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The Continuing Problems with Survivorship Benefits in Nevada Pension Cases

By Marshal S. Willick, Esq.

I. INTRODUCTION

Nevada case law concerning retirement and survivorship benefits has been based on an error of fact since 1996, and the Nevada Supreme Court actually exacerbated the situation with later decisions built on that foundational error.

For years, justices of the Court have remarked at conferences how, "given the chance," they would fix those known errors in prior case law and improve the law governing retirement and survivorship interests. But for at least the fourth time in 15 years, the Court recently had the chance to do so but again turned away, leaving Nevada case law factually wrong, confused, and out of step with neighboring states. If the Court will not correct its error, the Nevada Legislature should do so.

II. NEVADA COMMUNITY PROPERTY LAW

Under NRS 123.225, spouses have a "present, existing, and equal interest" in ***all*** benefits and burdens—i.e., the ***value***—of all property accrued during the marriage.

Different states have different versions of community property laws. Some require only the "equitable" distribution of community property, but under NRS 125.150, Nevada, like California, requires an actual ***equal*** division of community property and debts in the absence of written findings of "compelling reasons" to divide property unequally. In other words, "equal means equal."

The Nevada Supreme Court has repeatedly acknowledged the importance of this central aspect of community property theory. In *Blanco v. Blanco*, 129 Nev. 723, 311 P.3d 1170 (2013), through Justice Hardesty, the Court stated that "With property division in particular ... we conclude that community property and debt must be divided in accordance with the law. NRS 125.150(1)(b) requires the court to make an equal disposition of property upon divorce, unless the court finds a compelling reason for an unequal disposition and sets forth that reason in writing. The equal disposition of community property may not be dispensed with through default."

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—The Family Law Executive Council

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III. HOW TO EQUALLY DIVIDE RETIREMENT BENEFITS

Some retirement plans (like private pensions under ERISA, or Civil Service retirements under CSRS or FERS) are set up to make an equal and permanent division of benefits easy. In ***those*** systems, it is simple to effectively create a "separate interest" for the spouse, so each party has what amounts to a separate retirement; if the participant dies, the spouse's benefits are unaffected, and if the spouse dies, the participant's benefits are unaffected.

Other retirement plans make an equal division harder to accomplish. PERS, and the military retirement system, do not allow the creation of a "separate interest" for the spouse, no matter what a court orders. In those systems, only the "payment stream" can be divided, which creates a "one-way" survivorship benefit in favor of the participant.

Specifically, in those retirement systems, if the spouse dies, before or after retirement, the spousal share reverts to the participant, no matter what any court says; the participant will get the participant's share, ***and*** the spouse's share, for the rest of the participant's life. There is no corresponding survivorship benefit for the spouse in those systems; if a survivorship benefit is not provided for, the spouse gets ***nothing*** if the participant dies first.

Really, it boils down to a pretty simple concept: to make an "equal division" of retirement benefits ***actually*** equal, if the participant has a survivorship benefit in the spouse's life, then the spouse must have a survivorship benefit in the participant's life. Whenever one party has an "automatic" survivorship benefit, in order to make an equal division, the court has to make the division of benefits and burdens actually equal by providing survivorship benefits to the other party, too.

When retirement benefits that only allow dividing the payment stream (like PERS) are involved, in order to give the spouse an equal benefit to that of the participant, the court has to secure the spousal interest. In a system like PERS, doing so requires survivor benefit designation or private life insurance (before retirement), and an award of a survivor's benefit (after retirement). Not doing so is inherently ***un***equal, because one party has greater benefits than the other, even if the pension payments are allegedly being divided 50/50.

The value of such survivorship interests are huge—it varies from case to case, but the survivorship benefits can easily be one-fourth to one-third of the entire value of the retirement benefits. Ignoring that basic truth is a violation of NRS 125.150.

IV. THE *WOLFF* ERROR

Wolff v. Wolff, 112 Nev. 1355, 929 P.2d 916 (1996), was the appeal of a divorce case in which the husband was a Highway Patrol officer who had benefits through the Nevada Public Employee Retirement System (PERS).

There were several aspects to the case, each of which was correctly decided as a matter of community property theory, including affirmance of the line of authority, adopted from California case law, that a spouse is entitled to the spousal share of the retirement benefits at the time of the participant spouse's first eligibility to retire.

Along the way, the Court specifically affirmed the lower court's order that the spouse's share of the retirement benefits would ***not*** revert to the participant if she predeceased him,

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but would instead continue being paid to her estate, explaining that the community interest was divided upon divorce to two sole and separate interests, so her estate was entitled to the payments that she would have received if alive.

The error in the case is that what the Court said is just not true. PERS will ignore any order purporting to require payments to be made to the spouse's estate; the spousal share of benefits *automatically* revert to the participant. In other words, simply declaring the division a permanent and equal one like the Court did in *Wolff* does not make it so; the trial court has to actually ***do*** something to make the division of benefits and burdens in those assets equal.

In *Wolff,* the Supreme Court did not realize that what it pronounced was factually impossible. Based on its error of fact, the Court *reversed* the trial court order for the participant spouse to carry a life insurance policy to protect the spouse's pension interest, claiming that mandating life insurance to provide security for the spouse violated the equal division mandate of NRS 125.150.

In actuality, the Court ***caused*** the violation of the statutory mandate of equal division, because the participant was already and automatically ***secured.*** The spouse's death would not affect the participant's benefits in any way (except to ***also*** give the participant the spouse's share of the benefits). But without the insurance until retirement, and a survivorship

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benefit thereafter, the spouse was entirely ***unsecured***—the retirement benefits were ***not*** equally divided.

The "fact" recited by the Court—that the spousal share of the benefits would go to her estate if she died first—was simply false. This is not a matter of interpretation, debate, or decision—it was simply a factual error.

V. MAKING IT WORSE; THE *HENSON* ERROR FLOWING FROM THE *WOLFF* ERROR

The Court's error of fact in *Wolff* led it to make an error of law in *Henson v. Henson*, 130 Nev. 814, 334 P.3d 933 (2014). In *Henson*, the Court recited, incorrectly, that under PERS, "neither the employee nor the nonemployee spouse automatically receives a survivor beneficiary interest."

As detailed above, that is just not true, but on the basis of that false "fact," the Court held that Decree language saying simply "Equally divide the pension" did *not* include a survivor beneficiary interest for the spouse unless the survivorship benefit was explicitly recited as being provided.

This was an error. *Henson* did not actually do what the opinion *said* it was doing; instead, it did nearly the opposite, essentially redefining the spousal share of a pension such as PERS from community property into something more like a life estate based on the employee's life. The *Henson* holding therefore amplified the error in *Wolff* and made it even ***harder*** for spouses to get an actual equal division of retirement benefits, by stating that if the litigant or counsel did not know of and deal with survivorship interests during the original divorce, then too bad.

After *Henson*, if the decree of divorce is silent as to survivor benefits, those benefits are lost to the spouse, dispossessing the spouse if the participant dies first.

It is ***possible*** that this error has been partially ameliorated by other changes in the law. ***If*** courts treat survivorship benefits as "omitted assets" under NRS 125.150(3) when they are left out of Decrees—as they should—it will be possible in at least some cases to correct the error, if promptly addressed within three years of discovering the error. But the underlying problem, based on the false "fact" that "neither party has an automatic survivorship interest," should not exist in the first place.

