NFLR
NEVADA FAMILY LAW REPORT
A Publication of the State Bar of Nevada

Volume 7, Number 1 Spring, 1992

The Family Court

A Better Brand of Justice for Nevada's Children and Their Families

by Jeffrey A. Kuhn, Esq.

The practice of family law is unique. Ideally it balances the elements of legal issues and psycho-social relationships to secure justice for all. Few would argue our present family law procedures do little toward striking a balance between these elements. In fact, by their overwhelming approval of Question One on the November, 1990, general election ballot, Nevadans recognized the need to strike that balance in the form of a coordinated family court system.

This coordinated Family Court was created legislatively this year by the passage of Nevada Senate Bill 395. This article will attempt to discuss the main features of SB 395, but perhaps more importantly will discuss what it might mean not only to litigants in Nevada's justice system, but to family law practitioners.

THE COORDINATED FAMILY COURT MODEL

The Family Court acknowledges that family law conflicts require the judge's

con't page 3

Family Law Update

by Scott T. Jordan, Juvenile/Domestic Master, Second Judicial District Court

FAMILY COURT BILL

By far the most widely followed family-related legislation to emerge from the 1991 legislature was the family court act. Two competing bills were introduced; their sponsers ultimately agreed to combine them into what was finally approved as Senate Bill 395.

SB 395 mandates a family division of the district court in each judicial district with a population of more than 100,000. The family court, when established in January, 1993, will have exclusive jurisdiction over all divorce, paternity, child custody and support, juvenile, termination of parental rights, adoption, and guardianship matters, as well as other family related issues and cases involving the compromise of minor's claims.

SB 395 created six new positions for family court judges in Clark County, and one new position for family court judge in Washoe County. The judges will be at the district court level, and will serve permanently in the family court. The first

con't page 6

IN THIS ISSUE

NEVADA FAMILY LAW REPORT is a quarterly publication of the Family Law Section of the State Bar of Nevada. 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 Nev. Fam. L. Rep, Spring, 1992, at ____.
Nevada Family Law Report is supported by the Family Law Section of the State Bar of Nevada and NFLR subscriptions.

From the Editor

by Marshal S. Willick

As promised, books to review have started to arrive. Collier's *Family Law and the Bankruptcy Code* is now available, an impressive-looking tome in what is certainly a hot field. Please contact me for details. Again, please contact me if there are specific books (or books in specific areas) that you would like to see reviewed or to review yourself.

This issue begins a series of perspectives on the new Family Court that will shortly be operational in Washoe and Clark Counties. It will be interesting, two or three years from now, to see how well reality conforms to our current expectations.

Much is happening in the family law area in Nevada. As you can see by the number and variety of recent opinions from the Nevada Supreme Court, developments abound in custody, support, visitation, property, etc. (the *Williams* case, reviewed in brief in the Case Summaries section, goes even beyond last year's *Amie* decision in making Nevada's omitted property law like that in other community property states). The northern and southern local rules committees should be issuing their proposed local practice rules for the new courts in the near future; thereafter, a broader committee will attempt to put into place uniform rules to make family law practice as similar as possible throughout the state. Judge John McGroarty of Las Vegas is starting to put together a new domestic relations practice manual (to replace the out-of-date family law section in the 1988 Michie Nevada Civil Practice Manual).

Things are already being primed for the next session of the Nevada Legislature. The Family Law Section's Child Support Statute Review Committee has completed its work and will have presented its Report to the Bar's Board of Governors for approval by the time this is printed. The document is intended to focus the semi-annual legislative debate in the child support field. Upon approval, copies of the Report should be available from the Bar or Legislature. A summary will be printed in the next issue.

The Family Law Section Executive Council continues to study the subject of certification/specialization. Letters to the Editor on that subject are invited. As we move toward a specialized court, with its own procedures, judges, and perhaps its own ethics code (the "Bounds of Advocacy" proposal was approved by the section membership at the last Spring Showcase in Tonopah), the possibility of having a certified, specialized Bar seems increasingly likely.

There has never been a better time for practitioners who have an opinion as to how this field should develop to express those opinions and help shape the style, procedure, and substance of family law.

Back copies of the *Family Advocate* (the ABA periodical for Family Law practitioners) contain much valuable information on practical "bread and butter" issues. For example, "Relocation," "Appreciation of Property," "Third Party Rights," "Trial Techniques," "Conflicts of Interest," and "Attorney Fees" are a few of the titles available. For copies, call the ABA at (312) 988-6114. Family Law practitioners who are not members of the ABA Family Law Section should consider joining; much valuable information is published in the *Family Law Quarterly* and the *Family Advocate*.

Kuhn from page 1

balancing of legal issues with psychological and sociological concerns. Family disputes universally require the integration of protections provided by the law with those interventions provided by social services, court services and mediation. The Family Court allows for specialization of judges and court personnel and the efficient handling of multiple family conflicts. A family court often consolidates alternative dispute resolution tools such as mediation, arbitration, settlement conferences and status conferences into more focused and authoritative procedures so duplication of services can be avoided.

A family court will be commonly staffed with specially trained intake professionals who can analyze and refer disputes to the appropriate process or processes resulting in time savings and fewer frustrations for the public.

A fundamental characteristic of family court involves the provision of the administrative, legal, counseling and enforcement services in or near the court itself. Long-established and effective family court systems have successfully incorporated these arms of the family court into the physical court facility. In doing so, the objectives of promoting settlement of family disputes and avoiding more structured and adversarial legal proceedings have often been realized.

A coordinated family court unites the substantive with the procedural aspects of conflict resolution. Without question, the future will see less change in the substantive matters of family law than those procedural. The arrival of Nevada's new family court with specialized personnel and services will help facilitate that change.

THE LEGISLATIVE FACE OF NEVADA'S FAMILY COURT

In early 1990, after pursuing a family court for Nevada for more than five years, then State Senator Sue Wagner approached the National Council of Juvenile and Family Court Judges with a request to assist Nevada in determining a structure for a possible family court.1

The National Council responded by calling together ten Nevadans representative of the three branches of state government and the Nevada Bar, forming a group that became known as the Nevada Family Court Task Force.2 After receiving testimony, visiting other family court jurisdictions and hosting a National Family Court Symposium, this ad hoc body offered its recommendations to the State Legislature during March, 1991.3

Many of these recommendations were incorporated into SB 395. Others were not within the constitutional authority of the legislature to consider, but were offered to the judiciary and appropriate executive agencies for consideration in responding to the new family court legislation.

Below is a synopsis of the legislative package and the corresponding task force recommendations, when applicable.

Creation of the Court. Senate bill 395 established in counties whose population is 100,000 or more a family court as a division of the district court, e.g. Clark and Washoe Counties, effective January 4, 1993.4 Judicial districts whose population is less than 100,000 are mandated to. . ."enter into agreements or otherwise cooperate with local agencies that provide services related to matters within the jurisdiction of family courts to assist the family court or district court in providing the necessary support services to the families before the court."5 The district courts of each judicial district wherein a family division was not created may report to the 67th session of the legislature relative to their desire to have a family court created in their district.6

The Task Force Report recommended that each court district have established within it a division to be designated as the family court.7 The idea of a separate family court in judicial districts other than the 2nd and the 8th, however attractive, was impractical. The intent of the legislative package appears to have been to promote access to those services which will become integrated within the family court divisions in the 2nd and 8th judicial districts.

Physical Facilities. The Task Force Report recommended the family court, whenever possible, be located in a separate facility to facilitate a "holistic approach to the utilization of resources."8

While SB 395 did not address family court facilities, another bill, SB 559 authorized Clark County to assess an ad valorem property tax increase to fund a new family court facility. While Clark County Commissioners have deferred any

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 Marshal Willick, 330 S. Third St., #960, Las Vegas, NV 89101. Telephone, 384-3440.

