Volume 28, Issue 2 Summer 2015

NEVADA FAMILY LAW REPORT

Family Section of the State Bar of Nevada

In this Issue

Establishing and Developing a New Family Law Practice

By Bruce I. Shapiro, Esq., Pecos Law Group

After two years of working for small firms, I went out on my own. It really was not planned and I only had a few weeks to rent office space, purchase office furniture and figure out what I was going to do. I took one employee and about a dozen cases, with maybe five thousand dollars in a trust account. I was not ready for the business of a practice; I just barely knew how to practice law and learned the rest on the fly. After 20 years, a lot of trial and error, and help from good friends I met on the way, I am just starting to get it. This article will share what I have learned along the way for anyone starting a new practice. There is not necessarily a "right or wrong" way of doing things. I am just sharing a few pitfalls and tips that I believe are important for establishing and developing a family law practice.

A Note from the Editor

by Margaret E. Pickard, Co-Editor

The annual Ely Family Law Conference provided an opportunity for judges, attorneys, paralegals, and financial advisors in the family law community to come together to enhance their law practices and skills. We carry on this spirit of sharing our experience and knowledge in this edition of the Nevada Family Law Review.

In our first article, Bruce Shapiro provides practical advice for developing a new family law practice, including how and where to budget financial resources.

Our second article, by Vincent Mayo, discusses the impact of the U.S. Supreme Court's decision in *Lozano v. Alvarez*, 134 S. Ct. 1224; 188 L. Ed. 2d 200; 82 U.S.L.W. 4159 (2014). By refusing to toll the one-year automatic return period set forth in Article 12 of The Hague Convention on the Civil Aspects of International Child Abduction, the Supreme Court rewards parents who abduct children and flee to another country. In our third article, Jack Fleeman addresses the Nevada Supreme Court's recent decision in *Bluestein v. Bluestein*, 131 Nev. Adv. Opinion 14 (March 26, 2015), requiring that Nevada trial courts make specific findings that custody modifications are in a child's best interest.

In addition, Stephanie Holland and Margaret Pickard provide practical guidelines for practitioners and judges to follow when establishing parenting plans for young children.

We are also fortunate to have Kathy DiCenso, a Certified Divorce Financial Analyst, who explains the cost savings of working with a Certified Divorce Financial Analyst.

Hope you find this issue informative and helpful in your family law practice.

1. Mitigate Expenses

The first thing I learned is that you want to keep your overhead as low as possible. Most new practitioners think that the easy way to try to develop a practice is by throwing a lot of money at advertising. This is not only generally ineffective, but it is also lazy. It is easy to justify increasing

MESSAGE FROM THE CHAIR

It's hard to believe that after six years on the Family Law Executive Council, the duty of manning the ship has now been bestowed upon me. I am humbled and excited for this opportunity to lead the section. In my years on the Council I have learned that the members of our section are some of the most dedicated and hard-working members of the State Bar. The enthusiasm for the law and demand for just treatment of our clients and their children is inspiring. I am looking forward to working with my fellow members of the section as we embark on what I am sure will be a busy and productive year.

CLE

The Family Law Section continues to produce the most interesting, innovative, and attended conference in our state. In March, the Section presented its 26th Annual Family Law Conference in Ely, Nevada. A special thanks to our out-going Chair, Katherine Provost, and the members of the Executive Council for putting together a great program.

We have already started the planning for the 2016 conference. If you have any ideas for topics and speakers, please contact the Executive Council with your suggestions.

PRO BONO

We continue to advance the shared goal of the section and legal aid groups of providing attorneys for indigent Nevadans across the State. We implore a commitment from each section member to take on at least one family law *pro bono* matter in the next twelve months.

Thank you to the many volunteers who agreed to take *pro bono* cases at the Family Law Conference and who donated their time to make our *pro bono* efforts successful. If you are interested in taking a *pro bono* case, please contact:

Legal Aid of Southern Nevada
725 E. Charleston Blvd.
Las Vegas, Nevada 89104
Telephone: (702) 386-1070

Nevada Legal Services
530 S 6th Street
Las Vegas, Nevada 89101
Telephone: (702) 386-0404

Washoe Legal Services
299 South Arlington Avenue
Reno, Nevada 89501
Telephone: (775) 329-2727

LEGISLATIVE SESSION

During this session many members of our section worked hard to promote family law bills and attempted to defeat detrimental ideas from becoming law. Each week of the session there were several members of our section in Carson City working on our behalf. As you know, all of the lobbying volunteers donate their time and we certainly need more assistance in this regard. If you would like to get involved next session, please consider joining Nevada Justice Association Domestic Committee. Thank you to all of those who donate their efforts and funds to make our legislative efforts successful.

