## I. Tips and techniques for case assessment and vital first steps

The practice of family law is changing dramatically as we finished the first decade of the 21st century. At the present time, Nevada is mired in a serious recession with high unemployment, a high foreclosure rate, huge drops in real estate values, numerous business failings, increased bankruptcy filings, massive budget cuts in state and local budgets, and a stagnating local economy.

This has lead to large increases in the number of pro se litigants and fewer clients willing or able to finance much litigation in family law cases. Clients are more budget conscious than ever and are very wary of incurring sizeable legal fees in their cases.

In past years when Las Vegas enjoyed seemingly endless increases in property values and high population increases for year after year, attorneys could afford to represent clients and incur substantial fees since those fees could be paid out of the proceeds of the sale of the marital residence at the end of the divorce process.

Those days are over now and probably will not be seen for many years to come. The majority of the houses in Clark County are underwater, i.e. the owners owe more money on the mortgage than the house is worth. There is no equity to divide. That plus other substantial indebtedness often means a divorce is a "lose, lose" proposition.

Recessions are relatively common in economic cycles. The factors above are the result of market forces and policies affecting the national economy and matters over which we have little or no control.

Now add to the mix certain critical legal developments in Nevada. In Bero-Wachs v. Logar and Pulvar, 123 Nev. 71,157 P.3d 704 (2007), the Nevada Supreme Court ruled that any attorney fees judgment rendered against a client cannot attach to or reach any assets which are exempt under NRS 21.090. Few divorces today have marital assets beyond those exempt from execution. A fees judgment can only be enforced against non-exempt assets.

The legal boom came down harder in Argentena v. Jolly, Urga, Woodbury and Standish, 125 Nev. 527, 216 P.3d 779 (2009) when the Supreme Court essentially ruled that motions to adjudicate attorney fee disputes under NRS 18.015 generally cannot be prosecuted in the same underlying case. A retaining lien is a passive lien which does

not require or allow any affirmative court action. A charging lien can only be asserted in the same action in the district court if the client either requests the court to hear it or has otherwise consented to the court's jurisdiction.

These cases have rendered it very difficult to assert claims against clients for attorney fees in the underlying divorce case. Fees awarded in preliminary

proceedings are based upon explicit authorizing statutes and those fees are not affected except as to collections. Fees awarded for reducing arrears to judgment are also not affected.

It is more important than ever to have serious discussions with your client at the very beginning of a case about finances and fees. Even a preliminary motion in a divorce case can burn through several hundred dollars of legal time and court costs. Many couples separate either before or during the divorce process thereby incurring expenses for two households instead of one.

Therefore, it is suggested that attorneys strongly consider utilizing non-court alternative dispute methods for their clients including, but not limited to, mediation, the collaborative process, private assessments, private arbitration, and utilizing divorce coaches and certified divorce financial planners or analysts. Even with added professionals in a case, the overall costs can and often are cheaper.

These non-court methods are proving in experience to be cost effective for most divorcing couples and far less expensive than traditional litigation. David Hoffman, the founder of the Boston Law Collaborative, LLC and an experienced mediator, arbitrator, and lawyer, wrote a superb article on comparative costs for divorce cases in his firm. David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR,* 2008 Journal of Dispute Resolution 11 (2008).

Hoffman pulled a representative sampling of 199 cases handled by his firm from 2004 through 2007. All were divorce cases except for 8 prenuptial agreement mediations. Bearing in mind that his case samples came from only his law firm, the median fees for divorce was $6,613, collaborative divorce cases were $19,723, cooperative process cases were $26,500, negotiation/litigation cases were $26,830 and full bore litigation was $77,746.00.

His practice is in Boston, Massachusetts, a large urban area and the legal fees in that community may be higher. Nevertheless, he found that the alternative methods were far cheaper than the litigation methods. Experiences elsewhere are similar.