Articles published in the NFLR are eligible for continuing legal education credits. Contact the MCLE Board, 329-4443, for applications.

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

new assessments for a year or more, Officials of the 8th Judicial District are forging ahead with plans for a separate family court facility adjacent to the existing juvenile court facility on East Bonanza Road. A Family Court Facility Committee now meets on a regular basis. Initial funds for facility planning are expected to be available from the County's general fund. Actual construction may commence as early as 1993.

The 2nd judicial district has no immediate plans for a separate family court facility, although officials are hopeful such a complex located adjacent to the Children's Cabinet facility may some day be possible.

Family Court Jurisdictions. SB 395 merges all matters that were traditionally heard in the juvenile division of the district court with all matters related to domestic relations. These include: delinquency, juvenile traffic, status offenses, truancy, abuse and neglect, termination of parental rights, family violence protective orders, CHINS and PINS merging with divorce/dissolution, marital property, separation, annulment, child custody, support, visitation, paternity, PKPA, UCCJA and URESA.9 Also included within the jurisdiction of the new family court will be adult and juvenile guardianships, mental health matters including civil commitment and confinement, name change, compromise of minor's claim, right to die, abortion, living wills and emancipation.10

The jurisdictional parameters outlined in SB 395 are nearly consistent with Task Force recommendations relative to family court jurisdiction. While the legislation includes a provision for compromise of minor's claims, it is omitted from Task Force recommendations. During Senate and Assembly Judiciary Committee hearings, this subject was addressed by the practicing bar as more appropriate for the district court department handling the primary litigation.

Of particular note is the absence of criminal jurisdiction by the new family court over alleged child and spouse abuse perpetrators. These matters will remain within the jurisdiction of district courts generally or by assignment to the criminal division, where appropriate.

Judges/Court Personnel. SB 395 creates six new family court judge positions in the 8th judicial district and one new family court judge position in the 2nd judicial district.11 These new positions will be filled via the general election ballot on November 3, 1992.12 Candidates must declare their candidacy specifically for the family court, as opposed to running generally for the district court which could allow the possibility of rotation in or out of the family division during the six year term.13 Successful candidates will assume office for a six year term beginning January 4, 1993, at which time the family court will become operational.14

Although not legislatively mandated, to assist the family division of the 2nd judicial district court, District Judge Charles McGee will serve as a second judge of the family division until January 1996, at which time a second district family judge position will be authorized by the Washoe County Commissioners.

SB 395 makes further provision for the mandatory training of newly elected or appointed judges of the family division. New judges must attend and complete training at the first opportunity after their election or if temporarily appointed, at their first opportunity after 90 days service on the bench.15

Anticipating the need to increase the size of the family court judiciary over succeeding years, SB 395 requests a study be conducted by the National Council of Juvenile and Family Court Judges to determine appropriate workload levels for the family court. The results of that study are to be reported to the 67th session of the legislature.16

Task Force recommendations relative to the family court judiciary expressed concern relative to the expertise and experience of those on the family court bench.17 Equal status of the family court judge with judges of general jurisdiction was considered priority, as was electing judges specifically to the family court bench for no less than four years. With that degree of commitment to a high pressure assignment comes a risk of judicial burnout. Concern was expressed relative to allowing the family court judge to hear all aspects of the family court docket and to utilize the direct calendar or one case, one judge system.18

What the family law bar might expect from this cadre of new judges is a renewed commitment to the family. While issues of calendaring and rotation within the family division itself are better addressed by either local or Supreme Court Rule, the legislature appears to have responded within the parameters of their constitutional authority.

Other Provisions. The Legislature has sent a message by including within SB 395, language encouraging the new family court to engage in various methods of alternative dispute resolution wherever "practicable and appropriate."19 That such methods are considered less adversarial and dictated by less stringent guidelines in favor of dispensing a better brand of justice for children and their families is the purpose of the coordinated family court.

DAY TO DAY PRACTICE IN NEVADA'S FAMILY COURT

While the legislature has defined Nevada's new family court, its jurisdiction and its judges, day to day practice in the court has not been defined. Therefore, the judiciary and the practicing family law bar have a vitally important role in shaping future practice within the district family court.

Keeping in mind that delinquency and dependency adjudications will receive priority calendaring over domestic relations matters in the new family court, it is even more important that the judiciary and the family law bar involve themselves in the development of rules of court.

Universal concerns such as streamlining time to court hearings, simplified

access to the family court judge and imposition of mandatory mediation over child custody and visitation, as well as child support issues, are best addressed by the combination of legal professionals who confront these issues daily.

Other matters such as the prompt valuative scheduling of marital estates, utilization of mandatory disclosure forms and uncontested divorce forms would invaluably assist family law practitioners and should be subject to their input.

Members of Nevada's family law bar have suggested the need for a code of conduct and ethics such as that being adopted by the American Academy of Matrimonial Lawyers. The adoption of such a code of conduct and ethics would be one more step toward delivering that better brand of justice through the family court.

The Nevada Law Foundation has indicated interest to the National Council of Juvenile and Family Court Judges in facilitating a Family Court Rules Symposium which, if conducted, would provide a forum to help assure rules of court that would benefit practitioners, their clients and the courts equally. Should plans for this symposium proceed, family law practitioners should consider their involvement.

In the 8th judicial district, district court officials are working diligently toward a framework for local rules of family court. Those practicing within Clark County should be willing to assist them, as appropriate.

CONTEMPLATING THE NEW FAMILY COURT

Those who advocated and worked for the creation of a coordinated family court model for Nevada have not sat contentedly by since the passage of SB 395.

The 8th judicial district has formed three family court committees addressing facility, policy and core issues, respectively. Those committees, comprised of court and agency officials from throughout the county, are meeting long hours to solidify the new family court in their jurisdiction.

The 2nd judicial district is in the midst of developing a mediation arm of the court which will be heavily committed to the new family court operation. Court officials are also examining a process by which the Children's Cabinet in Washoe County would provide a holistic service provision to the court.

The College of Social Work and Community Sciences on the University of Nevada, Reno campus, has formed an ad hoc committee of persons representative of court and social services to aid those professionals who will facilitate and provide the coordinated service function to the family court. In cooperation with the National Council of Juvenile and Family Court Judges, this committee hopes to conduct one-day family court orientation workshops in Clark and Washoe Counties during April, 1992. It will also aid the National Council in complying with a legislative mandate to conduct an operational study of the new family court and report back to the 68th legislative session.

Previously discussed herein were plans to conduct a Family Court Rules Symposium. Should funding for this activity be secured, the family law bar will be invited to attend. This symposium is expected to offer the expertise of those within other family courts who have participated in developing rules of court. Considerable time will be dedicated to discussion and debate relative to developing appropriate rules for Nevada's family court.

SUMMARY

Delivering a better brand of justice for Nevada's children and their families can be done through the new family court if that balance between law and psychosocial relationships is achieved and maintained. The coordination of the various components that will comprise the family court are essential. Those working within the system should be prepared to work toward timely resolution of disputes, keeping in mind that the various disciplines should not hesitate to refer clients, parties or litigants to the appropriate office, bureau, clinic, program or service within the court where the expertise exists. This cooperation will naturally eliminate duplication of efforts and unnecessary commitment of resources and will make significant progress toward balancing the elements of family law practice.

