NFLR
NEVADA FAMILY LAW REPORT

Volume 23, Issue 1 Winter 2010

Vesting of Survivor Benefits in Divorce – An Issue of First Impression for the Ninth Circuit: *Carmona v. Carmona*

544 F.3d 988 (9th Cir. 2008)

by Raymond S. Dietrich, Esq.

Introduction

The Ninth Circuit could have disposed of this case easily. Under ERISA §206(d)(3)(F), an assignment of survivor benefits is only permitted to a "former spouse." In *Carmona*, however, the participant attempted to reassign survivor benefits to his current spouse, not a former spouse. According to the court, ERISA fails to allow reassignment to a future or subsequent spouse. Importantly, the QDRO provisions of ERISA only protect former spouses. Congress's silence as to the rights of a subsequent spouse is evidence that the right does not exist (citing *Boggs v. Boggs*, 520 U.S. 833, 847 (1997)). Therefore, the use of a QDRO to reassign survivor benefits to a participant's current spouse is improper.

The Ninth Circuit did not stop their analysis at the interpretation of ERISA §206(d)(3)(F). Rather, the court expanded its reasoning to create a workable rule that would apply in most cases requiring a *nunc pro tunc* QDRO. A *nunc pro tunc* QDRO is a judicial remedy that allows a court to correct a matter relating to a timing event. Two timing events that may impact a former spouse's benefits are death and retirement.

The vesting of survivor benefits in divorce is an issue of first impression for the Ninth Circuit. In *Carmona*, the Ninth Circuit held that surviving spouse

(cont'd. inside on page 3)

IN THIS ISSUE:

CARMONA V. CARMONA: Vesting of Survivor Benefits
Page 1

EDITOR'S NOTES
Page 2

LESSONS OF *CARMONA*
Page 6

DOMESTIC PARTNERS AND PARENTAGE
Page 11

FINANCIAL DISCLOSURE FORM
Page 14

ATTORNEYS' LIENS AFTER *ARGENTENA*
Page 17

NEVADA WELFARE DIVISION CALCULATING INTEREST
Link Page 19

Nevada Family Law Report

Editor:
Robert Cerceo

Family Law Section
Executive Council

Ray E. Oster, Chair
Reno
Robert Cerceo, Vice-Chair
Las Vegas
Katherine Provost, Secretary
Las Vegas
Jennifer Abrams, Treasurer
Las Vegas

Kathleen Breckenridge, Reno
Hon. Bryce Duckworth
Jessica Hanson, Reno
Hon. David Hardy, Reno
John "Jack" Howard, Las Vegas
Mike Kattelman, Reno
Hon. William S. Potter, Las Vegas
Eric A. Pulver, Reno
Vacant Seat, Southern NV

Design/Production
Kristen Bennett, State Bar of Nevada

NEVADA FAMILY LAW REPORT is an electronic publication of the Family Law Section of the State Bar of Nevada. To subscribe, please send a request to publications@nvbar.org.

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., Vol. 23, No 1, 2010 at ____.

The Nevada Family Law Report is supported by the State Bar of Nevada and its Family Law Section.

EDITOR'S NOTES

By Bob Cerceo, Esq.

In Memoriam: Bill Hilton, Former Ely Presenter

One too soon taken by time: sometimes our co-counsel, and sometimes our opponent, but always our colleague. From the Nevada Fellows of the International Academy of Matrimonial Lawyers – Mary Anne Decaria, Marshal S. Willick and Robert Cerceo – and the State Bar of Nevada Family Law Section. Released by the IAML on November 25, 2009:

> Sadly, I have to inform Fellows of the death of Bill Hilton after a lengthy illness. Bill was a Certified Family Law Specialist in Santa Clara, California and a long time Fellow of the Academy until his resignation due to ill health earlier this year. He was highly regarded for his expertise in international and trans-jurisdictional custody and abduction matters and was a Private Sector Advisor to the US Department of State on the Third Special Commission on the Operation of the Hague Convention on the Civil Aspects of International Child Abduction in 1997 and a United States delegate to the Fourth Special Commission in 2001. Most importantly, at a time when few practitioners knew much about, or had any real access to, the workings of the Hague Convention, he established and maintained at his own expense the website hiltonhouse.com on which he made available, without charge, an invaluable repository of judgments and information collated from around the world which, for many years, was the only comprehensive resource readily available to lawyers practicing in international custody disputes, ceasing only when his health no longer permitted him to continue. The IAML honors his contribution to international family law and his memory.

Specialization Exam

The next test is set for Nevada Day 2010. Find the applications at:

http://www.nvbar.org/sections/FamilyLaw/specialization_app.pdf

Find the Standards at:

http://www.nvbar.org/sections/FamilyLaw/Specialization_Standards.pdf.

Bob can be reached at (702) 252-5002, or rc@slwlaw.com.

CARMONA

cont'd. from page 1

benefits "ordinarily" *irrevocably vest* in the participant's spouse at the time of the annuity start date and may not be reassigned to a subsequent spouse. The reasoning of *Carmona* is of key importance, rather than its unique facts. That is, *Carmona's* reasoning provides a framework for when a *nunc pro tunc* QDRO, in the context of survivor benefits, will be acceptable.

The Ninth Circuit's vesting rule can be minimized, however, if the attorney recognizes the importance of proper timing and plan notice. Proper timing and plan notice is satisfied when a QDRO is incorporated by reference into the divorce decree and served immediately upon the plan administrator.

Note that a former spouse loses his or her ERISA-based benefits at divorce by operation of law. Thus, it is better practice to notice the plan administrator during the divorce proceeding of a pending QDRO. A notice of adverse interest served on the plan administrator will provide an additional safeguard against attorney malpractice in the event the QDRO is not incorporated into the decree. Therefore, if proper timing and plan notice practice is followed, the Ninth Circuit's vesting rule will have little effect on a former spouse's community interest claim to survivor benefits.

I. Background

The Ninth Circuit has been forgiving in respect to allowing a *nunc pro tunc* QDRO. Three controlling Ninth Circuit cases are *Tise*, *Stewart* and *Gendreau*. Each case supports a former spouse's claim to ERISA plan benefits.

In *Tise*, the court permitted the entry of a *nunc pro tunc* QDRO issued *after* the participant's death. See *Trs. of the Dirs. Guild of Am-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415 (9th Cir. 2000). Importantly, the plan had notice of the pending QDRO prior to the participants' demise. In a footnote, the court declined to decide if a QDRO could issue after a participant's death if the plan had no notice of a former spouse's adverse interest in the plan.

In *Stewart*, the court permitted the entry of a QDRO issued *after* the participant's retirement. *See Stewart v. Thorpe Holding Co.*, 207 F.3d 1143 (9th Cir. 2000). Like *Tise*, the plan had notice of the former spouse's adverse interest in the plan prior to the participant's retirement.

