**FEBRUARY 2021**

**NEVADA BAR EXAM**

**QUESTION NO. 1: ANSWER IN LIGHT BLUE BOOKLET**

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In March, DrugCo, a Nevada drug store, telephoned Beauty Land, a California manufacturer of beauty products, asking about Beauty Land's special face cream with retinol advertised to eliminate wrinkles. During the call, Beauty Land offered to supply DrugCo with one case per month of the face cream with retinol, 10 jars per case at $40 per jar, for the next 12 months. DrugCo sent Beauty Land an email accepting the proposed terms and stating, "Must receive by the 5th of each month. Any disputes to be resolved by arbitration in Nevada."

DrugCo received the first case on April 5th. With customers waiting, DrugCo immediately put the jars onto its shelves. A packing slip inside the case stated, "This product is sold 'as is' without any representations or warranties. Excessive heat destroys the product." Several weeks later, DrugCo noticed the face cream contents, printed on the bottom of each jar, which stated the product did not contain retinol. DrugCo pulled the jars from its shelves and contacted Beauty Land. Beauty Land said it would send a replacement case. Having no room inside the store, DrugCo stored the jars outside in temperatures exceeding 100 degrees.

Before shipping the replacement, Beauty Land called DrugCo and said it would now have to charge significantly more for the replacement case and future shipments. Having no other options, DrugCo agreed to the new price and received the replacement case. Beauty Land's cost at that time had not changed.

Beauty Land's next delivery was conforming but arrived late on May 15th. Concerned about performance and hearing rumors about Beauty Land's financial stability, DrugCo emailed

Beauty Land demanding written assurances that it could perform as agreed. Beauty Land did not respond to the email but delivered a conforming shipment to DrugCo on June 5th. In the interim, DrugCo found a more reliable vendor and returned the June shipment to Beauty Land unopened with a note that DrugCo was terminating its relationship with Beauty Land.

**Please fully discuss the following:**

**1. Is there a contract between DrugCo and Beauty Land? Assuming there was a contract, what are its terms?**

**2. What claims can DrugCo assert against Beauty Land and what defenses can Beauty Land raise?**

**3. What claims can Beauty Land assert against DrugCo and what defenses can DrugCo raise?**

**Exhibit A**

**FEBRUARY 2021**

**NEVADA BAR EXAM**

**QUESTION NO. 2: ANSWER IN RED BOOKLET**

---

NV Suppression ("NVS") is a Nevada corporation that markets and sells specialized fire suppression equipment. It holds a federal patent for its equipment. While attending a trade show in Las Vegas, NVS representatives noticed a booth for Xtinguish, a company marketing similar products that NVS believes infringes on its patent. Xtinguish is a Texas corporation that sells its products at trade shows and on its website. It does not advertise. Xtinguish's owner Dan is a Nevada resident who attended the trade show in Las Vegas. After leaving the trade show for the day, NVS filed a lawsuit with a verified complaint against Xtinguish and Dan for patent infringement and state law unfair competition in the United States District Court for the District of Nevada.

The same day it filed its lawsuit, NVS filed an *ex parte* motion for Temporary Restraining Order against Xtinguish and Dan. The court granted the motion and ordered NVS to post security in the amount of $10,000. After posting security, NVS had a United States Marshal serve a copy of the Summons and Complaint and the Temporary Restraining Order upon the Xtinguish sales and marketing vice-president who was in the trade show booth. Dan was not present.

NVS subsequently filed a motion for Preliminary Injunction asking the Nevada court to continue to prohibit Xtinguish from selling its infringing products. The motion for Preliminary Injunction was properly served upon Xtinguish and Dan. Xtinguish responded with a motion to

Dismiss or Transfer Venue, claiming lack of personal jurisdiction and arguing that the matter should be heard in Texas where it manufactures its products and all its employees are located.

Without holding a hearing on the matter, the court granted NVS's motion and set the duration of the injunction at one year. The court also ordered NVS to post a $50,000 bond within ten days and denied Xtinguish's motion to dismiss or transfer. NVS failed to post bond within ten days, claiming its sales and revenue had been decimated by Xtinguish's presence at the trade show. After 20 days had passed since the documents were served at the trade show, NVS sought and obtained entry of default against Dan. Dan subsequently filed a motion to Set Aside the entry of default.

**Please fully discuss the following:**

**1. Did the United States District Court for the District of Nevada have the authority to enter an order against Xtinguish and Dan?**

**2. Was the Temporary Restraining Order properly issued?**

**3. Was the Preliminary Injunction valid?**

**4. Assuming the Preliminary Injunction is valid, can NVS enforce it?**

**5. Did the court properly rule on the motion to Dismiss or Transfer?**

**6. How should the court rule on the motion to Set Aside?**

**FEBRUARY 2021**

**NEVADA BAR EXAM**

**QUESTION NO. 3: ANSWER IN DARK GREEN BOOKLET**

---

Andy and Beth were high school sweethearts who married a week after their graduation. During their 15-year marriage, they had three children and acquired a home in Reno, and an apartment building in California. Andy filed a complaint for divorce in the Nevada state court. Issues in their divorce include the value and division of property, child custody, child support and alimony. The court may consider the parties' wealth and relative financial circumstances in awarding alimony and child support. Andy claims that he is a loving and actively involved father, but that Beth has mental health issues, so it is in the children's best interest that he be awarded primary custody. Beth denied his claims and insists she should have custody.

At trial the following evidence was offered:

1. Beth offered her testimony that when she became pregnant in the spring of their senior year of high school, Andy argued that they should terminate the pregnancy or give the baby up for adoption so they could follow through with their plans to go to college, although they ultimately decided to keep the baby and get married.

2. Andy's counsel, knowing the judge owned commercial property near their apartment building in California, asked the court to take judicial notice that: a) there is a new California regulation governing apartments; and b) those regulations have an adverse impact on the value of the apartment building.

3. Beth, who had exchanged letters with Andy's grandmother, sought to introduce a letter she found in a Bible Andy's grandmother had given him. In the letter, his terminally ill

grandmother thanked Andy for helping her move into hospice care in Maine, even though she knew she would die there. She also wrote that because Andy had always been good to her, she was leaving him her $10 million estate.

4. Andy called a Nevada licensed psychiatrist to offer the opinion that based on her Parental Capacity Evaluation, Andy should be awarded primary custody. The psychiatrist testified that the Parental Capacity Evaluation was based on psychological testing of the parties and on what the parties, their children and third persons told her. She further offered testimony that the Parental Capacity Evaluation was done in compliance with generally accepted customs and standards of her profession.

**Please set forth all arguments for and against admission of the offered evidence.**

**FEBRUARY 2021**

**NEVADA BAR EXAM**

**QUESTION NO. 4: ANSWER IN ORANGE BOOKLET**

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Adam, Brooke and Cody are all attorneys who are admitted to practice law only in Nevada.

Adam is a solo practitioner who has an office in Las Vegas, Nevada. Adam has enjoyed recent success mediating short-term vacation rental disputes. As a result of the high volume of such disputes in the Lake Tahoe area, Adam opened an additional office, which he named Rental Legal Aid Foundation, in Truckee, California. Adam used this office periodically when he had mediations scheduled in the area. To keep up with his growing workload, Adam hired File Clerk and tasked him with moving all Adam's client files to electronic storage. Although unfamiliar with this type of storage, File Clerk made a few calls and quickly engaged the services of Vendor who offered a significantly lower price than other electronic storage companies. File Clerk sent the hard copy of the client files to Vendor, who shredded the files after they were uploaded. A few weeks later, Adam received notice from Vendor that its system had been hacked and some of Adam's client files had been accessed and deleted. Adam did not notify his clients of this breach.

Brooke and Cody work at Law Firm in Reno, Nevada. Brooke previously worked for the U.S. Department of Justice as the head of the legal team prosecuting Cable Company for charging hidden fees in violation of deceptive trade practice laws. Recently, Law Firm entered into a contingent fee agreement with Ruby to sue Cable Company over hidden fees. Unknown to Ruby, Law Firm had contingent fee agreements with several other customers of Cable Company over hidden fees. Based on Brooke's familiarity with the legal issue, Law Firm, without

checking with her former government employer, assigned Brooke to handle the cases. Soon thereafter, Brooke received an email from Opposing Counsel offering to settle the cases. Attached to the email was a memo prepared by Opposing Counsel outlining his litigation strategy in the case. Unaware that Brooke had received the strategy memo, Opposing Counsel later negotiated a settlement of the lawsuits with Brooke. Brooke deposited the settlement payment in Law Firm's client trust account. After deducting one-third of the settlement payment to satisfy the Law Firm's contingent fee, Brooke divided up the remainder of the amount equally among the clients and sent them each a check. The clients were very surprised that the cases had settled.

