FAMILY COURT JUDICIAL FORUM

December 2, 2009

Gold Coast Hotel and Casino
4000 W. Flamingo Road
Las Vegas, Nevada

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I. WHAT CONSTITUTES JOINT PHYSICAL CUSTODY

A. Rivero v. Rivero, 125 Nev. Adv. Op. #34 (Aug. 27, 2009)

For the first time in Nevada legal history, the bench and bar have a major decision which seeks to define what constitutes joint physical custody. This has long since been done but what constitutes joint physical custody has engendered much debate and much uncertainty. Sometimes whether the parties were awarded joint physical custody depended upon who was the judge in the case. Prior decisions hinted at or acknowledged joint physical custody but set no standards or guidelines.

That all changed on August 27, 2009 when the Nevada Supreme Court issued its final opinion after rehearing. The court withdrew its prior opinion from 2008 which can only be charitably described as a disaster and was met with serious protest and criticism from the bench and bar.

Some fundamental points from the Rivero decision.

First, the parents retain the right to privately enter into custody agreements and create their own custody terms and definitions. Such agreements will be enforced as contracts as long as they are not unconscionable, illegal or in violation of public policy.

Second, if the case ends up in court for resolution, then the court must use the terms and definitions under Nevada law.

Third, if the court modifies the custody terms, the court must make specific findings of fact that the modification is in the child's best interests.

Fourth, the court intended to define all types of legal and physical custody and create the continuum clarifying when one type of custody ends and another begins.

Fifth, Nevada statutes use only the ambiguous phrase "joint custody" and does not adequately distinguish between legal and physical custody.

Sixth, legal custody involves basic responsibility for a child and making major decisions for the child's health, education, religious upbringing. It requires parents be able to cooperate, communicate and compromise in the best interests of the child.

Seventh, joint legal custody can exist regardless of physical custody arrangements of the parties. Equal decision making power is not required because one parent may have decision making authority regarding certain areas of activities of the child such as education or healthcare.

Eighth, physical custody can be either primary physical custody or joint physical custody.

Ninth, the type of physical custody is important in three situations: determining the standard for change of custody, defining the procedure if a parent wants to move out of state with the child, and determination of child support.

Tenth, no statutory or case law has explicitly required an essentially equal time share in order to have joint physical custody.

Eleventh, the court construed NRS 125.480(1) to create a presumption that joint legal and physical custody are in the best interests of the child if the parents so agree. (Note: statute only refers to "joint custody").

Twelve, since an essentially equal time share is not always possible for many reasons, flexibility is required.

Thirteen, while an approximate 50-50 share is the desired goal, the court adopts the 40% guideline as the minimum time to constitute joint physical custody. Anything

less than that is primary custody to one parent and visitation to the other.

Fourteen, Barbagallo, 105 Nev. 546 (1989) plus the applicable statutes define the calculation of child support when one parent has primary physical custody.

Fifteen, Wright v. Osburn, 114 Nev. 1367 (1998) defines the calculation of child support for joint physical custody cases.

Sixteen, the goal of the decision was to provide clarity in the law because attorneys must still advise their clients, public policy favors settlement and parties are entitled to consistent and fair resolution of their disputes.

Seventeen, the forty percent time share will be calculated over a one year period, being at least 146 days per year. This allows flexibility for scheduling alterations during school weeks, vacations, holidays, etc. without unduly impacting a parent's ability to be considered as a joint physical custodian.

Eighteen, the focus of primary physical custody is on the child's residence. The parent with primary custody has the primary responsibility for maintaining a home for the child and providing for the child's basic needs.

Nineteen, the trial court cannot modify a child support order if the predicate facts upon which the court issued the order are substantially unchanged.

Twenty, a child support order may be modified upon (1) a three year review as authorized by statute or (2) upon a showing of changed circumstances at any time. A change of 20% or more in the obligor's gross monthly income requires the court to REVIEW the order but does NOT require the court to modify the order.

Twenty one, when adjusting child support, the court must consider the factors in NRS 125B.070 and 125B.080(9).

Twenty two, the court can consider facts previously unknown to the court or a party even if the facts predate the current support order at issue.

Twenty three, joint physical custody increases the total cost of raising the child but does not necessarily reduce the cost of raising the child to the other parent.

Twenty four, the Wright formula can be further modified by resort to the deviation factors in NRS 125B.080(9). Maintaining the lifestyle of the child between the parties' household is the goal of the Wright formula.

B. Rivero settles many questions and raises a whole host of new issues

This decision adopted, but did not cite, the research and view of Professor Marygold S. Melli, *Guideline Review: Child Support and Time Sharing by Parents,* 33 Fam. L. Q. 219 (1999). This program moderator was on amicus curie committee of the Family Law Section for the Rivero brief and advocated Professor Melli's theory of joint physical custody as the acceptable standard and then applying the Wright formula to that determination.

Just when we think we understand a decision and how to apply it in practice, we must remember that it takes its place as just one part in the larger body of law. There are several other aspects of family law and practice that can and will conflict with the Rivero decision in the world of real people in a variety of circumstances and different contexts. In physics, there is opposite reaction for every action. For every question answered and issue settled, new questions and issues rise up to challenge us.

Those different circumstances include whether or not there should be joint physical custody for infants and toddler, what to do in instances of domestic violence, what to do with parents who have alcohol or drug problems that significantly impair

parenting and custody concerns, what to do with parents with mental illnesses, and what to do with parents inflicted with difficult personality disorders, the needs of a child for stability and personal growth, and cases of high parental conflict.

Joint physical custody works best with normal functioning parents that are capable of low conflict and high levels of communication. The potential for joint physical custody goes down when there is high conflict and low levels of communication. Some cases will work in parallel parenting patterns (little communication and little conflict).

C. Factors to assess prospects for joint physical custody.

Taylor v. Taylor, 508 A.2d 964 (1986) is an excellent opinion on the evolution and difficulties of joint custody law doctrine. The biggest contribution of this case to the evolution of family law is its itemization of factors critical to a determination of whether joint physical custody will work. The court lists these factors as follows:

1. Capacity of the parents to communicate and to reach shared decisions affecting the child's welfare.
2. Willingness of the parents to share custody.
3. Fitness of the parents to share custody.
4. Relationship established between the child and each parent.
5. Preference of the child.
6. Potential disruption of the child's social and school life.
7. Geographic proximity of parental homes.
8. Demands of parental employment.
9. Age and number of children.

10. Sincerity of parents' request.

11. Financial status of the parents.

12. Impact on state or federal assistance.

13. Benefit to parents.

14. Other factors. (List is by no means exclusive).

The court opinion explains these factors in considerable detail and the reader is encouraged to download this superb opinion and study it.

D. Rivero and domestic violence

Rivero creates a presumption of joint legal and joint physical custody in domestic cases but that conflicts with the custody determination to be made if domestic violence is an issue. In such an instance, joint custody is PRESUMED not to be in best interest.

