

# INTRODUCTION TO NEVADA DIVORCE LAW

There are five main aspects of divorce law – Jurisdiction and Grounds, Child Issues (custody, visitation, and support), Spousal support/Alimony issues, Property & Debt issues, and procedural and cost issues.

## I. Preliminary Considerations – GROUNDS & JURISDICTION

A court has grounds to enter a divorce if it has subject matter jurisdiction. Subject matter jurisdiction; Under NRS 125.010, requires court to find that:

1. Insanity existing for two years prior to commencement of the action.
2. Separation for one year or longer without cohabitation.
3. Incompatibility.

Because of the 3d ground, NV is a “no fault” state (no finding of fault is necessary for a court to enter a divorce decree; other places called this “irreconcilable differences”); Not a terribly difficult test; essentially one-party divorce. Qs on the stand would be . . . .

Personal jurisdiction; Under NRS 125.020(1), a particular district court has jurisdiction if that is where:

1. The cause of action accrued;
2. The defendant resides or can be found;
3. The plaintiff resides;
4. The parties last cohabited; or
5. The plaintiff has resided for at least six weeks prior to the filing of the complaint.

Under a legal doctrine know as “divisible divorce” recognized by the United States Supreme Court in the 1940’s, a court might be able to resolve some but not all incidents of a divorce; therefore, the specific rules going to jurisdiction to decide issues of child custody, alimony, child support, etc., must be dealt with.

It *is* permissible to move to Nevada specifically for the purpose of getting a divorce, but that residence must be bona fide – while the case law continues to develop, it can be summarized as stating that any fact, or action, that makes it appear either that a party did not actually live in Nevada for six weeks before filing for divorce, or that during those six weeks, the party did not really have the intent to live in this state “for at least an indefinite period of time.”

## II. CHILD CUSTODY, VISITATION, & SUPPORT

### A. Jurisdiction and preliminary considerations

#### 1. UCCJA/PKPA

- a. Concept of a child's "home state"—where the child has been for 6 months < action

#### 2. FFCCSOA—only one controlling support order at a time, even when people move.

#### 3. Matters of custody, visitation, & support are never really finished during the minority of the children

- a. However, "inertia" of decisions . . . .

### B. Custody comes in 2 main flavors—physical and legal

#### 1. Who is a parent . . . .

#### 2. When little Johnny goes home at night . . . .

#### 3. Criteria for **Custody** as Between Parents: The "best interest of the child" is the required standard by both statute and case law

- a. Statutory preferences in 125.480 & .510:

- (1) ....

- (2) ....

- b. Mandatory mediation model

- c. Possibilities are agreement between parties, mediation, or litigation

- (1) Once in litigation, court can resolve dispute:

- (a) On law and motion hearing

- (b) by evidentiary hearing, or

- (c) by outsourced evaluation and return (and possible evidentiary thereafter)

#### 4. Reality – two primary approaches:

- a. The "continuity of child's view" approach

- b. The "fresh start" approach

#### 5. Visitation Rights of the NonCustodial Parent

- a. No real standards

#### 6. It is possible that a Third Party could have Visitation, or even primary custody

- a. Difficult standard, however; parental preference in both state law and even of constitutional dimension per United States Supreme Court in *Troxel*

#### 7. Modifications of *joint* custody are on "best interest" test (*Truax*), but modifications of *primary* require showing (1) the circumstances of the parents have been materially altered

and (2) the child's welfare would be substantially enhanced by the change (*Murphy*).

- a. Further, under *McMonigle*, the moving party in a custody proceeding must show that the circumstances of the parties have materially changed “*since* the most recent custodial order,” and events that took place before that proceeding are generally inadmissible.

#### 8. Relocation

- a. NRS 125C.200—parent wishing to move must request the written consent of the non-custodial parent. If the non-custodial parent refuses to consent, the custodial parent may petition the court for permission to move the child.
- b. In 1991, *Schwartz* case, the Nevada Supreme Court held that in deciding whether to grant permission to move, the district courts in Nevada are supposed to balance the interest of the custodial parent's freedom of movement against the best interests of the child and the competing interest of the non-custodial parent. Multi-part test:
  - (1) the party seeking to move must demonstrate that an actual advantage will be realized by both the child and the custodial parent as a result of the move. If the threshold requirement is met, the court must then examine the following additional factors and their impact on family members.
    - (a) the extent to which the move is likely to improve the quality of life for both the child and the custodial parent;
    - (b) whether the custodial parent's motives are honorable, and not designed to frustrate or defeat the visitation rights of the non-custodial parent;
    - (c) whether the custodial parent is willing to comply with any substitute visitation orders issued by the court in the event that permission to move is granted;
    - (d) whether the noncustodial parent's motives in opposing the move are honorable; and
    - (e) whether, if the move is allowed, there will be a realistic opportunity for the non-custodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship.
      - i) If the answer to this last question is no, as in moves to the other side of the planet, then the move can be granted anyway, if the reasons for moving are honorable and in the best interest of the child, but the standard changes somewhat, since the choice to be made is, really, one of primary physical custody.

#### C. Child support

1. Amount: percentage of income – 18%, 25%, 29%
  - a. presumptive minimum of \$100/child and
  - b. presumptive maximum in a series of bracketed ranges, so that parents making up to a little more than \$50,000 per year pay a maximum of \$500, adjusted with inflation,

and stepping up with income, so a parent making about \$180,000 or more pays an inflation-adjusted \$800 per month.