Pensions are property and should be treated like any other kind of property, which for some reason seems confusing to many lawyers and judges.

To illustrate the conflict between the mandate of NRS 125.150 to equally divide all property, on one side, and the second *Henson* holding, on the other, just apply that holding to any ***other*** property that might be distributed—for instance, cars. The Henson holding, applied to that property, would mean that—unless the decree specifically recited otherwise—if the non-participant spouse died first, the participant gets to keep the participant's own car, and receives the spouse's car too; but if the participant spouse dies first, the non-employee spouse's car is destroyed.

That result would not be tolerated as to any other item of community property, as a violation of the statutory mandate to provide each spouse with a permanent division of an equal share. Permitting the post-divorce destruction of a property interest whenever survivor benefit language is not specifically recited is a violation of community property theory, as the California (and many others) courts have repeatedly held.

As succinctly stated by one court, ordering a survivorship benefit, the cost of which is split between the parties, just gives the spouse a right already enjoyed by the participant, that is "the right to receive her share of the marital property

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awarded to her"; the survivorship is "an equitable mechanism selected by the trial court to preserve an existing asset – the wife's interest in the ... pension." *In re Marriage of Payne*, 897 P.2d 888, 889 (Colo. App. 1995).

Very few lawyers and judges—and almost no *pro se* litigants—understand this. The majority of divorces in Nevada today are between proper person litigants, the overwhelming majority of whom have no idea how retirement or survivorship interests work, or what to recite in a divorce decree to properly distribute those interests. If most Decrees say ***anything*** about retirement benefits, it is along the lines of "spouse should get her time rule interest in the retirement." *Henson* held that if a survivorship benefit is not specifically identified and provided for, it is lost.

The result has been that every division of retirement benefits in which the spouse does not have counsel at the time of divorce who understands and specifically addresses the survivorship benefits has resulted in an ***un***equal division of what is, in most cases, the most valuable asset of the marriage. Virtually every divorce involving such retirement plans is resulting in an unequal division of assets, and the spouse may be deprived of the ability to fix it even when it is later discovered.

It is poor public policy to not include the survivorship component of retirement benefits in the definition of "property" that ***must*** be divided upon divorce. The second *Henson* holding directly contradicts the holdings in *Wolff* and *Blanco*, and causes both unjust enrichment and wrongful deprivation in violation of the mandate of NRS 125.150—all without ***any*** valid purpose being served.

Accordingly, the second *Henson* holding should be overruled in favor of a directive that in every retirement division in which the plan includes a reversionary interest in favor of the employee (and thus an ***automatic*** survivorship beneficiary interest for the participant in the spouse's share of the pension), the divorce court is required to provide an equal benefit to the former spouse, and to balance the cost of all distributed benefits between the parties. In other words, if one party has a survivorship, the other one gets one too, and the total value, and costs, should be equally divided between the parties.

The Court already held years ago that vague language in a divorce decree should be construed to comply with Nevada

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law unless the Court explicitly states otherwise. In *Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1988), the Court held that in the absence of express language specifying otherwise, the phrase "one-half of [James'] pension with the United States Government" was to be construed as referencing only the pension earned during marriage.

Henson should be reversed on the same basis—saying "half the pension" necessarily includes ***all*** of the value of the retirement benefits, including the survivorship benefits making up a large part of the value of those benefits.

VI. SEVERAL MISSED OPPORTUNITIES TO FIX IT

The W*olff* error (now compounded by *Henson*) has been talked about in CLE presentations for 25 years. Throughout that time, various justices of the Court attending those lectures have privately opined that the factual and legal error embedded in our case law is a problem that should be fixed, and asked for the "opportunity to do so."

Based on those requests, it has been repeatedly brought to the Court's attention in appellate filings, but the Court has never acted to fix its errors.

In *Hedlund v. Hedlund*, No. 48944, Order of Reversal and Remand (Unpublished Disposition, Sept. 25, 2009), the state bar Family Law Section submitted a detailed *Amicus Brief*, explaining the *Wolff* error and the damage it was doing. The Court did not address the issue at all in its disposition.

In *Doan v. Wilkerson*, 130 Nev. 449, 328 P.3d 498 (2014) and *Holyoak v. Holyoak*, No. 67490, Order of Affirmance (Unpublished Disposition, May 19, 2016), the errors were again fully explained; the Court elected not to address it, stating in a footnote in the latter case that the issue was not "before the Court" because the spouse had not filed a formal cross-appeal.

The errors in both *Wolff* and *Henson* were fully laid out yet again in *Peterson v. Peterson*, No. 77478, Order of Reversal and Remand (Unpublished Disposition, May 22, 2020), and again the Court did nothing to correct the case law errors, stating that because counsel for both Appellant and Respondent in that case *agreed* that the district court had made an erroneous decision, they did not have to decide anything, but simply remand for its correction in that case.

It is worth noting that at least three of those decisions involved volunteer lawyers spending many dozens of hours of time *pro bono* for the purpose of improving family law, at the direct invitation of multiple justices of the Nevada Supreme Court, only to have those efforts be disregarded and the errors they were invited to address left uncorrected.

VII. COULD THE COURT HAVE FIXED THE ERRORS IF IT WANTED TO?

Of ***course*** the Nevada Supreme Court can correct known errors in the case law at any time; it has done so repeatedly over the years, when it felt so inclined. *See, e.g., Rivero v. Rivero,* 125 Nev. 410, 216 P.3d 213 (2009) ("disaffirming" a holding in *Scott v. Scott*, 107 Nev. 837, 822 P.2d 654 (1991); *Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004) (overruling in part *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994); *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998) (overruling *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 532 (1989)).

Given the clear equal-division mandate of NRS 125.150, and the Court's promise to enforce that mandate in cases like *Blanco*, what could possibly explain the Court's refusal to fix

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open, obvious, and detrimental errors in its precedent causing unequal division in thousands of divorce cases, despite several justices repeatedly acknowledging the problem and vowing to fix it "if given the opportunity"?

Whatever the actual explanation, the gaffe is a black spot in our case law, and the refusal to correct the known error for 25 years despite multiple opportunities to do so is inexplicable.

VIII. A LEGISLATIVE FIX; THE CALIFORNIA PRECEDENT

California has *exactly* the same law as we do for mandatory equal division of community property, and for years had the same problem with trial court judges not dealing with survivorship benefits, and so actually dividing retirement benefits unequally.

The difference between California and Nevada is that at least the appellate courts in California kept issuing decisions telling the district courts to make actual equal divisions. *See, e.g.,* discussion throughout *In re Marriage of Sonne*, 225 P.3d 546, 105 Cal. Rptr. 3d 414 (Cal. 2010), as completed on remand with *In re Marriage of Sonne* [*Sonne* II], 111 Cal. Rptr. 3d 506, 185 Cal. App. 4th 1564 (Ct. App. 2010).

But the trial courts there continued to do what our trial courts have done—divide property unequally by failing to account for the valuable survivorship benefits and make sure they were equally distributed as well. So California passed a specific statute (Cal. Civ. Code 2610) saying that an equal division includes equally dividing the value of survivorship benefits—not to ***change*** the equal division law, but to get courts to enforce it:

> "[T]he court shall ... divide the community estate of the parties equally." (Fam. Code, § 2550.) "[T]he court shall make whatever orders are necessary or appropriate to ensure that each party receives the party's full community property share in any retirement plan, whether public or private, *including all survivor and death benefits*, including, but not limited to, any of the following: [¶] (1) Order the disposition of any retirement benefits payable upon or after the death of either party in a manner consistent with Section 2550." (Fam. Code, § 2610, subd. (a)(1), italics added.)

