NFLR Nevada Family Law Report

Volume 13, Number 3 **Fall, 1998**

Child Support Awards in Shared Custody Cases

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Only one-half of this country's children live in a "traditional nuclear" family.[1] As more children live in split homes, issues involving child support in shared custody arrangements will continue to emerge. Unfortunately, it generally emerges as a means of obtaining a reduction in one of the parents' child support obligation.

In Nevada, the relevant statute is NRS 125B.080(9)(j), which provides that the court shall consider "the amount of time the child spends with each parent" as a basis for deviating from the statutory guidelines. Litigation of this factor has generally centered on the question of how much time the noncustodial parent must have with the child before the court will give that parent an offset or abatement in his or her support obligation. This has left the courts to decide whether to look at the decreased financial burden of the custodial parent or at the increased financial burden of noncustodial parent. It is virtually a given that certain expenses of the custodial parent, such as food, entertainment and perhaps clothing, will decrease during periods when the noncustodial parent has visitation or extended custody. That same parent's fixed expenses, however, such as rent and utilities, will not abate during such periods. By the same token, the noncustodial parent will have increased food and entertainment expenses while caring for the child. Additionally, the noncustodial parent may also have increased rent and utilities expenses to accommodate substantial visitation with his or her child[2]

When the Nevada Supreme Court considered such a situation in *Barbagallo v. Barbagallo*,[3] it stated that an abatement in child support should not be granted unless an "injustice" would occur. This decision applied to an extended weekly visitation by the noncustodial parent. The statutepresumes that there will be a certain amount of visitation by the noncustodial parent, but just how much time was presumed is not clear.[4] *Barbagallo* presents difficult questions, such as how much time, and what kind of time, is appropriate for a court to consider when deviating from the statutory formula. Which parent receives credit for the child during school hours or during the night? It is not an easy question to decide when a noncustodial parent should receive an abatement in his or her child support obligation. This question, however, is arising more often and it is becoming increasingly difficult to answer.

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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, FALL, 1998 at ____.
Nevada Family Law Report is supported by the Family Law Section of the State Bar of Nevada and NFLR subscriptions.

FROM THE CHAIR

by Shawn Meadow, Chair

For those of you who follow State Bar policies and politics you may recall that there has been an on-going dispute about what "political" activities a Section of the State Bar, such as the Family Law Section, may pursue. The U.S. Supreme Court has ruled that integrated Bars, such as the State Bar of Nevada, may not use members' mandatory dues to pursue political objectives. Dues can be used to advance the administration of justice. Sections, however, do not rely upon mandatory dues as membership is purely voluntary. There is, therefore, no legal prohibition against State Bar Sections taking political positions, such as advocating for the passage of various legislation.

However, until recently, Article 6, Section 6.9 of the By-Laws of the Board of Bar Governors permitted Sections to take political positions or to seek to influence a legislative position only with the express written permission of the Board of Bar Governors. In practice, section 6.9 was not well publicized and infrequently, if ever, honored. Over the past year and a half, however, the Board of Bar Governors and various Sections became more aware of and concerned about this issue.

As a result, the Board of Bar Governors has recently amended section 6.9. While a Section must still submit proposed political positions to the Board of Bar Governors for review, the Section may pursue the action unless the Bar Governors expressly disapproves it. If the Bar Governors approve the political action, the Section may assert that the legislative position is endorsed by the State Bar. If the Bar Governors do not approve the legislative action, the Section must provide a prominent disclosure that the legislative action is not endorsed by the State Bar.

Any legislative action endorsed by a Section must also state whether it is a position taken by the general membership of the Section or simply by the Section's Executive Council. The By-Laws of the Family Law Section generally provide that the general membership shall make decisions affecting the Section. However, between meetings of the general membership the Executive Council has full authority to act on behalf of the Section.

