this time."[31] Trauma responses begin forming very early in childhood, so many people erroneously mistake such responses as part of their personality.[32] Some people may be more resilient to trauma than others. Growing up in a loving and supportive home, having a good education, and maintaining strong family and friend connections can help reduce the harm caused by a traumatic event, while people who are raised in broken or

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information due to the continuing advancement of trauma studies, we have taken a 'working definition' approach, defining trauma in public health terms rather than strictly clinical terms.").

26 Kuhlman TedTalk, *supra* note 3, at 0:15.

27 Dhall, *supra* note 23, at 43.

28 Dr. Porterfield has provided clinical care to adults and children who have experienced war and refugee trauma and torture for over 25 years. She regularly consults on issues pertaining to trauma, including in cases at the Guantanamo Bay Detention Center, in U.S. federal courts, and at the International Criminal Court, as well as with journalists and human rights organizations.

29 Trauma-Informed Law, *supra* note 9, at 15.

30 Athens, *supra* note 18.

31 Trauma-Informed Law, *supra* note 9, at 26. *See also* Mallika Kaur, *Trauma and Myths*, *in* Trauma-Informed Law, *supra* note 9, at 25-26.

32 Dhall, *supra* note 23, at 44.

dysfunctional homes have been abused, neglected, or abandoned as a child, or who lack healthy role models may be more adversely affected by a traumatic event.[33]

B. *The Biology of Trauma*

> *All complex animals (of which homo sapiens is one) move through the world with their nervous systems sending the world with one priority question at the fore: "Am I safe?"*
>
> *– Dr. Amar Dhall*[34]

When trauma occurs, the human brain is wired to find a way to survive. The brain perceives trauma as a threat, triggering a fear response. The brain enters a dysregulated state due to an actual or perceived lack of control.[35] Under normal circumstances, human brains operate out of the prefrontal cortex, which controls "executive functions" such as attention, the capacity to integrate memories into narrative, and the ability to plan and make decisions; those functions are suppressed when the trauma response is triggered. The mediation process, which includes brainstorming, problem-solving, decision-making, and negotiation, requires operating out of the prefrontal cortex. However, when mediating parties are tasked with reliving a traumatic experience, a task that is often necessary to the mediation process, their brains may begin to operate out of the fear-based parts of their brain instead.

When the brain responds out of fear, the limbic brain, rather than the prefrontal cortex, is activated.[36] The limbic brain governs the functioning of emotions, memory encoding (i.e., how memories are stored), and survival responses. The limbic brain functions more quickly than the prefrontal cortex to ensure survival, causing the brain to short-circuit, picking "neural pathways that may not be the most rational response."[37] Two significant structures of the limbic system are the hippocampus and the amygdala. The amygdala—the part of the brain that governs one's response to fear and informs the body to fight, flight or freeze—functions as

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33 Athens, *supra* note 18.
34 Dhall, *supra* note 23, at 43.
35 Trauma-Informed Law, *supra* note 9, at 25-26.
36 *Id.* at 33.
37 *Id.* at 26.

an alarm system, signaling the presence of danger.[38] The amygdala grows as a result of trauma, impacting one's ability to communicate effectively and making it difficult to regulate emotions.[39] It takes twenty to sixty minutes to calm the brain back down when the amygdala is triggered.[40] Fight, flight, freeze, or fawn mode kicks in, resulting in behaviors such as hypervigilance, dissociation, withdrawal, and disrupted memories or narratives.[41] The hippocampus facilitates the production of cortisol under stress.[42] Chronic stress leads to neuron death in the brain, which results in issues with memory.[43] Under threat, the brain becomes focused on survival instead of forming memories or narratives; as a result, memories or narratives may not be linear or chronological.[44]

Ultimately, to employ a trauma-informed approach in mediation, it is less important to understand the precise neurobiology of trauma than it is to understand resources for meeting trauma in clients, communities, and themselves as it arises. The goal of a trauma-informed approach is to calm the brain to operate out of the prefrontal cortex, which governs problem-solving, reasoning, logic, attention, and predicting consequences of actions, rather than out of the amygdala, so that participants can engage constructively in the mediation process.[45] Despite the level of information amassed regarding the lasting impacts of trauma on individuals, mediators do not need to become experts in psychology to understand some

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38 *Id.*

39 Dawn Kuhlman, *Trauma-Informed Mediation 3-Hour Webinar*" given via Zoom to mediators across the United States (May 13, 2022), https://drive.google.com/file/d/1CqvhS55q9xMTEmY7XdzBjqug90XwKHLn/view [hereinafter "Kuhlman Webinar"]. *See also* Dan Siegel, Pocket Guide to Interpersonal Neurobiology: An Integrative Handbook of the Mind (2012); Bessel van der Kolk, The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma (2015).

40 Kuhlman Interview, *supra* note 16.

41 Trauma-Informed Law, *supra* note 9, at 32.

42 *Id.* at 26.

43 Kuhlman Webinar, *supra* note 39.

44 Trauma-Informed Law, *supra* note 9, at 33. For more on the neurobiology of trauma and other important trauma concepts, including the trauma of racism, see Alisha Moreland-Capuia, Training for Change: Transforming Systems To Be Trauma-Informed, Culturally Responsive and Neuroscientifically Focused (2019); Alisha Moreland-Capuia, The Trauma of Racism: Exploring the Systems and People Fear Built (2021).

45 Kuhlman Webinar, *supra* note 39.

of the effects of trauma on the brain and body. By employing this informed approach, mediators can better understand the impact of trauma on the brain and body, helping them connect with and have greater empathy for the parties they are mediating. It also helps them give guidance regarding individuals who are struggling with emotion regulation during mediation.

C. *Implications of Trauma on the Behavior of Mediating Parties*

The impact of trauma on a mediating party will vary considerably based on the source and type of trauma, that person's resilience, and the social and community supports that person has available. Examples of the various categories of trauma include: early childhood trauma, complex trauma, intimate partner or family violence, community violence, natural disaster and refugee trauma, medical trauma, sex trafficking, sexual abuse, and traumatic grief.[46] When a person experiences a trauma response, their human capacity to respond with all possible resources is diminished. Because thoughts themselves can be a trigger, an essential aspect of being a trauma-informed practitioner is "to understand that all trauma work is performed in the present, and why (as a corollary) sharing presence and mindful attention with traumatized clients is an appropriate way to work, because it will help them to ground themselves in the present."[47] Traumatized parties often operate out of a dysregulated state, making it difficult to recall memories, regulate their emotions, set goals, be logical or reasonable, be attentive, predict the consequences of their actions, problem-solve, or manage conflict.[48]

Additional patterns that may be observed when a person experiences a trauma response include:

- gaps in memory, narrative, learning, and decision-making;
- hyperarousal or hypoarousal (also known as fight, flight, freeze, or fawn response);

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46 For more information on the nuances of particular types of trauma, see the National Child Traumatic Stress Network, *Trauma Types*, https://www.nctsn.org/what-is-child-trauma/trauma-types (last visited Jan. 23, 2024). *See also* Center for Substance Abuse Treatment (US), *Chapter 2, Trauma Awareness, in* Trauma-Informed Care in Behavioral Health Services (2014). (Treatment Improvement Protocol (TIP) Series, No. 57.) https://www.ncbi.nlm.nih.gov/books/NBK207203/.

47 Dhall, *supra* note 23, at 43.

48 Athens, *supra* note 18.

- hypervigilance or hopelessness manifested in fearful thoughts and moods, anticipating disaster, or giving up;
- inability to grieve;
- lack of emotion, extreme emotions, or an inability to identify emotions;
- withdrawing or inundating with communication;
- key body functions disrupted, such as sleep;
- feeling unsafe and unable to trust and anxious, insecure, or disorganized attachment patterns; and
- an inability to seek or accept help.[49]

Understanding the prevalence of trauma can change the perspective of mediators, who can then approach each situation with a presumption that one or both parties may exhibit a trauma response during mediation. Acknowledging the biopsychosocial impact of trauma, Kate Porterfield argues that lawyers must become prepared to meet trauma "not just with intellectual strategy or cognitive responses but also to consider how to include biologically calm, psychologically safe, and socially trustworthy approaches" in their work.[50]

III. Principles of Trauma-Informed Mediation

The principles of trauma-informed lawyering are evolving, and various approaches have been proposed by lawyers, clinics, law schools, trauma experts, and government agencies. The trauma-informed approach to mediation acknowledges and addresses the traumatic experiences of participants, fostering a safe and supportive environment that empowers them toward healing and resolution. It seeks to inform mediation participants and make them more mindful of their own cognitive, behavioral, and emotional responses as a result of trauma.[51] Mediators must, therefore, cultivate an awareness of trauma responses in psychobiological terms, which may be complex, counterintuitive, or at first appear to be (or be perceived as) so-called "difficult behavior."[52] It is important to note that lawyers do not need to be therapists to be

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49 Trauma-Informed Law, *supra* note 9, at 34-35.

50 *Id.* at 29.

51 Kuhlman Interview, *supra* note 16.

52 Trauma-Informed Law, *supra* note 9, at 65.

trauma-informed. The mandate of the mediator is to increase safety, trustworthiness, choice, collaboration, and empowerment to guide parties through their trauma responses, making it more likely that they will settle their case.

Dawn Kuhlman is a mediator who has spent the last decade crafting her own trauma-informed mediation model that she now teaches to mediators all over the state of Missouri, and in programs around the United States. Kuhlman's model integrates aspects of the transformative style of mediation with mindfulness, an awareness of trauma neuroscience, and a realistic assessment of the parties' ability to mediate.[53] Her work provides a frame of reference upon which other mediators can continue to build.

Transformative mediation places the principles of empowerment and recognition at the core of helping people in conflict change how they interact with one another. The mediator can empower parties by reminding them they have choices and providing them with resources and coping skills, reframing a victim mindset into the mindset of someone empowered to make decisions about their future.[54] Empowerment can also be cultivated by focusing on individuals' strengths, self-determination, autonomy, choices, and control.[55] Here, control involves enhancing a litigant's ability to be an active part of the legal process, which can be accomplished by asking for permission and feedback from the parties throughout the mediation.[56] Mediators can also encourage and challenge the parties to have greater recognition for the person across the table. They can affirm the parties when they do so, simply telling them, "You did a good job on that."[57] Validating the source of the traumatic experience and the parties' attempts to work through the process can motivate them to engage constructively with one another. Recognition between the parties should be encouraged, as should recognition by the mediator of the parties' successful efforts to engage constructively.

Integrating mindfulness, meditation, and visualization techniques can help the parties self-regulate. Kuhlman, who began using these techniques in 2014, found that "people weren't always

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53 Kuhlman TedTalk, *supra* note 3, at 2:25.

54 Kuhlman Interview, *supra* note 16.

55 Athens, *supra* note 18.

56 Katherine Porterfield, *Trauma-Informed Client Communication Strategies for Lawyers*, *in* Trauma-Informed Law, *supra* note 9, at 69.

57 Kuhlman Interview, *supra* note 16.

able to do this . . . so it was my job to help them calm down. I was doing deep breathing with people. Sometimes we'd just sit in silence."[58] This may also help people identify and be mindful of their thoughts and behavior and how they treat others. Explaining the neuroscience of trauma can go hand-in-hand with the concept of mindfulness, and it may be effective for the mediator to help the parties take a more clinical view of their trauma responses. Such a tactic may also help normalize the effects of trauma and encourage the parties to rise above what is afflicting them.

Safety and trust must be prioritized and considered in everything from the physical space to the mediator's communication style. Individuals who have experienced a trauma that threatened their fundamental sense of safety and security sometimes "operate in the world as if they are still in danger."[59] This priority on safety shapes the mediator's approach in everything from the physical layout of the meeting space to the way topics are introduced and anticipated.[60] Dr. Katherine Porterfield, a psychologist who regularly consults in the U.S. federal courts, has developed three recommendations to enhance safety through communication.

First, the attorney (or mediator) should acknowledge the physical space.[61] The mediator should be aware that the office where the mediation takes place can be intimidating or imposing. The presence of adversaries may increase the individual's threat perception.[62] Porterfield recommends that the lawyers explicitly begin by asking if the litigant is comfortable in the current meeting conditions, proposing a variety of questions that can be utilized, including: "Is this an okay place for us to speak?" and "It's important that you feel safe speaking to me here. Do you feel able to talk?"[63] While simple, these questions signal to litigants that their experience is critical to the mediation process.

In addition to acknowledging the physical space, the mediator should anticipate what will happen next in the mediation and

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58 Kuhlman TedTalk, *supra* note 3, at 7:30.

59 Porterfield, *supra* note 56, at 72.

60 *Id*. at 70.

61 *Id*.

62 *Id*.

63 *Id*. For more information on responding to trauma in the moment, see Rebecca M. Stahl, *Embodied Trauma and How to Respond to It*, *in* Trauma-Informed Law, *supra* note 9, at 124.

explain their role in detail. Traumatized individuals have often experienced severe helplessness and unpredictability in their environments.[64] Therefore, the mediator should make every effort to decrease uncertainty by giving a clear overview of the mediation process, explaining the purpose behind caucusing, the reasoning for their recommendations, and the limitations of their role as a mediator.

Creating a safe environment for a client lays the foundation for communication to proceed constructively. Mediators can also foster safety and dignity by taking a non-judgmental approach to communication with the parties, providing them time and space to discuss their needs and preferences.[65] Mediators should be mindful of their tone and how the parties will perceive their communication style. The ABA Legal Practice Division encourages attorneys to have a "relational practice" by communicating with genuine curiosity and empathy to establish trust with the parties, allowing for relationship formation instead of goal-oriented, transactional communications only.[66] Reflecting back what the individual has said without interpretation, analysis, or disagreement can "create a powerful feeling of being a subject in one's own story, rather than being seen as an object in another's interpretation."[67] The mediator should make known to the parties that she genuinely wants to understand their respective positions and help them reach a resolution if possible. Additionally, rather than abruptly ending the mediation session, which can leave the parties feeling exposed and distressed, the mediator can provide closure in ways that recognize the work the parties have done, the stress they might be under, and the need for a sense of what is happening next.[68] The mediator can use closure to transition the parties away from the traumatic material, increasing their satisfaction with the process and buy-in on their settled agreement.

Mediators using a trauma-informed approach sometimes hold pre-mediation sessions with each party to foster trust and a sense of safety. These sessions, often one hour long, allow the mediator to listen to each party's story privately and without interruption, helping them

64 *Id*.
65 Athens, *supra* note 18.
66 Trauma-Informed Law, *supra* note 9, at 65.
67 Porterfield, *supra* note 56, at 73.
68 *Id.* at 74.

feel heard and supported.[69] This time can also be utilized to explain the process in detail and place parameters around how the parties will interact with one another in mediation, identifying triggers and equipping them with coping skills before the mediation even starts.[70] The mediator can encourage shared agreements regarding what to do if a party gets trigger during the session, thereby avoiding re-traumatization and respecting personal boundaries.[71] This will assist the mediator in setting an agenda and identifying "low-hanging fruit," or issues that are more easily resolved, to be addressed at the beginning of the mediation and in a manner that does not waste time.[72] Pre-mediation sessions encourage transparency and accountability, which can help mitigate the impact of trauma on mediating parties by preparing and respectfully educating them about the mediation process in advance, clearly articulating what they can expect and giving an overview, and being a reliable facilitator by doing what they say they will do.

Some mediators admit that this approach is not very practical in attorney-assisted mediations,[73] while others insist that hearing from attorneys can help reduce retraumatization.[74] Additionally, parties do not always have four hours to spare for mediation. However, when parties exhibit difficulty regulating their emotions and are unrepresented at mediation, a pre-mediation session with both parties can go a long way toward de-escalating and equipping them with the skills to reach a resolution.

Another way to foster a sense of comfort and safety is to offer several formats for mediation: in-person, zoom, or by phone. While many mediators prefer in-person mediations over those of a virtual or auditory format, there are benefits to allowing parties to attend from the comfort of their own homes, in the presence of their pets or comfort objects. Mediators utilizing this approach reflect that offering such formats can reduce trigger responses and help the parties calm down more quickly when they get upset.[75] However, in

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69 Kuhlman Interview, *supra* note 16.

70 *Id.*

71 Mediators Beyond Boarders, *Trauma-Informed Conflict Engagement*, https://mediatorsbeyondborders.org/what-we-do/conflict-literacy-framework/trauma-informed/ (last visited Jan. 23, 2024).

72 Kuhlman Interview, *supra* note 16.

73 *Id.*

74 Terri Round, Interview via Zoom (Sept. 13, 2023), Kansas City, Missouri.

75 Kuhlman Interview, *supra* note 16.

online mediations, there should be built-in breaks for participants to have an opportunity to recharge or consult with their attorneys.[76] Regardless of the format, the mediator must frequently monitor the participants' comfort level and sense of security.

One more consideration to be aware of when implementing a trauma-informed approach to mediation is the parties' present ability to mediate. The mediator needs to be aware if she is working harder than the parties. If this is the case, then their problem is likely bigger than mediation, and the mediator should consider ending the mediation and referring the parties to community resources to obtain specific interventions as necessary.[77] This is especially noticeable when parties are repeatedly rehashing the same issue and "continually going off the rails."[78] To avoid burnout, the mediator must recognize the limitations of her position and have resources to which she can refer the parties when their challenges are beyond her role and skill set.

To summarize, trauma-informed mediators should develop skills such as empathy, empowerment, recognition, flexibility, patience, preventing traumatization, rapport building and offering a sense of safety, and identifying opportunities for closure. They must cultivate an awareness of trauma responses in psychobiological terms and increase the mindfulness of the parties in this regard, as well. Having such a skill set can empower parties toward healing and resolution.

IV. Reasons To Adopt Trauma-Informed Mediation

While the context and impact vary drastically from individual to individual, most people have had some sort of traumatic experience, making it exceedingly likely that mediators will encounter parties exhibiting trauma symptoms. Traditional mediation often fails to consider the underlying trauma that parties may have experienced. This oversight can exacerbate feelings of powerlessness, fear, and retraumatization during the mediation process. By contrast, trauma-informed mediation recognizes that unresolved

76 Athens, *supra* note 18.
77 Kuhlman Interview, *supra* note 16.
78 *Id.*

trauma can significantly impede effective communication and decision-making. Mediators should be "keenly aware of the likelihood that parties have been exposed to trauma to such an extent that it colors their perceptions and beliefs, and therefore, influences how they engage in conflict resolution."[79] Using trauma-informed tools can help parties engage in the dispute resolution process in a more emotionally regulated manner, allowing for full engagement of the executive function in the brain's prefrontal cortex, making them more likely to have full access to all of their capacities, make decisions with agency, and be less likely to feel limited by toxic stress or act as if they are still in "survival mode."

Thomas Hubl, author, teacher, and host of the Collective Trauma Summit,[80] provides insight into why trauma-informed care matters:

> Whether individual or collective, trauma fragments and fractures, it disowns and silences. It creates denial and forgetting to assist in its repair, we must choose to acknowledge, to witness, and to thereby feel together, what has actually occurred, even the most horrific details we would rather close our eyes to. Because to look away, to dismiss, deny, minimize, or willfully forget, is to uphold the institutions of inequality, of inhumanity, that created them.[81]

There are significant costs to neglecting the impact of trauma on the legal system. For attorneys representing parties in mediation, failing to acknowledge a client's trauma may lead to a tolerance of legal services that do not support their best interests, and may even inadvertently harm them. In a representative capacity, attorneys have an ethical duty to pursue the best interests of their clients. To do so, attorneys must explicitly seek to understand their clients' needs more closely. While mediators do not have such a duty, conflict resolution is best served by having a deeper understanding of the parties' injuries and needs. The mediator can identify more effective problem-solving strategies by gaining a greater

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79 Athens, *supra* note 18.

80 The Collective Trauma Summit is an annual conference bringing together teachers, coaches, authors, artists, activists, and leading experts in trauma, self-care, health and wellness, mindfulness, and more to illuminate the root causes of trauma and help create a global healing response system.

81 Thomas Hubl, Healing Collective Trauma: A Process of Integrating Our Intergenerational and Cultural Wounds 79 (New York: Sounds True Inc., 2021).

proximity to the nuances and details of a party's situation, such as their social context, socioeconomic, cultural, or personal factors.

Without trauma-informed lawyering, litigants impacted by trauma risk being inadvertently deprived of justice by the very injuries that the injustice caused in the first place. Ignoring trauma perpetuates its presence as a barrier to accessing justice, legal assistance, or alternative dispute resolution services, dissuading individuals from engaging with a system that remains oblivious to its potential to inflict further damage despite its intentions to aid them. This lack of awareness creates an environment where individuals feel unsupported and discouraged from seeking justice through traditional means. Additionally, overlooking the impact of trauma on lawyers' and mediators' wellbeing poses a considerable problem. Failing to address this issue can have detrimental effects on their ability to effectively represent clients and provide quality service, also increasing the likelihood that the lawyer will run afoul of written and unwritten rules of professional responsibility.[82] Therefore, lawyers, especially mediators, should turn toward trauma in litigants, in systems, and in themselves, "with the same humanity [they] would offer a fellow human who has experienced a visible injury."[83]

V. The Challenges

A. *Social Influences*

Lawyers and mediators may face challenges in applying trauma-informed practice tools because these tools' underlying principles differ drastically from, and are even opposite to, the principles underlying traditional legal training, which teaches that analysis and judgment are the primary skills to be employed in any situation.[84] By contrast, trauma-informed practice emphasizes the practical utility of nonjudgment, empathy, and compassion. Without practice, employing these skills can be uncomfortable and inconvenient.

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82 Kenneth Townsend, *Ethics and Professional Responsibility: What Lawyers Should Know and Trauma-Informed Lawyering as a Legal Competency*, *in* Trauma-Informed Law, *supra* note 9, at 76.

83 Trauma-Informed Law, *supra* note 9, at 21-22.

84 *Id.* at 101.

Individualizing trauma can overlook the ethical and political dimensions of a party's situation.[85] Their communities define what experiences are normal or deviant and what the individual's range of possible action looks like. Thus, parties do not always possess the agency to identify their own trauma, tell their story, or advocate for themselves.

B. *Preventing the Mediator's Secondary Trauma*

Lawyers are not exempt from the prevalence of trauma. Numerous studies and literature reviews have generally found that trauma is prevalent among lawyers, judges, and law students.[86] In the context of the legal system, vicarious trauma is the phenomenon experienced by lawyers, judges, and mediators "who hear, see, or read about trauma on a regular basis, then begin to experience adverse mental health impacts similar to those who are directly victimized or traumatized."[87] Such trauma can be more prevalent, subtler, and more chronically present than it may first appear, coming from one's own experience or from working with someone who has had a traumatic experience.[88] Addressing secondary or vicarious trauma, burnout, or compassion fatigue is a continuous process, and no one can provide a universal guide to resilience. The underlying concept, however, involves openly asking ourselves what happened to us and what we have experienced, believed, or assumed.

Adversity is an inevitable part of life, and its impact varies drastically from person to person. This holds true for lawyers as well, as they encounter different forms of trauma in their practice areas. While some areas of law may be more prone to trauma, no field appears to be completely immune to it. Practice areas such as family law, criminal law, immigration law, and personal injury or

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85 Susanne Van der Meer, *Looking at Law and Trauma Through a Philosophical Lens: Zooming Out from One Victim to a Community of Actors*, *in* Trauma-Informed Law, *supra* note 9, at 47-48.

86 Dawn D'Amico, *Trauma And Well-Being Among Legal Professionals* (2021); M.-J. Leonard et al., *Traumatic Stress in Canadian Lawyers: A Longitudinal Study*, APA PsycNet (2023), https://doi.org/10.1037/tra0001177; Karen Oehme & Nat Stern, *Improving Lawyers' Health by Addressing the Impact of Adverse Childhood Experiences*, 53 U. Rich. L. Rev. 1311 (2018-2019).

87 Trauma-Informed Law, *supra* note 9, at 160.

88 *Id.* at 30.

health law often involve personal stories of trauma shared behind the scenes. In the medical field and among therapists, it is widely acknowledged that professionals cannot remain untouched by suffering and loss.

Similarly, lawyers cannot expect to be unaffected by the mix of traumas they encounter daily. The very nature of the legal profession is that it serves victims of crime, victims of poverty, and victims of discrimination; and, while attorneys do not personally experience this victimization, they often internalize it, revisiting it throughout the case.[89] While recognizing the existence of trauma does not creating a pain-free life for lawyers, it can help remind those in the trenches that they are not alone, and help cultivate resilience. Trauma-informed tools such as mindfulness, mental health support from qualified practitioners or groups, emotional literacy, emotional intelligence, self-regulation skills, and maintaining appropriate emotional boundaries are crucial for mental and emotional wellbeing.[90]

Self-care plays a vital role in working with trauma. It is considered integral to "trauma stewardship,"[91] which emphasizes both providing care for others while supporting one's own capacity to help. Lawyers who regularly hear about or witness traumatic events can experience vicarious trauma similar to those directly affected by it. By committing themselves to learning about trauma and recognizing its effects on their mental health, judges, lawyers, and mediators can begin their journey towards resilience or recovery strategies. Awareness is critical in implementing these strategies effectively. Lawyers, like professionals in other fields, cannot remain untouched by the trauma they encounter. Recognizing and addressing trauma is essential for cultivating resilience and promoting mental health and wellness in the legal profession. Every

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89 Megan Zwisohn, et. al., *Vicarious Trauma in Public Service Lawyering: How Chronic Exposure to Trauma Affects the Brain and Body*, 2 Rich. Pub. Interest L. Rev. 22 (2019), https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1455&context=pilr.

90 Trauma-Informed Law, *supra* note 9, at 129-30. *See also* Nazanin Moghadami, *Common Signs and Symptoms of Vicarious Trauma*, *in* Trauma-Informed Law, *supra* note 9, at 133-34.

91 *See* Laura Van Dernoot Lipsky & Connie Burk, Trauma Stewardship: An Everyday Guide to Caring for Self While Caring for Others (San Francisco: Berrett-Koehler Publishers, 2009).

person needs healthy coping strategies to navigate through challenging times.

VI. Conclusion

In conclusion, trauma-informed mediation is a transformative approach that recognizes the psychological impact of trauma on the mediation process. It acknowledges that individuals who have experienced trauma may exhibit specific behaviors and reactions during mediation, which can significantly affect the outcome. By understanding these impacts, mediators can create a safe and supportive environment that promotes healing and resolution. This approach acknowledges the impact of past traumas on participants' wellbeing. It fosters healing while facilitating resolution by creating an environment rooted in safety, empowerment, collaboration, and self-care. Trauma-informed tools allow the mediator or lawyer to better support a litigant's needs rather than taking a purely intellectualized approach often taught in traditional legal settings. Such tools often have the added benefit of supporting the lawyer's wellbeing. No one should leave mediation sessions feeling more traumatized, victimized, marginalized, or dehumanized than when they entered.[92] Mediators have an opportunity to empower the public toward healing and resolution. As society becomes increasingly aware of the prevalence of trauma within communities, it is imperative to embrace this compassionate method as a means to promote justice and restore harmony among individuals affected by conflict.

Taylor Marshall

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92 Myrna McCallum et al., Trauma-Informed Legal Practice Toolkit 59 (The Law Foundation of British Columbia: Golden Eagle Rising Society, Sept. 2020), https://www.goldeneaglerising.org/docuploads/Golden-Eagle-Rising-Society-Trauma-Informed-Toolkit-2021-02-14.pdf.

Burnout & Practical Self-Care for the Busy Lawyer

Racheal H. Mastel, Esq. & Rebekah A. Mastel, Psy.D.

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Different Strokes for Different Folks

- ★ I’m Me and You’re You - And we need different plans

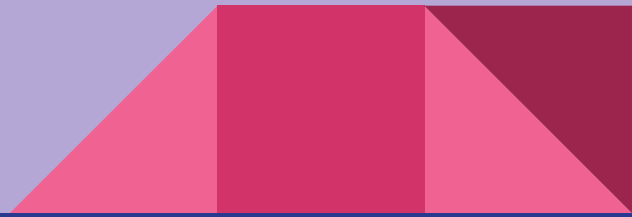
Different Strokes for Different Folks

- ★ Meditation - Does it work for you? Great!
  - Does it work for me? NO! (And that's okay too)
- ★ Travel!
  - Who has the time?
  - Maybe you don't like it? That's alright!
- ★ Healthy Food, Sleep and Exercise - You Probably Need to Be a Morning Person (Guess What - I'm NOT)
  - Not when I have an 8:30 a.m. court appearance
  - Not in the Las Vegas Summer
  - Can we add a few extra hours to the night?

Different Strokes for Different Folks

So:

What Do We Do When You Can’t Have It All?

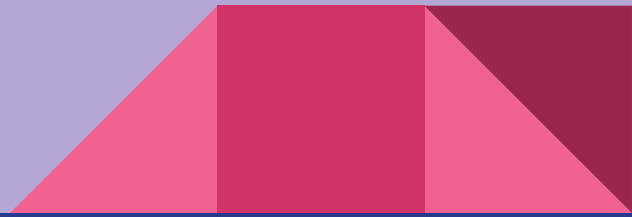


Why It Matters

- Your Health
- Your Competence
- Your Relationships

And sometimes:

- Your Life or Someone Else’s



Who? What? Where? When? How?

- ★ Burnout?
  - Psychological syndrome emerging as a prolonged response to chronic interpersonal stressors on the job.
  - Three key dimensions: overwhelming exhaustion, feelings of cynicism and detachment, sense of ineffectiveness and lack of accomplishment.
  - Clearly places an individual stress experience within a social context.
  - Involves a person's concept of both themselves and others.
- ★ Vicarious/Secondary trauma?
  - Indirect exposure to traumatic content through hearing or witnessing another's experiences.
  - Can cause a gradual lessening of compassion over time.
  - An occupational challenge for people working and volunteering in victim services, law enforcement, emergency medical services, mental health, and other allied professions.
- ★ Compassion fatigue?
  - Indifference to appeals from those who are suffering, experienced as a result of the frequency or number of such appeals.
  - The cost of caring for others or for their emotional pain, resulting from the desire to help relieve the suffering of others.

Why?

Individual lawyers have a duty of self-care, **AND**:

“taking effective action to protect yourself from indirect trauma is an important part of professional development and maintaining professional competence.”

While some of the measures are broad principles, which may seem facile to a cynical lawyer (e.g. ‘Take care of yourself’ and ‘Look after your physical and mental well-being’), the point is that lawyers generally ***do not*** take care of themselves, which is why many are vulnerable to indirect trauma.

Many studies on lawyer well-being confirm a tendency to over-work and adopt bad habits to cope with work stress, including alcohol and drug abuse as well as poor diet, sleep and fitness regimes, and many lose contact with supportive friends and community due to the pressures of work.

Most supported is a **four-step process**: 1) enhanced self-awareness; 2) committing to addressing the stress; 3) making a personal plan of action; and 4) following through with action (Sansbury, Graves, & Scott, 2015)

Mindfulness - “Know Thyself”

NOTICE/OBSERVE

PRESENT MOMENT

NONJUDGMENTAL

Enhancing self-awareness enables us to:

- ★ recognize our thoughts and feelings about a client's trauma
- ★ normalize and validate those reactions internally
- ★ discover what works for us, since a strategy that helps one lawyer may not work for another

"Negative emotions are like waves- they rise up to their peak and then fall and fade away.
We avoid negative emotions because they feel so bad, but also because they can sometimes feel like they will stay forever."

(7Cups Series)

SELF-CARE

Activities and practices that we can engage in on a regular basis to reduce stress and maintain and enhance our short- and longer-term health and well-being.

So? Self-care is what we do about how we feel.

Do You Need Your Inhaler?

VS.

Prevention Inhaler

Self-Care Assessment Tool

- actively choosing to make time for your wellness in the ways that work best for you
- can be as simple as doing things each day that bring you joy
- works best when it feels like a natural part of our schedule.

Physical Self-Care

1. Having a balanced diet
2. Going to sleep at the same time each night
3. Getting enough sleep
4. Being active

Practice Emotional Self-Care

1. Practice positive thinking
2. Journaling
3. Practicing mindfulness or meditation
4. Listening to your favorite song
5. Talking to your therapist

Social Self-Care

1. Calling a friend
2. Laughing with a friend
3. Asking for help
4. Spending time with friends

Professional Self-Care

1. Take breaks
2. Learn new things
3. Advocate for yourself

THE RECOVERY VILLAGE

Okay But Actually…

Hot Tips!

Quick And Easy Alternatives to the Usual Ideas

- ★ Stroll down memory lane (guided imagery & visualization)
- ★ 5 minutes/5 senses (not just for anxiety) (5-4-3-2-1 game)
- ★ Demarcation moment (work brain/home brain) (transition & ritual)
- ★ Get outside
- ★ Reframing repetitive automatic negative thoughts (RANTs) into realistic empowering perspectives (REPs)
- ★ Limit social media
- ★ Trade in “I’m sorry” for “Thank you”
- ★ Approach your pre-existing daily activities with intention
- ★ TAKE A DEEP BREATH. NOW TAKE THREE MORE.

Effective Self-Compassion

Self-compassion is an antidote to shame.

If shame disconnects and leaves us feeling unworthy, self-compassion connects us to ourselves and to others while helping us feel more human.

Shame -> increased cortisol and adrenaline, leaves us stuck in a threat-response.

Self-compassion -> **decreased cortisol and release of dopamine and oxytocin** to help the body feel more relaxed and open.

Essentially talking with ourselves and being with ourselves as we would be with a good friend who is having a hard time—with warmth, understanding, and kindness.

https://self-compassion.org/self-compassion-practices/#guided-practices.

Look out for common humanity around you.

Try on a couple self-kindness phrases.