Corrective legislation for Nevada, modeled after the parallel California provision, was drafted, debated at great length, and approved by the Nevada AAML Chapter. It was submitted to the 2021 Nevada Legislature, but since the proposed statute

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would "just" improve the law instead of benefitting anyone in particular, it had no paid lobbying and failed to gain a hearing.

Contemplating legislative action should not be necessary. The Nevada Supreme Court can, and should, correct its own errors, when they have been repeatedly pointed out, as here. But if the Court just won't fix its known mistakes, it falls to the Nevada Legislature to do so.

IX. AN ASIDE ABOUT PRE-RETIREMENT SURVIVOR BENEFITS

In prior years, CLE materials indicated that in the "reversionary interest" type retirement plans (PERS and the military), there was ***no*** pre-retirement survivorship interest available for former spouses, so private insurance was necessary until the retirement of the participant and the selection of a form of benefit providing a survivorship interest for the protection of the spouse. But that is no longer—entirely—true.

In military cases, the 2002 Defense Authorization Act included a provision, retroactive to September 10, 2001, making survivors of members who die in the line of duty eligible to receive Survivor Benefit Plan (SBP). This apparently created a ***pre-retirement survivor annuity***, for spouses ***or*** former spouses.

For PERS, a participant can name a former spouse as a survivor beneficiary under NRS 286.672 and 286.6767, but the designation will only result in payment of benefits to a former spouse if the participant is *unmarried* at the time of death. In other words, if the participant remarries after divorce, the benefits to the former spouse are lost in favor of the later spouse. For PERS cases, using private insurance to secure survivorship benefits until actual retirement and the implementation of retirement benefits including a survivorship option naming the former spouse is by far the safer alternative.

X. CONCLUSIONS

Equal means equal. When the community property assets before the court—like a PERS pension—provides by default different benefits and burdens to the participant and the spouse, it is the job of the lawyers and judges to nevertheless divide the benefits and burdens—i.e., the ***value and costs*** —of that property equally. In too many cases, that is not happening in Nevada divorce courts.

The Nevada Supreme Court bears a large part of the blame for this ongoing problem, not so much for making the original error in *Wolff* in 1996, where it was probably not briefed and presented, but for failing for a quarter century to fix the mistake after it was identified, and then magnifying its scope and impact in *Henson* in 2014, making a legal error based on its earlier factual error.

For whatever reason, on the subject of equal distribution of retirement and survivorship benefits, the Nevada Supreme Court has refused at least four opportunities to correct its errors. If the Court will not comply with the statutory mandate of actual equal division of community property, it falls to the Nevada Legislature to fix the Court's mistakes.

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The Relationship Between Alimony and Child Support

By Jennifer V. Abrams, Esq.

INTRODUCTION AND DEFINITIONS

What is "child support"?

The Nevada Legislature has declared in NRS 125B.020 that "The parents of a child (in this chapter referred to as "the child") have a duty to provide the child necessary maintenance, health care, education and support." The current child support regulations set out at NAC Ch. 425 do not contain a statement of purpose, or definitions altering either prior statutes or case law. Thus, child support is a flow of funds from one parent of a child to the other for the purpose of meeting the child's needs.[i]

What is "alimony"?

Alimony has not really been defined by either the Nevada Legislature or the Nevada Supreme Court. ***Most*** of the comments by the Nevada Supreme Court have been in "subtractive"—saying what alimony is ***not***, rather than what it is. This fits with the American Law Institute's description of alimony as a "residual category ... defined as those ... awards ... in connection with the dissolution of a marriage that are not child support or the division of property."[ii] This residual category of award is used "to provide remedies in a wide variety of cases that do not share any consistent pattern that can be captured in a sensible definition of [need]."[iii]

In 1989, the Legislature amended the alimony statute to require "consideration" of rehabilitative alimony, further requiring a court to consider a spouse's need for obtaining career-related training, whether the spouse who would pay such alimony obtained greater job skills during the marriage, and whether the spouse who would receive such alimony provided financial support while the other spouse obtained job skills or education.[iv]

In 2019, in *Kogod*,[v] the Court defined "permanent alimony" as financial support paid from one spouse to the other for a specified period of time, or in a lump sum, following a divorce, citing NRS 125.150(1)(a) and *Rodriguez*.[vi]

Of course, there are kinds of alimony other than "permanent." Nevada case law has also included characterizations of alimony in various contexts as "maintenance,"[vii] temporary spousal support,[viii] rehabilitative alimony,[ix] or as lump-sum alimony, which presumably requires a set aside of one spouse's separate property to the other.[x]

In short, the "definition" of alimony is elusive, such that one commentator has described trying to provide a concise definition of it as a "'blind men and the elephant' fallacy—trying to explain the whole of a complex concept consisting of several very different parts by focusing on only one of them."[xi]

What is the statutory or case law purpose of "child support" vs. "alimony"?

Child support has at times been stated in the cases as intended to provide for a child's "basic needs,"[xii] but at other times has been stated as intended to allow a child to have a comparable standard of living in both parents' homes after they separate.[xiii] The existing regulations are unclear as to purpose, containing both "basic needs" and "household income" language and factors.

It is noteworthy that there is no mechanism to evaluate how the child support recipient allocates the child support payments received to determine whether or not those dollars

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are actually benefitting the child(ren). For example, two physicians get divorced. They share joint physical custody of four children. Husband earns $1M annually ($83,334 per month) and Wife earns $500,000 annually ($41,667 per month). Husband's guideline child support obligation calculates to $2,916.69 per month. With each parent providing housing, food, childcare, clothing, etc. for the children 50% of the time, Husband paying the health insurance premiums for all four children, and the parents equally sharing out-of-pocket medical expenses, does the child support obligation of $2,916.69 per month provide for the children's "basic needs" or "allow the children to have a comparable standard of living in both parents' homes after they separate"? Or, does the child support in this scenario begin to resemble "alimony"?

"Alimony is wholly a creature of statute," entirely unknown to either the common law or ecclesiastical law.[xiv] The statute, NRS 125.150, authorizes the court to award alimony to a spouse in granting a divorce.[xv] There is no other statutory authority for alimony.

The Court's explanations of the purpose of alimony have been several. In 1998 in *Shydler*,[xvi] the Court stated that alimony was "an equitable award serving to meet the post-divorce needs and rights of the former spouse."[xvii] Most of its explanations have been in the negative, as in the 2000 explanation of alimony being "no fault" in *Rodriguez*, when it held that fault is not to be considered in the making of alimony awards at all, so alimony is not "a sword to level the wrongdoer" or "a prize to reward virtue."[xviii]

Similarly, courts are ***not*** required to award alimony so as to equalize future income.[xix] Property equalization payments "do ***not*** serve" as a substitute for alimony (or presumably vice versa).[xx] And alimony is ***not*** an assignable property right.[xxi]

The statute lists only "factors" to be "considered," from which various commentators have analyzed the never-stated "purpose" of alimony.[xxiii] Judge Hardy came up with four possible, overlapping and perhaps contradictory purposes:[xxiii]

1. Traditional need-based alimony and/or the payor's ability to pay.
2. Non-specific economic loss.
3. Adjunct to property division.
4. Reliance theory of marriage continuation.