As a general rule, I do not personally believe that the Executive Council should make a practice of taking political positions or endorsing legislation without the consensus of the majority of the Section. However, the realities of the legislative process in Nevada are that legislation often arises and must be acted upon extremely quickly. As a practical matter, it would be impossible to seek or obtain consensus from the membership quickly enough to act effectively. Therefore, there may be times when the Executive Council may be called upon to react to proposed legislation quickly and without

consulting the membership. It is important, therefore, for members to stay abreast of what is happening in the Legislature and to let members of the Executive Council know how they feel about such legislation.

It can be expected that a number of bills will be introduced in the Legislature affecting family law in the up-coming session. For example, the Legislative Commission's Subcommittee on Family Courts has prepared draft legislation to either abolish or substantially alter the Family Court system. I personally believe the proposed legislation, while well-intentioned, will cause substantially more problems than it could resolve and anticipate testifying against it.

Todd Torvinen is thinking about advancing the draft alimony formula we have been discussing for the past couple of years. It is my understanding that he may make some minor modifications to clarify the family courts' discretion to deviate from the formula when appropriate. Because the Section has considered, but has not approved, the proposal, I do not believe the Executive Council will take a formal position with respect to the proposed formula.

There has also been some interest in the "Arizona Initiative" to modify the date on which the community ends. As you know, in Nevada, the community continues until the date of divorce. In California, on the other hand, the community ends on the date of separation. It has been reported, particularly in Southern Nevada, that there is a substantial amount of forum shopping arising out of this difference. The Arizona Initiative provides that the community would end on the date a formal complaint for divorce is filed. I believe that this proposal is consistent with the theory of community property and would help alleviate problems that arise due to the fact that the community continues until divorce, such as the practical problem of valuing assets on the date of divorce rather than on a date certain prior to the divorce trial. If anyone is interested in the Arizona Initiative please contact Marshal Willick or me.

Finally, the annual Tonopah Spring Fling has been scheduled for March 18, 19 and 20, 1999. This will be the 10th anniversary of the Tonopah seminar. Kathryn Wirth, who organized last year's incredibly successful seminar has agreed to a repeat performance this year. Ann McCarthy has promised to top last year's entertainment; a very tall order! Both would appreciate your ideas and assistance. Mark your calendars now and join us in Tonopah.

ARTICLES, CASE SUMMARIES WANTED FOR NFLR

The Nevada Family Law Report seeks to provide interesting and substantive family law material to educate both the bench and the bar. NFLR needs articles for upcoming issues. If you are interested in writing critiques of pertinent cases, reports/opinions of family law legislation or discussions of family law trends and issues, please request authors guidelines from Editor Mary Rose Zingale, 528 Commercial St., Elko, NV 89801.

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The Section's publication needs your input and contributions. Please contact an editor to discuss any article topic, critique or book review.

CHILD SUPPORT CON'T

Relatively rare in the recent past, more family court judges are awarding equal shared custody in certain situations. This trend is supported by the recent Nevada Supreme Court decision of *Mosley v. Figliuzi*.[5] The Nevada Supreme Court and the legislature have yet to address the manner in which a district court should set child support in a shared custody situation. The district courts desperately need guidance in this area. This article proposes that for the purposes of calculating child support in equal shared custody arrangements, the parent earning the lesser income should be designated as the primary custodian for setting child support.

LEGISLATIVE HISTORY

The CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984 required all states to develop advisory mathematical guidelines to calculate child support awards by October 1, 1987.[6] As a result, in 1987 the Nevada legislature enacted NRS 125B.070 and NRS 125B.080, which were modeled after the "Wisconsin Percentage Formula."[7] The FAMILY SUPPORT ACT OF 1988 created a rebuttable presumption that the guidelines represent the proper child support award and that a deviation from the guidelines will be allowed only upon a written finding that the application of the guidelines would result in an unjust or inappropriate mathematical award.[8] These child support guidelines were developed because the child support awards being made before enactment of the formulas were severely deficient when compared to the actual economic costs of rearing children. Judicial discretion, unassisted by the presumptive guidelines, often resulted in severely deficient child support awards.[9]

