NFLR
NEVADA FAMILY LAW REPORT
A Publication of the Family Law Section of the State Bar of Nevada
Volume 1, Number 1 Spring/Summer 1987

1987 Family Law Legislative Summary

By Peter B. Jaquette

Family law was clearly not the burning issue in the minds and hearts of the 1987 Legislature. Although some 15 to 20 pieces of legislation dealt in some fashion with family law, it was only in the area of child support that fundamental changes were made. Outlined below is a summary of 1987 legislation affecting the practice of family law. Specific statutes affected by each piece of legislation are listed parenthetically at the end of each summary.

Child Support

Assembly Bill 424. This legislation which provides child support guidelines brings Nevada into compliance with Federal and interstate support enforcement compacts. The guidelines are based solely on the supporting parent's gross monthly income and provide that the payor shall pay 18% of gross monthly income for one child, 25% for two children, 29% for three children and then an additional 2% for each child beyond that. The statute provides a "rich man's cap" of $500.00 per month per child and a minimum of $100.00 per month per child.

These guidelines do not mean the end to judicial discretion with regard to support. The statute enumerates 12 specific factors which the Court may use to adjust the ordered amount of support upward or

continued page 4

Assembly Bill 874: The Right to Remove the Child from the Jurisdiction

By James J. Jimmerson

Although Assembly Bill 424, which sets forth strict criteria for child support, seems to have attracted the greatest attention among new domestic relations bills, no less significant is Assembly Bill 874, which imposes an affirmative duty on a custodial parent to notify the noncustodial parent before the child can be moved from the State of Nevada. The applicable portion of Assembly Bill 874 reads as follows:

> If custody has been established and the custodial parent or parent having joint custody intends to move his residence to a place outside of this state and to take the child with him, he must, as soon as possible and before the planned move, attempt to obtain the written consent of the other parent to move the child from the State. If the noncustodial parent or other parent having joint custody refuses to give that consent, the parent planning the move shall before he leaves the State with the child, petition the court for permission to move the child. The failure of a parent to comply with the provision of this section may be considered as a factor if a change of custody is requested by the noncustodial parent or other parent having joint custody.

continued page 6

In This Issue

NFLR

EDITOR
Ronald J. Logar

ASSOCIATE EDITOR
James L. Spoo

MANAGING EDITOR
Christine Cendagorta

ARTICLES EDITOR
Jim Jimmerson

ARTICLES EDITOR
Richard W. Young

ARTICLES EDITOR
John Ohlson

SUBSCRIPTION EDITOR
Sue Saunders

NEVADA FAMILY LAW REPORT is a quarterly publication of the Family Law Section of the State Bar of Nevada. Mailing address: 243 South Sierra Street, Reno, Nevada, 89501 (702) 786-5040.

SUBSCRIPTION PRICE FOR NON-SECTION MEMBERS is $35 payable in advance annually from January 1 to December 31. There are no prorations.

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 19__ NFLR _____.

Nevada Family Law Report is supported by the Family Law Section of the State Bar of Nevada, NFLR subscriptions, and the following corporate sponsors:

First Interstate Bank
Grant Thornton
The Baker Group

Family Law Section Elects New Chairman, Council Members

At the Family Law Section meeting held May 24, 1987, during the Annual Meeting of the State Bar of Nevada at Silverado Country Club, the Section elected the following officers for the 1987-88 term: James J. Jimmerson, chairman; Sue Saunders, secretary; and Peter Jaquette, budget-officer. Council members are Ronald J. Logar, Fred Fisher, Gary DiGrazia, Kirby Wells, Hon. Terrance Marren, Gary Silverman, Howard Ecker and Syliva Gross. James Jimmerson also serves as ex-officio member of the State Bar's Board of Governors.

NFLR Seeks Family Law Articles

The *Nevada Family Law Report*, published quarterly by the Family Law Section of the State Bar of Nevada, seeks to provide interesting and substantive family law material to educate both the bench and the bar. **NFLR needs articles for future issues.** If you are interested in writing critiques of pertinent cases, reports/opinions of family law legislation, or discussions of family laws trends and issues, please request author's guidelines from NFLR, 243 South Sierra Street, Reno, NV 89501, and contact an articles editor to discuss your idea.

Articles published in the NFLR are eligible for continuing legal education credits. Authors must request an application for approval of authorship in publication from Karen Bernhardt, executive director of the State Board of Continuing Legal Education, 295 Holcomb Avenue, Suite 5A, Reno, NV 89502. Telephone: 329-4443. The CLE Board then reviews the article and application.

Nevada Family Law Report Back Issues Available

Vol. I No. 1

Vol. I No. 2

Vol. I No. 3

Send $5.00 per copy ordered to

NFLR Managing Editor
State Bar of Nevada
295 Holcomb Avenue, Suite 2
Reno, NV 89502

The State Bar of Nevada And The Nevada Family Law Section Present A FAMILY LAW SEMINAR

Door Registrations Accepted

$125 **All** Tuition Received **After** September 4, 1987

September 17, 1987 - Reno

Washoe County Courthouse
Department One

September 18, 1987 - Las Vegas

Union Plaza Hotel
Convention Center - 3rd Floor of South Tower

Faculty Coordinators:
James J. Jimmerson, Esq. - Las Vegas
Ronald J. Logar, Esq. - Reno

CLE Committee Coordinator:
Richard G. Barrows, Esq.

