A legal note from Marshal Willick about how determining jurisdiction in cohabitant cases just got a lot harder – unnecessarily

In *Landreth v. Malik*, 125 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 61, Dec. 24, 2009), the Nevada Supreme Court determined that the family courts don't have jurisdiction to resolve all division-of-property disputes between prior unmarried cohabitants, because the Nevada Legislature has not explicitly said the family courts do have such jurisdiction.

Specifically, the Court found that, pursuant to Article 6, Section 6(2) of the Nevada Constitution, the Legislature could prescribe the jurisdiction of the family courts, and did so in NRS in NRS 3.223 (listing assorted chapters of the NRS under which cases might be brought, including Chapter 125).

I. FACTUAL BACKGROUND

This case concerned a man and a woman who lived together in various States from 2001 until 2004, when the woman moved to Las Vegas. All sides agreed that the man followed and the relationship either continued or was reconciled, but ended permanently in 2005.

At issue was real estate that the woman purchased in Las Vegas in 2004. The man asserted that she used funds from a joint account to acquire and improve a home, and he wanted half the equity, eventually suing in family court.

Technically, the case involved appeal of a default judgment entered by the family court judge (Del Vecchio), which that court had refused to set aside. But on appeal, the case turned on the question of jurisdiction.

II. THE HOLDING AND THE DISSENT

Categorizing it as an action involving "an unmarried, childless couple, who used to live together and now dispute the ownership of property," the four-justice majority found that because NRS 3.223 did not give the family courts explicit jurisdiction to adjudicate such disputes, the family court's judgment was void for lack of subject matter jurisdiction.

The three-justice dissent would have found that the family court ***did*** have jurisdiction to hear the matter, but not because disputes of "this type" were within the family court's explicit jurisdiction. Rather, the dissent reasoned that family court judges were equal to all other district court judges, and on separation of powers grounds, that the Legislature lacked authority "to limit the constitutional powers of a district court judge sitting in the family court division." The dissent would therefore have ruled that a district court judge could resolve the dispute, wherever that judge was sitting, and whether or not the case "involved a subject matter outside the scope of NRS 3.223."

Both the majority and the dissent spent some time addressing *Barelli v. Barelli*, 113 Nev. 873, 944 P.2d 246 (1997) ("both the family and the general divisions of the district court have the power to resolve issues that fall outside their jurisdiction when necessary for the resolution of those claims over which jurisdiction is properly exercised"). Apparently, both sides would have been quite happy

to have had the case resolved in family court if the man and woman had managed to have a child during their years together.

III. WHY THE OPINION MAKES THINGS HARDER FOR LITIGANTS AND LAWYERS

The problem with *Landreth* is its real-world impact on parties (and their lawyers) who bring such cases. The majority's opinion distinguished cohabitant (palimony) cases that ***did*** belong in family court from those that did not, this way:

> We acknowledge that this court previously has recognized the right of unmarried cohabitants to bring a cause of action for "breach of the implied-in-fact contract to acquire and hold property as if the parties were married or general partners." Hay v. Hay, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984); see also Western States Constr. v. Michoff, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). However, the few cases in which this type of claim has been litigated are not instructive because jurisdiction was not at issue in those cases, as it is in this case. Moreover, in those cases, the parties presented evidence that they held themselves out as married couples and that they agreed, either expressly or impliedly, to hold property as co-owners or as though they were a marital community. Hay, 100 Nev. at 198, 678 P.2d at 673; Michoff, 108 Nev. at 936-37, 840 P.2d at 1223. This is not the case here. Although the parties dispute whether they hold property as co-owners, neither party claims to have held themselves out as a married couple or otherwise qualify as a familial unit, therefore, Hay and Michoff are not applicable.

In other words, the Court held that subject matter jurisdiction is dependent on the veracity of a party's ***claim*** that the parties were "holding out" as husband and wife, or "otherwise qualified as a familial unit." This language is nearly sure to cause much unnecessary litigation and confusion.

In most such cases, one party asserts facts such as "holding out," and the other denies it, so the determination can't be proven until trial. This creates a horror in the real world of litigation – one could find out only ***after trial*** that the court hearing the case never had jurisdiction to do so in the first place.

The burden placed upon plaintiff's counsel is an impossible one – to predict the correct court in which to bring such an action, based on precognition as to whether the court will find that the parties were "holding out" as husband and wife – or not. If so, the case apparently belongs in family court. If not, in the civil/criminal division downtown. So the first order of business for all counsel filing all such actions – at least for now – may be to ask the court where the action is filed for a preliminary ruling at the outset whether it belongs there, to avoid wasting large amounts of time, effort, and money.

The second possibility stated by the majority for finding jurisdiction in the family court – that the couple "otherwise qualify as a familial unit" – may have created even worse problems. That terminology is unknown to the prior case law, and appears on its face to be contrary to the standard slowly being evolved in this subject area.

In *Michoff*, the dissent had complained that the majority was re-establishing common-law marriage,

which the majority refuted stating that access to the courts was granted not on the basis of the parties' ***status***, but to enforce their ***agreement*** – either express or implied – to acquire and hold property as if they were married. It was on that basis that the Court found that community property laws "applied by analogy," holding that

> adults who voluntarily live together "may agree to pool their earnings and to hold all property acquired during the relationship *in accord with the law governing community property.*"

The *Michoff* Court said that all that was required was conduct demonstrating an ***implied*** contract for "partnership or joint venture," declaring as the purpose of its holding the duty of courts to "protect the reasonable expectations of unmarried cohabitants with respect to transactions concerning their property rights."

