A legal note from Marshal Willick about jurisdiction for divorce, child support, and child custody where there are actions pending in more than one court, and how child support is figured when there are multiple children in different custodial households.

Two attorneys wrote in – one with a complaint, and the other with a question. Both illustrate just why a subject that seems simple on its face – how and when to calculate child support in Nevada – can be far more complicated than it looks.

For the first, the jurisdictional analysis is a whole lot more complicated when actions are pending in more than one place. For the second, the law is pretty uncertain as to what to do when a non-custodial parent is paying support for children located in more than one custodial household – but the latter subject will have to wait for a another day.

I. JURISDICTION WHEN THERE ARE COMPETING ACTIONS

One astute attorney wrote in immediately after legal note No. 29 ("Child Support but not Custody Jurisdiction," posted at http://www.willicklawgroup.com/newsletters) went out, accusing the note of being "misleading and therefore incorrect" for failure to anticipate the possibility of competing actions in multiple jurisdictions.

As a preliminary matter, multi-jurisdictional cases are ***always*** challenging and full of potential conflicts and contradictions. Some of these are discussed in *Issues in Interstate and Multistate Matrimonial Litigation*, posted at http://www.willicklawgroup.com/published_works.

Note No. 29 was concerned with the situation of an action pending in only ***one*** place, but in which a court could address only some, but not all, "incidents" of the divorce action because different statutes govern divorce, child custody, and child support, each of which must be separately satisfied to give the court authority to act. This is the "divisible divorce" doctrine, under which divorce jurisdiction is considered a "bundle of sticks" rather than a log.

Where the parties file actions in ***more*** than one place, each statutory scheme determines what can and should happen where.

A. THE LEGAL DIVORCE – STATUS

Here, there is no uniform act; rather, 50 States have established 50 separate legal regimes for when a divorce may and may not be initiated, prosecuted, and concluded, only loosely restricted by amorphous principles of due process. Since a marriage definitionally goes wherever each of the two parties to the marriage go, it is common for more than one State to simultaneously have jurisdiction to grant a divorce (at least to rule upon status, if not any other incident).

Since, in our federal scheme, chaos could easily result from that reality, the due process glue holding the system together has given rise to a loose set of rules for "comity" and "abstention," where

typically the court in the later-filed action stays or dismisses its action in favor of the earlier-filed action – unless there is a good reason to dismiss the earlier action in favor of the latter one (such as, that ***every*** other incident of the marriage beyond status must be resolved in the other jurisdiction).

A full discussion of the doctrines of comity and abstention, and their application, is beyond the scope of this note, but they are discussed at some length in *The Basics of Family Law Jurisdiction*, posted at http://www.willicklawgroup.com/published_works.

B. CHILD SUPPORT

As discussed in legal note No. 29, UIFSA was created to replace URESA, under which there could be more than one valid child support order. The full history of "why" is beyond the scope of this note, but UIFSA is fixated on ensuring that a support order can and ***will*** be entered. Its "central tenet" is the concept of a single controlling order – there can be only one controlling order, and only one court can have (continuing, exclusive) jurisdiction to modify an existing order at any given moment. We call it the Highlander Rule – "There can be only one."

The Official Comments to § 611 of UIFSA (our NRS 130.611) distinguish ***support*** modification motions from ***custody*** modifications in that, as to support, the "privilege of declining jurisdiction, thereby creating the potential for a vacuum, is not authorized under UIFSA." There is no known authority indicating that this "lack of privilege to decline" is any less true for making an initial award of support than it is in deciding whether to modify an existing support order.

Because a court with jurisdiction to enter a child support order may not decline to do so, the establishment of the fact that a court ***may*** enter an order is identical to establishing that a court ***must*** do so.

However, UIFSA was also deliberately designed to have "expansive" jurisdictional rules for support initiation. Those rules give rise to lots of opportunities for the filing of competing child support actions in two (or even more than two) jurisdictions simultaneously, so the statutory scheme also includes two mutually exclusive tests designed to ensure that one, and ***only*** one, court has authority to enter a support order at any given moment.

In Nevada, these "tie-breaking" rules are found in NRS 130.204, governing "simultaneous proceedings in another state." Subsection one deals with the situation where the Nevada support action is filed ***after*** a support action is filed elsewhere. Subsection two deals with the situation where the Nevada action is filed ***before*** the action is filed elsewhere.