These federal laws recognized the need for more realistic and equitable child support awards that provide children with a standard of living comparable to that of their non-custodial par-

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ent. The congressional mandate for development of guidelines was intended to address several deficiencies in the traditional case-by-case method of setting amounts for child support orders. These deficiencies can be described as:

• A shortfall in the adequacy of child support orders when compared with the true costs of rearing children, as measured by economic studies:

• Inconsistent orders causing inequitable treatment of parties in similarly situated cases; and

• Inefficient adjudication of child support awards in the absence of uniform standards.[10]

The statutory scheme enacted by the Nevada legislature in 1987, and the case law that has followed, has alleviated many problems that the federal legislation intended to address in traditional custodial arrangements, *i.e.*, where one party is designated as the primary physical custodian. The guidelines, however, have not adequately provided for the setting of child support in shared custody arrangements. Consequently, these arrangements are susceptible to the same shortfalls that existed before 1987.

DETERMINING CHILD SUPPORT IN SHARED CUSTODY ARRANGEMENTS

There is an equal duty of both parents to contribute toward the support of their children in proportion to their respective incomes.[11] The needs of the children are, in part, determined by the income level of the parents and the ability of each parent to provide support in proportion to his or her contribution to that income level. "When two people who are legally responsible for a child choose not to live together, neither party should end up with a substantially greater standard of living than the child."[12] The court has a "responsibility to look at the parties appearing before it and to devise an order directing transfer of money which recognizes the situation of those parties and their children."[13]

The percentage of income approach reflects a public policy that, after a family separation, parents should spend on their children the approximate percentage of income that they would have had the family stayed together.[14] The statutory sum considers the child's need and the income that each parent should contribute to the financial responsibility of his or her child. The guidelines, in part, are based on the benefit a child will receive by receiving a fair portion of each parent's income. The statutory formula is a means of calculating child support to maintain the standard of living that the child would have enjoyed if his parents had not divorced.[15]

UTILIZING STATUTORY GUIDELINES

The usual application of a child support guideline is with a traditional custodial arrangement in which one parent has primary custody of the children and the other parent has specified visitation. As set noted above, however, shared physical custody arrangements have become more common.[16] An equal physical custody arrangement does not necessarily mean that there should not be child support paid by one of the parents.[17] Even if one parent has substantial visitation or shared custody, he or she should not be excused from paying child support if the circumstances justify such.[18] In some cases, the parties may attempt to posture themselves during the litigation to minimize or maximize their child support award.[19]

The Nevada legislature was aware of the problem relating to the formula, but took no action on the issue. The original bill provided that the presumptive level of support would apply if the noncustodial parent had physical custody for less than 147 days per year, which is approximately 40 percent of the time. If that time share was exceeded, the guideline amount would be multiplied by the custodial parent's fractional time and that was the amount payable.[20] Arkansas' guidelines, for example, presume that the noncustodial parent will have visitation of alternating weekends and several weeks during the summer. If the noncustodial parent spends more than 14 consecutive days with the child, the court should consider whether an adjustment is necessary, considering the fixed obligations of the custodial parent which are attributable to the child, and to the increased costs of the noncustodial parent attributed to the child's visits. The court may award an abatement up to fifty percent of the child support award.[21]

The Nevada Supreme Court has not addressed the manner in which a district courts should establish child support obligations in shared custody situations. In a shared custody arrangement, the costs for each parent do not decrease proportionately with the reduced time they may have with the children. More likely, there is an increase in the total expenditures for the children.[22] ***The courts must therefore balance the equities between the parents and the impact it will have on the standard of living of the parties' children while in each parent's respective custody.***

Although Nevada's child support formula was designed to be used in the traditional situation in which one parent was designated at the "custodial parent,"[23] the child support formula as mandated by NRS 125B.070 "does apply in joint and shared custody cases."[24] The Nevada Supreme Court, in *Barbagallo*, found that:

1. The presumptive child support applies to joint physical custody and shared physical custody cases.

2. The court must decide which parent is the primary custodian.

3. The primary custodian must receive the full presumptive amount unless a "substantial injustice" may be shown.

4. In determining whether a "substantial injustice" is present, the court should consider the parents' standards of living, their earning capacities and relative financial means.