FAMILY LAW SEMINAR - RENO
SEPTEMBER 17, 1987

The Schedule

8:00 - 8:30 Registration
8:30 - 12:00 Mock Trial (Breaks Between Sessions)
12:00 - 1:30 Lunch (On Your Own)
1:30 - 5:00 Mock Trial (Breaks Between Sessions)

The Case - Ligament v. Ligament (Orthopedic Surgeon)

Issues to be addressed: Evaluation of a Professional Practice or Closely Held Corporation; Evaluation of the Professional License; Apportionment; Reimbursement and Pro-Tanto Interests; Transmutation; Quasi-Community Property; Alimony; and Equitable Distribution of Assets and Liabilities

Moderator

Ronald J. Logar, Esq.
Sole Practitioner

Judge

The Honorable Jerry Carr Whitehead
Second Judicial District Court

Plantiff's Attorney

Richard W. Young, Esq.
Sole Practitioner

Defendant's Attorneys

John Ohlson, Esq.
Ohlson, Edmiston & Aimar
Gary R. Silverman, Esq.
Silverman & Decaria

Attorney for Third Party Defendant

Richard L. Elmore, Esq.
Hale, Lane, Peek, Dennison & Howard

Expert Witnesses

Kenneth L. Fortney CPA
Donald L. Muckel CPA
Ballard, Muckel & Clausen

6.00 Nevada CLE Credits

FAMILY LAW SEMINAR - LAS VEGAS
SEPTEMBER 18, 1987

8:00 - 8:45 Registration

8:45 - 10:00 Practice Pointers for Family Law Practioners From Both Sides of the Bench
Franny A. Forsman, Esq.
Beckley, Singleton, DeLanoy, Jemison & List and Alternate
Domestic Relations Referee
Jacalyn Glass, Esq.
Senior Citizen Law Project and Alternate Domestic Relations Referee

10:00 - 10:15 Break

10:15 - 11:45 The New Domestic Relations Rules -- A View From the Bench
The Honorable Terrance P. Marren
Domestic Relations Referee

11:45 - 1:15 Lunch (Own Your Own)

1:15 - 2:15 Point/Counterpoint: Is Professional Goodwill an Asset of the Community
Lynn M. Hansen, Esq.
Jimmerson & Davis
Howard M. Miller, Esq.
Carelli & Miller

2:15 - 2:30 Break

2:30 - 4:30 Evaluating a Family Law Case
Panel:
The Honorable Miriam Shearing
The Honorable Thomas A. Foley
The Honorable Donald M. Mosley
Eighth Judicial District Court
Stewart L. Bell, Esq.
Stewart L. Bell, Chartered
George M. Dickerson, Esq.
Dickerson, Dickerson & Lieberman
Lynn R. Shoen, Esq.
Lynn R. Shoen, Chartered
Moderator:
James J. Jimmerson, Esq.
Jimmerson & Davis

6:00 Nevada CLE Credits

Legislative Summary

downward from the guideline amount. Included among these factors are special needs of the child, the responsibility to support others, the amount of time the child spends with each parent, and the relative income of both spouses. If the court uses any of these factors to deviate from the formula, it must set forth specific findings of fact explaining such deviation.

The law took affect July 1, 1987 and provides that the formula shall apply to: "A.) Determine the required support in any contested case involving the support of children; and B.) Regarding any request filed after July 1, 1987, change the amount of the required support of children."

Subsection B raises the question, at least in my mind, as to whether or not the new formulas, standing alone, represent a sufficient change of circumstance to justify modification of any previous support order.

This legislation also facilitates discovery by setting forth specific information (such as the preceding three years tax returns) which must be provided for the Court's consideration.

The legislation also provides that the attainment of the age of majority shall not terminate the support obligation of a parent for a child who is physically or mentally handicapped, provided that the handicap occurred prior to the age of majority. (NRS 125.460, 425.390)

Assembly Bill 395. Assembly Bill 395 is too long and tedious for any reasonable person to comprehend, but the chief changes appear to be:

1. More authority for an "enforcing agency" to obtain an assignment of wages to satisfy delinquent support obligations (and sanctions for employers who fail to comply);

2. The authorization of the appointment of a master in actions to establish paternity;

3. Elimination of the statute of limitations for the enforcement of delinquent child support; and

4. Every Order for the support of a child must include notice to the responsible parent that he is subject to the wage withholding provisions of NRS 31.230.

The removal of the statute of limitations is set forth as follows:

> If a court has issued an order for the support of a child, there is no limitation on the time in which an action may be commenced to (a) collect arreareages in the amount of that support; or (b) seek reimbursement of money paid as public assistance for that child.

Whether the legislature intended that this removal of the statute of limitations applies only to the minority of the child plus a certain number of years or whether it truly means that there is no limitation at all, remains to be seen. (NRS 31A, 125.450, 126)

Custody/Parental Rights

Assembly Bill 708. This bill provides for grandparent visitation in situations of divorce or termination of parental rights, using the best interests of the child test. Visitation for relatives other than parents or grandparents may be established based on a variety of specified factors, all of which seem to add up to the "best interest" test. This bill also authorizes temporary custody awards to grandparents of a child placed in protective custody. (NRS 123.123, 432B.480)

Assembly Bill 874. Assembly Bill 874 establishes a procedure for a custodial parent or "a parent having joint custody" to obtain the permission of the Court to move his residence to a place outside of the state and to take the child with him. The law requires that the non-custodial parent be given notice of the proposed move. If the non-custodial parent refuses to give written consent to the other parent to move the child from the state, the custodial parent must petition the court prior to leaving the state with the child for permission to move the child. Failure to do so may be considered as a factor if a change of custody is requested by the non-custodial parent.