NRS 125.480(5) provides as follows:

> "Except as otherwise provided in subsection 6 or NRS 125C.210 a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Upon making such a determination, the court shall set forth:
>
> (a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and
>
> (b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child."

When making a custody determination, the court has to make findings of fact pursuant to NRS 125.480(4) and subpart (k) specifically asks: "Whether either parent or

any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child."

In a series of cases, the Nevada Supreme Court has reversed child custody decisions which failed to take domestic violence into account and failed to apply the Domestic Violence presumption. See McDermott v. McDermott, 113 Nev. 1134, 1136-7 (1997):

> There is no indication that the district court gave due weight to, or even considered, the rebuttable presumption in NRS 125.480(5) that sole custody or joint custody of the child by the perpetrator is not in the best interest of the child. Accordingly, we conclude that the district court abused its discretion by failing to expressly consider all necessary components of the NRS 125.480(5)."

In Russo v. Gardner, 114 Nev. 283, 290-91 (1998), the trial court's decision for joint custody was reversed because the trial court failed or refused to consider Mr. Gardner's domestic violence conviction.

The most recent case on point is Castle v. Simmons, 120 Nev. 98 (2004) which affirmed a change of custody because of a history of domestic violence by the mother. In affirming the lower court decision, the Nevada Supreme Court noted that the statutes on domestic violence and child custody require the court to conduct a hearing and to find by clear and convincing evidence that domestic violence has occurred.

Questions for panel discussions:

In your views, what constitutes circumstances which rebuts the presumption?

Is it age of the domestic violence instances?

Is it the frequency or infrequency of domestic violence? Compare isolated instances of transitory DV with coercive controlling violence.

What if one party has committed acts of domestic violence but the other parent/spouse is the worst parent due to mental health issues, alcoholism or drug abuse, or has a serious personality disorder, criminal history, etc.

What if the alleged "victim" was a conscious and willing participant in episodes of domestic violence?

What about the presence or absence of injuries?

What about the child's preferences?

Should one or two isolated instances of domestic violence preclude that parent from having JOINT LEGAL custody thereby depriving that parent of input and consultation regarding a child's education, medical care, religious upbringing, etc.

What if the parent with the DV problem is proven to be a more nurturing parent and better decision maker than the other parent?

E. Joint physical custody and infants and toddlers.

Social scientists and mental health professionals are often appalled at custody decision making in the courts. Judges and lawyers may be seen to be to too focused on a parent's "rights" to the detriment or exclusion of the child's best interests.

There has been an explosion of social science research on families and divorce done in the past three decades. In recent years, social scientists have studied how infants and toddlers may be harmed by permitting overnights with the non-custodial or other parent and being away from a primary care giver. This subject is hotly debated in the professional literature. Some courts have developed recommended guidelines for custody and visitation determinations based upon the child's age and developmental milestones. Many experts frown on overnight visitations for infants and toddler.

Several of these articles were published in the Family Court Review, a multi-disciplinary journal published by the Association of Family and Conciliation Courts These social scientists focus on attachment and bonding theory of child development and its implications for child development. Ultimately, it is a factor for custody decisions. These articles include the following:

Joan B. Kelly and Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children,* 38 Fam. & Conciliation Courts Rev. (July 2000);

Judith Solomon and Zeynep Biringen, *Another Look at the Developmental Research: Commentary on Kelly and Lamb's "Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children,"* 39 Fam. Ct. Rev. (October 2001);

Michael E. Lamb and Joan B. Kelly, *Using the Empirical Literature to Guide the Development of Parenting Plans for Young Children: A Rejoinder to Solomon and Biringen,*, 39 Fam. Ct. Rev. (October 2001);

Richard A. Warshak, *Blanket Restrictions: Overnight Contact Between Parents and Young Children,* 38 Fam. & Conciliation Courts Rev. (October 2000);

Biringen, et al, *Commentary on Warshak's "Blanket Restrictions: Overnight Contact Between Parents and Young Children,* 40 Fam. Ct. Rev. (April 2002);

Richard A. Warshak, *Who Will Be There When I Cry in the Night? Revisiting Overnights – a Rejoinder to Biringen, et al,* 40 Fam. Ct. Rev. (April 2002); and

Marsha Kline Pruett, Rachael Ebling, and Glendessa Insabella, *Critical Aspects*

of Parenting Plans for Young Children: Interjecting Data into the Debate About Overnights, 42 Fam. Ct. Rev. (January 2004).

There are several other social science journal articles on this topic and it continues to be researched and debated by social scientists all the time.

The debate is whether a child's developmental needs and concerns is a "best interests" factor that overcomes any legal presumption of joint physical custody.

Some states and courts have developed guides for parenting plans which incorporate child developmental standards and a child's age into the recommendations for custody and parenting time. Spokane County, Washington and Maricopa County, Arizona are two good examples. The Oklahoma Legislature directed the Oklahoma Supreme Court to create a guideline approach to child custody. 43 O.S. Section 111. The guidelines are available on the internet at www.ocsn.net

F. Personality disorders and joint physical custody.

It is a "rule of thumb" that for a family court judge, about 90% of the judge's time and energy is spent on 10% of the cases. (Actual empirical estimates range from 8% to 15%). This is where the high conflict cases end up in court.

It is in these high conflict cases that one is likely to find litigants with personality disorders. Not all disorders result in high conflict case but there are certain deadly disorders that rear up in many difficult, protracted cases.

An excellent article is Linda Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases,* 28 Wm. Mitchell L. Rev. 495, 510-11 (2001) and she observes:

> "Most parents involved in repeated litigation over custody have personality characteristics different from those parents who readily agree. Separating parents may feel shame and a vulnerability that turns their perceptions into 'black and white' issues, i.e. I am good and my spouse is evil. Some parents have a need to win, to be in charge or a need to maintain a semblance of the marital relationship. Some of these parents, however, have serious personality characteristics that distort relationships and make them unable to tolerate negative emotions.
>
> In most high conflict families, one or both parents exhibit either narcissistic, obsessive-compulsive, histrionic, paranoid, psychotic or borderline personalities. These parents chronically externalize any blame, possess little insight into their own role in the conflict, fail to understand the impact of the conflict on their children and routinely feel self-justified. The adversarial system may exacerbate the negative behaviors of parents who possess the financial resources for extended litigation and who believe the court will eventually prove them 'right.'"

Professor Elrod is one of the premiere family law experts in the United States and she strongly believes that judges should receive specialized training to understand the developmental stages of children and knowledge of cross-disciplinary issues and high conflict cases.

High conflict cases require special care and handling in an effort to ensure safety and adequate protections for children in such cases.

Panel discussion topics

What are the options for handling high conflict cases and is this sufficient to overcome the joint custody presumption?

When is joint physical custody inappropriate in high conflict cases and how would you select which parent should have primary custody?