Cody is representing Defendant in a highly publicized murder trial. Because Defendant's bank accounts were frozen, Cody met with Defendant and they signed an agreement specifying that Cody's fee would be paid by the assignment to Cody of the media rights to a movie based on the case and the conveyance of Defendant's $10 million private jet. Before trial, the prosecutor offered a plea deal to Cody. Confident with his case, Cody immediately turned it down without checking with Defendant. During closing arguments at the trial, Cody told the jury, "After hearing all the evidence, I know you'll agree with me that Defendant is innocent." After Defendant was acquitted, Cody posted to his Twitter account, "Yet another great victory in court today! Defendant is so stoked! Who wants to be the next winner?"

**Please fully discuss the ethical issues under the Nevada Rules of Professional Conduct raised by the conduct of each attorney in the situations described above.**

**FEBRUARY 2021**

**NEVADA BAR EXAM**

**QUESTION NO. 5: ANSWER IN PURPLE BOOKLET**

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Vegas Sports & Entertainment, Inc. ("VSE") owns and operates a multi-purpose indoor arena in Las Vegas. Throughout the arena there are signs that state, "VSE is not responsible for accidents or injuries due to flying objects or otherwise." Bob attended a hockey game at the arena. While watching the game from his assigned seat, Bob was knocked unconscious by a puck that came off the ice during play. The puck barely cleared the plexiglass partition that separated the playing surface from spectators.

Bob regained consciousness lying on a couch in the arena security office. When he attempted to sit up, a VSE security guard told Bob not to move because he was in "concussion protocol." Bob stated he had a headache, but otherwise felt fine and wanted to get back to the game. When Bob tried to leave the couch, he was pushed back down by the guard who commanded him to remain still. The security guard then turned off the lights and left. Bob heard the room's only door being locked from the outside.

Less than five minutes later, the security guard's supervisor released Bob. Over the ensuing week, Bob's headache got worse and he began to develop memory problems. Bob hired an attorney who filed a lawsuit against VSE. Shortly thereafter, Bob received a letter from VSE informing him he was no longer permitted to enter the arena.

Ignoring the letter, Bob went to another game at VSE's arena to measure the height of the plexiglass partition. He discovered that it was 20 inches lower than the industry standard. The

following week, VSE raised the wall by two feet. Bob, unaware of the remedial work, posted to his new social media account that, "VSE arena is unsafe." Although Bob's social media account is public, he did not yet have any followers.

**Please fully discuss:**

1. **The claims Bob could assert against VSE, and all possible defenses.**
2. **The claims VSE could assert against Bob, and all possible defenses.**

**FEBRUARY 2021**

**NEVADA BAR EXAM**

**QUESTION NO. 6: ANSWER IN YELLOW BOOKLET**

---

Ann and Bill lived in Clark County, Nevada. After very contentious court proceedings, Ann and Bill were granted a divorce. For months after the divorce, Ann regularly made threatening calls and sent threatening texts to Bill. One night, on his way home from work, Bill saw Ann pull her car alongside his at a traffic light and heard her shout through her open window, "I hope you die!" As they drove away from the intersection, Ann violently swerved her car into Bill's car, causing it to travel over the curb, onto the sidewalk and strike John, killing him. After Ann's car struck Bill car, she quickly sped away.

Later that day, Ann was arrested. While transporting Ann to jail, the police officer asked Ann if she knew she caused Bill's car to hit and kill a pedestrian. Ann, completely shocked, responded, "Oh no, I just wanted to teach Bill a lesson and dent his precious car!" Shortly after she was booked into the jail, a homicide detective came to speak to Ann in her cell. The detective read Ann her Miranda rights and asked her if she wanted to speak about what happened. When Ann declined to answer questions and asked the homicide detective for a lawyer, he told Ann, "If you cooperate, I can help you and tell the District Attorney I know you didn't mean for this to happen." Ann, believing the detective would help her, told the detective she was the driver that ran into Bill's car.

**Please fully discuss:**

**1. The criminal liability of Ann;**

**2. Whether Ann's statement to the police officer is constitutionally admissible at trial; and**

**3. Whether Ann's statement to the homicide detective is constitutionally admissible at trial.**

**FEBRUARY 2021**

**NEVADA BAR EXAM**

**QUESTION NO. 7: ANSWER IN DARK BLUE BOOKLET**

---

Lou owned a house on 8th Street in Minden, Nevada. Mary approached Lou and offered to lease the house. Lou said "okay." Mary gave Lou a check for the first month's rent and a security deposit. Mary attached a sticky note to the check that read: "For lease of 8th Street, Minden, NV; $12,000 per year rent, payable monthly; Mary responsible for repairs." Lou immediately deposited the check into his bank account.

Mary moved into the house and re-painted the outside of the house as the paint was in poor condition. While painting, Mary noticed large gaps around the windows. She notified Lou about the gaps and demanded that the gaps be repaired. Lou did not address the issue.

A month later, swarms of bees entered the house through the gaps around the windows. An exterminator told Mary that it would be a major expense to remove the bees. Mary notified Lou about the bees, told him she feared for her health due to her severe bee allergy and demanded that Lou take all necessary steps to repair the gaps around the windows and eliminate the bees.

Lou refused to repair the gaps around the windows and eliminate the bees, telling Mary that it was her responsibility. Mary immediately moved out of the house, stopped paying rent and filed a complaint with the local building authority claiming several building code violations. Due to the poor real estate market conditions and the known bee infestation in the house, Lou decided not to put the house on the market for lease or sale.

Upon receiving notification from the local building department about Mary's complaint, Lou initiated legal proceedings in the appropriate Nevada state court against Mary to evict her and obtain a judgment for the remaining unpaid rent.

**Please fully discuss the following under Nevada law:**

**1. Is there a lease between Lou and Mary, and if so, what are its terms?**

**2. What is each party's obligation, if any, with respect to repairing the gaps around the windows and eliminating the bees?**

**3. What claims and defenses does Mary have with regard to the eviction proceeding?**

**4. What claims and defenses does Lou have with regard to the eviction proceeding?**

# INSTRUCTIONS
# NEVADA PERFORMANCE TEST
# FEBRUARY 2021

Materials to be used for the Nevada Performance Test are contained in a "File" and a "Library." The first document in the File is a memorandum that contains the instructions and a summary of the problem. Other documents in the File contain factual information, which may or may not be relevant to the issues.

The Library contains the legal authority. It is your responsibility to determine what legal authority is pertinent. The legal authorities include statutory provisions and cases.

You will be graded on your responsiveness to the instructions and on the content, thoroughness and organization of your document. Time management is also a critical factor. You reasonably should expect to use half the time reading and analyzing the materials and organizing your document. The remaining time should be sufficient time to write it.

# FILE

**SECOND JUDICIAL DISTRICT COURT**
**STATE OF NEVADA**
**FAMILY DIVISION**

# MEMORANDUM

**FROM:** Senior Judge

**TO:** Applicant

**RE:** Jones v. Jones
Bench Memorandum Regarding Alimony Issues

John Jones filed suit for divorce against his wife Betty Jones, a prominent neurosurgeon in Reno. The couple has been married for 25 years. The Complaint contains fairly scurrilous allegations of marital infidelity against Betty that was alleged to occur over a period of years. A bench trial was held following extensive discovery and much acrimony.

The attorneys were able to stipulate that the community estate consisting of real property, cash, stocks, and bonds, will be divided equally. John's Complaint seeks a recovery of alimony and Betty's counsel argued that alimony is not appropriate in this case. I must determine whether alimony should be awarded to John Jones and if so, how much.

Please prepare a bench memorandum addressing the factors set forth in NRS 125.150 and the relevant cases provided to you. Your memo should include a range of the amount and duration of alimony, if any, and the basis for your recommendation. Please follow the attached guidelines for drafting bench memoranda.

## SUMMARY OF KEY POINTS OF EVIDENCE

1. John and Betty Jones married in the fall of their senior year of college at University of Nevada, Reno in 1991.

2. John dropped out of school that fall semester and went to work to support Betty as she finished her undergraduate degree and then medical school at the University of Nevada School of Medicine.

3. John worked as a UPS driver and was promoted regularly to a supervisory position while Betty was in medical school.

4. When Betty started her neurosurgery residency at the Mayo Clinic in Minnesota, John quit work as a UPS manager and moved to Rochester, Minnesota. He again took a job as a UPS driver and helped to support the two of them during the residency.

5. After completion of the residency, in 1997, John and Betty returned to Reno where Betty went to work with the leading neurosurgery specialist group.