Recognizing Burnout in Yourself

Maslach Burnout Inventory

Questions	Never	A few times per year	Once a month	A few times per month	Once a week	A few times per week	Every day
SECTION A	**0**	**1**	**2**	**3**	**4**	**5**	**6**
I feel emotionally drained by my work.							
Working with people all day long requires a great deal of effort.							
I feel like my work is breaking me down.							
I feel frustrated by my work.							
I feel I work too hard at my job.							
It stresses me too much to work in direct contact with people.							
I feel like I'm at the end of my rope.							
Total score – SECTION A							

Questions	Never	A few times per year	Once a month	A few times per month	Once a week	A few times per week	Every day
SECTION B	**0**	**1**	**2**	**3**	**4**	**5**	**6**
I feel I look after certain patients/clients impersonally, as if they are objects.							
I feel tired when I get up in the morning and have to face another day at work.							
I have the impression that my patients/clients make me responsible for some of their problems.							
I am at the end of my patience at the end of my work day.							
I really don't care about what happens to some of my patients/clients.							
I have become more insensitive to people since I've been working.							
I'm afraid that this job is making me uncaring.							
Total score – SECTION B							

Questions	Never	A few times per year	Once a month	A few times per month	Once a week	A few times per week	Every day
SECTION C	**0**	**1**	**2**	**3**	**4**	**5**	**6**
I accomplish many worthwhile things in this job.							
I feel full of energy.							
I am easily able to understand what my patients/clients feel.							
I look after my patients'/clients' problems very effectively.							
In my work, I handle emotional problems very calmly.							
Through my work, I feel that I have a positive influence on people.							
I am easily able to create a relaxed atmosphere with my patients/clients.							
I feel refreshed when I have been close to my patients/clients at work.							
Total score – SECTION C							

Burnout

Caused by prolonged levels of chronic stress and pressure, which can come from work or home demands. It can also be caused by personality traits, such as perfectionism, a pessimistic view of yourself and the world, and a need to be in control.

- ★ Physical symptoms
  - Headaches, stomachaches, intestinal issues, fatigue, frequent illness, changes in appetite or sleep
- ★ Emotional symptoms
  - Helplessness, cynicism, sense of failure or self-doubt, decreased satisfaction, feeling detached or alone in the world, loss of motivation
- ★ Behavioral symptoms
  - Reduced performance in everyday tasks, withdrawal or isolation, procrastination, outbursts, using substances to cope, taking frustrations out on others, skipping work or coming in late and leaving early

SCORING RESULTS - INTERPRETATION

Section A: Burnout

Burnout (or depressive anxiety syndrome): Testifies to fatigue at the very idea of work, chronic fatigue, trouble sleeping, physical problems. For the MBI, as well as for most authors, "exhaustion would be the key component of the syndrome." Unlike depression, the problems disappear outside work.

- Total 17 or less: Low-level burnout
- Total between 18 and 29 inclusive: Moderate burnout
- Total over 30: High-level burnout

Section B: Depersonalization

"Depersonalization" (or loss of empathy): Rather a "dehumanization" in interpersonal relations. The notion of detachment is excessive, leading to cynicism with negative attitudes with regard to patients or colleagues, feeling of guilt, avoidance of social contacts and withdrawing into oneself. The professional blocks the empathy he can show to his patients and/or colleagues.

- Total 5 or less: Low-level burnout
- Total between 6 and 11 inclusive: Moderate burnout
- Total of 12 and greater: High-level burnout

Section C: Personal Achievement

The reduction of personal achievement: The individual assesses himself negatively, feels he is unable to move the situation forward. This component represents the demotivating effects of a difficult, repetitive situation leading to failure despite efforts. The person begins to doubt his genuine abilities to accomplish things. This aspect is a consequence of the first two.

- Total 33 or less: High-level burnout
- Total between 34 and 39 inclusive: Moderate burnout
- Total greater than 40: Low-level burnout

A high score in the first two sections and a low score in the last section may indicate burnout.

Rescue Inhaler

Addressing Burnout

Daily Recovery:

- More frequent short breaks are better than one long annual vacation.
- Daily recovery periods are more important and effective than weekly, or less frequent, recovery periods.

Work-Home Interference:

- Stop receiving text messages about work after work hours.
- Stop actively checking work email after work hours.

Stay on the Couch!

- ★ Social activities improved physical vigor, cognitive liveliness, and recovery
  - spending time with friends and family at home or outside of the home; taking part in social activities with other people outside of the home
- ★ Low-cost activities improved physical vigor and cognitive liveliness, but not feelings of recovery
  - lying on the couch, watching tv, doing nothing, napping
- ★ Physical activities showed no improvement for any of the three outcome variables
  - participating in sports, yoga, or exercise

Once You’ve Put Your Oxygen Mask On…

Recognizing Burnout in Others

Passive Burnout:

- ★ **Internal passive** - weariness accompanied by feelings of inadequacy and sadness, feelings of hopelessness and anxiety, and personalizing failure. May manifest as gloominess, language clues around feeling resigned, accompanied by a low tone, audible sighs, and slight head shaking.
- ★ **External passive** - lowered usual standards of performance, withdrawn effort, relaxing the rules, missing deadlines, or expressing more cynicism. Expressing apathy. Extreme avoidance behaviors, such as sidestepping interactions with coworkers, not speaking up about an idea or when something's wrong, or letting problems slip by.

Active Burnout:

- ★ **Internal active** - negative coping tactics like adopting unhealthy eating and drinking habits or neglecting healthy routines like workouts and hobbies, absences from work.
- ★ **External active** - easily annoyed and expressing impatience and discontent. For some employees, these behaviors are standard fare, but they may indicate burnout in people who are usually patient and diplomatic.

How to Help

- ★ Offer emotional support
- ★ Be safe, empathetic, and non-judgmental
- ★ Validate their experience
- ★ Most practical step: helping with tasks
- ★ Encourage breaks
- ★ Check in regularly

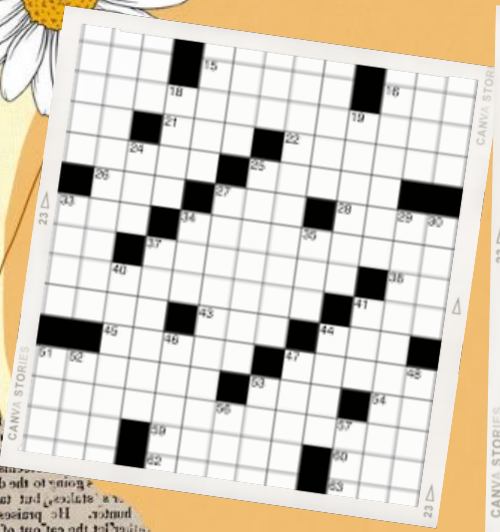
What Not to Do

- Minimise their feelings
- Blame or criticise
- Offer unsolicited advice
- Pressure to perform
- Compare experiences
- Gossip about the situation

Make a SMART Self-Care Plan

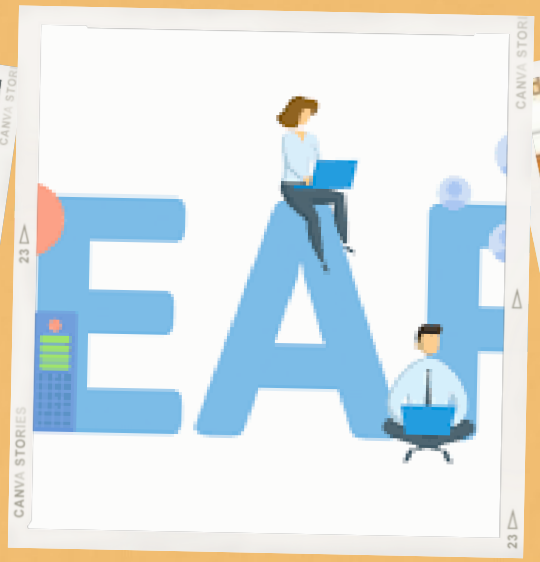
ENVIRONMENTAL

INTELLECTUAL



PHYSICAL

OCCUPATIONAL

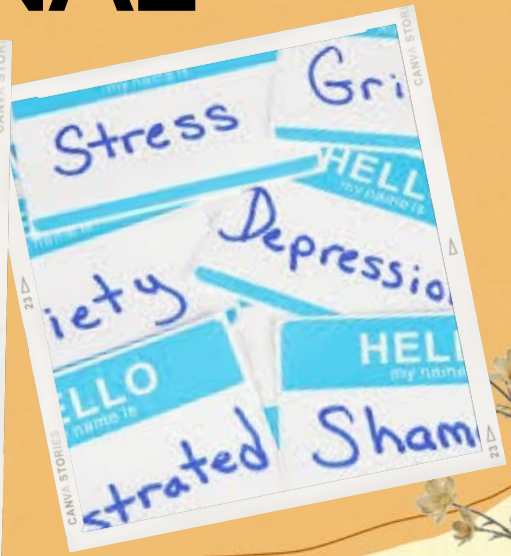


SPIRITUAL

SOCIAL

FINANCIAL

EMOTIONAL



MAKE YOUR GOALS

Setting goals can be a great way to challenge yourself to make healthy lifestyle changes. Set yourself up for success by making your goals SMART!

SPECIFIC
What is your goal?

MEASURABLE
How will you keep track of your progress?

ATTAINABLE
How will you achieve your goal? Make a plan!

RELEVANT
How will this goal help you?

TIMELY
When will you achieve this goal?

QUESTIONS?

MAKE YOUR GOALS

S M A R T

Setting goals can be a great way to challenge yourself to make healthy lifestyle changes. Set yourself up for success by making your goals SMART!

SPECIFIC	MEASURABLE	ATTAINABLE	RELEVANT	TIMELY
What is your goal?	How will you keep track of your progress?	How will you achieve your goal? Make a plan!	How will this goal help you?	When will you achieve this goal?

S **My goal is:** _____

e.g. To drink more water! I will aim for 6 cups per day

M **I will track my progress by:** _____

_____

e.g. I will track my progress by logging how many glasses I drink each day in my phone or planner

A **I will achieve this goal by doing the following:** _____

_____

e.g. 1. Keep a clear bottle with me so I can tell how much I've had
2. Set an alarm to remind myself to drink every 2 hours

R **This goal helps me because:** _____

e.g. This goal will help me to be healthier, have more energy, and help my skin

T **I will complete this goal by (date):** _____

e.g. I will achieve my goal by February 15th

S M A R T GOAL

Goal:	How I will achieve my goal:
	I will achieve my goal by:

S	M	T	W	T	F	S

Self Care Assessment Tool

This is a questionnaire to complete in your own time. How many of these self - care strategies do you use and how often? Hopefully you will find some new ideas or perhaps you will be reminded of activities that you have let slip.

How often do you do the following? (Rate using the scale below):

5 = Frequently

4 = Occasionally

3 = Sometimes

2 = Never

1 = It never even occurred to me.

Physical Self Care

__ Eat regularly (eg breakfast and lunch)

__ Eat healthily

__ Exercise or play sport

__ Lift weights

__ Practice martial arts

__ Get regular medical care or complementary health care for prevention

__ Get medical care when needed

__ Take time off when you are sick

__ Get massages or other body work

__ Do physical activity that is fun for you

__ Take time to be sexual - with yourself, with a partner

__ Get enough sleep

__ Wear clothes you like

__ Take holidays

__ Take day trips or mini-holidays

__ Get away from stressful technology such as pagers, faxes, telephones, e-mail

__ Other:

Psychological Self Care

__ Make time for self- reflection

__ Go to see a counsellor for yourself

__ Write in a journal

__ Read literature unrelated to work

__ Do something at which you are a beginner

__ Take a step to decrease stress in your life

__ Notice you inner experience- your dreams, thoughts, imagery, feelings

__ Let others know different aspects of you

__ Engage your intelligence in a new area – go to an art museum, performance, sports event, exhibit, or other cultural event

__ Practice receiving from others

__ Be curious

__ Say no to extra responsibilities sometimes

__ Spend time outdoors

__ Other:

Emotional Self Care

__ Spend time with others whose company you enjoy

__ Stay in contact with important people in your life

__ Treat your self kindly (supportive inner dialogue or self-talk)

__ Feel proud of yourself

__ Reread favourite books, watch favourite movies

__ Identify comforting activities, objects, people, relationships, places – and seek them out

__ Allow yourself to cry

__ Find things that make you laugh

__ Express your outrage in a constructive way

__ Play with children

__ Other:

Spiritual Self Care

__ Make time for prayer, meditation, reflection

__ Spend time in nature

__ Participate in a spiritual gathering, community or group that has meaning

__ Be open to inspiration

__ Cherish your optimism and hope

__ Be aware of non tangible (nonmaterial) aspects of life

__ Be open to mystery, not knowing

__ Identify what is meaningful to you and notice its place in your life

__ Sing!

__ Express gratitude

__ Celebrate milestones with rituals that are meaningful to you

__ Remember and memorialize loved ones who are dead

__ Nurture others

__ Have awe-ful experiences!

__ Contribute to or participate in causes in which you believe

__ Read inspirational literature

__ Listen to inspiring music

__ Other:

Workplace/Professional Self Care

__ Take time to eat lunch

__ Take time to chat to co-workers

__ Make time to complete tasks

__ Identify projects or tasks that are exciting, growth-promoting, and rewarding for you

__ Set limits with clients and colleagues

__ Balance your caseload so no one day is too much!

__ Arrange your workspace so it is comfortable and comforting

__ Negotiate for your needs (benefits, pay raise)

__ Have a peer/collegial support group

__ Other:

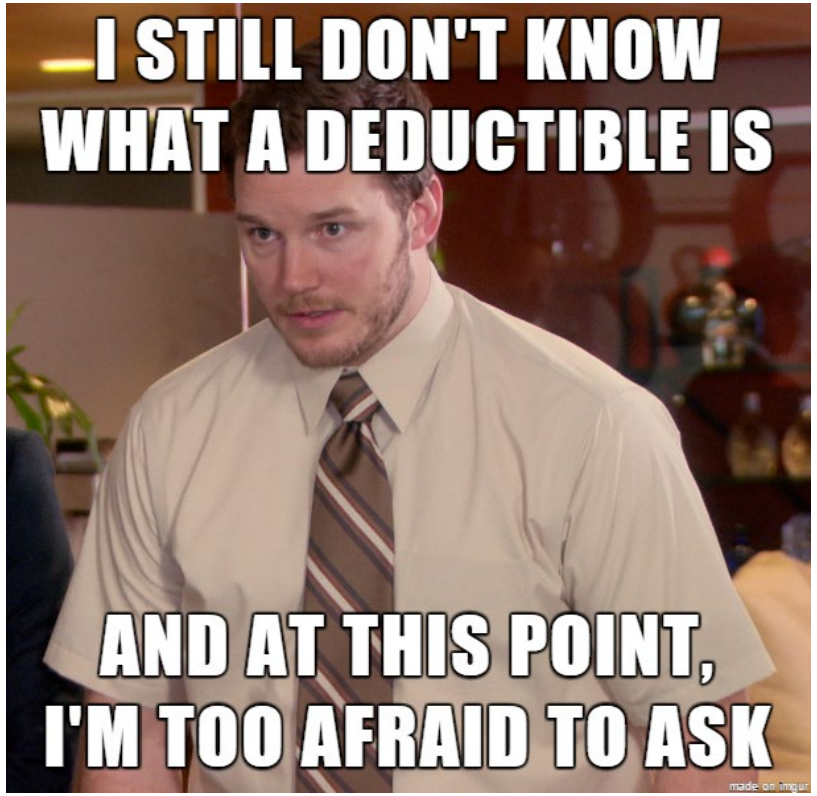
Be Shrewd, Don’t Get Sued: The nexus between ethical law practice and avoiding malpractice suits.

- Malpractice Insurance
- Ethics
- Preventing Claims
- Cyber Risk

Is malpractice insurance required in NV?

- No.
- However, NV State Bar collects Biographical Data Form which asks private practice lawyers if they maintain professional liability insurance.
- Specialist or Expert requirement
  - The lawyer shall carry a minimum of $500,000 in professional liability insurance…The lawyer shall provide proof of liability coverage to the state bar as part of the reporting requirement…

Claims and Bar Complaints



Malpractice Claims and Bar Complaints -Family Law

- Trends
- Family law historically #2 in terms of number of claims. Second to PI-Plaintiff. [ABA Profile of Legal Malpractice Claims]
  - Growing concerns and claims around high value divorce

DOMESTIC VALUES QUESTIONNAIRE

Please provide a breakdown of your Divorce practice:

Divorce - marital assets <$1,000,000	%
Divorce - marital assets $1,000,000 - $5,000,000	%
Divorce - marital assets $5,000,000 - $10,000,000	%
Divorce - marital assets >$10,000,000	%

What is the value of the largest marital asset case? $ _____

Family law attorneys rank among the legal specialties that receive the highest number of grievances filed.

- As many as 90% are ultimately dismissed
- Only in divorce do opposing parties file nearly as many complaints as clients
- Solo practitioners are the target of 50% or so of all complaints
- Bar Defense -Typically covered, no deductible
    - deductible-free defense and loss of earning coverage for lawyers included in the policy with a sublimit $25k typically per incident or max

Risk Management Resources

- Hotlines. Some forming attorney client privilege.
  - Discuss ethics or liability issues including withdrawal, conflicts, fee disputes etc.
- Free or discounted CLE courses.
- Resources like checklists and sample letters.

Application

- Most important question

After inquiry, has the **Named Insured** or any attorneys to be insured under this policy:

a. been the subject of a professional liability claim or suit, or entered a tolling agreement with a client with respect to a threatened professional liability claim, in the last five (5) years (or earlier if the claim is still open)? ☐ Yes ☐ No

b. have knowledge or information of any fact, circumstance or actual or alleged act, error or omission which may reasonably be expected to give rise to a professional liability claim(s) under the proposed policy? ☐ Yes ☐ No

If yes to any of the above, complete the Claim Supplement.

It is understood and agreed that, without limiting any rights of the underwriter, if such knowledge or information exists, any claim arising therefrom is excluded from this proposed insurance.

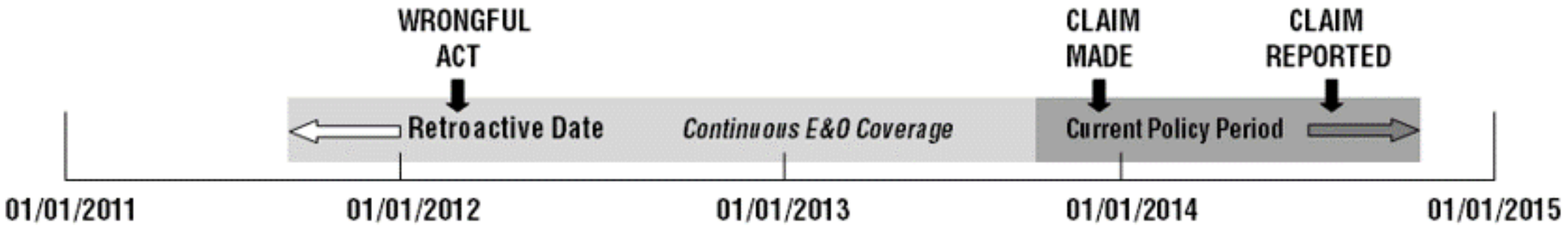
Pricing

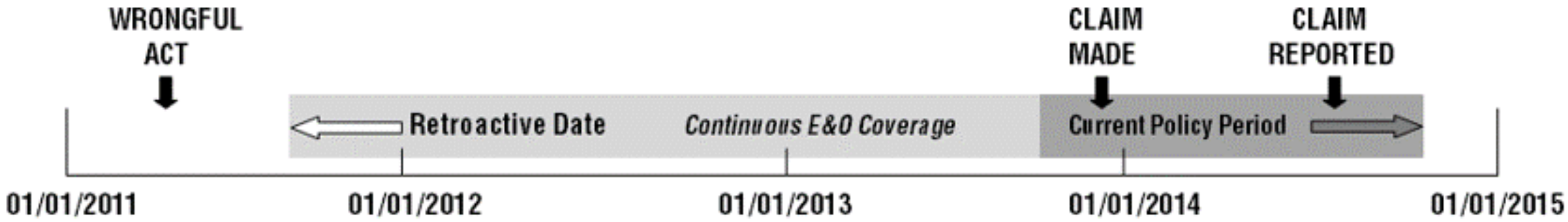
- Formula based on: number of attorneys, limits, deductible, geography, claims, areas of practice.
- Step Rating
  - Policies are ‘claims-made’ basis, which means that a firm (or newly hired attorney) with one year of experience has less exposure than a firm with five years of experience.
  - The insurer “step-rates” the policy in years 2-5 to account for the increased exposure in prior acts
  - Your premium is relatively low the first year as the risk that a claim will arise for the services rendered during the first policy term is rather low.
  - Step-rating is calculated on a per attorney basis, so new attorneys will start out at the discounted rate. The premium will continue to increase until the attorney is fully mature: the insurer has determined that additional years of exposure no longer increase the likelihood of a claim being filed against them. Usually year 5.

Malpractice Coverage

- Claims Made form and what constitutes a claim?
- Occurrence vs claims-made (and reported)
  - Occurrence: An occurrence policy covers claims arising from acts or incidents that occurred during the policy period, regardless of when the claim is made. For policies written on an occurrence basis, the timing of when the claim is made doesn’t matter, it could be years later. What matters, is when the act or incident that gave rise to the claim took place.
  - Claims-made: A claims made policy covers claims made during the policy period. The event that gave rise to the claim could have happened at any time, as long as the claim (or the written demand) was made during the policy period, and reported to the insurance company as required by the policy.

Claims-made


WRONGFUL ACT
CLAIM MADE
CLAIM REPORTED
Retroactive Date
Continuous E&O Coverage
Current Policy Period
01/01/2011
01/01/2012
01/01/2013
01/01/2014
01/01/2015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Continuous E&O Coverage
Current Policy Period
01/01/2011
01/01/2012
01/01/2013
01/01/2014
01/01/2015

Tail and retroactive date

- Prior lawyers, staff
- Tail
  - Cost, automatic and extended
  - Automatic: Coverage as provided under this Policy shall automatically continue for a period of sixty (60) days following the effective date of such cancellation or non-renewal, but only with respect to a **Claim** first made against the **Insured** and reported to the **Insurer** during the Automatic Extended Reporting Period and only if the **Claim** arises out of a **Wrongful Act**: 1) occurring prior to the effective date of such cancellation or non-renewal and on or after the Retroactive Date
- Retirement Tail

Limits and deductibles

- CEIL, CEOL (or some CEOL - sublimit for claims expense)
  - Claim Expense Inside the Limit: Defense costs erode the limit of liability
  - Claim Expense Outside the Limit: Defense costs are in addition to the limit of liability, leaving your Per Claim and Aggregate Limit available for damages.
- Deductible
  - Loss and expense or First Dollar?
    - Loss & Expense: This is the standard deductible that applies to both damages and defense costs.
    - First Dollar Defense: The deductible only applies to damages. In other words, the carrier pays defense costs from the “first dollar” on.
  - Per claim and aggregate

Who is covered and what activities are covered

- Definition of insured
- Staff, new attorneys, new areas of practice or changes in practice during policy
- Leaving a firm/switching firms
- Closing a firm
- Duty to defend
  - The Company will pay on behalf of the **Insured** all sums which the **Insured** shall become legally obligated to pay as **Damages** for **Claims**
  - The Company shall have the right and duty to defend any **Suit** against the **Insured** seeking **Damages** to which this insurance applies even if any of the allegations of the **Suit** are groundless, false or fraudulent.
- Definition of professional services

Exclusions (avoiding uncovered malpractice claims)

- Intentional Acts:
  - Arising out of an illegal, dishonest, fraudulent, criminal, knowingly wrongful, or malicious act, error or omission, or an intentional or knowing violation of the law
- Businesses you own or control
  - Rule 1.8 provides that a lawyer shall not enter into a business transaction with a client unless specific conditions are met
    - Be very careful when entering into business transactions with clients. The potential for misuse of that information in a business transaction is very high.

One or both: breach of contract and tort (primarily negligence related)

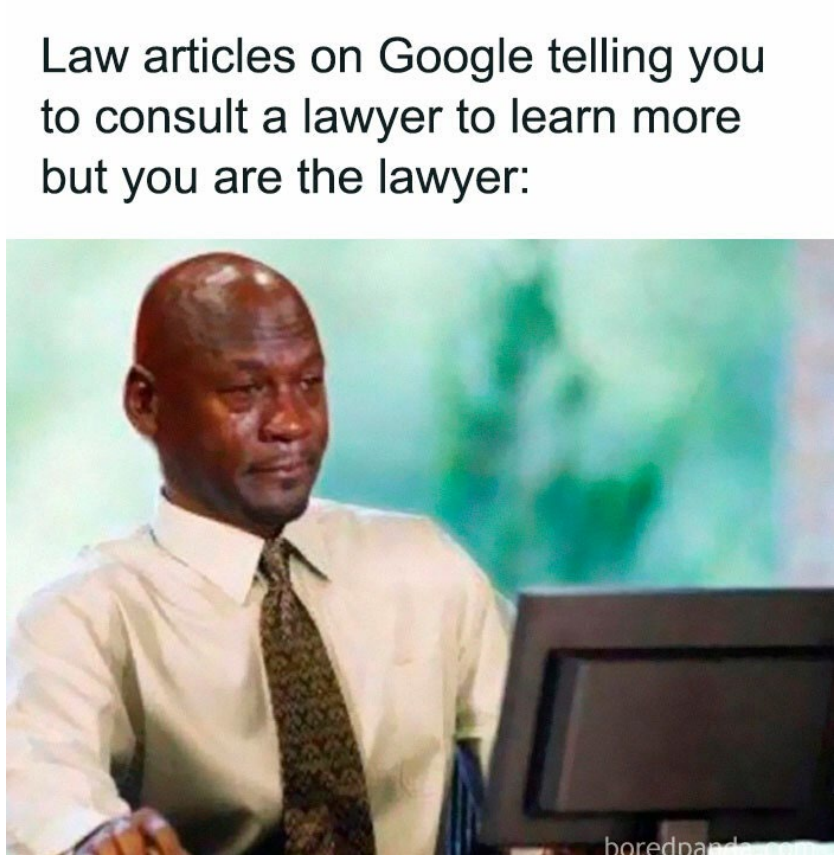
- Breach of contract
  - Focuses on existence of an agreement , nonperformance, and resulting damages
- Tort claims
  - Including malpractice: existence of duty, breach of the duty, proximate causation, and damages.
    - Duty defenses, comparative and contributory negligence- Modified Comparative Fault- 51% Bar
    - Typically, a claimant must prove damages
    - Limited by statute

Claims-what to report and when

- "**Claim**" means an oral or written demand made against the **Insured** for money or services, including the service of a suit or the institution of mediation or arbitration proceedings against the **Insured**, or a request to waive the statute of limitations or sign a tolling agreement

What constitutes a claim?

- Client demands you waive or refund their fees
- Written request to toll or waive a statute relating to a potential civil or administrative proceeding
- Client alleges malpractice or threatens to sue verbally or in writing
- Client requests their file
- Client initiates a bar complaint (see disciplinary coverage above)
- Client reports a firm to the fee dispute panel of the bar



Potential Claims

- “**Potential Claim**” means any conduct or circumstance that might reasonably be expected to be the basis of a **Claim**.

Most common reason for claim denial-failure to report a *potential* claim.

- Two ways coverage can be lost if you fail to report a potential claim
  - First, failure to disclose a potential claim on the application will give the insurer the right to rescind the policy entirely if the misrepresentation is material. The policy is void and the premium refunded leaving no coverage for any insured.
  - Second, most claims made policies do not cover any act, error or omission that an insured could reasonably have foreseen, when the policy was purchased.
  - https://www.cusickbrokers.com/failure-to-report-a-potential-claim/

Consent to Settle and Hammer

- Company cannot settle claim without consent of insured (generally)
- If the **Named Insured** refuses to consent to any settlement recommended by the Company, and elects to contest the **Claim** or continue any legal proceedings in connection with such **Claim**, then the liability of the Company for **Damages** and **Claims Expenses** for such **Claim** shall not exceed the amount for which the **Claim** could have been settled, as well as the **Claims Expenses** incurred by the Company or with the Company's consent up to the date of such refusal, plus 50% of covered **Damages** and **Claims Expenses** incurred after the date of the **Insured's** refusal to settle.
    - 50% hammer

How to choose insurer and broker

- Broker: specialist in insuring law firms
  - Need only one broker for all property/casualty
  - Why?
  - What is a direct writer?
- Insurer
  - AM Best-FSR and FSC
  - Length of time insuring law firms, claims paying reputation

How to choose insurer and broker

- Financial Strength Rating
  - FSR is an independent option of an insurers financial strength and ability to meet its obligations

Best's Financial Strength Rating (FSR) Scale

Rating Categories	Rating Symbols	Rating Notches*	Category Definitions
Superior	A+	A++	Assigned to insurance companies that have, in our opinion, a superior ability to meet their ongoing insurance obligations.
Excellent	A	A-	Assigned to insurance companies that have, in our opinion, an excellent ability to meet their ongoing insurance obligations.
Good	B+	B++	Assigned to insurance companies that have, in our opinion, a good ability to meet their ongoing insurance obligations.
Fair	B	B-	Assigned to insurance companies that have, in our opinion, a fair ability to meet their ongoing insurance obligations. Financial strength is vulnerable to adverse changes in underwriting and economic conditions.
Marginal	C+	C++	Assigned to insurance companies that have, in our opinion, a marginal ability to meet their ongoing insurance obligations. Financial strength is vulnerable to adverse changes in underwriting and economic conditions.
Weak	C	C-	Assigned to insurance companies that have, in our opinion, a weak ability to meet their ongoing insurance obligations. Financial strength is very vulnerable to adverse changes in underwriting and economic conditions.
Poor	D	-	Assigned to insurance companies that have, in our opinion, a poor ability to meet their ongoing insurance obligations. Financial strength is extremely vulnerable to adverse changes in underwriting and economic conditions.

** Each Best's Financial Strength Rating Category from "A+" to "C" includes a Rating Notch to reflect a gradation of financial strength within the category. A Rating Notch is expressed with either a second plus "+" or a minus "-".*

How to choose insurer and broker

- Financial Size Category FSC
  - AM Best assigns each rated company an FSC indicates the size of the company based on capital and surplus

GUIDE TO BEST'S FINANCIAL SIZE CATEGORY – (FSC)

AM Best assigns each rated (A++ through D) insurance company a Best's Financial Size Category (FSC), which is designed to provide a convenient indicator of the size of the company. The FSC is based on Capital and Surplus in U.S. dollars and may be impacted by foreign currency fluctuations.

Category	Capital and Surplus	Category	Capital and Surplus
I	Less than USD 1 Million	IX	USD 250 Million to Less than 500 Million
II	USD 1 Million to Less than 2 Million	X	USD 500 Million to Less than 750 Million
III	USD 2 Million to Less than 5 Million	XI	USD 750 Million to Less than 1.00 Billion
IV	USD 5 Million to Less than 10 Million	XII	USD 1.00 Billion to Less than 1.25 Billion
V	USD 10 Million to Less than 25 Million	XIII	USD 1.25 Billion to Less than 1.50 Billion
VI	USD 25 Million to Less than 50 Million	XIV	USD 1.50 Billion to Less than 2.00 Billion
VII	USD 50 Million to Less than 100 Million	XV	Greater than or Equal to USD 2.00 Billion
VIII	USD 100 Million to Less than 250 Million		

For additional information regarding the development of a Best's Credit Rating and other rating-related information and definitions, including outlooks, modifiers, identifiers and affiliation codes, please refer to the report titled "Guide to Best's Credit Ratings" available at no charge at www.ambest.com/ratings/index.html.

Version 072423

Billing and Fee Practices -NRPC 1.5

- Bill periodically and consistently and proofread all bills with your name on them.
- Clearly detail the work performed and charges
- Often the bills are the first thing requested in a malpractice or bar complaint. Each should be drafted as though they will be scrutinized.
- An unpaid bill is a message to you from the client- follow up promptly and have discussion about your bill. Otherwise, they have permission to ignore your bill

Can you sue for fees? Yes. Should you sue for fees?

- Checklist [Fee Suit Checklist]
- Fee disputes, suing for fees
  - No attorney should be caught off guard when a client stops paying. Nonpayment is an occupational hazard.
  - Discussions of fees and bills are extremely important. At the initial meeting, assess the cost of representation with the client, together with the client's ability and willingness to pay.
  - Nonpayment of attorney's fees is not by itself a defense to a legal malpractice claim.
    - Stopping work because the client does not pay is ill-advised
  - Red Flag on application

Avoiding Claims and Bar Complaints

Sources of Grievances and Malpractice Claims

- Client selection, engagement/intake, declination and withdrawal
  - A good engagement letter includes how fees will be computed and charged and is (essentially) required by RPC
  - Poor client relations and Client Selection
  - Scope of representation issues
- Conflicts of interest (current and former clients) NRPC 1.7 & 1.8
- Communication with unrepresented persons/parties

Lack of Documentation

- lawyers frequently fail to memorialize advice given to their clients or fail to adequately memorialize the parties' agreements.
- in the context of a legal malpractice lawsuit, clients will likely claim that they were not properly advised
- documenting all issues discussed with clients, opposing counsel, and anyone else involved in a particular matter
    - doesn't have to be pretty

Inadequate Communication NRPC 1.4

- Failing to obtain client consent, failing to follow client instructions, lack of responsiveness to the client, procrastination, and inadequate client follow-up
- Unhappy clients or uninformed clients are more likely to have some complaints

Rule 3.3 Candor Toward the Tribunal and Rule 4.1 Truthfulness in Statements to Others

As well as third parties (negotiation, transactions, and litigation)

- In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or

  - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client…

Rule 8.3. Reporting Professional Misconduct

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority

Excellent Ethics and Risk Management Resources

- Ethics, Malpractice, and Professional Liability in Family Law Cases: An Annotated Bibliography, 2013-2018
  - https://aaml.org/wp-content/uploads/MAT203_1.pdf
- https://www.amazon.com/Ethics-Family-Law-Domestic-Principled/dp/0314291881
- https://community.njsba.com/blogs/njsba-staff/2019/04/16/a-guide-for-spotting-and-avoiding-common-ethical-p?ssopc=1

Cyber and Privacy

ABA Model Rules for Professional Conduct :Rule 1.6: Confidentiality of Information. 1.6 (c)

- ABA Model Rules for Professional Conduct :Rule 1.6: Confidentiality of Information. 1.6 (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client

"We need to draw the line on unethical behavior. But let's draw it with an Etch-a-Sketch and don't be afraid to shake it a little."