Should a parent with significant mental health problems, personality disorders or drug or alcohol use even have joint Legal custody? What if their decision making skills are impaired or just too difficult to deal with?

II. ISSUES IN CHILD SUPPORT DETERMINATION

The Rivero case addressed some issues for child support determinations. Little new ground was broken here. The Nevada Supreme Court thankfully got away from the convoluted formula it created in the first Rivero decision in 2008.

The child support guidelines were established by legislation in 1987 which created Chapter 125B. Each state was required by federal law to create some formula approaches for the determination of child support as a condition of receiving federal money from the Department of Health and Human Services. Since Nevada, like all other states, needed and received substantial federal funding for social service expenditures, it complied with the federal mandate.

The individual states had a choice of three methods for the calculation of child support. Nevada and a small number of other states chose the "percentage of gross monthly income" method wherein child support is calculated as a percentage of the obligor's gross monthly income from employment or self-employment.

The relevant statutes are NRS 125B.070, 125B.080 and 125B.140 which respectively state:

> **NRS 125B.070 Amount of payment: Definitions; adjustment of presumptive maximum amount based on change in Consumer Price Index.**
>
> 1. As used in this section and NRS 125B.080, unless the context otherwise requires:
>
> (a) "Gross monthly income" means the total amount of income received each month from any source of a person who is not self-employed or the gross income from any source of a self-employed person, after deduction of all legitimate business expenses, but without deduction for personal income taxes, contributions for retirement benefits, contributions to a pension or for any other personal expenses.

(b) "Obligation for support" means the sum certain dollar amount determined according to the following schedule:

(1) For one child, 18 percent;

(2) For two children, 25 percent;

(3) For three children, 29 percent;

(4) For four children, 31 percent; and

(5) For each additional child, an additional 2 percent,

of a parent's gross monthly income, but not more than the presumptive maximum amount per month per child set forth for the parent in subsection 2 for an obligation for support determined pursuant to subparagraphs (1) to (4), inclusive, unless the court sets forth findings of fact as to the basis for a different amount pursuant to subsection 6 of NRS 125B.080.

2. For the purposes of paragraph (b) of subsection 1, the presumptive maximum amount per month per child for an obligation for support, as adjusted pursuant to subsection 3, is:

PRESUMPTIVE MAXIMUM AMOUNT

INCOME RANGE If the Parent's Gross Monthly Income Is at Least		But Less Than	The Presumptive Maximum Amount the Parent May Be Required to Pay per Month per Child Pursuant to Paragraph (b) of Subsection 1 Is
$0	-	$4,168	$500
4,168	-	6,251	550
6,251	-	8,334	600
8,334	-	10,418	650
10,418	-	12,501	700
12,501	-	14,583	750

If a parent's gross monthly income is equal to or greater than $14,583, the

presumptive maximum amount the parent may be required to pay pursuant to paragraph (b) of subsection 1 is $800.

3. The presumptive maximum amounts set forth in subsection 2 for the obligation for support must be adjusted on July 1 of each year for the fiscal year beginning that day and ending June 30 in a rounded dollar amount corresponding to the percentage of increase or decrease in the Consumer Price Index (All Items) published by the United States Department of Labor for the preceding calendar year. On April 1 of each year, the Office of Court Administrator shall determine the amount of the increase or decrease required by this subsection, establish the adjusted amounts to take effect on July 1 of that year and notify each district court of the adjusted amounts.

NRS 125B.080 Amount of payment: Determination. Except as otherwise provided in NRS 425.450:

1. A court of this State shall apply the appropriate formula set forth in NRS 125B.070 to:

(a) Determine the required support in any case involving the support of children.

(b) Any request filed after July 1, 1987, to change the amount of the required support of children.

2. If the parties agree as to the amount of support required, the parties shall certify that the amount of support is consistent with the appropriate formula set forth in NRS 125B.070. If the amount of support deviates from the formula, the parties must stipulate sufficient facts in accordance with subsection 9 which justify the deviation to the court, and the court shall make a written finding thereon. Any inaccuracy or falsification of financial information which results in an inappropriate award of support is grounds for a motion to modify or adjust the award.

3. If the parties disagree as to the amount of the gross monthly income of either party, the court shall determine the amount and may direct either party to furnish financial information or other records, including income tax returns for the preceding 3 years. Once a court has established an obligation for support by reference to a formula set forth in NRS 125B.070, any subsequent modification or adjustment of that support, except for any modification or adjustment made pursuant to subsection 3 of NRS 125B.070 or NRS 425.450 or as a result of a review conducted pursuant to subsection 1 of NRS 125B.145, must be based upon changed circumstances.

4. Notwithstanding the formulas set forth in NRS 125B.070, the minimum

amount of support that may be awarded by a court in any case is $100 per month per child, unless the court makes a written finding that the obligor is unable to pay the minimum amount. Willful underemployment or unemployment is not a sufficient cause to deviate from the awarding of at least the minimum amount.

5. It is presumed that the basic needs of a child are met by the formulas set forth in NRS 125B.070. This presumption may be rebutted by evidence proving that the needs of a particular child are not met by the applicable formula.

6. If the amount of the awarded support for a child is greater or less than the amount which would be established under the applicable formula, the court shall:

(a) Set forth findings of fact as to the basis for the deviation from the formula; and

(b) Provide in the findings of fact the amount of support that would have been established under the applicable formula.

7. Expenses for health care which are not reimbursed, including expenses for medical, surgical, dental, orthodontic and optical expenses, must be borne equally by both parents in the absence of extraordinary circumstances.

8. If a parent who has an obligation for support is willfully underemployed or unemployed to avoid an obligation for support of a child, that obligation must be based upon the parent's true potential earning capacity.

9. The court shall consider the following factors when adjusting the amount of support of a child upon specific findings of fact:

(a) The cost of health insurance;

(b) The cost of child care;

© Any special educational needs of the child;

(d) The age of the child;

(e) The legal responsibility of the parents for the support of others;

(f) The value of services contributed by either parent;

(g) Any public assistance paid to support the child;

(h) Any expenses reasonably related to the mother's pregnancy and confinement;

(l) The cost of transportation of the child to and from visitation if the custodial parent moved with the child from the jurisdiction of the court which ordered the support and the noncustodial parent remained;

(j) The amount of time the child spends with each parent;

(k) Any other necessary expenses for the benefit of the child; and

(l) The relative income of both parents.

(Added to NRS by 1987, 2267; A 1989, 859; 1991, 1334; 1993, 486; 1997, 2295; 2001, 1866)

NRS 125B.140 Enforcement of order for support.

1. Except as otherwise provided in chapter 130 of NRS and NRS 125B.012:

(a) If an order issued by a court provides for payment for the support of a child, that order is a judgment by operation of law on or after the date a payment is due. Such a judgment may not be retroactively modified or adjusted and may be enforced in the same manner as other judgments of this State.