6. John quit work when their first child was born in 1998 and acted as a stay-at-home dad.

7. After the birth of their second child, John attended night school at the University of Nevada to complete his bachelor's degree in Accounting.

8. Because John was the full-time care giver for the children he never worked as an accountant and did not acquire his CPA license.

9. Bridgette Kunze was retained by John as an expert witness to testify at trial. Brigette opined at trial that a new CPA could earn $100,000/year and it would take another 3 years for John to get his CPA license. She testified that during this period he could only expect to earn $75.000/year until he received his CPA license.

10. Betty earns $750,000 a year from her practice.

11. The couple own a 10,000 sq. ft home in a gated neighborhood in Southwest Reno.

12. Betty drives a 2020 BMW and John drives a 2018 Land Rover.

13. The couple vacations in Europe and in Hawaii each year.

14. The couple's accountant testified that their annual expenses exceeded $500,000.

15. The evidence established that the community estate is worth $7 million.

16. John does not have a separate property estate.

17. Betty inherited $10 million from her mother in late 2019.

18. Both John, 45, and Betty, 49, are in good health.

19. During marriage, the couple helped support John's mother and John believes he has a moral obligation to continue to help after divorce.

**SECOND JUDICIAL DISTRICT COURT**
**STATE OF NEVADA**
**FAMILY DIVISION**

**MEMORANDUM**

**FROM:** Court Administrator

**TO:** Applicants

**RE:** Format of Bench Memoranda

The purpose of a bench memoranda is to help the judge prepare a final order or prepare for a hearing or oral argument. The bench memorandum is not designed to be a brief as would be submitted by counsel nor a judicial order or opinion.

You are expected to identify key issues and analyze the applicable law. You also are expected to provide a recommendation for the resolution of each of the issues you have identified. The format to be used should be as follows:

(1) Statement of Issue or Factor to be Considered

Provide a brief statement of the question. Statements should be limited to a single sentence.

(2) Analysis

Discussion of the issue or factor identified based on the relevant facts and applicable law. You may use abbreviations when citing to cases. Omit page references.

(3) Recommendation

A recommendation for a proposed resolution of each issue or factor. Some issues or factors to be considered may not be resolvable as individual matters. In such cases you should conclude how the issue or factor would be weighed or considered as part of a final recommendation.

A separate statement of facts should not be provided. The relevant facts should be addressed as part of the analysis or recommendation for each issue or factor identified. The analysis and recommendations should be closely tied to the relevant case facts. You may use abbreviations when citing to cases. Omit page references.

# LIBRARY

**NRS 125.150 Alimony and adjudication of property rights**

Except as otherwise provided in NRS 125.155 and 125.165, and unless the action is contrary to a premarital agreement between the parties which is enforceable pursuant to chapter 123A of NRS:

1. In granting a divorce, the court:

(a) May award such alimony to either spouse, in a specified principal sum or as specified periodic payments, as appears just and equitable; and

(b) Shall, to the extent practicable, make an equal disposition of the community property of the parties, including, without limitation, any community property transferred into an irrevocable trust pursuant to NRS 123.125 over which the court acquires jurisdiction pursuant to NRS 164.010, except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

2. Except as otherwise provided in this subsection, in granting a divorce, the court shall dispose of any property held in joint tenancy in the manner set forth in subsection 1 for the disposition of community property. If a party has made a contribution of separate property to the acquisition or improvement of property held in joint tenancy, the court may provide for the reimbursement of that party for his or her contribution. The amount of reimbursement must not exceed the amount of the contribution of separate property that can be traced to the acquisition or improvement of property held in joint tenancy, without interest or any adjustment because of an increase in the value of the property held in joint tenancy. The amount of reimbursement must not exceed the value, at the time of the disposition, of the property held in joint tenancy for which the contribution of separate property

was made. In determining whether to provide for the reimbursement, in whole or in part, of a party who has contributed separate property, the court shall consider:

(a) The intention of the parties in placing the property in joint tenancy;

(b) The length of the marriage; and

(c) Any other factor which the court deems relevant in making a just and equitable disposition of that property.

As used in this subsection, "contribution" includes, without limitation, a down payment, a payment for the acquisition or improvement of property, and a payment reducing the principal of a loan used to finance the purchase or improvement of property. The term does not include a payment of interest on a loan used to finance the purchase or improvement of property, or a payment made for maintenance, insurance or taxes on property.

* * * *

9. In addition to any other factors the court considers relevant in determining whether to award alimony and the amount of such an award, the court shall consider:

(a) The financial condition of each spouse;

(b) The nature and value of the respective property of each spouse;

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

(d) The duration of the marriage;

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

(f) The standard of living during the marriage;

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

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

(i) The contribution of either spouse as homemaker;

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

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

10. In granting a divorce, the court shall consider the need to grant alimony to a spouse for the purpose of obtaining training or education relating to a job, career or profession. In addition to any other factors the court considers relevant in determining whether such alimony should be granted, the court shall consider:

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

(b) Whether the spouse who would receive such alimony provided financial support while the other spouse obtained job skills or education.

Heim v. Heim

Supreme Court of Nevada (1988)

This is an appeal by a divorced wife who claims that the trial court abused its discretion in awarding her only $500.00 per month alimony under the following circumstances:

(a) a marriage of thirty-five years;

(b) a marriage during which, by agreement of the parties, the wife did not pursue her own employment or career so that she could remain at home as a homemaker and raise the parties six children;

(c) a marriage during which the husband pursued his own professional advancement, earned a Ph.D. and achieved his present academic position as chairman of the Computer Science and Electrical Engineering Department at the University of Nevada-Las Vegas;

(d) a marriage in which the marital property, consisting of a small ($10,000.00) equity in a house, household
furniture and personal property, a 1982 Buick, a 1984 Plymouth, and a retirement fund, has been equitably divided;

(e) a husband who earns $5,600.00 per month and who, by his affidavit, has living expenses of less than $2,000.00 per month;

(f) a wife who is fifty-seven years old, who has no professional skills, who is unemployed and who never has been able to earn any more than $600.00 per month; and

(g) a wife who, after the divorce, has no appreciable assets other than a 1982 Buick, a mortgaged house in Detroit and a future interest in half of her husband's University of Michigan retirement benefits.

Under these circumstances we must agree with Loretta Heim: the trial court did abuse its discretion in making this award. The sum of $500.00 per month until death or remarriage is not, as a matter of law, just and equitable under the circumstances of this case.

Alimony is wholly a creature of statute. We interpret NRS 125.150(1) to mean that, since 1861, alimony awards must in this jurisdiction be just and equitable. Furthermore, as required by NRS 125.150(1), the award must be fairly related to the respective merits of the parties and to the condition in which they will be left by the divorce.

We begin our analysis by looking at the condition in which these parties are to be left by the divorce or, more particularly, at their relative financial worth and earning capacities.

The husband earns $5,600.00 per month and is required by the alimony decree to pay something less than nine percent of this to his wife of thirty-five years. He may deduct the $500.00 from his income tax; she must pay income tax on the $500.00. After paying alimony and living expenses he appears to have $3,000.00 left over each month.

The wife is unemployed, but even if we were to assume that she will soon start to earn the $600.00 per month that she was able to earn from time to time in the past, she will have an income of only $1,100.00 per month, alimony included. Without a job she is close to the recognized poverty level. Even if her income amounts to $1,100.00 per month, she will have an income of one-fifth that of her husband.

In sum, the financial condition in which the parties are left is this: the husband, after paying tax-deductible alimony, will have $3,000.00 per month income after living expenses, while the wife's financial condition after divorce appears almost certain to result in deprivation, poverty and social degradation.

Analyzing the respective merits of the parties mentioned in the statute is difficult in this case as we know little or nothing about the actions or behavior of the parties. Merits may refer to the good marital behavior or to the fault of the parties. When examining the merits of the parties the courts might look at the parties' good actions or good behavior or lack thereof in determining what either husband or wife justly deserves.

Finally, as we must, we look to the overall justice and equity that must inform all alimony and property distribution decrees. As suggested above, what is just and equitable as an alimony award, broadly speaking, can be translated into terms of what is fair and what Loretta deserves under the circumstances of the case. We have said before that parties in divorce actions must be treated fairly. The trial court's objective is that of fairness, which it achieves by the judge's personal observation of the parties and the evaluation of the circumstances as they come before him in the arena of the trial court.