Jeffrey A. Kuhn is a Staff Attorney at the National Council of Juvenile and Family Court Judges in Reno. He served as Director of the Nevada Family Court Study Project and recently co-authored with Professor Sanford N. Katz of Boston College Law School, "Recommendations for a Model Family Court." The publication was recently endorsed by the Family Law Section of the American Bar Association.

REFERENCES

[1] *Annual Report of the Delaware Family Court*, July 1990.

[2] Clark, H.H. Jr.; *The Law of Domestic Relations in the United States*, 2nd Ed., West, 1987.

[3] Dziech, B. W. and Schudson, C.B.; *On Trial*; Beacon, 1989.

[4] Folberg, J. and Milne, A.; *Divorce Mediation Theory and Practice*; Guilford, 1988.

[5] *General Laws of the Commonwealth of Massachusetts*, Chapter 215, Probate Court.

[6] Hofford, M. (ed.); *Families in Court*, NCJFCJ Press, June 1990.

[7] Katz, S.N. and Kuhn, J.A.; *Recommendations for a Model Family Court*, NCJFCJ Press, May 1991.

[8] Kuhn, J.A.; *Final Report of the Nevada Family Court Task Force*, NCJFCJ Press, March, 1991.

[9] Nevada Senate Bill 395 from the 66th session of the Nevada State Legislature (1991).

[10] Page, R.W.; *The Role of the Judge in Family Court*, October, 1990.

[11] Pressler, S.B.; *Rules Governing the*

Courts of the State of New Jersey, Gann, 1990.

[12] *Rhode Island Family Court Benchbook*, Volume One.

[13] Titus, D.; *Toward a Consolidated Approach to Legally-Related Domestic Problems: Nevada Creates a Family Court*, Nevada Public Affairs Review, UNR Center for Applied Research, 1990, Number 2, P.18.

Family Law Membership

The Family Law Section welcomes new members Richard Koch, John Graves, David Spurlock, and Morissa Schechtman.

When your dues statement arrives, don't forget to check your membership in the Family Law Section.

Jordan from page 1

selection for these new positions will be by election in 1992, to take office in January, 1993.

In addition to creating a family court, SB 395 attempted to resolve a potential jurisdictional dispute concerning Orders for Protection Against Domestic Violence issued pursuant to NRS Chapter 33. The final draft of the bill contains two conflicting provisions concerning this issue: one of the provisions (Section 8) amends NRS 4.370, which establishes Justices' Court jurisdiction, to eliminate Protection Orders from Justices' Court jurisdiction in judicial districts with populations over 100,000. However, another section of the act (Section 3) provides for concurrent jurisdiction between the Family Court and the Justices' Court. Since the Family Court is only created in judicial districts with a population of 100,000 or more, the two provisions are inconsistent with each other. The Nevada Constitution has been recently interpreted to prohibit concurrent jurisdiction between District Court and Justices' Court (*KJB, Inc. v. Second Judicial District Court*, 103 Nev 473, 745 P.2d 700 [1987]). It is most likely that SB 395 will be interpreted to allow only the district court to issue domestic violence protection orders in Washoe and Clark Counties.

S.B. 395 makes one additional change to the practice of family law in Clark County. The use of domestic relations referees in the district court of Clark County is abolished by Section 12.5 of the bill. After January 3, 1993, all pre- and post-divorce motions regarding custody, visitation, and support will be heard at the district court level by the family court judges.

CHILD SUPPORT

Two bills were passed by the legislature which affect child support. Senate Bill 75 makes the following changes:

A. Child support enforcement (URESA) and paternity hearings will be conducted within the court system by a master, in all counties except Clark County. This eliminates the administrative procedure within the Nevada State Welfare Division which was created on an experimental basis two years ago.

B. At enforcement hearings, the master has the authority to recommend an adjustment of a previously imposed duty of support. Either an increase or decrease in support can be recommended. The legislature has thus overruled the Supreme Court's decision in *Taylor v. Vilcheck*, 103 Nev. 462, 745 P.2d 702 (1987).

C. Support orders from other states can be modified using the foreign order registration procedure set forth in NRS 130.330 et seq.

D. A master's recommendation to modify a support order issued by a district judge from within the state of Nevada must be reviewed and approved by the court issuing the original order.

E. A master's recommendation concerning child support is given effect immediately unless stayed pending review by the district court judge.

Senate Bill 280 makes a number of additional changes to child support-related provisions, including the following:

A. Requires that the state's child support formulas established in NRS 125B.070 be reviewed every four years by the State Bar of Nevada; the State Bar's recommendations are to be reported to the legislature. The first report will be made by January 18, 1993.

B. NRS 125B.110, which extends the duty of support beyond the age of majority for a handicapped child, was amended by providing a new definition of "handicapped".

C. NRS Chapter 126, relating to paternity, is amended to allow genetic paternity testing in addition to blood testing.

D. NRS 126.121 is amended to provide that failure to appear for a court-ordered blood or genetic test to determine

paternity may be a basis to find that the non-attending party is the father of the subject child.

E. Amends NRS Chapter 130 to clarify that all URESA support orders must be established in accordance with NRS 125B.070 and 125B.080.

F. Amends NRS 432B to provide that support orders directed at the parents of children in the custody of a state agency be established in accordance with NRS 125B.070 and 125B.080.

G. Repeals NRS 31A.170, which allowed a wage assignment to be discontinued after eighteen months of timely payments.

H. Allows notice of child support enforcement proceedings to be served by restricted-delivery mail (personal service is not necessary).

DOMESTIC VIOLENCE

Assembly Bill 743 provides that violation of a temporary restraining order issued in a divorce action which is "in the nature of" an order for protection against domestic violence is a criminal act punishable as a misdemeanor. Violations involving physical violence carry mandatory minimum sentences which are consistent with sentences required after conviction for a violation of an Order for Protection Against Domestic Violence issued pursuant to NRS Chapter 33 which involves violence (NRS 33.100). In addition, A.B. 743 amends NRS 125.480(4) by directing the court to consider domestic violence as a factor when determining custody of minor children.

MISCELLANEOUS

A. Senate Bill 609 amends NRS 125A.330 to expand the rights of grandparents and great-grandparents to seek court ordered visitation, and grants priority to relatives within the third degree of consanguinity in determining custody in various domestic relations or juvenile court proceedings.

B. Senate Bill 304 requires the establishment of centers to provide services to displaced homemakers throughout the state.

C. Senate Bill 570 declares the legislature's intent "that law enforcement agencies in this state give a high priority to the investigation of crimes concerning missing children" and establishes guidelines to be followed by law enforcement agencies and school districts in dealing with cases of missing children.

D. Assembly Bill 521 makes various changes to NRS Chapter 127 concerning adoptions, including which agencies may be involved in placing children for adoption and how information is disseminated.

REORGANIZATION OF STATE SERVICES

In addition to the above, the legislature approved a reorganization of the State Department of Human Resources to consolidate all state services to families and children in a new Division of Child and Family Services. Previously, services were provided through the Welfare Division, Division of Mental Health and Mental Retardation, and Division of Youth Services. The transition to the new structure should be completed within the next several months.

Errata

In the last issue of NFLR, the article by Charlotte Kiffer, "Mediation in Nevada," was missing the final three paragraphs. We apologize for the error and print the correction here.

When to Use Mediation

Mediation has been successfully utilized in the following types of disputes: civil matters, divorce, custody/visitation, business, community, environmental, educaitonal and family, including parent-child conflicts, adoption matters, elder care issues, cohabitation arrangements and estate settlements. However, both parties must approach the mediation process in good faith.