This legislation also makes it clear that a party may proceed without counsel in custody determinations. (NRS 125)

Senate Bill 98 adds "failure of parental adjustment" to the statutory grounds for the termination of parental rights. Failure of parental adjustment is defined as the "inability or unwillingness within a reasonable time to correct substantially the circumstances, conduct or conditions which led to the placement of the child

Peter B. Jaquette

outside of the home, notwithstanding reasonable and appropriate efforts made by the state or a private person or agency to return the child to his home." Parents whose child has been removed from their home by a state agency are essentially given six months to "get their act together". This new law also requires that the state or agency having jurisdiction over the child must show that reasonable efforts were made to return the child to the home.

Senate Bill 99 requires that the court make a specific finding of fact as to the grounds for termination of parental rights. (NRS 128.010, 128.105)

Senate Bill 116 requires that notice of any petition to terminate parental rights be given to the minor's legal custodian or guardian, in addition to the parents or nearest known relatives of the child. (NRS 128.060)

Adoption

Senate Bill 272 is an effort to clamp down on what the legislature perceived as shady practices in private adoptions. The primary change makes invalid any consent to adoption executed prior to 72 hours after the birth of the child and requires that one witness to the consent to

continued next page

adoption be a social worker employed by the Welfare Division or a licensed child placing agency. I have been advised by local welfare workers that this 72 hour requirement will not "necessarily" prevent the immediate temporary placement of a prospective adoptive child, provided that Welfare has had an opportunity to do a home study and evaluate the natural mother's intentions. We shall see. This legislation also defines "arranging or recommending" placement of a child. It also authorizes the payment of medical or other necessary living expenses related to the birth of a child, so long as payment is "an unconditional act of charity" and not contingent upon placement or consent for adoption. It is now necessary for prospective adoptive parents to file with the Court an Affidavit setting forth all fees, costs or expenses paid as part of the adoption process. (NRS 127)

Senate Bill 271 makes the State of Nevada a participant in the Interstate Compact on Adoption and Medical Assistance. This law establishes a program offering financial assistance to parents adopting a child who has a physical, mental or emotional handicap. Factors such as ethnic background, age or membership in a minority group may also qualify a prospective adoptive child as a child with special needs. (NRS 127)

Senate Bill 103 authorizes the Welfare Division to charge the adopting parents reasonable fees for services that the division provides in the adoption process. (NRS 127.280, et seq.)

Procedure

Assembly Bill 807 is the Nevada version of statutes which have commonly come to be known as OOPS! statutes in various states. The bill provides that military pensions which were not litigated in a divorce may be litigated at a later time, provided usual jurisdictional requirements can be met. This new law applies only to U.S. Military pensions and not to private retirement benefits. (NRS 125)

Assembly Bill 599 provides for the emancipation of minors 16 years and older. The process is initiated when a minor files a verified petition which is then heard in the juvenile court by a judge or special master. The statute attempts to clarify the legal status of an emancipated minor in such areas as contractual rights, ownership of property and commission of crimes. (NRS 129)

Senate Bill 524 expands the availability of the summary divorce procedures of NRS 125.181. The summary procedure is now available in cases where there are children of the marriage or where the parties have agreed to spousal support, PROVIDED that the parties have executed an agreement setting forth custody and support. This legislation also clarifies and tightens the requirements for both the summary petition and any affidavits filed in conjunction therewith. Requirements for affidavits in support of a default divorce decree are also tightened, requiring that each allegation in the application have factual support set forth in the affidavit accompanying it. (NRS 125.123, 125.181)

Crimes

Assembly Bill 636, the spousal rape law, removes the defense of marriage from the charge of sexual assault, if the assault was committed by force or by the threat of force. (NRS 200.373)

Assembly Bill 412 appears to make probation more readily available in situations of domestic battery. (NRS 200.481, 2 (a))

Senate Bill 173 adds the execution of a false affidavit or a false verification to the statutory definition of perjury. (NRS 199.120)

Community Property

Assembly Bill 456 permits the equal partitioning of community assets in situations where one spouse has been admitted to "a facility for skilled nursing or a facility for immediate care". Upon the entry of such a decree by the Court, the separate property of each spouse is not liable for the costs of supporting the other spouse including the costs of the necessities of life or medical care. (NRS 123)

Senate Bill 468 with an apparently similar purpose to Assembly Bill 456, allows that spouses living apart may by agreement divide their assets into equal shares of separate assets for purposes of Title XIX of the Social Security Act. (NRS 123, NRS 422)

Peter B. Jaquette is a Carson City attorney specializing in family law.

AB 874

The bill, while reasonably simple in its intent, may prove more difficult in its application. It presents two major issues which have been dealt with in various fashions by Courts from jurisdictions across the nation:

1. On a petition for permission to move a child out of state, which party has the burden of proof, and what test will the Court apply?

2. What effect should a failure of a parent to comply with this section have on a Motion by the noncustodial parent to change child custody?

The Standard and the Burden of Proof

Although the State legislature has the "best interests of the minor child" standard for an initial determination of custody (see NRS 125.480), there appear to be no controlling statutes nor judicial opinions which extend this standard to a determination of whether or not a custodial parent may leave the State of Nevada with his/her minor children. Courts in other jurisdictions have considered the issue at length, but are not necessarily in agreement on the proper standard.