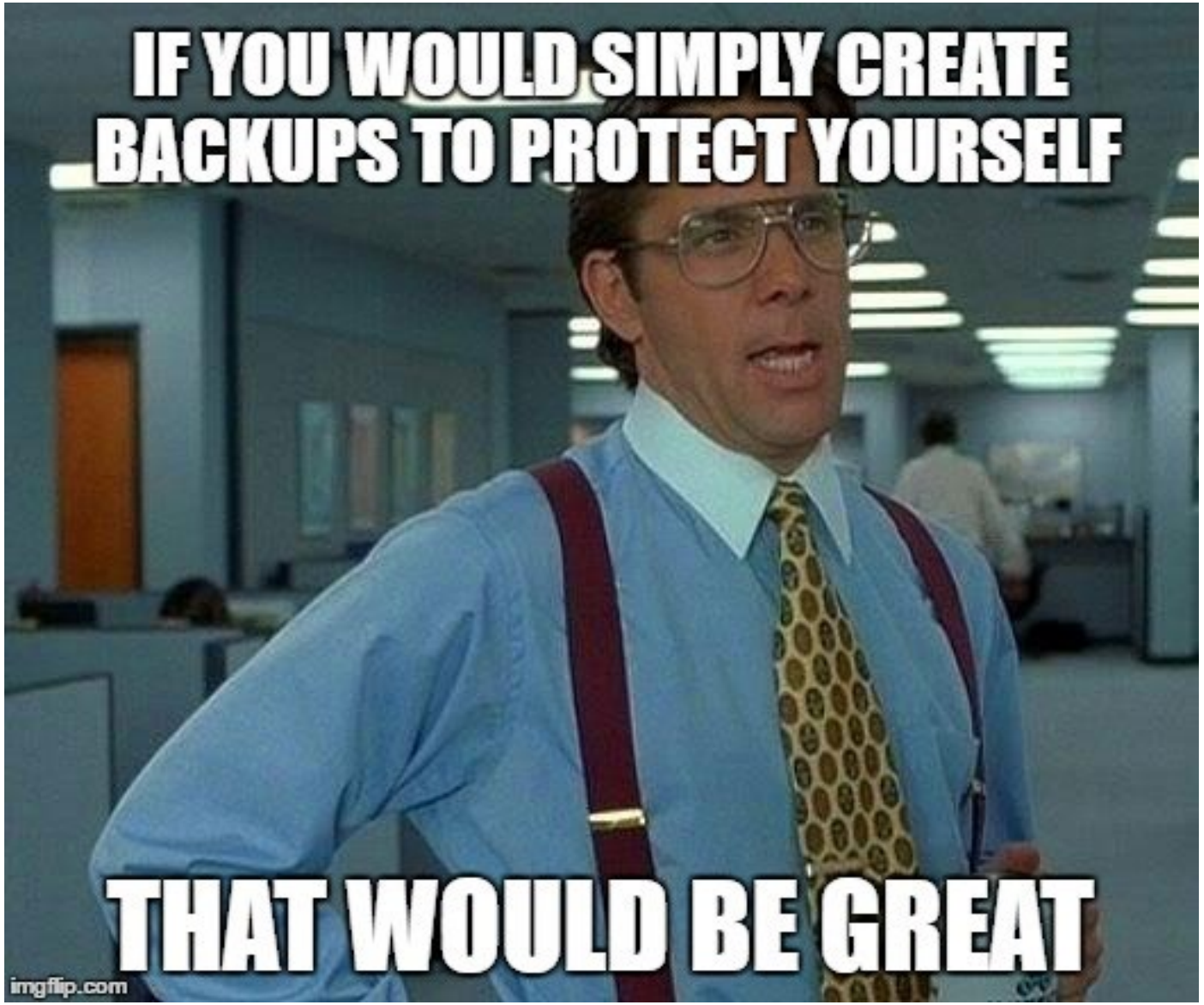
Cyber Threats today

- Ransomware
- Social Engineering
  - exploit and manipulate employees, vendors or other people within the organization to transfer funds to unauthorized accounts
- Invoice Manipulation
- Spear phishing, Zero-day attacks, File-less threats, Botnets, Insider Threats, Man in the Middle attacks, Live Off the Land attack

Rule 1.4(a)(3).

- The ABA has concluded that a lawyer has a duty to disclose a data breach “where material client confidential information is misappropriated, destroyed, or otherwise compromised, or where a lawyer’s ability to perform the legal services for which the lawyer is hired is significantly impaired by the episode
- Is this happening?

Cyber Insurance Policies include First-party and Third-Party Coverage along with Social Engineering and Funds Transfer Fraud (sublimit usually)



First-party cyber coverage helps respond to a data breach

- Breach Legal Counsel
- Forensic investigations
- Notifying customers that their personal information was exposed
- Purchasing credit monitoring services for affected customers
- Launching a public relations campaign to help restore a company's reputation after a data breach
- Reimbursing a company for business interruption and revenue lost while handling the data breach
- Paying ransom to a hacker who is holding data hostage

Third-party Pays for liabilities

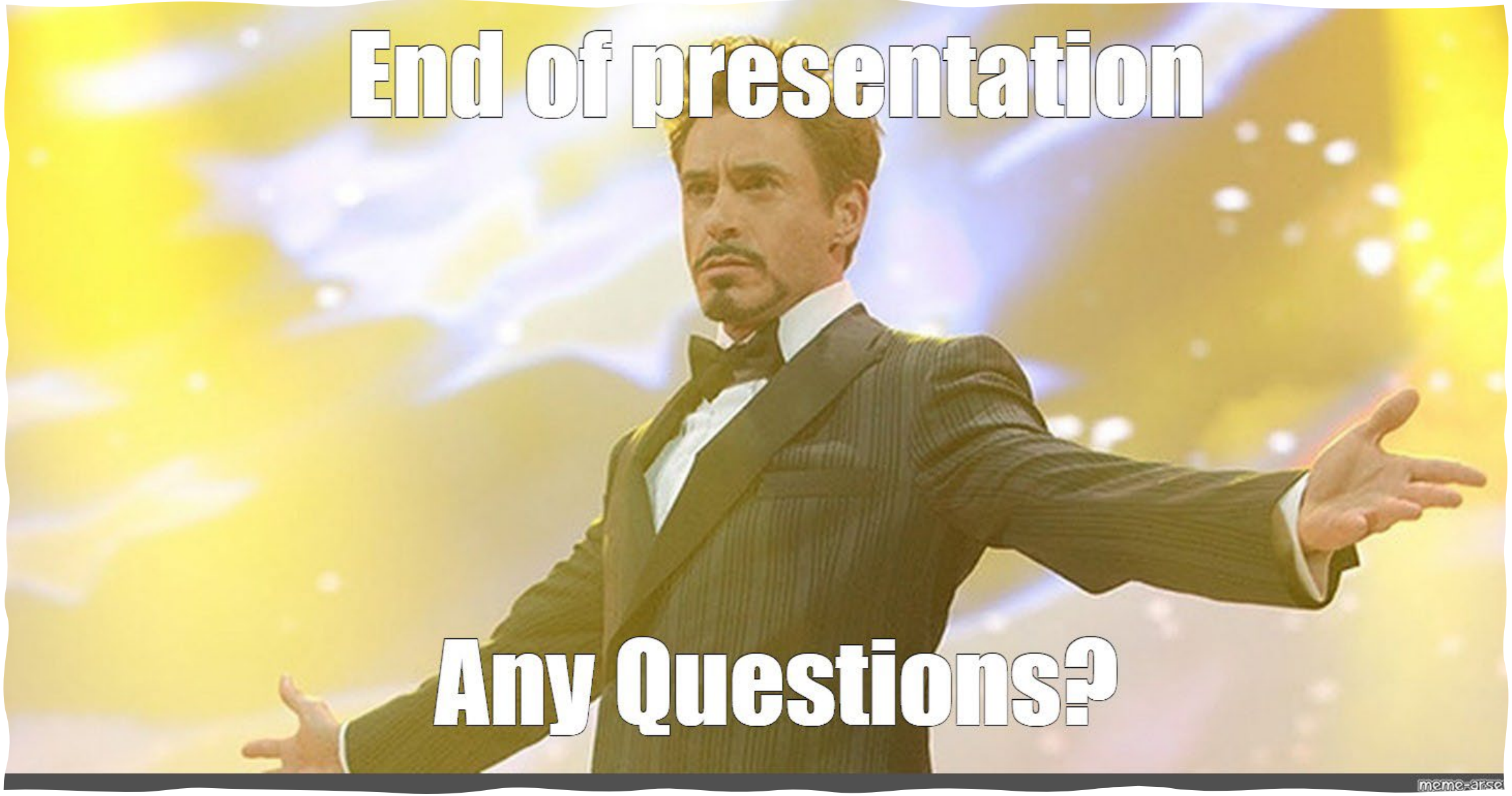
- Defense costs and damages
- Regulatory Liability: cost to defend, fines, penalties
- PCI Fines

Pricing and Limits

- Employee count and revenue combined with industry. Claims effects.

Cyber Hygiene

- Does the applicant have MFA in place for remote network access?
- Does the applicant have MFA in place for email access?
- Does the applicant have MFA in place for network administrators and other privileged users?
- Does the applicant use an EDR tool that includes centralized monitoring?
- Does the applicant use an email security filtering tool?
- Does the applicant regularly back up and segregate sensitive data?


End of presentation
Any Questions?
meme-arse

2024

NEVADA FAMILY LAW CONFERENCE

LAKE TAHOE

CASE LAW UPDATE

Presented by: 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.

Table of Contents*

*The text of the cases included in these materials has been heavily edited to provide the most relevant portions of each case. In many cases, entire paragraphs, or series of paragraphs have been removed. Indication is given when the leading portion of a paragraph has been removed. Likewise, indication is given when part of the internal portion of a paragraph has been removed. The **bolding** for emphasis is the author's. No page citations to official or unofficial reporters are included. Most cases are not published and were issued before the mid-August 2024 date from which opinions by the Court of Appeals may be cited as authority. *See* NRAP 36(c)(3). Accuracy of the reproduction of the text is not guaranteed. Users must make an independent evaluation of each case and give appropriate citations.

Attorney's Fees

Cunning v. Cunning, No. 84255-COA, Order Affirming In Part And Reversing In Part (Unpublished Disposition, May 3, 2024)

Lisa Messing appeals from a decree of divorce, award of attorney fees, and post judgment orders in a family law matter.

On appeal, Lisa argues that the district court abused its discretion when (1) dividing the parties' community property, including reimbursing Chris for community expenses paid with his separate property during the divorce; (2) calculating the alimony award; and (3) allowing Pecos Law Group to file a lien against her and by requiring her to pay attorney fees.

We likewise see no abuse of discretion in the district court's decision to refund the temporary spousal support paid to Lisa during the divorce.

Although the district court initially found that Lisa was entitled to temporary spousal support of $2,000 a month during the divorce, the court later ordered Lisa to apply for jobs to obtain financial independence, and Lisa failed to do so. Moreover, evidence presented at trial revealed that, in addition to her failure to seek gainful employment, Lisa had separate property funds that she could have utilized to pay her personal expenses during the divorce. Accordingly, the district court found that because Lisa was capable of self-support, the provisions of NRS 123.110, requiring a spouse to support "his or her spouse out of his or her separate property when the spouse has no separate property and they have no community property and the spouse, from infirmity, is not able or competent to support himself or herself," did not apply. Because the district court's findings related to the community debt and Lisa's ability to support herself are supported by substantial evidence, we conclude that the district court did not abuse its discretion when it determined that Chris was entitled to a reimbursement for separate property paid during the divorce and for temporary spousal support paid to Lisa and affirm that portion of the district court's order. *See Schwartz*, 126 Nev. at 90, 225 P.3d at 1275.

Next, Lisa contends that the district court abused its discretion when awarding her alimony in the amount of $3,000 a month for seven years, and imputing income of $130,000 to Chris and $45,000 to Lisa for purposes of future modification. Specifically, Lisa argues that the district court abused its discretion in the length and amount of alimony by failing to consider her economic circumstances, including that she is close to retirement age without a retirement fund, had not worked in 21 years, and that the alimony award does not cover her monthly expenses, and also abused its discretion by failing to consider her testimony that Chris is hiding his actual income.

When reviewing awards of alimony, "this court extends deference to the discretionary determination of the district court and withholds its appellate power to modify or reverse except in instances where an abuse of the trial court's discretion is evident from a review of the entire record." *Gardner v. Gardner*, 110 Nev. 1053, 1055-56, 881 P.2d 645, 646 (1994). In deciding the amount and duration of an alimony award, the court should consider what is "just and equitable"

based on the circumstances of each case. *Shydler v. Shydler*, 114 Nev. 192, 199, 954 P.2d 37, 41 (1998).

When determining if alimony is just and equitable, a district court must consider the eleven factors listed in NRS 125.150(9). In the divorce decree, the district court weighed and evaluated the relevant factors and found (among other things), that the parties had lived above their means for several years and would not be able to maintain the standard of living following divorce, that both parties have a roughly equal amount of monthly expenses, that, while Lisa has not worked in 21 years, she is highly educated, did not present evidence that she is unhealthy or unable to work, and failed to comply with the court's order that she prepare for financial independence by finding a job, and that Chris's commission-based income fluctuates but has been relatively stable. Moreover, the court also considered that both parties have separate and community property awards from the divorce with which they can support themselves. Finally, the court found that while Lisa had requested rehabilitative alimony under NRS 125.150(10), she failed to support this request with any relevant evidence.

Turning to the district court's offset of the attorney fee award against Lisa's share of the community, we conclude that the district court did not abuse its discretion in apportioning these fees towards Lisa's share. *See Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005) (holding that a district court's award or denial of attorney fees is reviewed for an abuse of discretion.). Related to this offset, Lisa argues that the district court abused its discretion in requiring her to pay a portion of Chris's attorney fees and expert witness fees because her pursuit of the marital waste and hidden asset claims were not frivolous, and further argues that the court abused its discretion by failing to consider the disparity in the parties' income prior to awarding fees.**3**

NRS 18.010(2)(b) allows the district court to award attorney fees to a prevailing party "when the court finds that the claim, counterclaim . . . or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." "The court shall liberally construe the provisions of [NRS 18.010(2)(b)] in favor of awarding attorney's fees in all appropriate situations," and "[i]t is the intent of the Legislature that the court award attorney's fees pursuant to [NRS 18.010(2)(b)] . . . in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses." *Id.* "For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it." *Rodriguez v. Primadonna Co.*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009).

In granting Chris's motion for attorney fees, the district court determined that Lisa's claims related to marital waste and hidden assets were maintained without reasonable ground, stating that despite Lisa's claims to the contrary during trial, her pretrial memorandum included her forensic accountant as an expert witness, and her trial memorandum included marital waste arguments. Thus, the court found that "it appears that Lisa pursued these claims up to the time of trial, long after a reasonable investigation by a forensic accountant should have determined they were fruitless. Continuing to allege those claims were viable undoubtedly resulted in both Lisa and Chris incurring unnecessary attorney's fees." Accordingly, the court found that Chris should be reimbursed for reasonable attorney fees related to his defense of meritless claims pursued by

Lisa but ultimately abandoned during trial, as Lisa did not call her expert to testify, present any documentary evidence related to those claims during trial, or present a marital waste claim to the court in closing arguments.

Given the record supporting the district court's assessment of the evidence regarding Lisa's abandonment of these claims and the increased litigation costs for both parties, as well as the Legislature's mandate that the district court liberally construe the statute in favor of awarding attorney fees, we find no abuse of discretion in the district court's decision to award Chris attorney fees and expert witness costs.

Child Custody "Other" Factors, Evidentiary Presumptions, Tracing

Hacham v. Sebai, No. 86819-COA, Order of Affirmance (Unpublished Disposition, Mar. 22, 2024)

This is an appeal from a district court's findings of fact, conclusions of law, and order following a trial in a family law matter.

Tarik Hacham and Dounia Sebai met in Morocco and moved to Las Vegas in October 2011.**1** The parties were married in November 2011 and have two minor children: A.H., born in 2012 and L.H., born in 2015.

Both Tarik and Dounia work in the timeshare industry, but Dounia quit her job in 2018 to focus on taking care of the children. Once Dounia stopped working, Dounia alleged that Tarik began having substance abuse issues. This caused a rift in the marriage that continued into September 2020, when the parties decided to take an "extended trip" with their children.**2** This trip was meant to last months and encompassed travel both domestically and abroad. The parties planned to return to the United States for the 2021-22 school year after visiting family in Morocco. Dounia surmised that this trip would afford the parties a chance to repair their marriage.

The parties arrived in Morocco in April 2021. . . . In May, while visiting Tarik in Rabat with the children, Tarik and Dounia got into a heated argument wherein Dounia alleged a physical confrontation occurred. Tarik then took Dounia's and the children's passports and did not return them.

Tarik commenced divorce proceedings in a Moroccan court in June 2021.

Simultaneous with the Moroccan divorce proceedings, in July 2021, Dounia filed in Nevada both a complaint for divorce and an ex parte application for sole legal custody to obtain replacement passports. In early September 2021, the district court granted Dounia sole legal custody with respect to the passport issue, and Dounia was able to obtain one-time, temporary use passports for the children from the U.S. consulate in Morocco. She returned with the children to Las Vegas shortly thereafter.

The Moroccan court issued a Decree of Divorce (the Moroccan decree) in January 2022. The Moroccan decree awarded Dounia primary custody of the children, with Tarik entitled to parenting time. . . . Tarik remained in Morocco for the next eight months and returned the United States in June 2022. During that time, he did not visit the children once, despite Dounia's requests for him to come to Las Vegas.

Tarik did not initially move to Las Vegas and instead moved to Sedona, Arizona. While in Arizona, the parties informally agreed that Tarik would have parenting time each Friday from 4:00 p.m. to 8:00 p.m. and Saturday from 10:00 a.m. to 4:00 p.m.

In December 2022, the parties stipulated to an order establishing a temporary custody arrangement that granted Tarik a date night with the children each Tuesday, regular parenting time every Friday, and additional parenting time on Christmas. The district court entered another

temporary custody order in February 2023 that granted Dounia primary physical custody, with Tarik to have parenting time from Thursday afternoons until Saturday at 6:00 p.m. The district court declined to award joint physical custody, finding that it was not in the children's best interest.

Throughout 2021 and 2022, the parties intensely litigated jurisdiction. Specifically, the parties contested the district court's jurisdiction to divide the parties' assets and enter custody orders, considering the litigation in Morrocco.

Simultaneous with litigating jurisdiction, the parties also engaged in discovery surrounding the merits of their divorce. In September 2022, Dounia moved to compel discovery, arguing that Tarik's responses to her discovery requests were inadequate, and that he had not filed an updated Financial Disclosure Form (FDF), as required by NRCP 16.2. Notable to this appeal, when questioned about separate property, Tarik stated only that he "bought a condo in 2008 prior to the marriage." Tarik was also exceedingly vague in his answers regarding financial accounts and did not disclose relevant statements.

At a discovery commissioner hearing in October 2022, the commissioner determined that the majority of Tarik's responses and disclosures were inadequate, and that Tarik had not acted in good faith. In his report and recommendations, the commissioner, with few exceptions, directed Tarik to fully comply with Dounia's discovery requests or face a negative inference penalty. Pursuant to this penalty, a negative inference would automatically issue to any information Tarik withheld as of October 12, 2022, such that the withheld information would support Dounia's position.

In November 2022, the district court issued an order affirming and adopting the discovery commissioner’s report and recommendations (DCRR). . . . The court also scheduled an evidentiary hearing (trial) for April 2023 on the remaining custody, asset, and debt issues. Notable to this appeal, Dounia requested at the trial that: she remain the primary custodial parent; the parties' two Las Vegas properties, as well as the Moroccan apartment, be listed for sale, with each party entitled to one-half of the net sale proceeds; and she be awarded one-half of the funds Tarik purportedly improperly liquidated (approximately $160,000) from his 401(k) retirement account.

Tarik argues that the district court erred when it awarded Dounia primary physical custody because it considered the Moroccan decree in issuing its determination.

In making a child custody determination, the district court's sole consideration is the best interest of the child. NRS 125C.0035(1); *see Davis*, 131 Nev. at 451, 352 P.3d at 1143. In determining the best interest of the child, a district court must consider, and set forth specific findings concerning, the "best interest" custody factors delineated in NRS 125C.0035(4)(a)-(l). **Crucially, a district court cannot "simply . . . process[ ] the case through the [best interest factors]" but must instead "tie the child's best interest, as informed by specific relevant findings" to the custody determination made.**

With respect to physical custody, **there is a statutory presumption that joint physical custody is in the child's best interest** if a parent has demonstrated an intent to establish a meaningful relationship with the child, but the other parent has frustrated their efforts, NRS 125C.0025(l)(b).

After expressing its concerns about Tarik's ability to "*adequately* care for the children," the court found all of the best interest factors to either be neutral or in Dounia's favor. Specifically, the court concluded that: Dounia was more likely to nurture the children's continued relationship with Tarik because, during Tarik's extended absences, Dounia offered Tarik visits, while Tarik provided no evidence regarding this factor; Dounia was in a better position to care for the children's physical, developmental, and emotional needs because she has historically been the children's primary caretaker; and, stemming from Dounia's role as the children's primary caretaker, Dounia had a stronger relationship with the children than Tarik.

Regarding NRS 125C.0035(4)'s "other things" provision, the district court considered: the parties' acquiescence to Dounia's role as the primary caretaker; the terms of the Moroccan decree; Tarik's "limited requests for contact" with the children during the pendency of the divorce proceedings; and Tarik's "inconsistent testimony" regarding his custodial request. In its findings, the district court also expressed concern that, during the pendency of the action, Tarik had never requested joint physical custody and had previously agreed that Dounia having primary physical custody was in the children's best interest. Together, the court's comprehensive analysis of the best interest factors and specific findings all support its ultimate custody determinations. Accordingly, we conclude that the district court's decision to award Dounia primary physical custody of the minor children was not an abuse of discretion because it reflected a comprehensive best interest analysis based upon substantial evidence in the record. *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42.

Tarik argues that the district court erred when it ordered the parties to sell the Moroccan property and equally divide the proceeds because the property was not part of the community, and neither party testified to the issue during the evidentiary hearing. . . . We conclude that the district court (1) did not violate Tarik's due process rights when it used the negative inference because Tarik had specific notice and an opportunity to be heard at the hearing before the discovery commissioner and (2) did not abuse its discretion when it ordered the Moroccan property sold and proceeds equally divided because Tarik did not prove that he purchased the property prior to marriage.

Decisions impacting one's interest in real property implicate due process concerns. *See Malfitano v. Cnty. of Storey By & Through Storey Cnty. Bd. of Cnty. Comm'rs*, 133 Nev. 276, 282, 396 P.3d 815, 819-20 (2017) (recognizing that individuals with "a legitimate claim of entitlement" have a cognizable property interest). Thus, individuals with an interest in real property must be afforded notice and an opportunity to be heard before a district court issues a decision regarding that property. *See Sw. Gas*, 138 Nev. at 46, 504 P.3d at 511. To be proper, notice "must be provided at the appropriate stage" of the proceedings so that the parties "can provide 'meaningful input in the adjudication of their rights.'" *Id.* (quoting *Eureka Cnty. v. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 280, 417 P.3d 1121, 1125 (2018)).

Here, **the district court did not violate Tarik's due process rights by using the negative inference regarding the Moroccan property because Tarik had an opportunity to be heard at the hearing before the discovery commissioner and was on notice that information he withheld, including information about the Moroccan property, would be construed against him.** In its report and recommendations, the discovery commissioner stated,

[A]ll of the information being compelled is required to be provided no later than October 12, 2022 at 5:00 p.m. A negative inference will automatically issue as to any information that is withheld as of that date and time . . . [a]ny information that is withheld thereafter will not support [Tarik's] position in the matter and will in fact, support [Dounia's] position in the matter.

Accordingly, because Tarik had an opportunity to be heard at the discovery hearing, had specific notice that any information he withheld pursuant to Dounia's discovery requests would be construed against him, and had time to remedy his inadequate discovery responses before the negative inference vested, we conclude that the district court's decision to utilize the negative inference did not violate Tarik's right to due process.

Tarik argues that the district court abused its discretion when it treated the Moroccan property as a community asset because he purchased the property before he married Dounia, and neither party testified to the property during the evidentiary hearing.

While properties acquired during marriage are presumed to be community property subject to equal division, *Burdick v. Pope*, 90 Nev. 28, 29, 518 P.2d 146, 146 (1974), "all property of a spouse owned by him or her before marriage" remains that spouse's separate property upon divorce, NRS 123.130. Be that as it may, **mere conclusory statements, or conjectures, that property is separate in nature are insufficient to support a separate property characterization absent substantiating evidence.** *See Burdick*, 90 Nev. at 29, 518 P.2d at 146 (reasoning that "surmise or conjecture" do not constitute supporting evidence from which a district court can support its separate property characterization).

Here, Tarik failed to demonstrate with documentary evidence that he actually purchased the Moroccan property prior to marriage, negating his statement that the property was separate in nature.

Tarik argues that the district court erred when it found that $102,000.00 of the liquidated 401(k) funds could not be traced back to the community and then awarded Dounia half of those funds. Specifically, Tarik contends that his evidence showed that he used the funds to either finance the parties' extended trip, pay the parties' community credit card debt, or pay the Moroccan court fees associated with the parties' divorce.

Here, we conclude that the district court's determination that approximately $102,000 of the $160,000 Tarik liquidated from his 401(k) remained unaccounted for and was subject to equal distribution is supported by substantial evidence. It is undisputed that Tarik placed the liquidated 401 (k) funds into bank accounts titled in either his name alone, his name and his father's, or his name and his mother's. Dounia did not have access to these accounts and avers that, in January 2022, she had no knowledge that Tarik planned to liquidate the 401(k).

Tarik alleges he used the entire $160,000 he transferred to those personal accounts to pay community expenses. Yet, Tarik proffered evidence sufficient to show that only around $57,000 of the $160,000 could be traced back to community obligations. Specifically, Exhibit M demonstrates that Tarik transferred $40,000 from his personal bank account to a Moroccan bank account—an amount that correlates with what the Moroccan divorce decree stated the parties' owed in court fees. Trial Exhibits F, G, K, and S support that an additional $17,000 went towards community credit card payments. The tracing evidence ends there. Tarik failed to supplement his FDF in accordance with the discovery commissioner's directives and offered both conflicting and conclusory testimony during the evidentiary hearing regarding the remaining $102,000.

In its findings of fact, conclusions of law, and order, after finding that Tarik's credibility was in question, the district court noted that it would enforce a negative inference in Dounia's favor as to the remaining liquidated funds based on Tarik's failure to provide adequate tracing evidence. *See Matter of Parental Rights as to C.J.M.*, 118 Nev. 724, 732, 58 P.3d 188, 194 (2002) (recognizing that a district court is in the best position to observe the parties' demeanor and assess their credibility).

Consequently, because the admitted evidence showed that Tarik used only $57,000 of the improperly liquidated 401(k) funds to pay community expenses, and because the district court found Tarik to be non-credible and properly construed Tarik's withheld evidence in Dounia's favor, we conclude that the district court did not abuse its discretion when it awarded Dounia half of the unaccounted-for 401(k) funds.

Divorce, Confidentiality Agreement

Kellogg v. Ghibaudo, No. 84778-COA, Order of Affirmance (Unpublished Disposition, Mar. 22, 2024)

In February 2017, the district court entered a decree of divorce between Kellogg and Alex B. Ghibaudo. Following entry of the decree, the parties litigated several post-decree issues, primarily relating to Ghibaudo's support obligations.**1** In October 2019, pursuant to Ghibaudo's ex parte request, the district court entered an order sealing file under NRS 125.110. A few months later, in March 2020, the parties entered into a Stipulated Confidentiality Agreement and Protective Order (Confidentiality Agreement) because the court case included sensitive issues involving their finances and Ghibaudo's business. The Confidentiality Agreement generally provided that certain documents, material, and information may be deemed confidential and could not be disclosed by either party.

Ghibaudo subsequently became aware that several videos of the court proceedings in his divorce case had been publicly posted on the internet in 2021. During civil discovery in an unrelated matter, Kellogg freely admitted under oath that she obtained the videos and disseminated them to Veterans in Politics International, friends and family, and a reporter with the Las Vegas Review-Journal. She further admitted to knowing that Veterans in Politics would post the videos publicly.

In February 2022, Ghibaudo moved for an order to show cause why Kellogg should not be held in contempt of court for violating the order sealing file, for sanctions pursuant to EDCR 7.60(b)(4), and for clarification of the court's order sealing file. In his motion, Ghibaudo identified 13 videos of court proceedings that were publicly available and included their URL links.

The district court held a hearing in March 2022 and entered its findings of fact, conclusions of law, and order the next month. In its order, the district court found that the Confidentiality Agreement included videos of proceedings and that Kellogg's dissemination of the videos violated the Confidentiality Agreement as well as NRS 125.110 and EDCR 5.210. Although it did not order sanctions, the district court ordered Kellogg to immediately cease disseminating the videos and directed her to take "active measures to remove videos of hearings from these proceedings previously posted publicly." Kellogg now appeals.

On appeal, Kellogg contends the district court erred in (1) finding that Kellogg had disseminated videos of proceedings before and after the Confidentiality Agreement; (2) finding that Ghibaudo timely objected to the dissemination of the videos; and (3) finding that dissemination of the proceeding videos breached the Confidentiality Agreement.

Kellogg first argues the district court had no basis for its factual finding that she disseminated proceeding videos before and after entry of the Confidentiality Agreement. . . . Kellogg contends that this finding was erroneous because it made no findings "as to where these admissions were made (e.g., in a pleading or in open court), to whom these videos were allegedly disseminated to, when specifically these videos were disseminated (even a ballpark), or other components of who, what, when, where and why." While Kellogg takes issue with the degree of specificity in the

court's order, she does not explain how she was prejudiced by the court's failure to make more detailed findings. *Cf. Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached.").

Findings of fact must be upheld if supported by substantial evidence and may not be set aside unless clearly erroneous. NRCP 52(a); *see also Trident Constr. Corp. v. W. Elec., Inc.*, 105 Nev. 423, 426, 776 P.2d 1239, 1241 (1989). "Substantial evidence has been defined as that which a reasonable mind might accept as adequate to support a conclusion." *McClanahan v. Raley's, Inc.*, 117 Nev. 921, 924, 34 P.3d 573, 576 (2001) (internal quotation marks omitted). Moreover, "even in the absence of express findings, if the record is clear and will support the judgment, findings may be implied." *Pease v. Taylor*, 86 Nev. 195, 197, 467 P.2d 109, 110 (1970).

Here, substantial evidence exists in the record to support the district court's finding that Kellogg either disseminated or facilitated the dissemination of videos that depict proceedings before and after execution of the Confidentiality Agreement. In his motion for an order to show cause, Ghibaudo identified 13 videos of the sealed proceedings, each of which were publicly posted on YouTube. He provided a chart that included the live URL link, hearing date, and upload date for each video. The videos included proceedings that occurred both before and after the parties entered their Confidentiality Agreement, though all videos were apparently uploaded after entry of the Confidentiality Agreement. Ghibaudo also provided the district court with Kellogg's discovery responses and deposition transcript. In her discovery responses, Kellogg admitted, "I have shared the material because I have a right to and I believe it is public knowledge and a matter of public concern." In her deposition, Kellogg further admitted, multiple times, that she disseminated videos of the proceedings because she believed it was a matter of public interest. Ghibaudo's evidence and Kellogg's own admissions constitute substantial evidence to support the district court's finding that Kellogg publicly disseminated or facilitated dissemination of videos of proceedings that occurred both before and after the parties entered the Confidentiality Agreement.

Kellogg next argues that the district court erroneously found that Ghibaudo "timely objected" to dissemination of the proceeding videos when he waited "until 2022 to raise any issues about these postings." Specifically, Kellogg argues that "[p]arties to a contract are expected to enforce their rights within a reasonable period of time or they run the risk of waiving their rights."

When there are no facts in dispute, contract interpretation is a question of law subject to de novo review. *Bedrock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 460, 254 P.3d 641, 647-48 (2011). "It has long been the policy in Nevada that absent some countervailing reason, contracts will be construed from the written language and enforced as written." *Ellison v. Cal. State Auto Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990); *S. Tr. Mortg. Co. v. K & B Door Co.*, 104 Nev. 564, 568, 763 P.2d 353, 355 (1988) (holding that if a document is facially clear, it will be construed according to its language).

In this case, an express provision in the Confidentiality Agreement permitted Ghibaudo to object at any point during the Agreement's duration. Specifically, paragraph 20 provides that "[n]either the failure of any Party at any time to enforce any of the provisions of this Stipulated Protective Order nor the granting at any time of any other indulgence shall be construed as a waiver of that provision or of the right of either Party afterwards to enforce that or any other provision." When a contract contains express terms, this court "[is] not free to modify or vary the terms of an unambiguous agreement." *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001). Kellogg does not challenge the validity of the Confidentiality Agreement or otherwise address this provision in her argument.

Therefore, based on the plain language of the Confidentiality Agreement, we reject Kellogg's contention that Ghibaudo failed to timely object to the dissemination of proceeding videos in this case.

Kellogg next argues that the district court erroneously found that she breached the Confidentiality Agreement when she disseminated videos of the court proceedings.

Kellogg contends that the Confidentiality Agreement did not include videos because it "in no way shape or form contemplated hearing videos or matters outside of discovery." Conversely, Ghibaudo responds that videos are protected under the Confidentiality Agreement because it defines "Confidential Material" as "information" and "all such documents and information received and/or issued in this matter prior to the entry of this agreement."

In interpreting a contract, this court looks to the language of the contract and surrounding circumstances. *Redrock Valley Ranch*, 127 Nev. at 460, 254 P.3d at 647-48. When reviewing a contract, the objective "is to discern the intent of the contracting parties." *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012) (internal quotation marks omitted). In doing so, we will enforce the contract as written, so long as it is clear and unambiguous. *Id.; see also Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005) (noting that the appellate court interprets unambiguous contracts according to the plain language of their written terms).

Although Kellogg may have subjectively believed that the Agreement did not include videos, her belief does not override the contract's plain language. The Confidentiality Agreement expressly defined "Confidential Material" to include documents, material and *information*. Similarly, in the examples given of Confidential Material, the contract lists "information, records and data" pertaining to discovery disclosures. The Confidentiality Agreement also contains a specific provision for marking items as confidential and provides that "[m]achine readable media and other non-documentary material shall be designated as Confidential Material by some suitable and conspicuous means, given the form of the particular embodiment."

