



# THE TRANSMUTATION OF SEPARATE PROPERTY INTO COMMUNITY PROPERTY AND REVOCABLE FAMILY TRUSTS

By Vincent Mayo, Esq.

The potential effects of a revocable family trust on a divorce are often underestimated by attorneys. Many believe these types of trusts have little importance outside of avoiding probate or getting a favorable tax treatment. This is due to the fact that the revocation of a trust by either party during their joint lives for all intent and purposes terminates the trust. However,

revocable family trusts may give rise to an issue that could be of paramount importance in a divorce case: Whether the revocable family trust transmutes separate property into community property.

## Reasons to Create a Revocable Family Trust

An analysis of the issue starts with an examination of a revocable family trust. A revocable family trust is an inter vivos living trust, or in other words, a trust created during the lives of the grantors. A family trust creates a legal contract that outlines the management and distribution of the trust's assets. Such a trust is effective once it is funded and permits the grantors to manage the trust estate during their lives. A revocable family trust can serve numerous purposes, the most common one being the avoidance of probate.



Having a will go through the probate process is often an expensive and time-consuming process. In contrast, a family trust allows for the immediate and inexpensive transfer of assets from one spouse to the other upon either spouse's death. Revocable family trusts can also avoid will contests and provide privacy since a will that is probated becomes a public document.

Further, since the trust is revocable, the parties are not "locked in" long term and they can terminate the trust, often unilaterally, if either

### IN THIS ISSUE:

EDITOR'S NOTES  
Page 2

A MESSAGE FROM THE CHAIR  
Page 8

WHY SELECT A PHYSICIAN/  
PSYCHIATRIST FOR FORENSIC  
SERVICES?  
Page 9

NRS 125B.020(3) IS ANTIQUATED,  
UNFAIR AND UNCONSTITUTIONAL  
Page 14

*(cont'd. inside on page 3)*

**Nevada Family Law Report**

**Editor:**  
Shelly Booth Cooley

---

**Family Law Section  
Executive Council**

**Robert Cerceo, Chair**  
Las Vegas

**Michael Kattelman, Vice-Chair**  
Reno

**Katherine L. Provost, Secretary**  
Las Vegas

**Jennifer V. Abrams, Treasurer**  
Las Vegas

Jessica Hanson Anderson, Reno  
Kristine Brewer, Las Vegas  
Shelly Booth Cooley, Las Vegas  
Sarah Hardy-Cooper, Reno  
Hon. Bryce C. Duckworth, Las Vegas  
Dixie R. Grossman, Reno  
John "Jack" Howard, Las Vegas  
Josef M. Karacsonyi, Las Vegas  
Eric A. Pulver, Reno  
Hon. Chuck Weller, Reno

**Design/Production**

Christina Alberts, State Bar of Nevada

*NEVADA FAMILY LAW REPORT* is an electronic publication of the Family Law Section of the State Bar of Nevada. To subscribe, please send a request to: [publications@nvbar.org](mailto:publications@nvbar.org).

The *NEVADA FAMILY LAW REPORT* is intended to provide family law-related material and information to the bench and bar with the understanding that neither the State Bar of Nevada, Family Law Section editorial staff nor the authors intend that its content constitutes legal advice. Services of a lawyer should be obtained if assistance is required. Opinions expressed are not necessarily those of the State Bar of Nevada or the editorial staff.

This publication may be cited as Nev. Fam. L. Rep., Vol. 26, No. 1, 2013 at \_\_\_\_.

The Nevada Family Law Report is supported by the State Bar of Nevada and its Family Law Section.

## EDITOR'S NOTES

*by Shelly Booth Cooley, Esq., Editor*

In our first article, Vincent Mayo examines and analyzes arguments that should be made in determining whether a revocable trust could be deemed to have transmuted property. In our second feature, Dr. Kahmien A. LaRusch explains the benefits of utilizing a psychiatrist in a domestic matter. Lastly, Bruce I. Shapiro argues that NRS 125B.020(3) is antiquated, unfair and should be deemed unconstitutional and explains his reasoning why.

### Specialization Exam:

The Family Law Section is offering a test date on March 2, 2013 (the Saturday prior to the Family Law Conference). Good luck to all the folks taking the exam.

If you are interested in taking the Specialization Exam next year (which will likely be scheduled for the Saturday prior to the Family Law Conference), the deadline to submit your completed application is December 31, 2013.

Find the applications at:

[www.nvbar.org/sites/default/files/Family%20Law%20Specialization%20Application%20revised%201.7.13.pdf](http://www.nvbar.org/sites/default/files/Family%20Law%20Specialization%20Application%20revised%201.7.13.pdf)

Find the standards at:

[www.nvbar.org/sites/default/files/Specialization\\_Standards.pdf](http://www.nvbar.org/sites/default/files/Specialization_Standards.pdf)

### Family Law Conference:

If you haven't registered for the 24th Annual Family Law Conference, may I recommend doing so as soon as possible? The Family Law Conference is March 7 through 8, 2013, in Ely, Nevada and space is limited. The topic this year is "Evidence and Financial Disclosure: Telling the Story." Be prepared to learn about evidence, and have fun socializing with our colleagues, judges and Nevada Supreme Court Justices, with the added benefit of completing your required CLE credits for the year. I hope to see you there!

**Shelly Booth Cooley** is the Principal of The Cooley Law Firm, where she practices exclusively in the area of family law. Shelly can be reached at 10161 Park Run Drive, Suite 150, Las Vegas, Nevada 89145; Telephone: (702) 265-4505; Facsimile: (702) 645-9924; E-mail: [scooley@cooleylawlv.com](mailto:scooley@cooleylawlv.com).