(b) Payments for the support of a child pursuant to an order of a court which have not accrued at the time either party gives notice that he has filed a motion for modification or adjustment may be modified or adjusted by the court upon a showing of changed circumstances, whether or not the court has expressly retained jurisdiction of the modification or adjustment.

2. Except as otherwise provided in subsection 3 and NRS 125B.012, 125B.142 and 125B.144:

(a) Before execution for the enforcement of a judgment for the support of a child, the person seeking to enforce the judgment must send a notice by certified mail, restricted delivery, with return receipt requested, to the responsible parent:

(1) Specifying the name of the court that issued the order for support and the date of its issuance;

(2) Specifying the amount of arrearages accrued under the order;

(3) Stating that the arrearages will be enforced as a judgment; and

(4) Explaining that the responsible parent may, within 20 days after the notice is sent, ask for a hearing before a court of this State concerning the amount of the arrearages.

(b) The matters to be adjudicated at such a hearing are limited to a determination of the amount of the arrearages and the jurisdiction of the court issuing the order. At the hearing, the court shall take evidence and determine the amount of the judgment and issue its order for that amount.

© The court shall determine and include in its order:

(1) Interest upon the arrearages at a rate established pursuant to NRS 99.040, from the time each amount became due; and

(2) A reasonable attorney's fee for the proceeding,

unless the court finds that the responsible parent would experience an undue hardship if required to pay such amounts. Interest continues to accrue on the amount ordered until it is paid, and additional attorney's fees must be allowed if required for collection.

(d) The court shall ensure that the social security number of the responsible parent is:

(1) Provided to the Division of Welfare and Supportive Services of the Department of Health and Human Services.

(2) Placed in the records relating to the matter and, except as otherwise required to carry out a specific statute, maintained in a confidential manner.

3. Subsection 2 does not apply to the enforcement of a judgment for arrearages if the amount of the judgment has been determined by any court.

III. SPOUSAL SUPPORT ISSUES

Spousal support issues continue to be among the most vexing and emotional issues in divorce cases (alimony is purely a creature of statute and is not available for unmarried couple cases).

Nevada case law tends to haphazard and far from predictable. It tends to be fact and case specific with little clear guidance from the Nevada Supreme Court. Prior to 2007, attorneys and judges could only rely on vague statutes and a small handful of cases. In 2007, the Nevada Legislature added an alimony statute which did little more than codify essentially the same factors stated in the case law. Various subsections on alimony primarily 1(a), 7, 8, 9, 10 and 11, are in NRS 125.150 which now reads:

> NRS 125.150 Alimony and adjudication of property rights; award of attorney's fee; subsequent modification by court. Except as otherwise provided in NRS 125.155 and unless the action is contrary to a premarital agreement between the parties which is enforceable pursuant to chapter 123A of NRS:
>
> 1. In granting a divorce, the court:
>
> (a) May award such alimony to the wife or to the husband, in a specified principal sum or as specified periodic payments, as appears just and equitable; and (b) Shall, to the extent practicable, make an equal disposition of the community property of the parties, except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.
>
> 2. Except as otherwise provided in this subsection, in granting a divorce, the court shall dispose of any property held in joint tenancy in the manner set forth in subsection 1 for the disposition of community property. If a party has made a contribution of separate property to the acquisition or improvement of property held in joint tenancy, the court may provide for the reimbursement of that party for his contribution. The amount of reimbursement must not exceed the amount of the contribution of separate property that can be traced to the acquisition or improvement of property held in joint tenancy, without interest or any adjustment because of an increase in the value of the property held in joint tenancy. The amount of reimbursement must not exceed the value, at the time of the

disposition, of the property held in joint tenancy for which the contribution of separate property was made. In determining whether to provide for the reimbursement, in whole or in part, of a party who has contributed separate property, the court shall consider:

(a) The intention of the parties in placing the property in joint tenancy;

(b) The length of the marriage; and

© Any other factor which the court deems relevant in making a just and equitable disposition of that property.

As used in this subsection, "contribution" includes, without limitation, a down payment, a payment for the acquisition or improvement of property, and a payment reducing the principal of a loan used to finance the purchase or improvement of property. The term does not include a payment of interest on a loan used to finance the purchase or improvement of property, or a payment made for maintenance, insurance or taxes on property.

3. Except as otherwise provided in NRS 125.141 whether or not application for suit money has been made under the provisions of NRS 125.040, the court may award a reasonable attorney's fee to either party to an action for divorce if those fees are in issue under the pleadings.

4. In granting a divorce, the court may also set apart such portion of the husband's separate property for the wife's support, the wife's separate property for the husband's support or the separate property of either spouse for the support of their children as is deemed just and equitable.

5. In the event of the death of either party or the subsequent remarriage of the spouse to whom specified periodic payments were to be made, all the payments required by the decree must cease, unless it was otherwise ordered by the court.

6. If the court adjudicates the property rights of the parties, or an agreement by the parties settling their property rights has been approved by the court, whether or not the court has retained jurisdiction to modify them, the adjudication of property rights, and the agreements settling property rights, may nevertheless at any time thereafter be modified by the court upon written stipulation signed and acknowledged by the parties to the action, and in accordance with the terms thereof.

7. If a decree of divorce, or an agreement between the parties which was ratified, adopted or approved in a decree of divorce, provides for specified periodic payments of alimony, the decree or agreement is not subject to modification by the court as to accrued payments. Payments pursuant to a decree entered on or after July 1, 1975, which have not accrued at the time a motion for modification is filed may be modified upon a showing of changed circumstances, whether or

not the court has expressly retained jurisdiction for the modification. In addition to any other factors the court considers relevant in determining whether to modify the order, the court shall consider whether the income of the spouse who is ordered to pay alimony, as indicated on the spouse's federal income tax return for the preceding calendar year, has been reduced to such a level that the spouse is financially unable to pay the amount of alimony he has been ordered to pay.

8. In addition to any other factors the court considers relevant in determining whether to award alimony and the amount of such an award, the court shall consider:

(a) The financial condition of each spouse;

(b) The nature and value of the respective property of each spouse;

© The contribution of each spouse to any property held by the spouses pursuant to NRS 123.030;

(e) The income, earning capacity, age and health of each spouse;

(f) The standard of living during the marriage;

(g) The career before the marriage of the spouse who would receive the alimony;

(h) The existence of specialized education or training or the level of marketable skills attained by each spouse during the marriage;

(I) The contribution of either spouse as homemaker;

(j) The award of property granted by the court in the divorce, other than child support and alimony, to the spouse who would receive the alimony; and

(k) The physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse.

9. In granting a divorce, the court shall consider the need to grant alimony to a spouse for the purpose of obtaining training or education relating to a job, career or profession. In addition to any other factors the court considers relevant in determining whether such alimony should be granted, the court shall consider:

(a) Whether the spouse who would pay such alimony has obtained greater job skills or education during the marriage; and

(b) Whether the spouse who would receive such alimony provided financial support while the other spouse obtained job skills or education.