5. Where a deviation in the formula is ordered, the deviation should be supported by written findings of fact and a statement of reasons.[25]

Applying the Nevada Supreme Court's *Barbagallo* analysis to shared custodial arrangements:

1. *The presumptive formula applies.*

2. *The court must make a determination as to which parent is the primary custodian.*

3. *As the primary physical custodian for the purposes of calculating child support, the parent earning the lesser income should receive the full formula amount of support, unless the greater earning parent can show a* ***substantial*** *injustice would occur.*

4. *In considering a deviation, the court should primarily look at the parties' standards of living, earning capacities and relative financial means.*

5. *If the trial court is going to deviate from this procedure, its deviation should be supported by specific findings of fact and a statement of reasons.*

Although it may appear that this proposal is extreme and would result in inequitable child support awards, the district courts would retain the discretion to prevent "substantial injustices." More important, however, this proposal would accomplish the goals of the federal legislation and the decisions of the Nevada Supreme Court: to provide children with adequate support. This author believes that it would also encourage more stipulations providing for the equal shared custody of children.

The court *In Re Marriage of Oakes*,[26] stated that because the legislature has not addressed this situation, "we must construe the child support statute to achieve the overall purpose of the act." "The overriding purpose of the child support schedule is to insure that children are protected with adequate, equitable and predictable child support."[27] An award of child support less than the statutory presumptive formula amount clearly does not protect the children with "adequate, equitable and predictable child support."

In *Downey v. Rogers*,[28] the court recognized that the statutory scheme for setting child support did not address every possible situation in which divorcing parents may find themselves. The statute contemplates that children "will primarily reside in one household and not be raised in two separate households."[29] In *Downey*, however, the trial court recognized the unique custody arrangement, considered alternatives to utilizing the formula, "but decided to utilize the guidelines without deviating therefrom," recognizing in particular, the greater income capacity of one of the parties.[30]

Joint physical custody is an increasing trend.[31] Shared custodial arrangements should not be discouraged, but there should be an equitable, objective way to establish reasonable child support orders in these cases. ***In order to preserve the best financial interests of children, for the purpose of calculating child support in an equal shared custody situation, the court should consider the parent with the lesser income to be the primary physical custodian. The court should then begin with the statutory presumption and use the factors set forth in NRS 125B.080 to consider any deviation based on the enumerated factors.*** This provides the court with an objective starting point from which to deviate, rather than forcing the court to begin with an arbitrary figure.

Alternatively, the court may also consider a proposed formula by which each parent's child support obligation is calculated as if each parent is the secondary custodian, and then "cross- crediting" the amounts so that the parent owing the higher obligation would be required to pay a net child support obligation to the other. Several of the family court judges in Clark County use this formula. The problem with methods such as this, however, is that they often result in support orders that are "too low" and that do not provide "adequate compensation to the lower income parent for actual child rearing expenditures."[32]

The congressional mandate for development of guidelines was intended to address deficiencies in the traditional case-by-case method of setting amounts for child support orders.[33] These deficiencies included inadequate and inconsistent orders causing inequitable treatment of parties in similarly situated cases.[34] Deficient orders that result from shared custodial arrangements. ***Following dissolution of marriage, the standard of living of women and their children fall 73% while that of the husbands increases 42%.***[35]

One may argue that any "application of the guidelines to a true 50-50 custody arrangement must take into account the fact that each party has the children half the time, and is presumed to expend 50% of the statutory rate of support for the children while they are in their custody." Each parent will likely spend the same percentage of their incomes on their children. While each parent will arguably spend the same percentage of their income on their children, the parent earning the greater income, will have a larger number of actual dollars to spend on his or her children.

