19th Annual Symposium
of the
Family Law Council of Community Property States

May 3 through May 5, 2007, Las Vegas, Nevada

The Inter-relation of Alimony Awards with Community Property

Materials submitted by:

WILLICK LAW GROUP
3591 East Bonanza Rd., Ste. 200
Las Vegas, NV 89110-2101
(702) 438-4100
fax: (702) 438-5311
website: Willicklawgroup.com
e-mail: [First name of intended recipient]@Willicklawgroup.com

May, 2007

TABLE OF CONTENTS

I. A BRIEF HISTORY OF THE NEVADA LAW OF ALIMONY

Nevada's marriage and divorce laws trace to the territorial laws of 1861, and provisions empowering courts to make awards of "support of the wife and children" go all the way back to that time.[1] They remained in the form of husbands paying support for wives until the whole statutory scheme was reworded in 1975, during the debate regarding the proposed Equal Rights Amendment. After that time, alimony could theoretically flow in either direction.

The basic form of the Nevada law on the subject has thus been in place for some time, and provides for five basic flavors of alimony awards:

- "Maintenance" – temporary spousal support payments made during the pendency of an action, which terminate upon entry of a final Decree.[2]

- Temporary spousal support – a specified post-divorce award intended to terminate at a specified future time or upon a specified future event.[3]

- Permanent alimony – a specified post-divorce award intended to continue indefinitely, unless modified by later court order (usually upon "changed circumstances" of some sort).[4]

- Rehabilitative alimony – a specified post-divorce award for the purpose of obtaining training or education relating to a job, career or profession.[5]

---

[1] "Support" is a word of "broad signification," permitting the separate property of the husband to be set aside for the wife and children for "everything, necessities and luxuries, which the wife in like circumstances is entitled to have and enjoy." *Lake v. Bender*, 18 Nev. 361, 403 (1884) *opn. on reh'g*.

[2] NRS 125.040 authorizes Nevada courts to make orders for "temporary maintenance for the other party" during the pendency of an action. No standards are provided, and such temporary orders for the purpose of keeping everyone fed, clothed, and housed during the pendency of the case are often made on a perfunctory review of "need and ability," as disclosed solely by preliminary Affidavit of Financial Condition forms.

[3] NRS 125.150(1) authorizes the court to award alimony at the conclusion of a divorce case "as appears just and equitable." No standards are provided there, either.

[4] *Id*.

[5] In 1989, the Nevada Legislature added NRS 125.150(8), requiring a court granting a divorce to "consider the need to grant alimony to a spouse for the purpose of obtaining training or education relating to a job, career or profession." This provision did add some language indicating what such an award would encompass, and at least two factors to consider in making such an award (whether the obligor obtained job skills or education during the marriage, and whether the recipient provided financial support while the obligor did so). Such an order must contain terms for when such training or education will commence.

- Lump-sum alimony, which presumably requires a set aside of one spouse's separate property to the other.[6]

In practice, these categories are sometimes blurred and overlapping. For example, the Nevada Supreme Court has directed entry of a temporary alimony award "at least for a period of rehabilitation" where no specific job or career training was at issue.[7] Similarly, a lump-sum award is sometimes designated as providing for temporary or permanent alimony.

NRS 125.150(1) authorizes the court to award alimony at the conclusion of a divorce case. Unless otherwise ordered by the court, alimony terminates in the event of the death of either party or the subsequent remarriage of the spouse receiving periodic payments pursuant to NRS 125.150(5). Pursuant to NRS 125.150(7), prior to the expiration of the term during which alimony is being paid, either party may file a motion for a modification of the award upon a showing of a change of circumstances.

Judicial determination of all categories of alimony are so subjective and discretionary that the subject has been described as "the last great crapshoot in family law."[8] While the judiciary has criticized the legislature for not providing any objective criteria for alimony,[9] the Court itself has not done much better. Both the statutes and the case law are so vague as to be largely useless in predicting, or negotiating, the awards that will be made in actual cases.

This, in turn, necessarily increases both the costs and uncertainties of all litigation including potential alimony claims, because the likelihood of litigation varies in lock-step with the lack of predictability of the outcome, and (to a lesser extent) with a lack of uniformity among various judges. Since alimony awards are both unpredictable in a single department and inconsistent from one department to another, alimony cases frequently require resolution in court. The level of resources expended by

---

[6] 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.

[7] *See Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998).

[8] Marshal Willick, *In Search of a Coherent Theoretical Model for Alimony*, Nevada Lawyer, April, 2007, at 40.

[9] "Regarding the award of spousal support, the legislature has failed to set forth an objective standard for determining the appropriate amount. Absent such a standard, there appears to be a disparity in the awards for spousal support on similar facts even greater than for child support." *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998).

both the parties and the courts is disproportionate to the economic stakes actually involved in such cases. In a word, the current system of making alimony determinations is inefficient.

II. THEORETICAL ROLE AND PURPOSE OF AN AWARD OF ALIMONY (VS. COMMUNITY PROPERTY AWARD) – ECONOMIC, FAULT RELATED, OR OTHER?

A. Overview

The closest the Nevada Supreme Court has come to explaining its perception of the distinction between awards of property and alimony is its statement in 1998 that "property and alimony awards differ in effect," with alimony constituting "an equitable award serving to meet the post-divorce needs and rights of the former spouse."[10]

In 1993, the Legislature resolved the potential conflict between the concept of a no-fault divorce, on the one hand, and the consideration of marital misconduct, on the other hand, when determining an award of alimony, by deleting the phrase "having regard to the respective merits of the parties" from NRS 125.150(1).

The Nevada Supreme Court emphasized the point in 2000, when it dramatically held that fault is not to be considered in the making of alimony awards at all, so alimony is not "a sword to level the wrongdoer" or "a prize to reward virtue."[11]

Historically, ***most*** of the comments by the Nevada Supreme Court as to the nature and function of alimony have been in the "subtractive" – saying what alimony is ***not***, rather than what it is, and stating why its grant, denial, or amount was improper, rather than when or how much ***is*** proper.

Thus, according to the Court, in addition to alimony not being a sword or prize, courts are ***not*** required to award alimony so as to equalize future income.[12] Property equalization payments "do

---

[10] *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998), *citing Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996). The *Shydler* decision is discussed in greater detail below.

[11] *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000). The Court closely examined the legislative history of the 1993 amendment to NRS 125.150, and concluded that the Legislature deleted the language about the "respective merits of the parties" in direct response to the Court's decisions in previous cases suggesting that marital fault could be considered in determining both alimony and property distribution.

[12] *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998).

not serve" as a substitute for alimony (or presumably vice versa).[13] And alimony is ***not*** an assignable property right.[14]

But that begs the question of what it ***is*** – or is supposed to be. The repeated reference to negatives is reasonable, given the absence (in Nevada law or nationally) of any viable defined purpose for alimony awards. Indeed, even the American Law Institute's Principles of the Law of Family Dissolution noted that the current law of alimony, nationally, has "no coherent rationale," and that alimony continues to be a "residual category," defined as a negative – i.e., a financial award that is neither child support nor a division of property.[15]

So while it might be thought that the elimination of "fault" analyses would make it simple to know what alimony awards are intended to accomplish, such has not proven to be the case. Even with a strictly "economic" *raison d'etre*, the Nevada Supreme Court has still set out a number and variety of explanations for what it was trying to accomplish, and why, over the past forty years, as it groped its way from looking for a facial "abuse of discretion" to deciding whether the trial court paid at least lip service to "consideration" of changing lists of "factors."

Throughout that evolution, the Court has consistently stated that the amount of alimony a district court may award "is within its sound discretion."[16] In a series of cases, the Nevada Supreme Court shaped and re-shaped how that "sound discretion" should be applied, without ever providing objective analytical criteria.

B. Case Law Development

A line of cases starting in the Nineteenth Century (long predating the Nevada Revised Statutes) held that the power of a divorce court to award the separate property of one spouse to the other was limited to the amount "necessary and proper" for the support of the wife or children, but explicitly included whatever level of "necessities and luxuries" the court determined was proper.[17] The court's power extends to, but does not require, an actual change in title to real or personal property.[18] It

---

[13] *Id*.

[14] *Foy v. Estate of Smith*, 58 Nev. 371, 81 P.2d 1065 (1938).

[15] ALI *Principles of the Law of Family Dissolution* (Summary Outline).

[16] *See*, *e.g.*, *Rutar v. Rutar*, 108 Nev. 203, 827 P.2d 829 (1992).

[17] *Lake v. Bender*, 18 Nev. 361, 4 P. 711, 7 P. 74 (1884).

[18] *Powell v. Campbell*, 20 Nev. 232, 20 P. 156 (1888); *Greinstein v. Greinstein*, 44 Nev. 174, 191 P. 1082 (1920).

includes the power to order liquidation of assets in order to provide income necessary for support,[19] or to terminate one spouse's partial ownership interest in jointly-titled property so as to set aside the entirety of the property to the other spouse as a matter of support.[20]

All of these set-aside cases, and even the early "regular" alimony cases discussed immediately below, had a rather paternalistic tone. Both that tone, and the reasoning behind it, were understandable in the era before 1975, when the husband had sole management and control of community property, and the spouses necessarily had unequal powers and bargaining positions.