These sensible holdings were further fleshed out in *Gilman v. Gilman*, 114 Nev. 416, 427, 956 P.2d 761, 767 (1998), in which the Court explained that the basis of the *Michoff* decision was implied contract for the pooling of assets, that it had simply "enforce[d] the agreement of the parties for coequal ownership" and that "the cohabitation element of the relationship was virtually incidental," so that "neither cohabitation nor a romantic relationship is the real basis for the *Michoff* holding." 114 Nev. at 427, 956 P.2d at 767.

IV. WHAT THE COURT ***SHOULD*** HAVE DONE

The saddest thing about the problems created by *Landreth* is that they are completely unnecessary. Both the majority and the dissent appear to have missed facts that give rise to a simple solution.

Hay and *Michoff* were tried before the family courts existed; that distinction is the only one necessary to explain why the earlier were filed where they were filed.

And it would be a simple matter to note that "community property by analogy" is not a legislative creation, but a judicial remedy created for the purpose of satisfying parties' expectations as to disposition of their property interests by equally dividing property accrued during meretricious relationships, because (in the phrasing of the Nevada Family Law Practice Manual) for courts of equity, "any possible alternative to that rule would be worse."

From there, it is not much of a stretch to say that the judicially-created cause of action belongs in the court assigned the tasks to which the analogy applies. Community property is dealt with in NRS Chapter 125, for which the family courts have exclusive jurisdiction. Cases involving disposition of property "by analogy" to that chapter likewise belong in family court.

While common sense and legal analysis do not always necessarily coincide, that analysis is also the reasonable analysis. Dissolution of a cohabitant relationship is far more similar to the breakdown of a marriage than it is to a contract dispute between strangers. As an Illinois court once put it, a property-accrual agreement between cohabitants is "not the kind of arm's length bargain envisioned by traditional contract principles, but an intimate arrangement of a fundamentally different kind." *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

In fact, "are or used to be living together" versus "never living together" is already used as a distinction for determining the appropriate court for hearing cases. In the domestic violence arena, an application relating to "a person with whom he is or was actually residing" is heard in the family court, per NRS 33.018, whereas an Order Against Stalking and Harassment against a co-worker or stranger is heard in Justice Court. *See also City of Las Vegas v. Municipal Court*, 110 Nev. 1021, 879 P.2d 739 (1994) (holding that municipal courts have jurisdiction to enforce TPOs and that language of NRS 33.100 referencing "county jail" not critical, and stating that Supreme Court will "harmonize" statutory provisions where possible).

The bottom line is that, due to the intimate interdependence of the parties to cohabitant relationships (and agreements), the logical place to resolve disputes relating to such agreements, and the dissolution of such relationships, is family court. It would not have been difficult for the Court to put those disputes there, satisfying part of the legislative intent behind setting up the family courts in the first place.

It is more important than ever that such relationships end up in the proper place, since in modern America countless millions of household consist of unmarried cohabitants, both with and without children. Whether a child has been born is a poor reason to send some cases one way, and others another. A State that puts divorce, paternity, and domestic partnerships before its family courts does no service to anyone by sending some cohabitation and palimony cases anywhere else.

IV. WHAT CAN AND SHOULD BE DONE TO FIX IT

Given the *Landreth* holding, the only apparent way to restore logic to case assignments – and prevent unnecessary malpractice claims against attorneys who guess wrong – is for the Nevada Legislature to amend NRS 3.223 to expressly state that family courts have jurisdiction over the disposition of property accrued during meretricious or quasi-marital relationships. Perhaps someone on the mailing list for these Legal Notes can provide it to a legislator.

That would solve the immediate problems identified above; if the legislature wanted to proactively avoid repetition of such a situation, the statute could be further amended to say that a case more appropriately heard in one division is not void by reason of being heard in the other.

V. THE BIGGER PICTURE

The entire *Landreth* analysis may be based on a fundamental error of construction by the Supreme Court. NRS 3.0105 establishes the family courts "as a division of the district court." The language of section one of NRS 3.223 states that "the family court has original, exclusive jurisdiction in any proceeding: . . . ." Nothing in the text of the statute says that the family court's jurisdiction is ***limited*** to those subjects – just that the enumerated types of cases must be heard there.

I remember the debates regarding the founding of the family court, and a key concept was that the judges of the various divisions of the district court (civil/criminal and family) were to be equal in all ways. Why there would be an apparent desire to relegate the family court, and its judges, to a limited-jurisdiction court is unclear.

But again the fix is a simple one, even though it would take until the next legislative session. Simply amend the language of NRS 3.0105 to state that the family courts are "as a division of the district court with co-equal general jurisdiction, and exclusive jurisdiction over the subjects enumerated in NRS 3.223."

The provisions of the following sections permitting the chief judge to temporarily assign a civil/criminal judge to the family division should probably be made reciprocal, as well; it seems ridiculous that a judge who could direct ownership of corporations or divide huge pensions could not decide who gets compensated for a fender-bender.

Family court has too often been treated by the rest of the bench and Bar as a red-headed step-child of lesser standing. It is probably time for any conceivable rationalization for such treatment to be purged from the statutes.

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