Other commentators have grouped the decisions somewhat differently, as "transitional, rehabilitative, just and equitable, [or] permanent alimony,"[xxiv] or as "bridge the gap alimony," "rehabilitative alimony," and "compensatory or contract alimony."[xxv]

But a later commentator found the various categorizations attempted to be "vague, overlapping, and sometimes contradictory," and that ultimately the absence of a coherent theoretical basis for the cases rendered any attempt to line them up into categories of purpose would be "an intellectual dead-end" because "coherence cannot be divined from chaos."[xxvi] In sum, the district court has broad discretion to award alimony "as appears just and equitable,"[xxvii] and that award will not be disturbed on appeal absent an abuse of discretion.

Who can get "child support" and who can get "alimony"?

Child support is a right of "all children" of "all parents," whether or not those children are "legitimated." Under prior case law, biology was the sole focus,[xxix] but the modern revisions to statutory law governing surrogacy and "intended parents"[xxx] makes it highly likely that parentage, and child support, are going to be increasingly distinct from biological parentage.

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For the time being, alimony generally requires a finding of a legitimate marriage, although existing case law would already permit an alimony award between parties not actually married if there was a purported marriage and there were considerations of bad faith or fraud by the potential alimony obligor.[xxxi]

Existing case law has not yet extended to unmarried cohabitants the same potential alimony rights that have already been established as to property by the theory of "community property by analogy."[xxxii] Some commentators have indicated, however, that the general trajectory of the law is to make ever-thinner the lines separating marital from non-marital cases, so that alimony, as well as property, could be a legitimate subject for court awards upon the dissolution of a non-marital relationship.[xxxiii] In fact, the Uniform Law Commissioners[xxxiv] have already promulgated a proposed "Uniform Cohabitants' Economic Remedies Act" which may well be a first step toward making alimony available in such cases.[xxxv]

Comparing and Contrasting Child Support and Alimony Elements and Ramifications

How is each calculated/factors?

Child support was previously provided by formula under NRS 125B.070-.080, providing a guideline formula, presumptive maximums, and deviation factors. They were replaced as of February 1, 2020, by regulations found in NAC Ch. 425, in a revised formulation that eliminated both the presumptive maximums and the prior $100 statutory presumptive minimum and made the calculations a bit more complicated.[xxxvi]

Instead of the simple percentages-per-child with statutory presumptive maximums, the new regulations require a varying percentage of gross monthly income on the first $6,000 of income, depending on the number of children, a lower percentage on the next $4,000, and a still-lower percentage for income exceeding $10,000 per month. On the low end of incomes, instead of a presumptive $100 per month, the regulations adopt reference to the federal poverty tables, which change annually.

In the 1998 *Wright v. Osburn*[xxxvii] case, the Nevada Supreme Court held that in 50/50 joint custody cases, child support would offset, so that the parent with the higher income would pay support to the parent with the lower income. In 2003, in *Wesley v. Foster*,[xxxviii] the Court clarified that the offset should

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take place before, not after, application of the statutory presumptive maximums. And in the 2009 *Rivero v. Rivero*[xxxix] case, the Court extended that offset calculation to all "joint custody" cases, which it defined as all cases in which the parents share custody 60/40 or closer.

Where there is joint custody of one or more children, the existing "offset" method is used in the new regulations. Where there is a mix of primary custody and joint custody, each parent's obligation to the other is separately calculated and then offset. The Child Support Commission is contemplating numerous changes, including as of this writing making the offset to be one half of the difference in offset cases, as opposed to the straight offset set out by the case law and in the current regulations.

Replacing the prior statutes' "total amount of income" language, the regulations try to define "gross monthly income" (GMI) with greater specificity. GMI expressly ***does*** include:

1. Salary and wages, including, without limitation, money earned from overtime pay if such overtime pay is substantial, consistent and can be accurately determined.
2. Interest and investment income, not including the principal.
3. Social Security disability and old-age insurance benefits under Federal law.
4. Any periodic payment from a pension, retirement plan or annuity that is considered "remuneration for employment."
5. Net proceeds resulting from workers' compensation or other personal injury awards intended to replace income.
6. Unemployment insurance.
7. Income continuation benefits.
8. Voluntary contributions to a deferred compensation plan, employee contributions to an employee benefit or profit-sharing plan, and voluntary employee contributions to any pension or retirement account, regardless of whether the account provides for tax deferral or avoidance.
9. Military allowances and veterans' benefits.
10. Compensation for lost wages.
11. Undistributed income of a business entity in which a party has an ownership interest sufficient to individually exercise control over or access the earnings of the business, unless the income is included as an asset for the purposes of imputing income pursuant to a separate section of the proposed guidelines. The regulations further define what is included:
    a. "Undistributed income" means federal taxable income of a business entity plus depreciation claimed on the entity's federal income tax return less a reasonable allowance for economic depreciation.
    b. A "reasonable allowance for economic depreciation" means the amount of depreciation on assets computed using the straight-line method and useful lives as determined under federal income tax laws and regulations.
12. Child care subsidy payments if a party is a child care provider.
13. Alimony.
14. All other income of a party, regardless of whether such income is taxable.

GMI under the new guidelines expressly does ***not*** include:

1. Child support received.
2. Foster care or kinship care payments.

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3. Benefits received under the federal Supplemental Nutrition Assistance Program.
4. Cash benefits paid by a country.
5. Supplemental security income benefits and state supplemental payments.
6. Except as otherwise provided in the guidelines, payments made for social services or any other public assistance benefits.
7. Compensation for losses, including, without limitation, both general and special damages, from personal injury awards not intended to replace income.

Once guideline support has been determined, the regulations provide for "adjustments" (replacing the prior "deviations") for a list of potential reasons, which may be refined and altered by the Child Support Commission as it reviews the regulations, but now include:[xl]

a) Any special educational needs of the child;
b) The legal responsibility of the parties for the support of others;
c) The value of services contributed by either party;
d) Any public assistance paid to support the child;
e) The cost of transportation of the child to and from visitation;
f) The relative income of both households, so long as the adjustment does not exceed the total obligation of the other party;
g) Any other necessary expenses for the benefit of the child; and
h) The obligor's ability to pay.

Additionally, federal disability or old age insurance might be added to a parent's gross income and the amount of the child's benefit subtracted.

By comparison, there is no formula for calculating alimony in Nevada. In 2007, the Nevada Legislature codified 11 "guideline factors" lifted directly from Nevada Supreme Court decisions,[xli] which a district court is required to "consider" in making an alimony award:

a) The financial condition of each spouse;
b) The nature and value of the respective property of each spouse;
c) The contribution of each spouse to any property held by the spouses pursuant to NRS 123.030;
d) The duration of the marriage;
e) The income, earning capacity, age and health of each spouse;
f) The standard of living during the marriage;
g) The career before the marriage of the spouse who would receive the alimony;
h) The existence of specialized education or training or the level of marketable skills attained by each spouse during the marriage;
i) The contribution of either spouse as homemaker;
j) The award of property granted by the court in the divorce, other than child support and alimony, to the spouse who would receive the alimony; and
k) The physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse.

