July 2024

Nevada Bar Exam

STATE BAR OF NEVADA

NEVADA ESSAY EXAM INSTRUCTIONS

Each essay is one hour in length. Quality of writing counts. Answers written in a form other than paragraphed essay form will not receive full credit. Excessive use of abbreviations, such as symbols, acronyms and text-talk, may result in score reduction.

Read each fact situation carefully and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing. Do not search for hidden meanings or remote exceptions, since none are intended. Let your answer represent your best judgment in each instance on the plain meaning of the question. Clarity and conciseness are important but make your answer complete. Do not volunteer irrelevant or immaterial information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question.

Analysis is the most important part of the essay answer. Your answer should demonstrate your ability to reason and analyze the facts in the question and to discern the points of law and fact upon which the situation turns. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles and theories of law, and the reasoning by which you arrive at your conclusions. Do not merely show that you remember legal principles. Instead, demonstrate your proficiency in using and applying them to the facts. If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

You should answer according to Nevada case or statutory law, unless Federal law applies.

You will be instructed when to begin and when to stop this test. Do not open this booklet until you are told to begin.

If you are using a laptop computer, answer each question on the screen assigned to that essay number. There is no limit on the length of your answers. If you are handwriting, answer each question in the answer booklet assigned to that essay number. Write legibly and concisely and organize your answer. You may make notes anywhere in the test materials; You may not tear pages from the question booklet.

You are required to answer all questions.

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NEVADA BAR EXAM

QUESTION NO. 1: ANSWER IN LIGHT BLUE BOOKLET

Karen is licensed to practice law in Nevada. She graduated from law school and passed the bar exam in 2020, but has been unable to find work as an attorney. Instead, Karen has been working as a cocktail waitress at a Las Vegas casino. While on a work break, Karen met Mike, an engineer in the casino's IT department. Despite her lack of legal experience, Mike convinced Karen they could operate a successful law practice using a new artificial intelligence chatbot called BratGPT. Karen and Mike quit their jobs, leased an office, and formed a partnership called "AI Attorneys." They agreed to equally split all fees earned.

The firm's first client, Betty, arrived when only Mike was in the office. It was a simple collection case, so Mike decided to handle it himself. Betty reluctantly agreed to a 75% contingency fee paid to AI Attorneys for all amounts collected. Although the fee agreement was not reduced to writing, Mike and Betty agreed and shook hands. After Betty left, Mike used BratGPT to draft a demand letter to Betty's debtor. Mike sent the letter and, much to his surprise, received a cashier's check for the full amount of the debt two weeks later. Mike deposited the $100,000 check into the firm's operating account, but did not tell Betty. Because the firm was struggling with start-up expenses, Mike decided to pay Betty with fees from future cases.

Karen's clients, Larry (landlord) and Terry (tenant), requested a residential lease. The clients agreed to split the cost. Karen had BratGPT prepare the lease, but she did not specify it was for property in Nevada or review the final document. As a result, several mandatory provisions, including pet occupancy, were omitted. Shortly after signing the lease, Larry and

Terry got into a dispute about whether cats were allowed in the residence. Upon receiving an email from Terry's new lawyer, Karen called Terry to explain that pets were not permitted, and that she had forgotten to include the clause when drafting the lease.

Please fully discuss all issues arising under the Nevada Rules of Professional Conduct.

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NEVADA BAR EXAM

QUESTION NO. 2: ANSWER IN RED BOOKLET

Plumas Plumbing, Inc. ("PPI"), a Nevada corporation, offers plumbing services in Reno, Nevada. Dayton Software, Inc. ("DSI"), a Nevada corporation, is a software development company operating out of Dayton, Nevada.

PPI engaged DSI to develop software that would make it easier for PPI to keep track of its customers, jobs, and invoices. The parties signed a written contract that read, in relevant part, as follows:

Software Purchase and Sale Contract ("Contract")

Section 1

Software Development and Sale

In consideration for $1,000,000, DSI hereby agrees to develop software for PPI meeting the specifications set forth on Exhibit A (the "Software"), and sell PPI an external hard drive containing the Software, that PPI can run on its company computers.

. . .

Section 25

Entire Agreement

This Contract (including Exhibit A) constitutes the entire agreement between the parties relating to its subject matter, and supersedes all prior and contemporaneous agreements, representations, or understandings, either written or oral, between the parties with respect to such subject matter.

. . .

Section 30

Interpretation

All headings in this Contract are for convenience only and will not affect the meaning of any provision hereof.

PPI received a FedEx package containing an external hard drive on which the Software had been installed. The Software performed exactly to specifications. Satisfied, PPI paid DSI the agreed upon $1,000,000.

A year after PPI received the Software, PPI's management decided that they wanted to add additional features to the Software. One of PPI's employees said she could make the necessary modifications to the Software, but DSI had applied restrictions to the Software prohibiting any modifications.

PPI wrote to DSI requesting that they remove the restrictions, but DSI refused, saying that PPI only had a limited license to run the Software on its company computers, and that the license did not include the right to make modifications. PPI insisted they owned the Software and should be able to do what they wanted with it.

PPI filed suit in Nevada court seeking a declaratory judgment that PPI was the owner of the Software. DSI responded requesting the Court find that DSI is the owner of the Software.

In its court filings, PPI: (1) asserted that, under the contract's plain meaning, DSI sold (rather than licensed) the Software to PPI; and (2) requested that PPI be permitted to introduce into evidence emails between DSI and PPI during the negotiation of the Contract in which representatives of each party discussed PPI's "purchase" and DSI's "sale" of the Software.

In its court filings, DSI: (1) asserted that, under the contract's plain meaning, DSI only sold the hard drive (and not the Software itself) to PPI; and (2) requested that DSI be permitted to introduce evidence demonstrating that the industry standard is to license, rather than to sell, software.

In answering the following questions, consider only the laws governing contract interpretation and do <u>not</u> take into consideration or discuss any Rules of Evidence or Rules of Civil Procedure.

1. **Please fully discuss whether the Contract is governed by common law or the UCC?**
2. **Please fully discuss whether:**
    a. **PPI should be permitted to introduce the emails into evidence?**
    b. **DSI should be permitted to introduce the industry standard evidence?**
3. **Please fully discuss whether any of your answers change depending on whether the Contract is governed by common law or the UCC?**

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NEVADA BAR EXAM

QUESTION NO. 3: ANSWER IN DARK GREEN BOOKLET

Andrew, a California resident, headed to Reno, Nevada one morning to deliver a couch on behalf of his employer, Couch Potato, Inc. Couch Potato is a California corporation, with its principal place of business in Sacramento, California. Although Andrew normally drives Couch Potato's truck to make deliveries, Andrew drove his personal truck for this specific delivery because it performed better in the snow.

Soon after crossing into Nevada, Andrew answered a call on his hands-free headset. Andrew's wife, Barbara, was calling to remind him to be back home by 8:00 p.m. for their son's birthday and to pick up a gift on his way home. Distracted by the conversation, Andrew slid over a sheet of black ice and swerved into the other lane hitting Dave's car. Dave, a Nevada resident, pulled over, limped out of his vehicle, and approached Andrew's truck while screaming profanities. Dave started pounding on Andrew's door, which prevented Andrew from exiting his truck for several minutes. Andrew finally exited out of the passenger side of the truck, only to be punched in the face several times by Dave. Andrew screamed in pain. Frightened and injured, Andrew climbed back into the truck, and while driving away, ran over Dave's foot breaking several bones. Barbara heard the entire encounter from Andrew's headset.

A few days later, Andrew suffered a mental breakdown due to several stressors in his life and was institutionalized in California for six months. After he was released, his face was still healing from the incident and Barbara was still having nightmares from listening to the incident. Andrew and Barbara consulted an attorney to sue Dave. The attorney sued Dave in Nevada and Dave countersued. California prohibits the use of hands-free headsets while driving.