In *Rosenbaum v. Rosenbaum*,[21] the Court directed that in setting an appropriate level of alimony, a trial court is allowed but not required to consider what a husband could in good faith earn if he so desired. Evidence of "earning power" is proper, and the key to the trial court's use of the information is its determination of good faith. If the payor "intentionally holds a job below his reasonable level of skill or purposefully earns less than his reasonable capabilities permit, the court should take that into consideration in fixing the amount of alimony or child support. On the other hand, if a husband or father, through circumstances beyond his control, cannot in good faith obtain a job commensurate with his skills or by the exercise of ordinary industry of a person those skills earn more money, the award should be in keeping with his ability to pay."[22]

In 1972, the Court returned to the subject of lump-sum alimony, affirming in *Sargeant v. Sargeant*[23] a lump sum 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.[24]

In *Buchanan v. Buchanan*,[25] the Court laid out a series of factors that courts should consider when deciding whether or not to make an alimony award, including the financial condition of the parties, the nature and value of their respective property, the contribution of each to any property held by them as tenants by the entirety, the duration of the marriage, the husband's income, earning capacity,

---

[19] *Lewis v. Lewis*, 71 Nev. 301, 289 P.2d 414 (1955).

[20] *Jacobs v. Jacobs*, 83 Nev. 73, 422 P.2d 1005 (1967).

[21] 86 Nev. 550, 471 P.2d 254 (1970).

[22] 86 Nev. at 554, 471 P.2d at 256-57.

[23] 88 Nev. 223, 495 P.2d 618 (1972).

[24] *Id*., 88 Nev. at 228-29, 495 P.2d at 621-22. The Court noted that it had previously approved lump sum alimony awards in *Fenkell v. Fenkell*, 86 Nev. 397, 469 P.2d 701 (1970); *Winn v. Winn*, 86 Nev. 18, 467 P.2d 601 (1970); and *Shane v. Shane*, 84 Nev. 20, 435 P.2d 753 (1968).

[25] 90 Nev. 209, 215, 523 P.2d 1, 5 (1974).

age, health, and ability to labor, and the wife's income, age, health, station, and ability to earn a living.

The "*Buchanan* factors" thus became the first analytical test for determining the appropriateness of alimony. It gave trial courts a "check the box" list of ostensibly-objective things to explicitly discover or determine before doing what courts had always done – taking their best guess as to what alimony award was appropriate. From time to time after *Buchanan*, the Nevada Supreme Court indicated that the failure of a district court to "adequately consider" those factors would be reversible error meriting remand for reconsideration.[26]

Matters were often expressed differently when "lump-sum" alimony was at issue. In what seems like linguistic slight-of-hand, the Court held in 1977 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.[27] In other words, lump-sum alimony need not 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."[28]

In *Johnson v. Steel, Inc.*,[29] the Court characterized the trial court's two year alimony award as one of "rehabilitative alimony," which it then found unjust under the guidelines established in *Buchanan*, given the wife's prior education, lack of work experience, and the absence of evidence to suggest that she actually would be able to earn enough to meet her expenses after only two years of training.[30] Questioning the wisdom of awarding "rehabilitative alimony" in cases involving "lengthy marriages" and children raised by a spouse who may never be able to acquire an earning capacity commensurate with the marital standard of living, the Court found an "inherent injustice" in denying a wife "reasonable alimony" where she has been a full-time homemaker and caretaker of the children with her husband's agreement and to the parties' mutual benefit.[31] The Court reversed the alimony award and remanded for reconsideration.

In *Heim v. Heim*,[32] the Court seemed to indicate a desire to go beyond a "check-the-box" approach. It reversed an award of $500 per month to a 57-year old wife who was unemployed and who had

---

[26] *See Forrest v. Forrest*, 99 Nev. 602, 606, 668 P.2d 275, 278 (1983).

[27] *Kishner v. Kishner*, 93 Nev. 220, 562 P.2d 493 (1977).

[28] 93 Nev. at 223.

[29] 94 Nev. 483, 581 P.2d 860 (1978).

[30] 94 Nev. at 489-90, 581 P.2d at 864.

[31] 94 Nev. at 487-89, 581 P.2d at 862-64.

[32] 104 Nev. 605, 763 P.2d 678 (1988).

stayed home during the 35-year marriage to raise the parties' six children, while the husband had acquired a Ph.D. and was earning $60,000 per year at the time of divorce. The Court held that in deciding matters concerning alimony, the judge must "form a judgment as to what is equitable and just, having regard to the respective merits of the parties and to the condition in which they will be left by the divorce."[33] Further, the Court ruled that the "*Buchanan* guidelines" were "simply an inexhaustive list of . . . common sense considerations," rather than a specific analysis for lower courts to follow. Finally, the Court emphasized that an award of alimony must be "fair."[34]

In *Ford v. Ford*,[35] the trial court had initially awarded the wife $2,500 per month for six years as rehabilitative alimony, but later rescinded that order when the wife sold some stock awarded to her for more than it was presumed worth at the divorce trial. The Nevada Supreme Court reversed, citing the lower court's failure to consider the tax implications of the wife's liquidation of the stock, and again relying upon the "inexhaustive list of factors" in *Buchanan*.

In 1990, however, in *Fondi v. Fondi*,[36] the Court affirmed a trial court order awarding ***no*** alimony at all after a 17-year marriage of a legal secretary to a judge, despite the large disparity in their incomes, finding that the wife had "marketable skills" and was working at the time of divorce, and that the wife had not been "required" to stay home from work to care for her stepson (although she had, apparently, done so at least part of the time). The Court emphasized that the wife received some $91,000 in property, plus a share of the husband's future pension.

The Court took the opportunity in *Fondi* to discuss the meaning and importance of the then-new "rehabilitative alimony" provisions, finding that they were passed as a response to the growing number of unskilled spouses who were forced into poverty as the result of a divorce. The Court found that the rehabilitative alimony provisions were "created . . . as a way of allowing these spouses to obtain some sort of job skill, especially in situations where community funds and labor have been used to educate and train the other spouse."[37] But in the case at hand, the Court saw no problem with the result reached, since the lower court "considered" the possibility of job training for the wife before rejecting it, reasoning that since the wife had some "marketable skills" as a legal secretary, she was "not within the class of unskilled workers that this statute was designed to benefit."

---

[33] 104 Nev. at 609, 763 P.2d at 680.

[34] 104 Nev. at 610.

[35] 105 Nev. 672, 782 P.2d 1304 (1989).

[36] 106 Nev. 856, 802 P.2d 1264 (1990).

[37] 106 Nev. at 863, n.5, referencing Minutes of the Assembly Committee of Judiciary, 65th Sess. at 4-5 (May 22, 1989).

Also in 1990, the Court revisited the subject of lump-sum alimony. Relying on its 1972 holding in *Sargeant*, the Court clarified in *Daniel v. Baker*[38] that the general rule of abatement of alimony claims upon death of the obligor[39] does not apply where a right to lump sum alimony is in question. The wife's appeal of the lower court's denial of lump sum alimony was on appeal. The Court noted 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. 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" so that the claim survived death, and remanded.

After another two years, the Court issued a decision in *Rutar v. Rutar*,[40] in which the parties had been married for 18 years. The Court reversed a 3½ year rehabilitative support award, indicating that support should continue for 8 years because the wife had not worked at all for the past 12 years, spoke little English, and sought re-education. The Court directed the lower court to retain jurisdiction to further modify the award as circumstances changed. Notable here was the minimal regard given to the approximate one and a half million dollars in property split by the parties, despite the statement in *Buchanan* that property allocations should be considered in alimony determinations, and the emphasis in *Fondi* of a far smaller payout to the spouse. Inexplicably, given the posture of the case on appeal, the Court ignored the rehabilitative alimony statute in had found so important less than two years earlier, and instead referenced the list of factors in *Buchanan*.

In *Fick v. Fick*,[41] the Court was primarily concerned with the appropriate weight to give a premarital agreement. Along the way, however, the Court held that under NRS 125.150(9), the trial court erred in making an award of rehabilitative alimony but not establishing the period by which wife must have commenced her re-training.

In 1994, the Court decided several alimony cases. In the first, *Sprenger v. Sprenger*,[42] the Court reversed the district court's two-year rehabilitative support award to a 44-year old wife after a marriage of 21 years, in which she had stayed home to raise two children, despite a prior career as a practical nurse. The husband earned about $100,000 per year, and the Court found that he had developed his "business acumen" during the marriage.

---

[38] 106 Nev. 412, 794 P.2d 345 (1990).