Jessica Hanson Anderson, Chair
Family Law Executive Committee

your monthly expenses by thinking "I only need a billboard to generate one case to justify the cost." Five thousand dollars here and two thousand dollars there, however, add up. Many small practitioners end up working just to cover their overhead.

2. Effectively spend a limited budget

First impressions are important for a professional. The likely first impression most of your clients will have of you will be whoever answers your telephone. Many believe that it's okay to throw a minimum wage worker on the phones, who simply directs the caller to voicemail or someone else. First, voicemail is a mistake. Attorneys provide a service and if the first impression of your service is a recording, potential clients are likely to hang up until they call someone else and are able to talk to a person. Many prospective clients have a list and will just call another number.

A receptionist who can offer the personal touch, answer non-legal questions, and put potential clients at ease, is worth the additional cost. Do not short-change your reputation with a poor first impression.

The second impression, and almost as important, is your reception area. First, it should be small. You do not want people waiting, so you keep it small and it forces staff to move clients out of the reception area. Furthermore, by having it small, you can put more money into making the reception area look professional and reflect the image you are attempting to create. Use tile or wood and have nice furniture. Don't be cheap. A pet peeve of mine is old magazines, so pay attention to detail.

The conference room provides clients a closer look at your office space, so make sure it's not cramped. Many large firms have relatively small offices and spacious conference rooms. Clients need not ever see your office.

3. Don't Be Afraid to Delegate

For many attorneys, this is easier said than done. I spent the first ten years of my practice paying an accountant to do my payroll and taxes. Then I discovered the payroll service ADP. It took less time, was less stressful and saved a significant amount of money each month. I could not believe that I waited so long to use this service.

Delegation also applies to other attorneys and staff. Other than signing trust account checks, everything else can be delegated. If you do not trust an employee enough to delegate, you probably should not have that employee.

4. Cut Your Losses Early

Speaking of delegating, cutting your losses is also extremely important. If a certain advertising strategy is not working, stop it. Do not commit to any long-term contracts and if you see something is not working, do not be afraid to admit a mistake and start over. This is particularly important for employees. You generally know within a week if a certain employee

"gets it" and is going to be useful. Despite the fact that we know an employee "doesn't get it," or is not going to work out, most of us are reluctant to terminate an ineffective employee. We hope that something will change and the employee is going to get it. We stress because the ineffective employee costs us time and money and we want to terminate him or her, but do not. The biggest mistakes I have made from a personnel perspective is waiting too long to terminate an ineffective employee.

The same concept also applies to clients. While sometimes getting stuck on a case that you know you will not be paid on is unavoidable, if you have sufficient time and the client will not be prejudiced, file that motion to withdraw. I have always had the philosophy that I would rather not work, than to work for free.

5. Do Not Accept Every Case That Comes Through the Door

The biggest mistakes young attorneys make in developing a new practice is being afraid to say "no" to a new case; often, even experienced attorneys make this mistake. Sometimes cases you don't take are more important than ones you do take. When you are developing your own practice, you need to take a long-term view. You may be stressed about making payroll in a particular month so you decide to take a case in an area you know nothing about. The chances are you will regret taking this case because of the extra stress it causes. It may also distract you from concentrating on other cases.

Even if there are cases available that are within your normal practice areas, it's important to not take a case if you do not have the appropriate time to devote to the case. It is vital to have "down time" and it is easy to get caught up taking so many cases that you don't have any time to relax. By taking more cases than you can reasonably handle, you will cause yourself more stress, obtain a poor reputation from your client and opposing counsel for not "being on the case," and you also risk malpractice or bar complaints.

6. Make a Good Faith Effort to Settle Your cases

You will often hear young attorneys boasting about how many trials they have had or have. These young attorneys do not understand that boasting about how many trials or hearings they have emphasizes how unreasonable they are or that they are just ineffective negotiators.

It is in your best long-term interest to resolve cases. It is best for your client to have a reasonable resolution and save money. You are more likely to get paid by a happy client and you are more likely to receive referrals from a happy client. Young practitioners need to have a long-term view of their practice. Sure, you can take a case to trial and maybe collect that $20,000 fee. Of course, maybe you don't collect that fee. It is better to resolve the case and have a happy client that could be a referral source for the next 30 years than to squeeze every penny a client may have.