Please fully discuss:

1. **Whether the Court should apply Nevada or California law to the action;**
2. **Andrew's claims against Dave, and Dave's defenses;**
3. **Barbara's claims against Dave, and Dave's defenses; and**
4. **Dave's claims against Andrew and Couch Potato, and Andrew's and Couch Potato's defenses.**

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NEVADA BAR EXAM

QUESTION NO. 4: ANSWER IN ORANGE BOOKLET

While driving to a store, John and Steve decided to rob it. John and Steve entered the store, robbed the cashier, and ran out of the store with the security guard chasing them. John fired his gun at the security guard and the security guard fired back. Steve was shot and fell to the ground, while John ran away. In the ambulance on the way to the hospital, Steve died. John was arrested for robbery and murder and proceeded to trial.

Under the Nevada Rules of Evidence, please fully discuss the admissibility of the following evidence offered by the prosecution:

1. Steve's statement to the paramedic, right before taking his last breath, "The robbery was all John's idea, John shot that security guard, and I think John shot me";
2. The cashier's testimony that she heard Steve tell John, "Get it all, because I need to pay my bills";
3. Testimony from John's wife, Joyce, that John told her he was planning to rob the store for their rent money;
4. Testimony from a firearms expert that, based on the location of the spent casings, the first shot was fired in the direction of the security guard;
5. The security guard's previous statement to police that John fired his gun first, after the security guard testified during trial that he did not remember who fired their gun first; and
6. Evidence that John has a prior robbery conviction from 3 years ago.

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NEVADA BAR EXAM

QUESTION NO. 5: ANSWER IN PURPLE BOOKLET

After receiving several complaints from people in downtown Reno, Nevada that an "unknown male" was approaching them trying to sell methamphetamine, the Reno Police Department set up a "buy" program. This program involved a female undercover officer, Officer Olive, walking around downtown and attempting to purchase methamphetamine while other undercover officers conducted audio and video surveillance.

On her first day, Officer Olive saw Danny, who was standing on a downtown street with two other men. Officer Olive waved Danny over and asked him if he had any methamphetamine that she could buy for $40.00. Danny answered "no," and went back to where he had been standing. The next day, Officer Olive approached Danny, who was alone, and asked again if he could sell her some methamphetamine. Again, Danny answered "no." These unsuccessful exchanges continued for several days.

The following week, Danny walked up to Officer Olive and asked her to follow him into an alley where Danny pulled a bag containing methamphetamine out of his coat pocket and gave it to Officer Olive. Officer Olive gave Danny $40.00 and left. Other officers subsequently arrested Danny when he exited the alley. Officers searched Danny even though he did not consent. During their search, the officers found two additional small bags of methamphetamine and one fentanyl pill in his pocket.

Meanwhile, the "unknown male," who prompted the initial complaints, watched Danny get arrested from across the street.

Danny is charged with: one count of selling a controlled substance; one count of possession of a controlled substance for the purpose of sale; and four counts of possession of a controlled substance.

Please fully discuss the following:

1. **What constitutional arguments can Danny make regarding the admissibility of the narcotics?**
2. **Identify and fully discuss all legal defenses that Danny may raise.**
3. **Prior to trial, the prosecution refused to disclose the identity of the undercover officer to Danny's defense attorney. What arguments should Danny's defense attorney raise in his motion to require the disclosure of Officer Olive's identity and how should the court rule?**
4. **Assuming he is convicted of all charges, what arguments should Danny's defense attorney raise regarding the court's ability to sentence Danny on all counts and how should the court rule?**

JULY 2024

NEVADA BAR EXAM

QUESTION NO. 6: ANSWER IN YELLOW BOOKLET

Paul, a successful entrepreneur and investor in start-up companies, recently relocated from California to Incline Village, Nevada. After moving to Nevada, Paul entered into a promissory note with WeDrive, a California corporation, to provide $5 million in funding for its autonomous car project. WeDrive is headquartered and has its operations in California but test drove its autonomous cars throughout Northern Nevada under an agreement it had with the Nevada Department of Transportation. At the time Paul entered into the promissory note, his California limited liability company, Angel, LLC, also entered into an Advisor Agreement with WeDrive to provide advisory services to the company in exchange for an equity stake in WeDrive.

WeDrive struggled to get approval for its autonomous cars and failed to timely make the first $100,000 payment to Paul under the terms of the promissory note. Paul filed suit in Nevada state court against WeDrive. His complaint included claims for breach of contract and an accounting.

After being properly served with the summons and complaint, WeDrive removed the entire action to the United States District Court for the District of Nevada. Following removal, WeDrive filed a Motion to Dismiss for lack of personal jurisdiction and brought a counterclaim against Angel, LLC and Paul for breach of the Advisor Agreement and related torts, claiming they failed to provide advisory services and thus were not entitled to any equity.

Heeding Paul's instructions to "be aggressive," Paul's lawyer served WeDrive with a number of discovery requests the day after the Motion to Dismiss and counterclaim were filed. The discovery requests included 50 interrogatories and 30 requests for admission, which sought

admissions of liability from WeDrive. WeDrive ignored the discovery requests and did not respond.

Paul's lawyer timely filed a Motion to Remand the case to state court in Nevada, arguing that all the claims in his complaint arose under Nevada state law. After briefing, the Federal District Court entered an order denying both the Motion to Dismiss and the Motion to Remand.

Please fully discuss the following:

1. **Did the United States District Court properly rule on the Motion to Dismiss?**
2. **Was the action properly removed to the United States District Court?**
3. **Was it permissible for WeDrive to bring a counterclaim against Paul and Angel, LLC?**
4. **Were Paul's discovery requests proper and should WeDrive have responded?**
5. **Did the United States District Court properly rule on Paul's Motion to Remand the case to state court in Nevada?**

STATE BAR OF NEVADA

NEVADA PERFORMANCE TEST (NPT) INSTRUCTIONS

The NPT is a 2-hour exam designed to test the ability to complete a common legal task that a beginning lawyer would be expected to perform. You are required to use necessary legal skills in a real-life scenario.

You will be provided with a File. The File will contain source documents that will set forth the facts of the case and other background information. These materials may include interview transcripts, correspondence, investigative reports, client records, pleadings, internal memorandum, newspaper articles, legislative materials, medical records and correspondence between counsel. All facts recited are not relevant, and maybe incomplete, ambiguous or conflicting. You are expected to recognize what facts are relevant and to identify when facts are ambiguous and how such ambiguities could be resolved.

The second component of the exam materials is the Library. The Library may contain cases, statutes, administrative regulations and other legal authority commonly cited in a legal memorandum or used for reference. All legal sources are based on Nevada law. You may use abbreviated titles and omit page references when citing cases found in the Library.

The NPT is not a test of your knowledge of substantive law. The NPT is designed to evaluate your fundamental lawyering skills. Your answer will be evaluated on the content, thoroughness, and organization of your document based on these criteria:

- Ability to determine relevant factual details, to distinguish relevant from irrelevant facts, and to resolve potentially conflicting facts;
- Analysis of source legal authorities to determine applicable principles of law;
- Application of the controlling law to the relevant facts and circumstances;
- Effective communication and professional presentation in writing;
- Performing task in a timely matter; and
- Ability to follow the directives provided.

In preparing your written document, it is important that you concentrate on the materials in the File and Library, which provide the specific materials from which you should use. Use your general legal knowledge to assist you with analyzing the issues presented.

You may make notes anywhere in the test materials; You may not tear pages from the question booklet.