To determine what is fair, just and equitable one has to look not only to the relative financial condition of the parties and to where they will be left by the divorce, but also to all of the circumstances of the marriage--its duration, the age and health of the parties, the special agreements and understandings of the parties and the past relations, conduct and status of the parties. In the present case, one can give little consideration to general principles of justice, equity, deserts and fairness without being struck by the enormous disparity in the status and quality of life of the two marital partners that is brought about largely by the paltry amount of alimony awarded to her by the trial court. It is quite obvious that Dr. Heim leaves the divorce with almost everything and Mrs. Heim with almost nothing. By everything we mean principally Dr. Heim's present capacity (a capacity gained by him through the long-term efforts of both parties) to hold a prestigious position and command a large salary. Rather clearly, the single most valuable product of the

Heims' enterprise in the marital partnership is the Ph.D. degree and the high level of professional employability which were gained by Dr. Heim during the marriage.

There are those who would argue that Dr. Heim carried with him, out of the marriage and out of the reach of Mrs. Heim, a species of property sometimes referred to as a career asset. In considering the basic principles of equity and justice that must be applied in this case, it must be borne in mind that Dr. Heim leaves the marriage with a Ph.D. acquired during the marital partnership and the capacity to earn $67,000.00 per year, while Loretta Heim leaves with virtually nothing.

In those cases in which it is the decision of the parties that the woman becomes the homemaker, the marriage is of substantial duration and at separation the wife is to all intents and purposes unemployable, the husband simply has to face up to the fact that his support responsibilities are going to be of extended duration--perhaps for life. This has nothing to do with feminism, sexism, male chauvinism or any other trendy social ideology. It is ordinary common sense, basic decency and simple justice.

In Johnson v. Johnson we manifested our concern for women like Loretta Heim, an example of a woman who, for historical and personal reasons, and especially with the long concurrence by her husband, chooses to make her contribution to a marriage by remaining at home to raise the children of the union.

A fairly recent case which is very close factually to the case at hand lends judicial authority to our conclusion that $500.00 per month alimony cannot be just and equitable under these circumstances. In this case, the husband, a prominent judge, earned around $5,000.00 per month. His wife was capable of earning $800.00 per month. The trial court ordered alimony to the wife of $800.00 per month. The court of appeals ruled that, taking into consideration the other factors in the decree, this paltry amount of alimony, constituted an abuse of discretion.

The court observed that, as here, the husband, after the minor adjustment required to be made under the alimony decree, could still maintain the life style he has enjoyed for 36 years. The wife cannot. The court also ruled that a dissolution award should be sufficient to compensate the wife for her contribution to the marriage, and further recognized that a trial court need not equalize the financial positions of the parties. However, a trial judge must ensure that neither spouse passes automatically from misfortune to prosperity or from prosperity to misfortune, and, in viewing the totality of the circumstances one should not be shortchanged.

It is undeniable that Mrs. Heim has been shortchanged, that divorce has automatically taken her from relative prosperity to misfortune, if not destitution, and that her treatment by the court below was not just and equitable. She is entitled to some fair return based on her thirty-five year contribution to the marital partnership. She is entitled after this long marriage to live as nearly as fairly possible to the station in life that she enjoyed before the divorce.

Buchanan V. Buchanan

Supreme Court of Nevada (1974)

The parties, married May 20, 1967, are parents of twin girls, who were approximately 2 1/2 years of age when appellant, alleging incompatibility, initiated this action for divorce in October, 1971.

On January 31, 1973, the trial court granted appellant the divorce, custody of the twins, divided property of the parties, ordered respondent to pay $150.00 per month per child for their support, and specifically ruled that respondent was not obligated to pay (appellant) any sum whatsoever as and for her support.

Appellant contends error because the trial court refused to award her alimony. Appellant's brief states: “It is not the contention of appellant that an award should have been made for alimony for an unlimited period of time but rather that the court, because of the inadequacy of the totality of its ruling, should have provided at least enough money which, together with the support for the children, would have entitled appellant to adjust to the situation.” The trial court's ordering that respondent make an additional payment of $3,600.00 at the rate of $300.00 per month, though as part of the property settlement and not as alimony, to this court, is a showing of a reasonable effort on the part of the trial court to allow appellant to adjust to the situation.

In support of her claim for alimony appellant states that this court has long held the right of the wife, who has been given the divorce, to such support as to the court shall appear adequate in view of the financial conditions of the parties, cannot be questioned. While the statement is correct, this court has also said these words mean simply that the action of the trial court in awarding alimony in a proper case will not be disturbed on appeal. They do not mean that in all cases where the wife is granted a divorce she is entitled to alimony as a matter of right.

In determining whether alimony should be paid, as well as the amount thereof, courts are vested with a wide range of discretion. This power of determination is neither arbitrary nor uncontrolled. Much depends upon the particular facts of the individual case. Among the matters to be considered are: the financial condition of the parties; the nature and value of their respective property; the contribution of each to any property held by them as tenants by the entirety; the duration of the marriage; the husband's income, his earning capacity, his age, health and ability to labor; and the wife's age, health, station and ability to earn a living.

The record shows, inter alia, that in the aggregate appellant and respondent cohabited as husband and wife for a period of three years; that appellant was thirty-one years of age at the time of the trial of this matter; that beginning in August 1972, some 16 months after she instituted the divorce action, she worked as a model one day a week earning $20.00 per day, with sporadic other modeling work; that except for remedial dental work, which is not shown to be continually required, there is no evidence showing that she was in ill health or in any way infirm; that there was neither effort nor desire on her part to seek steady or full-time employment; that she required a live-in housekeeper at $200.00 per month because she was accustomed to having one; that there is no showing that she could not adjust to other employment, or become more gainfully preoccupied with modeling. The record also shows that during the three-year period the parties lived together respondent's gross income averaged less than $13,500.00 annually.

NRS 125.150(1) provides guidance to a trial court in making an award of alimony or denying the same, and this record reflects that the trial judge adhered to the standards set out in that statute.

Had the trial court granted reasonable alimony for a reasonable period of time, this record would have supported the award and it would not have constituted

an abuse of discretion. The record shows that the trial court gave due regard and consideration to all facts bearing on the issue of alimony and support for appellant.

Fondi V. Fondi

Supreme Court of Nevada (1990)

Janice and Michael Fondi were married on August 25, 1973. At the time of the marriage, Janice worked as a legal secretary in the Carson City district attorney's office, where Michael also served as district attorney. Following the marriage, Janice worked for various state agencies, first as a legal secretary and then as an administrative assistant. She quit full-time employment in 1975, and remained at home for several years before returning to part-time work in 1977 as a secretary for the lieutenant governor. This employment lasted for the duration of the legislative session. Janice also worked for the legislature during the 1979 and 1981 sessions as secretary for the assembly minority leader.

In 1986, appellant began working for the Western Nevada Development District (WNDD) on a part-time basis. In 1989, Janice became employed full-time by that agency as an administrative assistant. At the time of trial, she remained employed by the WNDD, at an annual salary of $16,600.00.

Respondent Michael Fondi is now a district judge for the First Judicial District Court in Carson City. He was appointed to this position in 1977, following several years service in the Carson City district attorney's office, both as a deputy and district attorney. Judge Fondi has been re-elected as district judge several times and was again re-elected this year.

On the other main issue of contention, alimony, the court rejected most of Janice's claims. Appellant sought an award of alimony so that she could receive education and retraining (in the field of accounting) in order to obtain a better paying job. The court below found that Janice was able and intelligent and would be sought after by many employers if she would pursue her previous training as a legal secretary. Therefore, the court refused to provide alimony, although it did

award Janice $3000.00 in order to familiarize herself with computer technology changes that had occurred since appellant had last worked as a legal secretary in 1974.

Our decision on this issue is guided by our recent ruling in *Heim v. Heim*. In *Heim*, we held that the district judge must, in making an alimony decision, form a judgment as to what is equitable and just, having regard to the respective merits of the parties and to the condition in which they will be left by divorce. We then applied this standard and concluded that, under the circumstances, a $500.00 per month alimony award was not equitable and just, and therefore was an abuse of discretion.

*Heim* involved a couple that had been married for thirty-five years. During the marriage, the husband had earned a Ph.D. and achieved a position as department chairperson of a state university, at a salary of $5600.00 per month. By contrast, the wife did not pursue her own employment or career so that she could remain at home and raise the parties' six children. At the time of the divorce, therefore, the wife had no professional skills, was fifty-seven years old, and had never earned more than $600.00 per month. Consequently, under the terms of the district court award in *Heim*, the wife was left with only a 1982 Buick, a mortgaged house in Detroit (worth approximately $10,000.00), and a future interest in half of her husband's retirement benefits, in addition to her $500.00 per month alimony award.