If the other action was filed first, the Nevada court is only ***permitted*** to exercise jurisdiction to establish a support order if:

> (a) The action here was filed before the expiration of the time allowed in the other place for filing a responsive pleading challenging the exercise of jurisdiction by the other place;

(b) The contesting party challenges the exercise of jurisdiction in the other place in a timely manner; ***and***

(c) If relevant, Nevada is the home state of the child.

Subsection two is the mirror of subsection one, and is applicable where the Nevada action is filed ***before*** the action is filed elsewhere. If our filing was first, the Nevada court is only ***prevented*** from exercising jurisdiction to establish a support order if:

(a) The action in the other place was filed before the expiration of the time allowed in Nevada for filing a responsive pleading challenging the exercise of jurisdiction by Nevada;

(b) The contesting party challenges the exercise of jurisdiction in Nevada in a timely manner; ***and***

(c) If relevant, the other place is the home state of the child.

These tests should be mutually exclusive – if there is jurisdiction here, there should not be jurisdiction in the other place under these tests, and vice versa.

In other words, by making it mechanical and non-discretionary, NCCUSL ensured that in every case, one (and ***only*** one) court would have jurisdiction to award child support.

Which action is filed first matters, and if a responding party is unhappy with the first-in-time court going forward, that party has the burden of timely filing paperwork in ***both*** jurisdictions – actually seeking a support order in the second-in-time court, challenging the jurisdiction of the first-in-time court to proceed, and (if relevant for support jurisdiction) showing that the child at issue lives in the second-in-time jurisdiction. Otherwise, the first-in-time child support case satisfying any of the "expansive" ways in which a support case might be brought proceeds to resolution.

C. CHILD CUSTODY

By contrast, the rules governing competing child custody actions are not so mechanical, and have a different focus. They set up a bright line test, to determine whether the child has a Home State (or did within six months of the filing of the first action seeking a custody order). If so, the inquiry ends, the non-Home State forum is to defer, and the Home State is the place the action must proceed (unless the Home State court declines to go forward, finding another State a more convenient forum). *See* NRS 125A.305.

Only if there is ***no*** Home State are "significant connection" analyses relevant. If there is no Home State, then the judges in each of the two potential jurisdictions are to confer to establish which of the two is more appropriate (NRS 125A.355), going down a statutory factor list of what makes a forum more or less inconvenient, including factors as diverse as domestic violence, the parties' finances,

and where evidence and witnesses are located. *See* NRS 125A.365.

The mechanics of such a decision are beyond the scope of this note – the point here is the enormously different process of resolving multiple-jurisdiction filings concerning child custody from those involving either divorce status, or child support. For child custody cases, the focus is not so much on making sure that there ***will be*** an order entered somewhere (as with child support), as on ensuring that the "right" forum makes the custody decision.

II. CONCLUSIONS

When more than one action is filed in more than one place concerning the same family, the modern very technical set of rules governing jurisdictional contests requires a great deal more sophistication than was previously the case. The rules governing which forum may, or must, proceed vary from one subject to another, reflective of their different emphases and priorities, making it clear that in an increased number of cases, some of the sticks in the bundle will be doled out in one place, and others in another.

Whether or not this is a good thing may be legitimately debated, but the fact that it is so is not really questionable – it is a logical ramification of setting up different jurisdictional rules in different subject matters to more deliberately and intelligently decide what should proceed where, based on the policy choices inherent in each distinct subject matter.

III. ASIDE RE: FALL NEVADA FAMILY LAW REPORT

For some reason, multiple people have reported not seeing/not knowing that there was a Fall 2010 issue of the NFLR. For those that missed it, here is the notice that went out – if you are supposed to be receiving the NFLR and not getting these notices, you should probably contact the State Bar:

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The Fall 2010 issue of the Nevada Family Law Report (NFLR) is available

The Family Law Section is pleased to let its members know that the Fall 2010 issue of the NFLR is now available for download. The publication is offered electronically, in PDF format, to avoid costly printings and to make the best use of your section dues.

In this issue you'll find articles covering how juvenile delinquency cases proceed in Clark County, the enforcement of ERISA's Plan Documents Rule, an overview of the Rivero II case opinion, and much more. Visit the Family Law Section webpage to see this issue as well as an archive of all issues of the NFLR.

To download and print the newest issue, visit: http://www.nvbar.org/sections/FamilyLaw/NFLR/Fall_2010.pdf

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IV. QUOTES OF THE ISSUE

"If you don't know where you're going, you'll end up somewhere else."
– Yogi Berra.

"Nine times out of ten, in the arts as in life, there is actually no truth to be discovered; there is only error to be exposed."
– H.L. Mencken, *Prejudices, Third Series*, ch. 3 (1922).

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This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.