In *Gendreau*, the court held that a QDRO is the enforcement of an interest assigned to him or her by a divorce decree. Notice was not an issue. In *Gendreau*, the objection to the QDRO took place in the context of a bankruptcy proceeding.

Carmona reverses the favorable treatment the Ninth Circuit has afforded to former spouses, even though in this case the former spouse's benefits were ultimately protected. Under most fact patterns, however, a former spouse will likely be prohibited from receiving survivor benefits via QDRO if the plan has no notice of a former spouse's adverse interest prior to the participant's retirement and remarriage. In other words, the Ninth Circuit's vesting rule may be used to defeat a former spouse's untimely claim to survivor benefits.

II. Statement of the Case

Holding: The *Carmona* court held that a Qualified Joint Survivor Annuity (QJSA) (i.e. survivor benefits) "ordinarily" *irrevocably vest* in the participant's spouse at the annuity start date and may not be assigned to a subsequent spouse. The court concluded that the vesting rule is proper for the following reasons: First, ERISA's statutory scheme for survivor benefits establishes the importance of the annuity start date. Second, the amendment to ERISA by the Retirement Equity Act establishes the importance of a participant's retirement date and the vesting of the survivor benefits at that time. Finally, the intent of Congress is satisfied by the court's vesting rule.

Facts and Procedural History: The plan participant, Lupe Carmona, married his eighth wife, Janis Carmona, in 1992. The participant had accrued benefits during the marriage under two ERISA-based plans, the Hilton Pension Plan and a local union pension plan. The participant retired and began drawing on his pension benefits from both plans in 1992. Janis and Lupe divorced in 1997. Lupe married Judy Carmona, his ninth wife, also in 1997.

The participant initiated the action by submitting a QDRO in Nevada state court in 1997. The proposed QDRO sought to revoke Janis' survivor benefits. The participant died in 1999. The day after the participant's death, the Nevada family court granted the participant's petition and QDRO. The Nevada Family Court ordered both plan administrators to change the beneficiary designations from Janis to Judy. The court also imposed a constructive trust on Janis in the event the plans refused or were unable to comply.

(cont'd. on page 4)

CARMONA

cont'd. from page 3

Rather than removing the matter to federal court, Janis appealed the decision to the Nevada Supreme Court. In 2003, the Nevada Supreme Court affirmed the Family Court's ruling. Janis also filed an action in Nevada federal district court. The District Court dismissed Janis' claim for lack of jurisdiction under the Rooker-Feldman Doctrine. The District Court, however, did not dismiss the union plan's objection to the reassignment of survivor benefits. The District Court held that ERISA does not preclude a state court from issuing a QDRO which substitutes an alternate payee for a former spouse after a plan participant's retirement. Both Judy and the union plan appealed.

III. Analysis

Carmona's timeline of events is atypical as it relates to the vesting of survivor benefits; the facts are unique. *Carmona* involved the following timeline of events: marriage, retirement, divorce, remarriage, submission of a QDRO. In *Carmona*, the participant sought to reassign survivor benefits to his current spouse. In contrast to *Carmona*, it is a former spouse who typically seeks the assignment of survivor benefits.

Most cases requiring a *nunc pro tunc* QDRO involve the following timeline of events: marriage, divorce, remarriage, retirement and/or death of the participant, submission of a QDRO by former spouse. See *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997). In *Hopkins*, the Fourth Circuit held, albeit for different reasons, that survivor benefits vest with the current spouse at retirement. The timeline of events, as compared to *Carmona*, are quite different and worth noting.

Timeline Comparison *Carmona* vs. *Hopkins*:

Carmona Timeline of Events:
Atypical (current wife)

1. **Marriage**
2. **Retirement**
3. ***Divorce***
4. **Remarriage**
5. **QDRO**

Hopkins Timeline of Events:
Typical (former spouse)

1. **Marriage**
2. ***Divorce***
3. **Remarriage**
4. **Retirement**
5. **QDRO**

In *Hopkins*, the outcome would have been different had counsel submitted the QDRO in a timely manner at divorce. At a minimum, the attorney should have put the plan on notice of a pending QDRO prior to the participant's retirement. The malpractice issue in *Hopkins* overshadows the vesting rule.

A. The Importance of Plan Notice

The Ninth Circuit hedged its vesting rule by addressing the issue of plan notice. Note that *Carmona* held that survivor benefits "ordinarily" *irrevocably vest* in the participant's spouse at the time of the annuity start date. Importantly, the court used the phrase "ordinarily" in its holding; the Ninth Circuit recognizes the fact that a plan administrator may have notice of a domestic relations order prior to retirement but be unable to qualify the order until after retirement. Therefore, it may be inferred that the vesting rule would not apply in cases in which a plan administrator has notice of a pending QDRO prior to the participant's retirement. Plan notice will continue to play a critical role in most cases involving a QDRO and a timing event.

B. Distinguishing Between the Annuity Start Date and Retirement Date

The terms "annuity start date" and "retirement date" are not always synonymous. For example, a participant may retire early but not receive his or her benefits until a later date.

The Ninth Circuit concluded that the vesting rule promotes one of the principal goals of ERISA, to wit: ensuring that plans be uniform and simple in their application (citing *McGowan v. NJR Serv. Corp.*, 423 F.3d 241 (3rd Cir. 2005). Accordingly, administrative convenience should be a consideration when deciding whether ERISA requires plan administrators to act in a certain way, especially considering that plan benefits are based on actuarial calculations. According to the court, a plan administrator must know with certainty the life expectancy of the person receiving the survivor benefits in order to determine the participant's monthly pension benefits.

It is at the annuity start date, typically not at the retirement date, that the plan administrator is required to calculate a participant's benefits based on the option elected (i.e. single life annuity or QJSA). Therefore, it can be inferred from *Carmona* that a QDRO is likely to be accepted by a plan administrator if the QDRO is submitted in the interim of retirement and the annuity start date. But why take the chance? If you represent a former spouse, file the QDRO concurrently with the divorce decree.

(cont'd. on page 5)

CARMONA

cont'd. from page 4

C. Avoidance of the Rooker-Feldman Doctrine

In *Carmona*, the Rooker-Feldman Doctrine applied due to counsel's improper pleading. The Rooker-Feldman doctrine prevents federal district courts to hear appeals from state court *judgments* for lack of jurisdiction. Specifically, the doctrine bars relief from a state court decision in federal court. Conversely, the doctrine does not bar a plaintiff to seek relief in federal district court if the plaintiff alleges an *illegal act* or *omission* by an adverse party.

In *Carmona*, the former spouse did not argue that an adverse party caused her injury. Instead, she pled that her harm was caused by the "state court judgment." Accordingly, the court dismissed her claim for lack of jurisdiction. A different result may have occurred if the former spouse properly pleads her action. The court expressly worded its dismissal and holding by using the words "as pleaded."