## Transmutation of Prop.

cont'd. from page 1

spouse believes it is no longer beneficial to have the trust.<sup>1</sup>

Another common benefit to revocable family trusts is that they can result in beneficial tax treatment to a married couple. Upon the death of either spouse, their businesses, real estate and stocks may receive a full step-up in basis if they are “deemed” community property. This means that when property is classified as community property and one spouse dies, the cost basis of both the deceased spouse’s half and the surviving spouse’s half are increased to the asset’s fair market value at the time of the first spouse’s death.<sup>2</sup> The full step-up (also called a “double step-up”) could potentially save a surviving spouse thousands of dollars in capital gains tax. In contrast, any property considered separate in nature receives a partial step-up in value representing only the deceased spouse’s interest. Couples may therefore be counseled by their tax advisors to include separate property in a trust and designate it as community property in an effort to take advantage of the full step-up.

The issue that arises in a divorce is whether the classification of separate property as community property in a revocable family trust

transmutes one spouse’s separate property into community property.<sup>3</sup> The matter is not settled in Nevada and is therefore open to two competing positions, one against transmutation through a revocable family trust and the other for.

### The Arguments Against Transmutation

**Lack of Intent:** An argument against transmutation is that spouses typically only treat separate property as community property in their trusts in order to take advantage of tax laws or to allow for an easy transference of their estate. It is not because they truly mean to make one spouse’s separate assets community in nature.<sup>4</sup> This is supported by the fact that most family trusts state that upon revocation, the assets in the trust retain their original separate or community character. In *Sprenger v. Sprenger*, the Nevada Supreme Court held that the transmutation of separate and community property must be shown by clear and convincing evidence.<sup>5</sup> The obvious tax and estate planning motives behind characterizing separate property as community would seem to prevent the meeting of that burden. This is persuasive since under *Cord v. Cord*,<sup>6</sup> the intent of the parties as uncovered through evidence is a factor in determining whether property has been transmuted.<sup>7</sup>

**Lack of an Express Declaration:** A lack of express language in a family trust that transmutes property, it is argued, would also bar a transmutation. In the case of *In re Marriage of Starkman*, the Court of Appeals of California held that husband’s separate property placed into a family trust established by the parties did not become community property

simply because it was labeled as “community property” in the trust.<sup>8</sup> Rather, the court reasoned that due to the considerable consequences of transmuting the nature of property, there must be an express declaration that “A change in the characterization or ownership of property is being made.”<sup>9</sup> As stated in the case of *In re Marriage of Koester*, one simply does not “... slip into a transmutation by accident.”<sup>10</sup> A similar analysis was conducted by the California Court of Appeals for the Second Appellate District in *Barker v. Barker* when it found that the mere listing of separate property in a joint tax return as community property did not amount to an express declaration of transmutation.<sup>11</sup> Also, if not all of the trust documents (i.e. the trust agreement, the trust asset schedules, deed of trusts, a certification of trust, amendments to the trust, etc.) evidence that a transmutation has taken place, or better yet take a contradictory position, it would be hard to show the intent was clear and convincing.

This need for an express, clear declaration is in line with the *Sprenger* court’s requirement of clear and convincing evidence of a transmutation. In *Sprenger*, the court found that the wife’s mere signature on a stock transfer restriction certificate was not clear and convincing evidence of a transmutation of her husband’s separate stock into community property, especially since the stocks were never issued in her name.

**Transmutations Cannot be Conditional:** Another contention against transmutation through revocable trusts is that a transmutation cannot be contingent. If an asset can at any time be transferred back

(cont'd. on page 4)



## Transmutation of Prop.

cont'd. from page 3

into separate property, how can it be said to truly have been indefinitely converted to community property? Further, if the transmutation of separate property to community property is essentially a gift conditioned upon one party's death, such a conditional interest does not arise to the level of an express delivery of same. This was the Court of Appeals of Tennessee's reasoning in *Burns v. Burns* when it held that the placing of a certificate of deposit into both parties' names for estate planning purposes, but not payable to the husband's spouse until his death, did not transmute the certificate of deposit into marital property.<sup>12</sup>

**No Reference to Specific Property:** There is also an argument that property being transmuted must be specifically set forth in a family trust. Quite often, parties forget or do not get around to actually attaching a schedule that lists what assets are being changed from separate to community. They sometimes rely on broad provisions stating "... all property owned or acquired by the parties ..." or similar language. Since clear and convincing evidence is needed to demonstrate that an asset is becoming community property, it is logical to conclude that the specific assets must be inventoried or set forth in the trust. A mere representation that "all of the parties' assets" are being converted into community property via the trust may be insufficient to meet the burden.

**Equitable Relief:** Finally, additional equitable arguments exist in opposition to the transmutation of assets through a revocable family

trust. One is that most spouses entering into a trust do so through the assistance of just one attorney who "represents" both spouses. Many times, spouses sign off on these documents with little thought of or explanation by the attorney of the adverse effects. If the spouses later divorce, the spouse whose separate assets were supposedly gifted may allege that he or she believed that the parties were qualifying for a double step-up in basis only when characterizing the property as community. As a result, the legal and economic consequences in the event of a divorce were not adequately explained to them. Such a spouse would allege they entered into the trust blindly and without a real understanding of his or her actions – i.e., without the requisite intent.<sup>14</sup> This could also make the trust itself susceptible to an attack similar to an attack on a pre-nuptial or postnuptial agreement for the same grounds. Another assertion is that a policy in favor of transmutation would be detrimental to married couples obtaining estate planning since a spouse's attempt to permit the orderly transfer of assets to and best provide for the care of the other spouse could be undermined.

## The Arguments for Transmutation

Just as there are arguments against the recognition of transmutation through revocable family trusts, there are meritorious ones in favor of it.