Kellogg acknowledged that the Confidentiality Agreement "was entered into 'to facilitate the disclosure of information'" during discovery. **Based on the intent of the parties to facilitate the disclosure of information, in conjunction with the contract's express terms, the purpose of the contract was to protect the *information* or *data* disclosed during discovery, not simply**

the paper documents. . . . **Therefore, the Confidentiality Agreement protects from disclosure any videos that were themselves marked as Confidential Material or, alternatively, any portions of videos that contained or otherwise referenced information designated as Confidential Material.**

Due Process: Cancelling the Second Portion of a Continued Hearing

In re: Guardianship of Sarnelli, No. 85698-COA, Order of Affirmance (Unpublished Disposition, Mar. 29, 2024)

Anthony Barone, Jr. appeals from a district court order in a guardianship matter.

Barone was appointed to be the guardian of the person and estate for his nephew, Nicholas Sarnelli, in 2010. Beginning in 2019, issues arose concerning Barone's yearly accounting of Sarnelli's estate, and the district court ordered Barone to provide receipts for expenditures over $250.

In January 2022, Barone submitted a petition for approval of accounting for December 2020 to December 2021, and Sarnelli's counsel raised concerns with the proposed accounting. . . . The court appointed a Nevada Guardianship Compliance Office financial forensic specialist to conduct a financial forensic audit. The specialist filed a report with the district court outlining various issues with the accounting and noting Barone's failure to comply with statutory guardianship accounting requirements.

Following a hearing, in September 2022, the district court denied Barone's request to approve the accounting.

Shortly thereafter, Sarnelli's counsel filed a petition to remove Barone as guardian of Sarnelli's estate. The district court issued a citation to Barone, notifying him of the petition to remove him as guardian of the estate and ordering him to appear and show cause if he had any objection or opposition to being removed as guardian of the estate.

In response, Barone filed various documents, including an objection and a supplemental opposition to the petition; a notice of intent to present video evidence at the hearing on the petition to remove him, which stated he would present video footage of prior court hearings; a brief in companion to his video presentation; and a motion to remove Sarnelli's appointed counsel.

On November 3, 2022, the district court held a hearing on the petition. The court continued the hearing to November 10, 2022. However, on that date, the court vacated the November 10 hearing and issued a written order granting Sarnelli's petition to remove Barone as guardian of the estate. This appeal followed.

On appeal, Barone first asserts that he was denied due process when the district court granted the petition to remove him without conducting a hearing.

"Due process is satisfied where interested parties are given an opportunity to be heard at a meaningful time and in a meaningful manner." *Mesi*, 136 Nev. at 750, 478 P.3d at 369 (internal quotation marks omitted). This generally takes the form of a live hearing, but in some cases the parties may be "afforded sufficient opportunity to present their case through affidavits and supporting documents." *J.D. Constr., Inc. v. IBEX Int'l Grp., LLC*, 126 Nev. 366, 378, 240 P.3d 1033, 1041 (2010).

Here, Barone received notice when the district court, in compliance with NRS 159.1855, issued him a citation to appear and show cause for why he should not be removed and the court provided him with an opportunity to be heard both when he responded to the petition to remove him as guardian of the estate and at the November 3 hearing. . . . Therefore, we conclude that **Barone was not deprived of due process.**

Our conclusion in this regard is unchanged by the district court's decision to vacate the subsequent November 10 hearing. . . . Here, as previously discussed, the district court afforded Barone the right to be heard at the previous hearing. Thus, we cannot say that he was deprived of that opportunity simply because there was not an additional hearing. *Cf. State, Div. of Child, & Fam. Servs. v. Eighth Jud. Dist. Ct.*, 120 Nev. 445, 453, 92 P.3d 1239, 1244 (2004) ("District courts have wide discretion to control the conduct of proceedings pending before them.").

Moreover, Barone's reliance on the Confrontation Clause set forth in the Sixth Amendment to the United States Constitution is misplaced. . . . [T]he Confrontation Clause is inapplicable here as it applies to criminal proceedings. *See, e.g., Kille v. State*, No. 77265-COA, 135 Nev. 672, 2019 WL 1976981, *1 (Nev. Ct. App. May 2, 2019) (explaining that the Confrontation Clause does not apply in civil proceedings); *see also* U.S. Const. amend. VI (The Confrontation Clause of the Sixth Amendment guarantees that "[i]n all *criminal* prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (emphasis added)). In sum, we conclude that Barone has not demonstrated that he was denied due process under these circumstances.

Divorce, Survivor Benefits, *Henson* is the Controlling Law

McPherson v. Segno, No. 86043-COA, Order of Reversal and Remand (Unpublished Disposition, Apr. 10, 2024)

Marla McPherson appeals from a district court order granting respondent's motion to enforce the parties' divorce decree and enter an amended Qualified Domestic Relations Order (QDRO).**1**

Marla and respondent Ginamarie Segno were divorced by stipulated decree of divorce in 2019, Pursuant to the terms of the decree, the parties agreed that Ginamarie would receive "1/2 of the community property portion of Marla's NV PERS" as well as half of the community share of two of Marla's other retirement accounts. The decree further provided that "the parties will equally divide the costs of any QDROS that may be necessary to divide any assets, which will be prepared by Family Law Solutions for a total of $850 per QR.DO."

During a hearing on issues unrelated to this appeal in February 2020. Ginamarie's counsel informed the district court that Marla refused to sign a PERS QDRO prepared pursuant to the terms of the decree. After making brief inquiries of counsel for both parties regarding the status of the QDRO, the court asked Ginamarie's counsel if the QDRO had been preapproved by the PERS plan administrator, and Ginamarie's counsel confirmed that it had been preapproved. At that point, the court acknowledged that it did not see any reason why Marla should not sign the QDRO, and Marla's counsel agreed she would sign the document. Marla signed the QDRO following the hearing.

As relevant here, the terms of this initial QDRO indicated that Ginamarie is entitled to one half of Marla's PERS benefits earned during the marriage, but also stated that "[t]he Alternate Payee is entitled to a portion of the Participant's retirement based upon a selection of Option 2." The QDRO further stated that "this Order is intended to be merged to the decree of divorce in this matter and is subject to all provisions of that Decree except in cases where this QDRO and the Decree contradict, in which case the QDRO shall control."

Despite the representations of Ginamarie's counsel during the hearing that the QDRO had been preapproved, PERS rejected the signed QDRO on the basis that the language of the provision relating to when the alternate payee is to receive benefits under the QDRO was unclear. Thereafter, Ginamarie and her counsel revised the QDRO to comply with PERS' request, but Marla refused to sign the revised document on the basis that the QDRO did not comply with the terms of their stipulated divorce decree, which only provided that Ginamarie would receive a one-half community property interest in her PERS retirement—not a survivor beneficiary interest under Option 2.

Ginamarie subsequently moved the district court for an order directing Marla to execute the amended QDRO to satisfy the terms of the divorce decree, which required the parties to "execute any and all documents that may be required to effectuate transfer of any and all interests . . . as specified herein."

In her opposition, Marla argued that Ginamarie's request for relief should be denied as the QDRO is drafted contrary to the express terms of the stipulated divorce decree, which only awarded Ginamarie a one-half community property interest in her PERS benefits. Marla further argued that enforcing the amended QDRO as written would run afoul of the holding in *Henson v. Henson*, 130 Nev. 814, 815-16, 334 P.3d 933, 934 (2014), wherein the supreme court held that "unless specifically set forth in the divorce decree, an allocation of a community property interest in the employee spouse's pension plan does not also entitle the nonemployee spouse to survivor benefits." Finally, Marla alleged that Ginamarie attempted to deceive her when having her execute the first QDRO.

Following a hearing on unrelated issues regarding the parties' minor child, as well as the QDRO issue, the district court entered the challenged order granting Ginamarie's motion to compel Marla to execute the amended QDRO. As relevant here, the court found that while Marla argued that the application of *Henson* was appropriate because Ginamarie was not expressly awarded survivor benefits in the decree of divorce, the court nonetheless found that *Wolff v. Wolff* is the correct authority in this case and the Court agrees with [Ginamarie's] understanding of her interest in the pension benefit."

Without further explanation of these findings, or consideration of Marla's contention that she was deceived into signing the initial QDRO, the district court ordered that the "request for a QDRO dividing Marla's Nevada PERS pension benefit under a mandatory selection of Option 2 is granted." Marla now appeals the portion of the district court's order related to the enforcement of the QDRO.

"An appellate court reviews a district court's disposition of community property deferentially, for an abuse of discretion." *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 75, 439 P.3d 397, 406 (2019). "Although this court reviews a district court's discretionary determinations deferentially, deference is not owed to legal error" or findings so conclusory that they mask legal error. *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015).

On appeal, Marla contends, among other things, that the district court erred in enforcing the Amended QDRO and awarding Ginamarie a survivorship benefit under Option 2 by ignoring the controlling precedent of *Henson v. Henson*.

Here, Ginamarie argued—and the district court accepted—that, under *Wolff*[,] because she was awarded a community property interest in Marla's PERS pension, that interest became her separate property upon the parties' divorce and thus she was entitled to enforce this interest through Marla's mandatory selection of Option 2 in the amended QDRO. But this argument, and the district court's resolution of this issue in its order, disregards the more recent controlling authority in *Henson*, which determined that "unless *specifically set forth in the divorce decree*, an allocation of a community property interest in the employee spouse's pension plan does not also entitle the nonemployee spouse to survivor benefits." 130 Nev. at 815-16, 334 P.3d at 934 (emphasis added). Thus, **the community property interest Ginamarie was awarded in the divorce decree is not sufficient by itself to entitle her to survivor benefits, and the question**

is whether the mandatory selection of an Option 2 survivor beneficiary was an agreed-upon term of the parties' divorce decree.

Here, the original divorce decree did not expressly include an Option 2 designation and instead only specified that Ginamarie would receive one half of the community property portion of Marla's PERS benefits. However, the parties in this case also signed the initial QDRO, which provided Ginamarie with an Option 2 benefit, and expressly stated that the QDRO is intended to merge into the divorce decree and shall control over the terms in the decree in all cases in which the QDRO and the decree contradict. Because the district court relied upon *Wolff* instead of applying *Henson*, the court did not address whether the parties reached an enforceable contract reflected by the initial QDRO that would modify the divorce decree and incorporate the provisions of that QDRO in determining the allowable interests under *Henson*, or—as Marla argued on appeal and below—equitable circumstances and defenses exist that would either void that contract or render it unenforceable, requiring the district court to apply the holding of *Henson* to the divorce decree alone, without any consideration of the initial QDRO provisions.

In light of these significant questions of fact, we direct the district court, on remand, to consider Marla's equity-based arguments and determine whether an agreement was created by the signing of the initial QDRO and, if so, whether that agreement impacted the terms of the stipulated decree of divorce. After making these findings, we direct the district court to consider and apply the holding in *Henson* to the circumstances presented by this case.

Child Support, Arrears

Silva Filho v. Belay Da Silva, No. 86120-COA, Order Affirming in Part, Reversing in Part, and Remanding (Unpublished Disposition, Apr. 19, 2024)

Alfredo Jorge Silva Filho appeals from the amended findings of fact, conclusions of law and order granting child support arrears and interest.

Alfredo and respondent Cristiane Belay Da Silva have two children together, G.A.B.S., born in November 2000, and R.B.S., born in November 2007.**1** The parties never married and when their relationship ended, the children resided with Cristiane, while Alfredo lived in Australia working as a circus performer. In December 2013, Cristiane filed a complaint for child custody in which she requested future child support and arrears from 2007. Alfredo also filed a complaint for custody, in which he proposed that he would pay child support to Cristiane in the amount of $600 per month. . . . [I]n May 2014 the district court entered a default order awarding Cristiane custody, but left the issue of child support unresolved.

In 2016, Alfredo relocated to Las Vegas and moved to modify his parenting time. In Cristiane's opposition and countermotion, she requested that child support be set by the district court and noted that Alfredo had not paid any child support for the minor children in the past three years. The court granted Alfredo parenting time . . . and set his child support obligation at $600 per month. The order from this hearing was entered on June 27, 2016. . . . Alfredo then moved to reduce his monthly child support to $300 because Cristiane had purportedly kicked G.A.B.S. out of the house, and the court held a hearing on that motion on August 18, 2016. The district court reduced his support as requested but also ordered Alfredo to pay $30 per month to Cristiane toward child support arrears.**2**

In April 2022, Cristiane moved for an order to show cause why Alfredo should not be held in contempt due to his failure to pay child support arrears and to modify Alfredo's child support based on changes to his income. . . . In August 2022, Cristiane sought an amendment to the order from the August 18, 2016, hearing to clarify that she was entitled to child support arrears. Alfredo filed an opposition on October 4, 2022, asserting that the statute of limitations on Cristiane's ability to collect arrears had expired.

The district court held an evidentiary hearing on child support issues on October 5 and 6, 2022. At the hearing, the court granted Cristiane's request to amend the order from the August 18, 2016, hearing nunc pro tune [sic], adding the key language that Cristiane was entitled to seek child support arrears. The court found that the parties reached a verbal agreement where Alfredo was to pay $600 per month to Cristiane in child support, and Alfredo was current on his monthly payments until December 2013. The court further found that Alfredo owed Cristiane arrears of $47,160, and owed $24,360 in interest on those arrears. The court also awarded Cristiane $14,890 as lump sum child support from Alfredo's "America's Got Talent" earnings.

On appeal, Alfredo argues that . . . (2) the district court abused its discretion in ordering child support arrears for the period of December 2013 through July 2016 after the court entered its

child support order in June 2016; (3) Cristiane should have been barred from requesting child support arrears under the doctrine of laches**3**; and . . . .

Here, the record supports that the parties had a verbal agreement where Alfredo agreed to pay child support in the amount of $600 per month, the amount he proposed in his complaint for custody, and that Alfredo was current on his support payments until November 2013. Further, the district court, having reviewed Alfredo's complaint for custody, also found that Alfredo admitted to proposing that he would pay Cristiane $600 per month for child support. *See Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 127 Nev. 331, 343, 255 P.3d 268, 278 (2011) (citing to *Scalf v. D.B. Log Homes, Inc.*, 128 Cal.App.4th 1510, 27 Cal.Rptr.3d 826, 833 (2005) for the proposition that concessions in pleadings are judicial admissions); *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (explaining that factual assertions in pleadings are considered judicial admissions conclusively binding on the party who made them).**5** Thus, substantial evidence supports the district court's decision to enforce the agreement between the parties and requiring Alfredo to pay Cristiane $600 in child support arrears for the period of December 2013 through July 2016. Therefore, the district court did not abuse its discretion.

Moreover, we are not persuaded by Alfredo's contention that the district court could not award child support arrears based on the expiration of the relevant statute of limitations. Indeed, NRS 125B.050(1) provides:

If there is no court order for support, any demand in writing to a parent not having physical custody for payment of support on behalf of a minor child, mailed to the last known address of the parent, tolls the running of the statute of limitations for the bringing of an action for that support.

In this case, Cristiane initiated an action for child support with the filing of her complaint for custody in 2013. Thus, pursuant to NRS 125B.050(1), the statute of limitations was tolled once Cristiane filed her complaint. The complaint was personally served on Alfredo, so he had actual knowledge of her request and proposed, in his own complaint for custody, that he pay $600 a month in child support. Additionally, Cristiane's opposition and countermotion was mailed to Alfredo in May 2016 and qualifies as a demand for support pursuant to the terms of NRS 125B.050(1).

Further, to the extent that Alfredo argues that Cristiane cannot recover arrears for the period before the district court's June 27, 2016, order, we are not persuaded by this argument.

Cristiane's request for arrears from December 2013 through July 2016 was proper when considering NRS 125B.030. **The district court first set child support in its June 27, 2016, order and first addressed child support arrears in its order from the August 18, 2016, hearing, but failed to provide the amount of arrears** to which Cristiane was entitled. **The arrears from December 2013 through July 2016 were within four years before the district court first granted child support**, and thus, **not barred by NRS 125B.030**. And, as previously discussed, the parties also had an agreement setting forth monthly child support, which covered

the period of December 2013 through July 2016. Thus, we conclude that the district court did not err in granting Cristiane child support arrears.

Child Custody, Evidentiary Presumptions

Cleland v. Cleland, No. 86558-COA, Order of Affirmance (Unpublished Disposition, Mar. 19, 2024)

Jared Linton Cleland appeals from a district court decree of divorce. Eighth Judicial District Court, Family Division, Clark County; Nadin Cutter, Judge.

Jared and Randell Cleland were married and share three minor children. Both parties initially resided in Nevada. However, the parties' marriage deteriorated and Jared subsequently moved to Utah and brought two of the children with him.

The district court thereafter conducted an evidentiary hearing concerning the custody matters and both parents testified at that hearing.

[At that hearing,] Randell also discussed Facebook Messenger communications she had with Jared regarding the children and acknowledged that several of these communications discussed the logistics involved with the children's travel to and from Utah. She again stated that the discussions only concerned Jared's summer parenting time with the children and did not include any agreement for the youngest children to move to Utah. However, Jared testified that he had believed those messages related to his move to Utah and were proof of Randell's agreement for the youngest children to move with him. Randell further acknowledged that she had deleted some of the messages but stated that they were messages she inadvertently sent while her phone was in her pocket or contained typos.

The district court also found that, pursuant to *Druckman v. Ruscitti*, 130 Nev. 468, 473, 327 P.3d 511, 515 (2014), Jared was not permitted to move to Utah with the youngest children over Randell's objection without a court order authorizing such a move. The court found that the language and context of the messages between the parties concerning Jared's move to Utah was ambiguous and that those ambiguities did not favor Jared's position that he had Randell's permission for the children to move to Utah with him.

Jared subsequently filed a motion for reconsideration of the district court's custodial decision. The court conducted a hearing concerning the motion for reconsideration. At the hearing, Jared contended that the district court did not properly evaluate the importance of the deleted messages and argued that he should have received a rebuttable presumption pursuant to NRS 47.250(3) that the deleted messages were adverse to Randell such that they provided proof that she consented to the youngest children moving to Utah. Randell opposed Jared's contention and argued that he was not entitled to relief.

The district court entered a written order denying Jared's motion. The court found that the parties testified concerning the contents of the messages at the evidentiary hearing, the district court evaluated that testimony, and Jared did not demonstrate that the district court made errors in its evaluation. In addition, the court concluded that the previous order appropriately considered the relocation factors and that any information contained within the deleted messages had little bearing upon the court's conclusion that relocation was not appropriate.

On appeal, Jared argues that the district court abused its discretion by denying his request to relocate the youngest children to Utah and awarding Randell primary physical custody of the children. In addition, **Jared contends that he was entitled to a presumption pursuant to NRS 47.250(3) that the messages deleted by Randell were adverse to her interests** such that the court should have presumed that she consented to Jared's relocation to Utah in those messages.

Jared further contends that he was entitled to a rebuttable presumption pursuant to NRS 47.250(3) that any missing message was evidence "willfully suppressed that would be adverse if produced" to Randell's position that she did not give him consent to relocate the youngest children to Utah. We review a trial court's decision regarding sanctions for the destruction or spoilation of evidence for an abuse of discretion. *Bass-Davis v. Davis*, 122 Nev. 442, 447, 134 P.3d 103, 106 (2006). In *Bass-Davis*, the Nevada Supreme Court, in addressing available spoliation sanctions, explained that **"before a rebuttable presumption that willfully suppressed evidence was adverse to the destroying party applies, the party seeking the presumption's benefit has the burden of demonstrating that the evidence was destroyed with intent to harm."** *Id.* at 448, 134 P.3d at 107;

In this case, **Jared only argued he was entitled to a rebuttal presumption** for the deleted messages. The **district court considered the facts and circumstances surrounding the deleted messages and found that Jared failed to meet his burden** that he was entitled to a rebuttable presumption. Because this court is not at liberty to reweigh the evidence on appeal, *see Quintero*, 116 Nev. at 1183, 14 P.3d at 523, and there is sufficient support for the district court's determinations, **we conclude that Jared failed to demonstrate that the district court abused its discretion by denying his spoliation claim.** *See Nguyen v. Boynes*, 133 Nev. 229, 237-38, 396 P.3d 774, 781 (2017) (affirming a family court's rejection of a request for a rebuttable presumption pursuant NRS 47.250(3) because there was inconclusive evidence to support a claim of spoilation of evidence). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Child Support, Child Care Costs

Patterson v. Wainwright, No. 86926-COA, Order Affirming in Part, Reversing in Part and Remanding (Unpublished Disposition, Mar. 19, 2024)

Austin Lydell Patterson appeals from a district court decree of child custody.

Respondent Kalena Wainwright filed a complaint for custody in which she requested sole legal custody and primary physical custody of a minor child. Wainwright also requested child support, including costs for child care. Wainwright stated that she had $2,000 in monthly child care costs. Patterson filed an answer and counterclaim in which he requested joint legal and physical custody of the child. The parties also filed financial disclosure forms. Wainwright declared that she earned $5,934 per month, and Patterson declared that he earned $1,950 per month.

The court subsequently entered a temporary custody order awarding the parties joint legal and physical custody, entered a timeshare and parenting time schedule, and directed Wainwright to pay Patterson $328 per month in temporary child support.

Wainwright subsequently moved to modify the temporary custody order to reduce her monthly child support obligation. . . . Wainwright also filed an updated financial disclosure form declaring that she earned $5,857 per month and documentary evidence concerning her child care costs. Patterson opposed the motion, disputed Wainwright's factual allegations, and contended that Wainwright was hostile toward him.

The district court conducted an evidentiary hearing.

[In its written order following the hearing], the district court noted that the parties reached an agreement after the evidentiary hearing for the child to attend a child care program that had a monthly cost of $1,375, and the court then ordered the costs to be equally divided, with each parents' share of those costs amounting to $687.50 per month. . . . The court further ordered the parties to equally share the child's medical costs and awarded Wainwright $52.83 per month to account for Patterson's share of the monthly medical insurance premium payments.

The district court further found that Patterson earned $1,950 per month at his job but also noted that Patterson testified he is able to earn additional income from side gigs. The district court noted Patterson did not include information concerning any income earned from side gigs on his financial disclosure form. The court also rejected Wainwright's request to impute additional income to Patterson and rejected Patterson's request for a downward deviation from the standard child support amount due to his additional and ongoing child-support obligations for other children. The court therefore calculated Patterson's monthly child support from his income pursuant to NAC 425.140(1)(a) and awarded Wainwright $312 based on that calculation. And the district court ultimately awarded Wainwright a total of $1,052.33 in monthly child support, inclusive of payments for the medical insurance premium and child care costs. This appeal followed.

. . . **[W]ith regard to the child care costs, the district court was required to consider both whether the child care costs were reasonable and whether the division of those costs was**

equitable pursuant to NAC 125.130. But the court's order does not address either of these points—particularly whether the division of the cost was equitable in light of the court's findings that Patterson only earns $1,950 per month and its rejection of Wainright's willful underemployment argument. Moreover, while the court noted that the parties agreed for the child to attend the child care program, it made no findings as to whether they agreed to equally divide the costs for that program. **While we generally presume that missing record documents support the underlying decision, *Cuzze*, 123 Nev. at 603, 172 P.3d at 135, given the court's failure to make written findings on these points, and the fact that including half of the child care costs brings Patterson's monthly support payment to $1,052.33 on a monthly income of just $1,950, without more, we cannot presume that the missing transcripts support the court's determination regarding the monthly child care payments,** *see Davis*, 131 Nev. at 450, 352 P.3d at 1142 (stating that the appellate courts will not defer "to findings so conclusory that they may mask legal error"). Therefore, we reverse the portion of the court's child support determination concerning the child care costs and remand this issue for the district court to reevaluate this issue in line with this order.

Divorce, Necessary Parties, Community Property, Presumptions, Tracing

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

In this appeal, we examine the district court's authority in a divorce action to resolve community property disputes over property held in a revocable inter vivos trust. Our analysis brings us to an issue of first impression: whether a revocable inter vivos trust holding community property must be named as a necessary party in a divorce action where the divorcing spouses are co-trustees, co-settlors, and beneficiaries. Because we conclude that the spouses are the materially interested parties, and that divorce revokes every devise given by a settlor to their former spouse in a revocable inter vivos trust, we hold that the parties are not required to name such a revocable inter vivos trust as a necessary party in a divorce action where the spouses are co-settlors, co-trustees, and beneficiaries.

Pedro filed for divorce in April 2021. During the case management conference (CMC), the district court urged the parties to comply with their mandatory NRCP 16.2 financial disclosure requirements and produce accurate and thorough financial disclosure forms (FDFs).**5** Throughout the CMC and later hearings, Maria represented that the Grizzly Forest, Abrams Avenue, and San Gervasio properties were her separate property and should not be included in the court's community property distribution decisions. She also argued that the district court did not have the authority to make distributions of the family trust's assets because it did not have jurisdiction over the family trust. Additionally. Maria claimed a prenuptial agreement existed that the parties signed in Mexico; the agreement supposedly demonstrated that Maria had $80,00.0 in personal savings and a $250,000 inheritance from her father that were to remain her separate property throughout the marriage. Pedro denied the agreement's existence and expressed his concern that Maria would attempt to fabricate a document with her sister an attorney in Mexico, to use at trial. The district court repeatedly cautioned Maria that she would need to produce the prenuptial agreement before trial with an official translation for the court to admit it into evidence. The district court also expressed frustration that neither party had engaged in sufficient discovery; subpoenaed bank records; or obtained formal appraisals for their real property, which at that point had approximately $3 million in equity.'

In its findings of fact, conclusions of law, and decree of divorce, the district court deemed all family trust properties to be community property and ordered them distributed equally between the parties because neither party offered a compelling reason for an unequal distribution.

On appeal, Maria argues that the district court (1) did not have authority to distribute the P & D Family Trust's assets; (2) made an unequal distribution of property and abused its discretion because it distributed the Grizzly Forest, Abrams Avenue, and San Gervasio properties as community property and not Maria's separate property; and (3) abused its discretion when it did not allow Maria to question Pedro on cross-examination [a]bout the alleged prenuptial agreement.

Here, the parties did not offer the family trust as an exhibit at trial, nor does it appear in the record on appeal, and we cannot verify its provisions. Regardless, neither party argues that the

trust's express terms would have precluded the district court from removing and distributing the family trust's community property. Instead, Maria contends that, pursuant to NRS 111.781 and NRS 125.150, district courts have express authority to distribute community assets placed in irrevocable trusts but not those placed in revocable inter vivos trusts. Yet, Maria's argument fails to account for the distinct nature of revocable inter vivos trusts that makes these statutes inapplicable. Unlike property transferred to irrevocable trusts—and in contrast to the general principle that settlors no longer own trust property once they transfer that property into a trust--property transferred to or held in a revocable inter vivos trust is considered to remain with the settlor because "any interest of other beneficiaries is purely potential and can evaporate at the settlor's whim." 90 C.J.S. *Trusts* § 254 (2020) (also noting that a "settlor may be the owner of property in a revocable trust of which the settlor is the trustee"); *see also Linthicum v. Rudi*, 122 Nev. 1452, 1453, 148 P.3d 746, 747 (2006) (concluding that "a beneficiary's interest in a revocable inter vivos trust is contingent at most"); *see, e.g., Wishengrad v. Carrington Mortg. Servs.*, 139 Nev., Adv. Op. 13, 529 P.3d 880, 886 (2023) (noting that, with respect to real property held in a revocable inter vivos trust, the trustees "hold legal title" and the beneficiaries "are the equitable owners"). Further, dispositions between spouses from a revocable trust are immediately revoked upon divorce unless the instrument expressly states otherwise. *Colman*, 136 Nev. at 114, 460 P.3d at 454. Thus, the district court automatically assumed the authority to distribute the family trust's community assets contemporaneous with Maria and Pedro's divorce.

Maria also implies that the family trust should have been joined as a necessary party in order to distribute the trust's assets. NRCP 19 requires that all necessary parties be joined in an action, so long as the party's joinder does not deprive the court of subject matter jurisdiction. A necessary party includes a party without whom the court cannot accord complete relief and a party whose interest in the action is such that the party's ability to protect its interests will be impeded if that party is not joined. NRCP 19(a)(1).

In a divorce action, the spouses are the materially interested parties. Where the spouses are the co-settlors, co-trustees, and beneficiaries of a revocable inter vivos trust, the court's distribution of the trust's joint assets will not impede the trust's interests because the necessary parties are already named in the litigation.9 *See, e.g., Tsai v. Hsu*, No. 50549, 2010 Nev. Unpub. LEXIS 236, 2010 WL 3270973, at *4-5 (Nev. Apr. 29, 2010) (Order of Affirmance) (concluding that a revocable inter vivos trust between spouses was not a necessary party to a divorce proceeding because the husband and wife (both co-trustees) were already parties to the litigation, and the district court's distribution of the trust's assets did not substantially affect the rights of nonparties).

. . . [E]ven if considered on the merits; the trust in this case is not a necessary party to the action because Maria and Pedro, like the co-trtistees in *Tsai*, were both existing parties to the divorce action and the trust's co-trustees, co-settlors, and beneficiaries. The parties' status'as co-trustees is particularly noteworthy. Legal proceedings involving a trust must be "brought by or against the trustees in their own name[s]." *Americold Realty Tr. v.. Conagra Foods, Inc.*, 577 U.S. 378, 383, 136 S. Ct. 1012, 194 L. Ed. 2d 71 (2016). Consequently, to join the trust would require naming

Maria or Pedro in their co-trustee capacities, which would be redundant because Maria and Pedro were already parties to the litigation. *See id.*

Joining the family trust was also not a prerequisite for complete relief, as neither Maria's nor Pedro's interests were impeded by not naming the family trust as a separate party. In fact, the district court's disposition of the trust's assets was a necessary part of the divorce's execution because all revocable distributions between Maria and Pedro in the family trust were revoked upon divorce. *See* NRS 111.781(1). Thus, we conclude that the family trust was not a necessary party and failing to name the family trust in the action did not preclude the district court's ability to distribute the trust's assets.

Maria and Pedro purchased the properties in the family trust jointly during their marriage, which raises a presumption that the properties are community property. *See* NRS 123.220(1). Maria, however, alleges that three of the properties—Grizzly Forest, Abrams Avenue, and San Gervasio—were gifted to her by the new purchasers as separate property prior to the parties' divorce. To that end, Maria argues that it was Pedro's burden to show that these three properties were transmuted back to community property from separate property. Pedro argues that Maria is attempting to improperly shift the burden to him to prove transmutation and that the burden is instead on Maria to overcome the initial presumption of community property by clear and convincing evidence. We agree with Pedro and conclude that the district court could reasonably find that Maria did not meet her burden to overcome the initial presumption of community property.

As noted above, when Maria and Pedro defaulted on the mortgages for three properties around 2008, they sold Grizzly Forest and Abrams Avenue via short sales to third-party buyers who then gifted the properties back to Maria as Maria's "sole and separate property." Maria and Pedro financed those third-party purchases with their personal funds; however, Maria argues that these funds came from her separate property, and Pedro counters that the sales were financed with community assets.

To overcome the community property presumption, Maria needed to show at the outset that the funds used to purchase the properties at the short sales came from her separate property. However, Maria did not proffer any tracing evidence, either during discovery or trial, sufficient to show that her separate funds financed the short sales. If anything, the parties' banking records show significantly commingled funds, with both Maria and Pedro consistently transferring joint account funds to their separate accounts. "Once an owner of separate property funds commingles these funds with community funds, the owner assumes the burden of rebutting the presumption that all the funds in the account are community property." *See Malmquist v. Malmquist*, 106 Nev. 231, 245, 792 P.2d. 372, 381 (1990). Maria's FDFs failed to adequately account for her assets and debts, and, as will be addressed below, the alleged prenuptial agreement was inadmissible to support her separate property claims. The district court also determined that all assets in every bank account—both joint and separate—belonged to the community.

Additionally, because substantial evidence supports the district court's findings that community funds financed the short sales**, the fact that the third-party buyers gifted the properties back to Maria as her "sole and separate property" is of little consequence. Function takes precedence over form, and without proof that the funds used to purchase the properties came from a separate property source, nominally titling the properties as Maria's separate property was insufficient for Maria to overcome the community presumption**. *See Peters*, 92 Nev. at 690, 557 P.2d at 715. This conclusion is particularly relevant in this case because the district court found that the third parties who purchased the homes were "straw buyers" who facilitated the nominal changes in title.

As to San Gervasio, Maria alleges that she paid off the mortgage with inherited funds and that, after the mortgage was satisfied, Pedro transferred his interest in the property to Maria. Pedro disputes the validity of the deed and argues that his signature was forged, as he testified at trial. The same findings that applied to Grizzly Forest and Abrams Avenue regarding the insufficiency of Maria's tracing evidence apply to San Gervasio as well. The district court determined that Maria used community funds to pay off the San Gervasio mortgage and that Pedro's testimony was more credible than Maria's at trial.**13** Given Maria's lack of tracing evidence, coupled with the district court's credibility determinations and conclusion that Pedro did not voluntarily relinquish his community interest to Maria, there is substantial evidence to support the finding that the funds used to finance the two short sale purchases and pay off the San Gervasio mortgage were derived from community assets.

Child Support, Offsetting Benefits Received

Rosiak v. Rosiak, No. 86632-COA and 85464-COA, Order Affirming in Part, Vacating in Part and Remanding (Unpublished Disposition, Feb. 22, 2024)

Richard J. Rosiak appeals from a district court order following a decree of divorce, an order reducing child support arrears to judgment, and an order awarding attorney fees. Eighth Judicial District Court, Family Division, Clark County; Michele Mercer, Judge.

Richard J. Rosiak and Margarita E. Rosiak were married in 2000 but have been romantically involved since 1993.**1** They have two children. One, K.R., is a minor.

In September 2022, the district court entered an order with distinct findings about the parties' finances and property, as well as findings regarding child support and alimony. The district court found that Richard was not credible and had made multiple material misrepresentations. Richard offered no evidence to trace his claimed separate property. The district court found that any meaningful tracing was impossible because of Richard's failure to keep basic financial records and his commingling. The court acknowledged that it was not dividing the property equally but made thorough written findings, including that Richard gave his separate property to the community as gifts, failed to pay Margarita a salary, commingled all income, and failed to show that the rent from his purportedly separate property was enough to cover the expenses of the property.