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The legislative history adopting those factors is devoid of any discussion or consideration of whether the factors listed make any sense individually or in combination or how they were to be prioritized, weighted, or applied in making awards.

The case law provides no calculation matrix, continuing to review individual decisions for "an abuse of discretion." As noted by the Nevada Supreme Court in *Kogod*, alimony is "the last great crapshoot in family law" because "it is a category of remedy without any substantive underlying theoretical rationale."[xlii]

The Court in *Kogod* provided at least two approaches ("need" and "loss") for alimony, and set out a version of the "alimony bell curve" by which alimony would normally not be considered at the upper end if a property award was sufficient to fully satisfy the recipient's standard of living, but at least one commentator has found its "need" and "loss" tests to be conflicting, and has urged use by lawyers and adoption by courts of a more structured analysis to determining whether, and how much, alimony is appropriate in a given case.[xliii]

Presumptive/minimum amounts?

The regulations replacing the prior child support statutes explicitly did away with the prior $100 per month presumptive minimum child support award. The regulations set out a formula, incorporating the federal poverty table, which produces a presumptive award in every child support case, subject to adjustments based on specific findings relating to the specific needs of a child.

There is no presumption of any kind as to alimony, as to its existence or as to any amount if it is found to be appropriate at all.

In what forms can it be paid?

Since 1983, NRS 125B.090 has stated that "A judgment or order of a court of this State for the support of a child ordinarily must be for periodic payments which may vary in amount. In the best interest of the child, a lump-sum payment or the purchase of an annuity may be ordered in lieu of periodic payments of support."

So, child support is normally paid as a monthly obligation, and the regulations are set up to do calculations of a guideline schedule sum payable in accordance with the "monthly gross income of an obligor." However, the regulations specifically permit parties to stipulate to a child support obligation that does not comply with the guidelines. This presumably means that parties could create alternative child support payments, including lump sum or alternative payments as to time or even substance (for example, stock or other assets in lieu of cash).

Any arrangements seeking a lump sum payment in exchange for a waiver of future monthly child support payments would have to be carefully structured with an eye toward the case law indicating that parties are unable to remove a child support modification from the jurisdiction of the trial court.

In *Fernandez*, the district court held the parties to their bargain of non-modifiability, but the Supreme Court reversed, holding that "so long as the statutory criteria for modification are met, a 'trial court always has the power to modify an existing child support order, either upward or downward, notwithstanding the parties' agreement to the contrary.'"[xlv]

The Court reasoned that "[h]ad the Legislature wanted to give parents the option of agreeing to a decree providing for nonmodifiable child support, it could have easily provided an

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exception to NRS 125B.145." The lack of any such exception in the statute led the Court to conclude that the jurisdiction of the court never ends in a child support matter, as long as the child is eligible to receive support.

There is no presumption or directive of any kind as to the form of alimony, although cash payments, usually monthly, appear to be the norm.

NRS 125.150(1)(a) permits an award of post-divorce alimony "in a specified principal sum," as distinguished from "specified periodic payments." This money could come from the obligor's separate property existing during the marriage or to be acquired later, or even from that spouse's share of community property divided upon divorce.

Nevada cases have a lengthy familiarity with "lump-sum" alimony awards, but the overall law governing such awards is as confusing as all the other categories. A lump-sum award is sometimes designated as providing for temporary or permanent alimony.[xlvi] And the case law indicates that lump-sum alimony need not even actually be paid in a "lump sum."[xlvii]

NRS 125.150(4) allows the set aside of separate property from a spouse for the support of the other spouse or their children as is deemed "just and equitable." Applying this statute would apparently require a finding that some separate property of the obligor spouse existed upon divorce.

The Court's discussions of lump sum alimony over the years[xlviii] do not clearly explain whether it is applied as a remedy or some separate species of available award. In either case, the Court has expressed the sentiment that there is a need for lump sum alimony to be available to avoid a party being left without the ability of self-support or to prevent efforts by the payor spouse to frustrate a divorce court's order.[xlix]

Duration, modification, and termination—when/how does it end?

The duty of child support continues until 18 (or 19 if the child is still in high school). The obligation could extend indefinitely for a handicapped child.[l] Once ordered, child support continues until the death or emancipation of the child, or the adoption of the child.[li]

A child support obligation may transcend the death of the obligor. NRS 125B.130 provides that "The obligation of a parent is enforceable against his or her estate in such an amount as the court may determine, having regard to the age of the child, the ability of the custodial parent to support the child, the amount of property left by the deceased parent, the number, age, and financial condition of the lawful issue, if any, and the rights of the surviving spouse, if any, of the deceased parent." The court apparently has some discretion, as the statute further provides that "The court may direct the discharge of the obligation by periodical payments or by the payment of a lump sum."

Child support may be modified "at any time" upon a finding of "changed circumstances"[lii] and every three years in any event.[liii] No such changes may be retroactive as to accrued

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sums due under an order.[liv] A change of 20 percent or more in the gross monthly income of a person who is subject to an order for the support of a child is deemed to constitute changed circumstances requiring a review for modification of the order.[lv]

While neither the statutes nor the regulations provide a list of all things that could be considered "changed circumstances," they would include an alteration in the needs of the child, the custodial schedule, and the income of the obligor, as well as the receipt of public assistance by a child or an obligee.[lvi]

As with most topics, matters relating to duration, modification, and termination are less certain for alimony. Trying to find some meaningful distinction between facts supporting "permanent," as opposed to "temporary," awards yield no firm criteria. The Court has used the same factor lists for both, sometimes throwing in "rehabilitative" language as well, without ever giving any kind of guidance or test for distinguishing "long term" from "short term" marriages, or otherwise indicating when temporary alimony might be more appropriate than permanent alimony, or vice versa.

Unlike child support, it appears that alimony payments—at least monthly periodic payments—terminate on the death of the obligor, since NRS 125.150(5) states that "In the event of the death of either party or the subsequent remarriage of the spouse to whom specified periodic payments were to be made, all the payments required by the decree must cease, unless it was otherwise ordered by the court."

There is some fuzziness in what awards terminate upon remarriage. Traditionally, in the absence of the district court "otherwise ordering," all future payments cease upon remarriage, but it would appear that a periodic payment of lump sum alimony or even (after *Waltz*[lvii]) a designation of "permanent alimony" is sufficient to prevent remarriage from constituting a terminating event. Since lump-sum alimony need not even be paid in "lump sum" under *Kishner*[lviii], it seems possible that this entire category is just a euphemism for "unmodifiable." Left unclear is whether there are ***any*** contingencies that could affect the recipient's entitlement to full collection of such an ordered "lump sum award."

The same confusion exists between "rehabilitative" and "temporary" awards. The Court has at times confused "rehabilitation" as a goal with general temporary support, using the terms interchangeably, making it unclear which should be the focus of a trial court, or under what circumstances one or the other is more appropriate.

In 1989, what is now NRS 125.150(10)-(11) both codified and modified the earlier case law which recognized the need for rehabilitative alimony, adding targeted classes of intended beneficiaries, and restrictions and conditions necessary for such awards. The statute recognized the need to sustain a spouse during a period of readjustment and training for employment, and the Court has added in the goals of avoiding welfare dependence and not forcing unskilled spouses into poverty upon divorce.