We noted that part of this unfairness was due to the fact that the husband had obtained the ability during the marriage to earn $67,000.00 per year, while the wife left the marital partnership having obtained "virtually nothing." This court pointed out that if the trial court's distribution were allowed to stand, divorce would take Mrs. Heim from a position of "relative prosperity" to one of "destitution." Because

such a result would have been manifestly unjust, we vacated the $500.00 alimony stipend and remanded the case for reconsideration of the award.

There are, however, several important differences between that case and the one at bar. First, the Fondis' marriage was of much shorter duration than the one in *Heim*, and here Judge Fondi had obtained both his legal degree, and his standing in the legal community, prior to the marriage. Second, Janice leaves the marriage with marketable skills as a legal secretary. These skills, especially after they are brought up to date with the $3000.00 awarded by the district court, indicate that this is not a situation where one party leaves the marriage without a viable means of supporting her or himself. Another important difference between this case and Heim is that Janice leaves the marriage with far more property than did the spouse in Heim. Janice received a $91,000.00 cash award under the district court order, not including her interest in Michael's retirement plan. A further distinguishing characteristic is that Janice was never obligated to stay home and raise children.

Any examination into the equity and justice of the lower court's ruling requires more than a mechanical comparison with the facts of the *Heim* case itself. Heim mandates that this court examine the totality of the circumstances in order to determine whether the court below abused its discretion in rendering its alimony decision.

Such an examination reveals that the district court did not abuse its discretion under the facts and circumstances of this case. Although an exhaustive list of our reasons for so concluding is impossible, we find the following facts especially persuasive: the size of the cash award received by Mrs. Fondi, the amount of the pension plan that she will ultimately secure, and the fact that each party leaves the marriage with the same marketable skills and talents that were initially brought to the union. We caution, however, that each situation will be examined on its own facts, and although Janice's situation is substantially different from that of Loretta

Heim, our review of the record indicates that this was a very close case. Consequently, we are slow to approve the trial court's denial of alimony.

Kogod v. Cioffi-Kogod

Supreme Court of Nevada (2019)

This is a divorce action with a $ 47 million community property estate, in which the district court awarded alimony not based on need and also unequally distributed the parties' community property due to one spouse's extramarital affairs, gifts to family, and excess spending. In this opinion, we recognize that alimony can be just and equitable even when not based on financial need, but we reverse the alimony award in this case because the receiving spouse's share of community property will produce passive income sufficient to maintain her marital standard of living.

Dennis Kogod and Gabrielle Cioffi-Kogod married in 1991 in New York City. They lived in various cities throughout their marriage, moving each time to advance Dennis's career in the healthcare industry. In 2003, Dennis and Gabrielle moved to Las Vegas. Dennis worked for a healthcare company based in southern California and Gabrielle worked part-time in Las Vegas as a nurse consultant. Dennis traveled frequently for work and spent his weekdays either traveling or at his office in southern California. He spent most weekends with Gabrielle in Las Vegas.

Dennis and Gabrielle considered themselves upper-middle class until 2004, when Dennis took a more senior role at his company. By 2009, Dennis was promoted to Chief Operating Officer of a Fortune 500 healthcare company. With his new promotion, he earned an average base salary of $ 800,000 per year, but received bonuses that put his average annual income at almost $ 14,000,000. Gabrielle, as a part-time nurse consultant, earned approximately $ 55,000 per year.

Unknown to Gabrielle, Dennis had started a separate family in southern California. He met Nadya in November 2004 and by June 2005 they participated in

a wedding-type ceremony in Mexico. Shortly after, Dennis informed Nadya he was already married. Despite this, Dennis and Nadya remained together and, after participating in in-vitro fertilization, had twin girls in 2007. Dennis paid for all of Nadya's and his daughters' expenses, including a condominium in southern California, luxury cars, shopping trips and vacations, cosmetic surgery, and Nadya's college classes—he even invested in a business on Nadya's behalf. Dennis and Nadya remained together until 2015 when Nadya discovered that Dennis had another girlfriend.

Because the district court previously awarded more than $ 6 million to each Gabrielle and Dennis as separate property throughout the divorce proceedings, $35 million of community property remained in the marital estate. Due to Dennis's expenditures on extramarital affairs, gifts to his family during the divorce proceedings, and spending in excess of his self-declared expenses, the district court found that Dennis dissipated $ 4,087,863 in community property and unequally divided the parties' community property on that basis. The district court also awarded Gabrielle alimony in the lump sum of $ 1,630,292 to compensate for economic losses as a result of the marriage and divorce, but recognized that she did not need alimony to support herself. In total, Gabrielle, 58 years old, received nearly $ 21 million in the divorce decree and Dennis, 57 years old, received just under $ 14 million. Gabrielle received mostly cash assets, which she does not contest can passively earn her between $ 500,000 and $ 800,000 per year, whereas Dennis's assets largely consist of real property.

As set forth in NRS 125.150(1)(a), Permanent alimony is financial support paid from one spouse to the other for a specified period of time, or in a lump sum, following a divorce. Alimony is financial support paid from one spouse to the other whenever justice and equity require it. When granting a divorce, a district court may award alimony to either spouse as appears just and equitable. The

decision of whether to award alimony is within the discretion of the district court. In determining whether alimony should be paid, as well as the amount thereof, courts are vested with a wide range of discretion.

The parties' arguments in this case highlight the undefined nature of alimony awards. Dennis argues that a judge's discretion to award alimony is limited to instances of financial need, and that no Nevada case or statute extends alimony beyond financial need. Gabrielle responds that alimony may be awarded to equalize post-divorce earnings or maintain the marital standard of living, regardless of need. Our previous cases often addressed alimony without discussing its purpose or scope in express terms. But after examining the historical underpinnings of alimony and our prior case law, we now hold that alimony can be "just and equitable" both when necessary to support the economic needs of a spouse and to compensate for a spouse's economic losses from the marriage and divorce, including to equalize post-divorce earnings or help maintain the marital standard of living.

Alimony, in its most elementary form, is based on the receiving spouse's need and the paying spouse's ability to pay. Alimony to remedy the economic-power imbalance between husband and wife is recognized in Nevada's earliest cases.

NRS 125.150, which authorizes alimony, directs a district court to consider several factors that help the court to understand the spouses' financial needs and abilities to pay. *See* NRS 125.150(9). A district court must consider: "[t]he financial condition of each spouse," NRS 125.150(9)(a) ; "[t]he nature and value of the respective property of each spouse," (9)(b); "[t]he income, earning capacity, age and health of each spouse," (9)(e); "[t]he award of property granted by the court in the divorce ... to the spouse who would receive the alimony," (9)(j); and "[t]he physical and mental condition of each party as it relates to the financial

condition, health and ability to work of that spouse," (9)(k). After considering these factors, and any other relevant circumstance, our case law makes clear that a district court may award alimony to ensure that an economically powerless spouse receives sufficient support to meet his or her needs.

If a district court awards alimony to address a spouse's financial need, the basis for an award is clear-cut when one spouse is unable to meet the basic necessities of life such as food, clothing, and habitation. But such an award becomes less certain and predictable when the divorced spouse is able to meet his or her basic needs. A court can reach very different figures for a spouse's needs, depending on whether those needs are measured at a subsistence level, a level that the court believes to be objectively reasonable, or the actual subjective marital standard of living.

In addition to economic need, alimony may also be awarded to compensate for economic loss as the result of a marriage and subsequent divorce, particularly one spouse's loss in standard of living or earning capacity. Given the contractual and cooperative undertakings implicit in a marriage, alimony might be seen as a remedy fashioned for the economic losses resulting from splitting one household into two through divorce. Such a loss could come in the form of lower income-earning potential due to forgoing career opportunities for the sake of the marriage or a lower standard of living than reasonably expected due to the early termination of the marriage.

Like the need-based factors, NRS 125.150(9) codifies some factors to help a district court assess the economic losses caused by the marriage and subsequent divorce. A district court must consider: the duration of the marriage; the income, earning capacity, age and health of each spouse; the standard of living during the marriage; the spouse's career before the marriage; specialized education or training obtained during the marriage; and the contribution of either spouse as homemaker.

After considering these factors, and any other relevant circumstance, the district court may award alimony under NRS 125.150(1)(a) to compensate a spouse for non-monetary contributions to the marriage and economic losses from the early termination of the marriage, such as lost income-earning potential or a decreased standard of living.

Dennis, then, is incorrect when he asserts that alimony may only be awarded to meet financial need and that the district court abused its discretion by basing its alimony award on an economic loss theory. Gabrielle asserts that alimony was necessary to narrow the large income gap between her and Dennis and to maintain her marital standard of living. We disagree.

