Common Misperceptions in Divorce

☐ **"The party with the higher income will get custody."**
This is possible, but by no means certain. The ability of a party to keep a job may indicate something about that person's stability, or not, but if money is the only difference, the court can simply divert funds from one party to the other. We have prepared a list of factors that courts may look to in making a custody decision.

☐ **"I have to get sole custody or I lose my children."**
There are at least two different kinds of custody, "legal custody" (basically, who exercises parental responsibilities and has parental rights) and "physical custody" (usually, the parent with whom the child spends more time). Legal custody can be sole or joint, and physical custody can be solely with one parent or the other, or primary to one and secondary to the other, or joint, which may or may not mean exactly equal between the parents. We have prepared a handout showing the various alternatives in both legal and physical custody.

☐ **"If I move out of the house, I will be liable for abandonment."**
The question of "abandonment" comes up in termination of parental rights cases, where a parent has voluntarily ceased having contact with or supporting a child for a substantial length of time, but moving out of a house neither provides a ground for divorce in this state, nor necessarily determines questions of ownership of the property, custody of the children, or alimony. Each of these issues is decided on its own grounds. Who did what, when, and why, may be relevant to all three, but moving out of a house, by itself, proves almost nothing. The criminal statutes for "desertion" deal with a husband or wife who "without just cause" deserts, willfully neglects, or refuses to provide for the support or maintenance of a spouse "in destitute or necessitous circumstances," or who "without lawful excuse" deserts or neglects to provide for a child. There have been very few prosecutions for failure to support a child, and no known case for failure to support a spouse.

☐ **"There are no retirement benefits to divide because my spouse is still working."**
Both "defined contribution" plans (401(k) plans, etc.) and "defined benefit" plans (often called "pension plans") have a value, and each spouse is presumed to be entitled to half of the sum, or increase in value, that accrued during the marriage. While the 401(k) and other "cash" plans, like IRA accounts, are easier to value, both kinds are community property, and they are often the most valuable assets accumulated during the marriage. If a pension or account was started before marriage, but partially earned during marriage, it is probably part separate property and part community property. And retirement plans have value whether the earning spouse is still employed, or already retired.

☐ **"If the divorce decree says my former spouse will pay certain debts, I don't have to worry about them any more."**
Debts for which both parties agreed to be responsible (for example, by signing the co-payor card from a credit card company) remain debts that the creditor can try to collect from either

party. While the divorce decree may give one spouse the ability to try to collect from the other if a creditor comes after the spouse who was not supposed to have to pay the debt, the decree is not binding on the creditor directly. It is almost always a good idea to terminate all joint credit, in writing, during divorce proceedings. It is a simple matter for anyone to request a copy of his or her own credit report, and no attorney is necessary to terminate joint credit accounts. What debts are owed, to whom, and why the debt was incurred, are all subjects that should be thoroughly discussed between attorney and client.

☐ **"One lawyer can represent both of us."** For a variety of ethical and practical reasons explained in some of our other client handouts, it is impossible for one lawyer to advise both sides to any case, whether contested or uncontested. It ***is*** possible to have only one lawyer involved, such as where one party is unrepresented, or if the lawyer is merely hired to put an agreement between people into legal form without advising either of them, but by far the better practice is for each party to a divorce to at least get some independent advice of counsel before agreeing to terms. It is not just the things that are written in any proposed papers, but also what might be missing from those papers, that could be important to the rights and obligations of each party.

☐ **"There is a certain age at which children decide for themselves which parent they are going to live with."** There is no "magic age" in Nevada. The statutes say that a child's wishes are a factor the Court "shall consider" in determining a child's best interest, "if the child is of sufficient age and capacity to form an intelligent preference as to his custody." This is, obviously, a highly subjective standard which applies differently in each case.

☐ **"There is no alimony in Nevada."** Nevada has alimony (sometimes called spousal support) by statute and case law. It can be rehabilitative, temporary, or permanent. Counsel may be able to estimate whether and how much alimony might be awarded in any case, but it is discretionary with the Court, and therefore must be examined in light of the unique facts of each case, and cannot be predicted with certainty.

☐ **"Child support can only be modified every three years."** Actually, the statutes provide that child support can be changed to an amount consistent with the child support formula at any time, and can be modified at any time "upon changed circumstances." Even where circumstances have not changed, either parent may ask to have the sum of support reviewed to determine if it should be modified or adjusted "at least every three years."

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