Nevada Performance Test #1

DATE: August 1, 2024 **Time allowed for session: Two Hours.**

In re Bill Baker

FILE

LIBRARY

FILE

MEMORANDUM

TO: Applicant
FROM: Sharon Hedges, Supervising Attorney
SUBJECT: Memo on Legal Issue in Bill Baker Matter
DATE: August 1, 2024

Welcome to our firm! For your first assignment I need a quick assessment of legal issues that surfaced in our intake interview yesterday with a new potential client, Bill Baker. Another associate did the interview but he had other urgent matters so we need you to take the next step.

Baker may have a claim for back wages owed under Nevada's Minimum Wage Amendment (MWA), Article 15, Section 16 of the Nevada Constitution, for work he performed helping to restore power after storms the past two winters. I checked the applicable minimum wage schedules and calculated how much Mr. Baker was paid, and the wages appear too low if the MWA applies. Although the total wage recovery may not be large, the case could be attractive for us to pursue because the MWA provides for attorneys' fees if we prevail.

This case raises many issues and questions, but, before going any further, using the File and Library attached, I want an analysis of whether Mr. Baker will be considered an employee, rather than an independent contractor, under the MWA. In addition to providing the legal analysis, please note any important missing facts we could investigate to potentially strengthen our confidence in our legal conclusions.

Thank you.

Notes from July 31, 2024

Intake Interview with Bill Baker

Bill Baker came to us because he heard Nevada has a law that could mean he should have been paid more for the recent work he did as an emergency worker restoring power lines that went down in bad weather.

Mr. Baker is a twenty-two-year-old man who lives with his parents in Ely, Nevada. He graduated from high school and has earned some credits at Great Basin College, mainly in technical courses and health sciences. He took those courses to prepare for possible careers as an EMT (emergency medical technician) or an HVAC (heating, ventilation, air conditioning) repair person.

Mr. Baker's neighbor in Ely, George Cornish, is a "splicer," who makes good money helping to repair telephone and other communication lines during emergencies, often traveling around the Western states and gone for weeks at a time. In December 2022, George Cornish suggested to Bill that Bill might want to get his foot in the door to become a "splicer" by getting hired as a Splicing Assistant for the company Cornish worked for, Power Back Nevada (PBN). Bill liked the idea of working outside, got along well with his neighbor, and knew that his neighbor made a lot of money with a lot of time off, so, Bill signed on.

According to Bill, the splicing work crews were hired directly by PBN, a scheduling company and intermediary between the power utilities and the splicing workers. Bill gave me his contract with PBN, which is attached. According to Bill, a Splicing Assistant position is a low-skill job that requires no training or experience.

Bill says that he worked for PBN for 13 weeks between December 2022 and March 2023, and then again for nine weeks between November 2023 and January 2024. His contract with PBN specified that he would be paid $400 per week. Bill says he has check stubs showing that he received $400 per week for each of those twenty-two weeks. Bill said that he understood the money was not great, but it was better than living at home and paying for college. His expenses were low while doing this work, so he was able to stay afloat while he had an adventure and learned about a new kind of work.

Bill did not receive any medical benefits, which didn't bother him because he is still on his family's insurance. Bill thought about taking online college courses while he was working for PBN, but the hours were too long and the internet connection too uncertain for it to work. He decided instead to concentrate on doing a good job to get a start in the splicing world.

In the 2022-23 stint, Bill assisted his neighbor, George Cornish. Their schedule was to work six days each week and 12 hours each day. Bill usually slept in Mr. Cornish's recreational vehicle, but occasionally came home or stayed with friends. They were mainly working in the Great Basin area, not too far from Bill's home in Ely, but occasionally traveled to other parts of Nevada. Their work included both emergency repairs and system upgrades.

In the 2023-24 stint, George Cornish was working in another state, so Bill assisted different splicers each week. He worked all over the state because of another high number of windstorms knocking out power. For this stint, Bill usually slept in his own truck.

During both stints the routine was the same: The crew would show up at the site designated by PBN at 7:00 a.m. to receive an assignment and would report back at 8:00 p.m. to sign out and return any company equipment. If they finished a job midday the splicer would call in and they would be sent by PBN to another location to finish the day. They took two fifteen-minute breaks and a 30-minute lunch break for a total of one hour off each day, making a twelve-hour workday. Bill generally rode with a splicer in that splicer's truck, and used that splicer's equipment, other than the knapsack of hand tools Bill owned and carried himself. Mr. Cornish had given him some of the basic tools, and Bill spent some money getting the other tools he needed.

Bill enjoyed the camaraderie with the crew, the rugged weather, and the sense of independence. No one from the company was looking over their shoulders because it was only splicers and assistants and other people on the crew out in the field with them. Bill got along well with the splicers. He says that he made himself valuable by being willing to carry anything and by learning to operate the bucket trucks that lifted splicers up to overhead lines. That was often challenging because of uneven terrain and lots of tree branches.

Bill didn't do much splicing himself, except on occasion when the job was simple and, typically, when one of the older guys did not want to deal with the cold or wind or some other

problem. Although he did not get much on-the-job experience actually splicing lines, Bill was confident he had learned enough to earn a splicing job in the future.

Bill was back home and in school in May of this year while still considering trying to get a position as a splicer, when he took an opportunity that opened for him to get into an HVAC apprenticeship program in Ely. Also, he now has a serious girlfriend, Melanie, and doesn't want to keep doing a job that requires him to leave home. Melanie is a waitress. When she heard what he was paid for this work, she told him to find out if the company owed him more money.

Now that he's not planning to keep working for PBN Bill told me that he is more comfortable making some enemies by trying to get more pay, especially if that's the law.

I told Bill we would do some research and get back to him.

Power Back Nevada Independent Contracting Agreement

Power Back Nevada agrees to contract with _William (Bill) Baker__ of Ely, Nevada ____ as an INDEPENDENT CONTRACTOR to provide services as a __Splicing Assistant__ working on repair and maintenance of power lines, communications lines, and other projects as designated and directed by Power Back Nevada (PBN).

The terms of the Contract are as follows:

1. The Independent Contractor will start work at 7am on each day designated for work by PBN, after signing in with PBN personnel.
2. The Independent Contractor will perform assigned duties at field work sites every workday until returning to the work distribution site designated by PBN by 8pm each workday, by which time he will return to the designated site and sign out.
3. The Independent Contractor will be paid $400 per week in return for services contracted for and in return for learning the industry of communications splicing maintenance and repair.
4. The Independent Contractor understands that this opportunity is akin to an apprenticeship program to provide entry into a lucrative and growing profession.
5. The Independent Contractor will be available when notified by PBN personnel that he is needed to perform his duties, some of which are emergency in nature and difficult to schedule in advance.
6. The Independent Contractor will supply his own equipment.
7. PBN will not provide medical insurance or any other kind of insurance for the Independent Contractor. The Independent Contractor is responsible for buying whatever insurance he believes is advantageous or useful.
8. As an Independent Contractor, the undersigned will not need supervision to perform his duties for PBN.
9. The Independent Contractor will make himself available for six days at a time, with one day off when called for work by PBN.

10. The Independent Contractor will provide his own transportation to whatever work distribution site and whatever field sites are designated by PBN.
11. The Independent Contractor will hold PBN harmless for any claims of injury or other actionable matter from performing this work for PBN.
12. The Independent Contractor is an adult of sound mind who is fully capable of signing a legally binding contract.

Signature: /s/ William Baker s/s Harry Hays

Independent Contractor for Power Back Nevada

DATE: November 30, 2022

LIBRARY

EXCERPTS FROM STATE OF NEVADA CONSTITUTION

Nev. Const. Art. 15, § 16

§ 16. Payment of minimum compensation to employees [excerpted]

A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. [details about wage rates omitted]

B. The provisions of this section may not be waived by agreement between an individual employee and an employer. [….] An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.