[39] *See Foy v. Estate of Smith*, 58 Nev. 371, 81 P.2d 1065 (1938) (a motion to increase alimony becomes moot if the requesting spouse dies during the pendency of the motion, or an appeal related to the motion, because alimony is a personal right and not an assignable property right); *Bank v. Wolff*, 66 Nev. 51, 202 P.2d 878 (1949).

[40] 108 Nev. 203, 827 P.2d 829 (1992).

[41] 109 Nev. 458, 851 P.2d 445 (1993).

[42] 110 Nev. 855, 878 P.2d 284 (1994).

The Court, remanding, directed the lower court to "increase and extend" the alimony award so that the wife, who had not worked outside the home in decades, would enjoy, "as nearly as possible," the "station in life" she had prior to the divorce until she remarried, died, or her financial circumstances changed.[43] The Court listed seven factors that should be considered by the trial courts in deciding whether and how much alimony to award as: (1) the wife's career prior to the marriage; (2) the length of the marriage; (3) the husband's education during the marriage; (4) the wife's marketability; (5) the wife's ability to support herself; (6) whether the wife stayed home with the children; and (7) the wife's award, besides child support and alimony.

Almost immediately after *Sprenger*, however, the Court issued a decision in *Gardner v. Gardner*,[44] which did not go through that analysis at all, but also reversed a two-year award of rehabilitative alimony. The parties in that case had been married 27 years, the husband made about $75,000 per year, and had developed his career during the marriage. The wife had been a career teacher throughout the marriage, and was making about $43,000 at the time of divorce.

The Court majority extended the award made below by an additional ten years to make the award "fair and just," and remanded with directions that an amended judgment be entered. The court also directed the lower court to retain jurisdiction "to review this modified award in the event of a substantial change of circumstances that would suggest the need for additional relief to either party."

As in *Fick* – but not *Sprenger* – the Court in *Gardner* made a point of distinguishing alimony granted under the "general" from that awarded under the "rehabilitative" statutory provisions. Concluding that the wife would not be able to improve her position with further education, and that the proposed rehabilitative alimony award would not accomplish its goals, the Court simply dismissed the idea of "rehabilitation," and entered the award as stated above on the basis of the general alimony factors used for evaluating what would be "fair and just under the circumstances." But it did not consider why the career teacher in the case at hand should be considered so differently than had the career legal secretary in *Fondi*, as to the "class of person" the statutes were designed to assist.

Also in 1994, the Court issued a decision in *Waltz v. Waltz*,[45] in which it held that NRS 125.150(5), which requires termination of alimony payments in the event of the death of either party or remarriage of the payee, did not apply to an award of "permanent alimony" as that term had been

---

[43] In so holding, the Court echoed prior case law extending back more than a hundred years. On rehearing in *Lake v. Bender*, 18 Nev. 361, 4 P. 711, 7 P. 74 (1884), the Court held that the wife "is entitled, at least, to be as well supported during the remainder of her life, as she ought to have been, and was, prior to her application for divorce." 18 Nev. at 410.

[44] 110 Nev. 1053, 881 P.2d 645 (1994).

[45] 110 Nev. 605, 877 P.2d 501 (1994).

used in the parties' divorce decree, because in that case, the "alimony" award ***had***. been intended to substitute for a property award that was not made.[46]

In *Alba v. Alba*,[47] the Court affirmed a lower court award of $1,000 per month as rehabilitative alimony for three years to permit the wife to obtain education in the field of graphic arts, following a marriage of seven years, where the husband worked as a general contractor, the wife was a blackjack dealer, and they apparently had no children. The Court based its decision, in part, on the approval of the lower court's finding that the husband had a much higher earning potential than did the wife, "justifying" an award of rehabilitative alimony pursuant to NRS 125.150(8).

In *Kerley v. Kerley*,[48] the lower court had ordered $250 per month in rehabilitative alimony for two years. The parties had been married for eight years when the husband filed for divorce, and nearly three more years passed before the *Decree* was issued. The wife had not worked during most of the marriage, at the husband's request, but had the capability to work for her own support, and the husband in this case, too, was a contractor.

The Supreme Court affirmed, finding that the husband "failed to present sufficient evidence to demonstrate that the district court's judgment was anything other than 'equitable and just' or that it failed to consider the requirements of NRS 125.150." Oddly, the Court's affirmance did not reference the rehabilitative alimony provisions, disregarding the label assigned by the district court, and treating the "rehabilitative" award as general temporary alimony rather than under the restrictions of the rehabilitative alimony provisions, none of which were mentioned.

In 1998, the Court issued several opinions dealing with the purpose and mechanics of alimony awards. In *Shydler v. Shydler*,[49] it reversed a trial court's denial of alimony after a 17-year marriage, reiterating the seven factors set out in *Sprenger*, and reversing with instructions to the lower court to determine a "fair award" to the wife, who could never earn what her husband was making. The Court held that "two of the primary purposes of alimony, at least in marriages of significant length, are to narrow any large gaps between the post-divorce earning capacities of the parties . . . and to allow the recipient spouse to live 'as nearly as fairly possible to the station in life [] enjoyed before the divorce."[50]

---

[46] Specifically, a share of military retirement benefits, where the marriage had been just a bit short of the ten years required for direct payment by the military pay center of a portion of the military retirement benefits as the wife's sole and separate property. *See* 10 U.S.C. § 1408(d)(2).

[47] 111 Nev. 426, 892 P.2d 574 (1995).

[48] 111 Nev. 462, 893 P.2d 358 (1995).

[49] 114 Nev. 192, 954 P.2d 37 (1998).

[50] *Shydler v. Shydler*, *supra*.

Coming as close as ever to a definition, the Court in *Shydler* distinguished alimony from awards of community property, defining alimony as "an equitable award serving to meet the post-divorce needs and rights of the former spouse." The definition was essentially circular, however, because the Court stopped short of stating that courts actually had any duty to satisfy those "needs and rights," or precisely what facts would trigger a required determination of such an "equitable award." Even as to what should be ***considered***, the Court was both vague and contradictory, stating simultaneously that property equalization payments "do not serve" as a substitute for alimony, ***and*** that the amount of community property divided "may be considered" in setting alimony. Again ignoring the rehabilitative alimony statutory provisions and their requirements, the Court held that there should be an award of spousal support "at least for a period of rehabilitation."

In *Wright v. Osburn*,[51] the Court reversed as an abuse of discretion a five-year rehabilitative award to a stay-at-home mother after a 14-year marriage, during which the wife did not work outside the home. The Court remanded without specific instructions, but indicated that the award should have been higher, for a longer period, or both. Again referring the court below to the factors set out in *Sprenger*, the Court observed that "it appears very unlikely that in five years, [wife] will be able to earn an income that will enable her to either maintain the lifestyle she enjoyed during the marriage or a lifestyle commensurate with, although not necessarily equal to, that of [husband]."

Along the way, the Court criticized the Nevada Legislature for not giving better guidance for alimony cases, saying: "Regarding the award of spousal support, the legislature has failed to set forth an objective standard for determining the appropriate amount. Absent such a standard, there appears to be a disparity in the awards for spousal support on similar facts even greater than for child support."

In consolidated cases issued under the title *Gilman v. Gilman*,[52] the Court considered requests to modify alimony awards in light of the post-divorce cohabitation of the recipient spouses. Denying that request in one of the cases, the Court found mere cohabitation insufficient to justify terminating spousal support, because such relationships are voluntary and tenuous, that "a recipient spouse may be left largely unprotected, from an economic standpoint, if he or she breaks off a relationship with a cohabitant," and that this was important because part of the reason for spousal support is to keep spouses off the welfare rolls.

In 2000, the Court turned from its repeated references to the list of factors in *Sprenger* – not even mentioning that case in its opinion in *Rodriguez v. Rodriguez*.[53] Instead, the Court reasserted and 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

---

[51] 114 Nev. 1367, 970 P.2d 1071 (1998).

[52] 114 Nev. 416, 956 P.2d 761 (1998).

[53] 116 Nev. 993, 13 P.3d 415 (2000).

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.

Noting the "archaic tenor" of the factors, the Court nonetheless applauded them for being "common sense," and added "examples" of factors that "conceivably could from time to time be relevant as well" as including "the existence of specialized education or training or level of marketable skills attained by each spouse," and "repetitive acts of physical or mental abuse" by one spouse "causing a condition in the injured spouse which generates expense or affects that person's ability to work."

It was at that point that the Court stressed that simple marital misconduct or fault are expressly ***not*** to be alimony factors, so alimony is not "a sword to level the wrongdoer" or "a prize to reward virtue," making the alimony analysis – at least theoretically – strictly an objective, economic analysis.

The Court did not discuss whether the (previously) often-recited *Sprenger* factors should be considered outdated, or whether they continued to stand as an alternative list of factors to consider in alimony cases.

The Court has had little to say about alimony in the seven years since *Rodriguez*, leaving the trial courts to resolve cases on the basis of the statutes and cases discussed above.

C. Summary of Stated Theoretical Roles and Purposes of Alimony Awards

In summary, the law of alimony as set forth to date by the Nevada Legislature and Nevada Supreme Court is muddled, vague, contradictory, and inadequate.