The most successful practitioners generally have established the most successful referral sources by making their clients happy. Few clients are happy going through a divorce trial, even if they win.

7. Don't Be Overzealous

Understand what a "zealous advocate" means. Many young attorneys believe that being a zealous advocate means being obnoxious. Being zealous is not being mean to the opposing party, being rude to opposing counsel or being disrespectful to the court. It doesn't mean taking every issue to trial. It means representing your client's interests by taking reasonable positions.

Sometimes winning every issue isn't in your client's best interest. Once a contested trial is completed, you are done. Your client, however, likely has to deal with the opposing party for years to come. Pick your battles and represent your client to the best of your ability, but don't be obnoxious.

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

Have the Interests of Parents Been Placed at Odds With Those of Their Kidnapped Children?: *Lozano v. Alvarez* and Concerns Over How the U.S. Supreme Court's Newest Precedent Impacts the Return of Internationally Abducted Children

By Vincent Mayo, Esq.

The U.S. Supreme Court recently issued a decision in *Lozano v. Alvarez* which essentially rewards parents who abduct children and flee to another country. *Lozano v. Alvarez*, 134 S. Ct. 1224; 188 L. Ed. 2d 200; 82 U.S.L.W. 4159 (2014). Namely, the Supreme Court refused to toll the one-year automatic return period set forth in Article 12 of The Hague Convention on the Civil Aspects of International Child Abduction ("The Hague Convention" or "the Convention") while the whereabouts of abducted children are unknown out of concern that tolling could affect a now "resettled" child's stability. Even if the High Court's legal analysis on tolling is correct, does its decision unjustly undermine Article 12 and the families it was intended to protect?

Article 12 of The Hague Convention states:

> Where a child has been wrongfully removed or retained in terms of Article 3. (Article 3 of the Hague Convention states that removal or the retention of a child

> is to be considered wrongful where it is "in breach of rights of custody attributed to a person" under the law of the State where the child was a resident prior to being removed and at the time of a removal, the parent's rights were or would have been exercised but for the removal or retention.) and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

The purpose of Article 12 is to allow the *speedy* return of a wrongfully removed child to the rightful country of origin. It is also intended to prevent "forum shopping" in countries without jurisdiction.

Lozano v. Alvarez involved Petitioner Manuel Lozano and Respondent Montaya Alvarez, who both resided with their minor child in London. *Lozano*, 134 S. Ct. at 1230. Without notice to Mr. Lozano, Ms. Alvarez left England with the minor child in November 2008 and settled in New York. *Id.* Despite his efforts, Mr. Lozano was not able to locate Ms. Alvarez until November 2010 – sixteen months later. *Id.* Mr. Lozano then filed a petition for return of the child in the Southern District of New York pursuant to Article 12 of The Hague Convention. *Id.* Finding that the petition had been filed more than one year after the child began residing in New York and that the alleged concealment of the child did not toll Article 12, the Second District Court denied the petition and the Second Circuit Court affirmed the lower court's ruling on appeal. *Lozano v. Alvarez*, 697 F.3d 41 (2nd Cir., 2012). The U.S. Supreme Court granted Mr. Lozano's petition for *certiorari* due to inconsistencies between the circuit courts of appeals as to Article 12 and the issue of tolling. *Lozano*, 134 S. Ct. at 1231.

The Supreme Court had a difficult decision to make between competing policies. On the one hand, they could hold (as Mr. Lozano petitioned and three federal circuit courts previously held) *Dietz v. Dietz*, 349 Fed. Appx. 930 (5th Cir. 2009). *See also Duarte v. Bardales*, 526 F.3d 563 (9th Cir. 2009); *In re B. Del C.S.B.*, 559 F.3d 999 (9th Cir. 2009); *Furness v. Reeves*, 362 F.3d 702 (11th

Cir. 2004) that the one year automatic return period should be equitably tolled in cases where a child is abducted and concealed until the child's whereabouts are determined. The Supreme Court could also accept Mr. Lozano's contention that the one-year automatic return period constitutes a statute of limitation, thereby making it subject to tolling. On the other hand, the High Court could hold, as Ms. Alvarez argued, that the Hague Convention's one year period is not subject to nor does it authorize equitable tolling – even if by agreeing with this position, the Supreme Court would essentially reward abducting parents.