Without the adoption of a means of calculating child support in shared custody arrangements, the trial courts will simply continue setting child support in an arbitrary manner. A guideline that allows for an award to be set on a case-by-case approach undermines the goals of consistency and higher support awards.[36] The courts should adopt a policy which will provide children in equal shared custody situations adequate support regardless of which parent with whom they reside.

CONCLUSION

Until the legislature acts to create a method for calculating child support in equal shared custody situations, ***the courts should consider the parent with the lesser income in such a situation to be the primary physical custodian. The courts should then begin with the statutory presumption and use the factors set forth in NRS 125B.080 to consider any deviation based on the enumerated factors.***[37]

NOTES

[1] USA Today, "More Kids Live In Changing Family," August 30, 1994.

[2] *See Sjolund v. Carlson*, 511 N.W. 2d 818, 822 (S.D. 1994).

[3] *Barbagallo vs. Barbagallo*, 105 Nev. 546, 779

P.2d 532, 786 P.2d 673 (1991).

[4] Conversely, because the statute presumes that the noncustodial parent receives some level of basic visitation, if the noncustodial parent does not exercise any visitation, should this be a factor in increasing support based on the fact that the custodial parent has a greater burden? An Arkansas court held that "assessing economic penalty for not exercising visitation would be an indirect means of ordering visitation." The dissent, however, opined that the guidelines contemplate visitation with the noncustodial parent every other weekend for two days. If this visitation is not exercised, this could mean an additional 66-82 days of care that the custodial parent must provide and finance. Arkansas provides for an abatement for visitations in excess of 7 consecutive days.

[5] *Mosley v. Figliuzi*, 113 Nev. ___, 930 P.2d 1110 (Nev. Adv. Op. No. 8, January 3, 1997).

[6] Pub. L. No. 98-38, §18, 98 Stat. 1305.

[7] *See* NEVADA CHILD SUPPORT ENFORCEMENT COMMISSION MINUTES, June 23, 24, 1986, City Hall, Reno, Nevada, at page 3.

[8] Pub. L. No. 100-485, 102 Stat.

[9] *See* Williams, *Guidelines For Setting Levels of Child Support Orders*, 21 FAM. LAW QUART. 281, 283 (1987); McDonald, *Child Support Guidelines: Formula To Protect Our Children From Poverty and the Economic Hardships of Divorce*, 23 CREIGHTON LAW REVIEW 835 (1990); Goldfarb, *Child Support Guidelines: A Model For Fair Allocation of Child Care, Medical, And Educational Expenses*, 21 FAM. LAW QUART. 335 (1987); U.S. Department Of Health And Human Services, Administration For Children and Families, Office Of Child Support Enforcement, THE TREATMENT OF MULTIPLE FAMILY CASES UNDER STATE CHILD SUPPORT GUIDELINES, July, 1991 pages 1-4 (hereinafter "TREATMENT") citing U.S. Bureau of the Census, U.S. Dept. of Commerce, DIVORCE, CUSTODY AND CHILD SUPPORT, CURRENT POPULATION REPORTS, Series P-23, No. 84 (1979), U.S. Bureau of the Census, U.S. Dept. of Commerce, CHILD SUPPORT AND ALIMONY - 1983, CURRENT POPULATION REPORTS, Series P-23 No. 141 (1985); U.S. Bureau of the Census, U.S. Dept. of Commerce, CHILD SUPPORT AND ALIMONY: 1985 (SUPPLEMENTAL REPORT), CURRENT POPULATION REPORT, Series P-23, No. 154 (1989).

[10] ***See*** Williams, *Guidelines For Setting Levels Of Child Support Orders*, 21 FAM. LAW QUART. 281, 282, 326 (1987). *See also* Advisory Panel On Child Support Guidelines, DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ENFORCEMENT, National Center For State Courts I-3, 4 (1987) (hereinafter "ADVISORY PANEL").

[11] NRS 125B.020(1).

[12] Note, *An Introduction To California's Child Support Guidelines*, 3 SAN DIEGO JUSTICE JOURNAL 551, 555 (1995).

[13] *Id.*

[14] *See* TREATMENT, *supra* note 9.