C. As used in this section, "employee" means any person who is employed by an employer as defined herein.… "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.

D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the remaining provisions and all portions not declared illegal, invalid or inoperative shall remain in full force or effect ….

In this appeal, appellants argue they are in fact employees, not independent contractors, within the context of Article 15, Section 16 of the Nevada Constitution, the Minimum Wage Amendment (MWA). We hold that the "economic realities test" applies to constitutional MWA claims.

The MWA speaks in sweeping terms. It mandates that "[e]ach employer shall pay a wage to each employee." And it defines "employee" broadly, with only the narrowest of exceptions. In the context of the MWA, the federal Fair Labor Standards Act (FLSA) carries even greater persuasive weight, given that the relevant language of the MWA (defining employee as "any person who is employed by an employer," Nev. Const. art. 15, § 16(C)) so closely mirrors the FLSA 29 U.S.C. § 203(e)(1) (defining employee as "any individual employed by an employer"). When interpreting provisions that have analogous federal counterparts, Nevada courts look to federal law unless the state statutory language is 'materially different' from or inconsistent with federal law." (citation omitted).

The FLSA's definition of employment predates the MWA by decades, and courts' applications of the "economic realities test" to that language have been "nearly ubiquitous" during that period. Because the economic realities test is based on a totality of circumstances, courts have used a range of factors in their analyses of the same. There are five that courts nearly universally consider:

1) the degree of the alleged employer's right to control the manner in which the work is to be performed:
2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
4) whether the service rendered requires a special skill; and
5) the degree of permanence of the working relationship.

The question must be decided case by case, with reference to the particular circumstances of the relationship involved….

The central issue here is a familiar one: are the appellants "employees" or "independent contractors," and how do we tell? In this opinion, we clarify that employee status for purposes of the Minimum Wage Amendment to the Nevada Constitution (MWA) is determined only by the "economic realities" test. We reaffirm that a contractual recitation that a worker is not an employee is not conclusive.

BACKGROUND

The drivers sued in 2015, alleging that their take-home pay was often less than the minimum hourly wage required by the MWA. The MWA only applies to "employees." Nev. Const. art. 15, § 16. The drivers alleged that, notwithstanding the recital in the lease agreement that they were independent contractors, they were in fact employees under the "economic realities" test.

The cab companies contend that the recitation in the lease agreement that "LESSEE is an independent contractor" is conclusive evidence that the drivers are in fact independent contractors for MWA purposes, and thus no application of any other test is necessary. That argument is squarely foreclosed by our caselaw. *Terry v. Sapphire* (Nev. 2014) ("Particularly where, as here, remedial statutes are in play, a putative employer's self-interested disclaimers of any intent to hire cannot control the realities of an employment relationship.")

The drivers here seek to enforce a right that—if they are employees under the appropriate tests—is guaranteed to them by law, not by the contract.

Thus, we reaffirm that a worker is not necessarily an independent contractor solely because a contract says so. Instead, the court must determine employee status under the applicable economic realities test, based on all the relevant facts. Courts must not allow contractual recitations to be used as subterfuges to avoid mandatory legal obligations. Otherwise, our constitutional and statutory protections for workers could (and almost certainly would) be eviscerated by contracts of adhesion disavowing an employment relationship.

THIBAULT v. BELLSOUTH
U.S. Court of Appeals, Fifth Circuit (2010)

Thibault brought suit against BellSouth Telecommunications arising out of electrical splicing work he performed in New Orleans, Louisiana in the aftermath of Hurricane Katrina. Thibault claimed violations of the Fair Labor Standards Act (FLSA), under 29 U.S.C. § 207(a)(1). The trial court dismissed his claims on summary judgment. Thibault appeals.

BACKGROUND

As a result of Hurricane Katrina, BellSouth's telephone infrastructure suffered serious damage. BellSouth undertook the project of rewiring its entire New Orleans Area telecommunications grid, employing "splicers." A splicer installs, cuts, repairs, and tests various high voltage cables. Accordingly, BellSouth contracted with other entities, including Parker's company, to provide additional splicers for the project.

Parker contacted Bill Peek, a splicer in Delaware. Parker informed Peek that splicers would have to provide their own bucket trucks and tools to do the work. Mr. Peek was interested, and told his best friend, Lewis Thibault, of the job opportunity. Mr. Thibault was not a splicer by profession but had experience as a navy jet engine mechanic. He owned and operated his own business in Delaware that sold picnic tables, storage buildings, and golf carts. In 2005, his business made over $500,000 in gross profit. Despite his success, Thibault decided to accept Peek's invitation to travel to New Orleans as it would provide a much-needed break for him from his marital problems. Thibault was able to borrow a spare truck and various tools that the job required. Peek also taught Thibault the basics of splicing over the course of an evening; Thibault was able to learn the rest on the job.

From October 4, 2005 to January 6, 2006, Thibault worked as a splicer. Every day, Thibault was required to report to Kenner Yard, a property rented by BellSouth. Every day, Thibault showed up to Kenner Yard, and was assigned a specific splicing job in New Orleans. When Thibault received his assignment, he was then required to take his truck to the job and work on the problem he was assigned. When completed, Thibault would return to Kenner Yard and would be assigned another splicing job. Thibault brought this suit for overtime pay under the FLSA.

ANALYSIS

Thibault contends that he is entitled to overtime compensation for hours worked in excess of forty hours per week pursuant to the 29 U.S.C. § 207(a)(1). The FLSA gives employees certain protections from employers. The FLSA defines "employee" to mean "any individual employed by an employer." 29 U.S.C. § 203(e)(1). " 'Employ' includes to suffer or permit to work" *Id.* § 203(g). The defendants contend that Thibault is not an employee, but an independent contractor.

The relevant question is whether the alleged employee so economically depends upon the business to which he renders his services, such that the individual, as a matter of economic reality, is not in business for himself. The contractual designation of the worker as an independent contractor is not controlling. Instead, we generally use as a guide five, non-exclusive factors: (a) the permanency of the relationship; (b) the degree of control exercised by the alleged employer; (c) the skill and initiative required to perform the job; (d) the extent of the relative investments of the worker and the alleged employer; and (e) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer. These factors are merely aids to analysis and no single factor is determinative.

A. The Permanency of the Relationship

Thibault did not work exclusively for the defendants. He had his own business selling picnic tables, storage buildings, and customized golf carts. The nature of splicer work requires travel to different parts of the nation where the jobs are. Splicers travel from job-to-job and from state-to-state looking for work. Thibault and Peek traveled from Delaware to work in the aftermath of Hurricane Katrina. The project lasted only until the re-wiring project after Katrina finished. Thibault intended to return to Delaware after seven or eight months.

B. Degree of Control

Thibault only performed splicing work. The defendants assigned the splicers to specific splicing work and maintained daily time records for each splicer. BellSouth required the splicers to work the same days and hours as the remainder of the crew, including taking the same daily break periods. Thibault explained that his supervisors would only come by occasionally, and never specified how Thibault should do the splicing. According to Thibault, the defendants would tell him what needed to be fixed or spliced or give him blueprints, and then it was up to Thibault to go

out and fix the problem. Once Thibault finished a particular job, he would report back to be assigned another job.

C. Skill & Initiative

Thibault argues that he has never worked as a splicer before. Thibault, however, was a jet engine mechanic in the navy. In fact, he described his abilities: "I aced the mechanical aptitude test in the Navy. You show me how to do something one time and I can do it." Thibault learned the job from his friend Peek, but also learned how to splice on the job, working next to Peek and other splicers. The splicers' success depended on their ability to find consistent work by moving from job-to-job.