Little has been said as to maintenance, presumably because the orders are necessarily limited in time and therefore overall economic impact.

The "temporary" and "permanent" alimony cases are difficult to distinguish. The Legislature has provided no guidance at all, and the Court uses the same factor lists for both, sometimes throwing in "rehabilitative" language as well, without ever giving any kind of bright line or even analytical test for distinguishing "long term" from "short term" marriages, or otherwise indicating when temporary alimony might be more appropriate than permanent alimony, or vice versa.[54]

Once that never-specified threshold is crossed, however, the Court has done a bit better, indicating that one objective after "long term" marriages, or in "permanent alimony" cases, is maintenance of the marital standard of living for the lesser-earning spouse.

---

[54] Individual judges have been all over the map, from saying that a five-year relationship is "significant" to downplaying a 15-year marriage as "relatively short term."

Unanswered questions abound. For example, how should courts should consider property divisions, given that the Court has at times focused on less than $100,000 as a major factor in denying alimony (*e.g. Fondi*), while ignoring distributions to spouses in other cases of nearly ten times that much cash (*e.g. Rutar*). How long a marriage is required before maintenance of the marital lifestyle becomes important, and what part of the marital lifestyle should be "maintained" – the average, the peak, or whatever was true at the moment of divorce? What is the role of appellate review – to remand for consideration of factors and detailed inquiry as in *Sprenger*, or to impose specific amounts and terms of alimony as the Court did mere months later in *Gardner*? Are the Court's various factor lists in the alternative, or did one supplant the other? Which, and under what circumstances?

The law concerning "rehabilitative alimony" is a little bit cleaner. NRS 125.150(8)-(9) both codified and modified the earlier case law which recognized the need for rehabilitative alimony, adding targeted classes of intended beneficiaries, and restrictions and conditions necessary for such awards. The statute recognized the need to sustain a spouse during a period of readjustment and training for employment, and the Court has added in the goals of avoiding welfare dependence and preventing the forcing of unskilled spouses into poverty upon divorce.

The trend seems to acknowledge the importance of preserving the recipient spouse's community property distribution during the reentry years, in that the spouse is generally not required to consume any property award for self-support during a period of retraining. When it focused on the rehabilitative alimony statute itself, the Court was highly concerned with its statutory purpose (*Fondi*) and even its technical requirements (*Fick*).

At other times however, the Court simply threw the word "rehabilitative" out in some general sense (*Shydler*, *Kerley*) seeming to make it synonymous with temporary alimony. Sometimes (*Fondi*) the Court has seemed highly focused on the wife's ability to have ***some*** job so as to stay off the welfare rolls, but at other times has ignored the long-term career of the wife (*Gardner*) in ordering additional support. The Court has at times confused "rehabilitation" as a goal with general temporary support, using the terms interchangeably, making it unclear which should be the focus of a trial court, or under what circumstances one or the other is more appropriate.

Where trial courts have apparently relied upon the existence of the rehabilitative alimony statute to make a minimal award, the Nevada Supreme Court has sometimes reversed when it considered the overall award to be less than "fair and equitable." In other, analytically similar cases, the Court has not done so. In practice, the statute to date has not usually been applied as it is written at any level, which requires both the trial and appellate courts to conduct a separate analysis as to whether rehabilitative alimony is called for "in addition to any other alimony awarded by the court."

Nevada has a lengthy familiarity with "lump-sum" alimony awards, but the overall law governing such awards is as confusing as all the other categories. The Court has been at least apparently contradictory in its reference to NRS 125.150(4) (allowing the set aside of separate property). ***Any*** award of post-divorce alimony will presumably come from post-divorce (i.e., separate property) income of the payor. It is thus hard to see the purpose of differentiating a "set aside of separate

property" from any other payment of alimony from one (former) spouse to another; whether "lump-sum" or "regular" alimony, any money transferred is from the separate property of one to the other.

The Court's discussion of lump sum alimony over the years has not even clarified whether it is merely a remedy or some separate species of available award. Clearly, the Court has expressed the sentiment that there is a need for lump sum or permanent alimony to be available, to avoid the possibility that a party may be left without the ability of self support, or to prevent the possibility of future efforts to frustrate a divorce court's order by the payor spouse.

Traditionally, in the absence of the district court "otherwise ordering," all future payments cease upon remarriage, but it would appear that a periodic payment of lump sum alimony or even (after *Waltz*) a designation of "permanent alimony," is sufficient to prevent even remarriage from constituting a terminating event. Since lump-sum alimony need not even be paid in "lump sum" under *Kishner*, it seems possible that this entire category is just a euphemism for "unmodifiable." Left unclear is whether there are ***any*** contingencies that could affect the recipient's entitlement to full collection of such an ordered "lump sum award."

III. IMPACT OF TEMPORARY SPOUSAL SUPPORT AWARD ON FINAL PROPERTY DISTRIBUTION

The Nevada Supreme Court has not considered this matter in great detail, but everything stated to date indicates that any maintenance award is to be irrelevant to the alimony determination.

In *Dimick v. Dimick*,[55] the Court stated that maintenance and post-divorce alimony were different things, for different purposes. The parties had executed a premarital agreement limiting the alimony payable to a wife in the event of a divorce to a specific sum. It did not explicitly address the matter of temporary spousal support during the ***pendency*** of a divorce. On appeal, the Nevada Supreme Court affirmed the trial court ruling that maintenance was a matter outside of the scope of the agreement and the trial court was thus free to make an award for interim support. The case did not explicitly say whether or not a premarital agreement ***could*** restrict a party's right to make a claim for support during the pendency of a divorce.

The issue was more squarely addressed in *Shydler v. Shydler*,[56] where the Court reversed a trial court's ruling denying post-divorce alimony. The trial court had reasoned that the wife was receiving her share of the community property in a series of payments over time, and that the wife had been receiving maintenance during the pre-trial proceedings.

---

[55] 112 Nev. 402, 915 P.2d 254 (1996).

[56] 114 Nev. 192, 954 P.2d 37 (1998).

The facts indicated that the wife had used the money paid to her to maintain household expenses (including the mortgage) for herself and the children. Reversing, the Nevada Supreme Court held that temporary support received by the wife during the divorce proceedings should "not preclude" post-divorce alimony, "particularly where part or all of those interim payments are used to make payments on community property."

The language used appears to leave open the possibility that a maintenance award might be considered in a final alimony award under different facts. The Court gave no hint what those facts might be, but an equitable argument could be constructed along those lines if, for example, it could be proven that the wife had deliberately extended proceedings in order to extend the period during which maintenance was paid. For now, Nevada law tepidly indicates that temporary maintenance has no effect on a final alimony award.

IV. TIMING: IS ALIMONY DETERMINED BEFORE, DURING, OR AFTER THE ALLOCATION OF COMMUNITY PROPERTY BETWEEN SPOUSES, AND HOW DOES THE ORDER AFFECT THE OUTCOME?

The Nevada Supreme Court has never squarely addressed this issue, and most judges rattle off their decisions as to property and alimony simultaneously, in whatever order, under the direction that divorce cases should not be bifurcated.[57]

As a matter of logic, however, trial courts should complete their property evaluation ***prior*** to analyzing the question of post-divorce alimony. Nevada is a presumptive-equal-division jurisdiction, where the award of alimony, if any, should be irrelevant to the amount of community property received by each party.[58] On the flip-side, however, the "factor lists" promulgated by the Nevada Supreme Court for alimony decisions include the direction to consider "the wife's award, besides child support and alimony"[59] or "the financial condition of the parties."[60]

---

[57] Nevada Family Law Practice Manual, 2003 Edition § 1.316-1.317, quoting *Gojack v. District Court*, 95 Nev. 443, 445-46, 596 P.2d 237, 239 (1979); *see also Smith v. Smith*, 100 Nev. 610, 691 P.2d 428, 431 (1984); *Milender v. Marcum*, 110 Nev. 972, 980, 879 P.2d 748, 754 (1994).

[58] *See* NRS 125.150 requiring equal division of community property unless a "compelling reason" requires an unequal division and the trial court "sets forth in writing the reasons for making the unequal disposition." This statute, its history and amendments, and the implications of its current language, are discussed at some length in Marshal S. Willick, *Disproportionate Division of Community Property* (Council of Community Property States & State Bar of Texas, Fort Worth, Texas, 2005); posted at http://willicklawgroup.com/page.asp?id=40.

[59] *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994).

[60] *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000).

Since the question of whether any alimony is awarded is unnecessary to property division, but the amount of property divided is explicitly to be "considered" in deciding alimony, the amount of the community property division should be determined before the question of alimony is addressed.

V. FORMULAIC APPROACHES TO ALIMONY AWARDS, HOW PROPERTY AWARDS FIGURE INTO SUCH FORMULAS, AND HOW SUCH FORMULAS HAVE FARED

As discussed above, in *Wright v. Osburn*[61] the Nevada Supreme Court decried the Legislature's failure to set forth an objective standard for determining the appropriate amount of alimony. That fact had been debated in the Family Law Section of the Nevada State Bar for some time, and Section had appointed a working group to propose a standard.