Counsel should have also removed the action to federal court upon receipt of the participant's petition for a QDRO in Nevada state court, assuming an exception to removal does not apply; the facts do not indicate if Janis was a Nevada resident at the time of the petition. A defendant may remove a federal question to federal court within 30 days of a plaintiff's state court action. Here, the federal district court had subject matter jurisdiction as a federal question under ERISA. Unfortunately, counsel failed to remove the action within the requisite 30-day period. Therefore, timely removal would have prevented dismissal and taken the matter away from the Nevada Family Court.

D. ERISA Preempts the Imposition of a State Constructive Trust

In *Carmona*, the Nevada state court also imposed a constructive trust against the former spouse. The Court imposed the trust as an alternative in the event the plan failed or was unable to recognize the participant's current spouse as the survivor benefit beneficiary.

The Ninth Circuit found the state constructive trust to be improper. According to the court, a state court is prohibited from imposing a trust on an ERISA-based pension plan. ERISA preemption supersedes "any and all state laws" as they relate to any ERISA-based plan. See ERISA §514(a); see also *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). A constructive trust, however, may still be a viable alternative if the plan at issue is a state or municipal plan, which is outside the dictates of ERISA. See *Romans v. Romans*, 2006 Ohio 6554 (App. 2006) (imposing a constructive trust allowing a former spouse to receive survivor benefits despite the prohibition by the Ohio Revised Code).

Conclusion

The facts of *Carmona* are unique; the timeline of events is atypical. Rather than disposing of the case under a narrow holding, the Ninth Circuit chose to establish a broad vesting rule that will apply in most divorce actions involving the assignment of survivor benefits from an ERISA-based plan. Importantly, the Ninth Circuit held that surviving spouse benefits "ordinarily" *irrevocably vest* in the participant's spouse at the time of the annuity start date and may not be reassigned to a subsequent spouse. The Ninth Circuit's vesting rule, however, can be minimized if counsel recognizes the importance of timing and plan notice. Proper timing and plan notice is satisfied when a QDRO is incorporated by reference into the divorce decree and served immediately upon the plan administrator. Therefore, if proper timing and plan notice practice is followed, the Ninth Circuit's vesting rule will have little effect on a former spouse's community interest claim to survivor benefits, in most cases.

***

Raymond S. Dietrich manages a multi-jurisdictional law practice specializing in the drafting and litigation of Qualified Domestic Relations Orders (QDROs). Mr. Dietrich is author of the practice guide *Qualified Domestic Relations Orders: Strategy and Liability for the Family Law Attorney* (2008 © LexisNexis). The firm's website is located at www.qdrotrack.net.

The Actual Lessons and Implications of *Carmona* – and Why Every Divorce Lawyer in the Western United States Should Be Hoping I Prevail on Rehearing

by Marshal Willick, Esq.

INTRODUCTION

[38]"There are three things which I consider excellent advice. First, don't smoke to excess. Second, don't drink to excess. Third, don't marry to excess." – Mark Twain

Lupe Carmona violated these rules. My former client (he has been deceased several years) was married to wife number three when he was employed as a stagehand for a Las Vegas hotel, and accrued various retirement benefits, payable in the future, from the stagehand's union, IATSE.

Later he moved into management with the Hilton Hotel Corporation; he was no longer participating in the IATSE retirement plan, but he did accrue credits with Hilton while he moved through his marriages to wives four, five, six, and seven. None of his spouses through that time ever made any claim of any kind against the retirement benefits he accrued through those marriages.

But by the time he reached mandatory retirement age, he was still married to (but trying to divorce, in protracted litigation) wife seven, Janis. Knowing that he had a terminal illness and wanting to be able to leave a survivor's benefit to his widow, he elected a form of benefit for both his IATSE and Hilton retirement plans that included a survivor's benefit.

For the last several years of his lengthy divorce proceedings against Janis, Lupe was living with and supported by his intended future and final wife, Judy. Janis had accrued some retirement benefits in her own name during her marriage to Lupe, and the divorce decree recited that each party was awarded their own respective retirement benefits, in their entirety, as their respective sole and separate property. The tiny difference in the value of the benefits accrued in his name, versus her name, was calculated, and paid.

Immediately after the divorce, Lupe told both Hilton and IATSE to change the named beneficiary of his survivorship benefits to Judy, but the plans reported that they had no provisions permitting a change of beneficiary except by way of a QDRO. Janis objected to entry of a QDRO changing the named survivor beneficiary.

The Family Court judge expressly found that Janis had relinquished any and all rights she had to any portion of Lupe's retirement benefits, including the survivor's benefits, in the divorce settlement, and that Janis would be wrongfully enriched if she ever got any of them. He directed that a QDRO should be entered directing the money to Judy, that Janis was not entitled to any of the survivorship money, and that if for whatever reason the money was paid to the wrong person (Janis), she was required to pay it over to the intended beneficiary (Judy) in constructive trust.

Janis appealed before a QDRO could be entered; the Nevada Supreme Court affirmed, and the QDROs were not actually entered until some years later, on remand.

Once the QDROs were entered, Hilton began paying the money to Judy, as ordered. IATSE (a pension plan in which Janis just ***happened*** to be a participant herself) refused.

(cont'd. on page 7)

CARMONA LESSONS – *cont'd. from page 6*

AS BAD AS A CASE CAN GET

I admire perseverance as much as the next guy, but by any rational measure, this case is absurd. Janis refused to accept the ruling against her, instead re-filing and re-arguing the same issue over and over again.

Between 1998 and 2004, Judy prevailed in every forum – the Nevada Family Court (the original divorce case, ruling the benefits belonged to Judy and issuing QDROs); Nevada state district court, probate; U.S. District Court (which was dismissed; this is the case in which Janis attempted to sue the sitting state court judge, counsel, and all parties); U.S. Bankruptcy Court (where the court ruled that the survivorship benefits Janis was claiming were not hers); Nevada Supreme Court, first denying a writ, and then on two separately-filed appeals (affirming the Family Court's order in all respects); and the U.S. Supreme Court (Cert. Denied).

Janis filed again in the U.S. District Court, in an attempt to "remove" the years-old Family Court case to federal court (basically seeking an appellate review of the state court proceedings), which was firmly dismissed in 2004, and remanded back to the state Family Court with the request that the state court "enforce compliance with its own orders."

Janis filed yet a third federal district court action making identical claims, but ***that*** time named both pension plans as defendants as well. It was dismissed, but that third dismissal was the order appealed to the 9th Circuit by both IATSE and Janis. The 9th Circuit panel affirmed the dismissal as to Janis on Rooker-Feldman grounds (which bars suits "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the [federal] district court proceedings commenced and inviting district court review and rejection of those judgments"), but did not find IATSE to be barred from making a case, because it was not a party to the earlier actions.

Looking to the original 1974 phrasing of ERISA, the panel concluded that when Congress mentioned a "surviving spouse," it meant whatever spouse one happened to be married to at the moment of retirement – as opposed to the spouse either when the retirement benefits were earned, or to whom one happened to be married when one died. Nobody found anything in the 1974 legislative history of ERISA to suggest that Congress even thought about the possibility that this could be three separate people.