When it focused on the rehabilitative alimony statute itself, the Court was highly concerned with its statutory purpose[lix] and even its technical requirements.[lx] At other times however, the Court simply threw the word "rehabilitative" out in some general sense[lxi] seeming to make it synonymous with temporary alimony, and at least once directing entry of a temporary alimony award "at least for a period of rehabilitation" where no specific job or career training was at issue.[lxii]

Once ordered, only a court can modify alimony and only prospectively—there is no jurisdiction to modify alimony payments already ordered and accrued.[lxiii]

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"Changed circumstances" for alimony modifications have a couple of statutory specifics. Courts are directed that "In addition to any other factors the court considers relevant in determining whether to modify the order, the court shall consider whether the income of the spouse who is ordered to pay alimony, as indicated on the spouse's federal income tax return for the preceding calendar year, has been reduced to such a level that the spouse is financially unable to pay the amount of alimony the spouse has been ordered to pay."[lxiv] And "a change of 20 percent or more in the gross monthly income of a spouse who is ordered to pay alimony shall be deemed to constitute changed circumstances requiring a review for modification of the payments of alimony."[lxv]

It is possible that counsel may be able to choose whether to make alimony modifiable. In 1953, NRS 123.080(4) was enacted to provide a mechanism for the parties to make their agreements effective beyond the date of divorce by introducing their agreement into evidence as an exhibit in any divorce action and requiring the court to, "by decree or judgment ratify or adopt or approve the contract by reference thereto."

In 1962, the Nevada Supreme Court held in *Ballin v. Ballin*[lxvi] that a decree could direct the survival as an independent contract of an agreement containing alimony provisions:

> In our view, the support clause in an agreement should, in accordance with ordinary contract principles, survive a subsequent decree if the parties so intended and if the court directs such survival.
>
> * * *
>
> We therefore conclude that NRS 123.080 (4) does not apply to a decree directing survival of an approved agreement.[lxvii]

In the years since NRS 123.080(4) was enacted by the Nevada Legislature, the Nevada Supreme Court has reinforced the principle of merger in numerous opinions.

In *Day v. Day*,[lxviii] the fundamental consideration for the court in determining whether a separation agreement containing an alimony provision survived a validly entered decree of divorce was whether the ***decree*** specifically directed survival (as opposed to anything stated in the settlement agreement itself)[lxix]:

> We now take a further step and hold that the survival provision of an agreement is ineffective unless the court decree specifically directs survival. We recognize that our view is an arbitrary one; it has to be. However, we think that questions relating to enforcement rights and choice of forum are of such significance as to require a clear and direct expression from the trial court as to whether the agreement shall survive. Absent such a clear and direct expression in the decree we shall presume that the court rejected the contract provision for survival by using words of merger in its decree ("adopt," "incorporate," etc. and, since the 1953 statute, "approve," "adopt,""ratify."). Accordingly, in the instant matter, we hold that the agreement was merged into the decree of divorce, and that the provisions of such decree for the future support of Mrs. Day are susceptible to a proceeding under NRS 125.180.[lxx]

The holding in *Day* is consistent with the holdings in *Rush v. Rush*,[lxxi] *Watson v. Watson*,[lxxii] *Wallaker v. Wallaker*,[lxxiii] and *Vaile v. Porsboll*,[lxxiv] all of which looked to the decree for language regarding merger or survival.

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When considering whether or not to merge a settlement agreement containing an alimony provision into a decree of divorce, at least one commentator has opined that the decision might determine whether the divorce court might elect to modify alimony terms, whether or not the agreement states that they are "non-modifiable":

> In drafting marital settlement agreements where the parties intend alimony to be non-modifiable, it is important that the drafter contemplate the effect of merging the agreement into the decree – including the possibility that merger may nullify the parties' intent. Similarly, for practitioners wishing to modify "non-modifiable" alimony, merger of the agreement may provide the opportunity for making such a claim so long as a change in circumstances warrants such relief.[lxxv]

Care must be taken if there is any intention to have ***any*** spousal support provision in a separation agreement remain valid past the date of the decree of divorce.

The decree could expressly order that alimony is to be paid—in which case the alimony is presumably modifiable.[lxxvi] Or, a decree could expressly order the survival of a separation agreement providing for such support—in which case the court would presumably not have jurisdiction to modify that alimony award.[lxxvii]

Any support provisions in a separation agreement that are ***not*** merged into a decree and are ***not*** expressly ordered to survive the decree are apparently extinguished as a matter of law upon entry of the decree.[lxxviii] And if such a separation agreement lacks a severability clause, the ***entirety*** of the separation agreement becomes void and unenforceable upon entry of the decree—including the property provisions.[lxxix]

Tax implications?

Whole books were written regarding the tax planning opportunities, and internal revenue code restrictions, surrounding the deductibility of alimony and non-deductibility of child support under the prior law, but all of that changed when alimony was made non-deductible in 2019, when as a part of a federal tax reform bill, alimony was made non-deductible by payors, and non-includable by recipients. This eliminated the ability for attorneys to increase the net value of the award by taking advantage of differences in tax brackets between parties.

Bankruptcy implications?

The law has evolved considerably over the years, and federal bankruptcy judges still render decisions surprising to many family law practitioners on a variety of subjects. However, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[lxxx] eliminated the balancing of hardships under the prior law between the debtor and creditor spouse and "domestic support obligations"[lxxxi] were made non-dischargeable in Chapter 7 bankruptcies, but apparently not under Chapter 13 plans that are successfully concluded. Such obligations were given a priority before all but administrative expenses,[lxxxii] requiring their payment before satisfaction of virtually any other obligations of the debtor.

How to collect? Penalties for non-payment?

The 10% penalty provision previously applicable to child support obligations was prospectively eliminated as of February 2020. Interest at the legal rate continues to accrue on all child support that is due but unpaid.[lxxxiii] Statutory interest also runs as to any accrued, unpaid alimony, as it would as to any other money judgment.[lxxxiv]

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The full array of collection methodologies is beyond the scope of these materials, but a case may be opened through the District Attorney for any unpaid child support, and current policy appears to be that the D.A. will also collect alimony arrears so long as there is a child support arrearage.

CASES IN WHICH BOTH ALIMONY AND CHILD SUPPORT ARE PRESENT

What is counted, and in which order?

The definition of "income" in the child support regulations is more specific than under the prior statutes and may be further refined. The definition of "income" for purposes of alimony is far more expansive.

As to the order of steps in considering alimony and child support, there is currently little guidance in the law. The existing child support regulations do state that alimony is included as a part of the "gross income" for an obligor, implying that child support should be calculated *after* other transfers of funds, such as alimony, between the same parties in a given case.

Without much explanation of how it got there, the AAML Commission that attempted to create a model alimony formula directed those calculations be based on gross income, including actual and imputed income, calculated ***before*** child support is determined.

Not really discussed in the statutes, regulations, or case law are the myriad ways that payments could flow in the real world. Multiple family and serial marriage cases are extremely common; a child support obligor, or obligee, or both, could be paying or receiving either child support or alimony payments from third parties. Outlining the possibilities produces a minimum of nine possible scenarios.

The child support regulations appear to need some clarification on the point, but as a matter of logic, calculations appear to work best when calculations are done in the order: property, alimony, child support.