Writing on behalf of a unanimous Court that sided with Ms. Alvarez, Justice Clarence Thomas concluded that the one-year period providing an automatic return of an abducted child cannot be tolled. *Lozano*, 134 S. Ct. at 1232. The Supreme Court based its decision in part on the fact that the presumption regarding tolling of U.S. federal and state statutes does not apply to treaties, as courts in other countries have similarly found, unless specifically authorized. "A treaty is in its nature a contract between...nations, not a legislative act." *Id.* at 1232-1233, *citing Foster v. Neilson*, 27 U.S. 253, 2 Pet. 253, 314, 7 L. Ed. 415 (1829). Further, the International Child Abduction Remedies Act (ICARA), which enacts the Hague Convention, recognizes "the need for uniform international interpretation of the Convention." 42 U. S. C. §§ 11601-11610, Section 11601(b)(3)(B). The Supreme Court also held that the one year return remedy is not a true statute of limitation since the child's return is still permitted under the Convention, even if it was no longer automatic. *Lozano*, 134 S. Ct. at 1234.

While the Supreme Court issued a unanimous decision, the broader legal community was not in consensus with the Court's ruling. The International Academy of Matrimonial Lawyers (IAML) filed an *Amicus Curie* brief in support of tolling the one year period in cases where an abducted child is concealed. The IAML argued that rather than deterring kidnappings, a ruling against tolling would in fact encourage parents to flee with abducted children and live "underground" in order to gain an advantage in subsequent proceedings initiated after the one year period passes. Brief for the International Academy of Matrimonial Lawyers (IAML) as *Amicus Curie* in Support of Reversal, at 11-12.) The IAML went on to argue that few U.S. and international courts have ordered the return of an abducted child after having made a finding that the child was settled in the new country of residence. *Id.* at 8-10. Such precedent would suggest that a non-offending parent attempting to have their child returned to the home country faces an additional, undue burden that Article 12 was specifically drafted to prevent.

The same concerns were also shared by several United States courts of appeals. *Supra*. The Fifth Circuit Court ruled in *Dietz v. Dietz* that the equitable tolling of Article 12 is permitted in child concealment cases. *Dietz*, 349 Fed. Appx. at 930. The Eleventh Circuit supported this position in *Furness v. Reeves* when it stated that the equitable tolling of Article 12 is warranted during the concealment period since otherwise, a "parent who abducts and conceals [a child] for more than one-year will be rewarded for the misconduct by creating eligibility for an affirmative defense not otherwise available." *Furness*, 362 F.3d at 723-24.

In response, the Supreme Court presented, *via dicta*, what it viewed as "safeguards" available to non-offending parents in an attempt to put the general legal community at ease over the IAML's and circuit courts' concerns. First, the Supreme Court stated a parent pursuing the return of a child can claim that the offending parent's efforts to conceal a child essentially

prevent the child from becoming settled in their new environment. *Lozano*, 134 S. Ct. at 1236. Such efforts could consist of frequent relocations, a denial of contact with extended family, keeping the child out of school, extracurricular activities, church, etc. *Id*., *citing Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363-1364 (MD Fla. 2002; *Wigley v. Hares*, 82 So. 3d 932, 942 (Fla. App. 2011); *In re Coffield*, 96 Ohio App. 3d 52, 58, 644 N. E. 2d 662, 666 (1994). Second, the Supreme Court noted that Article 18 of The Hague Convention holds "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time." Hague Convention, Treaty Doc., at 11. Courts therefore have it within their discretion to order the immediate return of a child outside the terms of Article 12. "[N]either the Convention nor the ICARA, nor any other law of which we are aware including the Due Process Clause of the Fifth Amendment, requires 'that discovery be allowed or that an evidentiary hearing be conducted' as a right under the Convention." *West v. Dobrev*, 735 F.3d 921, 929 (10th Cir. 2013), *quoting March v. Levine*, 249 F.3d 462, 474 (6th Cir. 2001). Third, and in a concurring opinion, Justice Samuel Alito added that a court can look at the abducting parent's conduct in deciding to conceal a child as a factor when deciding on the child's settlement. *Lozano*, 134 S. Ct. at 1237.