Some jurisdictions simply set forth the "best interests of the minor child" standard, thereby leaving to the trial court a wide range of discretion. *Matter of Marriage of Meier*, 595 P.2d 474 (Ore. 1979); *Anhalt v. Fesler*, 636 P.2d 224 (Kan. 1981); *In re Marriage of Bergner*, 722 P.2d 1141 (Mont. 1986). The State of Minnesota has adopted the "best interests" test, and has further set forth the factors to be considered in evaluating the best interests of the minor child:

(a) The wishes of the child's parent or parents as to custody;
(b) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
(c) The interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly effect the child's best interests;
(d) The child's adjustment to home, school, and community;
(e) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

James J. Jimmerson

(f) The permanence, as a family unit, of the existing or proposed custodial home;
(g) The mental and physical health of all individuals involved;
(h) The capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any; and
(i) The child's cultural background.

Minn. Stat. Section 518.17(1), (1986); see also *Lees v. Lees*, 404 N.W.2d 346 (Minn. App. 1987).

The Nevada Statute does not set forth any guidelines or factors which may be considered by the Court but appears to leave the decision within the discretion of the trial judge to use whatever factors appear to him to be paramount. The Minnesota Statute also leaves the Court a wide range of discretion but lays out a path to follow in exercising such discretion. It also gives the practitioner the luxury of knowing which facts to put before the Court.

It should be noted that other jurisdictions have formulated more stringent tests, thereby making it more difficult for a custodial parent to remove the child from the jurisdiction. The State of Illinois requires the custodial parent to show a sensible reason for the move and that the move is in the child's best interest. *Winebright v. Winebright*, 508 N.E.2d 774 (Ill. App. 1987). The State of New York requires a further showing that some exceptional circumstance or pressing need supports the change of residence. *Reese v. Reese*, 516 N.Y.S.2d 152 (App.. Div. 1987).

The Supreme Court for the State of Nebraska set forth an even more constraining test, in that the petitioner must show that departure from the jurisdiction is "the reasonably necessary result of the custodial parent's occupation, a factually supported and reasonable expectation of improvement in the career or occupation of the custodial parent, or required by the custodial parent's remarriage." *Gerber v. Gerber*, 407 N.W.2d 497 (Neb. 1987). Although this type of standard is not set forth in A.B. 874 for use in Nevada, the fact that A.B. 874 does not set forth a standard does not preclude the use of a standard as tough as that used in Nebraska.

continued next page

The Nebraska standard appears to place more emphasis on the custodial parent's intent than it does on the best interest of the child. Most of the tougher standards arise in cases where the Court is primarily concerned with the visitation rights of the noncustodial parent. A decree which sets forth a noncustodial parent's visitation schedule is reduced to "empty pomposity" when the custodial parent moves the children to another state. *Marriage of Ciganovich,* 132 Cal. Rptr. 261, 263 (1976). A number of courts have held that protection of the visitation privilege is more important than the custodial parent's right to move.

For instance, in New Mexico, courts had previously held that the right to custody includes the right to remove a child from the State in the absence of any legal modification of that right. *State v. Whiting,* 671 P.2d 1158 (N.M. 1983). However, the New Mexico Court of Appeals recently held that a right of visitation by the noncustodial parent is a legal modification of the right of custody, and as such the custodial parent could not unilaterally abrogate the right to specific visitation without court approval. *Alfieri v. Alfieri,* 733 P.2d 4 (N.M. 1987). In that case, the Appellate Court upheld the trial court's findings that a mother could retain primary physical custody of a child *only* if she returned with the child from California. Similarly, the New York Supreme Court held that a trial judge abused his discretion by permitting a custodial parent to relocate inside the State of New York, thereby altering the noncustodial parent's visitation schedule. *Reese v. Reese, supra.*

Other courts have taken a more logical approach, focusing on the lack of regular visitation as a factor to be considered, rather than an ironclad restraint to the custodial parent's free movement. See *Marriage of Ciganovich, supra.* Further, the Wisconsin Supreme Court has held that a finding prohibiting an out-of-state move must be based on more than the determination that removal would in some way change the visitation arrangements or change the child's relationship with the noncustodial parent. *Long v. Long,* 381 N.W.2d 350 (Wis. 1986). Instead, the Court required a finding that the change of residence would "significantly harm or impede the child's relationship with the noncustodial parent and that this harm to the relationship would work to the child's detriment." *Id.,* at 357.

> Assembly Bill 874 is silent on which party would carry the burden of proof in a hearing for permission to move the child to another jurisdiction.

If we assume the standard to be implemented under A.B. 874 is the "best interest" standard, then the inherent decrease in visitation by the noncustodial parent involved with an out-of-state move may be considered as a factor for determining what is in the child's best interest, but it should not, of itself, foster a determination that the move is harmful.