In other words, the panel decided to construe the terms of ERISA to mean that your "surviving spouse" is not your ***actual*** surviving spouse, but the person who ***would*** have been your surviving spouse if you had remained married to him or her after retiring – even if that person explicitly relinquishes any right to those benefits upon divorce. Having reached that decision, and finding that one cannot do indirectly what can't be done directly, the panel further held the Family Court's constructive trust to be unenforceable.

(cont'd. on page 8)

Nevada FAMILY LAW PRACTICE Manual
2008 Update

Includes new sections on:
Interstate Child Support | Custody Appeals
Juvenile Law | Forms for New NRCP 16.2

Plus updates to these chapters:
Divorce | Domestic Violence
Adoption | Forms
Annulment | Child Custody
Separate Maintenance | Child Support
Tax Issues in Family Law | Paternity

Already have the Family Law Practice Manual?
Buy only the book without a binder for a lower price!

Some discounts available – see our website for order numbers and prices.

Visit our website at

www.nvbar.org

and click on "Publications" to order, or call 1-800-254-2797 for more information.

CARMONA LESSONS – *cont'd. from page 7*

THE ACTUAL MEANING OF *CARMONA* – AND WHY YOU SHOULD CARE

The panel's reading of ERISA is absurd. The 9th Circuit had already held in the 2000 *Tise* decision that pre-retirement survivor's benefits could be assigned by QDRO, and that the ERISA phrase "payable with respect to a participant under a plan" refers both to payments to a participant, and to a beneficiary, in referencing what payments can be redirected by way of QDRO.

But this panel, dancing (unnecessarily) on the head of a pin, distinguished survivorship benefits payable ***before*** retirement from those payable ***after*** retirement – even though both were created by the same provision of ERISA, and decided that restrictions on the post-retirement ability of a participant to change the ***form*** of benefit (i.e., with or without a survivorship benefit) ***also*** forbid any change to the name of the person who was to receive the money.

The absurdity of the interpretation was pointed out in a hypothetical set out in the briefs – but ignored by the panel:

> the logical preposterousness of IATSE's position should seem apparent. By IATSE's reasoning, if Lupe had been married to Wife "A" for thirty years, accrued 100% of his retirement benefits during that time, divorced her, and married Janis for a ***single day*** on which he happened to retire (immediately afterward divorcing Janis and re-marrying Wife "A," and remaining so married for another 30 years before dying), neither Lupe nor Wife "A" nor any court could do anything to prevent Janis from receiving 100% of the survivorship benefits. It is impossible that the Congressional scheme as set out in ERISA and the REA could be twisted to support such gross inequity.

And the actual facts of this case illustrate the absurdity of the so-called "vesting rule" (a phrase not found in ERISA) just as well as that hypothetical. Lupe started accruing IATSE retirement credits around 1967 – when Janis was seven years old – and ***ceased*** accruing them and moved on to management in Hilton (and a new retirement plan) in 1978 – while Janis was still in high school. Lupe had a completely ***different*** spouse when his IATSE service credits accrued, and did not meet or marry Janis until going through several more wives and after another full decade had passed.

The panel's interpretation of ERISA, however, ignores entirely whether Janis had any natural or community property interest in the funds at issue, in favor of a policy of irrevocable entitlement by coincidence – whether a divorce decree had been entered before or after the date of retirement.

In so doing, it actually adopted IATSE's view – even though Janis has no underlying interest in the retirement benefits Lupe earned long before he met her, and even though Janis was found to have explicitly waived any interest she ***might*** have ever had, and even though there is no QDRO naming former spouse Janis as a surviving spouse in place of the ***actual*** surviving spouse (Judy) – that IATSE should pay Janis the survivorship benefits ***anyway***.

Divorce lawyers should care about this because it makes them responsible for knowing at the time of divorce whether the deals they make in dividing up assets will or will not be enforced by various retirement plans – and because they will inevitably be sued for malpractice if the deals they make in divorce actions do not result in enforceable orders.

The panel decision explicitly discusses the possibility that parties to divorce cases could outright lie – getting financial concessions in exchange for giving up pension and survivorship rights – and then turn right around, double-cross the divorce court and opposing party, and claim those benefits anyway. The panel apparently did not consider the inequity of such a situation worthy of avoidance, or have any concern with the potential liability of counsel.

If this interpretation stands, divorce courts will not be able to enforce the equities upon divorce as the courts find them to exist, and divorce lawyers will be turned into insurers of the future compliance of pension plans with divorce court orders. It will not be possible to enforce divorce court orders, even by QDRO, and happenstance will be more important than the intent of the parties, or the court.

COLORINGS FROM ABOVE: THE UNITED STATES SUPREME COURT DECISION IN *KENNEDY*

While the most recent rounds of *Carmona* were being litigated, another case worked its way up the federal

(cont'd. on page 9)

CARMONA LESSONS – *cont'd. from page 8*

courts to the United States Supreme Court – *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan, et al.,* 555 U.S. ___, 129 S. Ct. 865 (2009). In a nutshell, *Kennedy* adopted the "plan documents" rule, under which a retirement plan is free to distribute benefits in accordance with the documents it has on file – even if that means ignoring a waiver of retirement or survivorship benefits as set out in a divorce decree.

But the effects and holdings of *Kennedy* are more subtle. In reaching that conclusion, the court found that a divorce decree waiver of survivorship interests is ***not*** a prohibited "assignment or alienation" under ERISA, whether under §1056 or otherwise. That directly contradicted the core holding of the panel decision in *Carmona*, and is part of the Petition for Rehearing En Banc – which has remained pending in the Ninth Circuit since October, 2008.

The *Carmona* panel's decision hinged entirely on its belief that upon retirement, survivorship benefits under ERISA "irrevocably vest" in the spouse that happened to be married to the participant at that moment, and could not be thereafter altered.

Kennedy refuted that assertion on its face – the United States Supreme Court had no trouble at all finding that the participant ***could*** have altered the survivorship designation at any time after the divorce (in which the former spouse had relinquished her interest) up to the date he died. It was the fact that he did not actually do so that led to the decision made in the case.

In *Carmona*, Lupe ***tried*** to alter the beneficiary designation from the moment of his divorce from Janice, but IATSE claimed it had no procedure or form for doing so. The *Kennedy* opinion noted that such circumstances might occur (i.e., a plan might have no process for changing beneficiaries), but gave no guidance on what to do about it, if that happened.