Persons who have mediated often come to recognize that through self-determination, they have left channels of communication open, avoided destroying once valued relationships and have saved time and money. Individuals and groups who use mediation generally respond favorable to post mediation evaluations about its fairness and value (Folberg and Taylor, 1984). [7] Research studies show that participants are more likely to follow through with a mediated solution than with a court imposed solution. Likewise, participants are less likely to return to court when they have a mediated agreement.

Conclusion

The use of alternative dispute resolution is being implemented throughout the nation and the world. Recently in Nevada, the Judiciary Committee of the 1991 Legislature urged the courts and the Nevada Bar to inform the public and legal clients, respectively, of alternative methods of resolving disputes. Mediation has been successfully utilizied in various types of disputes. It is a confidential process that empowers participants, with the use of legal and other consultants, to assume responsibility for making decisions that affect their lives. The process encourages cooperation and minimizes intrusion. Participants are more likely to follow through with a mediated solution than a court imposed one. Nevada citizens are fortunate to have court connected programs, private mediators and a soon-to-be neighborhood justice center to assist them in obtaining resolutions to their disputes.

PARTITION OF OMITTED ASSETS AFTER *AMIE*: NEVADA COMES (ALMOST) FULL CIRCLE

by Marshal S. Willick, Esq.

The Nevada Supreme Court has reaffirmed its forty-year old holding authorizing the partition in a post-divorce action of community property assets not divided at the time of divorce. In doing so, however, the court largely disregarded its contradictory holdings of the past eleven years, leaving the subject area open to considerable uncertainty.

In the 1949 case of *Bank v. Wolff*, the Nevada Supreme Court held:

In the absence of any reference thereto in the decree, the parties to the suit [for divorce] became tenants in common of the community property . . . this right must be enforced in an independent action.

The *Wolff* case would not be cited for another forty years. In the meantime, the court decided a series of cases brought by former spouses seeking to divide pensions that had been omitted from divorce decrees. In those cases, however, the court refused to apply the *Wolff* reasoning or holding. Instead, the court repeatedly maintained that the principle of *res judicata* silently awarded retirement benefits to the spouse in whose name the benefits accrued unless the divorce court stated otherwise.

THE *AMIE* CASE; A RETURN TO PARTITION

Amie v. Amie involved a suit by Deborah Amie to partition her community property share of the proceeds of a lawsuit brought by Frederick Amie for lost wages. The parties "simply omitted" the property from their property settlement agreement and divorce decree "[f]or reasons that are not entirely clear from the record."

Noting the *Wolff* holding quoted above, the *Amie* court found that the right to bring an independent action for equitable relief from a judgment is "not necessarily barred by res judicata." The court noted that the proceeds of Frederick's lost wages claim were apparently omitted from the parties' divorce settlement only because of their "mutual mistake" in leaving it out of the property settlement agreement.

The court then reaffirmed its adherence to *Nevada Industrial Dev. v. Benedetti*, which involved a second suit by a party to an earlier suit over land. The parties had, by "mutual mistake," settled the earlier case for $30,000.00 too much. The *Benedetti* court found that the overpayment constituted "unjust enrichment," and that the court's interest in finality did not bar a later independent action where "the policies furthered by granting relief from the judgment outweigh the purposes of res judicata."

After quoting the earlier holding, the *Amie* court found that Deborah's equitable action did not violate any of the "policies and purposes of the doctrine of res judicata," so there was "no reason in fairness and justice that she should not be allowed to proceed to have this property partitioned in accordance with *Wolff*." The court summed up by holding that since the proceeds of Frederick's suit were left unadjudicated and were not disposed of in the divorce, they were held by the parties as tenants in common, and the property was "subject to partition by either party in a separate independent action in equity."

CAN *McCARROLL* BE DISTINGUISHED?

Amie is not remarkable except in light of the court's prior denial of partition in cases between former spouses. The foundation for that line of cases was the 1980 decision of *McCarroll v. McCarroll*, in which a former wife sought partition of an omitted forest service pension on the ground that the former wife "had a fair opportunity to present the claim she is now making to the divorce court." Although *McCarroll* itself was not cited, its reasoning was followed six years later in *Tomlinson v. Tomlinson*.

The *Amie* court sought to distinguish *McCarroll*, claiming that in the earlier case the wife "had a fair opportunity during the divorce litigation to litigate the fraud allegations." The face of the *McCarroll* opinion, however, shows that the parties in that case had orally agreed to divide their property, but that their agreement "did not include the pension and no mention was made of it during the divorce action." In other words, as of the time of divorce, the facts of *McCarroll* were indistinguishable from those of *Amie*.

In *McCarroll*, however, the wife alleged that her husband's silent retention of the pension was due to his "fraudulent concealment" of the asset, whereas Deborah Amie alleged only the parties' "mutual mistake" in leaving the asset out of the divorce. The fraud alleged by Mrs. McCarroll in her partition case had not yet *occurred* at the time of divorce. The *Amie* court therefore incorrectly stated that she could have litigated that claim in her divorce action; what Mrs. McCarroll *could* have done in her divorce was litigate her right to the property itself (if she realized that she had such an interest),

just as Mrs. Amie could have done in her divorce action.

It is difficult to come up with any real distinction between the cases, except as to the form of pleading. The *Amie* court apparently relied substantially on form in reaching its result, finding:

Since the parties omitted to include this property in their written agreement and hence in the divorce suit itself, the property never came within the field of the prior divorce litigation.... There was no dispute as to the nature of the property, and neither party claimed exclusive entitlement to this property.

The court thus implied that its holding was based on the existence of mistake but *not* fraud, and the failure of the party holding the omitted asset to "claim exclusive entitlement" to it. Such an implication, however, would lead to the absurd result that partition would have been denied in *Amie* if Frederick asserted either that he intended to defraud Deborah, or that he simply claimed that the property was all his.

BUT WHAT OF *TAYLOR*?

The *Amie* court's distinction of *McCarroll* is even more problematic in light of the court's decision, just fourteen months before *Amie*, in *Taylor v. Taylor*. The *Taylor* opinion addressed a consolidated case involving two sets of former spouses whose divorce decrees omitted military retirement benefits. The parties to the earlier of the two cases (the Taylors) were divorced in 1970. At trial in the partition case, all parties testified that they had no idea the omitted pension was a divisible asset at the time of divorce (i.e., they were mutually mistaken as to the character of the asset).

In the second case, however (Campbell), the parties had been divorced in 1980, two years after Nevada case law established that pensions were community property divisible upon divorce. The wife had been unrepresented at the time of divorce. The divorce decree granted the husband the house, its furnishings, and the bulk of the parties' tangible assets. He also kept all assets *omitted* from the decree, including all joint bank accounts and the military pension with a present value upon divorce of about $200,000.00. He paid no alimony, no property equalization, and minimal child support. Mrs. Campbell received custody of three children, a used car, and some raw land in another state that had earlier been given to her by her mother. In the later partition case, the husband conceded that he knew all along that the pension was divisible community property, and that he discussed the matter with his attorney before the divorce. The divorce attorney had deliberately omitted the pension from the Complaint for Divorce and from the Decree.

If there was truly a distinction between property omitted by mistake and property omitted by fraud, the court would presumably have said so given these facts. Instead, the court merely recited that it had consolidated the cases for disposition on appeal "because they involve identical issues of law."

The *Taylor* court refused the former wives' invitation to apply *Benedetti* and *Wolff*; the court's decision made no mention of either "unjust enrichment" or the status of the parties as tenants in common of omitted assets. Rather, the court simply held that it did "not recognize a common law cause of action to partition retirement benefits not distributed as part of the property agreement at the time of divorce." The court reiterated its perception of a continuing legal distinction between "intrinsic" and "extrinsic" fraud, with only the latter justifying partition of omitted assets.