- c. Courts can exceed maximum, or dip below minimum, based on written findings of grounds.
  - d. Also, deviation factors built into the statute for certain listed factors, the most commonly-used of which are the cost of child care, special educational needs, and the legal responsibility of the parents for the support of others.
  - e. Medical expenses, usually including the cost of insurance and any unreimbursed amounts, are split on top of child support.
- 2. Duration: 'til child reaches 18 years of age (if no longer enrolled in high school), or if the child is still enrolled in high school, when the child reaches 19 years of age.
    - a. Can be exceeded if a child "handicapped" under statute
    - b. But not for college, unless parties have agreed to pay for it.
  - 3. Both parties will be called upon to file Affidavits of Financial Condition
  - 4. Essentially, no statute of limitations for any child support > 1981, and interest and 10% penalty accrue as to any amounts not paid

### III. SPOUSAL SUPPORT AND ALIMONY

- A. Four main flavors: Temporary spousal support, permanent alimony, temporary alimony, and rehabilitative alimony
  - 1. Temporary spousal support is an award made during pendency of a case
    - a. Generally, courts not concerned with goo guy/bad guy or anything else beyond staying alive to end of case
  - 2. Permanent alimony: "X pays to Y \$Z per month until payor or recipient dies, or recipient remarries, whichever shall first occur." Court can make alimony payable after death, or after remarriage, by specific order.
    - a. Under *Rodriguez*, (2000), the Court expanded the 1974 *Buchanan* factors as a list of what was to be considered by courts setting alimony awards: (1) the financial condition of the parties; (2) the nature and value of the parties' respective property; (3) the contribution of each to any property held by them as tenants by the entirety; (4) the duration of the marriage; (5) the husband's income, earning capacity, age,

health, and ability to labor; and (6) the wife's age, health, station and ability to earn a living.

- b. Simple marital misconduct or fault are expressly to **not** be alimony factors, so alimony is not "a sword to level the wrongdoer" or "a prize to reward virtue."
3. Temporary alimony is same, but you add a cut-off date at which it also ends.
4. Rehabilitative alimony
  - a. for the purpose of obtaining training or education relating to a job, career, or profession
  - b. classical situation is "my turn" situation . . . .
  - c. Any such award should establish the period by which recipient is to have commenced re-training.
5. Any alimony award can be ordered made in periodic payments, or by "Lump Sum" payable in a single installment or many
  - a. note that "lump sum" title basically eliminates remarriage cut off
- B. Modification of Alimony Awards – generally, modifiable until last day of last month when last payment is due, based on assertion of changed circumstances.
  1. Cases indicate that alimony can be awarded for bankruptcy of large property award
  2. Or even to compensate other spouse for debts not paid as ordered.
- C. Palimony, or "Community Property by Analogy"
  1. Largely misnamed; it is based on contract, and relates to property, NOT to alimony
  2. Basic core is the judicial declaration that "Where it is alleged . . . and proven that there was an agreement to acquire and hold property as if the couple was married, the community property laws of the state will apply by analogy."
  3. Not automatic, or easy: "Each case should be assessed on its own merits with consideration given to the purpose, duration and stability of the relationship and the expectations of the parties."

#### IV. PROPERTY RIGHTS AND DIVISIONS

- A. Community Property Defined as **all** property acquired during marriage, except for gifts, inheritances, and P.I. damages for pain & suffering.
- B. Both spouses are considered to have a "Present, Existing, and Equal Interest in Community Property"
- C. As of some years ago, Nevada moved from a presumptively equitable to presumptive

*equal* division upon divorce

1. Meat cleaver analogy
- D. Transmutation and commingling
1. Property in one party's name deposited into a joint account—presumption of gift.
  2. Ditto jointly-titled property transferred to one of the parties.
  3. Commingling is when there is identifiable bits of both separate property and community property in same place.
    - a. Bank account example.
      - (1) Two possible ways to separate – direct tracing, or exhaustion.
- E. Community Interest in Separate Property Assets
1. *Malmquist* – algebra as to tracing of payments made on a separate property home with community property (such as wages during the marriage).
  2. The courts are empowered, but not required, to trace back to a separate property source contributions to property held in joint tenancy that came from a separate property source, and order reimbursement to the contributing spouse.
- F. Division of Pension Plans and Retirement Benefits
1. The time rule; months of marriage during service  $\div$  months of total service,  $\div$  2.
  2. Normally, spousal share payable at first eligibility for retirement.
- G. Normally, Property Adjudications are final upon divorce. Some exceptions
1. Clerical errors can be corrected “at any time” under NRCP 60(a); probably includes all mathematical and typographical errors, but not *judicial* errors
  2. Under NRCP 60(b), the distribution of disclosed property can be changed due to fraud, mistake, etc.
    - a. An independent action can be filed more than six months after entry of the decree under NRCP 60(b), if based on certain acts considered fraud on the court.
  3. Additionally a party can seek Partition of Omitted (Nondisclosed) Assets upon discovery.
    - a. While case law is somewhat contradictory, the clear trend of modern opinions is to consider the parties tenants in common of any asset not distributed in the decree, allowing a later suit for partition at any time.
- H. Debt issues
1. Some indication in law (*Wolff*) that debt is to be divided equally, but uncertain.
  2. Need for termination of joint credit; court's division of debt not binding on third parties.

## V. PROCEDURAL AND COST ISSUES

- A. Joint petition divorces
- B. Traditional method is for Plaintiff to file a complaint on Defendant, who then either defaults or answers, beginning the clockwork in the statute that leads to trial
- C. There is a self-help center, with do-it-yourself, fill-in-the-blank forms, that can even be accessed directly on the internet.
- D. In any contested matter, either party can file a motion for temporary relief, such as custody, exclusive possession of the residence, money from the other side, which orders remain in effect until changed, or until the entry of the final order.
- E. Eventually, by stipulation, or at trial, a case ends with entry of a decree of divorce, which restores the parties to the status of single persons and is supposed to be the resolution of all issues contested between them.
  - 1. Either party can appeal, but that is another story.

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