Kennedy indicates that what was actually done in *Carmona* was exactly what ***should*** have been done to have Judy named as the recipient of the survivorship benefits: Janis had to waive the benefits (as the Family Court found that she did upon divorce), and then a QDRO had to be prepared, and presented to the plan indicating which person in the acceptable class of potential beneficiaries of survivorship benefits (a spouse or former spouse) was to receive them:

> In fact, a beneficiary seeking only to relinquish her right to benefits cannot do this by a QDRO, for a QDRO by definition requires that it be the "creat[tion] or recogni[tion of] the existence of an alternate payee's right to, or assign[ment] to an alternate payee [of] the right to, receive all or a portion of the benefits payable with respect to a participant under a plan." 29 U.S.C. §1056(d)(3)(B)(i)(I). There is no QDRO for a simple waiver; there must be some succeeding designation of an alternate payee.
>
> . . . .
>
> Depending on the circumstances, a surviving spouse has a right to a survivor's annuity or to a lump-sum payment on the death of the participant, unless the spouse has waived the right and the participant has eliminated the survivor annuity benefit or designated a different beneficiary. See *Boggs, supra*, at 843; 29 U.S.C. §§1055(a), (b)(1)(c), (c)(2). This waiver by a spouse is plainly not barred by the antialienation provision.

Kennedy also made uncertain the *Carmona* panel's rejection of the Family Court constructive trust. In footnote 10, the court declined to express "any view as to whether the Estate could have brought an action in state or federal court against Liv to obtain the benefits after they were distributed."

(cont'd. on page 10)

CARMONA LESSONS — *cont'd. from page 9*

THE PENDING DECISION ON REHEARING

The Petition for Rehearing in *Carmona* goes over much of the above, and asks the Ninth Circuit to reaffirm its own prior holding in *Tise* that survivorship benefits are "benefits payable with respect to a participant" which may be redirected to any eligible beneficiary by QDRO.

Which is what was attempted in *Carmona*, after the wife of happenstance at time of retirement (Janis) waived those benefits in the divorce decree. Lupe did everything he could, including written directions to the plan and commissioning a QDRO, to name his actual surviving spouse, Judy, as his survivor beneficiary.

The argument now pending asserts that ERISA simply does not provide for "vesting" of a survivor benefit in the potential survivor, and in any event, all retirement and survivorship benefits are assignable to an eligible alternate payee by QDRO, whether termed "vested" or not.

The position taken by IATSE (and accepted by the *Carmona* panel) is contradictory to the purpose of the QDRO exception created by Congress. A contrived and purposeless mis-reading of ERISA should not be permitted to override the clearly-expressed intention of Lupe to name his widow as his survivor beneficiary. Nothing in the law requires any other result, as *Kennedy* illustrates.

MR. DIETRICH'S ARTICLE

Respectfully, Dietrich's article contains multiple errors of law and fact. For example, his first paragraph states "the QDRO provisions of ERISA only protect former spouses," which as detailed above, is just not true.

29 U.S.C. §1056(d)(3)(K) defines "alternate payee" as "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant." And either a spouse or a former spouse may be the recipient of survivor's benefits under a defined benefit plan.

As the Ninth Circuit held in *Tise*, survivor benefits are "benefits payable with respect to a participant." They therefore cannot be held to be non-assignable by QDRO without violating §206(d)(3), which states that ***all*** such benefits are assignable to an alternate payee. That interpretation of the statutory scheme is critical to enabling the division of all marital property (which includes both retirement and survivor benefits). It is also critical to ensuring that "all" benefits payable with respect to a participant are available to satisfy the participant's child and family support obligations, which is the whole purpose of the ERISA/REA statutory scheme.

Dietrich was entirely correct in stressing the importance of "proper timing and plan notice" and why it is important to get a QDRO on file at the same time as a divorce decree, or at least as close to that date as possible. But no such action would have had any effect on the result – or the dispute now pending – in *Carmona*.

While it is an interesting perspective, Nevada divorce lawyers should be extremely cautious about taking the generalities and prescriptions in Dietrich's casenote as directory.

UPCOMING CLE ON THE TOPIC

No family lawyer seeking to fully serve his clients can avoid the complexities of dealing with retirement benefits. Those interested in improving their knowledge and skills will have an opportunity in March to jump into the deep end – the first Advanced Track at Ely will explore fine points in both PERS and ERISA QDROs, and explore the meaning of guidance from the courts in *Kennedy*, *Carmona*, and *Hedlund*.

***

Marshal S. Willick, Esq. is the principal of the WILLICK LAW GROUP, a firm in Las Vegas practicing exclusively in the field of family law. One of the original AAML members in Nevada and nationally published on family law topics, Mr. Willick can be reached at 3591 East Bonanza Rd., Ste. 200, Las Vegas, NV 89110-2198. His phone number is (702) 438-4100, and his fax is (702) 438-5311. E-mail can be directed to Marshal@WillickLawGroup.com.

Why Registered Nevada Domestic Partners Still Need Adoptions or Court Orders of Parentage But Not Investigation and Report

by Kimberly Surratt, Esq.

Cases are arising all over the United States regarding issues of recognition of other states' parentage judgments and adoption decrees for children of same-sex parents. Now that Nevada has domestic partnerships, it is important for Nevada lawyers to properly advise their clients regarding parentage. The focus is on the applicability of the Full Faith and Credit Clause of the United States Constitution.

In 2008, a custody dispute arose between two female partners who had entered into a Vermont Civil Union (similar to a Nevada domestic partnership) and subsequently had a child utilizing assisted reproductive technology. The parties then separated and one partner filed for a dissolution in Vermont. In the Vermont dissolution matter, the parties dissolved their civil union and received a custody and visitation order for the minor child. Shortly thereafter, the partner who had filed the dissolution matter in Vermont moved to Virginia, a state that had passed a Marriage Affirmation Act. This partner now filed a new action in Virginia seeking sole legal custody, claiming that Virginia was prohibited from recognizing civil unions and therefore could not recognize her former partner's parentage of the minor child. The Virginia action gave the filing partner sole legal custody. The Virginia Supreme Court reversed the decision, finding that the Vermont order was to be given full faith and credit in Virginia and that pursuant to the Parental Kidnapping Prevention Action, Vermont also had continuing jurisdiction over all custody matters for that minor child. *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2nd 822 (Va. 2008).

There was a United States Supreme Court case in 1942 that involved a Nevada decree of divorce, and the issue was whether the state of North Carolina had to give full faith and credit to the decree. *Williams v. North Carolina*, 317 U.S. 287, 303 (1942). In *Williams*, the petitioners were both married in North Carolina to other people. The petitioners took off to Las Vegas together to each seek a divorce. Each of the petitioners obtained a divorce in Nevada and then immediately married each other. Once married, they returned to North Carolina, where they were convicted of bigamous cohabitation. The North Carolina court would not recognize the Nevada decrees as valid in North Carolina.