Assembly Bill 874 is silent on which party would carry the burden of proof in a hearing for permission to move the child to another jurisdiction. One would assume that if the parent planning the move is required to petition the court for permission, then that party would have the burden to prove that the move would be in the child's best interest. Similarly, most other states applying the "best interest" test require the custodial parent to shoulder the burden to prove that the move would be in the child's best interest. *McRae v. Carbno,* 404 N.W.2d 508 (N.D. 1987); *Anhalt v. Fesler, supra.; Reese v. Reese, supra.; Winebright v. Winebright, supra.*

However, the State of Wisconsin recently changed its statute such that the burden now falls upon the *noncustodial* parent to prove "that it is *against* the best interest of the child for the custodian to so remove the child from the State. . ." W.S.A. 767.245(6). The State of Minnesota has attempted to bridge this gap by applying two different standards, depending on whether the parties have joint physical custody or whether the parties have joint legal custody of the children with one custodial parent. Where the parties have joint physical custody, the parent seeking modification to allow for an out-of-state move must establish that the move is in the best interest of the minor child. *Lees v. Lees,* 404 N.W.2d 346, 349 (Minn. App. 1987). When one party has physical custody and the other merely has a right of visitation, then a custodial parent is presumptively entitled to remove the child to another state unless the noncustodial parent establishes that the move is not in the best interest of the child. *Lees v. Lees, supra* at 349; *Auge v. Auge,* 334 N.W.2d 393 (Minn. 1983). This appears to be the best solution, in that a party who has joint physical custody should appear to have more of a right to block the custodial parent's move to another state than would a noncustodial parent who would need only to have his visitation schedule altered. This would force trial courts to be extremely clear in their determinations of joint physical custody as opposed to primary physical custody with one party and visitation for the other.

Effect of Noncompliance with Statute on Change of Custody

Assembly Bill 874 states in the final sentence as follows:

> The failure of a parent to comply with the provisions of this section may be considered as a factor if a change of custody is requested by the noncustodial parent or other parent having joint custody.

The provision does not state that failure to comply will necessarily cause custody to be changed, nor does it even specifically state that the failure to comply will even be considered by the Court. Courts from other jurisdictions have been more stringent in addressing this problem. In *Alfieri v. Alfieri, supra,* a mother took her daughter from New Mexico to California without notifying the noncustodial parent. The court found that where the custodial parent sought to cutoff the visitation rights of the noncustodial parent by moving out of state, the custodial parent would be given the choice of returning to the home state or giving up custody. Similarly, a California court found that where the custodial parent planned to move the

continued next page

children out of the community in which they were raised and had significant academic, athletic, social and religious ties, a change of custody to the parent remaining in the community was proper. *In re Marriage of Rossen*, 224 Cal. Rptr. 250 (Cal. App. 1986).

Other courts have gone in the opposite direction. In Colorado, changing custody may not be ordered to punish a custodial parent for removing a child from the jurisdiction of a Court. *Ashlock v. District Court, 5th Jud. Dist.*, 717 P.2d 483 (Col. 1986); *Holland v. Holland*, 373 P.2d 523 (Col. 1962). In *Ashlock*, the court stated:

> However unjustified the custodial parent's conduct may be, it is still incumbent upon the noncustodial parent to demonstrate that change of circumstances make a transfer of custody necessary to serve the best interests of the child.

Ashlock, supra. at 485.

Perhaps the most logical and equitable approach is to find middle ground on the issue, and allow the custodial parent's failure to comply to be a consideration reflecting upon the best interests of the child. See *Lees v. Lees, supra* at 350. The fact that a custodial parent may intentionally ignore the provisions of the statute or fail to comply with an Order denying permission to move out of the state would then necessarily reflect on that parent's ability to recognize and serve the best interests of the minor child. *Holland v. Holland*, 373 P.2d 543 (1962). This would then be considered, along with the other factors involved, in determining the best interests of the child to arrive at the best possible solution. Assembly Bill 874, if applied correctly, seems to have targeted this middle ground so as to consider the effect on minor children of the custodial parent's failure to comply. In a society as transient as Nevada's, this provision will act to deter some custodial parents from leaving the state without notifying the noncustodial parent.

CONCLUSION

Certainly the best interests of the minor children would be the paramount consideration in determining whether or not a custodial parent may remove the child from the State of Nevada. The fact that visitation by the noncustodial parent may be diminished should be considered only as it relates to these children's best interests, and not as it relates to the feeling of deprivation and loss by the noncustodial parent. Similarly, the provision regarding the failure to comply with the statute should be considered by the court in a Motion to Modify to Change Child Custody only as it relates to the behavior of the custodial parent affecting the children's best interest, and not as a punitive repercussion of removing the children from the state.

James J. Jimmerson is chairman of the Family Law Section and a member of the State Bar of Nevada Board of Governors. He practices in Las Vegas.

The Nevada Former Military Spouses Protection Act: Partition of Military Retirement Benefits Omitted from Prior Decrees of Divorce

By Robert C. LePome & Marshal S. Willick ©

Introduction: Generally

Before 1981, the states differed in their approach to division of military retirement benefits upon divorce.[1] The evolution of state law relating to division of military retirement benefits then changed radically when the United States Supreme Court essentially ruled such benefits non-divisible upon divorce.[2] The *McCarty* decision touched off a series of often-conflicting state court rulings attempting to interpret the impact and retroactive effect of the federal case.[3]

Some 20 months later, Congress reacted by passing the Uniformed Services Former Spouses Protection Act[4] (hereafter "USFSPA"), explicitly permitting state courts to divide military retirement benefits in accordance with state law and effectively nullifying the *McCarty* decision. The statute provides, in part:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.[5]

The rapid changes in federal law concerning divisibility of military retirement benefits caused considerable chaos in the state courts and resulted in a number of statutory and judicial initiatives attempting to deal with the "gap" cases — those involving divorces in which the later-nullified *McCarty* decision had been treated as controlling.[6]

While not all questions have been answered, and different legal theories are advanced by different courts reaching the same result, it is reasonably clear that at least courts in community property states today tend to divide the entirety of a military pension earned during marriage as a community asset.[7]