Overlap between child support and alimony

Child support is not necessarily spent on direct expenditures of a child. It includes "basic needs" of a child, including contribution towards shelter, utilities, food, and transportation. As the Nevada Supreme Court noted in *Barbagallo*, there are "fixed expenses relating to child rearing, costs such as rent, mortgage payments, utilities, car maintenance and medical expenses. These expenses go on and are not appreciably diminished as a result of the secondary custodian's sharing of the burdens of child care and maintenance... It is ironic that joint custody arrangements, which are premised on the theory that an equal sharing of physical and emotional resources is best for the child, would result in added burdens on both custodians." These "basic needs," however, overlap with the basic needs served by an award of alimony. When alimony is calculated first to meet the needs of the alimony recipient, there is a risk of overlap resulting from the guideline child support formula to that same recipient. In other words, independently applying the factor lists for alimony and for child support can generate two income streams intended to meet several of the same basic expenses.

Consider also the "double dip" dilemma when the payor is a business owner. The concept of "double dipping" concerns the double counting of a marital asset, once in the context of property for equitable division purposes, and once in the context of alimony and/or child support. The concept of "double dipping" is premised on the fact that the same cash flows capitalized to determine the present overall value of a spouse's business for purposes of property division is also

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considered as a component of that spouse's income for purposes of alimony and child support calculations.[lxxxv] There is significant potential for overlap in these circumstances.

For example, Husband earns $250,000 annually. Wife earns $50,000 annually. The parents share joint physical custody of two children. The parties have been married for 18 years. Alimony is $3,500 per month based on the disparity of income ($20,833 per month vs. $4,167 per month).

	Husband	Wife
GMI	$20,833	$4,167
Taxes	- $5,071	- $476
Alimony	- $3,500	+ $3,500
	$12,262	$7,191

For purposes of the child support calculation, Husband's GMI is $20,833—there is no deduction for taxes or alimony paid. For purposes of the child support calculation, Wife's GMI is $7,667. Child support calculates to $907 per month.

	Husband	Wife
	$12,262	$7,191
Child support	- $907	+ $907
	$11,355	$8,098

Also consider the equalization payment to Wife if Husband is a business owner.

Other considerations relating to awards of child support and alimony

Neither child support nor alimony are tax deductible by the payor or taxable to the payee. Thus, the actual obligation is greater than the amounts awarded due to the inherent tax liability associated with that income. Furthermore, when calculating child support, alimony is included in the income of the payee but is not deducted from the income of the payor. Thus, the payor's income for purposes of the guideline support calculation is artificially increased by the amount of the alimony being paid plus the tax obligation on the total support being paid.

In any case in which both alimony and child support are being paid by the same obligor to the same recipient, the net effect of what is and is not counted, and all tax effects, should be considered.

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ENDNOTES

[i] Recent case law, and possible legislative changes, may create scenarios where child support may involve three or more parties in the position of "parents." These materials do not address those possibilities directly, but the observations made here should apply to those situations, as well.

[ii] A.L.I., Principles of the Law of Family Dissolution: Analysis And Recommendations (2002) ("*Principles*") at 875 (§ 5.01).

[iii] *Id.*, Introduction at 29.

[iv] NRS 125.150(10).

[v] *Kogod v. Cioffi-Kogod*, 135 Nev. ___, 439 P.3d 397 (Adv. Opn. No. 9, Apr. 25, 2019).

[vi] *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000).

[vii] NRS 125.040 authorizes Nevada courts to make orders for "temporary maintenance for the other party" during the pendency of an action. No standards are provided, and such temporary orders are often made on law and motion hearings addressing "need and ability" as disclosed by preliminary financial disclosure forms.

[viii] NRS 125.150(1) authorizes the court to award alimony at the conclusion of a divorce case "as appears just and equitable." No standards are provided there, either.

[ix] In 1989, the Nevada Legislature added NRS 125.150(8) (now 125.150 (10)), requiring a court granting a divorce to "consider the need to grant alimony to a spouse for the purpose of obtaining training or education relating to a job, career or profession."

[x] NRS 125.150(1) considers on its face that alimony might be payable "in a specific principal sum" rather than in installments, and NRS 125.150(4) provides: "In granting a divorce, the court may also set apart such portion of the husband's separate property for the wife's support, the wife's separate property for the husband's support or the separate property of either spouse for the support of their children as is deemed just and equitable."

[xi] *See* Marshal Willick, *A Universal Approach to Alimony: How Alimony Should Be Calculated and Why*, 27 J. Am. Acad. Matrim. Law. 153 (2015) ("Willick").

[xii] *See, e.g., Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 532 (1989).

[xiii] *Anastassatos v. Anastassatos*, 112 Nev. 317, 320, 913 P.2d 652 (1996), citing to *Barbagallo*.

[xiv] *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000); *Freeman v. Freeman*, 79 Nev. 33, 378 P.2d 264 (1963).

[xv] NRS 125.150(1).

[xvi] *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998).

[xvii] *Id.*, citing *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996).

[xviii] *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000).The Court closely examined the legislative history of the 1993 amendment to NRS 125.150, and concluded that the Legislature deleted the language about the "respective merits of the parties" in direct response to the Court's decisions in previous cases suggesting that marital fault could be considered in determining both alimony and property distribution.

[xix] *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998); *Kogod*, *supra*.

[xx] *Id.*

[xxi] *Foy v. Estate of Smith*, 58 Nev. 371, 81 P.2d 1065 (1938).

[xxii] *See, e.g.,* David Hardy, *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 Nev. L. J. 325 (2009) ("Hardy"); Laura W. Morgan, *Current Trends in Alimony Law: Where Are We Now*?, 34 Fam. Advoc. 8, 10 (Winter 2012); Brett R. Turner, *Spousal Support in Chaos*, 25 Fam. Advoc. 14, 18 (Spring 2003).

[xxiii] Hardy, *supra* note 17, at 339-343.

[xxiv] *See* Bruce I. Shapiro & John D. Jones, *Alimony in Nevada, Part I*, 25 Nev. Fam. L. Rep. 1 (Summer 2012), available at http://www.nvbar.org/sections/FamilyLaw/NFLR/sept2002.pdf (last visited Sept. 29, 2013).

[xxv] *See* Radford Smith, *Advanced Child and Spousal Support Issues, in Advanced Family Law* (NBI, Nov. 2012).

[xxvi] *Willick, supra.*

[xxvii] NRS 125.150(1)(a).

[xxviii] NRS 125B.010.

[xxix] *See, e.g., Hermanson v. Hermanson*, 110 Nev. 1400, 887 P.2d 1241 (1994).

[xxx] *See* NRS ch. 126.

[xxxi] *Williams v. Williams*, 120 Nev. 559, 97 P.3d 1124 (2004).

[xxxii] *See Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992); *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984).

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[xxxiii] *See, e.g.,* Marshal Willick, *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-Marital Property and Support Law* (Nevada Lawyer, May 2011).

[xxxiv] The National Conference of Commissioners on Uniform State Laws ("NCCUSL"), also known a the "Uniform Law Commissioners." Now 116 years old, NCCUSL provides States with non-partisan draft legislation intended to bring "clarity and stability"—and most especially, consistency—to various areas of the law.

[xxxv] *See* https://www.uniformlaws.org/committees/community-home?CommunityKey=c5b72926-53d2-49f4-907c-a1cba9cc56f5.

[xxxvi] https://www.leg.state.nv.us/NAC/NAC-425.html.

[xxxvii] *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998).