It is important at the intake stage to gather a substantial volume of important information. This is needed to assess the case, start discussions about process, assess the parties, and provide the information necessary for the Case Management

Conference now mandated by NRCP 16.2.

One way of reducing fees and having better client relations is tasking the client with developing the information for you instead of you or some paralegal taking time to interview the clients, witnesses, write up the notes and then write up the court papers.

**Information Gathering Subject Areas**

**Basic:** Date of marriage; city, state and country of marriage ceremony;

Dates of birth of all children;

List of community property;

List of separate property assets

List of community debts;

List of separate debts;

Restore former name or retain married name;

Personal history of client including age and date of birth, social security number, education, employment, job status (employed or not or self-employment), health concerns, addiction concerns, mental health issues, criminal history, prior relationship histories (if relevant), children from other relationships,

Personal history of the other party – similar factors

**Financial:** Are both parties employed and information about incomes.

If a person is unemployed, is that person receiving unemployment, looking for work, retired, etc.

Will either party possibly be relocating for employment purposes?

Pension and retirement accounts information – IRA, 401(k), deferred compensation, Social Security benefits,

Are their taxes current or do the parties owe back taxes?

Real estate ownership information and is mortgage current? Is the house value "upside down" and any hope of recovering or adjusting the loan?
Credit card debts. Current, cut off, in collection, etc. Medical bills.
Motor vehicles and associated loans.

Support obligations for others (legally obligated)

Support obligations for others (elderly, disabled but with no legal obligation to assist) See NRS 125B.080(9)(e).

**Case status:** Is this a new case with no court cases filed by either party or an existing case? If so, what stage is the case at now? Trial coming soon, time remaining for discovery and motions.

Was there a domestic violence application submitted in Family Court or (sometimes) in Justice Court? Was a TPO issued?

Were there any prior cases filed and later dismissed or settled?

Were there or are there any child support enforcement cases? If so, which state orders are enforced and for whom? Pending or closed?

Were there any prior domestic violence civil or criminal cases?

Was either party a defendant in a past or pending criminal

case?

Was either party involved in a DUI or reckless driving case?

Was either party or a child involved in a mental health commitment?

Any other civil cases of consequence to this domestic case? (probate, personal injury, business disputes, real estate, etc.)

**Urgencies:** Is your client relatively stable now or is there a need for quick action such as a TPO application, motion for temporary custody, fees, and support? Does the client need to move out of the present living conditions and, if so, what are the options?

Can the urgent matter be resolved out of court or is court needed?

If the temporary matter is resolved is court, can the parties then switch to an alternative dispute resolution method?

Is there an urgency that needs quick action in a non-court setting? (health, mental health, counseling, family emergency, tax filing deadline)

**Assessments:** Now you are at the stage to determine the steps to be taken in a case.

Is your client appear to be a reasonably normal functioning adult that

can realistically engage in such processes as collaborative divorce, mediation, negotiations, and information gathering processes.

Is your client appear to be well grounded even though somewhat emotionally distressed by the pending divorce, custody dispute, etc.

Does your client appear to be rational enough to convey adequate and reasonably accurate information to your regarding the client and the opposing party and the children?

Does your client appear to you to be reasonably willing to accept compromises and make adjustments during the case process?

Does your client appear to you to be in need of counseling?

Does your client appear to be reasonably honest in disclosures or is desirous of hiding assets, testifying falsely in court, or is bent on litigating for revenge, spite, anger, etc.

What are the client's priorities in this case? Custody? Property?

**Interests:** Processes such as mediation, collaborative divorce, and negotiations focus heavily on interest based approaches and not on legal "positions."

It is important for you as a lawyer to understand the differences. As an example, in a custody context, a mother may take the legal "position" that she wants primary physical custody and a commensurate amount of child support. In interest based theory, what she is saying is that being the primary parent to raise her child or children is very important to her and that

she wants to be assured of having the financial means and security to do so. A father may take the legal "position" that he wants specific parenting times in the decree or order. In interest based theory, what he wants to be assured of is access to and meaningful involvement with his children.