D. Relative Investments

Thibault provided his own bucket truck, cable splicer, pump, ventilator, ladder, climbing belt, harness, hard hat, safety vest and other miscellaneous tools (such as wrenches, hammers, screwdrivers and other items one would usually find in a toolbox). In fact, the record contains a list of over 100 different tools splicers were expected to have for the job. Thibault had his own motor home, which he brought to Louisiana to live in. He stocked it with enough water and food to last him at least six weeks. He drove two days to get to New Orleans. We could not find, nor has Thibault pointed to, any evidence in the record of paying for general liability insurance. BellSouth did rent property in the area and built a shed and trailer as a base of operations. BellSouth also provided the materials used in the splicing: connectors, bonding straps, ground rods, terminal blocks, pedestals, cable, and drop wire, for example. The materials that BellSouth provided were either incorporated into their network or brought back to Kenner Yard at the end of the day.

E. Worker's Opportunity for Profit & Loss

The defendants required the splicers to fill out time sheets and invoices of the work performed. The splicers' year-end profits or losses depend on their ability to consistently find splicing work with other companies. Thibault's friend, Bill Peek testified that, even though he lived in Delaware, splicing requires travel from job-to-job across the country. The splicers here increased profits by controlling costs (repairs, supply costs, food, water, housing, etc.).

F. Other Factors

The determination of whether an individual is an employee or independent contractor is highly dependent on the particular situation presented. We do not hold that *all* splicers are always independent contractors. Indeed, the nature of this analysis suggests that in some cases splicers might be employees.

The circumstances of Thibault's employment reflect that he is not economically dependent on the defendants. Evidence shows that Thibault is a sophisticated, intelligent businessman who entered into a contractual relationship to perform a specific job for the defendants. Thibault worked for three months and his relationship to the defendants centered solely around the specific project.

When he worked as a splicer, he also oversaw K & L Sales operations and its multiple employees. As the owner of K & L Sales, Thibault routinely contracted with product manufacturers, customers, and transporters. After splicing in New Orleans, Thibault returned to his company in Delaware and has not worked as a splicer since.

Because we hold that the summary judgment record does *not* contain sufficient evidence to support a finding that Thibault was an FLSA employee while performing splicer services, we affirm the judgment dismissing the FLSA claims.

CROMWELL v. DRIFTWOOD ELECTRICAL CONTRACTORS
U.S. Court of Appeals, Fifth Circuit (2009)

The plaintiffs-appellants Cromwell and Bankston filed this Fair Labor Standards Act ("FLSA") suit against defendants-appellees alleging that they were not paid for overtime spent restoring damaged telecommunications lines along the Mississippi Gulf Coast in the wake of Hurricane Katrina. The district court granted summary judgment against the plaintiffs on the ground that they were independent contractors, not employees, and therefore exempt from the overtime provisions of the FLSA. Plaintiffs appealed.

Cromwell and Bankston provided cable splicing services for Driftwood for approximately eleven months, and were required to work twelve-hour days, thirteen days on and one day off. They were paid a fixed hourly wage for their work. Cromwell and Bankston reported to BellSouth's location every morning to receive their assignments, unless they had not completed their jobs from the prior workday, in which case they were permitted to check in by phone. Cromwell and Bankston were given prints describing the type of work that needed to be performed for each assignment and were instructed by BellSouth supervisors to follow certain general specifications. Driftwood and BellSouth representatives checked on the progress of work but did not train Cromwell and Benson or control the details of how they performed their assigned jobs.

Cromwell and Bankston provided their own trucks, testing equipment, connection equipment, insulation equipment, and hand tools, totaling over $50,000 for Cromwell and approximately $16,000 for Bankston, while BellSouth supplied materials such as closures and cables. Cromwell and Bankston were responsible for their own vehicle liability insurance and employment taxes, but Driftwood provided workers' compensation insurance and liability insurance for Cromwell and Bankston's work.

To determine if a worker qualifies as an employee under the FLSA, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself. To aid in that inquiry, we consider five non-exhaustive factors: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. No single factor is determinative.

The defendants-appellees argue that the facts of this case are similar to those in *Carrell v. Sunland Const., Inc.,* in which we held that a group of welders were independent contractors under the FLSA. (5th Cir.1993). In *Carrell,* we noted that several facts weighed in favor of employee status, including that the defendant dictated the welders' schedule, paid them a fixed hourly rate, and assigned them to specific work crews. *Id.* However, we held that the welders were independent contractors because the welders' relationship with the defendant was on a project-by-project basis; the welders worked from job to job and from company to company; the average number of weeks that each welder worked for the defendant each year was relatively low, ranging from three to sixteen weeks; the welders worked while aware that the defendant classified them as independent contractors, and many of them classified themselves as self-employed; the welders were highly skilled; the defendant had no control over the methods or details of the welding work; the welders performed only welding services; the welders supplied their own welding equipment; and the welders' investments in their welding machines, trucks, and tools averaged $15,000 per welder. *Id.*

In *Carrell,* we distinguished our prior decision in *Robicheaux v. Radcliff Material, Inc.* (5th Cir.1983), in which we held that a group of welders were employees under the FLSA. The employee welders in *Robicheaux* worked a substantial period of time exclusively with the defendant in that case, ranging from ten months to three years; the welding in *Robicheaux* required only "moderate" skill; the defendant in *Robicheaux* told the welders how long a welding assignment should take; the welders in *Robicheaux* spent only fifty percent of their time welding, and the remaining time cleaning and performing semi-skilled mechanical work; and the defendant in *Robicheaux* provided the welders with "steady reliable work over a substantial period of time."

The plaintiffs in this case worked full-time exclusively for the defendants for approximately eleven months, within the time range that the *Robicheaux* welders had worked for the defendant in that case. The plaintiffs in this case did not have the same temporary, project-by-project, on-again-off-again relationship with their purported employers as the plaintiffs in *Carrell* did with their purported employer. The defendants-appellees argue that Cromwell and Bankston's work—restoring damaged telecommunications lines along the Mississippi Gulf Coast in the wake of Hurricane Katrina—was by nature temporary, but "courts must make allowances for those operational characteristics that are unique or intrinsic to the particular business or industry, and to the workers they employ." *Brock v. Mr. W Fireworks, Inc.* (5th Cir.1987) ("[W]hen an industry is seasonal, the proper test for determining permanency of the relationship is not whether the alleged

employees returned from season to season, but whether the alleged employees worked for the entire operative period of a particular season."). Thus, the temporary nature of the emergency restoration work does not weigh against employee status.

It is common in FLSA cases that "there are facts pointing in both directions" regarding the issue of employee status, *see Herman v. Express Sixty–Minutes Delivery Serv., Inc.* (5th Cir.1998) (quoting *Carrell*), but the facts in this case truly appear to be nearly in equipoise. However, on balance, we believe that, as a matter of economic reality, Cromwell and Bankston were economically dependent upon Driftwood and BellSouth, and were not in business for themselves. The most significant difference between the facts in those cases, in terms of the economic reality of whether the plaintiffs were economically dependent upon the alleged employer, was that the *Robicheaux* welders (employees) worked on a steady and reliable basis over a substantial period of time exclusively with the defendant, ranging from ten months to three years, whereas the *Carrell* welders (independent contractors) had a project-by-project, on-again-off-again relationship with the defendant, with the average number of weeks that each welder worked for the defendant each year being relatively low, ranging from three to sixteen weeks. Similar to the *Robicheaux* welders, Cromwell and Bankston worked on a steady and reliable basis over a substantial period of time—approximately eleven months—exclusively for their purported employers. The permanency and extent of this relationship, coupled with Driftwood and BellSouth's complete control over Cromwell and Bankston's schedule and pay, had the effect of severely limiting any opportunity for profit or loss by Cromwell and Bankston. Although it does not appear that Cromwell and Bankston were actually prohibited from taking other jobs while working for Driftwood and BellSouth, as a practical matter the work schedule established by Driftwood and BellSouth precluded significant extra work. Also, the fact that Driftwood and BellSouth provided Cromwell and Bankston with their work assignments limited the need for Cromwell and Bankston to demonstrate initiative in performing their jobs. Although there are facts that clearly weigh in favor of independent contractor status, notably that Cromwell and Bankston controlled the details of how they performed their work, were not closely supervised, invested a relatively substantial amount in their trucks, equipment, and tools, and used a high level of skill in performing their work, these facts are not sufficient to establish, as a matter of economic reality, that Cromwell and Bankston were in business for themselves during the relevant time period. The judgment of the district court is

VACATED, and this case is REMANDED to the district court for proceedings consistent with this opinion.