[15] *See* ADVISORY PANEL at I-3, *supra*, note 10; *Sommer v. Sommer*, 323 N.W.2d 144 (Wis. App. 1982).

[16] ADVISORY PANEL at II-55.

[17] *Downey v. Rogers*, 847 S.W.2d 63 (Kent. App. 1993).

[18] *Lara v. Lara*, 495 N.W.2d 719 (Iowa 1993).

[19] *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 532, 549, 786 P.2d 673 (1991).

[20] *See* 1987 Legislative History of A.B. 424 at 2. *See also* Child Support Statute Review Committee Report, State Bar of Nevada Family Law Section, August 1, 1992 at 36, note 72 and accompanying text; Springer, *Some Thoughts On Child Support and Community Property Division*, State Bar of Nevada, Third Annual Family Law Spring Showcase, Tonopah, Nevada, April 3-4, 1992, at page 2.

[21] *In Re Guidelines For Child Support*, 863 S.W.2d 291 (Ark. 1993).

[22] *See* ADVISORY PANEL at II-59.

[23] *Barbagallo v. Barbagallo*, 105 Nev. 546, 548, 779 P.2d 532 (1989).

[24] *Id.* at 548-9.

[25] *Barbagallo* at 552.

[26] 861 P.2d 1065, (Wash. App. 1993)

[27] *Id.* at 1067.

[28] 847 S.W.2d 63 (Kent. App. 1993).

[29] *Id.* at 64

[30] *Id.* at 65.

[31] Melli, *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 HOUSTON L. REV., 543, 552 (1994). *See also Mosley v. Figliuzi*, 113 Nev. ___, 930 P.2d 1110 (Nev. Adv. Op. No. 8, January 3, 1997).

[32] ADVISORY PANEL at II-58.

[33] A reading of NRS 125B.070 and the legislative history of A.B. 424 [Nevada Legislative History, 87-9, A.B. 424 of the 64th Session, Child Support] indicates that the intent of the legislature was to comply with the federal mandate which was to adopt guidelines that would alleviate the disgrace of inadequate child support orders.

[34] *See* Williams, *Guidelines For Setting Levels of Child Support Orders*, 21 FAM. LAW QUART. 281, 282, 326 (1987). *See also* ADVISORY PANEL at I-3, 4.

[35] Note, *Child Support Guidelines: Formulas To Protect Our Children From Poverty And The Economic Hardship Of Divorce*, 23 CREIGHTON L. REV. 835, 836 (1990) *citing* Brackney, *Battling Inconsistency and Inadequacy: Child Support Guidelines In the States*, 11 HARV. WOMEN'S L.J. 197, 199 (1988).

[36] Note, *Child Support Guidelines: Formulas To Protect Our Children From Poverty And The Economic Hardship Of Divorce*, 23 CREIGHTON L. REV. 835, 854 (1990), *citing* Goldfarb, *Child Support Guidelines: A Model for Fair Allocation of Child Care, Medical, and Educational Expenses*, 21 FAM. LAW QUART. 335, 336 (1987).

[37] The author argued this position before the Nevada Supreme Court on January 12, 1998 in the case of *Wright v. Osburn*, case number 28714, which is currently under submission by the court.

CASE SUMMARIES

Prepared by Marshal S. Willick

Parties May Not Agree to Divide Social Security; It is Immune from Community Property Division

Boulter v. Boulter, 113 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 10, Jan. 3, 1997) Parties were divorced after marriage of 37 years. The decree merged a property settlement agreement signed by both parties, and required equalization of the Social Security payments received by each of them. Husband refused to apply for Social Security when he turned 65. Wife filed a motion. The district Court (Ames) held that there was no violation of federal law and that any ambiguity (apparently, as to whether payments were to begin at eligibility) should be construed against the Husband's attorney since he drafted the property settlement agreement.

