

A legal note from Marshal Willick about how common sense in some alimony determinations is now mandatory

In *Schwartz v. Schwartz*, 126 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 8, Mar. 4, 2010), the Nevada Supreme Court determined that when a potential alimony obligor is old, rich, and sick, courts must explicitly determine whether lump sum alimony is appropriate.

I. FACTUAL BACKGROUND

Milton, age 70, was very wealthy when he met 40-year old Abigail in 1992. At his request, she stopped working to allow joint travel. They wed in 1993 – with a premarital agreement in place. Bliss was short-lived, and by the end of 1994, Milton filed for divorce. But after 19 months of separation, the divorce proceedings were abandoned and the parties reconciled, each making “certain [unspecified] promises” memorialized in a reconciliation agreement.

Milton again filed for divorce in 2006. After a two-day trial, the district court (J. Ritchie) entered a divorce decree requiring Milton to pay Abigail \$5,000 in monthly spousal support for seven years. Again vacillating, Milton had dinner with Abigail shortly after the decree was entered, and told her he was unhappy that they had divorced and was again considering reconciling.

Conversations about reconciliation continued thereafter, but at the same time, Abigail filed a motion to alter and amend the decree based on Milton’s statements at the reconciliation dinner, in part requesting a new trial. The district court denied her motion in its entirety, and Abigail appealed. At some unspecified point in this process, Milton died.

II. LEGAL BACKGROUND

NRS 125.150(1) considers on its face that alimony might be payable “in a specific principal sum” rather than in installments, and NRS 125.150(4) provides: “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.”

In the meantime, the community property statutes require a presumptive equal division of such property, absent a “compelling reason” for an unequal division and the trial court “sets forth in writing the reasons for making the unequal disposition.” NRS 125.150(1).

So while “lump sum alimony” could, at least theoretically, be made from community property, the required standard and legal findings are so much lighter under the alimony rubric (“abuse of discretion”) than under the property division language (“compelling circumstances”) that most lump sum awards seem to be of separate property.

Cases involving lump sum alimony have been issued, if rarely, since at least the 1960s. In 1972, the

Nevada Supreme Court affirmed a lump-sum alimony award of over \$331,000 where the husband's net worth was three million dollars, the husband was twenty years older and had a much shorter life expectancy than the wife, and a possibility existed that husband might dissolve his assets in recrimination against the wife rather than pay a regular alimony award. *See Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972).

In 1977, the Court held that the “nature and purpose” of an award of lump sum alimony remains the same, whether it is payable immediately in full, or periodically in installments. *Kishner v. Kishner*, 93 Nev. 220, 562 P.2d 493 (1977). In other words, lump-sum alimony need not actually be paid in “lump sum” – whether it is ordered paid immediately in full or periodically in installments, it is not subject to automatic termination upon death or remarriage, since the purpose of such an award is to “fully and finally fix the rights and obligations of the parties with respect to future support.”

In 1990, the Court relied on its 1972 holding in *Sargeant*, clarifying in *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990), that the general rule of abatement of alimony claims upon death of the obligor does not apply where a right to lump sum alimony is in question. In *Daniel*, the wife had requested lump-sum alimony, but the trial court had denied it, and the husband died during litigation of the appeal.

The Court noted in that case that the husband was 20 years older than his 60-year old wife and in poor health, and the wife had few assets and no hope of employment, so that such an award of alimony *would* have been just and equitable. On that basis, the Court found an abuse of discretion in the lower court's failure to award permanent or lump-sum alimony. It held that the claim for lump-sum alimony did not abate even upon the death of the husband, and that a “permanent alimony” award would not abate if the court had “otherwise ordered” that the claim survived death, and remanded.

III. THE DISTRICT COURT AND APPELLATE DECISIONS IN *SCHWARTZ*

Apparently, the district court found *Daniel* distinguishable on some ground not disclosed in the appellate decision.

Without expressly examining the alleged distinction, the appellate court first repeated that the trial courts have wide discretion that will not be lightly overturned. Affirming the *amount* of alimony awarded to Abigail on that basis, the Court reversed the characterization of the award as “regular” alimony, finding that the trial court did not “properly analyze” whether the alimony should be awarded in a lump sum by not taking Milton's health into account, where he was 85 years old at the time of trial (to Abigail's 55), had end-stage kidney disease and was on dialysis, and was otherwise in poor health.

On those facts, the Court held that a district court should assess not only age disparity as set forth in *Daniel*, but also “whether the life expectancy of the payor will make a non-lump-sum alimony award illusory.” To do so, a trial court should take into consideration the age and health of the payor, explicitly considering life expectancy, medical condition, and prospects for healthy living, so

as to avoid “an illusory alimony award when a payor is known to be terminally ill or known to have low prospects for continued healthy living since it will allow the payee to continue to receive alimony in a manner that will assure [she is] supported past the payor’s death.” The Supreme Court remanded for such an analysis.

IV. BROADER IMPLICATIONS TO THE DECISION

The immediate lesson of *Schwartz* is simply to add a step to the legal analysis in every alimony case (as to reviewing the health of the obligor), but the implications are broader.

By requiring a focus on the practical likelihood of payment of an alimony award, the case is a positive, if small, step in the creation of a law of alimony that serves the goals of predictability, adequacy, and consistency. And there are some us – in contrast to others claiming that such structures “take all the creativity out of lawyering” – who consider that a good thing.

Developing a coherent theoretical model for alimony remains a large future project, but *Schwartz* is a step in the right direction.

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