The district court further found that Richard had a gross monthly income of $57,438 by looking at the gross deposits into the law firm operating fund because Richard provided no documentation to support the figure stated in his latest FDF. The court thus ordered Richard to pay $3,178 in monthly child support. The district court also ordered Richard to pay Margarita a lump sum of $202,500 in alimony.

Richard argues that the district abused its discretion by not reducing his child support obligation by the amount of money K.R. receives from Richard's Social Security dependent payment. Margarita concedes that Richard is entitled to a credit against his child support obligation for the amount that she receives as Social Security dependent benefits on behalf of K.R.

Under NAC 425.150(2), a court may adjust child support obligations by subtracting the benefit a child receives from the obligor's obligation. We note that the language of this regulation is permissive and not mandatory. Despite this, Nevada caselaw indicates that a credit should be applied to arrearages when a dependent child receives Social Security benefits. *See Hern v. Erhardt*, 113 Nev. 1330, 1335, 948 P.2d 1195, 1198 (1997) (holding that Social Security disability benefits paid in excess of the amount owed as child support should be credited toward child support arrears accruing after the date the obligor parent becomes disabled).

The district court heard testimony that Richard had previously received benefits on K.R.'s behalf but that once trial began, Margarita was receiving benefits on K.R.'s behalf. We also note that Richard requested that he be given a "dollar-for-dollar reduction in his child support

obligation" for the benefits Margarita receives on K.R.'s behalf. The district court's order indicates that the court was aware of the situation; however, there is no discussion on the effect of the dependent benefits on Richard's child support obligation.

Given this unusual situation, we could conclude that the district court did not abuse its discretion because NAC 425.150(2) does not require that an offset be given for current child support obligations. However, since Margarita concedes that an offset should be given for the Social Security benefits, we vacate the monthly child support obligation to the extent it includes the Social Security dependent payment and remand the matter to the district court to allow the district court to further consider the matter and explain its decision if it chooses not to allow an offset. To reiterate, we affirm the order regarding Richard's child support obligation except for the dependent payment. On remand, should the district court allow an offset for the dependent payment in Richard's child support obligation, all overpayments should be counted against his arrears. Since this may affect the amount of child support arrears, we necessarily vacate the order finding that Richard owes $63,955 in child support arrears. If the district court allows no offset, the monthly child support and arrearage orders shall be reinstated with any new arrears added.

Child Custody, Evidence Authentication, Attorney's Fees

Franklin v. Franklin, 2024 Nev. Unpub. LEXIS 486, S. Ct. 84334 (Jun. 20, 2024) Order Affirming in part, reversing in part, and remanding

This is an appeal and cross-appeal from a district court divorce decree and a post-decree order denying a motion to alter or amend.

Appellant/cross-respondent Ashley Franklin and respondent/cross-appellant John Franklin were married in April 2012. Together the Franklins have two children. In 2019, Ashley filed a complaint for divorce, after which John filed an answer and counterclaim.

During the divorce trial, Ashley testified that John had a violent pattern of behavior. She testified specifically with respect to an incident that occurred in 2013, after which she obtained a protective order against John. Ashley also claimed that in 2019, John bear hugged her and ruptured one of her breast implants. Ashley's sister also testified regarding incidents where her ex-husband went over to John and Ashley's house to fix broken doors and police were called to their house. John denied having ever committed domestic violence against Ashley but admitted to being charged with domestic violence and pleading to the lesser charge of disturbing the peace as to the 2013 incident.

The district court found the following in entering the divorce decree: (1) the preference for joint physical custody under NRS 125C.0025 applied because each parent had a meaningful relationship with the children; (2) Ashley lacked credibility and failed to support the presumption against joint physical custody with clear and convincing evidence of domestic violence by John under NRS 125C.003(1)(c) . . . .

Ashley filed a motion for reconsideration and to amend the findings regarding domestic violence and her credibility, arguing that the district court overlooked similarities in her statements regarding the 2013 incident. . . . After a hearing, the district court denied reconsideration and awarded John attorney fees without explaining its reasoning. Ashley appeals, challenging the child custody determination, the division of assets and debts, the alimony award, and the award of attorney fees to John. John cross-appeals, arguing that the district court abused its discretion in finding the loan from Karen Brady for living expenses was a community debt.**1**

[At trial, t]he district court declined to admit a photograph depicting an injury to Ashley's face that allegedly resulted from John striking her, finding that Ashley was unable to properly authenticate the photo. Ashley argues the court abused its discretion in doing so because her testimony sufficiently established that the photo was what she claimed it to be. Authentication or identification is a condition precedent to the admissibility of evidence. NRS 52.015(1). This condition precedent "is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." *Id.* "Authentication represent[s] a special aspect of relevancy . . . in that evidence cannot tend to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims." *Rodriguez v. State*, 128 Nev. 155, 160, 273 P.3d 845, 848 (2012) (alteration in original) (internal quotation marks

omitted). If a witness has personal knowledge that a matter is what it claims to be, their testimony is sufficient for authentication. NRS 52.025.

In presenting the district court with the photograph, Ashley could not describe the alleged physical violence preceding the taking of the photo, nor could she specify when the photo was taken other than it must have been before 2017. However, Ashley testified that the photograph fairly and accurately depicted what was shown in the picture and what she claimed it to be—a photo of her face after she was struck by John before 2017. We conclude that Ashley's testimony was sufficient to authenticate the photo because she testified that it fairly and accurately depicted her physical state after an alleged incident of domestic violence. NRS 52.025. Therefore, we conclude the district court abused its discretion in excluding the photograph based on insufficient authentication. *Klabacka v. Nelson*, 133 Nev. 164, 174, 394 P.3d 940, 949 (2017) (stating that "Minis court review[s] a district court's decision to admit or exclude evidence for abuse of discretion" (alteration in original) (internal quotation marks omitted)).

NRS 18.010(2)(b) permits the district court to award attorney fees when a party brings or maintains a claim "without reasonable ground or to harass the prevailing party." This court reviews an award of attorney fees for an abuse of discretion. *Rivero*, 125 Nev. at 440-41, 216 P.3d at 234. Here, pursuant to NRS 18.010, the district court, without further explanation, awarded John attorney fees incurred in opposing Ashley's motion for reconsideration regarding the domestic violence findings. **We conclude that the district court abused its discretion in awarding attorney fees pursuant to NRS 18.010(2)(b) without supported findings that Ashley's motion was unreasonable or brought to harass John. Although Ashley did not prevail on her custody argument, that alone does not warrant a finding that the motion was frivolous or meant to harass John.** Thus, we conclude the district court abused its discretion in awarding John attorney fees.

Attorney's Fees, Redacted Billing Entries, Guardianship

In re: Guardianship of Shively, No. 85871, Order of Affirmance (Unpublished Disposition, Jan. 30, 2024)

This is an appeal from a district court order granting a motion for attorney fees.

Respondent Tiffany Shively-Busse is the guardian for her mother, appellant Drena Shively, and of Shively's estate. Shively is represented in this matter by the Legal Aid Center of Southern Nevada (collectively, Shively).1 Shively-Busse filed an accounting and a petition for attorney fees with the district court pursuant to NRS 159.344. She attached attorney billing ledgers containing partial redactions in the descriptions of 15 of the 44 time entries, based upon attorney-client privilege. Shively filed an opposition to the accounting, arguing that 10 of the 15 redacted entries, totaling $660.00, contained insufficient information to determine whether the attorney fees were reasonable. Shively did not object to the remainder of Shively-Busse's requested attorney fees.

The district court found that the redacted billing entries provided sufficient detail to determine whether the attorney fees requested were appropriate and granted the request for attorney fees and costs, including the fees associated with the redacted communications. While the district court did not review the contents of the redacted statements, it found that "the nature and extent of the service performed" was still evident from the unredacted statements.

Shively further contends that the attorney-client privilege asserted by Shively-Busse with respect to the attorney billing ledgers does not apply to a party who voluntarily avails themselves of NRS 159.344, which authorizes a party to have their attorney fees and costs paid from the protected person's estate. We disagree. "The attorney-client privilege is a long-standing privilege . . . that protects communications between attorneys and their clients." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 374, 399 P.3d 334, 341 (2017) (internal quotation marks omitted). **Shively has presented no salient authority to support the proposition that the Legislature, in enacting NRS 159.344, intended to abrogate this long-standing privilege for those seeking attorney fees in a guardianship matter.** *See Cf. Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (observing that it is an appellant's responsibility to support arguments with salient authority).

Moreover, in its order granting attorney fees and costs, **the district court found that "the nature and extent of the service performed is still evident" in the redacted portions of the billing entries.** Shively-Busse provided an itemized, detailed list of each task performed, an indication of the time billed, and a fee summary with the amounts charged to the lawyers. She included redacted entries that range in specificity from "Email from client" with the remaining words blacked out to "Updating third annual accounting with June Statement- e-mail to client [redacted]. Finalized accounting for Wells Fargo and Nevada State Bank accounts. Finalized Brunzell. Sent to Marjorie for review." **The court was still able to determine the general purpose of each task, even if it did not know the exact contents of the task.** Because the

district court was able to decide the case based on the redacted entries, we conclude that the court did not abuse its discretion in granting fees and costs for the redacted billing entries.

Shively next argues that her right to due process was violated when the district court ordered the estate to pay fees and costs without allowing Shively the opportunity to review the unredacted billing entries. . . . Nor are we persuaded that due process entitled Shively herself to review the unredacted billing statements. *See Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 546 (9th Cir. 2016) (holding that the due process clause requires that the district court "allow Defendants access to the timesheets, appropriately redacted to remove privileged information, so they can inspect them and present whatever objections they might have concerning the fairness and reasonableness of Plaintiffs' fee request."). Shively had access to the billing statements, was able to inspect them, present objections, and was heard. **As the redacted billing entries contained sufficient information for the court to determine the nature and extent of the services performed, there was no need for Shively to view the unredacted portions. Because she had the opportunity to view the statements and make objections, the district court did not violate Shively's right to due process.**

Lastly, Shively argues that Shively-Busse failed to comply with NRCP 26(B)(5)(A) before withholding information related to her counsel's billing entries. NRCP 26(b)(5)(A) applies to discovery and requires a party to submit a privilege log that identifies any potentially privileged information. NRCP 26(b)(5)(A)(ii). **We conclude that NRCP 26(B)(5)(A) does not apply in a case without discovery. Here, the billing statements were appended to a petition for fees submitted to the court, rather than as part of discovery. We conclude that Shively has not shown that relief is warranted on the basis of NRCP 26(b)(5)(a).**

Child Custody, Default for Failure to Appear

Barton v. Barton, No. 86753-COA, Order of Reversal and Remand (Unpublished Disposition, Jan. 31, 2024)

Zachary Barton appeals from district court orders modifying child custody and denying post-judgment relief. Eighth Judicial District Court, Family Division, Clark County; Heidi Almase, Judge.

Zachary and respondent Sarah Barton were divorced in 2021 and have three minor children together. While the parties share joint legal custody of the children, the stipulated divorce decree awarded Sarah primary physical custody of the children, subject to Zachary's parenting time each weekend from Friday evening to Sunday evening. In January 2022, Zachary filed a motion for primary physical custody or, alternatively, joint physical custody, and requested that the court conduct interviews of the children. In that motion, Zachary alleged, among other things, that a change in custody would be in the children's best interest as Sarah's new boyfriend was abusive to them. Sarah opposed and filed a countermotion for sole physical custody. The district court thereafter opened discovery, set a calendar call for the trial for December 5, 2022, at 8:15 a.m., and scheduled a non-jury trial for December 19, 2022, at 1:30 p.m.

As relevant here, Zachary failed to file a pretrial memorandum or appear at the December 5, 2022, calendar call.**1** After waiting approximately 15 minutes for Zachary to appear or otherwise inform the court that he would not be attending, the court heard testimony from Sarah regarding the abuse allegations, and ultimately entered default judgment in Sarah's favor, awarding her sole physical custody of the children. Approximately one week after, Zachary filed a post-judgment motion to reconsider or set aside the district court's order, generally arguing that default judgments are inappropriate in child custody matters as it does not take the best interest of the children into account, and that he did not willfully miss the calendar call due to a misunderstanding of the court's scheduling system.**2** Sarah opposed, and filed a countermotion for supervised visitation and anger management courses for Zachary.

The district court resolved the pending motions on its chambers calendar and without oral argument, denying the parties' requests for relief. As pertinent here, the court found that Zachary had failed to meet his burden of demonstrating that the court's prior order was clearly erroneous under the reconsideration standard of NRCP 59, or that he was entitled to NRCP 60(b) relief. Accordingly, the court found that "notwithstanding a preference to decide issues on substantive merits rather than procedural default" under *Blanco v. Blanco*, 129 Nev. 723, 311 P.3d 1170 (2013), Zachary failed to demonstrate that relief is warranted.

Our supreme court has previously recognized that default judgments in matters of child custody are "simply not permissible" and that "child custody matters must be decided on their merits." *Cf. Blanco*, 129 Nev. at 730, 311 P.3d at 1174 (holding that case-concluding discovery sanctions were not appropriate in child custody and support matters).

Here, although the district court entered default against Zachary after a brief canvass of Sarah related to some of the best interest of the children factors under NRS 125C.0035(4),

its order did not contain any discussion of the same, but rather only relied upon Zachary's failure to appear at the calendar call and the court's ability to sanction that failure under EDCR 2.69(c) (stating that failure to appear at a calendar call may result in sanctions, including default judgment) to support its award of sole physical custody to Sarah. "But given the statutory and constitutional directives that govern child custody and support determinations, resolution of these matters on a default basis without addressing the child's best interest and other relevant considerations is improper," *Blanco*, 129 Nev. at 731, 311 P.3d at 1175, and we therefore conclude that the district court abused its discretion by awarding sole physical custody to Sarah by default.

Accordingly, we reverse.

Child Custody, Due Process, Prima Facie Case for a Hearing, Notice of Ultimate Determination

Zamboanga v. Ortiz, No. 86050-COA, Order of Reversal and Remand (Unpublished Disposition, Jan. 19, 2024)

This is an appeal and cross-appeal from a district court order denying a motion and countermotion to modify custody of minor children.

In September 2022, Brittany filed a motion to modify child custody, seeking sole legal and primary physical custody of all three children.

Joey filed an opposition to Brittany's motion as well as a countermotion to modify his physical custody of C.O. from joint to primary.

The district court held a hearing on all pending motions in November 2022. Both Brittany and Joey were represented by counsel and reiterated the arguments in their respective briefings. Following arguments, the court ordered that all three children be interviewed by the Family Mediation Center (FMC). and that Brittany and Joey attend FMC mediation to facilitate a potential custody agreement. The court ordered a return proceeding for December 2022 to determine the next step in the process and indicated that this hearing would focus on the VW' child interview report and mediation, as opposed to the children's custody status.

At the December 2022 return hearing, the district court overviewed the FMC child interview report and heard argument from both parties' counsel.

After hearing the parties' arguments, the district court placed both parties under oath but then, inexplicably, questioned only Joey.

The district court then stated that it was going to deny both Brittany's motion and Joey's countermotion. The court stated that there was not "sufficient reason to conduct an evidentiary hearing," as neither party had made a "prima facie case."

On appeal, Brittany argues that the district court violated her constitutional right to due process because the December 2022 return hearing was not properly noticed as a custody hearing. She also argues that the court abused its discretion when it issued a final custody determination without holding an evidentiary hearing. On cross-appeal. Joey argues that the court abused its discretion when it summarily denied his motion to change the physical custody of C.O. without holding an evidentiary hearing.

A permanent change to parenting time, such as a modification to custody, impacts the fundamental liberty interest parents have in the custody of their children. *See Blanco v. Blanco*, 129 Nev. 723, 731, 311 P.3d 1170, 1175 (2013) ("[C]hild custody decisions implicate due process rights because parents have a fundamental liberty interest in the care, custody, and control of their children."). A denial of an evidentiary hearing, much like a permanent change to parenting time, constitutes a profound decision on the merits that impacts this liberty interest. *See Myers v. Haskins*, 138 Nev., Adv. Op. 51, 513 P.3d 527. 536 (Ct. App. 2022) (concluding that a "district

court must provide an adequate explanation when it denies a motion to modify custody without holding an evidentiary hearing given that such a denial has the same practical implications for a movant as a denial on the merits").

Thus, before impacting fundamental custodial rights, district courts must give the parents proper notice. *See Gordon*, 133 Nev. at 546. 402 P.3d at 674-65: *Blanco*, 1.29 Nev. at 731, 311 P.3d at 1175. To be proper, notice "must be provided at the appropriate stage'" of the proceedings so that the parties "can provide meaningful input in the adjudication of their rights." *Sw. Gas*, 138 Nev. at 46. 504 P.3d at 511 (internal quotation marks omitted). **General notice that the court will hold a hearing is insufficient; rather, to comply with clue process requirements in child custody proceedings, the district court must give the parents "'prior specific notice" that it may make the custody determination that it ultimately does make.** *Dagher v. Dagher*, 103 Nev. 26, 28, 731 P.2d 1329, 1330 (1987).

Here, the district court violated Brittany's constitutionally protected right to procedural due process when it issued its final custody determination at the return hearing based on grounds not properly noticed or questioned. The court's action, also affected Brittany's substantive liberty interests in the custody, care, and control of her children. At the November 2022 nonevidentiary hearing, the court ordered that all three children be interviewed by FMC. that the parties attempt FMC mediation, and that the parties "return for further proceedings" in December 2022. The court's written order did not state that the court might issue its final custody determination at this return hearing or explain that the district court would be considering whether there had been a substantial change in circumstances, which was the stated basis for the district court's denials. Further, nothing in the order indicated that that the return hearing would be evidentiary in nature.

Brittany argues that the district court abused its discretion when it summarily concluded that there had been no substantial change in circumstances sufficient to warrant an evidentiary hearing before it denied her motion to modify custody. In response, Joey concedes that while an evidentiary hearing was probably necessary for J.O., the court did not abuse its discretion as to R.O. and CO. because Brittany failed to present a prima facie case. On cross-appeal, however, Joey argues that the court abused its discretion when it declined to hold an evidentiary hearing as to CO. because—although Brittany had not alleged a prima facie case regarding CO. —he had. We conclude that the district court abused its discretion when it declined to hold an evidentiary hearing as to all three children.

"A district court must hold an evidentiary hearing on a request to modify custodial orders if the moving party demonstrates 'adequate cause.'" *Arcelia v. Arcelia*, 133 Nev. 868, 872, 407 P.3d 341, 346 (2017) (quoting *Rooney v. Rooney*, 109 Nev. 540, 542, 853 P.2d 123, 124 (1993)). "Adequate cause" arises if the movant demonstrates a prima facie case for modification. *Rooney*, 109 Nev. at 543, 853 P.2d at 125. Namely, the movant must show that "(1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification." *Romano v. Romano*, 138 Nov. 1, 3, 501 P.3d 980, 982 (2022) (quoting *Ellis*, 123 Nev. at 150, 161 P.3d at 242), *abrogated, in part by Killebrew. State ex rel. Donohue*, 139 Nev., Adv. Op. 43, 535 P.3d 1167 (2023).

"[A] district court should not weigh the evidence . . . before holding an evidentiary hearing," but evidentiary hearings are warranted only when a movant can demonstrate a prima facie case. *Myers*, 513 P.3d at 532. In determining whether a movant has demonstrated a prima facie case for modification, the district court must typically accept the movant's specific allegations as true, without regard to the opposing party's competing allegations. *See id.* However, district courts are not required to consider a movants "general, vague, broad, or conclusory allegations," and "need not consider facts alleged or exhibits filed that are not supported by verified pleadings, declarations, or affidavits." *Id.* at 534. **As long as the parties assert "something more than . . . naked allegation[s], it is error to resolve the apparent factual dispute[s] without granting . . . an evidentiary hearing." *Vaillancourt v. Warden*, 90 Nev. 431, 432, 529 P.2d 204, 205 (1974). We have, however, recognized a narrow exception to this general rule. Namely, a district court may consider a nonmovant's evidence outside of an evidentiary hearing if that evidence "conclusively establishes [that] the movant's claims are false."** *Myers*, 513 P.3d at 533 (internal quotation marks omitted). However, if a district court denies a motion to modify custody without holding an evidentiary hearing, the district court must provide an adequate explanation for its decision. *Id.* at 536 (explaining that a denial of a motion to modify custody without holding an evidentiary hearing has the same practical implications for a movant as a denial on the merits").

Regarding witness credibility, **district courts must not "pass upon the credibility of witnesses" and should "disregard" contradictory evidence when determining whether a party has demonstrated a prima facie case for modification.** *Barelli v. Barelli*, 113 Nev. 873, 879-80, 944 P.2d 246, 249-50 (1997) (quoting *Griffin v. Rockwell Int'l Inc.*, 96 Nev. 910, 911, 620 P.2d 862, 863 (1980)): *see also Fernandez v. Adrmrand*, 108 Nev. 963, 968, 843 P.2d 354, 358 (1992) (noting "the credibility of the witnesses and the weight of the evidence are immaterial to the presentation of a prima facie case").

Here, the district court abused its discretion when it issued a custody order without first holding a proper evidentiary hearing because both Brittany and Joey independently demonstrated prima facie cases for modification, raising allegations that there had been a substantial change in circumstances, and that a custody modification would be in the best interest of the children.**6** In statements supported by declaration, Brittany alleged that Joey: gave J.O. alcohol and forced J.O. to do pushups; failed to adequately address J.O.'s mental health issues after J.O. expressed suicidal ideations; called R.O. "fat" and placed R.O. on a restrictive diet; created an environment which was not conducive to the children's wellbeing and mental health; changed his own physical appearance in disturbing ways; would scream and yell at the children and break things in the home; and was admitted to the VA hospital for observation following a depressive episode. She additionally alleged that J.O. feared Joey and did not want to live with him. *See Roberson v. Roberson*, No. 85635-COA, 538 P.3d 446, 2023 WL 7869084 at *4 (Nev. Ct. App. Nov. 15, 2023) (Order Affirming in Part, Reversing in Part and Remanding) (noting that a minor child's wish to live with a particular parent may constitute a substantial change in circumstance that warrants an evidentiary hearing).

Impacting all three children, Brittany alleged that Joey changed his physical appearance in unsettling and frightening ways; "paint[ed] the wrong picture" for the children's wellbeing and mental health; struggled with his own severe mental health issues that required him to undergo observation at the VA hospital; was not emotionally present with any of the children; would "scream[ ] and yell[ ] at everyone in the home;" would "break[ ] and punch[ ] things;" and created a home environment where J.O., R.O., and CO. felt that they "walk[ed] on eggshells" around him. **Under the lenient standard to establish a prima facie case, these more-than-naked allegations were enough to warrant an evidentiary hearing.** *Vaillancourt*, 90 Nev. at 432, 529 P.2d at 205.

On cross-appeal, Joey's allegations against Brittany were similarly satisfactory to warrant an evidentiary hearing as to CO. Specifically, Joey alleged that Brittany: began a relationship with an ex-felon who physically abused her in front of the children: maintained a hostile relationship with Joey's new girlfriend and physically assaulted Joey's girlfriend on one occasion; attempted to unilaterally disenroll C.O. from C.O.'s current school; and often skipped her parenting times.

Finally, neither party's allegations could conclusively establish the falsity of the other's. Thus, the district court was not permitted to consider either the parties' credibility or the parties' competing allegations when analyzing whether either party had demonstrated a prima facie case sufficient to warrant an evidentiary hearing. *See Barelli*, 113 Nev. at. 879-80, 944 P.2d at 249-50; *Myers*, 513 P.3d at 533. Brittany's and Joey's situation is currently—and was at the time of the hearing—one of competing justifications and dueling allegations.

Child Custody, Prima Facie Case for a Hearing

Payne v. Payne, No. 86478-COA, Order of Reversal and Remand (Unpublished Disposition, Dec. 13, 2023)

Pamela B. Payne appeals from a district court order denying a motion to modify child custody and motion for child testimony.

Pamela and Dale E. Payne divorced in Utah in 2018. As part of their stipulated divorce decree, they agreed to joint legal and joint physical custody of their minor child, A.P. (currently 12 years of age). Subsequently, the parties relocated to Reno, and the Utah decree was registered in February 2019. In 2019, Pamela also filed a motion to modify the decree and a separate motion for A.P. to attend therapy. The parties reached an agreement that modified the parenting time schedule but remained within a joint physical custody timeshare. The parties also agreed that A.P. would begin therapy. In October 2021, Pamela filed a motion where she detailed multiple concerns regarding A.P. and requested that A.P. continue therapy. The parties reached a second stipulation for A.P. to continue therapy.

Pamela then filed [a] . . . motion to modify child custody and child support in 2023. In her motion, Pamela alleged that A.P. was fearful of Dale and would get stomach issues before parenting time with him; Dale would involve A.P. in conversations about the custody litigation; Dale read Pamela's October 2021 motion to A.P.; Dale made disparaging comments about Pamela and her family to A.P.; Dale was unsupportive of A.P.'s therapy; Dale would chastise A.P. for being overweight, leading A.P. to cry; Dale had informed his male friends that A.P. got her menstrual period; Dale did not abide by the provisions of the decree because he did not give Pamela advance notice of multiple address changes, did not notify her when he took A.P. out of state in October 2021, and failed to exchange A.P. with her on Christmas Day at the correct time; and Dale would prevent A.P. from contacting Pamela during his parenting time. Ultimately, Pamela argued that these allegations demonstrated that Dale was emotionally abusive to A.P. and that the level of conflict between the parties was high. Thus, Pamela sought primary physical custody and a modification of child support. Attached to Pamela's motion was a declaration, in which she detailed the alleged instances of Dale's behavior that warranted a modification of child custody. In his opposition, Dale argued that Pamela failed to present a prima facie case warranting modification of child custody because she recycled the same allegations she raised in her 2021 motion for A.P. to continue therapy. Dale also disputed the veracity of Pamela's allegations.

Subsequently, without a hearing, the district court issued an order denying Pamela's motion to modify custody and child support and motion for child testimony. The court noted that Pamela's allegations were identical to the allegations raised in her October 2021 motion for A.P. to continue therapy, which was filed approximately one year and three months before Pamela's motion to modify custody. The court further found that Pamela's allegations were stale and largely broad or conclusory. Specifically, the court found that Pamela's declaration failed to provide specific facts or evidence in support of the allegations, such as the dates on which A.P. cried, dates on which Dale made disparaging statements, and dates on which A.P. would have

stomach issues before parenting time with Dale. The court also noted that Pamela's allegations regarding Dale's violations of the decree were meritless as they did not actually violate any provisions of the decree. The court noted that the only new allegations contained in Pamela's motion were that Dale discussed A.P.'s menstrual period with his adult male friends; read the October 2021 motion to A.P. and discussed the litigation with her; and refused to allow A.P. to contact Pamela during Dale's parenting time. The court then found that Pamela's motion failed to provide specific dates of when these events occurred, and that they were not indicative of a substantial change in circumstances warranting modification of custody. Pamela now appeals.

On appeal, Pamela argues that the district court improperly denied her motion because the court did not accept her allegations as true and instead improperly weighed the evidence without holding an evidentiary hearing. She also contends that the court concluded that her factual allegations were stale, but all the incidents she described were after the last custody order was entered in August 2019.

We review a district court's denial of a motion to modify child custody without holding an evidentiary hearing for an abuse of discretion. *Myers v. Haskins*, 138 Nev., Adv. Op. 51, 513 P.3d 527, 531 (Ct. App. 2022). A district court abuses its discretion only when "no reasonable judge could reach a similar conclusion under the same circumstances." *Id.* (quoting *In re Guardianship of Rubin*, 137 Nev. 288, 294, 491 P.3d 1, 6 (2021)).

A district court has discretion to deny a motion to modify custody without conducting an evidentiary hearing unless the movant has demonstrated "adequate cause." *Myers*, 138 Nev., Adv. Op. 51, 513 P.3d at 531. "Adequate cause" arises if the movant demonstrates a prima facie case for modification within the movant's affidavit and pleadings. *Id.* at 531-32. "To demonstrate a prima facie case, a movant must show that '(1) the facts alleged in the affidavits are relevant to the [relief requested]; and (2) the evidence is not merely cumulative or impeaching.'" *Arcella v. Arcella*, 133 Nev. 868, 871, 407 P.3d 341, 345 (2017) (alteration in original) (quoting *Rooney v. Rooney*, 109 Nev. 540, 543, 853 P.2d 123, 125 (1993)). In *Myers*, this court provided guidance concerning the proper application of the prima-facie-case prong of the adequate cause standard. 138 Nev., Adv. Op. 51, 513 P.3d 527. *Myers* explained that the district court may generally only consider "the properly alleged facts in the movant's verified pleadings, affidavits, or declarations" and "must accept the movant's specific allegations as true" when determining whether a movant has established a prima facie case for modification requiring an evidentiary hearing. *Id.* at 529-30, 532.

Here, the district court denied Pamela's request to modify physical custody without conducting an evidentiary hearing. Specifically, in its written order, the district court concluded that Pamela failed to present a prima facie case for modification because she did not demonstrate a substantial change in circumstances affecting the welfare of the minor child. We conclude that the district court abused its discretion in making this determination. **Assuming the allegations in Pamela's motion are true, these allegations *could show*** that there has been a substantial change of circumstances affecting the welfare of A.P. and that A.P.'s best interest ***could be*** served by modification. *See Romano*, 138 Nev. at 3, 501 P.3d at 982. **Specifically, Pamela alleged facts suggesting that A.P.'s relationship had deteriorated with Dale manifesting in A.P.**

having stomach issues, conflict related to the ability of the parties to cooperate and coparent, and concerns with A.P.'s emotional needs. *See* NRS 125C.0035(4) (outlining the best interest factors).

Although the district court found that most of the allegations Pamela raised were identical to the allegations she raised in her October 2021 motion for A.P. to continue therapy, this court recognized in *Myers* that a substantial change in circumstances requires the movant to "allege facts that have occurred *since the last custody determination." See Myers*, 138 Nev., Adv. Op. 51, 513 P.3d at 533 n. 10 (emphasis added) (internal quotation marks omitted).**1 Pamela's October 2021 motion was not a request for a modification of custody, and the district court did not make a custody determination pursuant to the allegations Pamela alleged in her October 2021 motion.** Accordingly, Pamela's allegations in her motion to modify custody were not cumulative or impeaching. *See Arcella*, 133 Nev. at 871, 407 P.3d at 345. Thus, we conclude that the district court abused its discretion in refusing to hold an evidentiary hearing on Pamela's motion to modify custody.

In reaching this result, we express no opinion with respect to the merits of Pamela's motion to modify custody. To the contrary, we recognize that Dale opposed Pamela's motion and that his challenges to Pamela's allegations may eventually be proven correct or found more credible. But given that no evidence has been taken at this stage of the proceeding, and the district court denied Pamela's motion requesting A.P.'s testimony, the district court could not properly deny Pamela's motion without an evidentiary hearing.

Attorney's Fees, NRCP 11, Procedures

LaMont's Wild West Buffalo, LLC v. Terry, 544 P.3d 248, 2024 Nev. LEXIS 9, 140 Nev. Adv. Rep. 11, 544 P.3d 248

LaMont's Wild West Buffalo, LLC, appeals from a district court order denying its motion for attorney fees as sanctions under NRCP 11, NRS 18.010(2)(b), and NRS 7.085. The district court found that. Nathanial Terry filed frivolous counterclaims against LaMont's for breach of contract, breach of the covenant of good faith, intentional interference with prospective economic advantage, trespass to chattels, and negligence. However, the district court denied LaMont's motion for its failure to comply with NRCP 11's safe harbor provision.

We conclude that the district court properly denied LaMont's motion for sanctions under NRCP 11 for failure to comply with that rule's procedural requirements. However, the district court erred by denying attorney fees under NRS 18.010(2)(b) and NRS 7.085 for the same perceived procedural flaw, as the NRCP 11 procedural requirements do not apply to awards under those statutes.

LaMont's contends that the district court abused its discretion when it denied LaMont's motions for fees under NRCP 11, NRS 18.010, and NRS 7.085 because the district court rigidly applied the safe harbor procedural requirements of NRCP 11 and improperly applied NRCP 11's safe harbor procedural requirements to NRS 18.010 and NRS 7.085.

In this case, the district court denied LaMont's motion for attorney fees as sanctions for failure to comply with NRCP 11(c)(2). LaMont's motion was not "separate from any other motion," as it combined the Rule 11 motion with a motion for attorney fees under NRS 18.010, and the motion was not served upon Terry 21 days prior to its filing.

We conclude that the district court's order denying the motion for failure to procedurally comply with NRCP 11(c)(2) was not an abuse of discretion, at least as to LaMont's request for Rule 11 sanctions. Rule 11 is clear: a request for sanctions must be made separate from any other motion and must be served 21 days prior to filing. The district court enforced compliance with the procedure explicitly mandated by the Nevada Rules of Civil Procedure.1

We have previously determined that NRCP 11 does not supersede NRS 7.085. *Watson Rounds*, 131 Nev, at 784-85, 358 P.3d at 230. In *Watson Rounds*, we determined that NRCP 11 and NRS 7.085 were "distinct, independent mechanism[s] for sanctioning attorney misconduct" because they apply to different types of misconduct. 131 Nev. at 784, 788-89, 358 P.3d at 230. 232. LaMont's argument regarding NRS 18.010 relies heavily on this premise. We agree that the same proposition is true of NRCP 11 and NRS 18.010(2)(b); each provision is a distinct mechanism for sanctions.

Thus, **the district court's order denying LaMont's request for fees was proper in part and erroneous in part. The district court properly applied NRCP 11(c)(2)'s procedural bar to LaMont's request for sanctions under Rule 11 but erred by applying the same procedural requirements to NRS 18.010(2)(b) and NRS 7.085.** Accordingly, we affirm the

district court's order in part as to NRCP 11, and we reverse in part and remand for the district court to determine whether LaMont's is entitled to attorney fees under NRS 18.010 and NRS 7.085.

Guardianship, Parental Preference, Analysis of All versus Relevant Factors

A.D.I. v. Adison R. (In re Guardianship of the Pers.), 2024 Nev. Unpub. LEXIS 535, 552 P.3d 68, 2024 WL 3355089

This is an appeal from a district court order terminating a guardianship.