The Supreme Court reversed. Under 42 U.S.C. § 407(a) (1983), any state action is preempted by a conflicting federal law, such as the Social Security Act, under the Supremacy Clause (Article IV, Clause 2) of the United States Constitution. Citing various cases from around the country indicating that Social Security payments are "immune to adjustment" by state courts dividing property at divorce, and noting that certain spousal benefits are built in to the social security law itself, the Court noted the holding of the United States Supreme Court that section 407(a) imposes "a broad bar against the use of any legal process to reach all social security benefits," citing Philpott v. Essex County Welfare Bd., 409 U.S. 413, 417 (1973), and noting the holding of Hisquierdo v. Hisquierdo, 439 U.S. 572, 575-76 (1979), superseded in part by 45 U.S.C. § 231m (1986). The Court then found that merging the prop-

erty settlement agreement into the divorce decree constituted "state action."

The Court rejected the wife's argument that the agreement merely constituted an agreement between private individuals as to how to use Social Security proceeds once received (which is permissible), since it was actually a forbidden contract to transfer unpaid (future) benefits. For good measure, the Court ruled impermissible voluntary as well as involuntary transfers or assignments. Even a bank account consisting of benefit payments is exempt.

In its final word, however, the Court, having found the agreement to share the benefits unenforceable, remanded to the district court "with instructions to reconsider the property distribution to the parties, and the issue of attorney's fees and costs."

Motion to Set Aside Default Should Have Been Granted to Out-of-State Victim of Domestic Violence Under NRCP 60(b); Domestic Relations Cases Should be Resolved on their Merits

Lesley v. Lesley, 113 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 79, June 17, 1997) High school graduate mother took the children to California after being hit and having a beer bottle thrown at her by her husband (the children's father). She obtained a temporary protective order in Fresno. Father filed for divorce in Nevada district court (Sullivan), later obtaining a default judgment, which was granted without a prove-up hearing, giving him all the property, and custody of the children. About 90 days later, mother moved to set aside default decree. Judge Sullivan refused to set it aside or allow witnesses to testify, saying that mother had not shown adequate mistake, surprise, or excusable neglect, or shown a meritorious defense. Mother's offer of proof showed father to be physically and verbally abusive to her and the kids (strikes to the head, black eyes, etc.), and that he drank too much. She had contacted attorneys and paralegals in California, but had no contact with lawyers before this case, and did not know that low-cost legal assistance was available here. She indicated that her inheritance was used to make the down payment on the house.

On appeal, the Nevada Supreme Court reiterated NRCP 60(b), and the district court's "wide discretion in deciding whether to grant or deny a motion to set aside a judgment," but added that "this legal discretion cannot be sustained where there is no competent evidence to justify the court's action."

The factors to be applied by the court in an NRCP 60(b)(1) motion are whether the movant: "(1) promptly applied to remove the judgment; (2) lacked intent to delay the proceedings; (3) demonstrated good faith; (4) lacked knowledge of procedural requirements; and (5) tendered a meritorious defense to the claim for relief," citing *Bauwens v. Evans*, 109 Nev. 537, 853 P.2d 121 (1993).

The Court overturned the lower court's finding of an "untimely" filing to set aside. Where the default was entered April 18 and she received it on May 28, a motion to set aside the default on July 3, after her return to Nevada and "prompt" consultation with a Nevada attorney, was "timely." The Court noted that the motion to set aside in *Petersen v. Petersen*, 105 Nev. 133, 771 P.2d 159 (1989) was timely filed 90 days after entry of judgment.

The Court likewise overturned the trial court's determination of intent to delay, since she had been in Fresno for two months when the Father filed, had gained temporary custody orders and filed for legal separation, thought she could finalize matters there (after consulting with legal authorities), "may have been unaware that Nevada had jurisdiction over the custody dispute," did not attempt to avoid service of process "or to totally disregard the Nevada proceedings," and that the Nevada court entered the default exactly one month after the complaint was filed. There was therefore "virtually no evidence" that the mother intended to delay the divorce proceedings.

Where the mother consulted with counsel and thought she could resolve things in California, there was "little evidence that she acted in bad faith" other than that the did not respond to the Complaint and was unwilling to return to Nevada. These matters did not show a "serious disregard for the judicial process."