These arguments, however, do not negate the fact that the Supreme Court's decision essentially creates an emotional, financial and legal struggle between the well-being of abducted children and the rights of their innocent parents. Where the interests of children and their non-offending parents were once aligned in allowing for their swift, automatic return, the *Lozano v. Alvarez* decision potentially pits those interests against one another based on the juridical consequences of the concealment. An abducting parent will have the incentive to turn the proceedings into what essentially constitutes a custodial determination since courts are encouraged to determine if a child has become settled in their new environments after a year. This is based on the fact that settlement requires an examination of numerous factors, including but not limited to the child's age, the stability of their residence, the nature of the relationship with the abducting parent, whether the child attends church and school consistently, whether the child has family and friends nearby, how they have adapted to their new environment, etc. *Lozano v. Alvarez,* 697 F.3d at 57. Such proceedings would also be more laborious and expensive for the non-abducting parent as they would have to litigate in a foreign country. The end effect, in cases where settlement of the child has been established, is that the non-abducting parent will either need to go through “another” custody battle (and face findings made in the prior settlement proceeding detrimental to their case) or give up on having their child returned to their country of origin, thereby losing custody. In those cases where the innocent parent decides to fight, every passing month will be another month in which the child is away from that parent and likely becoming more aligned with the interests of the abducting one. Clearly, such an outcome runs counter to the goal of Article 12 and the purpose of the Hague Convention.

As for the Supreme Court’s reliance on Article 18, realistically that Article does not operate like the equitable short cut the High Court believes it to be. Article 12 necessitates a determination of settlement after the one-year period has passed and courts are reluctant to disregard the best interests of the child as it pertains to settlement once they are no longer required to automatically return the child. Trial courts will undoubtedly require some type of initial proceeding addressing best interests in adjudicating the return of an abducted child, even under Article 18. The Hague Convention, Article 12. *See also* the Brief for the International

Academy of Matrimonial Lawyers (IAML) as *Amicus Curiae* in Support of Reversal, at 8-10. It should be noted as a counterpoint, however, that even if the Supreme Court had held that the one year period could be tolled, a parent who initiates litigation for the return of their child after the one year period would still have to establish that equitable tolling is warranted. Courts would essentially need to know if the delay in seeking a child's return was because the child was concealed by the other parent or because the requesting parent was simply dilatory in pursuing their rights. Therefore, it would have been incumbent upon the Supreme Court to fashion some expedited process or legal proceeding to adjudicate a finding of equitable tolling. Such a process though would still delay the automatic return of a child pending the adjudication of the tolling issue.

The end result under the Supreme Court's holding, right or wrong, is that the intentional concealment of a child for more than a year essentially bars the swift, automatic return of an abducted child in contrast to the purpose behind Article 12. Worse, it potentially places the interests of abducted children in opposition to those of their non-offending parents. Whether the Supreme Court's conciliatory arguments for the return of children in international abduction cases will indeed mitigate the potential harm caused by the decision in *Lozano v. Alvarez* is yet to be seen.

Vincent Mayo, ***Esq.*** is a partner at The Abrams & Mayo Law Firm. He is a Nevada Board Certified Family Law Specialist, a National Board of Family Law Trial Advocacy Specialist, a member in good standing of the State Bar of Nevada, State Bar of Nevada Family Law Section, American Bar Association, Nevada Justice Association and Clark County Bar Association. Mr. Mayo has published numerous articles on family law matters and practiced in the area of family law for over ten years. He can be reached at 6252 South Rainbow Boulevard, Suite 100, Las Vegas, Nevada 89118. Mr. Mayo's number is (702) 222-4021 and his fax is (702) 248-9750. He can be reached via email at vmayo@theabramslawfirm.com.

Recent Changes in Child Custody Law: Dimming the Bright Line Rule for "Physical Custody" Designations in Nevada

Jack W. Fleeman, Esq., Pecos Law Group

The biggest fight in domestic family law cases is often over the physical custody of children. "Physical custody involves the time that a child physically spends in the care of a parent." *Rivero v. Rivero*, 125 Nev. 410, 421, 216 P.3d 213, 222 (2009). In addition to parents wanting more time than the other parent has, physical custody is important because the characterization of a parent's physical custody—primary, joint, or non-custodial—determines the amount of child support a parent will pay or receive, and defines what test the court will apply if one parent wants to move with a child out of state in the future.

In Clark County, the default rule for most judges appears to be that joint physical custody is in the best interest of a child if each party is a fit and proper parent living in the same general locale. This default rule is likely based on Nevada's policy that the court must "ensure that minor children have frequent associations and a continuing relationship with both parents after the parents have become separated or have dissolved their marriage." NRS 125.460.

Based on the state's policy and the apparent default rule for joint physical custody, it may seem obvious that nearly every custody dispute in Nevada will end with parents having joint physical custody. This, of course, has not been the case over the years. In fact, even with that being the policy and rule, before 2009, it was often difficult to determine what the term "joint physical custody" meant from one judge to another.