Understanding the real underlying interests of both parties is critical to understanding a case and developing settlement options and outcomes.
While you may represent an adult in the actual case, other involved parties may also have significant interests to be taken into account. This is particularly true for children. They have their own points of view.

## IV. Child custody and visitation: Rivero v. Rivero, 125 Nev. 410 (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.

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.

## KEY STATUTES

Chapter 125B governs several aspects of child support. The key statutes are NRS 125B.070, 125B.080, and 125B.140:

**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: Click here to view image.

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.

4. As used in this section, "Office of Court Administrator" means the Office of Court Administrator created pursuant to NRS 1.320.

**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;

(c) 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;

(i) 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.

## VARIATION PATTERNS

At first blush, the determination of child support seems simple and easy to apply in practice. In most divorces with children, one party, most commonly the mother, has primary physical custody. The father then pays child support according to the guideline formulas in the statutes. Barbagallo v. Barbagallo, 105 Nev. 546 (1989) represents that straightforward application of the guidelines.

However, the family patterns that emerge after divorce are not always so neat and clean. The trend today is towards more joint physical custody. For years, there was little, if any, legal guidance on what constitutes "joint physical custody." In 2009, that issue was largely resolved with the Rivero decision, supra. (60/40 split).

The definitional issues were not addressed in Wright v. Osburn, 114 Nev. 1367 (1998). In that case, the Nevada Supreme Court crafted the calculation of child support in joint physical custody cases. The applicable percentage is applied to each parent's gross monthly income. The two resulting numbers would be compared and the parent with the larger number would pay the difference to the parent with the lower number. As is common in the evolution of law, the establishment of the law on one issue begats more issues.

The issue then was where to apply the cap. Based on Garrett v. Garrett, 111 Nev. 972 (1995), some Family Court judges applied the statutory cap at the first level, i.e. to initial calculation of the gross monthly income. If the cap reduced that number, the cap number was then used when determining the difference between the two calculations.

Other Family Court judges applied the cap to the end number, i.e. after the percentage calculations and subtraction has taken place. Since the legal rationales for both positions had arguable merit, the Nevada Supreme Court needed to resolve the dispute in order to provide for more uniform interpretation and application.

The court did so in Wesley v. Foster, 119 Nev. 110 (2003). The court chose the latter method, i.e. applying the cap to the end number of the calculation. In some instances, this means the parent with the higher income pays the same amount of child support as would be paid in the traditional primary physical custody case.

There are other variation models. For example, one parent may have one or more children as primary custodian and the other parent has one or more of the children (split custody). The Wright formula could be used but with different percentages. (Example: 18% v. 25%). However, the Nevada Supreme Court has expressly ruled that trial judges are not free to craft their own formulas. Lewis v. Hicks, 108 Nev. 1107 (1992).

Another difficult and all too common variation involves multiple children in multiple families. Many divorced people remarry and often have more children in the next family. The child support for the children in the first family may be negatively affected by the legal obligation to care for more children in the second family.

One other variation that is troublesome is when the father has custody and the mother is to pay child support. We have seen a number of cases where the mother remarries and has a child or children with the next husband and they decide she will be a stay at home mom. This presents a real clash of gender equality and gender biology.
A non-custodial mother has the same obligation to pay child support as would the non-custodial father. Yet, the demands of motherhood and private decision making within her next family create difficult problems and conflicts.

Nevada law does not permit the courts to impose a child support obligation calculated upon the income of the mother's new spouse. See Rodgers v.Rodgers, 110 Nev. 1370 (1994) and Jackson v. Jackson, 111 Nev. 1551 (1995). The child support obligation is based upon the obligor's income and not on a community share of the new spouses income.