**Revocable Family Trusts Qualify as Marital Agreements:** A revocable family trust could be considered an enforceable agreement that transmutes property. In *Verbey-*

*den v. Verbeyden*, the Nevada Supreme Court held that under NRS 123.220, a writing is required in order to transmute the character of property by clear and convincing evidence.<sup>15</sup> A trust is clearly a writing and depending on its content, may evidence a transmutation. Further, it could be argued that revocable family trusts are in fact marital contracts under NRS 123. The statute states that spouses can enter into marriage contracts during the marriage, which can alter their legal rights. Specifically, NRS 123.070 reads as follows:

Either husband or wife may enter into any contract, engagement or transaction with the other, or with any other person respecting property, which either might enter into if unmarried, subject in any contract, engagement or transaction between themselves, to the general rules which control the actions of persons occupying relations of confidence and trust toward each other.<sup>16</sup>

There is no requirement that contracts under NRS 123.070 take any specific "form," just that they abide by principles of equity and fair dealing as set forth in case law governing marital agreements. A trust is not a person but rather an agreement – a contract – entered into between spouses formed under a fiduciary relationship with respect to property.<sup>17</sup> More specifically, "A trust is a fiduciary relationship with respect to property, arising as a result of a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it

(cont'd. on page 5)

## Transmutation of Prop. cont'd. from page 4

for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.”<sup>18</sup> NRS 163.005 states that a trust is enforceable if it meets the requirements for enforcement as a contract. Hence, a trust would apparently fall under the definition of a marital contract since it satisfies the broad definition of NRS 123.070.

### Language Sufficient to Evidence a Characterization:

There is an argument that as long as a trust expresses a present intent to convert the character of property, a transmutation occurs upon execution. In the case of *In re Marriage of Holtemann*, the California Court of Appeals dealt with a revocable family trust in which the trust stated that the character of property in the attached schedule of assets “is hereby transmuted from his [husband’s] separate property to the community property of both sides.”<sup>19</sup> The court found such a declaration tantamount to an express statement evidencing the parties’ intentions and that the declaration was made and consented to by the spouse whose interest was adversely affected. While California law does not require the clear and convincing evidence standard that Nevada does in regards to transmutation, it is axiomatic that an express statement of transmutation adopted by the objecting party meets the clear and convincing standard.

The court further held that a trust does not have to specifically reference the word “transmutation” in order to create one. Rather, the court only required language sufficient to evidence an intent by the parties to change the character of

property. In the similar case of *In re Marriage of Lund* which also involved a revocable family trust, a transmutation of separate property into community property was found to have occurred via the language “Separate property ... is hereby converted to community property ...”<sup>20</sup> There was additional language evidencing a transmutation in *Lund*, such as the declaration that upon the property being converted, each party would have “... equal, existing and present interests therein.”<sup>21</sup> This is ironically the same language in NRS 123.225 regarding spouses’ rights in community property.

### A Present Transmutation Negates Subsequent Conditions:

In *Holtemann*, the court also took the position that it made no difference on the effect of transmutation if the family trust referenced that the creation of the trust was solely for estate planning purposes. The same conclusion was made in *Lund* and by the Supreme Court of Idaho in *Suchan v. Suchan*.<sup>22</sup> The *Holtemann* court reasoned that if there is a present transmutation of property from separate to community, it is final and property cannot be “retransmuted” without another sufficient declaration re-characterizing the property.<sup>23</sup> This would mean that a transmutation also cannot be made contingent upon death. Hence, once property is conveyed via an agreement, it would become an incontrovertible property right since the property must be transmuted in order for the subsequent benefit to take effect. In *Holtemann*, the court commented on the husband’s contradictory position that the transmutation was only for estate planning and tax reasons by quoting the trial judge’s findings:

Husband argues that the transmutation was limited to estate purposes only. In other words, Frank wishes to have his cake and eat it too. He argues that, in the event of either his or Barbara’s death, the survivor would be able to use the Transmutation Agreement to claim the property as community property, thus obtaining a full step up in basis to the fair market value of the property at date of death, while at the same time denying the validity of the Transmutation Agreement as an instrument which created community property. Thus, when it would benefit either Frank or his estate, Frank wishes to characterize the property as community. However, when it would be detrimental to Frank, he wishes to ignore the transmutation and call the property separate.<sup>24</sup>

The trial court was likely moved by the fact that the husband, who once wished, grounded on marital bliss, for both spouses to benefit from the transmutation had changed his position and wanted to dismiss that prior intention in light of the pending divorce. Husband attempted to change his position even though he was previously counseled of the potential consequences prior to executing the trust. If a spouse transferring separate property into a trust in order to benefit from its treatment as community property is informed regarding the effect of same, it is equitable for said spouse to be bound by the after-effects of their bargain. This supposition would have support in Nevada under NRS

(cont'd. on page 6)

## Transmutation of Prop. cont'd. from page 5

47.250(a), which establishes a disputable presumption that “A person intends the ordinary consequences of that person’s voluntary act.”

**Estoppel:** Finally, there is an argument related to estoppel that may establish transmutation in revocable family trusts. The Nevada Supreme Court, in *Anderson v. Anderson*, held that where spouses divided up their bank accounts prior to divorce and one spouse led the other to believe the division was permanent, the doctrine of estoppel governed and the funds in the account were transmuted into each party’s separate property.<sup>25</sup> Similarly, the position can be taken that a spouse controlling, utilizing or spending an asset for years that was converted via their family trust relied on the representation in the trust to their detriment upon a divorce being filed. The objecting spouse could as a result be barred from taking a contradictory position.

## Conclusion

The fact of the matter is that family trusts and divorces do not always mix well. While careful estate planning may be able to avoid the unintentional transmutation of separate property into community in revocable family trusts, divorce attorneys cannot risk assuming such is the case when they come across these trusts. A careful examination and analysis is required in order to determine whether a revocable trust could be deemed to have transmuted property. While Nevada does not address the issue, the arguments for and against the recognition of trans-

mutation through trusts all have merit. Due to the lack of legal precedent in Nevada on the matter, which argument would prevail upon presentation to a court could depend on the legal arguments as much as the specific fact pattern.

## Endnotes

<sup>1</sup> See also NRS 163.565.

<sup>2</sup> IRC §1014.