There is no "roving 'public policy exception' to the full faith and credit due judgments." *Thomas v. Thompson*, 484 U.S. 174, 180 (1988). "The requirement of full faith and credit is exacting. Full faith and credit decisions should not, and must not, include an analysis of morals, that is a decision that rests with each state's legislature and are immaterial to a full faith and credit analysis." *Williams*, 317 U.S. 287 at 303. Thus, the North Carolina court could not find that the Nevada decrees were an exception to the full faith and credit clause merely because its enforcement or recognition in North Carolina was in conflict with their own public policy. *Id.* In summary, even though the petitioner could not divorce under North Carolina law, the U.S. Supreme Court found that North Carolina had to recognize their divorce if it was valid where entered, Nevada.

In case upon case in the 20th century, the full faith and credit clause was tested by parents who sought to avoid an unfavorable child custody or support order by trying again in another state. Justice Jackson referenced this behavior as a "rule of seize-and-run." *May v. Anderson*, 245 US 528, 542 (1953) (Jackson, J., dissenting). This rampant behavior led to the creation of such acts as the Parental Kidnaping Prevention Act, the Full Faith and Credit for Child Support Orders Act, the

(cont'd. on page 12)

DOMESTIC PARTNERSHIP — *cont'd. from page 11*

Uniform Child Custody Jurisdiction Act, the Uniform Child Custody Jurisdiction and Enforcement Act and the Uniform Interstate Family Support Act. Same-sex couples and the cases involving their children have now seen a "recent revival of this seize-and-run behavior" in the 21st century, despite the preventative measures of federal and state acts. "Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond," UC Davis Legal Studies Research Paper Series, Research Paper No. 178, June 2009, at 565.

The difference between the current full faith and credit challenges for same-sex parents and the challenges that were seen leading up to the late 1960s is that the late cases dealt with parents seeking to obtain a more favorable allocation of custody or visitation, whereas in the same-sex parent cases, "litigants seek to persuade a court to declare that a person previously held to be a parent by the court of another state is, in fact, not a parent at all." *Id.* at 565-566. The harm that befalls children as a result of such a finding is significant. Obviously, without a legally recognized "parent-child relationship," there is no right for the child to "maintain a relationship with a functional parent" or obtain access to a host of financial protections such as child support, Social Security, etc. *Id.*

With all of this at risk, it is important to understand how the full faith and credit clause works and how best to protect Nevada domestic partners. Does the full faith and credit clause apply to registered Nevada domestic partners who have children together in Nevada and move to another state

that does not recognize domestic partnerships? Does it make a difference if the partners have a birth certificate with each of their names listed as a parent? Will the certificate that the registered Nevada domestic partners receive from the Nevada Secretary of State be given full faith and credit outside of the state of Nevada?

Pursuant to the United States Constitution, "Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other state." U.S. Const. Art. IV, §1. "Although the text of the Clause does not suggest or require this interpretation, the Supreme Court has held that the clause applies differently to public acts or statutes than it does to judgments." *Id.* at 570, citing Ralph U. Whitten, Full Faith and Credit for Dummies, 38 Creighton l. Rev. 465, 470 (2005). While there is a public policy exception for statutes and states can decline to apply the law of other states when inconsistent with the public policy of that state they may not do so with judgments. Some research suggests that this due only to "final judgments." The trend among the case law is that full faith and credit does not apply to birth certificates, domestic partnership certificates or marriage certificates.

Even before the passage of the domestic partnership bill in Nevada, I was often questioned, and people were shocked that I had managed to obtain a new birth certificate from the Nevada Office of Vital Statistics with two same-sex parents listed on the birth certificate pursuant to a court order. I had heard rumors that the Nevada Office of Vital Statistics had refused in some cases to amend a birth certificate even pursuant to an order. Any such denial would have been a violation of the full faith and credit clause because I had an order from a court granting parentage. There have been cases across the United States in which offices of vital statistics have violated full faith and credit and have been forced to come into compliance when an order is presented to them. However, if a birth certificate contains two same-sex parents as a result of a presumption of parentage, without the issuance of a court order granting parentage, and someone wants

(cont'd. on page 13)

DOMESTIC PARTNERSHIP — cont'd. from page 12

to request full faith and credit be given to the birth certificate in a state that does not recognize same-sex parentage that state may not have to give full faith and credit to that documents without a final judgement of parentage from the state of origination. There have been a good number of cases during the 21st century across the United States that have given full faith and credit to adoption decrees and parentage orders even in the most conservative of dtates such as Florida, and even by the federal government, for the issuance of benefits despite the Federal Defense of Marriage Act.

Thus, Nevada domestic partners should be able to utilize the paternity and maternity presumptions that heterosexual couples enjoy, but it is a bad idea for registered Nevada domestic partners to simply utilize the presumptions of parentage when a child is born to one partner during the domestic partnership. Rather, they should seek either an adoption or a declaration of parentage in the form of a "final judgment" from a Nevada court. Many families migrate in and out of the state of Nevada. Domestic partners are no different. They need to have the protection of portability of their parental rights in the form of a final judgment in case they move out of the state of Nevada to a state that does not allow recognition of their parentage.

It is very important for registered Nevada domestic partners to obtain a judgment declaring their parentage over a child. However, because the intent of the Nevada domestic partnership bill is clear, all registered domestic partners should do a step-parent adoption if one of the parents is already the legal parent of the child. Pursuant to Nevada statute, the adoption of a child by his stepparent shall not in any way change the status of the relationship between the child and his natural parent who is the spouse of the petitioning stepparent. The domestic partnership bill replaces the term "spouse" with "domestic partner." In addition, because the natural parent/domestic partner is a "petitioner" and because the natural parent is related within the first degree of consanguinity the court may waive the investigation and report by the agency which provides child welfare services. There isn't a reason for the court to deny the waiver of investigation and report, considering the court's obligation is to uphold the intent of the domestic partnership bill in allowing registered domestic partners to the same rights and obligations as afforded to married couples.

It is advisable that domestic partners seek a step-parent adoption and not a "declaration of parentage." Not all states have a form of a "declaration of parentage," including Nevada. With the slew of full faith and credit challenges across the country, it is advisable for domestic partners to have a judgment that will be recognized across the country, and not to mention within the cases dealing with federal benefits. A "Decree of Adoption" is a document title that all 50 states recognize and understand, giving the partners a leg up on any potential challenges in the future. In addition, under federal tax law, adoption of a child by an unrelated adult who is not a spouse of a parent (as defined by federal, not state law) is entitled to an adoption tax credit. Therefore, a registered Nevada Domestic Partner who adopts her partner's child may be entitled to the adoption tax credit.

One last practice tip: if the parties end their relationship and have not previously obtained a decree of adoption or judgment of parentage, it is imperative that parentage be dealt with at the time of dissolution, if possible. This may necessitate that a parentage action be filed along with the divorce action so that parentage is established in an action that is not tied to the parents' relationship status. Leaving children of same-sex parents without a court order establishing their parentage leaves them at risk if they need federal benefits based on that parentage or if they leave the state of Nevada.