## CURRENT GUIDELINE AMOUNTS AND CAPS

**PRESUMPTIVE MAXIMUM AMOUNTS (PMA) OF CHILD SUPPORT**
**EFFECTIVE JULY 1, 2011 - JUNE 30, 2012**

NRS 125B.070

*PMA increased 1.5% pursuant to the Consumer Price Index (a11 items) increase in Calendar Year 2010 (December - December) as published by the U.S. Department of Labor*
http://www.bls.govicpii#tables

| INCOME RANGE | | PRESUMPTIVE MAXIMUM AMOUNT (PMA) |
|---|---|---|
| *If the Parent's Gross Monthly Income is at Least* | *But Less Than* | *The PMA the Parent May Be Required to Pay per Month per Child Pursuant to Paragraph (b) of Subsection I is* |
| $0 | $4,235 | $630 |
| $4,235 | $6,351 | $693 |
| $6,351 | $8,467 | $758 |
| $8,467 | $10,585 | $819 |
| $10,585 | $12,701 | $883 |
| $12,701 | $14,816 | $945 |
| $14,816 | No Limit | $1,010 |

## 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 the party 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.

(c) 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.

In a recent case, the Nevada Supreme Court has ruled that child support obligations are public policy issues and that any private agreement that this obligation shall be non-modifiable is contrary to public policy and thus unenforceable. See Fernandez v. Fernandez, 126 Nev. Adv. Op.#3 (2/4/10). In that case, the ex-husband used to make large sums of money in the stock market but fell on hard times in recent years and his income plummeted to a low monthly income. During the good times and in a post decree stipulation, he agreed that the amount of child support would be non-modifiable. The court noted that such obligations were included in a court order and not merely limited to a contract which was not merged or incorporated into a decree or a court order.

Child support is not subject to modification merely due to the passage of time. As of this time, child support is modifiable on the basis of changed circumstances.

## VII. TAX CONSEQUENCES OF DIVORCE

A. Helping Your Client Understand Common Tax Issues.

Every divorce involves one or more tax aspects. The most common aspects involve who gets the dependency deduction for the children, who gets to claim the mortgage interest deduction on the forthcoming tax returns, who will be responsible for past due taxes, tax consequences from early distributions from IRA or 401(k) funds, alimony deductibility, capital gains treatments, possible tax impacts from business entities, tax aspects of short sales, etc.

Tax consequences of divorce is a difficult subject area for lawyers. The Internal Revenue Code and the mass of IRS regulations interpreting that code are often difficult to understand and apply to the specifics of the case.

In Ford v. Ford, 105 Nev. 672, 782 P.2d 1304 (1989), the Nevada Supreme Court ruled that trial courts can consider potential tax liabilities when valuing marital assets when a taxable event has occurred or will occur in the near future as a result of the divorce. The consequence should be clear enough and reasonably predictable in order to be taken into account before the divorce is final.

A lawyer exposes himself or herself to a potential malpractice claim if key tax aspects are not identified before the divorce is final. A malpractice claim against a lawyer in this area of divorce law is easier to prove than in any other aspect of divorce. The law and facts may be clearer, more objective and easier to prove. The financial cost of incorrect advice can be calculated with more precision.

Lawyers can take multiple steps to mitigate against that risk. First, a clause may be included in the retainer agreement that the lawyer does not give tax advise in a divorce case. That may be a defense if the lawyer also explicitly advises the client to obtain independent tax advice from a tax attorney, CPA or other financial professional.

Second, a lawyer can proactively involve a financial professional in the divorce process. Such professionals can include a tax lawyer, CPA, or financial planner. About 15 years, a new subspecialty in financial planning was created by Carol Ann Wilson, a financial planner in Colorado. She specialized in divorce cases and created the profession of certified divorce financial planner or certified divorce financial analyst.

The collaborative model formally includes a financial professional as part of the collaborative team. The financial professional does more than merely compile spreadsheets with assets and debts. The professional also does financial projections for the next several years based on employment, income, age, needs, etc.