Before 2009, Nevada law presumed joint physical custody to mean approximately a "50/50 timeshare." *Rivero*, 125 Nev. at 424; *see Wesley v. Foster*, 119 Nev. 110, 112-13, 65 P.3d 251, 252-53 (2003); *Wright v. Osburn*, 114 Nev. 1367, 1368, 970 P.2d 1071, 1071-72 (1998). However, as practical matter, many parents had no ability to share their children on a 50/50 basis. Thus, for some judges, granting joint physical custody would not have been in a child's best interests because the timeshare required would have been impractical or impossible under the parties' circumstances.

For other judges, the opposite might have been true. While a 50/50 timeshare was presumed to be joint physical custody, the time required for joint physical custody had not been explicitly defined. For these jurists, a stipulated order granting joint physical custody would have been permissible, even for a parent far below a 50/50 split, with the finding that the joint physical designation was in the child's best interests. After all, the sole consideration of the court in making an initial custody determination was, and continues to be, the child's "best interests." NRS 125.480(1).

In 2009, the Nevada Supreme Court addressed the lack of a bright line rule head on. *See Rivero*, 125 Nev. 410. The court adopted the "guideline" that a parent must have "at least 40 percent of the time" with a child to be considered a joint physical custodian. Id. at 426. If a parent did not have 40 percent of the time, then "the arrangement [was] one of primary physical custody with visitation" to the parent with less than 40 percent. Id.

In the years following *Rivero*, our district courts have witnessed an influx of motions to modify custody based solely on parents exercising timeshares inconsistent with the existing custody order. After *Rivero*, attorneys began arguing that the de facto timeshare, alone, could be used to modify the existing order because the *Rivero* court stated that the district court "must use the terms and definitions provided under Nevada law" when ruling on a motion to modify custody. Id. at 429.

Using *Rivero*, a parent that had been given two days a week under the order (less than 40 percent), but that actually had the child for three days each week (just over 40 percent) in the year or years following the order, would file a motion to modify child custody based on his or her de facto timeshare alone. The parent would argue that the burden had shifted to the non-moving

parent to show why the existing "joint physical custody [was] not in the best interest of the child." Id. at 427.

When this type of motion was filed, and it often was, at least some judges would modify the existing order from primary to joint physical custody. In many cases, the modification of the custody order was based solely on the de facto timeshare. A similar modification happened in the recently published case of *Bluestein v. Bluestein*, 131 Nev. Adv. Op. 14 (2015).

In *Bluestein*, a mother who had stipulated to a joint physical custody order later filed a motion to modify custody based on her de facto primary physical custody timeshare. *Id*. At an evidentiary hearing, the de facto timeshare the parents were exercising was determined to be one in which the mother had more than 60 percent. Id. As such, as a matter of law, the district court determined that the mother was the primary physical custodian.

In its opinion, the Nevada Supreme Court reversed the district court's decision because the lower court failed to set forth specific findings that a modification of the existing joint physical custody designation was in the child's best interests. Id. This was not surprising because best interests must always be considered in custody decisions. However, what was surprising to many, is that the court also chose to explicitly dim the bright light line rule from *Rivero*, stating, "*Rivero*'s 40-percent guideline should not be so rigidly applied that it would preclude joint physical custody when the court has determined in the exercise of its broad discretion that such a custodial designation is in the child's best interest." Id. (citing *Ellis v. Carruci*, 123 Nev. 145, 161 P. 3d 239, 241 (2007)).

The *Bluestein* opinion is clearly a dimming of *Rivero's* bright line definitions of physical custody designations in Nevada. The question is how much dimming has occurred. Only a couple of months after the decision, it appears that the *Bluestein* opinion has given back at least some of the discretion district court judges seemed to have lost under Rivero. The days of granting custody modifications based solely on *de facto* timeshares are over. The worry now is that in ending those days, the Nevada Supreme Court may have brought back the days of uncertainty that existed when the definitions of physical custody designations were not governed by a bright line rule.

Jack W. Fleeman, Esq. is an attorney at the Pecos Law Group. His practice includes representing clients in a wide range of domestic relations matters, including complex divorce, custody, child support, paternity, relocation, adoption, and termination of parental rights matters.

This article was originally published in COMMUNIQUÉ (June/July 2015) the official publication of the Clark County Bar Association.

Parenting Plans for High Conflict Custody Cases

Stephanie Holland, PhD and Margaret E. Pickard, Esq.