In a footnote, the court stated that "there is no evidence of fraud in these cases," and *denied* that its holding would

> allow a party to "hide" the retirement benefits from the other party and the court and avoid having them divided as part of the property settlement agreement as long as the other party does not discover the retirement benefits within the six-month period provided for by NRCP 60(b) for obtaining relief from a judgment. On the contrary, such conduct would most likely constitute a fraud on the court and NRCP 60(b) specifically provides that it "does not limit the power of a court to entertain an independent action to relieve a party from a judgment ... for fraud on the court."

Given the facts before the court in *Campbell*, however, the behavior that can be tolerated without giving rise to a need for judicial intervention is remarkably great.

The *Taylor* court's requirement of finding "extrinsic fraud" before allowing partition, moreover, was nowhere to be seen in the *Amie* decision, which did not cite *Taylor* at all. No legal distinction as to the character of the asset to be partitioned could be drawn, since both the omitted wages in *Amie* and the omitted pensions in *Taylor* are clearly community property.

Perhaps more telling than anything directly stated by the court in *Amie* was its alignment of its early decision in *Wolff* with the seminal California case of *Henn v. Henn*. The *Henn* decision is widely considered the foundational case for modern partition actions generally; the case itself expressly held that military retirement benefits omitted from a decree of divorce are subject to partition in a later independent action by the non-military spouse. It seems possible, therefore, that *Amie* directly undercuts *Taylor* and foreshadows the reversal of the earlier case.

CONJECTURAL CONCLUSIONS

It is clear, however, that *Wolff*, *Henn*, and *Amie*, on the one hand, and *McCarroll*, *Tomlinson*, and *Taylor*, on the other, are directly contradictory, and that both lines of authority cannot be indefinitely maintained as valid authority.

In the current, unsettled state of the law, practitioners must be very sensitive to potential malpractice considerations. If property is omitted from disposition at

the time of divorce, it may, or may not, ultimately prove to be partitionable in a later action. There is thus possible exposure to the attorneys for both the possessory and the non-possessory spouses, whether the omission was calculated or inadvertent.

Given the lack of any meaningful factual distinction among *McCarroll*, *Taylor*, and *Amie*, the law of Nevada concerning partition of omitted assets is quite uncertain. There appear to be no coherent guidelines for analysis according to the character of the assets omitted, the means by which they were omitted, or the form of the pleadings involved during attempted partition.

Thus, practitioners can only speculate as to what partition cases may be validly brought. Those faced with such a case can either wait for clarification from our supreme court, or simply litigate the case, secure in knowing that one of the two contradictory lines of cases reaffirmed by the court within the past two years will support whatever position they take.

References

[1] 66 Nev. 51, 202 P.2d 878 (1949).

[2] It next appeared in *Daniel V. Baker*, 106 Nev. __, __ P. 2d (Adv. Opn. No. 100, Aug. 21, 1990), the subject of this article. After *Daniel*, the case was next cited in *Amie v. Amie*, 106 Nev. __,__ P.2d (Adv. Opn. No. 100, Aug. 21, 1990), the subject of this article.

[3] See *McCarroll v. McCarroll*, 96 Nev. 455, 611 P.2d 105 (1980); *Tomlinson v. Tomlinson*, 102 Nev. 652, 729 P.2d 1363 (1986); *Taylor v. Taylor*, 105 Nev. 384, 775 P.2d 703 (1989). *McCarroll* and *Tomlinson*, along with *Wolff*, were discussed at length in Willick, "Res Judicata in Nevada Divorce Law: An Invitation to Fraud," Nev. Fam. L. Rep., Spr., 1989, at 1 (hereafter "An Invitation to Fraud").

[4] 106 Nev. __,__,P.2d__(Adv. Opn. No. 100, Aug. 21, 1990.

[5] The court expressly declined to rule on whether the general tort damages or punitive damages awarded to Frederick constituted community property, since those items had not been contested in the district court.

[6] *Amie*, Advance Opinion at 1.

[7] *Id.* at 2.

[8] 103 Nev. 360, 741 P.2d 802 (1987).

[9] 103 Nev. at 365.

[10] *Amie*, Advance Opinion at 2-3.

[11] *Id.* at 3.

[12] 96 Nev. 455, 611 P.2d205 (1980).

[13] 96 Nev. at 456.

[14] *Tomlinson v. Tomlinson*, 102 Nev. 652, 729 P.2d 1363 (1986).

[15] *Amie*, Advance Opinion at 2.

[16] 96 Nev. at 456.

[17] The advance opinion in *Amie* erroneously refers to this asset as "prison benefits."

[18] *Amie*, Advance Opinion at 2.

[19] 105 Nev. 384, 775 P.2d 703 (1989).

[20] See *Ellett v. Ellett*, 94 Nev. 34, 573 P.2d 1179 (1978).

[21] *Taylor*, 105 Nev. at 385, n.1.

[22] Such a distinction would seem to render meaningless the cause of NRCP 60(b)(2) which authorizes a party to seek relief from a judgment for "fraud" (whether heretofore denominated intrinsic or extrinsic.)" It is possible the court was seeking to preserve the intrinsic/extrinsic distinction only for actions (as opposed to motions) under NRCP 60(b), but no rationale for such a distinction was given.

[23] *Taylor*, 105 Nev. at 387, n.4.

[24] *See Ellett v. Ellett*, 94 Nev. 34, 573 P.2d 1179 (1978), *supra*.

[25] 605 P.2d 10 (Cal. 1980).

[26] This is so much the case that partition cases in California are frequently referred to as "*Henn*" actions."

[27] The case exhaustively refutes any *res judicada* or collateral estoppel defense to such a partition action. Under California statutes virtually identical to Nevada community property law, the California Supreme Court has uniformly concluded that no such defense is even theoretically capable of being valid. Henn is discussed at length in "An Invitation to Fraud," *supra* n. 3.

A "courtroom" scene from the Tonopah meeting. Pictured here , left to right, are Dr. Louis Etcoff, moderator Peter Jaquette, Referee Terrance P. Marren, Gary Silverman and Stephen W. Sessums.

In re Pacana: Child Support Obligations Under a Chapter 13 Bankruptcy Plan

by Deborah E. Schumacher

A recent Ninth Circuit Bankruptcy Appellate Panel decision provides an important tool for a family law practitioner whose client wants to collect child support, spousal maintenance or alimony arrearages from a debtor during a Chapter 13 bankruptcy case. The decision effectively makes rehabilitation through Chapter 13 unavailable to a debtor with heavy child support arrearages and, by reasonable extension, spousal support, alimony and maintenance arrearages, which are treated the same as child support under the Bankruptcy Code.

The Appellate Panel held that a debtor was not required to include child support obligations in a Chapter 13 bankruptcy plan and that the debtor's ex-spouse was not stayed from collecting delinquent child support during the debtor's Chapter 13 case. *Pacana-Siler v. Pacana, (In re Pacana)*, 125 Bankr. 19 (Bankr. 9th Cir. 1991).

Ninth Circuit Bankruptcy Appellate Panel opinions are binding authority on Nevada bankruptcy courts, and, on bankruptcy issues, would be followed by Nevada state courts as well.

Background

The debtor ex-husband filed a petition under Chapter 13 of the Bankruptcy Code, accompanied by schedules showing unsecured debt that included $13,900 to his ex-wife for child support arrearages. His Chapter 13 plan stated that the ex-wife's debt was classified as "priority," but the plan's disbursement provisions did not include any priority payment. Rather, the $13,900 was included in the total sum of unsecured debt, which was to be paid over 36 months, at 14 cents on the dollar. The ex-wife did not appear at the plan confirmation hearing, or object to the plan, and the plan was confirmed.