B. Tax Impact of Division of Assets and Marital Property

A lawyer's obligation is to craft a list of all known assets and debts, then categorize those assets, and be able to suggest ways of dividing the assets that makes sense for the client. In most divorce cases, the lawyers and clients are dealing with a finite "pie", i.e., the assets and debts to be divided between the parties. In a few cases, it is possible for lawyers to provide creative advice on how to increase the size of the "pie" and add wealth to the total assets of the parties.

Under IRC section 1041, property transfers between spouses pursuant to divorce are nontaxable. There is no recognition of income or capital gain when assets are divided and property transfers occur "tax-free". The spouse receiving the property assumes the basis of the property received. The challenge arises when assets are sold to pay debt or aid in the division of property. Under these circumstances, there could well be capital gains, and if monies are taken from retirement accounts as discussed previously, they are subject to ordinary income tax treatment. It is critical that the spouse receiving the asset also get the corresponding basis at the time of the divorce, preferably before it is final. Challenges can arise when basis is unknown 10+ years down the road when an asset is sold. If the basis is unknown for tax purposes, the IRS assumes a $0 basis.

There are three basic kinds of assets: hard assets, liquid assets and other.

HARD ASSETS

Hard assets generally includes anything tangible such as real estate, motor vehicles, furniture, appliances, clothing, jewelry, machinery, etc. Aside from valuation issues, there are tax aspects to a property division.

The most common example is the marital residence. Prior to the current recession and the bursting of the real estate market bubble, most houses had equity value. The common divorce dispute involved whether to sell the house or whether one party would buy out the other.

If the house was sold, mortgages paid off and net proceeds obtained, the parties could pay off other debts, legal fees, and/or divide the equity. Depending on when the divorce was completed and/or the sale was concluded, one party may claim the interest deduction on the house loan on a tax return.

If there was equity from the sale, the net proceeds would be subject to a capital gains tax treatment. However, there is no taxation on capital gains if it was the principal residence that was sold. Married taxpayers could exclude up to $500,000.00 gain whereas a single taxpayer can only exclude up to $250,000.00 gain. This was done under the Tax Relief Act of 1997.

In order to qualify for the capital gains exclusion, the parties had to live in the house for at least two of the last five years. However, if the sale occurs pursuant to a divorce in less than two years, the IRS regulations may provide a safe haven that allows a pro-rated capital gains exclusion.

However, today's real estate market is severely depressed. It has been said by real estate analysts that the current house values have fallen to 1997 values. It is estimated that a substantial majority of houses in Nevada are "underwater" in their mortgage debt, i.e. the houses are worth less than their fair market value.

If neither party can meet the current mortgage obligation, a possible scenario, then the house could be sold. If it is able to sell, and the bank agrees to a short sale, any forgiveness on the loan would be reported on a 1099-C. This is normally taxable to the parties, however, under the recent housing relief act, this amount is excluded from income through the year 2012. This is only on non-recourse loans on primary residences. Any forgiveness on an investment property could still be taxable. As with any of the issues discussed here, options should be reviewed with the client's CPA or tax preparer to determine what's best for their unique situation.

## LIQUID ASSETS

Assets in this category include cash or anything which can be readily converted to cash. This include bank assets, money market funds, Certificates of Deposit, and brokerage assets including stocks, bonds, mutual funds, ETFs, and annuities. These are the most common although they come in many different combinations and product names.

Information on these assets is generally easy to obtain from monthly or quarterly statements. Getting three to six months worth of statements at minimum or even a year is a start to determine the lifestyle of the couple and the extent of the wealth value. Make sure you pay attention to the share classes of mutual funds, A, B, C, etc. If you need to sell a mutual fund to cover expenses, a B-share mutual fund will have a back-end loaded surrender charge and you might wind up with fewer dollars than you thought.