STATE BAR OF NEVADA

NEVADA PERFORMANCE TEST (NPT) INSTRUCTIONS

The NPT is a 2-hour exam designed to test the ability to complete a common legal task that a beginning lawyer would be expected to perform. You are required to use necessary legal skills in a real-life scenario.

You will be provided with a File. The File will contain source documents that will set forth the facts of the case and other background information. These materials may include interview transcripts, correspondence, investigative reports, client records, pleadings, internal memorandum, newspaper articles, legislative materials, medical records and correspondence between counsel. All facts recited are not relevant, and maybe incomplete, ambiguous or conflicting. You are expected to recognize what facts are relevant and to identify when facts are ambiguous and how such ambiguities could be resolved.

The second component of the exam materials is the Library. The Library may contain cases, statutes, administrative regulations and other legal authority commonly cited in a legal memorandum or used for reference. All legal sources are based on Nevada law. You may use abbreviated titles and omit page references when citing cases found in the Library.

The NPT is not a test of your knowledge of substantive law. The NPT is designed to evaluate your fundamental lawyering skills. Your answer will be evaluated on the content, thoroughness, and organization of your document based on these criteria:

- Ability to determine relevant factual details, to distinguish relevant from irrelevant facts, and to resolve potentially conflicting facts;
- Analysis of source legal authorities to determine applicable principles of law;
- Application of the controlling law to the relevant facts and circumstances;
- Effective communication and professional presentation in writing;
- Performing task in a timely matter; and
- Ability to follow the directives provided.

In preparing your written document, it is important that you concentrate on the materials in the File and Library, which provide the specific materials from which you should use. Use your general legal knowledge to assist you with analyzing the issues presented.

You may make notes anywhere in the test materials; You may not tear pages from the question booklet.

Nevada Performance Test #2

DATE: August 1, 2024 **Time allowed for session: Two Hours.**

Smith v. Smith

FILE

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MEMORANDUM

To: Applicant
From: Jack Doe, Sr. Partner
Re: Smith Trial Statement

Our Firm represents Alice Smith in connection with her divorce. The case is going to trial without a jury. I met with Mr. Smith's lawyer yesterday. We were not able to settle the case, but did agree that: a) all discovery has been completed; b) there is no separate property; c) except as noted below, the parties' community property will be divided equally; and d) neither party will be entitled to receive or obligated to pay alimony.

The issues to be tried are: 1) our client's claim that the community estate should be divided unequally in her favor due to the money Mr. Smith spent in connection with his extra-marital affair; and 2) Mr. Smith's claim that the community estate should be divided unequally in his favor because Ms. Smith allegedly spent more than he did during the marriage and wasted money taking her sister on expensive European vacations.

The Washoe District Court Rules require us to file a Trial Statement. Please prepare our draft Trial Statement. My assistant will add the caption and signature lines so you will not need to do that. In the section of our Trial Statement regarding claimed facts, be an advocate for our client. Describe the facts in a way to persuade the Court that Ms. Smith should prevail. Our paralegal is working on the list of summaries of schedules so you will not need to complete that section of the draft Trial Statement. We will fill it in later.

Ms. Smith's complaint for divorce and Mr. Smith's answer are attached as **Exhibit 1**. Excerpts of Mr. Smith's deposition transcript are attached as **Exhibit 2**. Excerpts of our client's deposition transcript are attached as **Exhibit 3**. A copy of our expert's report is attached as **Exhibit 4**.

EXHIBIT

1

Jack Doe
1234 Neil Road, Suite 500
Reno, Nevada 89511
Telephone: (775) 555-5555
Attorney for Plaintiff

IN THE FAMILY DIVISION

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR WASHOE COUNTY

Alice B. Smith, Plaintiff, v. John J. Smith, Defendant.	Case No.: DV21-01234 Dept No.: 1

COMPLAINT FOR DIVORCE (NO MINOR CHILDREN)

As and for her complaint for divorce, the plaintiff, Alice B. Smith alleges as follows:

1. She is a resident of the State of Nevada and has been physically present in the State of Nevada for more than six weeks before the filing of this complaint and, thus, this Court has personal jurisdiction over her and has subject matter jurisdiction over this divorce.

2. The defendant, John J. Smith, resides in the State of Nevada and, thus, this Court has personal jurisdiction over the defendant.

3. The plaintiff and defendant were married on July 7, 2007, in Washoe County, Nevada, and ever since that time have been and still are married.

4. There are no minor children the issue of this marriage and the plaintiff, to her knowledge, is not now pregnant.

5. The parties are incompatible in marriage and there is no possibility of reconciliation.

6. There is community property to be divided pursuant to Nevada law.

7. There are compelling circumstances to divide the community property estate unequally in plaintiff's favor due to the defendant's financial misconduct during the marriage.

WHEREFORE, plaintiff requests relief as follows:

1. That she be granted an absolute decree of divorce restoring each of the parties to the status of single, unmarried persons;

2. That the community estate be divided pursuant to Nevada law, including an unequal division in her favor;

3. That she be restored to her prior name, Alice B. Wilson; and

4. For such other and further relief as the Court deems just in the premises.

Dated this 15th day of December, 2023.

LAW FIRM

By*/s/ Jack Doe*
Jack Doe, Esq

Jill Jones
Nevada Bar No. 111
OTHER LAW FIRM
111 California Avenue
Reno, Nevada 89501
Telephone: (775) 555-5555
Attorney for Defendant

IN THE FAMILY DIVISION

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR WASHOE COUNTY

Alice B. Smith, Plaintiff, v. John J. Smith, Defendant.	Case No.: DV21-01234 Dept No.: 1

ANSWER TO COMPLAINT FOR DIVORCE

As and for his answer to plaintiff's complaint for divorce, the defendant, John J. Smith, admits, denies, and affirmatively alleges as follows:

1. Admits the allegations contained in paragraphs 1, 2, 3, 4, 5, and 6 of plaintiff's complaint.

2. Denies the allegations contained in paragraph 7 and affirmatively alleges that the community estate should be divided unequally in his favor.

WHEREFORE, defendant seeks relief as follows:

1. That the parties be granted a decree of divorce restoring them to the status of single persons;

2. That the net community property estate be divided unequally in his favor; and

3. For such other or further relief as is appropriate.

Dated this 4th day of January, 2024.

OTHER LAW FIRM

By*/s/ Jill Jones*
Jill Jones, Esq

EXHIBIT

2

Deposition of John J. Smith
March 20, 2024

Question: Please state your name for the record.

Answer: John Smith

Question: Where do you live?

Answer: 400 East Virginia Ave., Apt. 303, Reno, Nevada.

. . .

Question: Did you have an affair during the marriage?

Answer: I shouldn't have to answer that question, I know Nevada is a no-fault state, so it doesn't matter. If fault matters, we should talk about how verbally abusive Alice was during the marriage.