[xxxviii] *Wesley v. Foster*, 119 Nev. 110, 65 P.3d 251 (2003).

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

[xl] NAC 425.150.

[xli] The underlying decisional authority is discussed in Appendix 1.

[xlii] *Kogod*, quoting from Marshal Willick, *In Search of a Coherent Theoretical Model for Alimony*, Nev. Law., Apr. 2007, at 41.

[xliii] *See* Marshal Willick, *Kogod Contradictions, Practical Problems, and Required Statutory Fixes: Part 1*, 33 Nev. Fam. L. Rep., Fall 2019/Winter 2020, at 1.

[xliv] *See Fernandez v. Fernandez*, 126 Nev. 28, 222 P.3d 1031 (2010).

[xlv] *Id.*, citing *In re Marriage of Alter*, 171 Cal. App. 4th 718, 89 Cal. Rptr.3d 849, 852 (Ct. App. 2009).

[xlvi] *See Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972) (explaining that the reason for the payment of alimony in lump sum was to ensure that the spouse would actually receive payments that might otherwise be made by way of periodic payments).

[xlvii] *Kishner v. Kishner*, 93 Nev. 220, 562 P.2d 493 (1977) (installment payments of "lump sum" alimony approved).

[xlviii] *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972); *Kishner v. Kishner,* 93 Nev. 220, 562 P.2d 493 (1977); *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990); *Schwartz v. Schwartz*, 126 Nev. 87, 225 P.3d 1273 (2010).

[xlix] *Daniel v. Baker,* 106 Nev. 412, 794 P.2d 345 (1990); *Schwartz v. Schwartz*, 126 Nev. 87, 225 P.3d 1273 (2010).

[l] NRS 125B.110.

[li] NRS 125B.120(2).

[lii] NAC 425.170; *see Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).

[liii] NRS 125B.145((1)(b).

[liv] NRS 125B.140(1)(a).

[lv] NRS 125B.145(4).

[lvi] NAC 425.170(2).

[lvii] *Waltz v. Waltz,* 110 Nev. 605, 877 P.2d 501 (1994).

[lviii] *Kishner v. Kishner*, 93 Nev. 220, 562 P.2d 493 (1977).

[lix] *See Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[lx] *Fick v. Fick,* 109 Nev. 458, 851 P.2d 445 (1993).

[lxi] *See Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998); *Kerley v. Kerley*, 111 Nev. 462, 893 P.2d 358 (1995).

[lxii] *See Shydler v. Shydler,* 114 Nev. 192, 954 P.2d 37 (1998).

[lxiii] NRS 125.150(8).

[lxiv] NRS 125.150(8).

[lxv] NRS 125.150(12).

[lxvi] 78 Nev. 224, 371 P.2d 32, at 36 (1962).

[lxvii] 78 Nev. 224, 371 P.2d 32, at 36 (1962).

[lxviii] 395 P.2d 321 (1964).

[lxix] *Day* at 389; *Rush v. Rush*, 85 Nev. 623, 460 P.2d 844 (1969).

[lxx] *Id.*

[lxxi] 82 Nev. 59, 410 P.2d 757 (1966) (Where the agreement and decree each direct survival, later controversy regarding support must rest upon the agreement, for the rights of the parties flow from the agreement rather than from the decree approving it).

[lxxii] 95 Nev. 495, 596 P.2d 507 (1979) (Where the agreement and decree each direct survival, courts are bound by language in the agreement which is clear and free from ambiguity and cannot, using the guise of interpretation, distort the plain meaning of an agreement).

[lxxiii] 98 Nev. 26, 639 P.2d 550 (1982) (Where the decree of divorce confirmed a Property Settlement Agreement and stated that the agreement was "not incorporated into this decree but shall survive the decree herein granted," the action should have been decided on principles of general contract law and although the district court could not modify the divorce decree, respondent has cited no authority that the district court was precluded from granting reformation of the property settlement agreement).

[lxxiv] 128 Nev. 27, 268 P.3d 1272 (2012) (Because the parties' agreement was merged into the divorce decree, to the extent that the district court purported to apply contract principles, specifically rescission, reformation, and partial performance based on Vaile's initial payments of $1,300 and Porsboll's acceptance of these payments to support its decision to set the payments at $1,300, any application of contract principles to resolve the issue of Vaile's support payments was improper, citing *Day* at 389-90.

[lxxv] *See* Dixie Grossman, *Alimony: When Nonmodifiable Terms Fail,* 22 Nev. Fam. L. Rep., Summer, 2009, at 4.

[lxxvi] Some states have held that a court's ability to modify a temporary or permanent alimony award cannot be waived by agreement or court order. *Sill v. Sill,* 164 P.3d 415 (Utah 2007); Ellis v. Ellis, 962 A.2d 328 (Me. 2008); *Braun v. Greenblatt*, 927 A.2d 782 (Vt. 2007); *Norberg v. Norberg*, 609 A.2d 1194 (N.H. 1992); *Eidlin v. Eidlin*, 916 P.2d 338 (Or. App. 1996); *Vorfeld v. Vorfeld*, 804 P.2d 891 (Hawaii App. 1991).

(cont'd on page 24)

The Relationship Between Alimony and Child Support (Cont'd from page 23)

[lxxvii] Some states allow parties to waive a court's ability to modify a temporary or permanent alimony award. *Burns v. Burns*, 677 A.2d 971 (Conn. App. 1966); *Bair v. Bair*, 750 P.2d 994 (Kan. 1988); *Toni v. Toni*, 636 N.W.2d 396 (N.D. 2001); *Beasley v. Beasley*, 707 So. 2d 1107 (Ala. Civ. App. 1997); *Rockwell v. Rockwell*, 681 A.2d 1017 (Del. Supr. 1996); *Kilpatrick v. McLouth*, 392 So. 2d 985 (Fla. 5th DCA 1981); Ashworth v. Busby, 526 S.E.2d 570 (Ga. 2000); *Voigt v. Voigt*, 670 N.E.2d 1271 (Ind. 1996); *Staple v. Staple*, 616 N.W.2d 219 (Mich. App. 2000); *Moseley v. Mosier*, 279 S.C. 348, 306 S.E.2d 624 (S.C. 1983); *Nichols v. Nichols*, 469 N.W.2d 619 (Wis. 1991); *In re Marriage of Ousterman*, 46 Cal. App. 4th 1090, 54 Cal. Rptr.2d 403 (Ct. App. 1996).

[lxxviii] *Day* at 389.

[lxxix] *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978) (The alimony provision of a postnuptial agreement violates NRS 123.080 and is void. Because the postnuptial agreement is "integrated" and not subject to severability, the entire agreement "must be annulled since a material part of it is illegal.").

[lxxx] ("BAPCPA") (Pub. L. 109–8, 119 Stat 23).

[lxxxi] The term domestic support obligation is defined very broadly to include all debts to a spouse, former spouse or child incurred during a divorce or separation regardless of whether or not the debt is designated as a "support" obligation.

[lxxxii] *See* 11 U.S.C. § 507(a)(1).

[lxxxiii] NRS 125B.140(2)(c)(1).

[lxxxiv] NRS 99.040.

[lxxxv] *See, e.g.,* Brian M. Boone, *Valuation of Goodwill in Professional Practices and "Double Dipping" With Spousal Support*, 22 Nev. Fam. L.R. at 6 (Summer 2009).