Nevada Law

Although the Nevada Supreme Court had not yet explicitly recognized the authority of the courts of this state to divide military retirement benefits, the practice was common in this state by

continued next page

1975. The holdings of our Court tended not to refer to one another and were so "fact-specific" as to give limited guidance to practitioners in the area.[8]

Nevada joined the near-universal trend of allowing partition of benefits for those divorced during the "gap" period when Robert C. LePome, Esq., counsel for the Plaintiff in *Burton*, submitted legislation allowing a "window period" during which divorcees could seek amendment of their decrees.[9]

Nevada was thus loosely aligned with those jurisdictions holding that, for purposes of division by state courts upon divorce, military retirement benefits are community property, whether vested or not, and whether matured or not.[10] The question remained, however, whether an action for *partition* of benefits was permissible in Nevada when the benefits had not been divided in the original divorce action.

The Tomlinson Case

Mr. and Mrs. Tomlinson had been married on December 30, 1946. Mr. Tomlinson had entered military service in 1941. Mrs. Tomlinson was granted a divorce from him by a Michigan court on the ground of extreme cruelty on December 22, 1971. The decree did not dispose of the retirement benefits in any way; the parties' other property was unremarkable.

Mrs. Tomlinson moved to Nevada and became a resident thereof in 1972. Mr. Tomlinson did the same in 1974.

In 1985, Mrs. Tomlinson learned of the USFSPA. She filed a Complaint for partition of the pension on October 8, 1985, naming her former husband as defendant.

The basis of the suit was that *both* spouses had participated in acquiring the pension. There was no question that if the divorce had taken place fifteen years later, Mrs. Tomlinson would have received a portion of the benefits under Michigan law (as authorized by the USFSPA). The suit alleged that her right to those benefits had attached when the benefits were *earned*. Since jurisdiction under the federal act was dependent on where Mr. Tomlinson lived at the time suit was brought, Nevada was the only place where an action for the omitted property could lie.

Mrs. Tomlinson filed a "Motion to Dismiss for Lack of Jurisdiction of the Subject Matter" on October 25, 1985, which was subsequently granted by the district court.

Robert C. LePome

Marshall S. Willick

The district court's dismissal did not specify whether its order was based on subject matter jurisdiction, the doctrine of *res judicata*, or a statute of limitations. A Notice of Appeal was filed on December 12, 1985.

The case was fully briefed and argued, but on December 30, 1986, the court issued an opinion affirming the district court's dismissal of Mrs. Tomlinson's partition action.[11] Without explicitly stating that it was doing so, the court adopted a conflict of laws approach. While conceding that Michigan divorce courts divide pensions *today*, the court observed that the directive to include pensions as marital property was not explicit in Michigan until 1978.[12]

The court found nothing in the USFSPA or the legislative history thereof indicating a congressional intent to create a right "to alter final decrees issued prior to *McCarty*."[13] Other courts, of course, have carefully explained why a partition action does not "reopen" a decree and have had no difficulty finding support in the USFSPA and its history to support partition irrespective of the date of the original decree.[14]

The NFMSPA recognizes that property rights, including the military pension, had been earned by *both* spouses whether the divorce took place in 1971 or 1987.

The court went on to state that because the original divorce decree provided alimony and child support, and divided other property, Mrs. Tomlinson was obliged to have raised the retirement benefits issue in 1971. The penalty to be imposed for her lack of legal prescience was denial of any share of the benefits she helped to acquire throughout twenty-five years of marriage.

The court paid only lip service to the equities involved in the case, stating "[t]he 1971 property settlement was not contested as being inequitable then, and it seems unlikely that it would be so now."[15] That statement, dicta since data regarding the worth of assets was not part of the record on appeal, flies in the face of common knowledge that the military pension is frequently (as it was in this case) the

continued next page

primary asset accumulated by a couple while one of them serves in the military during marriage.

The district court's order of dismissal was upheld on the sole ground of *res judicata*. Essentially, the court held that silence of a decree actually means disposition of any assets not mentioned therein; that the party who happens to acquire physical control of an asset, or apparent right to a future asset, simply retains it. The opinion did not deal with the obvious incentive given to parties to hide assets from one another at the time of divorce.

The opinion also did not touch upon the even worse result it could create for couples who accumulated retirement benefits elsewhere. Since jurisdiction under the USFSPA depends on the retiree's domicile, *Tomlinson* provided a means for retirees to cut off the rights of their spouses to the benefits earned during marriage by obtaining a summary divorce upon retirement and relocating in Nevada.

The Nevada Former Military Spouses Protection Act

In direct response to the *Tomlinson* decision, a bill was drafted and introduced during the recent legislative session as AB 807. Assemblyman Robert Gaston, an attorney from Las Vegas, introduced the measure in the Assembly Judiciary Committee and testified in favor of it when it went to the Senate committee. The Senate sponsor was Senator Sue Wagner of Reno. The original model bill was drafted by LePome & Willick. All legislative appearances were coordinated by Robert C. LePome, Esq.

As revised by the Legislative Counsel Bureau, the bill passed both the Assembly and the Senate without opposition, and was signed into law by the Governor on June 16, 1987.

The basic rule under the new laws is thus clear: former wives of military retirees who can acquire jurisdiction over their former spouses in Nevada may bring an action in district court for partition of military retirement benefits omitted from the original decree of divorce.