10. If the court determines that alimony should be awarded pursuant to the provisions of subsection 9:

(a) The court, in its order, shall provide for the time within which the spouse who is the recipient of the alimony must commence the training or education relating to a job, career or profession.

(b) The spouse who is ordered to pay the alimony may, upon changed circumstances, file a motion to modify the order.

© The spouse who is the recipient of the alimony may be granted, in addition to any other alimony granted by the court, money to provide for:

(1) Testing of the recipient's skills relating to a job, career or profession;

(2) Evaluation of the recipient's abilities and goals relating to a job, career or profession;

(3) Guidance for the recipient in establishing a specific plan for training or education relating to a job, career or profession;

(4) Subsidization of an employer's costs incurred in training the recipient;

(5) Assisting the recipient to search for a job; or

(6) Payment of the costs of tuition, books and fees for:

(I) The equivalent of a high school diploma;

(II) College courses which are directly applicable to the recipient's goals for his career; or

(III) Courses of training in skills desirable for employment.

11. For the purposes of this section, a change of 20 percent or more in the gross monthly income of a spouse who is ordered to pay alimony shall be deemed to constitute changed circumstances requiring a review for modification of the payments of alimony. As used in this subsection, "gross monthly income" has the meaning ascribed to it in NRS 125B.070.

The best article on Nevada alimony was recently published. David A. Hardy, *Nevada* Alimony: An Important Policy in Need of a Coherent Policy Purpose, 9 Nev. L. J. 325 (Winter 2009). Family Court Judge David Hardy (Washoe County) thoroughly traced the evolution of Nevada law on alimony and articulated the various theories of alimony such as career or job subordination, education subordination, economic need,

etc. and noted that Nevada law has recognized different theories at various times.

Judge Hardy had written an opinion on alimony in one of his divorce cases, Flood v. Flood, in which he denied alimony. The ex-wife appealed his decision to the Nevada Supreme Court, the case has been briefed and is under submission.

The wide range of discretion afforded to the family court judge is hardly limited by the phrase "just and equitable" as it appears in subsection 1(a). These words have been in the statutes for many years.

Nevada law largely excludes fault as a factor in awarding or declining to award spousal support. Rodriguez v. Rodriguez, 116 Nev. 993 (2000)

When the Nevada Supreme Court has reversed denials of alimony or has reversed unduly limited alimony provisions, it has done so because of perceived inequalities in education, employment, health concerns and the potential negative economic effects on the receiving spouse. See Sargeant v. Sargeant, 88 Nev. 223 (1972); Johnson v. Steel, Inc., 94 Nev. 483 (1978); Rutar v. Rutar, 108 Nev. 203 (1990); Gardner v. Gardner, 110 Nev. 1053 (1994); Wright v. Osburn, 114 Nev. 1367 (1998) and Rodriguez, supra.

Modifiable or non-modifiable alimony awards

Another area where Nevada has seen little case law is when is an alimony award deemed "non-modifiable" and can such awards ever be modified. In those instances, a critical factor is whether the alimony agreement is in a marital settlement contract which is NOT merged into the degree. In such a case, this is a matter of contract and the court has no legal authority to modify a written contract of the parties. See Ballin v. Ballin, 78 Nev. 224 (1962); Rush v. Rush, 82 Nev. 59 (1966); Jones v. Jones, 86 Nev.

879 (1970); and Gilbert v. Warren, 95 Nev. 296 (1979).

However, if the decree itself or a marital settlement agreement is merged into the decree, the court has the theoretical authority to modify an alimony award. See NRS 125.150(7), (11), supra.

The Nevada Supreme Court has not issued a published opinion whether a non-modifiable alimony award in a decree can never be modified. Some courts in other states have so ruled, finding such clauses unenforceable because it would effectively nullify a court's legal authority to amend alimony orders. See Vorfeld v. Vorfeld, 804 P.2d 891 (Hawaii App. 1991). Such a clause may be contrary to public policy. See Smith v. Smith, 618 A.2d 381 (NJ Super. Ct. Chanc. Div. 1993).

There are also differences in adjudication depending on whether the alimony is straight periodic alimony or a lump sum award. A straight alimony award is terminated upon the death of either party or the remarriage of the obligee spouse. NRS 125.150(5) unless it is otherwise ordered by the court.

On the other hand, a lump sum award may not be modified upon either death or remarriage. A lump sum award and the remarriage issue was squarely presented to the court in Kishner v. Kishner, 93 Nev. 220 (1977). The trial court granted a lump sum alimony award payable in installments and the former wife remarried six months after the divorce. The former husband claimed that his obligation ended. The trial court ruled against him and so did the Nevada Supreme Court . The Supreme Court held that notwithstanding the fact that the alimony statutes do not expressly mention lump sum alimony, it had approved such a form of alimony awards in the past. This form of alimony must still be paid regardless of the subsequent remarriage of the former wife.

The "death exception" was ruled upon by the Nevada Supreme Court in Daniel v. Baker, 106 Nev. 412 (1990). There were huge disparities between the husband and wife in their ages, education and financial wealth. The trial court awarded periodic alimony only. The wife objected and appealed. The Supreme Court reversed for abuse of discretion. The alimony award should have provided for a permanent or lump sum alimony award given these disparities. The former husband died shortly before the oral argument. Normally, the death of a litigant ends a case but this was an exception for the reasons stated in the opinion.

Traditional alimony and rehabilitative alimony

One cautionary note. Be aware that the court has the discretion and legal authority to award BOTH rehabilitative alimony and traditional alimony. See Gardner v. Gardner, 110 Nev. 1053 (1994).

Rehabilitative alimony is generally subject to modification upon changed circumstances but it is an open question whether this specific form of alimony will likewise be deemed non-modifiable solely upon remarriage or death of the obligor former spouse.

The rehabilitative alimony statute was created by the Legislature in 1989. The statute was first reviewed by the Nevada Supreme Court in Fondi v. Fondi, 106 Nev. 856 (1990). No alimony was awarded after a 17 year marriage of a legal secretary to a judge in Carson City (judge is now retired). The Nevada Supreme Court refused to award alimony despite a large difference in incomes because the former wife had marketable skills, was working at the time of the divorce, and was not required to stay home from work to care for her stepson. The court observed the legislative history

which noted that the provisions were intended to allow spouses to obtain some form of job skills to be able to enter the workforce and to reduce the state's welfare rolls.

In those cases wherein rehabilitative alimony was a significant issue, the focus is on the need for further education or retraining, whether the spouse, usually the former wife, stayed home with the children, the age, education and employment of the payor spouse, current employment and skills level, and other applicable factors.

Alimony and bankruptcy

Once upon a time, alimony was used as an offsetting financial tool to compensate one spouse when the other spouse filed a bankruptcy petition post decree and discharged all debts allocated to that spouse in the divorce decree. See Martin v. Martin, 108 Nev. 384 (1992) and Siragusa v. Siragusa, 108 Nev. 987 (1992).