<sup>3</sup> While not the topic of this article, community property may be also transmuted into separate property through a trust. This is usually done for purposes of protecting property from one spouse’s potential creditors. However, transmuting community property into separate property may deprive spouses of significant tax savings.

<sup>4</sup> It should be noted that transmutation language in small revocable family trusts is sometimes included unintentionally. This may be due to an attorney who does a bad job drafting due to laziness or because they do not concentrate in estate or tax planning. Other times, it is because the grantor does not wish to spend money beyond the “cheapest” trust available on additional provisions or documents that more efficiently segregate separate property.

<sup>5</sup> *Sprenger v. Sprenger*, 110 Nev. 855, 858, 878 P.2d 284 (1994). It is of note that in *Ricks v. Dabney (In re Jane Tiffany Living Trust 2001)*, 124 Nev. 74, 79, 177 P.3d 1060 (2008), the Nevada Supreme Court stated that clear and convincing evidence must “eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence.”

<sup>6</sup> *Cord v. Cord*, 98 Nev. 210, 213, 64 P.2d 1026 (1982).

<sup>7</sup> Said additional evidence could be in the form of a letter from the preparing attorney memorializing the parties’ intentions related to estate planning or tax savings to a noticeable absence in the case of any other documents transmuting separate property into community prior to the trust being formed.

<sup>8</sup> *In re Marriage of Starkman*, 129 Cal. App.4th 659, 28 Cal. Rptr.3d 639 (Cal. App. 2005).

<sup>9</sup> *d.* at 664.

<sup>10</sup> *In re Marriage of Koester*, 73 Cal. App.4th 1032, 1037, 87 Cal. Rptr.2d 76 (Cal. App. 1999).

<sup>11</sup> *Barker v. Barker*, 139 Cal. App. 2d, 293 P.2d 85 (Cal. App. 1956).

<sup>12</sup> *Burns v. Burns*, 1997 Tenn. App. LEXIS 772 (1997).

<sup>13</sup> *Dahlgren v. First Nat’l Bank*, 94 Nev. 387, 580 P.2d 478 (1978).

<sup>14</sup> *In re Marriage of Matthews*, 133 Cal. App.4th 624, 35 Cal. Rptr.3d 1 (Cal. App. 2005).

<sup>15</sup> *Verheyden v. Verheyden*, 104 Nev. 342, 757 P.2d 1238 (1988). It’s of note though that NRS 123.220 only addresses the transmutation of community property into separate property, although *Mullikin v. Jones*, 71 Nev. 14, 27, 278 P.2d 876 (1955) holds that separate property can be transmuted into community property. Most courts take the position that writing is required for transmutation either way.

<sup>16</sup> See also *In re Marriage of Holtemann*, 166 Cal. App. 4th 1166, 1172, 83 Cal. Rptr. 3d 385 (Cal. App. 2008).

<sup>17</sup> *In re Marriage of Lund*, 174 Cal. App. 4th 40, 44, 94 Cal. Rptr. 3d 84 (Cal. App. 2009).

<sup>18</sup> Restatement (Third) of Trusts § 2.

<sup>19</sup> *In re Marriage of Holtemann*, 166 Cal. App. 4th 1166, 1172, 83 Cal. Rptr. 3d 385 (Cal. App. 2008).

<sup>20</sup> *n re Marriage of Lund* at 52.

<sup>21</sup> *Id.* at 54.

<sup>22</sup> *Suchan v. Suchan*, 106 Idaho 654, 682 P.2d 607 (1984).

<sup>23</sup> *In re Marriage of Holtemann* at 1173.

<sup>24</sup> *In re Marriage of Holtemann* at 1174.

<sup>25</sup> *Anderson v. Anderson*, 107 Nev. 570, 816 P.2d 463 (1991).

**Vincent Mayo is a partner at the Abrams Law Firm, LLC. Mayo is certified as a Family Law Specialist by the State Bar of Nevada. He is an experienced family law litigator and concentrates in difficult and complex divorce and other divorce cases. He can be reached at The Abrams Law Firm, LLC, 6252 S. Rainbow Blvd., Suite 100, Las Vegas, Nevada 89118; Telephone: (702) 222-4012; E-mail: [vmayo@theabramslawfirm.com](mailto:vmayo@theabramslawfirm.com).**



## NOTICE OF PROPOSED SETTLEMENT TO MEMBERS OF THE SETTLEMENT CLASS:

Please be advised that a proposed class settlement has been approved by the United States District Court in and for the District of Delaware in the matter styled, *Claire V. Pascavage v. Office of Personnel Management*, Case No, 09-276-LPS-MPT.

Settlement Class: All persons who have submitted to the U.S. Office of Personnel Management (“OPM”) or to an employing Federal agency, or had someone submit on their behalf, as appropriate according to the terms of 5 U.S.C. § 8705(e)(2), any court decree of divorce, annulment, or legal separation, or any court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation (“Court Order”) where the following apply:

1. Where such Court Order expressly provides that such person(s) receive Federal Employees’ Group Life Insurance (“FEGLI”) benefits, or be named beneficiary with respect to FEGLI based on the criteria set forth in 5 U.S.C. §8705(e)(1)-(4) and 5 CFR 870.801(d), excepting section 870.801(d)(2);
2. Where such Court Order was received by OPM or the appropriate employing Federal agency only before enactment (on July 22, 1998) of Public Law 105-205;
3. Where OPM has denied or, in the absence of the developments in this Action, would deny such person(s) FEGLI benefits on the basis that the Court Order was received by OPM only prior to July 22, 1998;
4. Where such person(s) submitted a claim for payment within the time frames enumerated under 5 U.S.C. § 8705(b)-(c);
5. Where the insured Federal employee, compensation or annuitant whose Federal service is the basis of the FEGLI benefit died after July 22, 1998;
6. Where such Court Order was received by OPM or the appropriate employing Federal agency prior to that insured Federal employee, compensation or annuitant’s date of death; and
7. Where written evidence exists of the date the court order was received by OPM or by the appropriate employing Federal agency as proven by:
  - i. An OPM-generated search of the deceased Federal employee, compensation, or annuitant’s records held by OPM.
  - ii. If no such records are in the possession of OPM, then the burden is on the class member(s) seeking the FEGLI benefits to provide written documentary evidence of the date on which the Court Order was received by OPM or by the appropriate employing agency.