Essentially, the new law (hereafter, the "NFMSPA") reverses *Tomlinson*. It states that neither *res judicata* nor collateral estoppel will bar a partition action brought by a former spouse of a military retiree whose divorce decree, wherever entered, did not dispose of the pension. The date of the decree is irrelevant, but the military retiree may use all "available" equitable defenses.

The jurisdictional grounds were taken directly from the USFSPA: the retiree must be a resident of this state, or be domiciled here, or consent to the jurisdiction of the court (at the time of the decree or at any time thereafter) in order for the action to lie.

All of the above provisions constitute a legislative restatement of the holding of the California Supreme Court in *Casas v. Thompson, supra*. Our Supreme Court, presented with the then-recent *Casas* opinion when considering *Tomlinson*, summarily rejected it. As the California courts have realized, however, the USFSPA "validates partition of omitted pensions."[16]

Another provision of the NFMSPA has its roots in Texas. The act provides that "[t]he district court shall apply the law of this state applicable to the division of such benefits, regardless of the law of the jurisdiction in which the decree is entered." *See* § 1, para. 2(d). The Texas Supreme Court adopted that approach in *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982) in order to avoid precisely the "cumbersome conflict of laws approach" once used by the Arizona courts and resorted to by our court in *Tomlinson*.[17]

The basic rule under the new law is thus clear: former wives of military retirees who can acquire jurisdiction over their former spouses in Nevada may bring an action in district court for partition of military retirement benefits omitted from the original decree of divorce.

Remaining Questions Under the NFMSPA

The NFMSPA contains several latent questions which will probably require judicial construction. Laches, for example, is specifically preserved as a defense. Creative defense counsel might argue that some earlier date than that of passage of the NFMSPA should be considered by the court. Counsel might wish to introduce evidence that the benefits were discussed at the time of the original divorce, and that appropriate compensating property was awarded to non-military spouse, although the state of the law made it unnecessary to recite those facts in the decree.

On a related tack, the NFMSPA may have malpractice repercussions for domestic relations practitioners. The fact that the law ended up as it is raises questions regarding practitioners who have neglected to consider this asset, upon divorce or thereafter, regardless of which side was represented. The *Tomlinson* decision, however, should serve as a defense to negligence charges raised for failure to seek post-divorce partition prior to June 16, 1987.

continued next page.

There is some question as to the intent of the Legislature's use of the term "any time" in the jurisdictional provision. For example, would the non-military spouse be able to establish jurisdiction if the retiree had appeared in a *prior* action relating to marital property? If so, should it really make any difference whether the prior case was related to marital property? If the latter question is properly answered "no," then the NFMSPA probably altered the state's long-arm statutes to a large degree, and a challenge to that change should be expected.

Since the NFMSPA authorizes present collection of benefits previously paid to the retiree, which presumably could have been invested for several years, should interest on that amount also be collectible? Could an action be brought against the estate of a deceased retiree for benefits withheld?

Lurking in the future are bankruptcy problems and questions relating to "changed circumstances" for support and other previous orders. Further, the scope of the district court's equitable powers, especially toward sums owed for benefits received in prior years, remains to be clearly spelled out.

Finally, the attitude of our Supreme Court could easily determine the viability of the new law. the NFMSPA constitutes a legislative decision to rejoin the mainstream of law in this field, which is represented by the law of Texas and California. Nevada had been in close agreement with those jurisdictions on several related questions prior to *Tomlinson*.

Conclusion

Through the legislative reversal of the *Tomlinson* case, Nevada has rejoined the ranks of progressive jurisdictions in the field of the division of property. The property at issue in these cases was earned by the non-military spouse during the 1940s, '50s, '60s, '70s, and '80s. The NFMSPA recognizes that property rights, including the military pension, had been earned by *both* spouses whether the divorce took place in 1971 or 1987. The property acquired its jointly-owned characteristics when earned; the date of divorce is irrelevant.

Questions remain about the details of applying the NFMSPA to the various circumstances in which it will be raised. It is clear, however, that a great number of former spouses who have received nothing for their many years of work may finally be able to recover their rightful shares.

LePome & Willick is a general civil practice firm located in Las Vegas. Robert C. LePome is a member of the bar in Nevada and New York, and has extensive experience in real estate and military-related law. He was appellate counsel in *Burton*. Marshal S. Willick is a member of the bar of Nevada and California who has published several articles and lectured in the field of computer law. He was appellate counsel in *Tomlinson*. The firm concentrates its practice in family law, and in appellate, real estate, bankruptcy, estate planning and probate, and contract law.

---

continued next page

NFLR subscriptions run January 1 to December 31. If you are not receiving your issues, make sure your membership and/or subscription is current for 1987.

APPLICATION FOR MEMBERSHIP
FAMILY LAW SECTION
STATE BAR OF NEVADA

Enclosed is my check for $20.00 payable to the State Bar of Nevada for 1987 annual Section dues. Section members receive the Nevada Family Law Report and a discount for Section-sponsored seminars.

NAME: _____
FIRM: _____
ADDRESS: _____
_____
TELEPHONE: _____
Family Law Specialist: _____ Yes _____ No

Please check desired committee assignment:

_____ Officer
_____ Council member
_____ NFLR editorial staff
_____ Article and topic publication
_____ Seminar speaker

TO: **State Bar of Nevada**
Family Law Section
243 South Sierra St.
Reno, NV 89501

NFLR Subscription Only Order Form

Enclosed is my check for $35. payable to the Family Law Section of the State Bar of Nevada for a one-year subscription to the NFLR.