However, the continued efficacy of those cases appears to be in doubt following the major changes to the United States Bankruptcy Code in 2004, effective in spring, 2005, which changed 11 U.S.C. Section 523(a)(5) and (15) to effectively prohibit discharge of debts specified in a divorce decree. Alimony and child support obligations are likewise non dischargeable.

Questions for panel discussion

What are your most significant factors in deciding whether to grant or deny alimony? Have you awarded alimony to male litigants as well as female litigants?

What are your most difficult issues in deciding alimony cases?

What do you do when there is a strong case shown for alimony but an equally strong case is shown for inability to pay alimony?

IV. PROPERTY DIVISION DISPUTES

Just a few years ago, the real estate market was overheated and houses were selling in a short time after listing and the fair market values were rapidly increasing.

Now we are mired in recession and the majority of the houses in Clark County are "underwater." That is, more is owed on the house than it is worth.

Nevada's unemployment rate is about 13% and tax revenues for state and local government units continue to decline. Nevada is also seeing a record number of bankruptcies being filed.

In light of these economic difficulties, how have you been handling those cases with severe financial problems and unemployment for the litigants.

Have you observed any changes in the practice of law due to these economic conditions?

What is your advice to lawyers and litigants in these tough times?

Do you encourage loan modifications or short sales while the divorce is pending or should it be done after the divorce?

V. HOW TO PREPARE FOR MEDIATION

Mediation has proven itself as a viable alternative to trials. The empirical studies have been done and together with the anecdotal evidence gathered from many mediators and lawyers, it is now generally established that mediation successfully resolves from 65% to 80% of the cases referred to mediation. In Nevada, we have a ten year history of mandatory mediation with custody and visitation. Overall, there is about an 80% rate of resolution with full or partial parenting plans.

It is still a fact though that many cases settle out of court but after how much needless litigation and expense. Our family courts still try only 1-2% of the cases filed each year.

We also must face the fact that over 50% of the litigants are appearing pro se. Even those who can afford legal fees are often loath to hire an attorney because, rightly or wrongly, many of them feel that lawyers just make things worse, not better.

Since many litigants can't afford significant legal fees or don't want to pay substantial fees and courts tend to encourage settlements, this has given rise to a newer breed of lawyer, "the new lawyer", who has skills in negotiating and settling cases and resolving disputes with little or no court involvement.

Interest based negotiations

Lawyers normally trained in the adversary mode of dispute resolution learn the art of taking "positions" in litigation and then sticking to them as long as possible. Lawyers and clients taking "positions" do so to define the contours of the dispute and frame or limit the options available to the decision maker. "Positions" tend to be rigid

and uncompromising and a client may see abandoning or modifying a "position" in terms of "winning" and "losing."

In negotiations and mediation, we seek to move away from these rigid notions of "positions" and move towards a deeper understanding of the client's personal "interests" in the case and how this can affect both the process of settlement and the outcome of the case.

An example of a "position" is the parent who wants primary physical custody of the children, the other parent to have every other weekend parenting time, and a full assessment of child support. What this parent may be saying in a deeper sense is that "I believe the children need a stable, secure environment and that I will get enough money from you to enable me to provide that environment for them."

The other parent's "position" may be a desire for joint legal and physical custody and a calculation of child support based upon a shared arrangement. What this parent may be saying in a deeper sense is that he/she wants to be a significant part of the children's lives and not merely a visitor and a source of money.

It is important for the lawyers, clients, and the mediator to develop an understanding of the parties' respective interests. Then it is most helpful if each party can address the other party's interests and how to accommodate them in a negotiated agreement.

A mediator may need to dig deeper through dialogue to fully grasp a party's real interests. But a mediator must be careful and not dig too deeply and go where the parties don't want the mediator to go.

Not all "interests" are nice, meaning that a parent may have bona fide concerns

about the other parent's negatives such as mental health problems, domestic violence, alcoholism or substance abuse, etc. These and others like them are legitimate concerns and should be addressed. Sometimes one party's "interest" is revenge or spite. In either negotiations or mediation, these are dangerous waters to navigate.

What is Atna? (Hint: it is not a large insurance company).

Those who prepare well for negotiations or mediation consider the ATNA (alternative to a negotiated agreement) family in their strategic planning. There are three members of the ATNA family:

1. BATNA – Best Alternative to a Negotiated Agreement.
2. WATNA – Worst Alternative to a Negotiated Agreement
3. MLATNA – Most Likely Alternative to a Negotiated Agreement

BATNA is the best case scenario for what might happen if negotiations fail. For example, in a family law case where custody is an issue, the BATNA for one party might be joint legal custody with the client having primary physical custody.

WATNA is the opposite, the worst case scenario for your client if negotiations fail. In our custody case, the other party gets sole or primary physical custody.

MLATNA is the estimate by the client and counsel what is most likely to happen if the negotiations fail and the case goes to trial. The more likely scenario could be joint legal and physical custody.

Another relative in the ATNA family is EATNAs, i.e. "Estimated Alternatives to a Negotiated Agreement." Even if the parties do not have good options outside of negotiations, they often think they do. This is a perception issue by the client and that is what matters in deciding whether to accept an agreement.

How do you determine your BATNA? First, develop a list of your options you might conceivably take if no agreement is reached, develop the best of your options, and tentatively select the one option that seems best for the client. In determining which option may be "best", the client should consider the cost and feasibility of the option, which option will have the most impact, and which option is more likely to work than the other options.

In domestic cases, the option/alternative to a negotiated agreement is to use another decision making mechanism, namely, either private arbitration or litigation. This entails a cost/benefit analysis. If a client spends a lot more money for litigation, will the chances for prevailing improve enough that the unpredictability is worth the effort.

When considering the BATNA for your client, consider also the BATNA for the other side. What are their options and are they overly optimistic about what their options are in the case.

In settlement negotiations or mediation, parties are influenced consciously or unconsciously by their assessment of their alternatives to a negotiated agreement. If a party feels they have better alternatives, they may push for a more favorable settlement. If the alternatives are worse, they may be more accommodating. Parties often do a poor job of comprehending and assessing their alternatives and have unrealistic and uninformed ideas of what they might obtain without a negotiated agreement.

A negotiated agreement becomes "ripe" for completion when the BATNAs of each party have similar ideas or congruent images of how the dispute will turn out if

they do not agree in negotiations and pursue other dispute resolution methods, primarily litigation. Thus, if both parties are fairly close in agreeing that one side would likely prevail on an issue, they are more likely to settle out of court and save the transaction costs (legal fees and expenses).

The goal of negotiations or mediation is to narrow the differences, develop options and compromises and keep the parties moving towards a successful conclusion. It is often said in mediation that you may not get what you want but you could get what you need.