Specifically excluded from the proposed class are those persons who have already secured recovery against OPM or Metropolitan Group Life Insurance Company (“MetLife”) for the FEGLI benefits claimed, including those persons whose claims were the subject of an interpleader action or who otherwise recovered benefits, or a portion therefor from another claimant.

Should you or a member of the Settlement Class desire to review the Order Preliminarily Approving Class Action Settlement, kindly contact Shelly B. Cooley, editor of the NFLR, at [scooley@cooleylawlv.com](mailto:scooley@cooleylawlv.com).

Questions regarding the Order Preliminarily Approving Class Action Settlement should be directed to Class Counsel: John S. Spadaro, Esq., John Sheehan Spadaro, LLC, 724 Yorklyn Road, Suite 375, Hockessin, Delaware 19707, Telephone: (302) 235-7745, Facsimile: (302) 235-2536, E-mail: [jspadaro@johnsheehanspadaro.com](mailto:jspadaro@johnsheehanspadaro.com).

# A MESSAGE FROM THE CHAIR

*By Robert Cerceo, Esq.*

Reflecting briefly upon many years of service leading up to Ely 2013 and these last two years as the Chair of the Section, I am reminded of many meetings, calls and e-mails from every level of the Courts, Bench and Bar. I have always been pleasantly surprised at how many people I have met and the creative and collaborative problem solving used on many issues across the state. It has been a fun and exciting time. My hope is that the mark has been hit for customer service, and that the Executive Council, some very young in their careers, has developed into a top-tier team. And along the way, we have grown as friends. Thank you.

Send your questions and comments to [rcerceo@theabramslawfirm.com](mailto:rcerceo@theabramslawfirm.com).



## Article Submissions



Articles are invited! The Family Law Section is accepting articles for the Nevada Family Law Report. The next release of the NFLR is expected in **May, 2013**, with a submission deadline of **April 15, 2013**.

Please contact Shelly Cooley at [scooley@cooleylawlv.com](mailto:scooley@cooleylawlv.com) with your proposed articles any time before the next submission date. We're targeting articles that are between 350 words and 1,500 words, but we're always flexible if the information requires more space.



# WHY SELECT A PHYSICIAN/ PSYCHIATRIST FOR FORENSIC SERVICES?

By *Kahmien A. LaRusch, M.D.*



## EXECUTIVE SUMMARY:

Psychiatrists are physicians and have more training than any other mental health care provider.

Psychiatrists diagnose and treat medical and psychiatric illnesses with many modalities, including medications.

Psychiatrists are trained in managing, supervising and working with all other non-physician mental health care providers.

A psychiatrist should be consulted in a family law case if any of the parties has received or is receiving a psychiatric treatment that may be relevant or brought up in the case, such as medication, Electroconvulsive treatment or Transcranial Magnetic Stimulation.

A psychiatrist's Brief Focused Assessments can be faster, cheaper and more relevant for family law than other mental health care providers.

### What is a psychiatrist?

A psychiatrist is a physician who specializes in the diagnosis, treatment, and prevention of mental health disorders, including substance use disorders. Psychiatrists are qualified to assess both the mental and physical aspects of psy-

chological disturbance. Psychiatrists are trained to look for, test for, diagnose and treat general medical conditions that could be causing psychiatric symptoms such as thyroid disorders, multiple sclerosis, lupus, cancer/tumors, delirium and dementias, as well as various neurological conditions such as seizures or brain injuries in addition to many other problems.<sup>1</sup>

Often a litigant, or someone close to the litigant, is having problems in their life and sees a non-physician mental health provider. The non-physician mental health provider, not having medical training, though being well intentioned, will diagnose and use treatments learned about in their training, i.e.: depression = treat with talk therapy. These providers may miss the underlying general medical condition (thyroid dysfunction, for example) causing the behavioral and emotional problems.

A psychiatrist goes through the most rigorous, lengthy training of all the mental health professionals. The minimum training to become a psychiatrist is eight years of graduate school. Yes, on a mortgage application, if you count starting from kindergarten through high school (13 years), a psychiatrist would at a

minimum put down 25 years of education.

The post-secondary premedical/medical/psychiatric training consists of:

1. Four years of college to obtain a bachelor's degree (or more if there were minors, multiple majors or advanced degrees)
2. Four years of medical school to obtain a Medicinae Doctor (M.D.) degree.
3. At least four years of residency to become "Board Eligible" in a given specialty (Board Certification is not automatically awarded after residency, but rather granted after thorough, multiday written and oral testing. Board Certification goes above and beyond basic medical licensure and demonstrates a physician's exceptional expertise in a particular specialty of medical practice).<sup>2</sup>

Psychiatrists have been trained to be the treatment team leader. The psychiatrist knows, understands and works with all the other members of the treatment team in-

*(cont'd. on page 10)*

## Forensic Services

cont'd. from page 9

cluding pharmacists, nurses, social workers, physical and occupational therapists, non-physician mental healthcare providers and techs of every stripe (ultrasound, nuclear, respiratory, X-ray, etc.).

Psychiatrists spend a lot of time interfacing and coordinating with other mental health professionals such as: Ph.Ds, Psy.D.s, Ed.D.s, D.S.W.s, (These preceding four are doctoral-level degrees, so each has earned the title "doctor" but should not be confused with physicians who graduate from medical school and treat medical problems) such as LCSWs, MSWs, MFTs, MAs, LADCs, pastoral counselors and mental health techs. Even though over the course of their training all physicians spend many months working in other specialties (for example: during an OB/GYN rotation I delivered babies, during surgery rotation I helped excise tumors and do augmentations, in the ER I stitched up many a laceration), no physician can be an expert in all medical specialties. Part of a psychiatrist's training involves knowing when to refer to other physicians such as pediatricians, neurologists, and obstetricians/gynecologists etc., which is commonly done.