If either or both spouses are still working for an employer, you will need to get the retirement statements from them, although many employees have immediate access to their accounts for daily valuations online. Things become a little more challenging when partnerships or annuities are held in these accounts. While an annuity or partnership can have a value listed on a statement, they frequently don't address surrender charges, annuitization requirements or holding periods. For most annuities and life insurance policies, a better determination of value would be to run an "audit" of the policy. This will determine the value as of the date of the audit and more importantly, especially in the case of permanent insurance, whether there are any loans outstanding on the policies. Outstanding loans reduce the cash surrender

value available for withdrawal. Note: Only permanent life insurance policies will have these cash values such as whole, universal or variable universal life. Loan provisions vary dramatically based on the life insurance company. You also might find some surprises for beneficiary listings on these accounts. Regarding annuities make sure to ask for annuitization options as well.

Pensions are perhaps one of the most complex assets to divide and provide many opportunities for missteps in the divorce proceedings. The simplest way to determine a basic valuation is to look at the employee's annual statement. Pension valuation provides a unique discipline unto itself with issues arising from how pensions are to be split, who does them, how and when will they be paid, what happens if an employees dies, how do government pensions differ from those in the private sector, etc. If a pension will represent a significant asset to be divided or relied upon for future support, you probably want to get an official valuation from a pension valuation specialist.

One final note – if there is a qualified plan to be divided (note: These are ERISA retirement accounts such as pensions, 403(b)s, 401(k)s, 457s, NOT an IRA), a QDRO (qualified domestic relations order) will need to be done for each asset to be split. Sometimes this complexity induces parties to trade-off fairly equal qualified plans to avoid this complication.

For certain government pensions, a QDRO is not used. What the plan administrator needs is an Order to Pay.

One very large consideration for the lawyer here. It is not enough to get the pension division terms into the divorce decree. A QDRO or pay order MUST be done and MUST be sent to the plan administrator to be effective.

The same is true for designation of survivor beneficiaries, etc. because of a recent United States Supreme Court case which held that the beneficial interest in a fund went to the beneficiary still listed on the plan administrator's records even though those parties were divorced and the former spouse had agreed she was not entitled to the asset per the decree. See Kennedy v. Plan Administrator, 555 U.S. 285, 129 S. Ct. 865 (2009). In that case, the plan administrator paid survivor benefits to a former spouse who had waived such benefits in the divorce but the beneficiary designation had never been changed with the plan administrator. After the death of the former employee, the executrix of the estate brought an action to compel the plan to pay the proceeds into the estate rather than to the former wife.

The executrix lost the case at all court levels. The USSC held that since the former employee never changed the beneficiary designation with the plan and the former wife had never expressly waived her interest with the plan, the plan was entitled and justified under ERISA to pay the funds to the former wife.

A long standing divorce case from Clark County was implicated by this decision. In a lawsuit arising in federal court over pension beneficiaries and multiple claimants, the Ninth Circuit Court of Appeals conformed its earlier holding to include compliance with this decision. See Carmona v. Carmona, 603 F.3d 1041 (2010).

The last Carmona wife, number 9, claimed that her late husband was awarded all of his pension benefits as his sole and separate property in the divorce from wife #8. The husband had retired while married to wife #8 and her survivor benefits had vested at that time. The Ninth Circuit ruled that ERISA pre-empted state law and precluded the Family Court from issuing a QDRO substituting wife #9 in the place of wife #8.

Does that mean that wife #9 has no remedies after the Carmona decision? Perhaps not. In Estate of Hall v. Hall, 2009 U.S. Dist. LEXIS 79027 (D.C.E.D.Pa. 2009), the federal court remanded a similar case back to the Family Division of the local state court to handle the fight between beneficiaries. The court noted that ERISA statutes and federal law are satisfied when the plan administrator pays the money to the named beneficiary. However, if there is a dispute involving the interpretation and enforcement of the marital settlement agreement, that dispute belongs in the state courts. There is no remaining federal issue after the plan pays the money to the designated beneficiary. The other disputants can then resolve their dispute in the state court.