Appellant Randy Sue K. was granted guardianship over her daughter, respondent Adison R.'s minor children, respondents A.D.I., A.R.I., and A.J.I. (Minor Respondents) in 2018. Adison petitioned to terminate the guardianship in 2020. After the conclusion of a multi-day evidentiary hearing, the district court terminated the guardianship. Randy Sue appeals, asserting several errors concerning application of the law and the weight of evidence warrant reversal. Minor Respondents appeal, asserting errors concerning the appointment of their guardian ad litem.

Randy Sue argues that under any standard, the district court's decision to apply the best-interest of the child analysis set forth in NRS 125C.0035 instead of determining if termination would substantially enhance Minor Respondents' welfare as set forth in NRS 159A.1915 amounts to reversible error. Minor Respondents generally join in Randy Sue's arguments. Adison did not file an answering brief.**1** Whether the district court properly examined the best interest factors from NRS Chapter 125C as part of evaluating the substantial enhancement requirement in NRS 159A.1915 implicates statutory construction, which this court reviews de novo. *Potter v. Potter*, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005). NRS Chapter 159A governs guardianships of minors. When a parent seeks to terminate a guardianship over their children and the parent did not consent to the guardianship when it was created, NRS 159A.1915 unambiguously provides that the parent must show by clear and convincing evidence that (1) there has been a material change in circumstances that includes the parent's restored suitability, and (2) the "welfare of the protected minor would be substantially enhanced by the termination of the guardianship and placement of the protected minor with the parent." *See Richardson Constr., Inc. v. Clark Cnty. Sch. Dist.*, 123 Nev. 61, 64, 156 P.3d 21, 23 (2007) ("The construction of a statute should give effect to the Legislature's intent. In determining the Legislature's intent, we may look no further than any unambiguous, plain statutory language.") (footnote omitted).

At issue here is whether the district court, by utilizing the best interest factors from the child custody provisions of NRS Chapter 125C as part of its analysis, thereby overlooked the guardianship statute's requirement that Adison show that terminating the guardianship would substantially enhance Minor Respondents' welfare. The substantial enhancement standard is different than the best interest standard. *Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 243 (2007) (noting in child custody cases "modification of custody may serve a child's best interest even if the modification does not substantially enhance the child's welfare"). However, both standards naturally involve similar considerations which bear on the child's welfare, such as the physical, developmental, and emotional needs of the child. Thus, discussing and considering the best interest factors in this context is not inappropriate so long as the district court considers whether those factors and other relevant considerations demonstrate that the children's welfare would be substantially enhanced if the guardianship ends and the children are returned to the parent.

Beyond its analysis of the best interest factors, the district court made findings regarding Randy Sue's and Adison's respective financial situations, Minor Respondents' special and unique needs, Randy Sue's failure to pursue IEP or 504 plans for Minor Respondents until the court mentioned those services, and the opportunities that would be available to Minor Respondents if they were to return to Adison's custody, such as a more spacious living situation. Therefore, the district court did not abuse its discretion in considering the best interest factors in analyzing whether termination of the guardianship substantially enhanced the welfare of Minor Respondents.

Randy Sue argues that the district court failed to consider all of the relevant evidence and factors in finding Adison was entitled to the presumption of suitability. A parent is generally entitled to a presumption of fitness to care for their children. *Locklin v. Duka*, 112 Nev. 1489, 1494-95, 929 P.2d 930, 933-34 (1996). **The parental preference can be overcome by showing that the parent is unfit or through extraordinary circumstances which result in serious detriment to the child.** *Id.* at 1495-96, 929 P.2d at 934; *Litz v. Bennum*, 111 Nev. 35, 38, 888 P.2d 438, 440 (1995).

Factors that "may be considered in evaluating" such unfitness or extraordinary circumstances include, among many others, abandonment or persistent neglect by the parent; likelihood of serious physical or emotional harm to the child; extended, unjustifiable absence of parental custody; bonded relationship between the child and non-parent guardian that could result in significant harm to the child if custody were changed; the parent's delay in seeking custody; and the quality of the parent's commitment to raising the child. *Locklin*, 112 Nev. at 1496, 929 P.2d at 934-35. **When determining if "there is sufficient detriment to the welfare of the child to overcome the parental [preference] presumption," the district court must evaluate the *Locklin* factors that "may be present in the case before it."** *Id.* at 1496, 929 P.2d at 935. Here, the district court sufficiently addressed the *Locklin* factors present in the case by considering Adison's extended absence, her abdication of parental responsibilities, her commitment to raising Minor Respondents, and the extent to which Minor Respondents' education would be impacted by the termination. Substantial evidence supports the district court's ultimate conclusion, based on consideration of the factors present in the case, that termination of the guardianship would not result in sufficient detriment to overcome the parental preference presumption. For example, despite her absence from Minor Respondents' lives, Adison actively participated in the reunification process. Additionally, the record supports the court's finding that Adison's delay in petitioning to regain custody was partially justified by her pursuit of a new career and difficulties regarding service of the guardianship papers. Further, Adison had enrolled Minor Respondents in school, which supports that their education would not be impacted by the termination. *See Locklin*, 112 Nev. at 1496, 929 P.2d at 935 (listing the child's right to an education and impairment thereof if in the parent's custody as a consideration). Therefore, while the district court did not analyze all the *Locklin* factors, it did analyze factors present in this case and we perceive no abuse of discretion in the district court's determination that the parental preference presumption was not overcome.

Guardianship, Standard for Termination, Parental Preference, Retroactive Application

C.A.C. v. Clifford C., 2024 Nev. Unpub. LEXIS 678

This is an appeal from a district court order denying a petition to terminate a general guardianship.

NRS 159A.1915 governs parents' petitions to terminate a guardianship over their children. It places different standards on parents based on whether they "consented to the guardianship when it was created." NRS 159A.1915(2). Parents who consented need only make a showing that "[t]here has been a material change of circumstances since the time the guardianship was created," and "as part of the change of circumstances, the parent has been restored to suitability as described in NRS 159A.061." NRS159A.1915(1)(a). Parents who did not consent "to the guardianship when it was created" must make this same showing as well as a showing that "the welfare of the protected minor would be substantially enhanced by the termination of the guardianship and the placement of the protected minor with the parent." NRS 159A.1915(1)(b). Under both subsections, parents carry the burden of proof to make a showing by clear and convincing evidence. NRS 159A.1915(1).

On appeal, Amanda challenges the district court's decision on several grounds. One argument is that this "substantially enhanced" requirement—a requirement limited to nonconsenting parents—violates due process and equal protection. Another argument is that Amanda's "failure to 'consent' to the guardianship [in 2016] should not be a trigger for . . . this unconstitutional requirement that the welfare of the child be 'substantially enhanced' in order to terminate the guardianship" because NRS 159A.1915 did not exist in 2016.

Namely, given that the guardianship was created in 2016, we conclude that applying NRS 159A.1915 here would amount to improper, retroactive application of law. A statute has a retroactive effect if "it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Sandpointe Apartments, LLC v. Eighth Jud. Dist. Ct.*, 129 Nev. 813, 821, 313 P.3d 849, 854 (2013) (internal quotation marks omitted). "The essential inquiry ... is 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Vartelas v. Holder*, 566 U.S. 257, 273, 132 S. Ct. 1479, 182 L. Ed. 2d 473 (2012) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)).

Here, NRS 159A.1915 does "attach[ ] new legal consequences to events completed before its enactment": it attaches a specific, heightened showing to Amanda's nonconsent at the citation hearing in 2016. *Id.* Stated another way, a "new legal consequence[ ]" exists because the Legislature had not yet codified NRS 159A.1915's heightened standard for nonconsenting parents when the district court granted the guardianship in this case. *Id.* And the legal consequences of Amanda's nonconsent directly implicate her substantive right to care, custody, and control of her children. *See Harrison u. Harrison*, 132 Nev. 564, 569, 376 P.3d 173, 176 (2016) (noting parents' "fundamental liberty interest in the care, custody, and control of their

children"); *Guardianship of Jeremiah T.*, 2009 ME 74, 976 A.2d 955, 961 (Me. 2009) (concluding a statute was impermissibly retroactive where "[t]he amendment changing the burden of proof served to restrict the circumstances under which the mother could have the guardianship terminated and shifted the presumption in favor of terminating a guardianship upon petition to a presumption in favor of continuing it").

For these reasons, we reverse the district court order denying Amanda's petition to terminate the guardianship under NRS 159A.1915 and direct the district court on remand to consider the petition under NRS 159.1905(3) (2003) and the law in effect at the time the guardianship was created.

Termination of Parental Rights, Standards

G.R.S. v. State (In re G.R.S.), 2024 Nev. Unpub. LEXIS 38, 541 P.3d 791, 2024 WL 238068

Brandon asserts that the district court erred in finding he was an unfit parent because there was not clear and convincing evidence that his substance abuse persistently prevented him from caring for G.R.S.**5** Termination of a parent's parental rights may be warranted when the parent is unfit. NRS 128.105(1)(b). An unfit parent is defined as "any parent of a child who, by reason of the parent's fault or habit or conduct toward the child or other persons, fails to provide such child with proper care, guidance and support." NRS 128.018. NRS 128.106 lists conditions the court may consider in determining parental unfitness and includes "[e]xcessive use of intoxicating liquors, controlled substances or dangerous drugs which renders the parent consistently unable to care for the child." NRS 128.106(1)(d).

This court has previously recognized that "it is probably true that all parents are at one time or another guilty of neglecting to give their children 'proper' care," so in order for termination to be warranted, the failure to care for the child "must be serious and persistent and be sufficiently harmful to the child." *Champagne*, 100 Nev. at 648, 691 P.2d at 855. This court further explained that "a parent does not deserve to forfeit the sacred liberty right of parenthood unless such unfitness is shown to be severe and persistent and such as to render the parent *unsuitable* to maintain the parental relationship." *Id.* (footnote omitted). Applying this principle, this court reversed the termination of a mother's parental rights where the moth er was an alcoholic, but during the protective custody proceeding, she had obtained a stable job; demonstrated months of sobriety; and married a man with a stable job, with no criminal history, and who did not drink. *In re Parental Rights as to Montgornery*, 112 Nev. 719, 728, 917 P.2d 949, 956 (1996), *superseded by statute on other grounds as recognized by In re N.J.*, 116 Nev. at 798-801, 8 P.3d at 131-33. This court concluded that clear and convincing evidence did not show that the mother's alcoholism was irremediable or prevented her from adequately caring for the child, especially in light of the mother's significant progress in addressing her alcoholism. *Id.*

Under this precedent and the plain language of NRS 128.106(1)(d), a parent's substance abuse alone does not establish parental unfitness. Instead, there must be clear and convincing evidence that the parent's substance abuse consistently prevents the parent from providing the child with proper care, guidance, and support.

Lastly, Brandon argues that the district court erred in finding that DFS demonstrated by clear and convincing evidence that termination of his parental rights was in G.R.S.'s best interest.**7** We agree.

Here, the district court quoted NRS 128.108 in its order, but it did not address each of the statutory considerations in relation to this case. In fact**, the district court devoted only 2.5 pages of its 49-page order to what Nevada law says is the "primary consideration in any proceeding to terminate parental rights"—the best interest of the child**. NRS 128.105(1).

Adoption, Standing

Kathrine Anne P. v. Angela P. (In re Kathrine Anne P.), 549 P.3d 478, 2024 Nev. LEXIS 28, 140 Nev. Adv. Rep. 37

The finality of district court orders is of substantial concern to the judicial system. In the context of an adoption proceeding, finality plays a particularly elevated role because adoptions provide needed stability to children and their adoptive families. Accordingly, only parties to the proceeding, entities in privity with those parties, or nonparties whose rights are directly affected by the court order have standing to seek NRCP 60(b) relief from an adoption decree.

In the underlying matter, the district court adjudicated an adoption petition while a petition for guardianship filed by the child's grandparents was pending. Given that the grandparents were not parties to the adoption proceeding, were not in privity with any such party, and did not have interests directly affected by the proceeding, they lacked standing to file an NRCP 60(b) motion to set aside the adoption, and the court therefore erred in granting their motion. We conclude that neither the grandparents' familial relation with their grandchild, standing alone, nor the pending guardianship petition conferred standing to challenge the adoption. We therefore reverse the district court order setting aside the adoption.

Katherine and Michael argue that the district court abused its discretion in setting aside G.P.'s adoption pursuant to NRCP 60(b) because Angela and Randall lacked standing to bring the motion. The parties do not dispute that Angela and Randall were not parties in the adoption proceedings. Angela and Randall counter, however, that they have standing because their pending guardianship petition established an interest that was directly affected by the adoption. We conclude that neither Angela and Randall's status as grandparents nor the pending guardianship matter conferred standing.

NRCP 60(b) provides various grounds to set aside a final judgment. *Vargas*, 138 Nev. at 384, 510 P.3d at 778. NRCP 60(b) permits relief from a final judgment, order, or proceeding where there is "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." NRCP 60(b)(3). Relief pursuant to NRCP 60(b) may be provided to the parties to an action, those in privity with the parties, or to those directly affected by the judgment. *Pickett v. Comanche Constr., Inc.*, 108 Nev. 422, 427, 836 P.2d 42, 45 (1992). In *Pickett*, homeowners sought to set aside a judgment foreclosing on mechanic's liens that arose from proceedings in which they were not parties. *Id.* at 424-25, 836 P.2d at 43-44. This court determined that the judgment directly affected the nonparty homeowners in subjecting them to liability such that they could seek NRCP 60(b) relief. *Id.* at 427, 836 P.2d at 45. That is, in *Pickett*, nonparties had standing to challenge an order directly affecting them by subjecting them to legal liability even though they were not parties in the proceedings giving rise to the liability.

Federal courts have approached this standard similarly for nonparties directly affected by a judgment. *Cf. Willard v. Berry-Hinckley Indus.*, 139 Nev., Adv. Op. 52, 539 P.3d 250, 257 (2023) ("[W]here the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil

Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority for this court in applying the Nevada Rules." (internal quotation marks omitted)); *Bonnell v. Lawrence*, 128 Nev. 394. 398, 282 P.3d 712, 714 (2012) (recognizing that NRCP 60(b) is modeled on FRCP 60(b)). The Eleventh Circuit Court of Appeals looked to whether nonparties had legal rights "so intimately bound up with the parties" that a judgment would "directly affect any property or other legal right" of the movant. *Kem Mfg. Corp. v. Wilder*, 817 F.2d 1517, 1520 (11th Cir. 1987). The Second Circuit Court of Appeals likewise concluded that a nonparty had standing to seek FRCP 60(b) relief because it was "strongly affected" by a settlement agreement with a defendant where the plaintiff intended to use the judgment to collect alleged fraudulent conveyances from the nonparty. *Grace v. Bank Leumi. Tr. Co.*, 443 F.3d 180, 188-89 (2d Cir. 2006). The Bankruptcy Appellate Panel of the Ninth Circuit ruled comparably and held that a nonparty had standing to seek Rule 60(b) relief from an order that directly and adversely affected his property rights by reinstating a lien on real property. *In re La Sierra Fin. Servs.*, 290 B.R. 718, 729, 731 (B.A.P. 9th Cir. 2002). In contrast, the Ninth Circuit ruled that nonparty shareholders lacked standing where they sought relief for fraud because they would not recover any money even if their allegations were borne out and so any alleged fraud did not directly affect their rights or interests. *Herring v. FDIC*, 82 F.3d 282, 284-85 (9th Cir. 1995). And the Second Circuit limited its decision to the facts presented and stressed that standing for nonparties directly affected by a judgment was "an exceedingly narrow exception" to the general rule that nonparties may not challenge an order. *Grace*, 443 F.3d at 188-89. Thus, for nonparties to have standing to set aside a court order, they must show privity with a party or that their rights or interests are directly affected by the court's decision.

Adoption proceedings are creatures of statute without origins in the common law, 2 C.J.S. *Adoption of Persons* § 2 (2023), and courts generally have concluded that grandparents lack an interest in such proceedings solely by virtue of the familial relation, *see, e.g., In re Marriage of Herreras*, 159 Ariz. 511, 768 P.2d 673, 674 (Ariz. 1989) ("The Arizona courts, however, have not recognized the grandparental relationship as an interest or right which is entitled to protection except in the limited manner provided by the statute at issue."); *In re S.R.*, 217 Neb. 528, 352 N.W.2d 141, 144 (Neb. 1984) ("We hold that grandparents, as such, do not have standing to interfere with the process of termination of parental rights and the adoptive procedures provided by our statutes."), *superseded by statute on other grounds as stated in In re Artharena D.*, 253 Neb. 613, 571 N.W.2d 608 (Neb. 1997). Although this court has not determined that such an interest exists, *see generally Bopp v. Lino*, 110 Nev. 1246, 1250-51, 885 P.2d 559, 562 (1994) (recognizing that, historically, biological grandparents have no legally enforceable rights with respect to their grandchildren after adoption), Angela and Randall urge us to recognize their standing based on their grandparent relationship and their pending guardianship application. Thus, we consider grandparents' statutory and constitutional rights to determine their interest in an adoption.

Nevada law provides that a court may require notice of adoption proceedings to interested persons, who may in turn object to the adoption. NRS 127.210(3). No provision specifically designates grandparents as interested parties entitled to notice. By way of contrary example, notice *must* be provided to a child's legal custodian or guardian. NRS 127.123. Nor have the

parties pointed to any statute conferring on grandparents an applicable interest or right in a grandchild's care or in adoption proceedings. *Cf. Bopp*, 110 Nev. at 1250-51, 885 P.2d at 562 (explaining that when grandparent visitation rights provided for in certain circumstances under more recent statutory provisions are not exercised pre-adoption, the mere existence of those statutes does not confer any right on grandparents). Therefore, the Nevada statutes governing adoption do not confer standing on grandparents on the basis of that relationship. *Cf. In re Adoption of J.J.G.*, 736 So. 2d 1037, 1040 (Miss. 1999) (concluding grandparents lacked standing to object to the adoption of their grandchildren where no statute granted them standing); *R.K. v. A.J.B.*, 284 N.J. Super. 687, 666 A.2d 215, 217-18 (N.J. Super. Ct. Ch. Div. 1995) (concluding that grandparents lacked standing to object to an adoption where the adoption statutes did not entitle them to notice of the proceeding and thus with a right to object).

Turning to constitutional law, grandparents generally do not have a constitutional interest conferring standing to intervene in an adoption proceeding, *see L.F.M. v. Dep't of Soc. Servs.*, 67 Md. App. 379, 507 A.2d 1151, 1154 (Md. Ct. Spec. App. 1986) ("We do not question the sincerity or the depth of the affection that appellants feel for their grandchildren. That affection, however, simply does not translate into a constitutionally protected liberty interest."), absent a countervailing consideration, such as a court order entitling them to visitation rights, *see In re Adoption of a Minor Child*, 593 So. 2d 185, 189 (Fla. 1991) (finding that grandparents had a legal interest in maintaining a relationship with a minor child under the due process clause of the Florida Constitution after being given visitation rights by a New Jersey court); *but see Faust v. Messinger*, 345 Pa. Super. 155, 497 A.2d 1351, 1353 (Pa. Super. Ct. 1985) (concluding that statutory grandparent visitation rights do not constitute constitutionally protected liberty interests that implicate procedural clue process).

Although Angela and Randall petitioned for guardianship, they were not G.P.'s legal guardians and thus lacked an interest on that basis. The pending guardianship petition created a prospective interest in the adoption, but such a prospective interest is distinguishable from the present and extant rights and liabilities that this court in *Pickett*, and analogous federal authorities, have held to confer standing to nonparties challenging a judgment directly affecting them. Therefore, their interests were not directly affected by the adoption. Nor have Angela and Randall identified any statutory provision conferring standing to them as nonparty grandparents seeking to set aside the adoption, and we have found none. Finally, we conclude that the pending guardianship proceeding did not establish a constitutional interest implicating procedural due process rights because their interest remained prospective. Because Angela and Randall were not parties in G.P.'s adoption proceedings, do not have a legal interest that was directly affected by the adoption, and lack any other statutory or constitutional basis for standing, we conclude that the district court abused its discretion in setting aside G.P.'s adoption pursuant to NRCP 60(b).**1**

Divorce, Community Property, Presumptions

Draskovich v. Draskovich, 545 P.3d 96, 2024 Nev. LEXIS 13, 140 Nev. Adv. Rep. 17

In this divorce case, we consider whether a law firm, established by one spouse before the marriage and incorporated under a different name during the marriage, constitutes that spouse's separate property. We hold that the district court erred in determining that the law firm was entirely community property because the uncontested evidence demonstrated that, even after incorporation, it was a continuation of the spouse's original, separate property law practice, and thus, the presumption of community property does not properly apply.

Appellant/cross-respondent Robert Draskovich has been practicing criminal law since 1997. At the time he and respondent/cross-appellant Laurinda Draskovich married in 2012, he was a partner at Turco & Draskovich (T&D) with a 65% ownership stake in the firm. At T&D, Robert and the only other partner were paid separately for the work they each performed, and each partner maintained his own staff and clients, although they shared a bank account and paid taxes together. Laurinda brought no significant financial assets to the marriage and was a homemaker throughout the marriage.

In December 2018, T&D dissolved, and the next month, Robert incorporated the Draskovich Law Group (DLG) as his wholly owned corporation. Robert later offered uncontested testimony that DLG was "the very same practice" as his share of T&D. Robert kept the same office location, as well as his clients, staff, assets, and practices, after the incorporation and stated that he changed only the letterhead and the name stickers on the firm vehicles to match the name change of the firm. By the time Robert and Laurinda began divorce proceedings in 2022, DLG was worth approximately $1,210,000.

At trial, DLG was the primary asset in dispute. To analyze the value of DLG, Robert and Laurinda jointly retained a forensic accountant. The accountant determined the present value of DLG, but neither party asked her to determine the historic value of the practice. The accountant also noted during trial that she could not provide any valuation for a separate property share of DLG because neither party had engaged her to allocate the separate and community property interests.

After a two-day trial, the district court concluded that DLG was community property. The district court relied on the date of DLG's incorporation to find that DLG was acquired during the marriage and was thus presumptively community property under NRS 123.220. The district court then concluded that Robert had failed to overcome the community property presumption because he had not offered clear and convincing evidence regarding the value of any separate property interest in DLG. rendering the entire practice community property.

During oral argument before this court, Laurinda's attorney conceded that T&D was separate property with a community property component and that had the divorce occurred in 2018, it would have been Laurinda's burden to show a community property share of T&D. Robert's counsel conceded during oral argument that DLG almost certainly did contain some community property interest subject to at least some apportionment.

With limited exceptions, Nevada law provides that "[a]ll property, other than that stated in NRS 123.130, acquired after marriage by either spouse or both spouses, is community property . . . ." NRS 123.220. We have held that any property acquired during the marriage is presumptively community property, and the spouse claiming such property as their separate property must prove their interest by clear and convincing evidence. *Pryor v. Pryor*, 103 Nev. 148, 150, 734 P.2d 718, 719 (1987). This presumption and burden also apply to entities created during the marriage from mixed community and separate funds. *See Moberg v. First Nat'l Bank of Nev.*, 96 Nev. 235, 237, 607 P.2d 112, 114 (1980) (presuming property purchased during the marriage with funds of uncertain origin was community property). By contrast, any property a spouse brings into a marriage, along with the "rents, issues and profits thereof," is that spouse's separate property. NRS 123.130; *see Smith v. Smith*, 94 Nev. 249, 251, 578 P.2d 319, 320 (1978).

Caselaw from this court and from California, which this court often looks to for principles of community property, shows that the date of incorporation is not the decisive factor in determining a property's character. Rather, the court must look to the totality of the circumstances to determine whether a business is an asset acquired during the marriage and thus presumptively community property, or merely a continuation of a pre-marriage enterprise and thus separate property. *Schulman v. Schulman*, a case involving a husband who owned a wholesale meat processor as a sole proprietorship for approximately 40 years before his marriage, is illustrative. 92 Nev. 707, 709, 558 P.2d 525, 526 (1976). Four years after marrying and continuing to run his business as a sole proprietorship, the husband incorporated the business, received all shares of the newly incorporated business, and undertook operations expansions, but the essential nature and character of the business remained unchanged. *Id.* at 709, 558 P.2d at 526-27. We concluded apportionment between separate and community interests was necessary. *Id.* at 716-17, 558 P.2d at 530. In determining that the underlying business remained the husband's separate property, this court implicitly determined that the date of incorporation alone did not dictate the character of the property.

California has likewise declined to consider an act of incorporation as dispositive, opting instead to consider the essential character of the business in dispute. Take, for instance, *In re Marriage of Koester*, where a husband operated his business as a sole proprietorship before the marriage and incorporated the operation during the marriage. 73 Cal. App. 4th 1032, 87 Cal. Rptr. 2d 76, 79 (Ct. App. 1999). The court reasoned that the incorporation represented a mere change in "form or identity" and thus did not represent the acquisition of new property; all customers and accounts receivable were the same before and after the incorporation. *Id.* at 80. The court concluded that "[t]o say . . . that an asset was 'acquired' by the community . . . because some aspect of corporate formation took place during the marriage is to elevate semantics over substance." *Id.* at 81.

Here, in determining that DLG was community property, the district court relied exclusively on the fact that DLG was incorporated during the marriage. The district court deemed this single fact dispositive and characterized DLG as entirely community property by applying the community property presumption. That analysis was incorrect. We now expressly hold that

district courts must consider the totality of the circumstances when determining whether a business represents the continuation of a pre-marriage enterprise.

The parties do not contest the salient circumstances present in this case. Robert testified that he operated functionally the same business before and after the change from T&D to DLG. All his assets, staff, pay, and clients remained the same when he practiced at T&D and at DLG. Robert remained in the same office location. His testimony established that he only changed the letterhead on his papers and the name on the firm vehicles to match the new name. As in *Schulman* and *In re Marriage of Koester*, this is unrebutted evidence that DLG was a continuation of Robert's interest in T&D—a mere change in form or identity of his share in T&D—rather than a new property acquisition. DLG is thus his separate property under the totality of the circumstances, and the district court erred by instead relying on the date of incorporation alone to apply the community property presumption.

Here, Robert brought the business into the marriage, so it is his separate property, and any increase in its value over time is also presumed to be separate. *See Smith*, 94 Nev. at 251, 578 P.2d at 320. This means Laurinda bears the burden of showing by clear and convincing evidence that a portion of any increase to his practice's value over the course of the marriage belongs to the community. The community is entitled to that portion of the property "purchased with community funds or credit or acquired by . . . community toil or talent." *Kelly*, 86 Nev. at 310, 468 P.2d at 365. Laurinda can demonstrate this by showing that Robert's active work as an attorney at the firm during the period of the marriage increased the value of the firm in some way. *See Sly v. Sly*, 100 Nev. 236, 240, 679 P.2d 1260, 1263 (1984) (citing *Ormachea v. Ormachea*, 67 Nev. 273, 297, 217 P.2d 355, 467 (1950)) (noting that " [t]he labor and skills of a spouse belong to the community").

Courts must consider the totality of the circumstances when determining whether a disputed business interest represents a new acquisition or purchase subject to the community property presumption or merely the continuation of a spouse's preexisting enterprise and thus separate property, subject to a subsequent apportionment. Under the totality of the circumstances in this case, DLG's incorporation alone does not show that it was a newly acquired community property business, and the undisputed evidence makes clear that DLG is simply a continuation of Robert's pre-marriage legal practice. Thus, DLG is Robert's separate property, though on remand Laurinda may show by clear and convincing evidence that growth in the business during the marriage is attributable to community resources and apportionment is appropriate.

Guardianship, Emergency Guardianship for Children

B.S. v. Eighth Jud. Dist. Ct., 550 P.3d 835, 2024 Nev. LEXIS 33, 140 Nev. Adv. Rep. 46

Temporary court-ordered guardianships allow minors to obtain emergency care or protection pending a formal decision on a petition for general guardianship. In Nevada, such temporary guardianships may take either of two forms. NRS 159A.052 provides for temporary guardianships of minors who need immediate medical attention, while NRS 159A.053 provides for temporary guardianships of minors for other good cause. Although the district court here concluded that temporary guardianship over petitioner was not warranted under NRS 159A.052 because no medical emergency existed, the court failed to consider whether temporary guardianship was warranted under NRS 159A.053. In failing to consider an NRS 159A.053 temporary guardianship despite the proposed guardians' showing of good cause, the court manifestly abused its discretion, warranting our extraordinary intervention.

On March 8, 2024, real parties in interest Jeffrey and Nancy S. filed a petition in the district court seeking to be appointed guardians of B.S., their grandson; the petition included a request for temporary-guardianship.

The district court immediately issued a citation to appear and show cause, scheduling the hearing for May 28, 2024. Four days later, on March 12, without holding a hearing, the district court entered minutes denying the request for temporary guardianship, concluding simply that Jeffrey and Nancy had failed to show that a medical emergency existed under NRS 159A.052.**2**

B.S. subsequently filed this emergency petition for a writ of mandamus seeking to compel the district court to grant Jeffrey and Nancy temporary guardianship. In it, he asserts that the district court manifestly abused its discretion and acted arbitrarily and capriciously when it failed to even consider granting a temporary guardianship for good cause under NRS 159A.053, the general temporary guardianship statute, when Jennifer is presumptively unsuitable under NRS 159A.061(4)(a) and (b) and nonmedical emergency circumstances exist.

NRS 159A.052 and NRS 159A.053 provide for temporary guardianships over minors, which may issue when needed before the petition for general guardianship is decided. NRS 159A.052 governs temporary guardianships of minors who need immediate medical attention, while NRS 159A.053 governs temporary guardianships for other reasons.

General, nonmedical temporary guardianships may issue upon a finding of good cause, so long as the petitioner attempted to provide prefiling notice or was excused from so doing. NRS 159A.053(2). Here, Jeffrey and Nancy alleged that providing prefiling notice was not feasible under the circumstances, in accordance with subsection (2)(c), and thus that they were excused from providing notice at this stage in the proceedings. While the statute does not define good cause, NRS 159A.061(4)(a) and (b) presume a parent is unsuitable to care for their child if the parent is unable to provide for the child's basic needs or poses a significant risk to the child's physical or emotional safety, respectively. Jeffrey and Nancy's petition and supporting documentation demonstrated that both presumptions likely apply. Thus, Jeffrey and Nancy demonstrated, at least preliminarily, that Jennifer, B.S.'s custodial parent, is presumed

unsuitable and is currently unlocatable; B.S. has schooling and other special needs that cannot be met absent a guardianship; and they have been entrusted with much of his care since birth, including most recently by both Jennifer and child protective services agencies. These circumstances constitute good cause for temporary guardianship under NRS 159A.053, and the district court thus was required to issue the requested relief. Consequently, we conclude that mandamus relief is warranted to compel the district court to issue temporary guardianship of B.S. to Jeffrey and Nancy. *See* NRS 34.160; *Round Hill Gen. Imp. Bist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981).

Guardianship, Emergency Guardianship for Children

B.Y. v. Eighth Jud. Dist. Ct., 547 P.3d 666, 2024 Nev. LEXIS 25, 140 Nev. Adv. Rep. 32

The district court denied an ex parte petition brought by two minors for appointment of temporary guardians over them. A writ proceeding followed.

[T]emporary guardianships governed by NRS 159A.053 may issue upon a finding of good cause, so long as the petitioner attempted to provide prefiling notice or was excused from so doing. NRS 159A.053(2). Here, petitioners provided notice in accordance with subsection (2)(a). While the statute does not otherwise define good cause, NRS 159A.053(4) provides that "[i]f no parent of the proposed protected minor has had the care, custody and control of the minor for the 6 months immediately preceding the petition, temporary guardianship of the person of the minor is presumed to be in the best interest of the minor." **Similarly, NRS 159A.061(4)(c) presumes a parent is unsuitable to care for their children if the children have been out of the parent's care, custody, and control for the six months preceding the filing of a petition for guardianship.** Here, petitioners have been out of the care, custody, and control of their parents since March 2023, well over the six-month period after which the presumption applies. Thus, good cause for the temporary guardianship must be presumed.

In her answer, Judge . . . asserts that, since the NRS 159A.053(4) presumption is rebuttable, logic dictates that it cannot apply to a temporary guardianship issued ex parte before a hearing is held because the parents must have a chance to rebut it. While nothing in the statute indicates that the presumption is not rebuttable, *see* NRS 47.240 (noting that conclusive presumptions include only certain enumerated presumptions and a "presumption which, by statute, is expressly made conclusive," and no others); *Presumption, Black's Law Dictionary* (11th ed. 2019) (noting that, generally, "[a] presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption"), **we do not read the statute as limiting the presumption's application to extension decisions after a hearing. Rather, the presumption applies any time temporary guardianship is sought; the fact that it may not be rebutted until a hearing, at most ten days after an ex parte appointment, NRS 159A.053(8), does not render it inapplicable at the ex parte stage.** *See generally In re Amberley D.*, 2001 ME 87, 775 A.2d 1158, 1163 (Me. 2001) (concluding that the risk of erroneous deprivation of parental rights due to appointment of an emergency guardian without notice to parents is lessened when the guardianship is limited in duration and the parent can obtain a hearing on the matter thereafter, at which the guardian bears the burden to show continuation of the guardianship is in the child's best interest).

Child Custody, UCCJEA Presence Requirement

Kragen v. Eighth Jud. Dist. Ct., 2024 Nev. LEXIS 41, 140 Nev. Adv. Rep. 49

Petitioner Erika Kragen contends that the district court improperly assumed jurisdiction over child custody determinations concerning the minor children she shares with real party in interest Michael Kragen. Erika posits that Nevada is not the children's "home state" for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) because she physically removed the children from Nevada just four days short of the six-month residency period set forth in NRS 125A.085(1).

Erika and Michael were married in 2016 in San Diego, California, and have three minor children together, On August 4, 2022, they relocated from San Diego to Henderson, Nevada, where they lived with Michael's parents. They subsequently enrolled their children in a private school where Erika took a job as a teacher's aide.

On or about January 12, 2023, Erika indicated that she wanted a trial separation from Michael.