Question: The question is relevant to your spending in connection with the alleged affair so please answer the question.

Ms. Jones: Go ahead and answer the question, John.

Answer: Yes. I had to get my needs met somewhere. Alice certainly wasn't there for me.

Question: Where does your girlfriend, Linda Hart, live?

Answer: With me.

. . .

Question: When did your affair begin?

Answer: What do you mean by affair?

Question: When did you and Ms. Hart first go out to dinner?

Answer: Some time in January of 2019 but we were just friends.

Question: There is a hotel bill at South Lake Tahoe in March of 2019. Did you stay at the hotel that night and incur that bill?

Answer: Yes.

Question: Did Ms. Hart spend the night with you at the hotel that night?

Answer: Yes.

. . .

Question: Did you spend any money in connection with your affair?

Answer: What do you mean in connection with the affair? I didn't spend as much money as Alice did during the marriage. She spent more money than me all the time. In addition to all the money she spent day-to-day for her clothes and nails and hair and lunches with friends, she went to Europe with her sister, almost every year, and she not only paid her expenses, she paid part of her sister's expenses. And up until the last year or two, I earned more money than she did so I should be able to spend money on myself if I want to.

. . .

Question: Did you take trips with your girlfriend, take her to dinner, buy her gifts, things like that?

Answer: I didn't spend any more money going on vacations with Ms. Hart than I spent going on hunting trips with my buddies during the marriage. And Alice and I always spent a lot of money going out to dinner, so I didn't spend any more money going to dinner with Ms. Hart than I normally spent. I earned more money than Alice during the marriage and she spent more than I did. Why shouldn't I be able to spend some of my hard-earned money?

. . .

Question: How much total have you spent in connection with your affair with Ms. Hart?

Answer: I have no idea.

. . .

EXHIBIT

3

Deposition of Alice Smith
March 21, 2024

Question: Please state your name for the record.

Answer: Alice Smith.

Question: Where do you live?

Answer: 777 Partridge Lane, Reno, Nevada.

. . .

Question: How often did you and your sister go to Europe on vacation during the marriage?

Answer: Almost every year, I think.

Question Is it true that you paid part of your sister's expenses on those trips?

Answer: Yes, I had a lot of reward points from all the travel I had to do for work so I would sometimes use my points to pay for her airfare. I earn a lot more than my sister does and John and I are much wealthier than my sister is, so I paid for more of our dinners and other expenses than she did.

Question: Was Mr. Smith aware that you were paying some of your sister's expenses for these trips?

Answer: Yes. John reviews our credit card statements carefully each month. He is very good about that. He didn't care that I paid some of Cheryl's expenses because he didn't want to go to Europe and knew that I enjoyed those trips. Just like he enjoyed going hunting with his buddies. We both spent money for trips and vacations during the marriage. But we didn't take a lover on those trips. That's what I'm upset about. How could he use our money to take that woman on all those trips?

. . .

Question: This trip you went on with your sister last month, that was after you filed your complaint for divorce, wasn't it?

Answer: Yes.

Question: Did you pay some of your sister's expenses on that trip?

Answer: Yes. There was no court order saying I couldn't do so.

Question: How much of your sister's expenses did you pay on that last trip?

Answer: Oh, I'm not sure. Probably about $2,500 or $3,000.

. . .

EXHIBIT
4

EXPERT REPORT
GINA GREEN, FORENSIC CPA
999 South Meadows Rd.
Suite 200
Reno, Nevada

To Whom it May Concern:

I was retained by Alice Smith to evaluate John Smith's spending in connection with his affair with Ms. Hart, for purposes of the parties' divorce proceeding. I have been licensed as a CPA since 1998. I have specialized in forensic accounting since 2005. I have been qualified as an expert and testified as an expert witness in Washoe County courts in excess of 20 times.

I reviewed the parties' bank statements, credit card statements, airline and hotel reward points and Mr. Smith's deposition transcript. I prepared an initial summary of charges related to restaurants, hotels, airlines, jewelry stores, boutiques and other similar spending that appeared may be spending related to Mr. Smith's affair. I then met with Alice Smith and went over the initial list of possible spending in connection with the affair so that she could identify any spending that involved her or that she otherwise knew was not related to the affair.

I then prepared a revised final summary of Mr. Smith's spending in connection with his affair. If there were charges for hotels, restaurants, and activities in locations where Mr. Smith had traveled with Ms. Hart, I included those charges. If there were charges for purchases of jewelry, purses, and clothes that Mr. Smith did not give to Ms. Smith, I included those charges.

Based on my review and evaluation, Mr. Smith spent the following sums in connection with his affair: 1) the sum of $75,745 on airfare, hotels, dining, and other activities associated with travel with Ms. Hart; 2) the sum of $10,422 for restaurants in Reno when they were not traveling; and 3) the sum of $8,921 for jewelry and other gifts for Ms. Hart, for a total of $95,088. See, Schedules A, B, and C. In addition, Mr. Smith used approximately 700,000 airline reward points and 175,000 hotel reward points in connection with the travel with Ms. Hart.

This report is subject to modification should additional relevant information become available.

LIBRARY

EXCERPTS FROM THE RULES OF PRACTICE FOR THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

Rule 1. Applicability and citation of rules.

1. These rules shall be known and may be cited as Washoe District Court Rules or WDCR.

. . .

4. [T]hese rules shall apply to all cases within the jurisdiction of the family division of the district court.

[Amended; effective January 1, 2020.]

Rule 5. Trial statements.

1. Seven days before the trial, each party shall serve and file a trial statement which shall set forth the following matters in the following order:

(a) A concise statement of the claimed facts.

(b) A statement of admitted or undisputed facts.

(c) A statement of issues of law supported by a memorandum of authorities.

(d) A list of summaries of schedules . . . reasonably calling for orderly itemization, e.g., wages, income, expenses, inventories, business operations, tax computations . . . upon which an expert bases his opinion (not the opinion itself) . . . .

(e) The names and addresses of all witnesses.

(f) Any other appropriate comment, suggestion, or information for the assistance of the court.

(g) A list of special questions requested to be propounded to prospective jurors.

(h) Certification by counsel that discovery has been completed, unless late discovery has been allowed by order of the court.

(i) Certification by counsel that, prior to the filing of the trial statement, they have personally met and conferred in good faith to resolve the case by settlement.

EXCERPTS FROM NEVADA REVISED STATUTES

Title 11. Domestic Relations.
Chapter 125. Dissolution of Marriage

NRS 125.010. Causes for divorce.

Divorce from the bonds of matrimony may be obtained for any of the following causes:

1. Insanity existing for 2 years prior to the commencement of the action.
2. When the spouses have lived separate and apart for 1 year without cohabitation the court may, in its discretion, grant an absolute decree of divorce at the suit of either party.
3. Incompatibility.

NRS 125.020. Verified complaint; residence or domicile; jurisdiction of district court.

1. Divorce from the bonds of matrimony may be obtained for the causes provided in NRS 125.010.
2. [N]o court has jurisdiction to grant a divorce unless either the plaintiff or defendant has been resident of the State for a period of not less than 6 weeks preceding the commencement of the action.

NRS 125.150 Alimony and adjudication of property rights; award of attorney's fee.

1. In granting a divorce, the court:

. . .

(b) Shall, to the extent practicable, make an equal disposition of the community property of the parties . . . except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

Mitchell PUTTERMAN v. Barbara Lewis PUTTERMAN
Supreme Court of Nevada (1997)

SPRINGER, Justice:

The family court divided the community property of the parties to this divorce action *unequally.* NRS 125.150 requires the court to make an *equal* disposition of the community property except in cases in which the "court finds a compelling reason" for making an "unequal disposition" and "sets forth in writing the reasons for making the unequal disposition." *See Lofgren v. Lofgren* (Nev. 1996).