***

Kimberly M. Surratt is a family law attorney with a focus on surrogacy, adoption, domestic partnerships, collaborative law, and divorce. She is the principal of Surratt Law Practice, PC, 190 W. Huffaker Lane, Suite 401, Reno, Nevada 89511, Kim@SurrattLaw.com, www.SurrattLaw.com, (775) 324-3888.

The Financial Disclosure Form: Still a Ways to Go

by Richard M. Teichner, CPA, ABV, CVA, CFF, CDFA™ .

What prompted me to write this article is my concern that, in many instances, the financial declaration form (FDF) is not being completed properly or not in the way it was intended to be completed, mainly because of ambiguities that are inherent in the form. As a result, undoubtedly, inconsistencies will exist on how financial information is being reported among preparers of the form. The observations and comments mentioned below, along with some suggestions, should demonstrate how some of the ambiguities can result in incorrect and/or inconsistent reporting of financial information, and what might be done to mitigate or remedy such problems.

Some of you may have your own observations and suggestions that you would like to submit to the "powers that be," or may already have done so. (The "powers that were" consisted of the Family Law Rules of Civil Procedure Committee appointed by the Supreme Court.) In Washoe County, the family law judiciary plans to look for ways to improve the reporting of financial information by use of the FDF. However, other projects have been given higher priority, resulting in a delay in undertaking the task of revising the FDF. The family law bench or local bar in other jurisdictions may also be considering ways to improve the FDF, so you might want to look into contacting someone locally if you have any input about the form. Also, if you want to contact me to discuss any of your suggestions, please feel free to do so.

For the following, refer to a blank FDF, or go to www.nvbar.org/sections/familylaw/financialdisclosure.pdf.

Personal Income Schedule (page 2)

1. On line 1, there is no meaningful guidance on how the amounts to be entered for the components of employment income are to be determined in arriving at average gross monthly income. One cannot merely take one or two weeks of gross income that includes a bonus, commission or overtime, and then use this as the basis for determining an average monthly amount. This is because bonuses, commissions, overtime, tips, etc. vary from paycheck to paycheck. Thus, something more indicative of average monthly income could be arrived at, such as by using the total of the most recent three months of total compensation, including bonuses, commissions, overtime, tips, etc. divided by three; or using a recent period that is most representative of total compensation, including bonuses, etc. divided by the number of weeks in that period, then multiplied by 52, with this result then divided by 12. A separate page of instructions as part of the FDF could explain something to this effect by presenting examples.

2. On line 13 (investment income), capital gains is lumped with dividends and interest. Capital gains is a function of not only the proceeds received from the sale of a capital asset, but also of the tax cost basis of that asset. Thus the capital gains amount would probably not be meaningful. Also, if there is a net capital loss, then the netting of that loss with the dividends and interest would most likely not be indicative of investment income, and could even result in a negative figure that is essentially meaningless. For example, there could have been proceeds of $100,000 received in one year, but the asset was purchased for $150,000 ten years ago. Does this mean that the loss of $50,000 should be shown on line 13? This brings me to what is probably the most important point: a capital gain (or loss) or the proceeds received from a sale is usually not a recurring item, so shouldn't the reporting of capital transactions, including the details, within, say, the last year be disclosed on separate schedule so that the court and the opposing side have a more realistic picture of what *is* the average expected ongoing monthly income on line 23?

(cont'd. on page 15)

FINANCIAL DISCLOSURE — *cont'd. from page 14*

Personal Income Schedule (page 2) *(cont'd)*

3. On line 14 (rental income), it appears that the amount that goes in the right-hand box is net after depreciation, since the instruction on that line says to enter the depreciation amount claimed in arriving at rental income. If that is the case, then the amount shown will not be the cash income being received, but rather an arbitrary amount that is conditional on whatever depreciation method and depreciable life has been used for the rental property. Again, an essentially meaningless figure for the purpose of arriving at the monthly total income on line 23.

4. Apparently, other sources of income on line 21 would include distributions from interests in partnerships, S corporations and limited liability companies, and from trusts and estates that are making income distributions. There should be separate instructions as to what needs to be reported, i.e. monthly average distributions of cash or of distributable cash. (Also see comment 9. below.)

Personal Expense Schedule (page 3)

5. There should be a line for estimated taxes, if any, that are attributable to income other than wages. The income taxes and other deductions attributable to wages is reported on page 2, lines 2 thorough **7,** and income taxes and self-employment taxes attributable to "business income" is reported on page 7, line 29 (see comment 7. below), but what about income taxes that relate to all other sources of income, e.g., dividends and interest, rents, other investments, capital gains?

Business Income/Expense Schedule (page 7)

6. As indicated in 3. above, depreciation, on line 9 (and generally depletion, on line 8) is a non-cash expense, and by including this deduction, the average net income is understated, and such understatement could be substantial, especially if there is a large first year write-off element to the depreciation expense. This would apply even if the business income is reported on the accrual basis. (Note: Presumably, on average, the difference between cash and accrual would not be substantial.) A solution to this problem may be that, instead of having a line item for depreciation, there should be a line item for average capital expenditures, if material.

7. The average estimated tax payments on line 29 should only be the amount attributable to the business income, as there can be income or losses from many other sources besides business income. (See 5. above.) Also, since estimated tax payments for a particular year can be based on the prior year's taxable income (which avoids penalties, generally, if the prior year's tax is less than that of the current year), there may be no correlation between the estimated payments being made during the current year and the net income from the business. Therefore, the amount on line 29 should be a calculation of the expected total of the income tax and self-employment tax based on the amount shown on line 28, adjusted for book-tax differences such as deductible depreciation, deductible portion of auto, business meals, etc.

8. Apparently, this schedule combines income and expenses from each business, if there is more than one. I believe that having a separate schedule for each business would be much more meaningful to the users of the FDF, as the nature of the businesses and/or their profitability may be substantially different from one another.

(cont'd. on page 16)

FINANCIAL DISCLOSURE — *cont'd. from page 15*

Business Income/Expense Schedule (page 7)

9. If the litigant has interests in one or more partnership, S corporation and/or limited liability company, are the income and expenses supposed to be broken out and shown on this schedule or, instead, are merely the distributions and distributable cash from such entities supposed to be included on line 21 of the Personal Income Schedule (page 2)? (See 4. above.) What if the litigant owns a 90% interest in the entity? A 75% interest? Less than a 50% interest? Maybe a solution would be to have a separate schedule for "pass-through" entities, such as interests in partnerships, S corporations and limited liability companies, with instructions as to how and where to report the income from these (which may differ depending on the percentage interests owned in such an entity).

Asset and Debt Schedule (pages 5 and 6)

My suggestions as to how this schedule could be more informative are as follows:

A. Caption a column that says something to the effect of "Date Amount/Value Determined". The date of the information used in arriving at the amounts and values entered on this schedule may be significant in terms of ascertaining the net value of the marital estate at the time the FDF was prepared.

B. Caption a column that says something to the effect of "Source of Information".

C. Have an area at the bottom of the schedule for insertion of footnotes, as some line item amounts may warrant elaboration.