While a district court may generally award alimony to narrow large post-divorce gaps in income and to maintain the parties' marital standard of living, the nature. and value of the community property Gabrielle received in the divorce obviated any basis for awarding alimony. Gabrielle can earn between $ 500,000 and $ 800,000 in passive annual income from the cash assets she received in the divorce. This passive income from interest and dividends easily covers Gabrielle's monthly expenses and far exceeds the actual alimony award of $ 18,000 per month that the district court deemed just and equitable. Accordingly, we reject Gabrielle's argument that alimony was necessary to narrow her and Dennis's large post-divorce income gap and to maintain her pre-divorce standard of living.

A large gap in income, alone, does not decide alimony. The award must meet the receiving spouse's economic needs or compensate for economic losses resulting from the marriage and subsequent divorce. Justice and equity only require alimony to achieve more parity in post-divorce income levels when there is economic need, the marriage and subsequent divorce contributed to the disparate income levels, or one spouse cannot maintain the marital standard of living while the other spouse maintains or exceeds the marital standard of living.

Alimony to achieve parity in income must further some underlying rationale for alimony such as economic need, the receiving spouse's inability to maintain the marital standard of living, or the receiving spouse's decreased income-earning potential as a result of the marriage. The district court did not have discretion to award alimony solely to achieve income parity between Dennis and Gabrielle following the divorce.

Gabrielle is correct that we have upheld, and sometimes required, alimony to maintain the parties' marital standard of living. But Gabrielle can maintain her standard of living from the marriage without alimony. The passive income from the assets Gabrielle received in the divorce will easily cover her approximately $16,000 in monthly expenses and give her the ability to maintain savings and investment accounts. The district court acknowledged but then disregarded this passive income because the award was not need-based. The district court should have considered the nature and amount of the property disposition, including passive income from the assets awarded to the parties, when determining whether Gabrielle needed alimony to maintain her standard of living.

The principles underlying permanent alimony do not contemplate an award for a spouse who is, after the community is divided, capable of supporting him or herself, able to maintain the marital standard of living on his or her own, and not economically disadvantaged in his or her earning capacity as a result of the marriage. The lack of a proper basis for alimony in this case is especially concerning given the risk that an alimony award could have been improperly motivated by Dennis's marital indiscretions and role in bringing about the end of the marriage.

Shydler v. Shydler

Supreme Court of Nevada (1998)

Respondent Thomas J. Shydler ("Tom") and Alicia Margarita Shydler ("Margaret") married on June 9, 1976. Tom filed for divorce in March 1992. The parties appeared before the domestic relations referee who recommended that Tom pay $5,000 per month in temporary spousal support. Tom objected to the payment as excessive in light of his take-home pay, which was allegedly less than $9,000 per month.

After hearing the evidence at trial, the district court rendered an oral disposition in which she made the relevant findings and conclusions of law, summarized as follows:

(1) Margaret received all of the community's real property and chattels, and $215,798 payable in monthly $5,000 installments for a period of 38 months.

(2) Margaret was to receive no spousal support in view of the pretrial spousal support she received and the $5,000 per month she was to receive for her portion of the community property.

A district court must award such alimony as appears just and equitable, having regard to the conditions in which the parties will be left by the divorce. In *Sprenger*, this court enumerated seven factors to be considered in determining the appropriate alimony award.

In the case at bar, during the seventeen-year marriage, Tom obtained a general contractor's license, built up a successful company that made a net profit of $793,141 in 1991, and generally earned annual compensation in excess of $100,000. Thus, during that period, Tom developed the business acumen which has provided him with a thriving business and substantial assets.

During the marriage, Margaret continued working in the insurance industry. She also founded her own insurance company, Alamo. While her business was, by all accounts, less successful as time passed, Margaret had the opportunity to develop marketable skills. However, the record reveals that Tom's drinking problems may have interfered with Margaret's work, particularly during a ten-month period of time when Tom could not legally drive.

Despite her work experience, Margaret's potential post-divorce earning potential is well below Tom's. An expert witness testified that the maximum salary Margaret could expect to earn as an insurance adjuster is $59,000. A salary of $59,000 is clearly not at parity with Tom's documented earnings of more than $100,000.

In denying an award of spousal support, the district court focused on two sets of payments flowing from Tom to Margaret: pre-divorce support payments and post-divorce community property equalizing installment payments. With respect to the former, the district court noted in its written findings that Margaret had received "in excess of $165,000 (in addition to child support) during the (pre-divorce) period of January, 1992, through June, 1993, with the result that she has in essence received 33 months of spousal support at a rate of $5,000 per month."

The record indicates that the $165,000 in pre-divorce payments were mainly disbursed for then-current community expenses. Thus, this award was not alimony rendered solely for the benefit of Margaret. Payment of such interim support should not preclude a post-divorce spousal support award, particularly where part or all of those interim payments are used to make payments on community property.

With respect to the post-divorce property equalizing payments, the district court noted Margaret will have sufficient funds with which to support herself and completion of counseling, through payments to be made to her by Tom

to equalize the division of community property comprising of 36 payments of $5,000 per month plus one payment of $4,566, and will also have excess of other substantial assets awarded to her in that division of community property. In other words, the district court awarded Tom the portion of the community property which was producing an annual income in excess of $100,000, while Margaret's share of the community property was to be dissipated in the immediate future to provide for Margaret's living expenses so that Tom would not have to pay spousal support. This is unfair.

It follows from our decisions in this area that two of the primary purposes of alimony, at least in marriages of significant length, are to narrow any large gaps between the post-divorce earning capacities of the parties and to allow the recipient spouse to live as nearly as fairly possible to the station in life enjoyed before the divorce. The individual circumstances of each case will determine the appropriate amount and length of any alimony award.

As property and alimony awards differ in purpose and effect, the post-divorce property equalization payments payable to Margaret in this case do not serve as a substitute for any necessary spousal support. Although the amount of community property to be divided between the parties may be considered in determining alimony, the district court's order in the instant case compelled Margaret to utilize her community property share for support, while Tom's share of the community property was actually providing a substantial income for his support. By determining that the community property equalizing payments acted as a substitute for alimony, Margaret received a lesser share of the community property than Tom. We conclude that the district court improperly denied alimony on the grounds that Margaret had received a property award.

In light of the disparate incomes of the parties and the lifestyle enjoyed by Margaret prior to the divorce, we further conclude that the equities of this case

favor an award of spousal support, at least for a period of rehabilitation. While our case law does not require the district court to award alimony so as to effectively equalize salaries, an alimony award must nonetheless be awarded when just and equitable, and be set at a fair rate based on the individual circumstances of the parties.

Sprenger v. Sprenger

Supreme Court of Nevada (1994)

Appellant Barbara Sprenger (Barbara) and respondent Henry "By" Sprenger (By) were married in 1970 and divorced in 1991. At the time of the marriage, Barbara worked as a licensed practical nurse. Not long after the marriage and the birth of their first child, Barbara gave up her career as a nurse in order to look after her first child as well as a second child who was born two years later. Beginning in 1983, Barbara began taking a series of courses, and at the time of the divorce had accumulated a total of 90 university credits.

The district court awarded Barbara $1,500 per month in alimony "until she completes her undergraduate degree or for a maximum of two years, whichever comes first. The amount of alimony is within the sound discretion of the trial court. However, a court must award such alimony as appears just and equitable, having regard to the conditions in which the parties will be left by the divorce. *See* NRS 125.150(1)(a).

This court has articulated seven relevant factors in determining the appropriate alimony award in a divorce case: (1) the wife's career prior to marriage; (2) the length of the marriage; (3) the husband's education during the marriage; (4) the wife's marketability; (5) the wife's ability to support herself; (6) whether the wife stayed home with the children; and (7) the wife's award, besides child support and alimony.

In the instant case, Barbara was a licensed practical nurse prior to her marriage, but consequently gave up her career in order to take care of the children and household duties. She no longer wishes to practice nursing, and even if she did, would likely need additional coursework as she has not practiced nursing for many years.

Further, the parties were married for almost 22 years and Barbara was 44 years old at the time of the divorce. Barbara's current marketability is not promising and although she has completed 90 university credits toward her undergraduate degree, such a degree will not guarantee her a career, much less a salary allowing her and her family to live in the manner to which they have become accustomed. By, on the other hand, while never having completed college, has developed the business acumen which has provided him with a thriving business and substantial assets.

The only factor appearing to favor Barbara is the district court's award of other assets. The most substantial asset awarded Barbara was a 25 percent interest, valued at $837,408, in a partnership known as the Sprenger Property, owned by Barbara, By and By's parents. While at first blush the awarded interest in this partnership appears substantial, the record raises serious doubts regarding the extent to which Barbara will actually benefit from the award.