The intent was to establish a completely objective starting point and "reality check" for divorce courts and lawyers, by means of a formula that would reproduce the results in the existing case law by allocating weighted values to the factors set out in the prior decisions. The working group analyzed all of the Nevada Supreme Court's alimony decisions to the date of its creation (1996), ensuring that every factor relied upon by the Court in determining what sum of alimony should be awarded was reflected in a mathematical model, either as a direct part of the calculation (duration of marriage, and the parties' ages, education, difference in income, and disability, if any) or a potential modification factor.[62]

All information available nationally as to proposed alimony standards and objective tests was reviewed, including law review articles on the subject and the rules of thumb or computer models followed in jurisdictions throughout the country, specifically including Oregon, California, and Minnesota.

A model that produced results essentially consistent with all then-existing case law was created and presented to the Section at its annual meeting in Tonopah in 1997. A statute (A.B. 278, introduced March 17, 1997) was drafted. After some further mathematical testing, a "gross"-based version of the formula was created, which was believed to create essentially the same results as the original "net"-based version without requiring calculation of tax effects.[63]

The Tonopah formula has not been sanctioned by the Nevada Supreme Court and it was never intended to be blindly followed. Instead, an expressly non-exhaustive list of modification factors

---

[61] 114 Nev. 1367, 970 P.2d 1071 (1998).

[62] *See* Roger Wirth, *Alimony in Nevada*, in Eighth Annual Family Law at Tonopah (State Bar of Nevada 1997).

[63] Both the "net" and "gross" versions of the worksheet are posted at http://willicklawgroup.com/page.asp?id=22.

was set out in section seven of the original proposed statute, by which any court could deviate from the numbers supplied by the formula for "good cause":

> **Sec. 7.** In granting a divorce, if the court makes a finding that there is good cause, or if the length of the marriage is less than 7 years, the court may deviate from the amount or duration of alimony determined pursuant to the formulas set forth in sections 4, 5, and 6 of this act. In determining whether good cause exists, the court may consider any relevant factor, including, without limitation:
>
> 1. The length of the marriage;
> 2. The age and the life expectancy of each spouse;
> 3. The physical and mental health of each spouse;
> 4. The contribution during the marriage of one spouse to the education, training or earning capacity of the other spouse and any increase in the level of education of a spouse obtained during the marriage;
> 5. The extent to which the present and future earning capacity of one spouse is impaired because that spouse has not worked for an extended period;
> 6. The extent to which acceptable opportunities for employment are unavailable to a spouse because of his age;
> 7. The length of time reasonably necessary for a spouse to obtain training or to update his skills;
> 8. The extent to which a party has achieved a substantially advantageous economic position during the marriage through the combined effort of the spouses;
> 9. The standard of living established during the marriage;
> 10. The number of dependents of each spouse and the age, health and any other condition of such dependents;
> 11. The provisions of any order relating to the custody of any dependents, including, without limitation, the length of time that any obligations for the support of a child will be effective and the impact of the custody provisions of the order on the ability of a spouse to work;
> 12. The tax liabilities and benefits to each spouse as a result of the divorce, including, without limitation, the tax effect of alimony pursuant to sections 72 and 215 of the Internal Revenue Code (26 U.S.C. §§ 71 and 215), and future amendments to those sections and corresponding provisions of future internal revenue laws;
> 13. The amount of monthly income after taxes of each spouse after considering the overall financial situation of that spouse, including, without limitation, any outstanding mortgages or legal fees and costs;
> 14. The anticipated cost of health care for each spouse;
> 15. The amount and characterization of property that each spouse will receive pursuant to NRS 125.150, including, without limitation, separate property;
> 16. The amount of any future retirement income that each spouse will receive;
> 17. The length of time of physical separation of the spouses before the divorce;
> 18. Whether it would be more just and equitable to grant a spouse a lump-sum award of alimony; and

19. The amount and duration of any alimony awarded pursuant to section 8 of this act [the "rehabilitative alimony" provisions].

The factors listed were generated from the combined experience of the drafters of the proposed legislation, and reflect considerations in alimony cases in Nevada and elsewhere; they are, of course, legitimately argued as matters of general equity irrespective of the fact that the proposed legislation was never enacted as a statute.

The concept of a formulaic approach to alimony determination was controversial from the start. Proponents asserted that there was a value to establishing some level of consistency between cases and departments, and predictability in any given case, because litigation of the "What the heck, give it a try" variety could be reduced – on both sides – if there was some kind of objective methodology for establishing a presumptive spousal support award that could then be varied (up or down) in accordance with the particular facts of the case. Critics protested that any such approach "didn't work," whether the complaint was that the presumptive results were considered "too high" or "too low," and usually on the basis that a formula "eliminates judicial independence" or "hinders good lawyering" – the same sort of complaints that were heard when the concept of child support guidelines were first proposed.

At the 1997 Tonopah meeting, after lengthy debate, the Section voted to ***not*** ask the Nevada Legislature to formally enact the proposed statute, on the basis of a lack of familiarity by the bench and Bar as to how well it would "work" across a multitude of real-life cases. Instead, the Section requested that district courts throughout the state try actually running calculations under the formula, in parallel with their determination of alimony in real cases, and that the resulting comparative data be assembled and reviewed a few years later to determine the utility of that formulaic approach, and it could be determined whether the statute as proposed should be abandoned, modified, or submitted for enactment as consistent with justice.

Apparently, the follow up was never done, and partisans on both sides of the debate have remained staunchly for or against a formulaic alimony analysis, focused on the Tonopah formula model.

VI. ALTERATION IN APPROACHES TO ALIMONY IN HIGH OR LOW VALUE COMMUNITY PROPERTY CASES

As noted above, the Nevada Legislature has provided no guidance, and the Nevada Supreme Court has been inconsistent on this point.

As a matter of ***theory***, the Court has directed that "the financial condition of the parties," and "the nature and value of their respective property" be "considered" since the 1974 decision in *Buchanan*

v. Buchanan.[64] Similar directives were included in *Sprenger*[65] and *Rodriguez*.[66] But the direction to "consider" something is not terribly helpful to a trial court actually trying to figure out an appropriate award – or to counsel trying to negotiate an alimony case.

The case law does not seem particularly helpful, including both justifying denial of alimony based on the spouse's receipt of $91,000,[67] and justifying an expansion and lengthening of alimony despite the spouse's receipt of three quarters of a million dollars.[68]

Experience and logic suggest that, in reality, there is something of an "alimony versus property" bell curve in play, whether or not consciously acknowledged or referenced by the bench and Bar. Specifically, there are relatively few cases where parties have high incomes but no assets; more frequently, there is a correspondence such that those with low incomes have relatively few assets, those with moderate incomes have more, and those with very high incomes have a significant amount of property.

In a low-income, low-asset case, there is plenty of need, but very little ability to pay support. At the other end of the spectrum, there comes a point at which any award of alimony is simply irrelevant to the standard of living of the recipient – in other words, while there is ability, there is no demonstrable need.[69] Usually, alimony comes up in "the middle" – the bulk of cases between the very poor and the very rich, for whom there are some assets to divide, but post-divorce payments from one spouse to the other will have an effect on the quality of life for one party, the other, or both.

The exceptional cases are actually somewhat easier. It seems obvious that if there is high income, but no significant assets, the only way to not cause an immediate and severe disparity in living circumstances is by way of an award of significant alimony. And if there are plentiful assets but no significant income, an alimony award would be irrelevant or unenforceable.

---

[64] 90 Nev. 209, 215, 523 P.2d 1, 5 (1974).

[65] *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994).

[66] *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000).

[67] *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[68] *Rutar v. Rutar*, 108 Nev. 203, 827 P.2d 829 (1992).

[69] Someone with a spare million in conservative investments spinning off a 5% rate of return will have a monthly income of some $4,166 per month. While there are those that seem intent to test the limits of credulity with conspicuous consumption, there comes a point where the automatic income from assets exceeds any reasonable definition of "need."

In the Nevada experience, anyway, "the middle" is a large category indeed. There were ten primary alimony cases decided between 1988 and 2000.[70] Of these, the property at issue was either unspecified and presumably unremarkable,[71] to the low tens of thousands per spouse,[72] up to many hundreds of thousands of dollars per spouse.[73] There appears to be no meaningful correlation between the assets distributed, within that range, and the Court's stand on how much, or how long, alimony should be paid.

Given the precedent, any meaningful reframing of Nevada alimony law will have to do significantly better than advise trial courts to "consider" the property being divided in determining the appropriate sum of alimony. In any cases involving parties falling between abject poverty and extraordinary wealth, the cases to date could be used to support nearly any position in any case, from zero to lifetime support.