Parents involved in high conflict custody disputes need effective Parenting Plans that clearly define timeshare periods and provide for exchange provisions that will reduce parental conflict. While parents who are involved in cooperative parenting can work effectively with a fairly generic plan that includes an outline of a shared custody schedule, parents in high conflict cases need very specific plans, outlining exactly when and where a custodial exchange will take place, who will be present, who will provide transportation and what the consequences will be if a custodial exchange does not occur.

If you are drafting parenting plans for a high conflict custody case, make sure you include details that will help your client avoid a trip back to court:

1. ***Timeshare:*** Be specific about the timeshare agreement. Note the beginning and ending times of all parenting time, including holidays. For example, instead of saying, "In the morning" say "At 9:00 a.m." High conflict parents need structure and guidelines.

2. ***Weekend Timeshares***: Weekend timeshares should begin upon the release of school and continue until school resumes following the weekend; if the children are not in school, plan for the exchange to occur at daycare on Friday until daycare resumes following the weekend. The less parental interaction, the lower the risk of parental conflict; this translates into less stress for parties and their children.

3. ***Holiday Weekends***: Note whether holiday parenting time is for a day or a weekend. For example, Memorial Day is typically only celebrated for one day, but it's better to plan for the whole weekend. Don't forget other three day weekends, and include special holiday weekends like Mother's Day and Father's Day. Holiday periods will balance each other out, as parents will have equal timeshare periods with alternating holidays. The weekend structure will reduce the number of child exchanges, reducing the stress on everyone.

4. ***Holiday Timeshares***: It's best to switch off odd and even year holiday periods, instead of trying to share the holiday and conduct exchanges mid-way through a holiday period. For example, Thanksgiving and school breaks should be alternated from year to year instead of trying to break up the time equally.

5. ***Exchange Location***: In high conflict cases, the parents should not personally exchange the children. This isn't just limited to face-to-face contact, even the "honk and seatbelt" rule causes anxiety in your kids. Plan for the receiving parent to pick the kids up at school/daycare and drop them off at school/daycare following the timeshare. If the kids aren't in school, choose a neutral location and friend. The key is to make the exchange emotionally safe for the kids and inhibit a high conflict parent from acting out.

6. ***Summer Timeshare:*** Schedule a regular summer timeshare arrangement so that parents don't have to rely on the other parent cooperating to make plans. Whether the parents want two weeks or six, specify when each parent will have their dates. Plan now to avoid a fight later. Designate odd and even years to have priority dates (i.e.: "Mom elects her summer timeshare by March 1st in even years and Dad elects his summer timeshare by March 1st in odd years").

7. ***Birthdays:*** Parents need to avoid being rigid about celebrating a birthday on the actual day. It is a lot easier to celebrate a child's birthday on a different day, rather than increasing exchanges and the conflict that arises as a result of this. These days even out over the years. In drafting, be sure to designate that the parent designated for the birthday celebration is to receive all of the children, not just the birthday child. While kids can rarely identify the benefits of their parents' separation, two birthday celebrations is usually one of them.

8. ***Conflict is Engaging***: High conflict parents want to have contact so that they can engage in conflict because they aren't ready to let go. Limit personal contact and it will limit conflict. This means parents taking turns at routine doctor's appointments, school functions, etc. Kids will internalize the conflict and blame themselves for causing the problem, so it's best to reduce their stress.

9. ***Makeup and Missed Parenting time***: Only substantial medical reasons should be considered sufficient for postponement of parenting time. Parents are entitled to their court ordered time. What's more, kids need time to develop relationships with each parent.

While much of this advice seems counterintuitive, experts in high conflict custody cases advise parents to stay away from each other if their interactions are likely to result in conflicts for their children. The long-term damage caused by children observing hostile, or even silent passive-aggressive, parental exchanges, are extremely damaging for children.

So, keep it simple. Parties need to stay away from each other, it will help them stay out of court and saves years of therapy for the children later in life.

Stephanie Holland, PsyD is currently in private practice, working with children to overcome psychological challenges and assisting families with post-divorce issues. She also currently works as an Outsource Provider for the Las Vegas Family Courts as a Special Master/Parenting Coordinator and custody evaluator.

Margaret Pickard, Esq. is a family law attorney, author/educator, parenting coordinator, and mediator, specializing in family mediation and high conflict custody cases. She serves as an Outsource Mediator and Parent Coordinator for the Las Vegas Family Courts. The Mediators of Southern Nevada awarded Margaret their 2011 "Peacemaker of the Year," recognizing her for her work in developing and teaching UNLV's Cooperative Parenting program to Las Vegas community members and family court litigants. In 2015, Margaret was awarded UNLV's Faculty Award for Excellence to honor her 13 year teaching career with UNLV. She was recently appointed as the Standing *Pro Tem* Hearing Master for the Las Vegas Juvenile Drug Court. Margaret is admitted to practice law in Nevada, California and Montana.