### What is a psychiatrist's role in forensics?

Psychiatrists perform:

- Custody and parental fitness evaluations
- Competency to proceed to trial evaluations
- Substance abuse evaluations
- Child, adolescent and adult comprehensive psychiatric evaluations with psychological testing if needed
- Competency, capacity, guardianship evaluations
- Criminal culpability
- Mens rea
- Fitness for duty
- Independent medical evaluations

- Disability evaluations
- Personal injury
- Malpractice
- Medical and treatment records review (psychiatrists have a bio-psycho-social perspective. Non-physician mental health providers lack this biomedical background and are outside their scope of practice when they enter into any discussion about medical treatments, including medications, indications, recommendations, interactions and their side effects.)

It is an especially prudent decision to get a forensic evaluation performed by a psychiatrist when there are parties involved in the case that have any medical or psychiatric issues or who have taken or are taking any psychiatric medicine or illicit substances that may be brought up in the case.

(cont'd. on page 11)

## AVAILABLE SOON!

### The 2013 Nevada Family Law Practice Manual

#### With New Chapters and a New Look!

The third update of this highly sought after book includes updated information and new chapters on modern day topics such as:

- Military Divorce;
- Domestic Partnerships; and
- Artificial Reproductive Technology Law

The manual will be sold as both a one volume, hard bound book and as a digital download. Special pricing is available for Family Law Section Members.



#### Section Member Pricing:

- Hard bound book and digital download: \$119
- Digital download only: \$75

#### Pricing for Non-Section Members:

- Hard bound book and digital download: \$139
- Digital download only: \$89

To pre-order, e-mail [publications@nvbar.org](mailto:publications@nvbar.org) or call (702) 317-1459

## Forensic Services

cont'd. from page 10

Psychiatry is a specialty within medicine so it is technically redundant to say “medical or psychiatric problem” since by definition any psychiatric problem is a medical problem. The brain is a 3.5 pound gelatinous organ encased in the cranium. “The Mind” really is just one of the many functions of the brain. Psychiatrists can and do order medical tests that can have a tremendous bearing on family law cases such as drug testing using specimens of blood, urine, hair or all three depending on the circumstances.<sup>2</sup>

Psychiatrists can also administer hundreds of rating scales, inventories, personality tests and psychological tests that can be useful in a family law case, for example, demonstrating specific mental pathology or characterological problems. The MMPI (Minnesota Multiphasic Personality Inventory), HAM-D (Hamilton Depression Rating Scale), PANSS (Positive and Negative Syndrome Scale), BDI (Beck Depression Inventory) and substance abuse questionnaires such as the CAGE (cut down, annoyed, guilty, eye-opener) and SASSI (Substance Abuse Subtle Screening Inventory) are examples of tests that may yield potentially valuable information.

### What do psychiatrists treat?

The DSM-IV (Diagnostic and Statistical Manual of Mental Disorders, 4<sup>th</sup> edition) is almost 1,000 pages and contains hundreds of diagnoses a person can have. Part of being a board-certified psychiatrist is knowing the DSM very well and skillfully applying that information. Common diagnoses treated by psychiatrists are:

- Major depressive disorders
- Bipolar disorders
- Schizophrenia
- Attention Deficit/Hyperactivity Disorder
- Addictions of all types (substances as well as behaviors)
- Anxiety disorders such as PTSD (Post Traumatic Stress Disorder), OCD (Obsessive Compulsive Disorder), panic disorders
- insomnia
- Dementias (e.g.: Alzheimer’s disease)

### How do psychiatrists treat these problems?

Psychiatrists can and do use numerous treatment modalities. These modalities include:

- Psychotherapy (talk therapy of which there are more than 500 different kinds)
- TMS (Transcranial Magnetic Stimulation)
- ECT (Electroconvulsive Therapy)
- Medications

There are hundreds of medications that psychiatrists can use to treat various conditions. Some common psychiatric medications include: Prozac, Paxil, Lexapro, Zoloft, Wellbutrin, Suboxone, Subutex, Ativan, Librium, Xanax, Valium, Klonopin, Cymbalta, Effexor, Lithium, Depakote, Zyprexa, Abilify and Seroquel. A boardcertified psychiatrist knows all these treatments in detail, including the physiology, pharmacology, mechanism of action, risks, benefits and alternatives to all these treatments. But most importantly, in family law, the psychiatrist will



know the implications and ramifications of any of the above diagnoses and treatments as they pertain to a forensic case.

### COMPARISON, FEES AND EFFICIENCY:

The extensive training of a psychiatrist fosters more precise application of diagnostic criteria and diagnostic accuracy than other mental health professionals with less training that may not use a similar degree of diagnostic discipline.

Though psychiatrists, like other mental health professionals, are capable of expensive and time consuming forensic evaluations, one of the psychiatrist’s biggest contribution to the forensic team is the BFA (Brief Focused Assessment). Judges with busy dockets and litigants with limited resources also appreciate the advantages of the BFA. The BFA refers to assessments of narrowly defined, issue-specific questions that arise in family court settings. Usually, the psychiatrist’s expert opinion exploring the veracity and credibility of claims and allegations is all that is requested.

(cont'd. on page 12)

## Forensic Services

cont'd. from page 11

Four concrete examples of how I, as a psychiatrist, have assisted in family law matters using the Brief Focused Assessment approach follows.

### Example #1:

In a custody dispute with joint legal and physical custody, one parent living out of state petitioned the court to have sole legal and physical custody. That parent accused the other parent of having sex repeatedly with the door open such that the preadolescent child saw what was going on in the room. A comprehensive child custody evaluation would be expensive, time consuming and overkill in this situation. Instead of ordering a child custody evaluation, the judge asked me to evaluate the veracity of the claim, nothing more. I interviewed the mother, father and the preadolescent. By reviewing the documents and taking a careful history of each member separately, I was able to determine the preadolescent had been coached, and that in all likelihood the story of sex with the door open was a fabrication.