After confirmation, the ex-wife sought relief from the automatic stay to collect the past due child support. The bankruptcy court granted her motion, and ruled that in addition to what she received under the plan, the ex-wife "may collect an additional $250 per month from the debtor to be applied against the arrearages. This additional $250 may be collected upon immediately by agreement with or levy upon the debtor's wages or other moneys due him."

The debtor appealed, arguing (1) that the lift stay order rendered his plan unfeasible because he would have insufficient income to pay living expenses after making plan payments, and (2) that his plan impliedly provided for 100% payment of the arrearages by designating them as a priority claim (even though it included no payment schedule.)

The Opinion

The Bankruptcy Appellate Panel first considered the relevant bankruptcy statutes.

It summarily rejected the argument that support obligations were a priority claim because Bankruptcy Code Sec. 507 (which defines priority claims) does not include support obligations.

It next discussed the Bankruptcy Code provisions which govern treatment of claims under Chapter 13 and the effect of confirming a Chapter 13 plan on creditors' rights. Generally, a debtor may modify the rights of unsecured creditors by paying them less than the full amounts of their claims, as long as they receive more than they would if the debtor's assets were liquidated under Chapter 7.

Once a plan is confirmed, assuming the creditor got proper notice, the plan binds the debtor and the creditor, regardless of whether the creditor acquiesced or its claim is treated in the plan. Further, upon confirmation, absent a contrary provision in the order confirming the plan, bankruptcy estate property vests in the debtor free of all creditor claims, except as the Chapter 13 plan requires those claims to be paid.

Upon completing all plan payments, the debtor receives a discharge of all debt provided for by the plan. A Chapter 13 discharge, however, does not include debts for child support or to a former spouse for support, alimony or maintenance.

Finally, the Bankruptcy Appellate Panel noted that the automatic stay of all collection efforts, explicitly excepts actions to collect "alimony, maintenance, or support from property that is not property of the estate...."

Considering these provisions together, the Panel found that Congress manifested an "intent that child support obligations be excepted from the broad reach of Sec. 1322 [regarding permissible and mandatory plan contents] and 1327 [regarding the legal effect of plan confirmation], and therefore from the effects of a Chapter 13 plan, as well as the post-confirmation automatic stay." The Panel concluded: . . . "[C]hild support claimants need not wait in line with [ordinary unsecured creditors], but rather may proceed against the debtor without hindrance of either automatic stay or discharge."

A Critique

Bankruptcy and state domestic relations law and policy often collide, and can be difficult to reconcile. This opinion, is inadequate, however, because it fails to answer a central question.

A key legal issue in this appeal, on which the Panel "punts," is whether post-confirmation wages are bankruptcy estate property. This is important because the exception from the automatic stay for collection of alimony, maintenance and support during a Chapter 13 bankruptcy is limited to "property that is *not property of the estate.*"

Bankruptcy Code Sec. 1306 provides that estate property in a Chapter 13 case includes a debtor's earnings "after the commencement of the case but before the case is closed, dismissed or converted...." A Chapter 13 case is not closed on confirmation, but upon completion of the plan period or dismissal of the case. Bankruptcy Code Sec. 1306 thus seems to mean that wages are estate assets during the plan period.

The competing view is that Bankruptcy Code Sec. 1327, which vests all bankruptcy estate property in the debtor upon plan confirmation, means that future wages also vest in the debtor at confirmation. Under this interpretation, the estate "vanishes" upon plan confirmation. Since there no longer is any estate property, non-dischargeable support or alimony can be collected from any property of the debtor.

A third, hybrid, view is that any property designated in the Chapter 13 plan or the order confirming it as necessary for the plan's execution remains bankruptcy estate property. All other bankruptcy estate property vests in the debtor at confirmation. Under this reasoning, after plan confirmation, non-dischargeable support or alimony may be collected from assets not needed to fund the plan.

The Appellate Panel acknowledges only in a footnote the legal issue of whether post-plan confirmation wages are bankruptcy estate property. It states it is not deciding the issue because it is not necessary to resolve the appeal. Since the order that the Panel affirms specifically allows garnishing the debtor's wages during his Chapter 13 plan, the issue in fact is central to the decision. The holding in *Pacana* is logical only if the Panel has concluded that post-confirmation earnings are not estate property. Otherwise, the Panel's ruling sanctions violating the automatic stay.

A Chapter 13 debtor must commit all of his or her disposable income to paying unsecured debt during the plan period in order to confirm a plan, if a creditor or the trustee insists. Consequently, few Chapter 13 debtors will have any additional funds to pay support arrearages. Clearly, most Chapter 13 debtors will be using post-plan confirmation wages as the source of plan payments. An order to pay arrearages from wages during the plan period virtually will guarantee default on plan payments.

The Bankruptcy Code does not grant priority status to the payment of ongoing or delinquent support debt. Where *Pacana* is followed, however, the aggrieved former spouse can attach assets (usually wages) that would otherwise pay other creditors through the repayment plan. Other general creditors must accept payment under the plan's terms and are stayed by the Bankruptcy Code from instituting similar collection action. *Pacana* gives support, maintenance and alimony arrearages a *de facto* priority status in a Chapter 13 case.

References

[1] Chapter 13 proceedings are voluntary. Generally, Chapeter 13 is available to individuals with regular incomes. As long as creditors receive more than they would in a Chapter 7 liquidation, a Chapter 13 debtor may retain his or her property while repaying creditors over usually three, and not to exceed five, years.

[2] *Pacana*, 125 Bankr. at 21.

[3] *Id.*

[4] *Id.*

[5] 11 U.S.C. Sec. 1322(b)(2) & 1325(a)(4).

[6] 11 U.S.C. Sec. 1327(a).

[7] 11 U.S.C. Sec. 1327.

[8] 11 U.S.C. Sec. 1328.

[9] 11 U.S.C. 1328(a)(2) & 523(a)(5).

[10] 11 U.S.C. Sec. 362(b)(2).

[11] *Id. Pacana*, 125 Bankr. at 22.

[12] *Id.* at 24.

[13] 11 U.S.C. Sec. 362(b)(2) (emphasis added).

[14] *See*, e.g., Judge Ashland's dissent in *Pacana*, 125 Bankr. at 27, which flatly assets that post-confirmation wages are estate property. *See also*: Note, "Property of the Estate After Confirmation of a Chapter 13 Repayment Plan," 65 *Wash. L. Rev.* 677.

[15] *See*, e.g., *Mason v. Williams* (*In re Mason*), 51 Bankr. 548 (D.Ore. 1985).

[16] *In re Root*, 61 Bankr. 984, 985 (Bankr. D. Colo. 1986) (reasoning that there must be a post-confirmation estate because all plan payments are administered by a court-appointed trustee and the trustee must have something to administer).

[17] 125 Bankr. at 22 n. 4.

[18] *Id.*

[19] 11 U.S.C. Sec. 362(b) (2).

[20] 11 U.S.C. Sec. 1325(b)(1)(B).

Coming Next Issue

More on the Family Court!

Alimony Revisited
by Mary Anne Decaria

•

Some Thoughts on the New Family Court System
by W.E. Freedman

•

Family Court and URESA: Child Support Practice in Clark County in the 90's
by Roberta J. O'Neal

The Legislative Politics of Nevada's Family Court

by Dina Titus

In November 1992, seven new family court judges will be elected in Nevada, thus bringing to fruition a project begun in 1985 when State Senator Sue Wagner (R, Reno) introduced SB328 in the Nevada Legislature. Wagner's bill mandated that one judge in each county with a population of 100,000 or more be named to serve a two-year term as judge of a special division with exclusive jurisdiction in family-related cases. Opposed by the judiciary on the grounds that it was unconstitutional and violated separation of powers between the legislature and the courts, the bill died in committee without ever coming up for a vote.