Cost Savings of Working with a Certified Divorce Financial Analyst (CDFA)

By Kathy DiCenso, CDFA

There are many ways in which a Certified Divorce Financial Analyst (CDFA™) can save you money, time and stress when evaluating your family financials to aid in structuring your financial settlement, whether "pre-divorce" or at any time during your divorce process. The following summary will help you understand in greater detail how significant cost savings accrue to your family financial asset picture.

Pre-Divorce Planning Cost Savings

A Certified Divorce Financial Analyst (CDFA™) is aware of each document you will need in order to obtain the fairest marital settlement agreement and to substantiate the Marital Standard of Living for Spousal Support and income available for Child Support.

Having these documents ahead of time eliminates delays you may encounter once the divorce process has begun. These are also documents your attorney or mediator will immediately request of you, so you will have a leg-up when you start the process by being organized, and at a time when you are more likely to still have access to these important documents.

You will have a clear idea from the onset of your likely financial ramifications from getting an accurate and thorough picture of your family assets, debts, income and expenses, while including specifics as to any tax benefits and/or liabilities. While demystifying the process, many people have found this a useful evaluation tool for assessing the economic feasibility of proceeding with a divorce action.

In-Process Cost Savings

Knowing and applying the myriad tax benefits and other cost savings benefits provided by the law, and incident only to divorce, a CDFA™ can maximize their use. The cost savings can then accrue to the benefit of the parties, rather than going towards an unwarranted payment of taxes or rather than accruing to one party alone, who will carry the liability into the future to their sole detriment.

A CDFA™ is also skilled at understanding investment features and their costs (sometimes not readily apparent); how these will affect settlement scenarios, and whether they skew the results to one party's benefit or loss.

The CDFA™ can also forecast the effects of any proposed settlement, providing a year-by-year picture (and bottom-line number) of the effect on each party's net worth and cash flow - details a judge likes to see. This is more telling than a simple statement of the current allocation of assets and present income to each party, that is, what has traditionally been the scope of analysis provided to the parties.

The CDFA™, by combining both the tax and long-term financial planning knowledge, saves you from having to hire two professionals (an accountant and a financial planner), whose services often overlap, for an additional area of cost savings.

The CDFA™'s work is recognized by the courts so you won't have any "do-overs" with another professional and set of fees.

Summary

There are many ways to maximize the financial opportunities provided by law in preparing for and structuring your marital settlement agreement. This, combined with knowing exactly how your financial outcomes will play out in one scenario compared to another, saves

time and money both "pre-", "during", and "post" a divorce action, whether you are working with a litigator, mediator, collaborative process or doing it yourselves.

Certain highly emotional discussions are circumvented, when you have all the facts at your fingertips. Knowing ahead of time exactly what you are agreeing to in your marital settlement agreement, also puts your mind at ease about whether the money will last and knowing exactly how the settlement will impact your lifestyle -- both now and in years to come.

While divorce is not a pleasant situation to begin with, and often one in which we feel very little control, many have found that by using a CDFA™ and realizing significant cost savings, they gain comfort from knowing they made the most informed decisions possible and will skip the part about later regrets.

Information Provided by Teresa Dentino, CDFA™. Article was submitted by Kathy DiCenso, a local Reno practicing CDFA™. Kathy DiCenso is President of DiCenso & Associates and can be reached at 775-336-0021 or at kathy.dicenso@lpl.com. Financial Planning and Securities offered through LPL Financial, Member FINRA/SIPC.

Article Submissions

Articles are invited! The Family Law Section is accepting articles for the Nevada Family Law Report. The next release of the NFLR is expected in **September, 2015**, with a submission deadline of **August 15, 2015**.

When submitting an article to the NFLR, please note that automatically embedded footnotes/endnotes do not carry over into the State Bar of Nevada's publishing program. As such, if at all possible, we would ask that you utilize endnotes that are not automatically embedded (Please do not use the Footnote/Endnote function of your word processing program.).

Please contact Margaret E. Pickard at nevadamediator@gmail.com or Jason Naimi at jason@standishnaimi.com with your proposed articles anytime before the next submission date. We're targeting articles that are between 350 words and 1,500 words, but we're always flexible if the information requires more space.