More than a week later, on January 21, Erika took the children to San Diego to visit her family for a week during a school break. They returned to Henderson on January 29. Two days later, on January 31, while Michael was still at work and unbeknownst to him, Erika again took the children and drove back to stay with her family in San Diego. Only after their departure did Erika notify Michael by text that they had left for San Diego, that he was "welcome to call or visit," and that they "need[ed] a divorce." Michael stayed behind in Nevada.

The parties agree that January 31 was the last day the children were physically present in Nevada. Nevertheless, for several weeks after their departure, the children remained enrolled in their Nevada school, and Erika was still employed by the school. Erika and Michael also began attending marriage counseling.

Towards the end of February, Erika stopped communicating with Michael and withdrew the children from their school. On February 26, after speaking with Erika over the phone, Michael realized their relationship was over. That same day, he filed a complaint for divorce in Clark County, Nevada. Two days later, on February 28, Erika petitioned for legal separation in San Diego County, California.**1**

Erika was served with Michael's Nevada complaint on March 9 and filed an answer. More than two weeks later, on March 28, Erika applied for an emergency domestic violence restraining order in California . . . . On April 4, while Erika's restraining order request was pending in California, the Nevada district court orally announced a temporary custody arrangement . . . [that] was reduced to writing on April 20. Meanwhile, on April 18, the California court granted Erika's request for the emergency domestic violence restraining order and also issued its own temporary custody order **2**

The Nevada district court then held a telephonic conference with the California court to address the competing temporary custody orders and discuss which state had jurisdiction over the parties' children. Both courts acknowledged that Nevada had jurisdiction over the parties' divorce and

the division of marital assets; they further recognized that the children had resided in Nevada for close to the six months necessary to establish Nevada's home state jurisdiction under the UCCJEA. The California court ultimately agreed to "defer" to the Nevada court's decision on the issue of child custody jurisdiction.

Following the telephonic conference, the Nevada district court entered an order finding that it had home state jurisdiction over the parties' children. . . . Erika petitioned this court for a writ of mandamus or prohibition, arguing that the district court abused its discretion . . . . Noting that the district court had "conflicting evidence of the parties' time in Nevada," this court granted Erika's petition and vacated the district court's order with instructions to hold an evidentiary hearing and to reconsider the jurisdictional issue.

Thereafter, the Nevada court held an evidentiary hearing to determine whether Nevada or California had home state jurisdiction. At the hearing, both parties agreed that the children arrived in Nevada on August 4. However, the parties disputed whether the children's absence from Nevada after January 31 was temporary or permanent.

Erika took the position that the children's state of residence changed on January 31, testifying that the reason she moved back to San Diego was "[b]ecause there was domestic violence." Erika further testified that she had not intended to return to Nevada but acknowledged that she and Michael began attending marriage counseling thereafter.

Michael testified that when Erika left with the children, he believed they were coming back to Nevada for several reasons. Specifically, the children were still enrolled in their Nevada school, and they had initially moved to Nevada to attend that school; Erika was still employed at their children's school as a teacher's aide; he and Erika began marriage counseling, causing him to "expect things to go back to normal"; and Erika did not lay down roots upon her arrival in San Diego. During closing argument, Michael asserted that until the end of February, he believed the children's absence from Nevada was temporary.

The district court entered an order finding that Nevada had home state jurisdiction over the parties' children.

The district court also found that Erika's decision to remove the children without notice or permission from Michael was "unjustifiable conduct" that was intended to defeat Nevada's home state jurisdiction. The court noted that the statutory definition of "home state" included "any temporary absence from the state" and that permitting Erika "to circumvent this definition ... by unilaterally departing that [s]tate with the children, while giving the expectation of return through participation in therapy and continued enrollment of the children in school would be grossly unfair." As such, the court effectively concluded that the children's time in San Diego from January 31 to February 26 constituted a temporary absence that did not interrupt their Nevada residency. Including this time period, the court determined that the children's residency exceeded the six consecutive months required to establish Nevada's home state jurisdiction under the UCCJEA. Erika then filed the instant petition for a writ of mandamus or prohibition challenging the district court's exercise of home state jurisdiction in this case.

Subject matter jurisdiction over child custody issues is governed by the UCCJEA. NRS 125A.305. The UCCJEA elevates the "home state" to principal importance in child custody determinations. *Id.; Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). "Home state" is defined as "[t]he state in which a child lived with a parent . . . for at least 6 consecutive months, *including any temporary absence from the state*, immediately before the commencement of a child custody proceeding." NRS 125A.085(1) (emphasis added). "Thus, the definition 'permits a period of temporary absence during the six-month time frame necessary to establish home-state residency.'" *Ogawa*, 125 Nev. at 668, 221 P.3d at 704 (quoting *Felty v. Felty*, 66 A.D.3d 64, 882 N.Y.S.2d 504, 508 (App. Div. 2009)). If Nevada either is the child's home state on the date that custody proceedings commence, or if Nevada was the child's home state within six months before the proceedings commenced and the child is absent from the state but a parent continues to live in Nevada, then Nevada courts have jurisdictional priority to make initial child custody determinations. NRS 125A.305(1)(a).

Neither the UCCJEA nor other Nevada statutes define "temporary absence," and there is no single uniform test or definition that all UCCJEA states apply when evaluating whether an absence is temporary for purposes of determining home state jurisdiction. However, in *Antonetti v. Westerhausen*, the Arizona Court of Appeals examined how other jurisdictions evaluate whether an absence is "temporary" and found that states generally use one of three tests: (1) the duration test, (2) the intent test, or (3) the totality of the circumstances test. 254 Ariz. 364, 523 P.3d 969, 973-74 (Ariz. Ct. App. 2023).

The last approach is **the totality of the circumstances test. "As the name indicates, the test looks at all the surrounding circumstances of a purported temporary absence, including intent of the parties and duration of the absence, to assess whether the absence should be treated as a temporary departure from a putative home state."** *In re Marriage of Schwartz & Battini*, 289 Ore. App. 332, 410 P.3d 319, 325 (Or. Ct. App. 2017). Other relevant considerations may include a parent's wrongful withholding of a child, *see Ogawa*, 125 Nev. at 668, 221 P.3d at 704; "under what circumstances the child came to and remained in the state;" *In re Marriage of Richardson & Richardson*, 255 Ill. App. 3d 1099, 625 N.E.2d 1122, 1124, 193 Ill. Dec. 1 (Ill. App. Ct. 1993); and when the nonmoving parent "had reason to recognize that the child's relocation was permanent," *Antonetti*, 523 P.3d at 975.

The totality of the circumstances test is the most commonly used approach among other jurisdictions that adopted the UCCJEA. *Antonetti*, 523 P.3d at 974. **Having considered the various approaches, we too adopt the totality of the circumstances test, which offers the greatest flexibility for the district courts to consider a wide array of relevant factors.** *See* NRS 125A.605; *see also Kemp v. Turqueza*, 542 P.3d 751, 2024 WL 396207, at *3 (Nev. 2024) (Order of Affirmance) (affirming the district court's application of the totality of the circumstances test to evaluate whether a child's absence from their home country was temporary).

In this case, although the district court did not expressly reference the "totality of the circumstances" test in its decision and order, the court nonetheless addressed the pertinent factors

to conclude that Nevada was the children's home state notwithstanding their temporary absence from January 31 to February 26.

First, the district court addressed the parties' intent. *See Antonetti*, 523 P.3d at 974. The court considered Erika's testimony that she left Nevada because of domestic violence, as well as Michael's testimony that he believed Erika would return with the children, and concluded that Michael was "more credible" than Erika when it came to the parties' intentions. Although a moving parent's relocation is generally not weighed against them when the move is to protect the parent or child from domestic violence, *see Felty*, 882 N.Y.S.2d at 509, the court expressly found that Erika did not remove the children from Nevada to protect them from domestic violence, but rather did so to defeat home state jurisdiction. The district court reasoned that Erika could have timely sought a protection order in Nevada if she feared for her safety; but instead, she waited until after Michael filed for divorce to apply for a restraining order in California.

The district court also noted that Erika did not inform Michael beforehand that she was taking their children to San Diego, nor did she obtain his permission to leave with the children. *See Ogawa*, 125 Nev. at 668-69, 221 P.3d at 704-05 (affirming the district court's decision that the time from one parent's wrongful withholding of the children to the point when the other parent filed an emergency motion for the children's return was a temporary absence). The court further took into account Erika's participation in therapy with Michael during the month of February, which gave rise to an expectation that she and the children would return to Nevada.

Next, the district court considered the duration of the children's absence from Nevada and the timing of their departure. *See Antonetti*, 523 P.3d at 974. In this regard, the court specifically recognized that, up to the point that Erika unilaterally removed the children, they had resided in Nevada for just four days less than six consecutive months. Thus, the timing of the children's removal further supported the district court's conclusion that Erika's intent in leaving was to defeat home state jurisdiction and not to escape domestic violence.**4**

Finally, the district court evaluated the reasons why the children came to and remained in Nevada, *see In re Marriage of Richardson*, 625 N.E.2d at 1124, crediting Michael's testimony that the children's private school in Nevada was superior to the one they attended in San Diego. The court acknowledged that until the end of February, the children were still enrolled in their Nevada school, and it found that the children's continued enrollment gave the expectation they would return to Nevada.

In this case, substantial evidence in the record supports the district court's finding that Nevada was the children's home state, notwithstanding the children's temporary absence from January 31 to February 26. . . . Therefore, the children effectively resided in Nevada from August 4, 2022, until February 26, 2023—a period of 206 days, or 6 months and 22 days. Because the children resided here for more than six consecutive months, Nevada was the children's home state on the day that proceedings commenced, and Nevada has jurisdiction over the child custody issues in this case.**5** NRS 125A.305(1)(a).

Child Abuse and Neglect (NRS 432B), Statutory Construction

Cardenas-Garcia v. Eighth Jud. Dist. Ct., 2024 Nev. LEXIS 42, 140 Nev. Adv. Rep. 52

When interpreting a statute, this court aims to effectuate the plain meaning of every word. The statute at issue, NRS 432B.555, requires parents in child protection proceedings who have "ever been convicted" of felony child abuse, neglect, or endangerment to prove by clear and convincing evidence that the child subject to the proceedings will not be harmed by reunification before the child can be released to the parent. Petitioner Yumila Cardenas-Garcia pleaded guilty to felony child abuse but was later allowed to withdraw that plea after the successful completion of probation. Cardenas-Garcia now seeks extraordinary writ relief directing the district court, to find that NRS 432B.555's presumption against reunification does not apply to her since her felony conviction has been voided.

Real party in interest, six-year-old Z.K., was removed from Cardenas-Garcia's custody when conditions in her home were determined to be unlivable. Z.K. was placed in protective custody, and Cardenas-Garcia was charged with felony child abuse, neglect, or endangerment under NRS 200.508. Cardenas-Garcia pleaded no contest at the original custody hearing, and Z.K. remained in protective custody. As to the separate criminal case, Cardenas-Garcia pleaded guilty to the felony as part of a drop-down plea agreement.**1** A judgment of conviction was entered. Still, the terms of this drop-down agreement allowed Cardenas-Garcia to withdraw the felony guilty plea after successful completion of the terms of her probation and instead enter a plea of guilty to contributing to the delinquency of a minor, a misdemeanor.

[After] Cardenas-Garcia successfully completed probation and was allowed to withdraw the felony guilty plea. With the felony conviction now vacated, Cardenas-Garcia again moved the district court for a determination regarding the continuing application of NRS 432B.555. The court noted that because of the withdrawn plea, "mother does not have a conviction[;] however, at the 555 presumption hearing[,] mother did not overcome the presumption."

At issue is NRS 432B.555, which states, in relevant part, that in matters of child custody,

if the court determines that a custodial parent or guardian of a child has ever been convicted of a violation of NRS 200.508 [felony child abuse, neglect, or endangerment] or the law of another jurisdiction that prohibits the same or similar conduct, the court shall not release the child ... to that custodial parent or guardian unless the court finds by clear and convincing evidence presented at the proceeding that no physical or psychological harm to the child will result from the release of the child to that parent or guardian.

The plain text of NRS 432B.555, specifically the Legislature's use of the word "ever," persuades us that NRS 432B.555 does not provide an exception for parents who have had their convictions voided for certain legal purposes.

"Ever" means "always," "at any time," "in any way." *Ever, Merriam-Webster's Collegiate Dictionary* (11th ed. 2011). Cardenas-Garcia cannot dispute the clear fact that at one point, the

court entered a judgment of conviction on the underlying felony. Giving effect to the term "ever" in the statute, Cardenas-Garcia's previous conviction is all NRS 432B.555 requires.

Likewise, we do not construe our precedent regarding withdrawn pleas to require this court to ignore the judgment of conviction entered prior to the withdrawn plea where the Legislature unambiguously intended all possible convictions be considered by including the word "ever" in the statute. In *In re Tiffee*, this court noted that after a guilty plea is withdrawn, the conviction based upon the withdrawn plea "no longer exist[s]." 137 Nev. 224, 226, 485 P.3d 1249, 1252 (2021). Nonetheless, NRS 432B.555's use of the word "ever" unambiguously directs courts to look backwards and beyond the legal fiction of a withdrawn guilty plea.

NRS 432B.555 imposes a higher burden of proof on reunification for parents who have "ever" been convicted of felony child abuse, neglect, or endangerment. A voided conviction does not alter the fact that Cardenas-Garcia was at one point convicted of the underlying offense, so we give effect to the Legislature's use of "ever" in the statute, confirming the NRS 432B.555 presumption unambiguously applies here.

BELL, J., dissenting:

Until today, this court has never considered a judgment based on a withdrawn plea to have any legal effect and, in fact, has consistently held the opposite. The majority relies exclusively on the legislature's use of the word "ever" in NRS 432B.555 to contradict this court's clear precedent. Yet, by exercise of law, Cardenas-Garcia never had a conviction for felony child abuse, neglect, or endangerment, and the statute cannot apply. For this reason, I dissent.

Nevada caselaw has consistently held the withdrawal of a guilty plea voids the underlying judgment as if the plea never existed. In *Standen v. State*, a criminal defendant pleaded guilty to murder. 99 Nev. 76, 77, 657 P.2d 1159, 1159 (1983). This court vacated the judgment and set aside the guilty plea. *Id.* at 80, 657 P.2d at 1162. At trial on remand, the jury was allowed to hear evidence that the defendant had previously pleaded guilty. *Standen v. State*, 101 Nev. 725, 727, 710 P.2d 718, 719 (1985). This court, reversing the subsequent judgment, held "[a] prior guilty plea that has been legally withdrawn or judicially invalidated is deemed never to have existed." *Id.* at 728, 710 P.2d at 720.

The majority contravenes our precedent on withdrawn pleas to hold Cardenas-Garcia's voided judgment is not, in fact, void, seemingly because it is convinced, in the context of child welfare, that protectionary interests weigh out. Yet consistent application of our caselaw does not entitle Cardenas-Garcia to custody, nor prevent the Department of Family Services from raising the underlying substantive protectionary concerns as a compelling reason reunification is not appropriate; it merely removes a single barrier to reunification. *See* NRS 432B.530(5); NRS 432B.550; NRS 432B.590. The district court remains free to prevent reunification on the basis of Z.K.'s best interests.

Finally, I note concern with the majority's contention that the fact a parent can rebut the application of NRS 432B.555 prevents its harm. While Cardenas-Garcia did not cogently argue a constitutional violation, the possibility of rebutting a presumption unfairly imposed does not

appropriately preserve the parental interest, especially when the statute at issue concerns a parent's fundamental right to the care, custody, and management of their child. *See Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

Divorce, Access to Proceedings

Falconi v. Eighth Jud. Dist. Ct., 543 P.3d 92, 2024 Nev. LEXIS 6, 140 Nev. Adv. Rep. 8, 2024 WL 636534

In June 2022, the Eighth Judicial District Court amended its local rules EDCR 5.207 and EDCR 5.212, partially based on NRS 125.080. Under this statute and the newly amended local rules, a child custody matter is automatically closed and a family court proceeding must be closed upon the request of a party. In practice, this means that a party has the right to prohibit the public's access to court proceedings without a judicial determination having been made that closure is necessary and appropriate. However, the public has a constitutional right of access to court proceedings. Because the local rules and the statute require the district court to close the proceeding, they eliminate the process by which a judge should evaluate and analyze the factors that should be considered in closure decisions, and by bypassing the exercise of judicial discretion, the closure cannot be narrowly tailored to serve a compelling interest. Thus, **these local rules and NRS 125.080 violate the constitutional right of access to court proceedings. Accordingly, we hold that EDCR 5.207, EDCR 5.212, and NRS 125.080 are unconstitutional to the extent they permit closed family court proceedings2 without the exercise of judicial discretion.**

Divorce, Community Property, Tracing, Presumptions

Harris-Bey v. Harris-Bey, 2024 Nev. App. Unpub. LEXIS 433, 2024 WL 4010243

Cherelyn Harris-Bey appeals from a district court decree of divorce.

Having previously been married and divorced, Cherelyn and respondent Timothy Harris-Bey were remarried in December 2019. In June 2021, Cherelyn commenced the underlying divorce proceeding against Timothy, and the disputes that subsequently arose between the parties focused on how their separate and community property should be distributed and whether Cherelyn was entitled to alimony. Following a trial, the district court entered a decree of divorce in May 2023. The divorce decree awarded Timothy the parties' marital residence, provided for each party to receive any bank accounts in his or her name, and required Timothy to pay Cherelyn $350 per month in alimony for six months. This appeal followed.

On appeal, Cherelyn challenges the divorce decree's distribution of the parties' separate and community property and its alimony award. Moreover, Cherelyn contends that the district court was biased against her, such that this case should be reassigned on remand. We address each issue in turn.

Property distribution

In challenging the divorce decree's distribution of the parties' separate and community property, Cherelyn first contends that the district court improperly awarded Timothy the parties' marital residence because such relief did not conform to his answer and counterclaim. "Pleadings should be such that findings thereon will support a final judgment in the affirmative or negative." *Edmonds v. Perry*, 62 Nev. 41, 67, 140 P.2d 566, 578 (1943). When considering whether the relief granted by the district court was conformable to the case presented by the parties, "we must look to the issues joined by the pleadings, and not to the allegations of the complaint alone." *Buaas v. Buaas*, 62 Nev. 232, 234, 147 P.2d 495, 496 (1944). **A plaintiff who relies on only a general prayer for relief in his or her complaint "will be entitled to such relief as is conformable to the case established by him [or her]," which is relief that "follows legitimately and logically from the pleadings and the proof' and that is not "of such a character as to take the defendant by surprise."** *Id.* at 235, 147 P.2d at 496 (internal quotation marks omitted).

In attempting to demonstrate that the award of the marital residence to Timothy did not conform to the pleadings, Cherelyn relies on paragraph 4 of his counterclaim, wherein he specified that the district court should distribute the parties' community property by awarding Cherelyn the marital residence and a motor vehicle and awarding him four firearms with their respective ammunition. However, the question of how the parties' community property should be distributed remained in controversy following the pleading stage because, in her reply, Cherelyn denied paragraph 4 of Timothy's counterclaim in its entirety along with paragraph 5, which specified how Timothy believed the parties' community debts should be divided as part of his proposed property distribution. *See id.* at 234, 147 P.2d at 496, Moreover, at a hearing

approximately one year before the trial in this case, Timothy indicated that he was no longer willing to surrender the marital residence to Cherelyn, such that he effectively abandoned the proposed property distribution in his counterclaim.

As a result, insofar as this case concerned the distribution of separate and community property, it proceeded based on Cherelyn's complaint and Timothy's answer. In her complaint, Cherelyn alleged that the parties had separate and community property that needed to be distributed, but rather than specifying how she believed the property should be distributed and asserting a corresponding special prayer for relief, she relied on a general prayer for relief. In his answer, Timothy agreed that the parties had separate and community property that needed to be distributed and likewise relied on a general prayer for relief. Taking these pleadings together, we conclude that their assertion of the existence of separate and community property to be divided and general prayers for relief were sufficient to empower the district court to distribute the parties' separate and community property in accordance with theii' respective interests. *Id.* at 234-35, 147 P.2d at 496. (concluding that the district court was authorized to determine the parties' property rights under a general prayer for relief). With this in mind, we now turn to Cherelyn's specific arguments concerning how she believes the district court should have distributed certain of the parties' community property.

At trial, Timothy's undisputed testimony was that he paid the mortgage on the marital residence during the parties' second marriage with his earnings from employment. Because no evidence was introduced of an agreement between the parties or court order providing for those earnings to be treated as separate property, the presumption that they were community property applied. *See Pryor*, 103 Nev. at 150, 734 P.2d at 719. Since community funds were used to make payments on separate property, "the community is entitled to a *pro rata* ownership share in [the] property," which must be divided as community property. *See Malmquist*, 106 Nev. at 238, 792 P.2d at 376 (citing *Robison v. Robison*, 100 Nev. 668, 670, 691 P.2d 451, 454 (1984)). **But the district court did not apply the formula set forth in *Malmquist*, 106 Nev. at 238-44, 792 P.2d at 376-81, to determine the community's ownership share in the marital residence, or otherwise make adequate findings to support an unequal distribution of the parties' community property . . . .2 Instead, the district court indicated that it awarded the marital residence to Timothy based on "the time and status in which [it] was purchased [and] the short term nature of the parties' marriage." But neither of these circumstances negates the fact that community funds were used to pay down the mortgage on the marital residence during the marriage, such that the community was entitled to an ownership interest. *See Malmquist*, 106 Nev. at 238, 792 P.2d at 376.** Thus, because the district court failed to apply the proper legal framework to determine and allocate the community's interest in the marital residence, we reverse the portion of the divorce decree awarding Timothy the marital residence and remand for the district court to determine the parties' respective interests in the property.

Turning to Cherelyn's remaining challenge to the divorce decree's property distribution, she maintains that the district court abused its discretion by failing to equally divide a Navy Federal Credit Union (NFCU) bank account in Timothy's name because it contained community

property. Timothy's undisputed testimony at trial demonstrated that his earnings from employment and Cherelyn's unemployment benefits were deposited into the NFCU bank account during the parties' second marriage.**4** Because no evidence was introduced at trial of an agreement or court order providing for those funds to be treated as separate property, they were community property. *See* NRS 123.220; *Pryor*, 103 Nev. at 150, 734 P.2d at 719. **Although it is unclear whether the NFCU account also contained Timothy's separate property funds at some time, a presumption arose once Timothy deposited community property funds into the NFCU account that all the funds in that account were community property, and Timothy offered no evidence or testimony at trial to rebut the presumption.** *See Malmquist*, 106 Nev. at 245, 792 P.2d at 381 ("Once an owner of separate property funds commingles these funds with community funds, the owner assumes the burden of rebutting the presumption that all the funds in the account are community property."). Because the district court nevertheless awarded the NFCU account in its entirety to Timothy without identifying any compelling reason for an unequal distribution of community property, we conclude it abused its discretion in so doing.

Child Support, Imputation of Income

Favela v. Jimenez, 2024 Nev. App. Unpub. LEXIS 410, 2024 WL 3872803

Jose Enrique Valles Favela appeals from a decree of divorce and award of attorney fees in a family law matter.

Next, Jose argues that the district court abused its discretion by imputing income to him for the purpose of determining child support.**3** He asserts that the court failed to make specific findings regarding his employment barriers (his status as an undocumented immigrant and his inability to work due to not having a social security number), there was no evidence to show he was offered other employment which demonstrates that his underemployment was not willful, and the imputed income was based on his 2007 income without regard to his more recent earnings. Jose contends that his child support payment should have been calculated based on a monthly income of $2,080, which is the amount he reported on his most recent FDF.

This court reviews child support orders for an abuse of discretion. *Edgington v. Edgington*, 119 Nev. 577, 588, 80 P.3d 1282, 1290 (2003). We will not disturb the factual findings underlying a child support order if they are supported by substantial evidence, *Miller v. Miller*, 134 Nev. 120, 125, 412 P.3d 1081, 1085 (2018), "which is evidence that a reasonable person may accept as adequate to sustain a judgment," *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007). This court "leave[s] witness credibility determinations to the district court and will not reweigh credibility on appeal." *Id.* at 152, 161 P.3d at 244. District courts are authorized to impute income to an obligor if the court determines the obligor is underemployed or unemployed without good cause. NAC 425.125(1); *Rosenbaum v. Rosenbaum*, 86 Nev. 550, 554, 471 P.2d 254, 256-57 (1970) (holding that a district court may impute income to a party that "purposefully earns less than his reasonable capabilities permit").

Here, **the district court imputed a monthly income of $8,600 to Jose** after determining that he was willfully underemployed. Contrary to Jose's contentions, the divorce decree demonstrates that the district court considered his specific circumstances when it imputed income to him as required by NAC 425.125(2). The court noted that NAC 425.125(2) was applicable and set forth findings relevant to those factors. Specifically, **the court discussed Jose's ability to pay the parties' $3,600 mortgage and other monthly expenses; his gifting of cars to other family members; his substantial assets, which included the martial residence; his earning history; his job skills as a tax preparer; his young age; and his good health.** The court found that Jose submitted FDFs showing he was unemployed in 2020 and earned $2,080 as a laborer in 2022, but that his FDFs were not credible, and he failed to submit paystubs in violation of EDCR 5.507. **The court further found that Jose's income "suddenly dropped" when he filed for divorce, despite his earning history of $13,500 per month, as he reported on his mortgage application, and the substantial income he earned as a tax preparer.** Based on this evidence, the court determined that Jose was willfully underemployed and had an earning capacity greater than what he was purporting to earn during the pendency of the divorce proceedings.

In reaching this conclusion, **the court also found that the parties' substantial assets and the income Jose earned to afford their lifestyle demonstrated that he could earn more than the $12 per hour he claimed to be earning and that he was "actively deceiving the court about his income and earning capacity for purposes of a divorce."** The court then calculated Jose's child support payment for the parties' four minor children at $2,044 in conformance with NAC 425.140 based on his imputed income.

Although the district court did not specifically mention Jose's undocumented status or his lack of a social security number with respect to imputing income, the parties testified extensively as to these facts and the decree acknowledges these circumstances elsewhere hen discussing the division of property and the tax businesses where Jose earned his income.

Additionally, while Jose testified that he as not able to earn as much as he once earned, the district court explicitly found that Jose's testimony and FDFs were not credible. This court will not second guess a district court's resolution of factual issues involving conflicting evidence *Primm. v. Lopes*, 109 Nev. 502, 506-07, 853 P.2d 103, 106 (1993), or reconsider a lower court's credibility determination, *Ellis*, 123 Nev. at 152, 161 P.3d at 244. Thus, to the extent that Jose challenges the decision to impute income to him on these grounds, his arguments do not provide a basis for relief. **Under the facts of this case, a reasonable mind could accept that there was sufficient evidence presented to support the court's findings regarding Jose's income and its decision to impute income to him.** *Id.* at 149, 161 P.3d at 242 (providing that substantial evidence is evidence that a reasonable person would accept to sustain a judgment). Thus, we conclude that the child support award was supported by substantial evidence. *See Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004) (providing that district court determinations that are supported by substantial evidence will not be disturbed on appeal).

Child Custody Action, Sealing Records

Our Nev. Judges, Inc. v. Eighth Jud. Dist. Ct., 2024 Nev. Unpub. LEXIS 726

This original petition for a writ of mandamus challenges an order denying a limited motion to unseal the court records in a child custody action.

In the underlying child custody proceeding, petitioner Our Nevada Judges, Inc. filed a media request for camera access, which was opposed by real party in interest Troy A. Minter. Thereafter, the district court entered an order sealing the record in the case pursuant to NRS 125.110(2). That statute permits the sealing of the record in divorce actions upon a party's request. The court then denied the media request. Our Nevada Judges filed a petition for a writ of mandamus with this court challenging the denial of the media request.

Our Nevada Judges then filed a limited motion to unseal the docket index in the underlying matter. No party opposed the motion. Nevertheless, the district court denied the motion concluding that the Supreme Court Rules Governing Sealing and Redacting Court Records (SRCR) do not apply because either NRS Chapter 125 (dissolution of marriage) or 126 (parentage) applies. Our Nevada Judges then filed this petition challenging the district court's order. In its answer to the petition, the district court asserted that the matter was presumptively closed as a parentage action.

While limited supporting documents were filed in both this petition and the *Falconi* petition, **it appears this matter is a child custody action, arising under NRS Chapter 125C where the Supreme Court rules on sealing would apply.** It thus is concerning that the district court sealed the record under NRS 125.110(2), when the matter is not a divorce action. And then in its answer to this writ petition, the district court asserts that the matter is a parentage action, governed by NRS Chapter 126.**2** Further, the district court order sealing the record did not include specific written findings as required by SRCR 3(4) that support a conclusion that a compelling privacy or safety interest outweighs the public interest in access to the court record. Additionally, "[u]nder no circumstances shall the court seal an entire court file." SRCR 3(5)(c). Thus, because the district court erroneously determined that the SRCR do not apply to this matter and because it sealed the entire underlying file in violation of SRCR 3(5)(c), we conclude that the district court acted arbitrarily and capriciously in denying Our Nevada Judges' unopposed, limited motion to unseal the docket index. Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to grant Our Nevada Judges' March 4, 2024, Limited Motion to Unseal.

Child Custody, Medical Decisions, Factors

Brooke Westlake Kelley v. Kelley, 535 P.3d 1147, 2023 Nev. LEXIS 38, 139 Nev. Adv. Rep. 39

By the Court, STIGLICH, C.J.:

The best-interest-of-the-child standard is ubiquitous in child custody matters, and the Legislature and this court often guide such analysis by providing factors for district courts to weigh in making best-interest determinations. We now hold 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. Because district courts lack guidance on how to apply the best-interest-of-the-child standard in this context, we adopt nonexhaustive factors for district courts to consider in making such determinations: (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, divorced parents with joint legal custody disagreed on whether their 11-year-old child should be vaccinated against COVID-19. The district court found that vaccination was in the child's best interest based on the child's pediatrician's recommendation and government and professional groups' guidelines and research results. Although the district court did not have the benefit of express factors to weigh, we conclude the district court did not abuse its discretion in fin ding vaccination in the child's best interest because consideration of the other factors would not change the result in this case. Accordingly, we affirm.

Brooke argues that the district court abused its discretion in applying the best-interest-of-the-child standard. She points out that the district court did not analyze the best-interest factors laid out in NRS 125C.0035(4). She also contends that the district court erred in simply accepting the pediatrician's recommendation as in G.W.-K.'s best interest.

When a district court applies the best-interest-of-the-child standard, this court reviews its determination for an abuse of discretion. *Mack v. Ashlock*, 112 Nev. 1062, 1065, 921 P.2d 1258, 1261 (1996); *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). NRS 125C.0035(4) provides factors that a court must consider in determining a child's best interest in an action to decide *physical* custody. *Monahan v. Hogan*, 138 Nev. 58, 62, 507 P.3d 588, 592 (Ct. App. 2022). It does not necessarily control other types of best-interest-of-the-child analyses. *id*. at 62-63, 507 P.3d at 592 (recognizing that additional factors may be Salient in determining whether relocation serves a child's best interest). This court has provided best-interest guidance in different instances. For example, this court adopted factors tailored to education for the district court to consider in determining what school a child should attend, without reference to the NRS 125C.0035(4) factors. *Arcella*, 133 Nev. at 872-73, 407 P.3d at 346-47. And the court has adopted a different list of considerations in a dispute regarding naming a child. *Petit v.* Adrianzen, 133 Nev. 91, 94-95, 392 P.3d 630. 633 (2017).

Here, the district court did not make any decisions regarding joint physical custody, and thus the court did not need to weigh the NRS 125C.0035(4) factors. Indeed, the NRS 125C.0035(4) factors appear largely irrelevant in deciding whether vaccination is in a child's best interest. *See, e.g.*, NRS 125C.0035(4)(d) ("the level of conflict between the parents") & (4)(j) ("[a]ny history of parental abuse or neglect of the child"). In light of the foregoing, the district court was not bound to apply the NRS 125C.0035(4) factors in determining whether vaccination against COVID-19 was in G.W.-K.'s best interest.

Given that the NRS 125C.0035(4) factors do not apply, we acknowledge that district courts lack guidance on how to apply the best-interest-of-the-child standard in the context of a dispute between parents with joint, legal custody regarding medical decisions concerning a minor child. Although not exactly on point, we find instructive the factors enumerated in *In re Eric B.*, 189 Cal. App. 3d 996, 235 Cal. Rptr. 22 (Ct. App. 1987), and we adopt them as nonexhaustive factors for district courts to weigh in making best-interest-of-the-child determinations in this context. In *Eric B.*, the California Court of Appeal considered whether a juvenile court abused its discretion by ordering that a minor child retain "dependent child" status for purposes of obtaining cancer treatment over his parents' objections. 235 Cal. Rptr. at 23-24: **In reviewing whether medical treatment would serve the child's best interest, the Court of Appeal rioted several factors for consideration: (1) "the seriousness of the harm the child is suffering or the substantial likelihood that he will suffer serious harm," (2) "the evaluation for the treatment by the medical profession," (3) "the risks involved in medically treating the child," and (4) the "expressed preferences of the child."** *Id.* at 27 (internal quotation marks omitted). Because these factors are useful in evaluating the best-interest-of-the-child standard in the context of a dispute between parents with joint legal custody concerning the medical treatment of a minor child, **we adopt them with two modifications. In order to facilitate individualized determinations, we direct courts to consider the evaluation or recommendation by a medical professional—rather than the evaluation by the medical profession in general. And we clarify that a district court need only consider the child's express preferences if the district court finds that the child is of a sufficient age and capacity to form an intelligent preference.** We stress that district courts have discretion as to how much weight to give each factor and that **these factors are nonexhaustive**, meaning district courts should consider any information that is relevant under the circumstances. *Cf. Arcella*, 133 Nev. at 873, 407 P.3d at 346-47 (emphasizing that the factors are "illustrative rather than exhaustive").