That the mother thought she could do what she was doing in California and did not realize that she needed a Nevada lawyer was an adequate showing that she lacked knowledge of the procedural requirements.

The Court rejected entirely the lower court's "meritorious defense" finding, since the lower court focused on the mother's unwillingness to return to Nevada, not whether she had a defense to the underlying claims. "In an action involving child custody, the required meritorious defense factor is satisfied if the movant can show that the district court did not consider the best interests of the child before making the custody determination" under NRS 125.480.

Finally, when reviewing district court decisions on NRCP 60(b) motions, the Court also examines whether the case "should be tried on the merits for policy reasons." *Kahn v. Orme*, 108 Nev. 510, 835 P.2d 790 (1992). "This court has held that Nevada has a basic underlying policy that cases should be decided on the merits. . . . Our policy is heightened in cases involving domestic relations matters." (Citing *Hotel Last Frontier v. Frontier Prop.*, 79 Nev. 150, 380 P.2d 293 (1963) and *Price v. Dunn*, 106 Nev. 100, 787 P.2d 785 (1990). Here, an essential part of the case was child custody, requiring a focus on the best interests of the kids. It appears that the court "gave undue weight to [the mother's] failure to return to Nevada, but insufficient weight to the best interests of the children." Public policy "weighs in favor" of having the case heard on the merits. The court found that the lower court had abused its discretion, reversed, and remanded.

Only the Economic Consequences of Spousal Abuse or Marital Misconduct can Provide Compelling Reasons for Unequal Disposition of Community Property, and Abuse is not a Basis for Deviation from the Child Support Guidelines

Wheeler v. Upton-Wheeler, 113 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 133, Oct. 1, 1997) Parties had a child in 1978, and married in 1982. In 1993, Mother filed for divorce. At trial, Mother introduced photographs showing bruises, alleging that Father abused her, and "admitted for the limited purpose of determining whether her request for an unequal division of community property should be granted."

The trial court (Stone) granted joint legal custody, with primary physical custody to Father, and liberal visitation to Mother. The lower court found that $436.00 was the proper amount of child support. It awarded the home to the Father, and ordered Father to pay to Mother her half of the equity by one payment of $10,000.00, and an $8,500.00 credit, payable in installments equal to Mother's child support obligation, with no child support payments beyond that, either, as "additional consequence to [the Father] for the alleged abuse."

First, the Supreme Court found that the lower court had miscalculated Mother's child support obligation. Using the Mother's income figures, it should have been $468.00, and there was no factual finding justifying a deviation.

The Court found a violation of NRS 125B.080(4) in releasing the Mother from all child support obligations, since at least $100.00 per month must be ordered absent written findings of inability to pay that amount. Physical abuse of one parent by the other is not listed in NRS 125B.080(9). Further, "even if a legitimate compelling reason existed to support an unequal distribution of property, such unequal distribution could not be accomplished by reducing or eliminating [the Mother's] obligation to pay child support," citing *Westgate v. Westgate*, 110 Nev. 1377, 887 P.2d 737 (1994). The Court remanded for a determination of child support to be awarded pursuant to the guidelines.

Turning to property, the Court examined the 1993 revisions to NRS 125.150(1)(b), which require an equal distribution of community property absent "compelling circumstances." The Court found that "it appears that . . . the legislature wanted to ensure that Nevada would remain a no-fault divorce state." The legislative history apparently includes a "determination" that testimony regarding relative fault of the parties could have "an adverse effect on the children and could increase the expense of litigation."

From this, the Court determined that "except for consideration of the economic consequences of spousal abuse or marital misconduct, evidence of spousal abuse or marital misconduct does not provide a compelling reason under NRS 125B.150(1)(b) for making an unequal disposition of community property." If there has been such an "adverse economic impact," spousal abuse or marital misconduct may be considered in deciding whether to divide property unequally. The case was remanded to determine whether there had been such an economic impact.