### Example #2:

One parent was petitioning for a change in visitation. This parent said the petition was filed at the child's request. The judge asked me to review the records and interview the involved members and render an opinion. I determined that the child, now a teenager, was having age-appropriate new activities that took away from both parents' time. That parent did not want to give up any of the time with the child that

was awarded, even if it meant keeping the child at home while the parent was away. I opined it was not out of the ordinary that a teenager would want to spend less time with her parents, and more time with peers, especially when "time with the parent" included large amounts of time where that parent was absent.

### Example #3:

The competency of a deceased parent came in to question after it was found that the parent significantly modified their last will and testament only a few months before their death and left everything to only one out of several living children. I was asked to review medical records and render an opinion as to the testator's capacity to make sound decisions in the months immediately preceding their death. Based on my review of all available medical records, it was apparent the testator had significant cognitive deficits and most likely did not fully understand the changes she had made to her own will at the behest of the one sole beneficiary.

### Example #4:

One parent had a history of drug abuse and depression. This was made an issue by opposing counsel. The judge ordered the parent to undergo a comprehensive psychiatric evaluation, including a substance abuse evaluation. I performed this evaluation and put my findings and discussions in an informative report the judge found useful for decisions making.

A brief and focused evaluation comes naturally to a medical doctor, who has spent considerable time working in emergency rooms and

other acute care environments and must make quick but careful decisions that may profoundly affect the lives of others.

The AFCC (Association of Family and Conciliation Courts) has guidelines for "brief focused assessments." In the guidelines, the AFCC acknowledges this type of evaluation is relevant and increasingly practiced, and states, "When used appropriately, BFAs are a legitimate, parsimonious, and sufficient (i.e. stand-alone) process ... There are instances in which a BFA is the most appropriate process, e.g., when issues in dispute are narrowly defined. There are also situations in which either a BFA or a CCE could be useful, but the BFA is ordered due to economic or institutional constraints."<sup>4</sup> Less substantive information is not included in BFAs, such as how a parent interacts with their children while making cookies at home in the presence of a child custody evaluator, or the occupations and hobbies of the grandparents when the parents were youngsters.

Psychiatrists and the doctoral-level forensic expert typically both charge between \$300 - \$500 per hour for forensic services. A psychiatrist's BFA addressing one dimension of custody will be cheaper and faster than the psychologist's comprehensive evaluation. This is because a comprehensive custody evaluation by a psychologist can take 25 hours or more, spread over a month or more, costing \$10,000 plus. A psychiatrist will typically be able to do all work in five or 10 hours tops, and generate a report in one or two weeks or possibly less.

In addition, many psychiatrists are more readily available than

(cont'd. on page 13)

## Forensic Services

cont'd. from page 10

many psychologists and could easily complete the report in less than a week for as little as \$1,500 - \$3,000. Psychologist evaluators can charge \$25,000 or more in very complex and time-consuming cases and may have a considerable backlog of active cases before they can even get to the new cases. It then may take months in some cases to complete such a detailed, tedious 80-page or more report, that when distilled to its essence contains the same basic information as the psychiatrist's 10-page BFA report.

A final example in which a psychiatrist may be of help in family law is when the litigant needs treatment. An attorney referred a litigant to me that could not give a deposition. Every time the litigant came into the attorney's office, she broke down and cried hysterically. I saw the litigant a few times in my office, provided psychotherapy and prescribed a medication for her debilitating anxiety. After these few sessions with me, the litigant was able to give her deposition. The liti-

gant was able to go to her attorney's office and remain much more composed to the relief of both the litigant and the referring attorney.

In a therapeutic, rather than forensic setting, if therapy is what the litigant needs, psychiatrists can also be a better value than a non-psychiatrist. For example, some psychologists charge \$250 or more for 45 minute appointments. A psychiatrist may charge \$300 for a full 60 minutes, making the psychiatrist cheaper per unit time in such a case.

## Endnotes

<sup>1</sup> Accessed 1/24/13:

[www.psychiatry.org/mental-health/more-topics/what-is-a-psychiatrist](http://www.psychiatry.org/mental-health/more-topics/what-is-a-psychiatrist)

<sup>2</sup> Accessed 1/26/13:

[www.certificationmatters.org/about-board-certified-doctors.aspx](http://www.certificationmatters.org/about-board-certified-doctors.aspx)

<sup>3</sup> Accessed 1/27/13:

[www.aacap.org/cs/root/facts\\_for\\_families/comprehensive\\_psychiatric\\_evaluation](http://www.aacap.org/cs/root/facts_for_families/comprehensive_psychiatric_evaluation)

<sup>4</sup> Accessed 1/23/13:

[www.afccnet.org/Portals/0/PublicDocuments/Guidelines/BFATF2009final.pdf](http://www.afccnet.org/Portals/0/PublicDocuments/Guidelines/BFATF2009final.pdf)

**Dr. LaRusch** is a board-certified psychiatrist. He treats the entire spectrum of mental health problems as well as performs forensic evaluations and renders expert opinions. He has been practicing psychiatry in Las Vegas since 2004. He graduated from high school with honors two months after his 17<sup>th</sup> birthday. He graduated cum laude and as a member of Phi Beta Kappa and Phi Kappa Phi (academic honor fraternities) from San Diego State University in 1996. He graduated from the University of California, Irvine medical school in 2001.

He completed his internship at the University of Colorado in 2002. He completed his residency at the University of Nevada in 2007 where he served as chief resident in his fourth year. He started his solo private practice in 2006 while still a resident. He sees patients of all ages. In his private practice, Dr. LaRusch has seen patients as young as 4 years old and as old as 99.