A change of beneficiary in strict compliance with the plan requirements will not be questioned. But what if there is substantial compliance with the beneficiary change notices and designations but not perfect compliance? The majority of federal circuits follow the substantial compliance doctrine and hold that if the employee and/or the beneficiary provide the change of benefit information to the plan although not in perfect form, that is effective. See TIAAA v. Bernardo, 683 F. Supp. 2d 344 (2010).

## NON-LIQUID AND OTHER ASSETS

Assets in this category are less common and more challenging to value. Frequently they are not liquid or they represent a future value of a present interest. These can be looked at in 3 categories: financial investments, created entities (trusts) and company benefits.

In the first category, financial investments, you are dealing with defined, but predominately non-liquid, investments. These can be non-traded REITS (real estate investment trusts), equipment leasing programs, first trust deeds, tax credits, oil and gas partnerships and other programs. These programs usually have an income component as well as an asset value. Some are self-liquidating with regular principal and interest distributions; others provide income and the possibility of asset gain in the future. An analysis of each program will need to be completed. There are

frequently annual valuation letters and tax reporting requirements. The CPA or tax preparer can shed some light on the value as well as the company managing the investment. Frequently there are complex tax implications with these investments and some carry-forward losses/gains. Sometimes shares can be purchased back by the general partner at a discount and some companies on the secondary market purchase shares. This can involve heavy discounting of up to 80-90% of the initial value, so if shares can be split between the parties, it might present a more equitable division.

Created entities include most trusts (family, GRAT's, CRAT's, and ILIT's) as well as FLPs (family limited partnerships). In most of these investments, there is a two step process for valuation. First, you look through the "wrapper" or trust to the value of the underlying assets and then you read the trust to determine what rights the party has to the asset. For example, in a CRAT, the parties get an immediate tax deduction upon entry into a CRAT and benefit of the asset for their lifetime, with the remainder of the asset going to charity upon death. The details of these trusts are as individual as the people that create them and require intimate study.

Company benefits represent the third category. These can be special bonus or executive compensation programs, stock options, ESOPs, country club memberships and others. Compensation programs vary widely with the employer's company and variables include time with the company as well as performance and can be paid in cash or bonuses, company stock, options, life insurance, annuities and a myriad of other ways. Stock option valuation is a special category and considerations include the vesting schedule, duration of the marriage vs. duration with the company, tax issues and whether the options are underwater to name a few. The best place to begin is with company benefit documents, signed contracts and annual benefit statements, especially for executives.

C. Common Income Tax Considerations

1. Filing Status: Filing status can provide much confusion during the divorce process. Clients often want to file as single while still going through the divorce process – no, you can only file Married Filing Jointly or Married Filing Separately if you are still married on the last day of the tax year. Usually, fewer taxes are owed under Married Filing Jointly, although issues can arise under the innocent spouse rule. When the divorce is finalized, clients move into the Single or Head of Household categories. You are either "single" or "married" for the entire year depending on your status at the end of the year. It is different from the concept of filing a "part-year" state income tax return. In order to qualify for Head of Household status, a taxpayer must be unmarried at year-end, pay more than half the costs to maintain the household, and have custody of a child who is a dependent more than half the time.

2. Dependency Exemptions and Credits: Usually the custodial parent who has the child for over half the year will take the dependency exemption for the child, unless the custodial parent is a high wage earner who makes in excess of the phase-out threshold. If a parent wants to assign their dependency exemption to the other spouse, they need to sign IRS form 8332 to allocate the exemption. Other credits which might apply are the Child Tax Credit: the child must be under age 16 and this must go with the dependency exemption; the Child Care Tax Credit, the Earned Income Credit and Tuition Credits. You probably want to consult with a CPA to determine the most appropriate exemptions/credits for the parties.