Here, the district court "accepted" the pediatrician's recommendation to vaccinate G.W.-K. against COVID-19 as in his best interest. In terms of the framework we now adopt, the court determined that the recommendation-by-a-medical-professional factor favored vaccination. The district court also took judicial notice of the CDC and AAP guidelines and the research from those organizations regarding the safety of the vaccines and thus considered both the risks involved in the medical treatment and the likelihood that G.W.-K. would suffer serious harm. While Brooke speculated that the COVID-19 vaccine could negatively affect G.W.-K.'s behavior and fertility, this contention was not supported by any evidence at the hearing, and Brooke has not otherwise shown a risk of serious harm. And the district court found that international travel,

which vaccination would facilitate, was in G.W.-K.'s best interest. Although the district court did not have the benefit of express factors to weigh, the court considered similar matters in reaching its decision, and substantial evidence supports its findings. *See Rico v. Rodriguez*, 121 Nev. 695, 702, 120 P.3d 812, 817 (2005) (reviewing a child's best-interest determination for support by substantial evidence in a custody matter). The district court did not specifically address G.W.-K.'s wishes or his capacity to reach an informed decision, and we accordingly do not consider that factor to weigh in either direction.**4** Other than expressing her personal preference against vaccination, Brooke did not provide evidence that vaccination against COVID-19 was not in G.W.-K.'S best interest. Brooke's preference not to vaccinate G.W.-K. in and of itself does not outweigh Scott's preference to vaccinate G.W.-K., and vice versa, Scott's preference in and of itself does not outweigh Brooke's preference. Given that the district court's best-interest finding accords with the factors we adopt here, we affirm. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (holding that we will affirm the district court if it reaches the correct result, even if for the wrong reason).

Grandparent Visitation

White v. Jones, 2024 Nev. App. Unpub. LEXIS 22, 542 P.3d 19

Kimberly White appeals from a district court order regarding grandparent visitation.

Kimberly is the paternal grandmother of her son Christopher Judson's three minor children with respondent Tamika Beatrice Jones. In the proceedings below, Tamika filed a complaint for custody of the children against Christopher in 2019, and they subsequently stipulated to sharing joint legal and physical custody. The following year Kimberly intervened, without objection from Tamika or Christopher, seeking sole legal and primary physical custody or, in the alternative, third party visitation. **Kimberly was awarded temporary grandparent visitation, but the relationship between Kimberly and Tamika worsened and eventually Tamika stopped allowing Kimberly to see the children and relocated with them to Michigan.**

The parties thereafter litigated the issue of visitation, and there were changes to custody and visitation over a period of time that need not be recounted in detail.

In February 2023, the district court held an evidentiary hearing on Kimberly's request for grandparent visitation. Both Kimberly and Tamika testified. Neither party introduced exhibits. Following the evidentiary hearing, the district court entered a written order awarding Kimberly grandparent visitation on Labor Day and Memorial Day weekends, which was to occur in Michigan, and weekly telephonic communication with additional calls on birthdays and certain holidays. It found Tamika and Christopher did not want Kimberly to have visitation with the children and that there was a presumption against awarding grandparent visitation but, after evaluating the NRS 125C.050(6) statutory factors, the district court concluded that it was in the children's best interest to maintain a relationship with Kimberly.

On appeal, Kimberly challenges the district court's order, apparently seeking additional grandparent visitation, and raises numerous issues with the evidentiary hearing.

Grandparents or other persons who have resided with a child and established a meaningful relationship may petition the court for reasonable visitation under delineated circumstances not challenged here. NRS 125C.050(1)-(3). However, if a parent has denied visitation with the child, there is a rebuttable presumption that granting visitation to the petitioner is not in the child's best interest. NRS 125C.050(4). And to rebut this presumption, the petitioner must demonstrate by clear and convincing evidence that it is in the best interests of the child to grant visitation. *Id.* When determining whether the petitioner has rebutted the presumption, the district court shall consider the factors enumerated in NRS 125C.050(6).

Here, **although Kimberly was awarded grandparent visitation, she takes issue with the reduction in time from the prior temporary visitation orders**. While her visitation was reduced from prior temporary orders, **Kimberly has not provided any cogent argument to demonstrate that the reduction was an abuse of discretion**.

Child Custody, Competing Policies Between Best Interests and Evidentiary Rules

Sullivan v. Sullivan, 2024 Nev. App. Unpub. LEXIS 279, 549 P.3d 1204, 2024 WL 2873560

Tiffany argues that the district court abused its discretion when it excluded Dr. Holland as a witness, and ordered that her expert report was inadmissible. To that end, she argues that James' participation in the child interview process, as well as his words and conduct accepting Dr. Holland's witness status both prior to and on the evidentiary hearing's first day, estopped him from raising the untimely disclosure objection he lodged moments before Dr. Holland was set to testify. Tiffany also argues that, by excluding Dr. Holland's testimony and report, the court failed in its obligation to act in G.S.'s best interest.

The Nevada Supreme Court has recognized that, "[i]f a party has constructive or actual knowledge of potentially disqualifying circumstances, but fails to object within a reasonable amount of time, then the objection is waived." *Venetian Casino Resort, LLC v. Eighth Jud. Dist. Ct.*, 118 Nev. 124, 130, 41 P.3d 327, 331 (2002). This holding reflects a long-settled principle of Nevada law that objecting "too late" waives the objection. *Iowa Mining Co. v. Bonanza Mining Co.*, 16 Nev. 64, 67, 70-71 (1881) (concluding that a defendant waived his ability to object to improper service after he affirmatively expressed a willingness to litigate the case on the merits and raised his objection mere days before trial); *see also Wagon Wheel Saloon & Gambling Hall, Inc. v. Mavrogan*, 78 Nev. 126, 129, 369 P.2d 688, 690 (1962) (concluding that an otherwise timely objection to an officer's testimony was untimely where "[t]he same evidence had previously been received without objection").

The equitable doctrine of laches reflects this principle and may be invoked when one party's delay prejudices the other party, "such that granting relief to the delaying party would be inequitable." *Besnilian v. Wilkinson*, 117 Nev. 519, 522, 25 P.3d 187, 189 (2001). Notably, laches is "more than a mere delay"; to invoke laches, the party must show that the delay caused actual prejudice. *Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1044 (1997). To that end, the party asserting laches must demonstrate that they have "become so changed" that they cannot be restored to their former state, and the doctrine's applicability depends on each case's particular facts. *Id.* (quoting *Home Savings v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989)). To determine whether a challenge is barred by the doctrine of laches, this court considers "(1) whether the party inexcusably delayed bringing the challenge, (2) whether the party's inexcusable delay constitutes acquiescence to the condition the party is challenging, and (3) whether the inexcusable delay was prejudicial to others." *Miller v. Burk*, 124 Nev. 579, 598, 188 P.3d 1112, 1125 (2008).

Here, we conclude that James waived his ability to raise an objection to Dr. Holland's testimony because his objection was unjustifiably delayed and barred by the doctrine of laches. Namely, James' delay in raising his objection (1) was inexcusable, (2) indicated acquiescence to Dr. Holland's testimony and report, and (3) was prejudicial to both Tiffany and G.S.

Specifically, James had knowledge of the "potentially disqualifying circumstance" of Tiffany's untimely witness disclosure a month in advance of the evidentiary hearing. Yet, he did not file a

motion in limine seeking to either prevent Dr. Holland's testimony or preclude her report's admission. On the evidentiary hearing's first day, instead of lodging his untimely disclosure objection, or referencing the objection he allegedly made upon service, James agreed that Tiffany could pause her cross examination of him specifically so Dr. Holland could testify out of order the following morning and authenticate her expert report. Such conduct conveyed acquiescence that Dr. Holland's report would be admitted as evidence and used in his cross examination. As to prejudice, Tiffany argued that, upon information and belief, Dr. Holland's testimony would have been critical of both James' language in the recording and his choice to record the conversation itself. This testimony would have been relevant to the district court's best interest analysis, particularly because the court based its factor (h) findings about the nature of the parental relationships on G.S.'s statements in the recorded conversation.

Independent from estoppel, we take this opportunity to consider Nevada public policy, which favors the admission of all evidence tending to support the district court's best-interest analysis.

For instance, the Nevada Supreme Court has held that protecting the interests of a nonlitigant child takes precedence over enforcing procedural rules, or even the law itself. *Abid v. Abid*, 133 Nev. 770, 772, 774 406 P.3d 476, 478, 479 (2017). In *Abid*, the court affirmed the district court's decision to permit an expert to consider an illegally obtained recorded conversation because it was "the type of evidence a psychologist would consider in forming an opinion as to the child's welfare." *Id.* at 772-73, 406 P.3d at 478-79. To that end, the court reasoned that "NRS 200.650's prohibition against 'disclos[ing]' the contents of illegal recordings cannot reasonably be read to prohibit a court-appointed expert from considering such evidence in a child custody case, wherein the [c]hild's best interest is paramount.'" *Id.* at 773, 406 P.3d at 479 (quoting *Bluestein v. Bluestein*, 131 Nev. 106, 111, 345 P.3d 1044, 1048 (2015)). To hold otherwise, the court surmised, would amount to "sanctioning the child for the alleged crime of [their] parent." *Id.* at 774, 406 P.3d at 479. In terms of balancing competing policy justifications, the court concluded by noting that "the potential deterrent effect of ignoring [the illegally obtained] evidence is outweighed by the State's 'overwhelming interest in promoting and protecting the best interests of its children.'" *Id.* at 774, 406 P.3d at 479-80 (quoting *Rogers v. Williams*, 633 A.2d 747, 749 (Del. Fam. Ct. 1993)).

In 2018, our decision in *Nance v. Ferraro* indicated that district courts may, when necessary, supersede standard procedure when considering evidence relevant to its custody modification analysis. 134 Nev. 152, 153, 418 P.3d 679, 681 (Ct. App. 2018). Specifically, in *Nance*, we held that the district court did not abuse its discretion when it considered domestic violence incidents that occurred before the last custody order was entered. *Id.* Although considering these incidents implicated prior caselaw generally mandating that courts may not consider events that took place before the last custody order, we stated that, when the child's best interest is at stake, "it may at times be necessary for the district court to review . . . evidence that underpinned its previous rulings." *Id.* at 156, 159, 418 P.3d at 683, 685. In other words, we clarified the child's best interest includes considering evidence that predated the most recent custody order when doing so is necessary to evaluate the child's current situation. *See id.*

Here, the district court's duty to determine G.S.'s best interest should have outweighed the potential deterrent effect of excluding Dr. Holland's testimony to protect James from trial by ambush. *See Abid*, 133 Nev. at 777, 406 P.3d 476 at 481 ("The court's duty to determine the best interests of a nonlitigant child must outweigh the policy interest in deterring illegal conduct between parent litigants."). **This is particularly so, given that the risk of trial by ambush was minimal.** James was involved in the child interview process, initially acquiesced to Dr. Holland's testimony and report, and decided to object based on a procedural technicality at the last moment.

Additionally, the district court appointed Dr. Holland as a third-party outsourced provider, which NRCP 16.215(b)(3) defines as "any third party ordered by the court to interview or examine a child outside of the presence of the court for the purpose of eliciting information from the child*for the court*." (Emphasis added.) Thus, Dr. Holland's testimony and report were presumably intended for the court's consideration and would likely have been relevant to its best interest analysis and custody determination. *See*NRCP 16.215(a) ("[T]he court should find a balance between protecting the child, the statutory duty to consider the wishes of the child, and the probative value of the child's input . . . ."). In addition to elucidating how the recording may have been harmful to G.S., Dr. Holland's testimony and report would also have provided supplementary insight into G.S.'s custodial preference and relationships with James and Tiffany. By prohibiting Dr. Holland from testifying, the district court consequently hindered its own inquiry into G.S.'s best interest; in essence, the court improperly sanctioned G.S. for her mother's procedural misstep. *See Abid*, 133 Nev. at 774, 406 P.3d at 479.

Accordingly, we conclude that James' participation in the child interview process; initial acquiescence to Dr. Holland's testimony and report; and late objection on procedural, as opposed to evidentiary, grounds—coupled with Nevada's strong public policy favoring the consideration of all admissible evidence relating to the child's best interest—render **the district court's decision to exclude Dr. Holland's testimony and report an abuse of discretion. However, as will be explained below, the error was harmless.** Not only did Tiffany fail to include the report in the record for our review on appeal, but substantial evidence also supports that James is better able to support G.S.'s physical, emotional, and developmental needs pursuant to the best interest factors. Thus, the district court's ultimate custody determination was appropriate and does not warrant reversal. *See Khoury v. Seastrand*, 132 Nev. 520, 539, 377 P.3d 81, 94 (2016) ("To be reversible, an error must be prejudicial and not harmless.").

Child Support, Disabled Adult Child, Time to Seek Support After Age of Majority

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

In this opinion, we address the district court's jurisdiction to determine and award child support to a handicapped child beyond the age of majority. Relying on NRS 125C.0045(1)(a), the district court in the proceedings below found that it lacked jurisdiction to award support for the parties' adult handicapped child because he had reached the age of majority and support payments for him had previously ceased. We conclude that, while NRS 125C.0045(1)(a) generally requires that modifications to child support be made while the child is still a minor, NRS 125B.110 creates a statutory exception for adult handicapped children in certain circumstances. Thus, we conclude that the district court erred in finding that it did not have jurisdiction to reinstate support as to the child.

We conclude, however, that the district court did not abuse its discretion in denying a request to modify alimony. In this, we clarify that while a 20-percent change in monthly income may constitute a change in circumstances under NRS 125.150(8), it does not compel the district court to make a modification. Rather, it merely permits the court to determine, in its discretion, whether modifying alimony is appropriate. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

At the time of divorce, the parties' youngest child, Alex Kostanian, was still a minor. The decree provided that the parties would share legal custody and required them to consult with an autism specialist for "recommendations as related to autism treatment which may be necessary." The decree also stated that the district court would retain jurisdiction over whether treatment should be implemented and on what was recommended for Alex until he "reaches the age of majority." As for child support, Varoujan was ordered to pay Noune $1,010 per month for Alex until he turned 18 or, if he was still attending high school at that time, until he graduated high school or turned 19.

Alex turned 18 in 2015, and child support payments ceased. Pursuant to the divorce decree, Varoujan's obligation to pay alimony ended on October 1, 2021.

One day before Varoujan's alimony payment obligation expired, Noune filed the underlying motion requesting, among other things, to modify the alimony payment schedule and reinstate child support payments. After a hearing, the court issued an order denying Noune's motion. . . . The court also denied Noune's request for continued alimony because it determined that there was not a change in circumstances warranting modification under NRS 125.150(8).

[*Child Support*]

Noune argues that the district court erred in determining that it lacked jurisdiction to order child support beyond the age of majority.

Generally, a parent's court-ordered child support obligation ends when the child reaches the age of majority. *Edgington v. Edgington*, 119 Nev. 577, 582, 80 P.3d 1282, 1286 (2003); see also

NRS 125C.0045(9)(b). However, the Nevada Legislature created an exception with NRS 125B.110(1):

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.

. . . . In rejecting Noune's motion, the district court incorrectly determined that it could not consider her request for support pursuant to NRS 125B.110(1) because NRS 125C.0045(1)(a) requires that any modifications to a child support order be made while the child is still a minor. The district court also incorrectly found that "once a child reaches the age of majority and support payments cease, a parent cannot then request support payments for a disabled adult child." The plain language of NRS 125B.110 explicitly provides for child support "beyond the age of majority" in certain circumstances. *See Edgington*, 119 Nev. at 582, 80 P.3d at 1286 (acknowledging that NRS 125B.110 is a statutory exception to the general rule that child support obligations cease when the child reaches the age of majority). And while the statute explains that the child's handicap "must have occurred before the age of majority," NRS 125B.110(1) does not place any limits on when the district court may order a parent to provide such support. By enacting NRS 125B.110, the Legislature furthered Nevada's policies "[t]o encourage parents to share the rights and responsibilities of child rearing," NRS 125C.001(2), and "improve the circumstances of disabled citizens" so that an individual's worth is not tied to their physical or mental handicap. *Edgington*, 119 Nev. at 586, 80 P.3d at 1289 (quoting *McKay v. Bergstedt*, 106 Nev. 808, 825, 801 P.2d 617, 628 (1990)).

The district court also found that because over five years had passed since Alex last received child support payments, the court could no longer award child support. However, the time gap itself does not serve as a bar; rather, it is simply a factor for the district court to consider, as impairments can change over time.

[*Alimony*]

Noune argues that, when considering her alimony request pursuant to NRS 125.150, the district court improperly considered only whether Varoujan's income had changed by 20 percent or more and did not consider whether her obligation to care for Alex, coupled with the realities of her losing alimony payments, constituted a change in circumstances warranting modification. Varoujan argues that Noune did not address any factors set forth in NRS 125.150 to warrant extending alimony and that her request was deficient on its face.

NRS 125.150(8) provides that unaccrued alimony payments "may be modified upon a showing of changed circumstances." (Emphasis added.) The statute further directs the court to analyze any factors "the court considers relevant," including changes to "the income of the spouse who is ordered to pay alimony," specifying that "a change of 20 percent or more in the gross monthly income of [the paying spouse] shall be deemed to constitute changed circumstances requiring a review for modification of the payments of alimony." NRS 125.150(8), (12) (emphasis added); see also Siragusa v. Siragusa, 108 Nev. 987, 994-96, 843 P.2d 807, 812-13 (1992) (concluding

that a paying spouse's discharged property settlement obligation, which affected the finances of both spouses, was a "changed circumstance" for purposes of modifying alimony).

We conclude that the district court did not abuse its discretion in denying Noune's motion to modify alimony. Noune's only arguments for a change of circumstances are that Varoujan's income has increased significantly and that she now needs to care for Alex as a disabled adult child without receiving child support from Varoujan. Yet, the record shows that Noune failed to provide adequate evidentiary support for her claims.3 **Even assuming that Noune demonstrated a change in circumstances, the plain language of the statute only requires the district court to "review" an existing alimony payment schedule upon such a showing.** *See* NRS 125.150(12); *Zilverberg*, 137 Nev. at 72, 481 P.3d at 1230 (providing that this court will generally enforce a statute's plain language). Indeed, the statute ultimately commits the matter to the district court's discretion, providing that the court "may" modify spousal support upon a showing of changed circumstances. NRS 125.150(8).

Child Custody, Modification, Sole Physical Custody Definition, Attorney's Fees

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

In this opinion, we address an unclear area of Nevada child custody law. provide clarification with a definition of sole physical custody, and outline what a district court must consider when entering an order for sole physical custody.1 Further, we direct district courts to retain their substantive decision-making authority over custodial modifications and parenting time allocations, as well as reiterate that, in family law cases, being a prevailing party alone is not a sufficient basis for an award of attorney fees under NRS 18.010. This opinion also clarifies when reassignment of a case to a different judge on remand is appropriate because of the requisite fairness demanded in ongoing child custody proceedings.

. . . there is little direction as to what a district court must consider when entering an order for sole physical custody. 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. Sole physical custody is different than primary or joint physical custody because sole physical custody conflicts with this state's general policy for courts to support "frequent associations and a continuing relationship" between parent and child. *See* NRS 125C.001(1). Likewise: sole physical custody orders substantially impede the fundamental parental rights of the noncustodial parent. *See Gordon v. Geiger*, 133 Nev. 542, 545-46, 402 P.3d 671, 674 (2017); *see also Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (concluding that parents have a fundamental interest "in the care, custody, and control of their children").

In this opinion, we provide a definition of sole physical custody to ensure custodial orders are properly characterized. We direct district courts when entering an order for sole physical custody to first find either that the noncustodial parent is unfit for the child to reside with, or to make specific findings and provide an adequate explanation as to the reason primary physical custody is not in the best interest of the child. Following either of these findings, the district court must consider the least restrictive parenting time arrangement possible to avoid constraining the parent-child relationship any more than is necessary to prevent potential harm caused by an unfit parent and meet the best interest of the child. If the court enters a more restrictive parenting time arrangement than is otherwise available, it must explain how the greater restriction is in the child's best interest. Further, we reiterate that district courts must retain substantive decision-making authority over custodial, modifications and parenting time allocations and may not substitute a third party's discretion for their own.

At the close of [an evidentiary] . . . hearing [in March 2022], the district court maintained joint legal custody but granted Jason what it called primary physical custody, finding a substantial change of circumstances in the severe deterioration of H.R. and Maggie's relationship and H.R.'s age and wishes. The district court also considered H.R.'s best interest and found that H.R. wanted to live with Jason, Jason had relatively superior mental health, and the relationship between H.R. and Jason was comparatively less fraught.4 See NRS 125C.0035(4)(a), (f), (h). The court merely referred to the "March 11, 2022, [oral] Order" in setting Maggie's parenting time, ostensibly

restricting Maggie's parenting time to no contact with H.R. except for cards, texts, and calls. Thus, in the district court's final order modifying custody, Maggie was awarded no in-person parenting time with her child.

The district court also ordered Maggie to attend individual therapy with Dr. Collins twice per month, with the goal of working towards joint reunification sessions with H.R. If Maggie did not attend twice a month, the court ordered the downward adjustment in the child support order was to be terminated.5 Dr. Collins was also given authority to determine when Maggie's parenting time could be expanded to potentially include in-person contact with H.R. Finally, the district court ordered Maggie to pay $11,365 in attorney fees and costs to Jason because he was the prevailing party. This appeal followed.

. . . Maggie raises issues with the limitations the district court placed on ber parental rights and the fairness of the proceedings below. Maggie contends that the district court: (1) did not have substantial evidence to modify child custody, improperly considered child testimony when determining what was in H.R.'s best interest, and abused its discretion in finding there was a substantial change of circumstances since the 2017 order; (2) demonstrated actual bias against her; (3) violated her parental rights; and (4) abused its discretion in awarding Jason attorney fees and costs.

The district court found that the severely deteriorating relationship between H.R. and Maggie and H.R.'s age and wishes constituted a substantial change in circumstances affecting H.R.'s welfare. These findings are supported by substantial evidence. . . . While the district court's findings that Maggie was primarily at fault for H.R.'s behavior are suspect based on the evidence introduced during the hearing,8 under *Romano* the court was only required to find that a substantial change in circumstances affecting H.R.'s welfare existed. ***Romano*'s holding does not require the district court to properly diagnose the cause, even if it might be important in the ultimate custody decision.**

Likewise, substantial evidence supported the district court's best interest findings that three factors favored Jason: (1) H.R.'s wishes; (2) Jason's mental health,9 as compared with Maggie's "highly emotionally dysregulated" disposition; and (3) the nature of H.R.'s relationship with each parent.

. . . . We therefore conclude that substantial evidence supports the district court's findings that Jason demonstrated a substantial change in circumstances affecting H.R.'s welfare and supports the court's best interest factor findings. Thus, as the district court's findings allowed for a modification of the custody order, we affirm that determination.

Maggie argues that the district court's order infringed upon her parental rights and that the court's interlocutory and operative orders were so extreme that the district court effectively undermined her relationship with H.R. to the point of near termination of her parental rights. Jason argues that Maggie's fundamental parental rights are not properly at issue because she can simply follow the court's order, do the work as prescribed by Dr. Collins, and be reunited with H.R. as soon as Dr. Collins is satisfied with Maggie's progress.

First, the order restricts Maggie's parenting time to such a degree that it has unduly infringed upon Maggie's parental rights and effectively awarded sole physical custody to Jason without a sufficient legal basis or findings for so doing. Second, the district court improperly delegated its substantive authority to a third party, Dr. Collins. Finally, the order incorporates by reference what the district court called the "March 11, 2022, Order," which was its oral modification to "the no contact order of Dr. Collins" made midway through the evidentiary hearing, as its final parenting time order. No other findings or information are included as to how the "March 11, 2022. Order' controls Maggie's parenting time, so the final order is facially unenforceable.

Nevada's district courts enter one of three parenting time arrangements in a custodial order—joint, primary, or sole physical custody. The Nevada Legislature and our supreme court have previously defined the first two parenting time arrangements and provided guidance on what a court must consider when entering an award for either joint or primary physical custody.

However, neither the Nevada Legislature nor our supreme court has previously defined sole physical custody.

We now define sole physical custody as 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. Therefore, when a district court enters an order that limits parenting time to restrictive supervised parenting time, virtual contact, phone calls, letters, texts, a very limited block of hours on a single day of the week, or a similarly restraining parenting time arrangement, it has entered an order for sole physical custody.

Because the noncustodial parent's care, custody, and control of their child is so severely restricted, sole physical custody orders implicate a parent's fundamental rights and policies in a manner manifestly distinct from orders for joint or primary physical custody.

To protect a noncustodial parent's rights, judicial discretion is tempered by this state's policy of supporting "frequent associations and a continuing relationship" between parent and child after the parents' relationship with each other has ended. NRS 125C.001(1). Therefore, a district court risks abusing its discretion when it orders sole physical custody without sufficient cause or otherwise unnecessarily restricts and threatens the parent-child relationship.

To avoid unnecessary restrictions on parental rights, a district court must only enter an order for sole physical custody if it first finds either that the noncustodial parent is unfit for the child to reside with,12 or if it makes specific findings and provides an adequate explanation as to the reasons why primary physical custody is not in the best interest of the child. . . . As in *Davis*, these findings must be in writing, 131 Nev. at 452, 352 P.3d at 1143, and are separate and in addition to the best interest findings required under NRS 125C.0035(4) and our primary physical custody jurisprudence.

After making either of these findings supporting sole physical custody, the district court must then order the least restrictive parenting time arrangement possible that is within the child's best interest. *Cf.* NRS 125C.0035(1) (stating that in an action for physical custody of a child, "the sole consideration of the court is the best interest of the child"). When entering its

custodial order, if a less restrictive parenting time arrangement is available, or proposed but rejected, the district court must provide an explanation as to how the best interest of the child is served by the greater restriction. *Cf. In re S.L.*, 134 Nev. at 494-97, 422 P.3d at 1257-59 (concluding that to preserve a parent's fundamental rights, a district court must consider "the services offered to and the efforts made by the parents, and whether additional services would bring about lasting change"). For example, if a party, therapist, or guardian ad litem proposes supervised parenting time in lieu of an order for no physical contact with the child, and the district court declines to enter an order for supervised parenting time, it must explain in its written findings why supervised parenting time is not in the child's best interest.13 *Cf.* NRS 432B.530(3)(b) (stating that when a child is placed in the physical custody of a nonparent, "the court shall set forth good cause why the child was placed other than with a parent"). We now turn to the situation at hand and apply these principles.

[Here,] . . . in the district court's post-hearing custody modification order wherein it expressly awarded "primary physical custody" to Jason yet limited Maggie's parenting time solely to cards, texts, and calls. . . . the district court mislabeled the custodial order and inequitably restricted Maggie's parenting time so severely that she has less parenting time than other parents in cases the supreme court has addressed who were incarcerated or residing at in-person rehabilitation programs.

Further, **the district court's order put such a strangle on Maggie's parenting time with its reunification therapy requirements and imposition of significant financial liabilities, which tied any possible relief to her now limited financial resources, that it unreasonably restricted Maggie's fundamental rights** concerning the custody of her child.

In sum, the district court erred by: (1) failing to consider a less restrictive parenting time arrangement; (2) failing to adequately explain why the greater restriction was necessary; 15 (3) failing to make findings how true primary physical custody was not in H.R.'s best interest; and (4) implementing an almost unachievable plan with no ending, review, or even status check date . . . .

Maggie argues that it is impossible to satisfy Dr. Collins's treatment plan, as Maggie cannot afford to see her twice a month for an indefinite time and the therapeutic relationship is unrecoverable. . . . [Although a district court may direct an investigation to assist in custody determinations, a] district courts must have "the ultimate decision-making power regarding custody determinations, and that power cannot be delegated." *Bautista v. Picone*, 134 Nev. 334, 337, 419 P.3d 157, 159 (2018). Although some of its authority may be delegated "by appointing a third party to perform quasi-judicial duties," *Harrison v. Harrison*, 132 Nev. 564, 572, 376 P.3d 173, 178 (2016), the "decision-making authority [to be delegated] must be limited to nonsubstantive issues . . . and it cannot extend to modifying the underlying custody arrangement," including making significant changes to the timeshare for either parent, *Bautista*, 134 Nev. at 337, 419 P.3d at 159-60. **This restriction applies to any delegation of a district court's decision-making power when deciding an appropriate custodial award, as well as the discretion to hear future, post-order modifications**.

[Attorney's Fees Order]

[A]s awards of attorney fees and costs in family law cases are frequently appealed to this court, and they will have to be addressed again upon remand, we review the bases cited by the district court for its order.

Clearly there is no connection between a money judgment and a custody decision. Thus, an award for attorney fees to the prevailing party in a custodial action cannot be sustained under NRS 18.010(2)(a).

NRS 18.010(2)(b), however, permits the district court to award attorney fees to a prevailing party "when the court finds that the claim, counterclaim[,] . . . or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." The statute allows for liberal application because "[i]t is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions . . . in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses," Id. Under NRS 18.010(2)(b), "a claim is frivolous or groundless if there is no credible evidence to support it," *Rodriguez v. Primadonna Co.*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009), which **requires the district court to consider the actual circumstances of the case**, *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 688 (1995). **Simply, in a custodial action, being a prevailing party alone is not enough for the district court to enter an award of attorney fees.**

Here, the district court did not make findings that Maggie's claims or defenses were either unreasonable or meant to harass, as was required by the statute. Thus, the award of attorney fees was unsupportable under NRS 18.010(2)(b) based on the district court's sole finding that the legal basis for the award of fees was that Jason was the prevailing party.

Turning to NRS 125C.250, which allows a district court to award reasonable attorney fees and costs in a custody or parenting time action, the district court did not make any findings under this statute, nor a sufficient overall determination as to the reasonableness of ordering Maggie to pay Jason over $11,000 in attorney fees and costs, considering it also ordered Maggie to pay for very expensive reunification services and individual sessions with Dr. Collins to have any parenting time with H.R. Adequate findings of reasonableness are necessary, as the evidence indicates Maggie is largely unable to afford these payments and further suggests Jason's conduct has been at least a contributing factor necessitating the reunification services. *Cf. Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (providing the framework for a district court to make findings on "the reasonable value of an attorney's services"); *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 806, 102 P.3d 41, 47 (2004) ("When considering an indigency application [in contempt proceedings], a trial judge must consider a party's complete financial picture, balancing income and assets against debts and liabilities, taking into account the cost of a party's basic needs and living expenses."); *Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998) ("The disparity in [the parents] income is also a factor to be considered in the award of attorney fees.").

Finally, the district court could not properly sanction Maggie under EDCR 7.60(b)(3) without notice and an opportunity to be heard. Nor would it be proper without the court first finding that Maggie had multiplied the cost of litigation without just cause and did so unreasonably and vexatiously, which does not appear to be the case considering Maggie withdrew her motion to modify custody early in the proceedings. **Undoubtedly, there has been significant litigation in this case, but duration or volume alone does not show that a litigant is per se unjust, unreasonable, or vexatious**, and the court made no findings as to the same.

Evidence, Objections, Offers of Proof

Ram v. Kiran, 2024 Nev. App. Unpub. LEXIS 283, 550 P.3d 348.

Venus Priya Ram appeals from a district court decree of divorce.

Rain and respondent Cleavon Roy Kiran were married in 2008 and have two minor children in common. In 2020, Kiran filed a complaint for divorce and, as relevant to this matter, requested sole legal and primary physical custody of the children.

The district court subsequently conducted an evidentiary hearing and both parents testified at that hearing.

After the presentation of the parties' evidence, the district court noted that neither party presented evidence concerning the wishes of either child as to physical custody and stated that neither parent prevented the children from having a relationship with the other parent. The district court also explained that it found that the best interest factors supported an award of primary custody in favor of Kiran.

The district court subsequently entered a written decree containing its findings for the required factors under NRS 125C.0035(4) concerning the best interest of the children. The district court ultimately concluded six of the best interest factors favored awarding Kiran primary physical custody of the children and none of those factors favored Ram.

Based on those findings, the court concluded that it was in the children's best interest to award Kiran primary physical custody. In addition, the district court awarded the parties joint legal custody of the children. The district court also distributed the community property and granted the parties' request for divorce.

Ram later filed a motion for reconsideration of the district court's custodial decision.

The district court subsequently entered an order denying the motion for reconsideration.

First, Ram argues that the district court abused its discretion at the evidentiary hearing by admitting prejudicial and irrelevant testimony concerning Ram's arrests and by admitting inadmissible hearsay statements. Ram contends that information regarding her arrests was not relevant and was unduly prejudicial. Rain [sic] further contends that the inadmissible hearsay statements concerning Ram's arrests and other statements purportedly made by the children improperly influenced the district court's custody decisions.

"NRS 47.040(1)(a) requires a party who objects to the admission of evidence to make a timely objection or motion to strike . . . stating the specific ground of objection." *Thomas v. Hardwick*, 126 Nev. 142, 156, 231 P.3d 1111, 1120 (2010) (internal quotation marks omitted). Moreover, **"[t]he failure to specifically object on the grounds urged on appeal precludes appellate consideration on the grounds not raised below."** *Id.* (internal quotation marks and brackets omitted); *see also In re Parental Rights as to Dumais*, 76 Nev. 409, 414, 356 P.2d 124, 126 (1960) (stating "[i]f evidence secondary or hearsay in its character be admitted without objection, no advantage can be taken of that fact afterwards" (internal quotation marks omitted)).

Here, **Ram raised no objections at the evidentiary hearing regarding the aforementioned issues, and instead only raised challenges to the district court's evidentiary decisions in her motion for reconsideration. Because Ram failed to make timely, contemporaneous objections at the evidentiary hearing, we decline to review these claims of error on appeal.** Therefore, Ram is not entitled to relief on these grounds.

. . . Ram also argues that the district court's finding concerning the NRS 125C.0035(4)(a) factor, that the children were not of sufficient age or capacity to form an intelligent preference as to custody, was not supported by substantial evidence. Ram also contends the court should have ordered the children to be interviewed to ascertain their wishes.

In its order denying Ram's motion for reconsideration, the district court clarified its decision concerning this factor and stated that neither party presented evidence concerning that factor and, if the parties wished to present such evidence, it was their responsibility to do so. When the findings contained within the decree of divorce and order denying the motion for reconsideration are read together, they contain the sufficient findings as to the required best interest factors under NRS 125C.0035(4)(a). Rain [sic] **does not allege what the children would have stated had they testified or been interviewed and she does not establish that additional findings concerning the children's wishes as to physical custody would have reasonably resulted in a different outcome. Thus, Ram does not meet her burden to demonstrate any failure to make additional findings concerning the children's wishes was prejudicial.** *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("When an error is harmless, reversal is not warranted."); *cf*. NRCP 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). Therefore, Ram is not entitled to relief based on this claim.