It is undisputed that Barbara possesses a minority, noncontrolling interest in the Sprenger property and that the partnership is controlled by By and his parents. Barbara has no management control over the partnership and under the existing partnership agreement has no right to receive income from the partnership. By and his parents might decide to distribute some or all of the partnership earnings in one year and none the next. Then again, they may decide to continually reinvest partnership income. In short, Barbara is at the mercy of By and his parents with respect to whether or not she will receive any income from this partnership. She should not be required to depend on By and his parents' largesse for her living.

Considering the relevant factors cited above, the district court's award of alimony in the instant case is clearly an abuse of discretion. We therefore remand this case to the district court with instructions to both increase and extend Barbara's alimony award such that Barbara is able to live "as nearly as fairly possible to the

station in life she enjoyed before the divorce" for the rest of her life or until she remarries or her financial circumstances substantially improve.

# INSTRUCTIONS
# NEVADA PERFORMANCE TEST
# FEBRUARY 2021

Materials to be used for the Nevada Performance Test are contained in a "File" and a "Library." The first document in the File is a memorandum that contains the instructions and a summary of the problem. Other documents in the File contain factual information, which may or may not be relevant to the issues.

The Library contains the legal authority. It is your responsibility to determine what legal authority is pertinent. The legal authorities include constitutional provisions, statutory provisions and cases.

You will be graded on your responsiveness to the instructions and on the content, thoroughness and organization of your document. Time management is also a critical factor. You reasonably should expect to use half the time reading and analyzing the materials and organizing your document. The remaining time should be sufficient time to write it.

# FILE

MEMORANDUM

From: City Attorney

To: Applicant

Re: Transit Center Regulations

As you know, The City is dealing with a controversy about whether the Transit Tax should be repealed by a referendum. A group is attempting to gather signatures to get a referendum on the ballot to repeal the transit tax. Mayor Lane called me yesterday about this group's activities at the City Transit Center. The Transit Director told the Mayor that something needs to be done because the people gathering petition signatures at the Transit Center are making upsetting and unfair accusations about the transit department and getting into heated arguments with the staff and patrons about the bus service.

The Mayor wants the petition area shut down and, failing that, wants something done to address the suggestions referenced in the attached memorandum from the Transit Director. I explained to the Mayor that the petition area cannot be shut down because it is required by NRS 293.127565, but that we would develop Regulations to address the Transit Director's concerns as much as possible within the confines of the Nevada and U.S. Constitutions and NRS 293.127565.

I am providing you with Draft Regulations that were started several months ago regarding signature-gathering activities at the City Transit Center. This project is now urgent.

Please write a memorandum for me analyzing the legality of the three provisions in Section 2 ("Restrictions") of these Draft Regulations under NRS 293.127565 and the Nevada and U.S. Constitutions.

For each Section 2 provision, using the authority in the Library, analyze the applicable constitutional and statutory law and explain why the provision as

written is or is not lawful. You may use abbreviations when citing to cases. Omit page references.

If any provision would not be lawful, please recommend new language for a substitute provision that would address the Transit Director's concerns in a permissible manner. Explain why your new language would be lawful, again using the relevant legal authority from the Library.

MEMORANDUM

From: Transit Director

To: Mayor

Re: Political Activities at Transit Center

A group has been using the designated Signature Gathering Area at the Transit Center in attempt to get signatures for a referendum petition to repeal the transit tax. I have concerns with how this group's activities are causing problems at the Transit Center. I believe we should shut down the Signature Gathering Area because of these issues.

The morale of the Transit Center employees is being hurt by comments made to passengers in the area that the bus system "sucks" and needs to be defunded as reasons for why passengers should sign their petition. Recently this group got into a shouting match with bus drivers who took offense at the complaints about the bus system. The police were called and defused the situation without making any arrests. Why should anyone have to come to work to listen to complaints by people who are trying to cut funding and maybe cost our employees their jobs?

I respectfully request that you consider enacting regulations to bring some control to these activities. I suggest that we (1) get rid of the petition area; and (2) prohibit such demoralizing and disruptive opposition to the transit department.

***DRAFT***
REGULATIONS FOR CITY TRANSIT CENTER
SIGNATURE GATHERING ACTIVITIES

Section 1: Statutory Requirements for Designated Area

(A) The City Transit Center is a public building required by NRS 293.127565 to include a designated area where people seeking signatures for referendum or initiative petitions as defined in NRS 293.127565 may gather signatures on such petitions.

(B) The designated area for gathering signatures for referendum or initiative petitions within the meaning of NRS 293.127565 shall be the left side of the main lobby bounded by the main entrance door (south), windowed wall (west), interior doors (north) and a line from exterior to interior doors halfway between the east and west walls, as indicated by permanent tape on the floor.

Section 2: Restrictions

(A) Notice. Members of the public seeking to gather signatures pursuant to NRS 293.127565 must submit by phone or email to the Transit Director or his or her designee the name and contact information of any person intending to gather signatures at the City Transit Center; the organization of the requestor; the subject of the petition for which signatures will be gathered; and the date on which the activity is to occur. This notification must be given no later than 24 hours before the time such activities are intended to be initiated.

(B) The use of any language that is demeaning, critical, or disrespectful to employees of the City Transit Center is prohibited and will result in removal of the speaker from the City Transit Center.

(C) Signature gathering activity pursuant to NRS 293.127565 will be permitted between noon and 6:00pm daily.

# LIBRARY

# TITLE 24 - ELECTIONS

## CHAPTER 293

## CIRCULATION AND SUFFICIENCY OF CERTAIN PETITIONS

**NRS 293.127565 Use of public buildings to gather signatures on petitions; remedy for violation; regulations.**

1. At each building that is open to the general public and occupied by the government of this State or a political subdivision of this State or an agency thereof, other than a building of a public elementary or secondary school, an area must be designated for the use of any person to gather signatures on a petition at any time that the building is open to the public. The area must be reasonable and may be inside or outside of the building. Each public officer or employee in control of the operation of a building governed by this subsection shall:

(a) Designate the area at the building for the gathering of signatures; and

(b) On an annual basis, submit to the Secretary of State and the county clerk for the county in which the building is located a notice of the area at the building designated for the gathering of signatures on a petition. The Secretary of State and the county clerks shall make available to the public a list of the areas at public buildings designated for the gathering of signatures on a petition.

2. Before a person may use an area designated pursuant to subsection 1, the person must notify the public officer or employee in control of the operation of the building governed by subsection 1 of the dates and times that the person intends to use the area to gather signatures on a petition. The public officer or employee may not deny the person the use of the area.

## United States Constitution

## First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## Nevada Constitution

## Article 1 – Declaration of Rights

Sec. 9 **Liberty of speech and the press.** Every citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for libels, the truth may be given in evidence to the Jury; and if it shall appear to the Jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted or exonerated.

Regional Transportation Commission of Washoe County

v.

Nevadans for Sound Government

Nevada Supreme Court (2004)

In this appeal, we examine the constitutional boundaries of the government's right to impose "time, place, and manner" restrictions on the use of its property for petition-circulating activities. The First Amendment to the United States Constitution and Article 1, Section 9 of the Nevada Constitution protect the rights of persons to engage in expressive speech activity. NRS 293.127565 governs the right to use public buildings to collect petition signatures.

Nevadans for Sound Government [NSG] filed a complaint in the district court alleging that various actions taken during the previous months by the Regional Transportation Commission of Washoe County (RTC) had unlawfully restricted its access to RTC properties for signature collecting purposes.

RTC guidelines provide that an RTC request form must be submitted three business days before the date of the intended activity. The request form asks for the name, telephone number, and organization of the requestor. It also asks for the subject of the petition, and for the dates on which the activity is to occur.

**Freedom of Speech**

The First Amendment to the United States Constitution, as applied to state governments through the Fourteenth Amendment, prohibits a state from "abridging the freedom of speech." Similarly, Article 1, Section 9 of the Nevada Constitution protects the general right of the people to engage in expressive activities in this state. We have held that Article 1, Section 9 affords no greater protection to speech activity than does the First Amendment to the United States Constitution.

Therefore, under the Nevada Constitution, the appropriate analysis of appellants' restrictions is identical to that under the First Amendment.

The circulation of ballot petitions constitutes core political speech for which First Amendment protection is at its zenith. Nevertheless, the First Amendment does not grant a circulator the right to access all government property without regard to the nature of the property or to the disruption that might be caused.