3. Child Support: The prevailing guidelines for support are that child support is never taxable, and spousal support is usually tax-deductible by the payor and taxable to the payee. With this said, there are many criteria to determine if spousal support is truly deductible. The requirements include:

The payments must be made in cash.
The support must be pursuant to a written decree of divorce, separation or temporary support document.
The parties must be living apart.
The parties cannot file a joint tax return.
The support must terminate upon death of the payee.
It cannot be deemed child support.
It cannot be determined to be non-deductible for income tax purposes.
It cannot be front-loaded.

There are certain circumstances where spousal support is designated to be non-taxable. This could occur if one party, the payee, is permanently disabled and further income such as alimony would disallow certain benefits. In this instance, the support is NOT deductible by the payor, and like child support, would be a non-taxable event.

Spousal Support Reclassified as Child Support: Another issue to consider is in regards to spousal support and children. Frequently one of the parties will agree to pay support to the other spouse until the children reach the age of majority. This is a dangerous agreement. If this is deemed spousal support, written into the agreement as spousal support and the support ends within 6 months of a child attaining the age of 18, 21 or the local age of majority, spousal support will be reclassified as child support. This means that any deductions the payor spouse took for alimony against income will go away and will be reviewed all the way back – 10, 14, 16 years or more worth of amended returns, penalties and interest! This can be bad for the payee spouse as well as they will only be able to amend 3 years worth of taxes to "deduct" the payments as income. A final complexity involves two or more modifications of spousal support for multiple children between the ages of 18 and 24. In this case, they cannot be within one year of a child attaining age 18 or 24. Child support is classified as child support and alimony stands on its own.

D. Tax Planning Strategies

Tax planning can be very useful especially if significant assets are involved. For example, if there is a huge amount of equity in a home that could result in a large capital gain upon sale, a possibility for long-standing marriages or parties who have no mortgage loans, selling the martial residence before the divorce is final can result in the parties using the $500,000 exclusion on the capital gain of a home instead of a $250,000 for a single party. Note that only one property exclusion can be filed per year.

Another strategy involves the payment of spousal support. Frequently the payor is not interested in paying support for their soon to be ex-spouse; however, sometimes a payor in a high tax bracket can shift monies to the payee in a lower tax bracket. If this is the case, the net monies to both parties can be greater than without the support, which can benefit both parties' bottom line.

A similar consideration to the above payment of spousal support involves having the low income spouse take the dependency exemptions for children. Frequently these will phase out at high income levels and they will be lost. Paying attention to phase-outs for childcare deductions/credits can also provide for additional income benefits.

Due to the recent market decline, couples can have large carry-forward losses on Schedule D. This is an asset and should be split accordingly based on the ownership of the account generating the loss (i.e. – if $50,000 worth of losses were generated in a joint account, they must be split evenly between husband and wife, each taking $25,000 of the loss; husband cannot take all $50,000). Be aware of carry-forward NOLs (Net Operating Losses) as well as carry-forward tax refunds. Both can be assets and need to be considered.

An important planning point is the timing of sales of assets by either spouse in a divorce. Remember, these parties are married for tax purposes until they are legally divorced, the date of the file stamped decree of divorce. In some instances, assets are divided by agreement prior to the divorce and may be sold off by a party seeking liquid funds for immediate purposes. If that results in a substantial capital gain, that will impact the tax return for the couple for that tax year and may result in a tax due that the other party did not want to happen until after the divorce.

E. Property Tax Issues

Several property tax issues have been discussed earlier regarding taxability of support, taxable gain on selling assets and keeping track of carry-forward losses. While the interest forgiven on the short-sale of a primary residence is currently excluded from tax considerations, the interest or debt forgiven

on credit cards is not. Credit card companies can issue 1099-C for debt balances forgiven. Again, if the parties are insolvent, there is no forgiveness of the short-sale interest and it can be reported under IRC 108.

The tax implications of divorce can be myriad and complex. Finding the appropriate professionals whether CPA's, business valuation specialists, mortgage brokers, CDFA's (Certified Divorce Financial Analysts), pension valuators and QDRO preparers can help the parties realize the solutions they agreed to and prevent unpleasant surprises down the road.