Two years later, Wagner reintroduced the Family Court Bill as SB446 during the 1987 session, where it met similar opposition. Determined to establish a family court by whatever means, Wagner, now chair of the Judiciary Committee, abandoned SB446 in mid-session and moved instead for a constitutional amendment. This would circumvent the judiciary's objection by altering the constitution to specifically allow the legislature to create such a court. Accordingly, she introduced SJR24 which passed overwhelmingly in both houses, 20 to 1 in the Senate and 42 to O in the Assembly.

The resolution returned, as dictated by the amendment procedure in Nevada, for a second vote in the 1989 session. Again the resolution passed with only one negative vote in the Senate and none in the Assembly. It then appeared as Question 1 on the November 1990 ballot and was approved by a popular vote of 204,981 to 105,338, almost two to one in favor.

When the legislature convened in 1991, it began posthaste to develop appropriate procedures for implementing the mandated constitutional change and establishing the new family court. What would it look like; how would it function; and who would pay for it? Two weeks into the session, Assemblywoman Myrna Williams introduced AB278. The bill had been drafted by Jeffrey Kuhn, Director of the Nevada Family Court Task Force, a group of twelve representatives from the judiciary, the legislature, executive agencies serving children and families, and the state bar. The Task Force, organized in early 1990 by Senator Wagner and Louis McHardy, Executive Director of the National Council of Juvenile and Family Court Judges, met during the interim to study the family court concept and determine the most appropriate model for Nevada.

AB278 embodied their recommendations. Lobbied heavily by Kuhn and Judge Charles Thompson, who until recently had opposed the creation of a family court, the bill underwent considerable revision before finally being passed by the Assembly, 39 to 3, on May 27th, 1991.

Meanwhile, the Senate Judiciary Committee, none of whose members had been privy to the interim negotiations, grew impatient and introduced its own family court bill, SB395, on April 10. A public hearing was conducted in Las Vegas on April 19, where, although AB278 was still mired in the Assembly, testimony was taken on both family court bills.

While the two versions had much in common, several substantive differences sparked debate. Among the jurisdictional considerations, the question of whether cases involving juvenile matters should be handled by the new, specialized court, was the most controversial; others, such as quardianships and premarital agreements, were fairly easily resolved. Major disputes also centered around the number of new family court judges and the method of judicial selection to be employed. The lines were so firmly drawn, in fact, the parties remained entrenched until the final hours of the session, prompting the press to speculate that the "family court bill [was] on ropes" (*Las Vegas Sun*), June 30, 1991).

In the debate over how many judgeships to create, the overriding concern was financial. The State would be obligated to pay salary and benefits at approximately $95,000 for each new judge, while the county would bear the burden of additional operating costs of the court. Strongly supported by the district judges of Clark and Washoe Counties, AB278 was much more generous with taxpayers' dollars than SB395.

The Assembly bill originally established eight new family judgeships in Clark and two in Washoe and further mandated an increased ad valorem tax of $1.92 on each $100 of assessed valuation on all taxable property in the two counties to be used to support the new family courts. By the time the bill passed the Assembly, however, the number of judges had been reduced to seven and one, respectively; and the tax provision had been amended out.

The more fiscally conservative Senate Judiciary Committee, on the other hand, favored a gradual approach with lower initial capital outlay. Its bill, SB395, created only four new judgeships in Clark and one in Washoe; it simultaneously abolished the three existing district court referees hearing cases in the South who cost the state approximately $75,000 each. Finally, in light of the recent "fair share"

shift of some $16 million to Clark County, the Senators saw no need to include a provision allowing the counties to increase taxes to pay for family court. They further argued that, because no mention of increased cost to taxpayers had appeared in the "arguments against passage" which accompanied the ballot question, the people did not realize they were voting for a tax increase when they supported question 1. (Note: The tax increase came back, however, in the form of a separate bill, AB559, which eventually passed the Assembly 40 to 1, with one abstention, and the Senate, 15 to 6).

The second major point of contention was the selection of family court judges. Wagner and Williams advocated the specific election of permanent family court judges to serve solely in that capacity. They cited arguments that this would produce more committed, more competent judges who make the choice initially to devote their careers to family matters and then build expertise through experience.

The Senate Judiciary Committee, on the other hand, favored rotating, rather than permanent, family court judges. SB395 thus called for the creation of five new district court judgeships and the staffing of family court, on a two year rotating basis from among the augmented cadre of district court judges; this concept drew on the example of Clark County's juvenile court. While recognizing the advantages of specialization, the members were swayed by testimony concerning "burnout" and loss of sensitivity suffered by judges in this emotionally draining field. They also felt that a rotation scheme would deflect the inappropriate politicization of controversial family matters, such as child support or domestic violence, which will inevitably plague campaigns for family court judge.

The final product, like most legislation, represented a compromise. Signed by Governor Miller on July 5, 1991, SB395 had been amended to accommodate some of the provisions of AB278. In short, the legislation mandated the election of six new family court judges in Clark County and one in Washoe (in exchange for a commitment by the court to eliminate the three existing referee positions) and provided for the original, exclusive jurisdiction of the family court in certain proceedings related to family law, including juvenile matters and domestic violence. Finally, the measure required the court in those districts of the State where a family court was not created to report back to the 1993 legislature concerning their needs and desires in this area. After a long and arduous struggle, the new family court was thus established. Further monitoring will determine whether the law needs fine-tuning, but for now, it stands clearly as one of the sterling achievements of the 66th legislature.

Case Summaries

Dobson v. Dobson, 108 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 56, May 13, 1992) Appeal from order granting motion to quash service of process and voiding decree of divorce. Default divorce set aside by district court due to alleged fraud by husband in sending notice to wrong address despite knowing wife's address and having appeared in German divorce proceedings before starting Nevada action. NRCP 60(b)(3) is proper avenue for attacking a void judgment, citing Doyle v. Jorgenson. Because substantively the motion was brought under that rule, the order is appealable. J. Steffen dissents, claiming that wife certainly could choose to move to quash service of process if she wished and it should not have been "transmuted" by the court into an NRCP 60(b)(3) motion.

Cormier v. Manke, 108 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 48, May 13, 1992) Order denying attorney's fees under NRS 18.010(2)(a) (recovery of less than $20,000.00) vacated and remanded. District court refused to make award because final verdict quite close to amount ultimately recovered by verdict ($10,000.00 v. $12,750.00). While an award of fees is discretionary with the district court, where a non-statutory offer of judgment is rejected, court should consider reasonableness of rejection, including whether offeree eventually recovered more than offer, and whether rejection unreasonably delayed litigation without hope of greater recovery.

Sogg v. Nevada State Bank, 108 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 47, May 13, 1992) Premarital agreement reviewed de novo by appellate court whre trial court upheld it as voluntarily and knowingly entered into by both parties. Since agreement was drafted prior to adoption of Uniform Premarital Agreements Act (UPAA), it is enforceable if it either conforms to act or if conforms to common law prior to act. Here, agreement procedurally botched since wife never reviewed entire agreement with independent counsel. Presumed fiduciary relationship; presumption of fraud where the agreement greatly disfavors one of the parties. Presumption can be overcome by showing no real disadvantage — elements to consider are whether that party had ample opportunity to obtain independent advice of counsel; was not coerced into making rash decision by circumstances of signing agreement; had substantial business experience and acumen; and was aware of financial resources of other party and understood rights being forfeited. Agreement here stripped wife of all resources and means of support, and she would certainly have received more under community property law, so

agreement presumably fraudulent. Here, husband's attorney selected "wife's attorney" and set up appointment, which took less than an hour and was incomplete, and attorney refused to certify that he had independently advised her. Remand with instruction to retry case before a different district court judge.