**Time, place, and manner restrictions under the First Amendment**

When analyzing the constitutionality of restrictions placed on protected speech activities that take place on government property, the United States Supreme Court has differentiated between public and nonpublic forums. Public forums encompass places which by long tradition or government fiat have been devoted to assembly and debate, such as streets and parks. Public forums may also be created by government designation. However, when the government designates a forum as public, it must intend to open the forum for use by all or part of the public for discourse. Mere permission to freely go onto government land is not enough to create a designated public forum. Thus, the government does not create a designated public forum by permitting limited discourse.

All remaining property is nonpublic fora. Within the nonpublic forum description, falls a subset, the limited public forum. A limited public forum is created when a state designates an area for speech activities by certain groups or for certain subjects. In limited public forums, the state must respect the lawful boundaries it has itself set. When nonpublic or limited public forums are involved, government restrictions on time, place, and manner will be upheld if they are viewpoint neutral and related to a legitimate government purpose served by the forum. Moreover, the government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation.

In determining whether a forum is public or nonpublic, courts consider the policy and practice of the government and the nature of the property and its compatibility with expressive activity.

**Forum characterization**

In contending that the RTC CitiCenter is a limited public forum, RTC asserts that its primary purpose is to allow the transfer of passengers between buses, not to provide a forum for the free exchange of ideas. RTC concedes that, under the statute, it was required to open its facilities to petition circulators for signature-gathering activities. However, according to RTC, neither the statute nor RTC guidelines compel it to grant access for expressive activity to the public at large. Therefore, RTC asserts that with the enactment of NRS 293.127565, the state purposefully created a limited public forum or nonpublic forum at certain public buildings, including the RTC CitiCenter. We agree.

Clearly, the RTC CitiCenter was not designed for and dedicated to the advancement of expressive activities. Although NRS 293.127565 creates an obligation for the CitiCenter to provide areas for signature gathering, the statute applies only to people gathering signatures for petitions; it does not grant rights to the general public to engage in any type of speech activity that would normally be permitted in a traditional public forum. Nor does RTC permit speech activities on its premises other than those mandated by the statute. Further, the CitiCenter is of limited space and its patrons have limited time in which to make connections. If unrestricted expressive activity were allowed, the principal operations of the transportation system could be severely disrupted. Accordingly, we conclude that the RTC CitiCenter is a limited public forum, and RTC policies should be reviewed under the reasonableness standard generally applied to time, place, and manner restrictions of limited public and nonpublic forums.

**Restrictions' reasonableness**

At issue in this appeal are the RTC policies concerning advance notice, identification of the petition's subject and the petition circulator, and pre-authorization. Neither written policy discriminates amongst signature gatherers based on the content of the petition or the viewpoint of the petition circulator. Therefore, we must decide whether the policies are reasonable in light of the RTC CitiCenter's transportation purposes.

RTC contends that its guidelines were created in order to accommodate petition circulators while also ensuring the safety and security of RTC patrons and preserving efficient operations of its transportation system. In addition, with respect to its designated-area provision, RTC asserts that its CitiCenter is a cramped area in which patrons are often pressed up to the curb edges, and through which patrons have to quickly cross in order to make connections, and notes the potential dangers of permitting groups of signature gatherers or their equipment to become obstacles to unwary or distracted patrons.

We conclude that, under the First Amendment, the regulations are permissible restrictions related to legitimate government safety and functional operating purposes. There is nothing inherently unreasonable in requiring a petition circulator to provide advance notice of his or her intended signature-gathering activities. Advance notice serves a variety of purposes, including enabling building operators to better accommodate multiple signature gatherers and individual petition circulators' particular needs, and to have a chance to make other employees aware of the intended signature-gathering activities so that they will be able to adjust their duties accordingly.

Additionally, the RTC requirements that a signature gatherer provide his or her contact information before being allowed to use RTC property are reasonable. The requested information is reasonably related to RTC aims of accommodating

all requestors and unusual circumstances while maintaining safe and efficient operations of their affairs.

As the above discussion demonstrates, none of the RTC time, place, and manner restrictions challenged by NSG discriminates amongst petition circulators based on the content of the petition or the viewpoint of the petition's promoter. Further, all of the restrictions are reasonable and all are related to RTC's goals of promoting safety and efficiency in conducting their legitimate transportation purposes. RTC's time, place, and manner restrictions are constitutionally valid.

Griffin v. Bryant

United States District Court, D. New Mexico (2014)

In analyzing the constitutionality of restrictions on speech that occurs on public property, the Supreme Court has identified three types of forums: the traditional public forum, the public forum created by government designation, and the nonpublic forum. The Supreme Court has determined that this tripartite framework is necessary, because the First Amendment does not guarantee access to property simply because it is owned or controlled by the government. The Supreme Court has explained that the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.

Nonpublic forums are sometimes referred to as limited public forums. Governmental restrictions on access to a nonpublic forum are valid so long as the restrictions are reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

With respect to activities on government property, the Constitution does not require the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.

The Supreme Court determined that airport terminals are nonpublic forums, and the government could thus impose reasonable, viewpoint-neutral, speech restrictions. Regarding speech restrictions in a nonpublic forum, the Supreme Court emphasized that the “restriction need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation.”

The Defendants contest the proposed finding that a provision, which forbids speakers from making any negative mention of any Village personnel, staff, or of the Governing Body during the public input portion of Governing Body meetings, is an unconstitutional speech restriction. Instead, they contend that it is a content-neutral time, place, or manner restriction designed to prevent disruption during Governing Body meetings.

The Court determines that this provision violates the First Amendment.

First, the Court determines that the public input portion of the Governing Body meetings constitutes a limited public forum, and, thus, any government restriction on speech must only be reasonable in light of the purpose served by the forum and be viewpoint neutral.

A limited public forum is a subset of the nonpublic forum classification. The core pursuit of Governing Body meetings is to make decisions and conduct business on behalf of the municipality. To assist itself in this core pursuit, the Governing Body has chosen to open its meetings to limited public comment so that it can be informed of its constituents' opinions, and, with this information, be better situated to make decisions that are more democratic, and, sometimes, more competent.

On its face, a restriction that "no negative mention will be made of any Village personnel, staff or the Governing Body" is viewpoint-based, because it allows praise or neutral comment, but not criticism or disapproval, about government employees or the Governing Body. The restriction eschews a limitation that could cure its constitutional infirmity: narrowing the phrase "negative mention[s]" to an equivalent phrase that would include only personal attacks and breaches of decorum.

The Court can imagine three potential government interests that the Village could assert to justify this restriction: (i) preventing disruption of the Governing

Body meetings; (ii) maintaining decorum and an atmosphere of respect in the meetings; and (iii) preventing criticism and potentially damaging job-related embarrassment to government employees and the Governing Body. The first interest is constitutionally permissible. The third is not. The second might not be.

The serious way in which this restriction is viewpoint-based is, again, that it allows praise but not criticism of the Governing Body and its employees. It goes beyond the prohibition against personal or slanderous attacks upheld in *Scroggins v. City of Topeka, Kan.* and takes one side of the conversation—a conversation of public importance, in which citizens opine on their leaders' performance—off the table, while leaving the other side unimpeded. The suppression of political dissent is the core evil the First Amendment seeks to prevent, and that the viewpoint suppressed by this restriction is all negative feedback to the government—rather than one side of a single, discrete issue—makes things worse, not better, for the rule. This restriction is a viewpoint-based speech restriction.

Brees v. HMS Global Maritime, Inc.

U.S. District Court, W.D. Washington

(2020)

Speech in a non-public forum may be regulated as to time, place, manner, and content so long as the content regulation is viewpoint neutral. Where a non-public forum is at issue, the court must inquire whether the challenged restriction is reasonable in light of the purpose served by the forum, and is viewpoint neutral.

Plaintiff's First Amendment claim is without merit. The Pierce County Ferry System ("PCFS") regulates speech, through its Passenger Code of Conduct ("PCC"), by precluding "foul, abusive, or disruptive language" to "provid[e] a safe and enjoyable experience for all ... passengers." Approximately 12 times per year, HMS Ferries bars a passenger from boarding due to unruly and disruptive behavior; if a passenger persists in this behavior, they are banned. The ferry holding area is a non-public forum. It is demarcated by physical barriers and signage, and vehicles and pedestrians not boarding the ferry at not permitted in the holding area during ferry operations.

To the extent that Plaintiff was precluded from boarding the ferry because he said to Mr. Caputo, "I'll see you in court, asshole," or used any other foul, abusive, or disruptive language, this behavior was in violation of the PCC. The PCC's regulation of speech does not violate Plaintiff's rights under the First Amendment as it is a reasonable regulation in light of the purpose of the ferry system—safely and efficiently transporting passengers and crew—and is viewpoint neutral.