Advantages of mediation

1. Mediation can take place in any ordinary conference room. Mediation does not need a million dollar courtroom.

2. Mediation can take place at any time by agreement of the parties, attorneys, and the mediator. Mediation is not tied to or restricted by the availability of the judge or the courtroom. If folks want to mediate after normal business hours or on weekends, they can.

3. Mediation is often far cheaper than litigation. Although the fees and time needed for mediation varies from case to case, we have seen fees for completed cases as low as 10% of the fees for litigation of the case. In the great majority of the cases, mediation saves litigants money.

4. Mediation is far less stressful than litigation. Going to court for a case is very stressful, sometimes so severe that it has adverse health consequences. Mediation generally takes place in conference rooms in informal settings. Discussing disputes in a calm and relaxed setting is much easier on the parties, the attorneys and the mediator.

5. Mediation tends to be interest based whereas in litigation, lawyers and parties take "positions." This tends to be more rigid and uncompromising and makes it considerably harder to settle cases. In divorce mediation, it is often said that "you may not get what you want but you should be able to get what you need."

6. Mediation focuses on ways that differences can be understood and then resolved. Adversary litigation tends to focus the parties on their differences and creates a motivation for that party to "win" or at least "prevail" in the forthcoming trial.

7. Mediation works to reduce conflict and anger whereas litigation often pushes people to go "negative" and make all manner of accusations against each other. While a party may "win" the court case, the real result is often a pyrrhic victory because the parties hate each other when it is done.

8. In divorce mediation, the parties are more likely to cooperate with each other and communicate more effectively post mediation than they are if their dispute was litigated.

9. Mediated cases have a significantly lower rate of post mediation court proceedings than litigated cases. Mediation agreements tend to hold up longer and if there are post decree problems, parties that mediated tend to remediate instead of resorting to the court.

10. In family court today, more than half of the litigants are pro se. They are either unable or unwilling to hire lawyers to represent them in court. Pro se litigants are ill equipped to represent themselves. Mediation is informal and is not bound by the rules of evidence or procedure.

11. Mediation can be far faster than court processes. A divorce involves

significant personal transitions for the parties and their children. A divorce does not start when the complaint is filed nor does it end when the decree is filed. The decision to divorce may take place long beforehand and the post-divorce adjustments can take months or years.

12. Mediation does not require a large staff and support system for a judge, i.e. a judicial executive assistant, bailiff, law clerk, and a court clerk.

13. In the empirical studies done to date, roughly two-thirds or more cases settle in mediation, sometimes higher. The paperwork needed includes the pleadings, affidavits for prove-up purposes, and a decree of divorce. If more cases are resolved out of court, that will reduce the hundreds of court filings for motions, replies, etc.

14. Divorce is hardest on the children and we see the adverse consequences on children in our juvenile courts, criminal courts, schools, counseling services, etc. Teaching divorcing parents how to co-parent helps reduce the risk to our children.

15. In mediation, the parties often have the choice of selecting a mediator with specialized knowledge and experience suitable to the case. For example, a CPA mediator may be ideal for mediating a case involving substantial assets, tax consequences, trust and estate planning, retirement planning, etc.

How to prepare for a successful negotiation or mediation

Mediation does resolve roughly two thirds of the cases that go through the process. While not every case is suitable for mediation, most cases will settle in mediation. Lawyers should screen clients for mediation suitability. If the client has serious mental health issues (like clinical depression), drug or alcohol problems, personality disorders, or domestic violence problems, mediation may not be

appropriate.

Another screening issue is readiness and timing for mediation. Some clients are highly distraught and emotional at the beginning of a divorce and may not be in an acceptable mental condition to start a mediation. Some clients may be too motivated by anger in the beginning and are bent on revenge, not resolution. Others may be so distraught that they will agree to anything the other party suggests just to "get it over with."

In short, the early screening by the lawyer is done to assess the client's emotional readiness, cognitive ability, be future focused, and have a listening ability.

Here are some practical tips that will enhance the chances of a successful negotiation or mediation.

1. Obtain the fundamental financial information needed such as mortgages, credit cards, secured debts, loans, etc. and some idea of the value of assets.

2. Develop a list of major issues and concerns that need to be discussed at mediation. Advise your client to "let go" of unimportant issues.

3. Establish a collegial working relationship with the attorney for the other party. This doesn't mean you can't disagree on issues or your views of the parties. Both of you are in this process together to see if an agreement can be reached.

4. Impress on your client the importance of full voluntary disclosure of all assets and debts. A requisite degree of trust is essential to a successful mediation.

5. Be prepared to discuss the early and/or temporary arrangements for payment of marital debts and expenses during the separation phase while everyone is preparing for and participating in the mediation process. Who is going to live where?

Who will take care of the children for the time being?

6. Work with the client to start developing a series of options prior to mediation. This is nothing more than a list of possible options for the parties to consider. Do not develop fixed "positions" as the issues in mediation since that tends to polarize people and significantly reduce the prospects of a mediated settlement. It is not about winning and losing.

7. Do not create unrealistic hopes or false expectations in your client about the outcome of mediation. Encourage the client as well as yourself to approach mediation with an open mind. There will be ample opportunity to flesh out the factual information in the mediation and consider various options.

8. Select a mediator with skills, knowledge and experience appropriate to your case. It is unwise to hire a mediator with a mental health background (MFT, etc) to mediate a case with substantial assets, tax consequences, etc.

9. Determine in advance what kind of mediation scheduling you think is appropriate to the case. Some mediators will meet for 60-90 minutes maximum for each session; others will schedule a mediation for a half or full day.

10. Be courteous at mediation. Emotions may run high and feelings may be raw. Keep the mediation civil. Good mediators will let your client express himself or herself but in respectful ways. Avoid personal attacks on the other party or counsel.

11. Be sure that there is agreement in advance on who pays for the mediation services.

12. In between sessions, review the case with your client, gather more information or documents as needed, re-evaluate any positions or points of view, and

prepare for the next session.

13. Consider co-mediators or team mediation where there are multiple difficult issues and different experts may be needed to co-mediate a case.

The actual mediation itself should include food and beverages. There is something to the old Biblical adage about sitting down and breaking bread with your adversaries. Food can be snack foods of various kinds. People feel more relaxed when they can nibble at will throughout the process. Beverages include water, possible soft drinks, coffee, tea, etc.

The mediator should sit at the head of the table. This has symbolic and psychological importance and puts the mediator into a position of authority. The mediator is seen as a true neutral and not being on the side of the other party.

VI. Procedural and Trial Tips

There appears to be a wide divergency of opinions and practices on how the case management conferences are conducted. What are your practices and why?

If alternative methods of dispute resolution are available, when do you use them and why?

What are your selection criteria for deciding when to use an outsource child custody evaluation and what are your criteria for deciding which type of evaluator to use?

What are some of the worst things lawyers do in trials?

What are some of the best trial practices?