VII. THE IMPACT OF SUBSTANTIAL SEPARATE PROPERTY ASSETS TO DISTRIBUTION OF COMMUNITY PROPERTY AND THE AWARD OF ALIMONY

The fact that one party to a marriage has a significant separate property estate is irrelevant to Nevada community property law. It could be relevant, however, to a judge's view of the equities to be balanced in determining whether and how much of an alimony award should be made. For example, if the facts showed that a couple consumed the entirety of their community income during a marriage of significant length, based on the belief that separate property assets owned by one of them would provide for their income into old age, a case could be made to protect the expectancy interest of the spouse not on title to those assets in the event of divorce.

The law is not well developed, but it would appear that the separate property of one spouse is most readily "set apart" for the support of the other when the sort of facts set out in *Daniel v. Baker*, are present: there is a great disparity in the financial condition of the two parties; the spouse in need has no or little potential for meaningful employment with a sufficient salary for the spouse to reach a decent standard of living; and there is a great age distance between husband and wife. The case becomes even stronger where, as in *Sargeant*, one spouse is likely to violate court orders of regular support, or even destroy assets just to injure the other spouse.

---

[70] *Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988); *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); *Rutar v. Rutar*, 108 Nev. 203, 827 P.2d 829 (1992); *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994); *Gardner v. Gardner*, 110 Nev. 1053, 881 P.2d 645 (1994); *Alba v. Alba*, 111 Nev. 426, 892 P.2d 574 (1995); *Kerley v. Kerley*, 111 Nev. 462, 893 P.2d 358 (1995); *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998); *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998); *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000).

[71] *Gardner*, *Alba*, *Wright*, *Rodriguez*.

[72] *Heim*, *Kerley*; *Fondi* (actually, $91,000).

[73] *Rutar*, *Sprenger*, *Shydler*.

The cases from over a century ago (*e.g.*, *Lake v. Bender*, *supra*) dealt with situations in which the then-new community property law did not affect the wealthier spouse's accumulation of all property in his name despite long years of work by the other spouse. Oddly, the more widespread modern use of prenuptial agreements and similar contracts may have brought society full circle, returning to a situation in which one of two spouses can accumulate a large separate property estate while the other does not accumulate even a small community property estate, even during a long-term marriage.

This sets up the facts under which a heavier reference to the divorce courts' power to "set apart" one spouse's separate property estate for the support of the other may, and perhaps should, be seen. Courts are generally loathe to produce a result where one divorced spouse lives a life of relative luxury while the other is relegated to merely surviving on a meager – or non-existent – community property distribution. The existence of a substantial separate property estate on one side of a marriage of significant length is sometimes seen as a justification for an award of separate property from one spouse to the other to prevent such a situation.

It is, however, a standard-less and therefore dangerous power. Under what circumstances is it "fair" – or "unfair" – that one spouse's separate property should be reduced to provide assets to the other, just because the marriage did not create "enough" community property? What about the situation where the parties marry at or after retirement, and necessarily are living off the pre-marital savings of one or both parties?

The availability of separate property set-aside creates a situation where, in the discretion of a judge, the act of marriage could create a hotch-pot effectively making even premarital separate property available for distribution upon divorce. Absent a situation where one party has subsidized the marriage, and essentially seeks compensation, the concepts of no-fault divorce and presumptive equal distribution would seem to militate against a gratuitous transfer of wealth from one party's separate property estate to that of the other. But the power remains available, and the existence of substantial separate property assets on one side always at least raises the question of whether "regular" or lump-sum alimony should be awarded.

VIII. PROPOSALS FOR INTEGRATION OF PROPERTY AND ALIMONY LAW INTO A COHERENT ANALYSIS TO BE APPLIED UPON DIVORCE

As discussed in some detail above, the rehabilitative alimony statute as interpreted by the Nevada Supreme Court has a purpose – providing education and training to prevent lesser-earning spouses from falling into poverty and becoming dependent on the welfare system. But, of course, the same could pretty much be said of ***any*** alimony award, which serves the same end by way of forcing the direct subsidization of one former spouse by the other. Still, the legislative requirements of ascertaining a time when such training should begin, and the things it is intended to accomplish, necessarily require a court to focus on the age, ability, and feasability of getting the recipient back into the workforce.

The general alimony statute and the cases interpreting it appear to stand for the proposition that at the time of dissolution – at least after marriages of "significant length" – the parties should be put into some reasonable financial parity, either permanently or for some limited time, acknowledging that one party's contribution to the community might have been in the form of wage earning, homemaking, or caring for the children. But without standards for when temporary or permanent awards are more appropriate, or should be added to or in place of rehabilitative awards, the guidance to date is not very helpful in predicting (and, therefore, either negotiating or litigating) such cases.

The Nevada Legislature has not taken up the Nevada Supreme Court's decade-old invitation to provide better guidelines, so the Court has attempted to do so itself, in a series of cases that have not been entirely logically or analytically consistent, discussing and emphasizing different lists of factors and considerations, sometimes without even referencing or distinguishing the Court's own prior similar cases.

In 2000, the Court mused in *Rodriguez* that the legislature's alteration of the statutory language in 1993 was intended to eliminate any reliance on "fault" as discussed in *Heim*, in 1988. The Court closely examined the legislative history of the 1993 amendment to NRS 125.150, and concluded that the legislature deleted the language about the "respective merits of the parties" in direct response to the Court's decisions which suggested that marital fault could be considered in determining alimony and property distribution.

In practice, this has led to the highly counter-intuitive situation discussed in the first section of this paper.[74] While alimony has been consigned to a "strictly economic" review, the division of ***property*** in this no-fault, presumptive equal division state ***can*** be altered on the basis of bad behavior by a party, at least where that party commits economic harm. Especially because, as noted above, property should be divided ***first*** and then ***considered*** in the award of alimony, the Legislature and Court have created a system that is contradictory and illogical in both conception and execution.

The Nevada Supreme Court has struggled with alimony cases for the entire time such cases have been decided; even the case lines developed since the "no fault" era began half a century ago have been inconsistent and unpredictable, in both approach and results.

For example, in a single year the Court issued back-to-back decisions, in one of which it remanded to the district court, stating that it was the function of the trial court to weigh the particular equities and make a specific award – and in the ***other*** of which the Court issued a specific dollar sum award for a specific length of time.[75] Even the Court's list of general "factors to be considered" has varied wildly and without explanation, from the 20 years that it referenced a list of factors posited in

---

[74] *See* text and note at n.6.

[75] *See Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994) (remanding for entry of a"just and equitable" award); *Gardner v. Gardner*, 110 Nev. 1053, 881 P.2d 645 (1994) (extending alimony by 10 years at $1,000 per month).

Buchanan,[76] to the decade it switched to a partially coextensive list of factors laid out in *Sprenger*[77] for six more years, until it switched back to and expanded the 1974 *Buchanan* factors list without even ***mentioning*** *Sprenger*, in *Rodriguez*[78] in 2000.

And the "factors" – as set out in either *Sprenger* ***or*** *Buchanan/Rodriguez* – are of decidedly little assistance in quantifying an alimony award appropriate in any particular case, stating only that courts should "consider" such things as "the financial condition of the parties," "the nature and value of the parties' respective property," "the duration of the marriage," and the parties' "income and earning capacity."

Lack of predictability and consistency is a problem. The Nevada Family Law Section can be thanked for trying to trying to provide some measure of both, but perhaps a mathematical modeling of an inconsistent and contradictory body of case law was doomed for being acceptable. It is the same reason why automating a bad manual records-keeping system is not helpful – all that results is a fast and efficient bad records-keeping system.

Nevada is hardly unique – as noted above, the ALI has noted the same deficiency on a national level.[79] Both the public policy objectives being pursued, and the legal framework designed to realize them, remain difficult to discern and explain. A review of alimony statutes and cases from around the country show that ***most*** states have statutory or case authority setting up either a list of economic or behavioral factors (including or excluding questions of "fault"), or an attempt to give trial courts general guidance on how to balance an obligee's "need" with an obligor's "ability to pay." Both the factor lists in *Sprenger* and *Rodriguez*, ***and*** the Tonopah formula which mathematically models those factor lists, fit into that category.

The ALI's proposal to move the alimony analysis toward predictability and consistency involves recasting the question of alimony as one of "loss occasioned by dissolution" rather than one of the "need" of the former spouse. Changing focus from "need" to "loss" makes the question one of entitlement rather than a subjective plea for assistance, which seems positive, but inadequate.

What is needed, rather, is a substantive underlying theoretical rationale – what one district court judge has termed a desired "rational set of parameters which would be universally applied." The facts of the individual case could then be thrown against the theoretical net, presumably producing similar results in similar cases, and allowing the orderly negotiation and litigation of alimony-related cases.

---

[76] 90 Nev. 209, 523 P.2d 1 (1974).

[77] 110 Nev. 855, 878 P.2d 284 (1994).

[78] 116 Nev. 993, 13 P.3d 415 (2000)

[79] *See* text at n.15.