Conclusion

Having an FDF that is understandable and allows for a more consistent portrayal of financial information among prepares and users of the form can help avoid misunderstandings and misconceptions about a litigant's financial situation. Certainly, if a settlement or decree from the bench is based on incorrect financial information, the ramifications could be at least problematic and at worst disastrous.

***

Richard M. Teichner is the manager and sole member of Teichner Accounting Forensics & Valuations, PLLC in Reno. He is a CPA, accredited in business valuation, a Certified Valuation Analyst, Certified Financial Forensic and Certified Divorce Financial Analyst™. He provides litigation consulting, expert witness testimony and forensic accounting services relative to financial, economic damages and family law matters, as well as business valuation services. He can be contacted at (775) 828-7474 or at accounting-forensics@gmail.com. Website: www.accounting-forensics.com.

Getting Paid Through an Attorney's Lien After *Argentena*

by Marshal Willick, Esq.

In *Argentena v. Jolley Urga*, 125 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 40, Sept. 24, 2009), the Nevada Supreme Court effectively made it more difficult for attorneys to collect on either retaining or charging liens. The primary holding of the case was that in the absence of an enforceable charging lien, a client's request to liquidate a retaining lien, or a client's consent to the District Court's adjudication of a retaining lien, the District Court lacks jurisdiction to adjudicate an attorney/client dispute as to fees owed.

Partially overruling precedent from the past 50 years, the court found that no valid charging lien could be applied when no recovery was obtained for the client (as when the client's case was purely defensive, and no money judgment was obtained from the opponent). Further, the court found that any summary adjudication would be reversible error in the absence of a "basis for its decision in awarding the fees" as to reasonableness of the fees charged in light of the factors recited in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) and *Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005). Finally, the court found that the summary adjudication process would be entirely improper if a malpractice claim was pending by the client.

Reader plvlaw1 has written in to our website www.willicklawgroup.com, asking: "If we adjusted our retainer agreement to include language that we can pursue judgment of a lien through the case for which we are retained, will that be adequate to allow pursuit of the judgment without the necessity of filing an independent action?"

The answer is "yes," but altering the retainer agreement is not enough to cope with all that *Argentena* requires. In addition to two changes to a standard re-

tainer agreement, a motion seeking adjudication of an attorney's lien, and the resulting order, are now required to be much more detailed.

The two necessary changes to retainer agreements should include, immediately below the recitation of the firm's fee schedule, words to the effect:

> Client agrees that these fees are reasonable on the basis of Attorney's ability, training, education, experience, professional standing and skill, and the difficulty, intricacy, importance, and time and skill required to perform the work to be done.

(cont'd. on page 18)

ARGENTENA

cont'd. from page 17

This term mirrors the necessary considerations of an attorney's fee award under *Brunzell* and *Wilfong*. In addition, every retainer agreement should have a section as to liens and adjudication. Our model language reads:

> Client hereby grants Attorney a lien on any and all claims or causes of action that are related to the subject of Attorney's representation under this Agreement. Attorney's lien will be for any sums due and owing to Attorney at the conclusion of Attorney's services. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement, or otherwise. Any amounts received by Attorney's office on Client's behalf may be used to pay Client's account.
>
> Attorney will retain possession of Client's file and all information therein until full payment of all costs, expenses, and fees for legal services, subject to turnover or destruction of the file as set out in Paragraph ___. Client consents to the district court's adjudication of any such lien in the underlying action without requiring the filing of a separate action.

And since an adjudication would be reversible without findings under those cases, any motion for adjudication should make representations as to the required factors, and any order adjudicating a lien should include findings, as to:

1. ***The Qualities of the Advocate*:**
2. ***The Character of the Work to Be Done*:**
3. ***The Work Actually Performed by the Lawyer*:**
4. ***The Result:***

Finally, there is language within *Argentena* indicating that if the client wishes to assert a malpractice claim against an attorney, the summary adjudication procedure is not available. Another reader has asked why that could not be made a matter of contract, as well.

Presuming it's allowable, such an adjustment would further modify the sentence in the "Liens and Adjudications" section of a retainer agreement to read:

> Client consents to the district court's adjudication of any such lien in the underlying action without requiring the filing of a separate action, regardless of whether any other action might be or has been filed by either Attorney or Client against the other, including any action alleging malpractice.

Such a modification warrants a clear and strongly-worded warning, usually at the end of the agreement:

> This Agreement is a formal legal contract for Attorney's services. It protects both you and your attorney, is intended to prevent misunderstandings, and it may vary the law otherwise applicable to attorney's liens and resolution of fee disputes. **DO NOT SIGN THIS AGREEMENT UNTIL YOU HAVE READ IT THOROUGHLY AND ARE SURE YOU UNDERSTAND ITS TERMS.** If you do not understand it or if it does not contain all the agreements discussed, please call it to our attention and be sure this written Agreement contains **all** terms you believe are in effect between us. You have an absolute right to discuss this agreement with independent counsel (or any other advisor) before entering into this agreement, and we encourage you to do so.

All of this extra work is a burden, but it is still a lot faster, easier, and cheaper than filing a separate action for recovery against a client, and therefore actually in the interest of both attorney and client so that any disputes as to fees owed can be expeditiously, efficiently, and economically resolved.

***

Marshal S. Willick, Esq. is the principal of the WILLICK LAW GROUP, a firm in Las Vegas practicing exclusively in the field of family law. One of the original AAML members in Nevada and nationally published on family law topics, Mr. Willick can be reached at 3591 East Bonanza Rd., Ste. 200, Las Vegas, NV 89110-2198. His phone number is (702) 438-4100, and his fax is (702) 438-5311. E-mail can be directed to Marshal@WillickLawGroup.com.

WHY THE NEVADA WELFARE DIVISION IS CALCULATING INTEREST AND PENALTIES INCORRECTLY, AND HOW IT INJURES NEVADA LITIGANTS

by Marshal Willick, Esq.

TABLE OF CONTENTS

I. INTRODUCTION
II. A TRIP DOWN MEMORY LANE
III. THE TAIL WAGS THE DOG
IV. WELFARE'S APPEARANCE IN THE *VAILE* MATTER
V. ACTUAL POLICY-BASED COMPARISON OF CALCULATIONS
VI. CONCLUSION

[Ed. Note: One of the benefits of electronic publication is the ability to include CLE-length works. Please visit the link above to view the article in its entirety. And please give us your comments on this format.]

http://www.willicklawgroup.com/published_works

Articles Are Invited!

The next NFLR is expected in March 2010 at the Ely Family Law Conference. Please submit your proposed articles by February 1, 2010 to Bob Cerceo at rc@slwlaw.com. With our electronic format, we are less limited by space or length considerations.

State Bar of Nevada:

www.nvbar.org

Phone: (702) 382-2200 Toll-Free: (800) 254-2797
Fax: (702) 385-2045 Toll-Free: (888) 660-0060