V. Domestic Violence

The applicable statutes include the definitions of domestic violence and the presumptions for child custody when domestic violence is present.

NRS 33.018 Acts which constitute domestic violence.

1. 1. Domestic violence occurs when a person commits one of the following acts against or upon his spouse, former spouse, any other person to whom he is related by blood or marriage, a person with whom he is or was actually residing, a person with whom he has had or is having a dating relationship, a person with whom he has a child in common, the minor child of any of those persons, his minor child or any person who has been appointed the custodian or legal guardian for his minor child:

(a) A battery.

(b) An assault.

© Compelling the other by force or threat of force to perform an act from which he has the right to refrain or to refrain from an act which he has the right to perform.

(d) A sexual assault.

(e) A knowing, purposeful or reckless course of conduct intended to harass the other. Such conduct may include, but is not limited to:

(1) Stalking.

(2) Arson.

(3) Trespassing.

(4) Larceny.

(5) Destruction of private property.

(6) Carrying a concealed weapon without a permit.

(7) Injuring or killing an animal.

(f) A false imprisonment.

(g) Unlawful entry of the other's residence, or forcible entry against the other's will if there is a reasonably foreseeable risk of harm to the other from the entry.

2. As used in this section, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement. The term does not include a casual relationship or an ordinary association between persons

in a business or social context.

(Added to NRS by 1985, 2283; A 1995, 902; 1997, 1808; 2007, 82, 1275)

NRS 125.480 Best interest of child; preferences; considerations of court; presumption when court determines that parent or person residing with child is perpetrator of domestic violence.

1. 1. In determining custody of a minor child in an action brought under this chapter, the sole consideration of the court is the best interest of the child. If it appears to the court that joint custody would be in the best interest of the child, the court may grant custody to the parties jointly.

2. Preference must not be given to either parent for the sole reason that the parent is the mother or the father of the child.

. . . .

. . . .

4. In determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things:

(a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his custody.

(b) Any nomination by a parent or a guardian for the child.

© Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.

(d) The level of conflict between the parents.

(e) The ability of the parents to cooperate to meet the needs of the child.

(f) The mental and physical health of the parents.

(g) The physical, developmental and emotional needs of the child.

(h) The nature of the relationship of the child with each parent.

(I) The ability of the child to maintain a relationship with any sibling.

(j) Any history of parental abuse or neglect of the child or a sibling of the child.

(k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.

5. Except as otherwise provided in subsection 6 or NRS 125C.210, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and

(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

6. If after an evidentiary hearing held pursuant to subsection 5 the court determines that each party has engaged in acts of domestic violence, it shall, if possible, then determine which person was the primary physical aggressor. In determining which party was the primary physical aggressor for the purposes of this section, the court shall consider:

(a) All prior acts of domestic violence involving either party;

(b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence;

(c) The likelihood of future injury;

(d) Whether, during the prior acts, one of the parties acted in self-defense; and

(e) Any other factors which the court deems relevant to the determination.

Ê In such a case, if it is not possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 5 applies to both parties. If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 5 applies only to the party determined by the court to be the primary physical aggressor.

7. As used in this section, "domestic violence" means the commission of any act described in NRS 33.018.

(Added to NRS by 1981, 283; A 1991, 980, 1175; 1995, 330; 2005, 1678)

NRS 125C.230 Presumption concerning custody when court determines that parent or other person seeking custody of child is perpetrator of domestic violence.

1. 1. Except as otherwise provided in NRS 125C.210 and 125C.220, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody of a child has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and

(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

2. If after an evidentiary hearing held pursuant to subsection 1 the court determines that more than one party has engaged in acts of domestic violence, it shall, if possible, determine which person was the primary physical aggressor. In determining which party was the primary physical aggressor for the purposes of this section, the court shall consider:

(a) All prior acts of domestic violence involving any of the parties;

(b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence;

© The likelihood of future injury;

(d) Whether, during the prior acts, one of the parties acted in self-defense; and

(e) Any other factors that the court deems relevant to the determination.

In such a case, if it is not possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 1 applies to each of the parties. If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 1 applies only to the party determined by the court to be the primary physical aggressor.

3. As used in this section, "domestic violence" means the commission of any act described in NRS 33.018.

(Added to NRS by 1999, 742)

Domestic violence is another "hot button" topic in family litigation. There is substantial social science research showing that children are at serious risk in families with a serious history of domestic violence. Children of divorce are at risk enough just due to the fact of the divorce but domestic violence can significantly exacerbate those risks.

For many years, the professional literature seemed to focus on men as the "perpetrators" of domestic violence and women as the "victims" of domestic violence. After all, the major federal legislation is named the "Violence Against Women Act" and many law review articles on domestic violence, written mostly by female advocates, assumed that men were the perpetrators and that if women were violent, it was only because they were defending themselves.

Those contentions did not mirror the street realities and more recent research has dispelled these notions and has produced more precise and useful social science articles.

The current state of the art in social science research can be found in Joan B. Kelly and Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions,* 46 Fam. Ct. Rev. 476 (July 2008). Various studies in the past fifteen years have shown that there are different patterns of domestic violence and understanding that may greatly assist the lawyer and judge in decision making.

The worst form is what they describe as coercive controlling violence which is a pervasive pattern of power and control. That form of DV includes certain distinctive factors such as emotional abuse, economic abuse, coercion and threats , intimidation,

isolation, assertions of "male privilege", and minimizing, delaying and blaming behaviors. Abusers may not use all of these tactics but may use a combination of them that seems to work for them.

The abuse perpetrators in this type of DV are overwhelmingly male, perhaps as high as 97% of the reported and studied cases. However, the number of cases where coercive controlling violence is present is a minority of the total number of DV cases.

Situational couple violence is the most common type of DV and is perpetrated equally by both men and women. It is not a lesser version of the coercive controlling violence behavior pattern because it differs significantly in the type of violence and has different causes and consequences.

Another separate category is "separation-instigated violence" and emanates almost equally from men and women. It is perhaps best described as a traumatic reaction to the separation of a couple at the time of a divorce or unmarried couple separation, accusations of infidelity or sexual abuse, or public humiliation. It tends to be limited to one or two episodes at the very beginning of a case and diminishes when the parties are adjusting to the separation and court proceedings.

Nevada law has two statutes on DV and child custody. Both require proof of the DV by clear and convincing evidence and both create a rebuttable presumption that sole or joint custody by the perpetrator is not in the best interests of the child.

Many acts of DV do not result in criminal prosecutions or in criminal cases that are compromised after completion of counseling programs. That leaves the actual fact finding up to the family court judge.

If a person is actually convicted of DV, that easily satisfies the "clear and

convincing" standard of proof for the family court proceedings.

These statutes also make it a rebuttable presumption but say nothing as to what kind of evidence would suffice to rebut the presumption.

That is the major question for consideration in this seminar: when is the domestic violence finding established by the court and what kind of evidence will rebut the presumption.