This discussion therefore suggests an analytical framework, which can be used as the starting point for evaluation of individual cases, by classification of the factors involved in the dissolution.

A. Property Distribution and Rehabilitative Alimony Evaluation

As discussed above, property should be characterized, valued, and distributed, before the question of alimony is reached. Next should be a forthright review of whether the arguably dependent spouse is a candidate for rehabilitative alimony – whether he or she is capable of enhancing his or her earning potential and independent earnings. Not all former spouses can, or should, attempt "rehabilitation,"[80] but it is a logical second evaluation behind the extent of property distributed (and conscious evaluation of whether or not that property, plus what the spouse can reasonably earn if "rehabilitated," will provide adequately for self-support). The level of self-support that can and should be expected of the lesser-earning spouse informs the rest of the analysis.

B. General Alimony Based on a "Career Asset"

The third step would be a straight-forward evaluation of the realization of the "career asset." The term is shorthand for the common scenario in which only one career or other primary source of income has been developed by the efforts of both spouses during the marriage.[81] Even when the case concerns an original alimony award (rather than modification of an existing award), courts have reacted negatively to one spouse's early retirement that has the effect of decreasing the expected cash flow from the career to the detriment of the supported spouse.[82]

The tangible products of a "career asset" are spun off over time as "hard" assets – cash that can be saved, invested, or used for the purchase of tangible goods, or income deferred as divisible retirement benefits. But the remaining intangible potential for further production is not usually

---

[80] *See Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988).

[81] In *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000), the Court supported permanent alimony as a factor for the dependent spouse after a long-term marriage, noting that the husband was walking away with the "career asset" of the Ph.D. degree and high degree of employability, and that the wife was entitled after a long marriage to live as nearly as fairly as possible to the station in life that she enjoyed before the divorce. Similar language was used in *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d (1998), *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994), and *Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988).

[82] *See Smith v. Smith*, 737 So. 2d 641 (Fla. Dist. Ct. App. 1999) (the court pointed out that even if the parties had agreed to an early retirement, where the circumstances warranted, the court could still impute income to a retiring spouse); *Hill v. Hill*, No. ED76954, 2000 Mo. App. LEXIS 1506 (Mo. Ct. App. Oct. 10, 2000) (where husband voluntarily retired at age 56 before the separation and divorce and sought no other employment, the trial court acted properly when it imputed income to the husband since he was capable of earning a substantial income but chose, instead, to pursue nonremunerative activities, given his education, work experience, work history, and past income levels).

quantified in any overt way, other than whether the worker's business is a "going concern," or a professional remains in practice.

Most of the alimony cases do not seem to analyze either the stage of the career path that the working spouse had achieved as of the moment of divorce, or the arguably "separate" and "community" components of the career asset.[83] Both would appear to be mistakes, and consciously focusing on both the remaining potential of a career asset, and its appropriate allocation, would lead to sharper alimony rulings.

First, typical alimony analyses give no significant weight to the natural talent or primary education of the working spouse (definitionally "separate property" components to any career success), focusing instead on the education, training, and even business experience achieved during marriage to determine whether there is a legitimate spousal interest in the career asset of the employed spouse.[84]

As a preliminary matter, then the arguably "separate" and "community" components of the higher-earning spouse's career should be evaluated. The "separate" pieces are the natural talent, etc., mentioned above, plus of course the actual ***work*** to be done in the future. What remains is the ***marital*** component to the "career asset" of the working spouse in any marriage of significant length – the portion of future income to be realized by one spouse that are derived from the successes, contacts, and efforts contributed by ***either*** spouse during the marriage. That marital component could be analogized to a form of "community goodwill," and is effectively what courts seek to provide to the former spouse when they speak of a "career asset" possessed by the party paying alimony.

It might make sense to try to analyze the career asset more formally in an alimony case. The components combining to create income – from natural ability to education to experience – ***could*** be weighted and attributed as separate or marital contributions to the future income stream.

That brings up the second quantifiable part of an alimony award based on a career asset – the reasonable expectation of length of future receipt of funds based on that career. A "career asset" basis of alimony is dynamic, not static, and dissipates over time as ability, effort, and education/training are converted into assets, and potential income is transformed into realized income. The career asset declines in value with age and reaches zero upon *bona fide* retirement.

---

[83] *See* collected cases in Jane Massey Draper, Annotation, *Retirement of Husband as Change of Circumstances Warranting Modification of Divorce Decree – Prospective Retirement*, 110 A.L.R. 5th 237 (2003).

[84] In *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994), for example, the Nevada Supreme Court listed "the husband's education during the marriage" as a factor to be considered and, finding that he had developed his "business acumen" during that time, directed the lower court to "increase and extend" the alimony awarded.

There are cases which hint at exactly such a reasoning process in the court's mind, even if not stated exactly this way.[85]

For example, a 59-year-old airline pilot has an effective work life of just one year, as a matter of federal regulation. While such a person is not foreclosed from other work, even in the same industry (say, as a flight instructor), it would not be appropriate, no matter the length of the marriage, to create a permanent or long-term alimony award based on a career asset which has been almost completely converted at the time of divorce from potential income to realized income.[86]

Perhaps it would be best to deal with such realities with presumptions and burdens of going forward. Where the basis of alimony is a spouse's interest in the "career asset" being retained by the other spouse, an order establishing alimony could reasonably be couched as terminating or reducing at the date predicted for work to cease (and alimony payable to be adjusted accordingly). The burden should be explicitly placed on one side or the other to file a motion if the career asset did not stop producing income at the time predicted.[87] This could prevent the kind of cases in which modification upon retirement was denied because retirement was "foreseen" or "foreseeable" at the time the original order was made.[88]

---

[85] *See*, *e.g.*, *Kuester v. Kuester*, 554 N.W.2d 684 (Wis. Ct. App. 1996). In that case, a husband in his early fifties was involuntarily terminated, sought work for about a year, and then gave up, voluntarily retired and began to withdraw monthly amounts from his IRA. The court ordered alimony based upon his prior income, finding his decision to retire unreasonable given his age, health, work experience, and the job market, and stating that "since Frederick retained a substantial earning capacity at the time of the divorce, the trial court was entitled to impute income to him based on his unreasonable refusal to exercise that potential."

[86] *See Lambertz v. Lambertz*, 375 N.W.2d 645 (S.D. 1985) (obligor retired from the military shortly before his mandatory retirement date was entitled to downward modification of alimony since the retirement was not voluntary, despite his age of 55); *but see Stubblebine v. Stubblebine*, 473 S.E.2d 72 (1996) (setting alimony in accordance with husband's earning capacity despite his lack of income following retirement from both military and post-military private employment, at the age of 64, taking into account the obligee's needs and ability to provide for those needs, and balancing those against the obligor's ability to provide support, even when he has retired in good faith at a "normal" retirement age).

[87] Indeed, with the benefit of hindsight, courts have pronounced that the drafters of support agreements should provide for such "contingencies" as retirement at the time of drafting. *See Bogan v. Bogan*, 60 S.W.3d 721 (Tenn. 2001). Some courts and commentators have been quite harsh in such comments, stating that "no thoughtful matrimonial lawyer should leave an issue of this importance to chance and subject a client to lengthy future proceedings." *See Deegan v. Deegan*, 603 A.2d 542 (N.J. Super Ct. App. Div. 1992), *quoted in* Jane Massey Draper, Annotation, *Retirement of Husband as Change of Circumstances Warranting Modification of Divorce Decree – Early Retirement*, 2002 A.L.R. 5th 22, 2002 WL 31414142 at 19.

[88] *See*, *e.g.*, *In re Marriage of Jones*, 389 N.E.2d 338 (Ind. App. 1979) (husband unable to show that eventual retirement was "not reasonably foreseeable when the judgment was entered"); *Jenkins v. Jenkins*, 1993 WL 385346 (Ohio Ct. App. 1993) (same); *McManus v. McManus*, 638 So. 2d 1051 (Fla. Dist. Ct. App. 1994) (reversal of order terminating alimony because retirement was not an "unanticipated" change of circumstances). To some degree, of course, eventual retirement is "foreseeable" in ***every*** case – no one expects to be able to work forever.

Not every career has a clear "no later than" termination, but either within an industry, or for a particular individual, it is not unusual for there to be an expectation of concluding employment at some predictable point. That point could be projected, based on standards in the field, and any factors individual to the case.

A divorce decree calling for future reduction or termination of alimony may seem harsh to the obligee, whose needs presumably will not decrease. But property division schemes everywhere increasingly resemble the community property scheme of dividing, usually equally, that which was created during the marriage, and most States (including Nevada) have eliminated "fault" analyses in favor of (allegedly) purely economic criteria for whether and how much alimony should be awarded.

By treating the "career asset" as just one more thing to divide, alimony awarded on that basis can be as analyzed almost as readily as property. Looked at this way, any alimony award outliving the income stream thrown off by the career would not be compensatory to the former spouse, but a transfer of wealth from one party's separate property to that of the other. Where the property accrued during the marriage is divided, presumably equally, alimony awards reaching beyond the exhaustion of the career asset can be seen as unfair.