Name _____
Firm _____
Mailing Address _____
_____
_____

TO: **State Bar of Nevada**
Family Law Section
243 South Sierra St.
Reno, NV 89501

NOTES

[1] *Compare, e.g., Bankston v. Taft*, 612 S.W.2d 216 (Tex. Civ. App. 1980) (it is "well established law" that all retirement benefits that accrue during marriage are community property) *with Hutchins v. Hutchins*, 248 N.W.2d 272 (Mich. Ct. App. 1976) (pension subject to equitable distribution and is to be examined and valued in determination of assets to be allocated between parties) *and Kabaci v. Kabaci*, 373 So. 2d 1144 (Ala. Ct. App. 1979) (retirement benefits are income to be considered, but not property to be divided).

[2] *See McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).

[3] *See, e.g., Duke v. Duke*, 98 Nev. 148, 643 P.2d 1205 (1982) (*McCarty* not to be retroactively applied); *Rice v. Rice*, 645 P.2d 319 (Idaho 1982) (overruling prior state law in light of *McCarty); Segrest v. Segrest*, 649 S.W.2d 610 (Tex. 1983) (*McCarty* not to be retroactively applied), *cert. denied*, 464 U.S. 894, 104 S. Ct. 242 (1983).

[4] The act is titled differently by different courts. Its "real" name is apparently the "Uniformed Services Former Spouses Protection Act." *See* 10 U.S.C. § 1408 (1982).

[5] U.S.C. § 1408(c)(1) (1982).

[6] *See, e.g.*, 1983 Nev. Stats. ch. 301, § 1, at 740; *Burton v. Burton*, 99 Nev. 698, 669 P.2d 703 (1983); *In re Marriage of Ankenman*, 191 Cal. Rptr. 292 (Ct. App. 1983) (USFSPA applied retroactively in partition action); *Flannagan v. Flannagan*, 709 P.2d 1247 (Wash. Ct. App. 1985) (USFSPA applied retrospectively despite strength of concern with finality; discussing approaches taken in various jurisdictions and permitting motions for relief from *McCarty*-based judgments); *Koppenhaver v. Koppenhaver*, 678 P.2d 1180 (N.M. Ct. App. 1984) (USFSPA applied through post-decree motion to modify).

[7] *See, e.g., Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *affirming* 217 Cal. Rptr. 471, 473 (Ct. App. 1985) (recounting legislative history of USFSPA and noting theory underlying state court division of military retirement benefits); *Segrest v. Segrest, supra; Fransen v. Fransen*, 190 Cal. Rptr. 885 (Ct. App. 1983) (same result where original divorce decree entered in another state); *Berry v. Meadows*, 713 P.2d 1017 (N.M. Ct. App. 1986); *Steczo v. Steczo*, 659 P.2d 1344 (Ariz. Ct. App. 1983); *In re Marriage of Landry*, 699 P.2d 214 (Wash. 1985); *In re Marriage of Serdinsky*, 709 P.2d 69 (Colo. Ct. App. 1985); *accord Thorpe v. Thorpe*, 367 N.W.2d 233 (Wis. Ct. App. 1985); *Sink v. Sink*, 669 S.W.2d 284 (Mo. Ct. App. 1984).

[8] *See Burton v. Burton, supra* (remanding for reconsideration in light of changes in federal and state law); *see also Duke v. Duke, supra* (holding *McCarty* non-retroactive); *Forrest v. Forrest*, 99 Nev. 602, 607-08, 668 P.2d 275 (1983) (retirement benefits generally divisible as community property "to the extent that they are based on services performed during the marriage, whether or not the benefits are presently payable"; remanding for valuation and division of benefits); *Brown v. Brown*, 101 Nev. 144, 696 P.2d 999 (1985) (noting that case was remanded on prior appeal for reconsideration of division of benefits in light of *McCarty*, but filing to correct outcome in light of USFSPA).

[9] *See* 1983 Nev. Stats. ch. 301, § 1, at 740

[10] *See e.g., In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981); *In re Marriage of Brown*, 544 P.2d 561 (Cal. 1976); *Kullbom v. Kullbom*, 306 N.W.2d 844 (Neb. 1981); *Askins v. Askins*, (Mich. Ct. App. 1985); *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982); *see also Boniface v. Boniface*, 656 S.W.2d 131 (Tex. Civ. App. 1983) (discussing non-military benefits). *Contra In re Marriage of Rogers*, 709 P.2d 1383 (Colo. App. 1985) (non-vested benefits are not "property").

[11] *See Tomlinson v. Tomlinson*, 102 Nev. ____, 729 P.2d 1363 (1986).

[12] *see* 102 Nev. at ____, 729 P.2d at 1364.

[13] *See* 102 Nev. at ____, 729 P.2d at 1364.

[14] *See, e.g., Casas v. Thompson, supra*, 720 P.2d at 927, n.4, 927-28.

[15] *See* 102 Nev. at ____, 729 P.2d at 1364.

[16] *See, e.g., Miller v. Miller*, 222 Cal. Rptr. 652 (Ct. App. 1986).

[17] *See Cameron v. Cameron*, 641 S.W.2d 210, 222 (Tex. 1982); *Tomlinson v. Tomlinson, supra*, 102 Nev. at ____, 729 P.2d at 1364; *Steczo v. Steczo*, 659 P.2d 1344 (Ariz. Ct. App. 1983).

NFLR
State Bar of Nevada
Family Law Section
243 South Sierra Street
Reno, NV 89501