Dr. LaRusch can be reached at 702.257.3099. His office is located diagonally across the street from the Palace Station near Sahara and I-15, 2340 Paseo del Prado, Suite D - 207, Las Vegas, NV 89102. His e-mail is: [klarusch@gmail.com](mailto:klarusch@gmail.com).

His curriculum vitae and other information can be found at: [www.LVSHRINK.com](http://www.LVSHRINK.com).



# NRS 125B.020(3) IS ANTIQUATED, UNFAIR AND UNCONSTITUTIONAL

*By Bruce I. Shapiro, Esq.*

NRS 125B.020(3) provides: “The father is also liable to pay the expense of the mother’s pregnancy and confinement.” Unlike other provisions of NRS 125 and 126, this provision gives the court no discretion to equitably share such expenses. It burdens the father, who may or may not want the pregnancy, with all the expenses. It also burdens the father without regard to the parties’ respective financial resources. This antiquated statute serves no legitimate purpose and gives the court no discretion.

In contrast, NRS 126.171 provides, in part, that “The court may order reasonable fees of counsel, experts and the child’s guardian ad litem, and other costs of the action and pretrial proceedings, including blood tests or tests for genetic identification, to be paid by the parties in proportions and at times determined by the court.” NRS 126.171 gives the court the appropriate discretion to impose costs and fees in contrast to 125B.020(3), which gives the court no discretion and imposes the obligation of these costs to the father. NRS 126.171 also could cover costs of “confinement” thereby making NRS 125B.020(3) unnecessary. Additionally, the court also enjoys discretion under NRS 125B.080(9) (h) to deviate from a presumptive child support award based on “any expenses reasonably related to the mother’s pregnancy and confinement.”

If given the opportunity the Nevada Supreme Court should find NRS 125B.020(3) unconstitutional on its face. The Equal Protection Clause provides: “[N]or [shall] any State] deny to any person within its jurisdiction the equal protection of the laws.”<sup>1</sup>

This fundamental right protected by the United States Constitution entails two separate rights that

should not, and cannot, be segregated or selectively enforced by parties or the state. The statute in question on its face unconstitutionally discriminates against fathers because it mandates that in all cases where unmarried persons have a child, the father must pay the costs of pregnancy and confinement.

When a statute, such as state child support guidelines, is challenged under this clause, a court will apply one of three standards for that statute to withstand constitutional attack:

In considering whether state legislation violates the Equal Protection Clause of Fourteenth Amendment, the court applies different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.<sup>2</sup>

Such gender-based classifications and discriminatory practices as set forth in NRS 125B.020(3) do not serve any viable and/or important governmental objective under any interpretation and further are not substantially related to any such objective. This statute cannot withstand the applicable scrutiny and legal tests of the

*(cont'd. on page 15)*

**NRS 125B.020(3)***cont'd. from page 14*

Equal Protection Clause of the United States Constitution or the Nevada Constitution and should be stricken.

Such practices as set forth in NRS 125B.020(3) is an unequivocal violation of equal protection. Such practices and procedures impose special, broad and dissimilar responsibilities and obligations upon fathers, while affording certain privileges, rights and choices to be unilaterally made and exercised by mothers, all to the societal, financial, emotional, psychological and other detriment to fathers.

Section 15(c) of the Uniform Parentage Act provides:

The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. The judgment or order *may direct* the father to pay the reasonable expenses of the mother's pregnancy and confinement.

[Emphasis added]

Nevada has not adopted the uniform act. Section 15 (c) of the uniform act, however, gives the court the appropriate discretion to satisfy the constitutional standard. NRS 125B.020(3), however, does not. NRS 125B.020(3) is sweeping in nature, discriminatory, preventing and enjoining fathers from being afforded certain choices. It further treats mothers and fathers differently without giving the court any discretion to consider the particular facts of a case. This statute is particularly troublesome when a pregnancy has occurred accidentally. Regardless of the financial circumstances of each party, for the statute to direct that the father absolutely pay for the "confinement" of the mother, whatever that is, may be considered punitive. The statute basically provides for pre-birth child support. Moreover, "confinement" is not defined in the statute and no legislative history from the original 1923 statute could be found to ascertain what expenses "confinement" was intended to address.<sup>3</sup>

NRS 125B.020 was enacted in 1923 with the passage of Assembly Bill 17. It was amended in 1983 by Senate Bill 472 and in 1989 by Senate Bill 454. Subsection three is from the original 1923 bill and it has not been amended. This statute is a relic from the tender years' doctrine and has apparently been overlooked by the legislature. It is clear, however, that this statute does not withstand constitutional scrutiny and must be declared unconstitutional.

**ENDNOTES**

<sup>1</sup> U.S. Const. amend. XIV, Section 1.

<sup>2</sup> *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citations omitted).

<sup>3</sup> Black's Law Dictionary defines confinement as "Restraint by sickness in childbirth; lying-in for delivery of child, or possibly because of advanced pregnancy." *Rose v. Commonwealth Beneficial Ass'n*, 86 A. 673, 674, 4 Boyce (Del.)

**Bruce I. Shapiro** attended the University of Nevada, Las Vegas, and received his bachelor's degree in 1984 and his master's degree in 1986. He graduated from Whittier College School of Law in 1990, magna cum laude. He has practiced in family law since 1990 and has served as a Domestic Violence Commissioner, pro tempore, URESA/Paternity Hearing Master, Alternate, Municipal Court Judge, Alternate, Judicial Referee, Las Vegas Justice Court, Small Claims. Shapiro has written several articles in the area of family law and has served on the Nevada Children's Justice Task Force, Clark County Family Court Bench-Bar Committee, State Bar of Nevada, Child Support Review Committee, the State Bar of Nevada Southern Nevada Disciplinary Board, State Bar of Nevada Standing Committee on Judicial Ethics and Election Practices and the Continuing Legal Education Committee. Shapiro also served on the Board of Governors for the State Bar of Nevada from 2003-2005 and 2008 -2010.