For example, in a post-retirement case, the parties would have already completed the transformation of the career asset into assets and investments – large or small. If those assets and investments are equally divided, ***no*** alimony award would appear proper, since the parties would have precisely equal resources for self-support.

In the modern world, pensions are typically divided between spouses to the degree accrued during the marriage. Career-asset-based alimony might be seen, in part, truly as "maintenance" – stopgap payments by the employee spouse to the non-employee spouse to provide the ability to live long enough for the deferred compensation portion of the career asset to enter pay status.

Conceptualized this way, alimony becomes merely a means of preventing too gross of a disparity in the available incomes of the parties until the career asset is completely converted from potential to realized income, and the parties are returned to parity as they each begin to receive their half of the marital portion of that asset.

Anecdotal accounts suggest that this basic approach has been stumbled upon, if not clearly enunciated; in long-term marriages, the trial court sometimes effectively pools the current income of a working spouse and the retirement income of a spouse who has retired, until both achieve retirement age, at which time each receives his or her time-share rule of all retirement benefits earned during marriage. An order providing for such payments structured that way achieves by design the same result reached in cases where the payor spouse moves for alimony termination upon retirement – without requiring the additional litigation of the modification motion.

C. General Alimony Based on Compensation For Loss or Waste

As a theoretical matter, there are several possible bases for "compensatory alimony." For example, there have been many short-term marriages where one spouse liquidated pre-existing property, automobiles, etc., just to find that the marriage did not work out, and the assets had to be replaced or the spouse has to relocate back to some prior residence. In such a case, a straightforward allocation of the costs incurred in proportion to the means of the parties seems the most logical solution.

In the situation where one spouse has committed waste to such an extent that the community estate is severely depleted, there might not even be sufficient remaining property to make up the loss to the other spouse. Such circumstances would seem most appropriate for an award of a lump sum alimony award that could not be discharged in bankruptcy, or left uncollectible against an estate by reason of competition with other creditors. But Nevada statutory and decisional law have created the opposite approach to such situations.

Nevada switched from an "equitable distribution" to an "equal distribution" state in 1993. Prior to that year, NRS 125.150 required the court to make such disposition of:

> (1) The community property of the parties; and
> (2) Any property placed in joint tenancy by the parties on or after July 1, 1979, as appears just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by the divorce, and to the party through whom the property was acquired, and to the burdens, if any, imposed upon it, for the benefit of the children.

After 1993, NRS 125.150(1) provided that in granting a divorce, the court:

> (b) Shall, to the extent practicable, make an equal disposition of the community property of the parties, except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

The legislature did not define what is meant by a "compelling reason" which would permit an unequal division of community property, and no existing body of statutory or case law provided a reliable precedent. In *Lofgren v. Lofgren*,[89] the Nevada Supreme Court identified one "compelling reason" which would justify an unequal division of community property as the financial misconduct of one of the parties, such as waste or secretion of community assets in violation of court order.[90]

---

[89] 112 Nev. 1282, 926 P.2d 296 (1996).

[90] *Id*., 112 Nev. at 1283-84.

The next year, in *Putterman v. Putterman*,[91] the Nevada Supreme Court held that both the husband's financial misconduct in the form of his having refused to account to the court concerning earnings and other financial matters, and his lying to the court about his income, provided compelling reasons for an unequal disposition of community property.[92] The Court also noted, in dicta, that other possible "compelling reasons" for an unequal division of community property could include negligent loss or destruction of community property, unauthorized gifts of community property, and even, possibly, compensation for losses occasioned by marriage and its breakup.[93]

Thus, the Nevada Legislature and Supreme Court have jointly created a situation where theoretical consistency and precedent collide.[94] Especially in view of the ALI recasting of alimony from a focus on "need" to one of "loss," it makes much more sense to provide compensation to one spouse for the financial mis-deeds of the other by way of a compensatory alimony award, made ***after*** characterization and division of the marital property. Indeed, it is in the process of property division that any economic loss to a spouse is quantified.

At least as interpreted to date, the statutory changes authorizing disproportionate division of community property upon a finding of "compelling circumstances," while eliminating "the merits of the parties" in deciding alimony, have made the process of economic division upon divorce ***backwards***, so that compensation to a spouse who has suffered loss is an awkward part of the property division analysis – which still has to be done before alimony is awarded.

The Nevada Supreme Court should reconsider its interpretation of the legislative amendments. If ***anything*** should be done without consideration of the "merits" of the parties' actions, it is division of property characterized as community in this no-fault State. ***After*** the property is divided, a trial court can properly assess the compensation one spouse might owe another for "negligent loss or destruction of community property, unauthorized gifts of community property, and even, possibly, compensation for losses occasioned by marriage and its breakup." It is at that point that a court ***should*** consider whether compensatory alimony should be awarded.

D. "Just 'cuz" Alimony

While the analysis set out above makes a start (hopefully) toward a reproducible series of steps that can be applied from case to case when alimony is arguably at issue, it is only a first step in trying to

---

[91] 113 Nev. 606, 939 P.2d 1047 (1997).

[92] *Id.* at 609.

[93] *Id.* at 608.

[94] "The life of the law has not been logic; it has been experience." Oliver Wendell Holmes, *The Common Law* (1881).

develop a "rational set of parameters which can be universally applied." There is an infinite variety of scenarios that could be proposed which would not yield just and equitable results based solely on the steps of that analysis. And the judiciary is never more reflexive than when it perceives an effort to restrict the range of discretion.

Accordingly, any alimony analysis probably has to leave some general power to make a lump-sum or periodic award on the basis of equitable grounds to be specified by the trier of fact. It is hoped that having a gantlet of specific bases for alimony to be sequentially examined – even if each is individually rejected – will sharpen the basis of making or denying alimony in a specific case in such a way as to facilitate settlement, or at least consistent appellate review. The flippant title of this subsection notwithstanding, there is reason to believe that judges going through a series of concrete steps for making alimony determinations will reach decisions ***more*** – not less – grounded in law, equity, and public policy.

IX. CONCLUSIONS

The lack of a theoretical framework plagues all efforts to achieve predictability and consistency in alimony cases, since it is hard to formalize a process when it is uncertain exactly what it is intended to achieve or the meaning of the terms used in doing so. A multitude of "factors" of varying degrees of objective and subjective verifiability are not really helpful to counsel seeking to predict the outcome of litigation.

The lack of useful guidance decreases the chances for settlement and increases the likelihood of litigation, to the disadvantage of the bench, Bar, and public. The absence of predictability and consistency often pushes alimony cases quickly past the point of economic reasonableness, in that more time, effort, and money must be expended to reach a resolution than is warranted by the likely reasonable boundaries of the economic stakes of the dispute.

The analytical messiness and lack of predictability and consistency indicates a lack of definitional agreement about what alimony is, and should be. In altogether too many decisions – in Nevada and elsewhere – courts appear to simply decide what is "fair," and then set about constructing rationalizations in support of the conclusion already reached. This may be an artifact of the lack of a coherent theoretical model for either the original award of alimony or its modification once awarded.

While the entirety of the Nevada legal code pertaining to Family Law could use a restatement and recodification (for all the reasons commented on by the Nevada Supreme Court for more than the past hundred years), it is possible for the Court to stake out a multi-part analysis that would help. It would be helpful for the Court to set out what it perceives to be the meaning of the terms it uses, by definition or at least frames of reference, so that trial courts and litigants have some bright lines differentiating appropriate "rehabilitative" cases from those meriting "temporary" or "permanent" (i.e., until modified) alimony.

First, the separate and community property character of all the property owned by either spouse should be ascertained, and the community and other jointly-held property divided.

Second, the trial court should explicitly decide whether the arguably dependent spouse is a candidate for rehabilitative alimony under the facts of the case, and whether, if so, the other spouse can reasonably afford to pay for such rehabilitation.

Next, the trial court should examine whether a career asset was created during the marriage that one spouse will be able to utilize for the creation of future income, and then quantify both the community property contribution to that career asset, and its reasonable size and duration, compensating the other spouse for half the community property component of those future earnings. Again, some guidance from the Supreme Court might be useful in gauging how much or long of a spousal contribution to a career merits compensation for future income derived from the "career asset," but the trial court should specify its perception in making a ruling on this issue, in any event.

Fourth, the trial court should explicitly consider whether one spouse owes to the other compensation for some loss, or waste, essentially following the reasoning of the existing *Lofgren*/*Putterman* analysis, but shifting the quantification and award of compensation to the (post-property-division) alimony phase of the decision.

Finally, the trial court should determine whether there is a legitimate need for, and ability to pay, alimony falling outside the scope of the analysis provided in the other steps, and explicitly recite the equitable basis for such an award.

The above multi-step process – or one building on and improving it – would create the "objective standard" the Nevada Supreme Court called for in *Wright*, to the advantage of litigants on both sides of possible alimony cases.

P:\wp12\ccps\MSW4847.WPD