In *Lofgren,* we noted that "when the legislature changed property division from equitable to equal, it deleted the equitable factors that courts formerly were required to apply in making a `just and equitable' disposition of community property." *Id.* We also noted in *Lofgren* that the legislature did not define what it meant when it permitted an unequal division to be made in cases in which the court found "compelling reasons" for doing so. *Id.* In *Lofgren,* we defined one form of "compelling reasons" which would justify an unequal division of community property as that which arose out of the financial misconduct of one of the parties. Thus, in *Lofgren,* we approved of a lesser, unequal share of the community property being given to an errant husband who, in violation of court order, had "wasted" or "secreted" community assets. *Id.*

In this case, the court based its unequal disposition on its vision of *equity* and *fairness* and, more specifically, on the fact that the wife was the principal acquirer of the community property and that the husband was " less of a contributing member to the community."

In *Lofgren,* we defined one species of "compelling reasons" for unequal disposition of community property, namely, financial misconduct in the form of one party's wasting or secreting assets during the divorce process. There are, of course, other possible compelling reasons, such as negligent loss or destruction of community property, unauthorized gifts of community property and even, possibly, compensation for losses occasioned by marriage and its breakup. [citation omitted].

It should be kept in mind that the secreting or wasting of community assets while divorce proceedings are pending is to be distinguished from undercontributing or overconsuming of community assets during the marriage. Obviously, when one party to a marriage contributes less

to the community property than the other, this cannot, especially in an equal division state, entitle the other party to a retrospective accounting of expenditures made during the marriage or to entitlement to more than an equal share of the community property. Almost all marriages involve some disproportion in contribution or consumption of community property. Such retrospective considerations are not and should not be relevant to community property allocation and do not present "compelling reasons" for an unequal disposition; whereas, hiding or wasting of community assets or misappropriating community assets for personal gain may indeed provide compelling reasons for unequal disposition of community property.

[T]he trial court made "specific and meticulous findings of fact which set forth numerous compelling reasons for a division which was unequal." Based upon these findings, we conclude that here, as in *Lofgren,* there are sufficient compelling reasons to justify the trial court's unequal disposition of the property.

SHEARING, C.J., and ROSE and YOUNG, JJ., concur.

Dennis KOGOD v. Gabrielle CIOFFI-KOGOD

Supreme Court of Nevada (2019)

BEFORE THE COURT EN BANC.

By the Court, PICKERING, J.:

This is a divorce action with a $47 million community property estate, in which the district court unequally distributed the parties' community property due to one spouse's extramarital affairs, gifts to family, and excess spending. In this opinion, we hold that community funds spent on extramarital affairs are dissipated such that the district court has a compelling reason to make an unequal disposition of community property.

I.

Dennis Kogod and Gabrielle Cioffi-Kogod married in 1991 in New York City. They lived in various cities throughout their marriage. In 2003, Dennis and Gabrielle moved to Las Vegas.

. . .

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.

II. Section Omitted.

III.

Turning to the division of property, a court must make an equal disposition of community property in a divorce unless there is a "compelling reason" to make an unequal disposition. NRS 125.150(1)(b). An appellate court reviews a district court's disposition of community property deferentially, for an abuse of discretion. *See Wolff v. Wolff* (Nev. 1996).

Dissipation, or waste, can provide a compelling reason for the unequal disposition of community property. *Lofgren v. Lofgren* (Nev. 1996) ("[I]f community property is lost, expended or destroyed through the intentional misconduct of one spouse, the court may consider

such misconduct as a compelling reason for making an unequal disposition of community property and may appropriately augment the other spouse's share of the remaining community property."). "Generally, the dissipation which a court may consider refers to one spouse's use of marital property for a selfish purpose unrelated to the marriage in contemplation of divorce or at a time when the marriage is in serious jeopardy or is undergoing an irretrievable breakdown." 24 Am. Jur.2d *Divorce and Separation* § 524 (2018); *see also Dissipation,* Black's Law Dictionary (10th ed. 2014) (defining "dissipation" as "[t]he use of an asset for an illegal or inequitable purpose, such as a spouse's use of community property for personal benefit when a divorce is imminent").

The district court found that Dennis dissipated $4,087,863 in community property. A large portion of the dissipated community property relates to Dennis's extramarital affairs, some relates to expenditures on his family, and the other large portion comprises a variety of other expenditures beyond those Dennis claimed in his financial disclosures. Dennis argues that he did not dissipate any community property because the marital estate continued to grow tremendously—from $4 million to $47 million by his reckoning—during the time of alleged dissipation.

A.

The $1,853,212 Dennis diverted from the community for his extramarital affairs provided a compelling reason for an unequal disposition of community property. *See, e.g., Omayaka v. Omayaka* (Md. 2011) (noting that "[a]ppellate courts have held that improper expenditures on a paramour... constitutes dissipation"); *see also* Brett R. Turner, *Unintentional Conduct as Dissipation of Marital Property,* 21 Equitable Distribution J. 13 (2004) ("[F]unds spent on paramours are almost automatically dissipated."). The district court did not abuse its discretion in making an unequal disposition of community property in the amount spent on the extramarital affairs.

Dennis's argument that, because the overall value of the estate grew during the marital misconduct, his spending of community funds had no adverse economic impact on the marital estate is unpersuasive.

B.

The district court found that Dennis also dissipated $72,200 through post-separation, pre-divorce gifts to family members. A gift to a family member that violates a preliminary injunction constitutes dissipation. *Lofgren.* (upholding an unequal disposition where the husband transferred funds to his father despite an injunction enjoining such actions). Absent a specific injunction, a gift to a family member is not dissipation if there is an established pattern or history of giving such gifts to family members during the marriage. *See Robinette v. Robinette* (Ky. Ct. App. 1987) (recognizing that "giving gifts to family members could constitute dissipation" but the evidence "in the instant case indicates that such charity was a marital enterprise"). But a gift to a family member is dissipation when there is no previous history of gift giving or the amount of the gift during the divorce is substantially greater than past gifts.

Dennis routinely gave money to his family throughout the marriage, and often did so without consulting Gabrielle. The district court appropriately found that such "relatively long-standing and regular" expenditures on family members were not dissipation. But Dennis also gave $15,000 to his aunt after the joint preliminary injunction, which he could not establish as regular or routine. Additionally, he made two non-routine payments of $3,600 to his father and gave his father $50,000 for a political campaign contribution. The district court appropriately found that such gifts from Dennis, totaling $72,200, amounted to dissipation and afforded a compelling reason for an unequal disposition of community property.

C.

The final $2,162,451 of alleged waste represents the amount Dennis spent in excess of his self-declared monthly expenses that he failed to justify to the district court as a marital expense.

While Dennis's spending could appear wasteful in the aggregate, his expenditures appear typical of his general overconsumption throughout the marriage, and they do not provide a compelling reason for an unequal disposition of community property. *See Putterman v. Putterman* (Nev. 1997) ("Almost all marriages involve some disproportion in contribution or consumption of community property."). A district court must differentiate between ordinary consumption for higher-income earners such as Dennis, which is not necessarily dissipation, and misappropriation of community assets solely for personal gain, which can provide a compelling reason for an unequal disposition of community property when such expenditures redirect assets

needed for basic community support. *Id.* ("It should be kept in mind that the secreting or wasting of community assets while divorce proceedings are pending is to be distinguished from undercontributing or overconsuming of community assets during the marriage."). We therefore reverse the district court's unequal disposition of community property by the $2,162,451 labeled in the forensic accounting report as "potential community waste not elsewhere classified."