Williams v. Waldman, 108 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 81, July 13, 1992) Parties were married (note brief interruption; first divorce during law school of husband) when lawyer husband worked his way to part owner of firm. He stopped wife from getting her own lawyer upon divorce with promise that "I will take care of you" and "I will be fair to you and the children," and he prepared all papers. Seven years later, in consulting with lawyer, wife first learned that law practice was community property divisible asset. Wife sought partition. General "each to keep property in his possession" release clause in property settlement held non-binding where asset not specifically mentioned in document. Professional practice is community property, including its good will, per Ford. Here, property settlement was product of an attorney-client relationship; fiduciary relationship subject to closest scrutiny by the courts. Here, there was detrimental reliance [apparently, upon silent omission]; where lawyer benefits in transaction, there is duty of full as well as fair disclosure. 1977 *Applebaum* case, in which divorce action was held notice of adversity of interests, factually distinguished by length of marriage, existence of children, and peculiarity of knowledge by husband here. In case of doubt or ambiguity, contract construed against the party drafting it. Husband failed to prove that wife "completely understood her property rights when she executed the agreement." Wife's disclaimer of interest in law practice "unavailing" where it was "made in an informational vacuum, without a full understanding of the rights she was relinquishing." Citing Amie and Wolff, unadjudicated property held to be subject to partition in independent suit in equity, and held in meantime as tenants in common. *McCarroll* case distinguished upon court's conclusion that "after a careful review of the record . . . under the circumstances of this case, where [wife] did not have independent representation, she did not have a fair opportunity to present this issue to the original divorce court." Wife need not prove fraudulent omission, "but simply that the community property at issue was left unadjudicated and was not disposed of in the divorce."

Martin v. Martin, 108 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 65, May 18, 1992) August, 1988 Decree ordered child support and for husband to pay two Visa accounts. He filed bankruptcy in September, and had them discharged in April, 1989. Wife filed a motion for spousal support; after evidentiary hearing, court found debt payment terms "characterized as being in the nature of alimony, maintenance and support" and so ordered support in an amount sufficient to repay wife for credit debts now falling to her. Here, "hold harmless" provisions qualified as maintenance or support, since court found that without it "spouse would be inadequately supported." Here, husband's assumption of debt was tied to agreement for lower child support; when he breached agreement, he left her inadequately supported. While discharge was proper, he could not discharge obligations arising out of decree. [NOTE: Court apparently did not address timeliness question of how wife could file a motion for alimony nearly a year after divorce was final; there may be additional procedural facts not recited in opinion.]

Schryver v. Schryver, 108 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 35, Mar. 5, 1992) Where motion for modification of spousal support was filed within the term of support (last month), but after the final payment was made, the motion to extend the term of support was timely and the district court had jurisdiction to hear it. The term of temporary alimony goes through the last day of the last month of support, and support was to be paid on the first day of the month.

Carlson v. Carlson, 108 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 59, May 14, 1992) After twenty-five year marriage in which wife was traditional homemaker for 20 years and had a high school education, parties divorced. Husband and his counsel represented that proposed property division was "essentially equal" distribution of assets; wife was unable to verify value of pension during divorce pendency, and relied on husband's attorney's representation. After divorce (within 6 months), wife learned she had received about 29% of total asset value and moved to set aside property distribution under NRCP 60(b). Referee recommended setting aside; husband objected. District court sustained objection and vacated the Referee's findings and recommendations. Supreme Court rejects wife's arguments that EDCR 5.81(1)(a) require Referee's findings to be upheld if supported by substantial evidence; the trial court is not so constrained. Also, court rejects wife's arguments based upon NRCP 53, as Referee's do not constitute the Masters referenced by that rule. Rather, this case involves a normal "abuse of discretion" standard of review; such motions are within the sound discretion of the trial court, which will not be disturbed absent abuse. Here, the misrepresentation of the value of the pension can only be attributed to mutual mistake or fraud; if both parties were mistaken, the property settlement was based upon the mistake that the property was being evenly divided, entitling wife to redress under NRCP 60(b)(1); if husband or his attorney knew the true value, they fraudulently misrepresented under NRCP 60(b)(2). Court by footnote notes that for NRCP 60(b)(2), distinction between intrinsic and extrinsic fraud was eliminated in 1981. Arguably, wife's counsel should have moved to continue trial to get valuation information, or more diligently

pursed the information. Nonetheless, the purpose of Rule 60(b) is to redress and injustices that may have resulted because of excusable neglect or the wrongs of an opposing party, and should be liberally construed to do so, citing Benedetti. Finally, the court noted that during marriage, the parties had chosen a form of retirement benefit with survivorship option, but that the divorce decree was defective as a QDRO under ERISA to cause survivor's benefits to be paid to her as "surviving spouse." Court directed that trial court amend decree to constitute a QDRO for that purpose.

Rutar v. Rutar, 108 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 38, Mar. 5, 1992) Trial court award of $500.00 per month per child support, plus $1,000.00 per month rehabilitative alimony for 3 1/2 years reversed, where divorce followed 18-year marriage, parties split about 1.5 million in property, wife was primary caretaker of children and had not worked outside home in 12 years and received no income-producing property. Reasonableness of rehabilitative alimony is within sound discretion of the trial court. Court expressly refused to define "respective merits of the parties" but reiterates that the term must be considered in all cases involving alimony or property awards; *Heim* applied; *Johnson v. Steel* and *Buchanan* re-examined, and the factors of the alimony test from those cases set out, but not expressly re-established, now labelled "useful but inexhaustive." Here, both parties "contributed substantially to the marriage but are left with vastly disparate earning capacities after the divorce." Wife's current educational pursuits "will not necessarily enable her to support herself in the manner to which she had been accustomed" where she is 45 and has difficulties with English, is still raising 2 children, and will be 50 when she gets her undergraduate degree (planning to go to law school). Court ordered trial court to increase alimony to $1,700.00 for 8 years. Court affirmed order for husband to continue paying all of house and condominium expenses (to be half repaid when sold, with no specific time for sale given), but directed district court to retain jurisdiction over both the alimony award and the property division. No attorney's fees awarded in light of increased alimony.

Epp v. State, 107 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 85, July 12, 1991) Felony willful neglect or refusal to support minor children under NRS 201.020 affirmed. Divorce was in California, with Epp ordered to pay support. Epp chose prison over work time to pay arrearages. Defense of inability via claim of having made too little money during past five years rebuffed by court on basis that he was physically able to work during that period and in fact did so on various occasions. Elements are parentage, that defendant had a legal child support obligation, that defendant knew of obligation, and that defendant willfully failed to support child. NRS 201.070 allows proof of willfulness by showing neglect or refusal to provide support, and implies lack of just cause, excuse or justification. While the law does not contemplate punishing a person for not doing that which he cannot do, burden was on Epp to show excuse or justification, and testimony that he lived "hand to mouth" was insufficient to do so. Per NRS 194.020, its no defense that Epp was outside of Nevada during period in question, since his inaction constituted a criminal act here; six year sentence plus restitution upheld.

Nevada Family Law Report
State Bar of Nevada Family Law Section
1325 Airmotive Way, Ste. 140
Reno, NV 89502