CAN THE FAMILY COURT EVER HEAR CIVIL DIVISION COURT MATTERS? MARITAL TORTS AND THE SELECTIVE EXPANSION OF SUBJECT MATTER JURISDICTION

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Client: "She hit me over the head with a chair and it hurts – OUCH!" Lawyer: "Why did you wait until you were in bed to tell her you wanted a divorce?" Torts happen; we cannot stop them. Where do you file the action – Family Court or District Court? As with many questions answered by lawyers – ***it depends***.

In Southern Nevada, at least, where to file claims for facts such as those above usually hinges on the relief sought; specifically, whether the client wants to seek punitive damages, ***or*** an unequal distribution of community property in the divorce. The procedural mechanisms for review vary from department to department, and the District Court Judges in both divisions have discretion on the choice of forum.[1]

Three rules must be balanced in determining which court hears the claims. First is that torts and contract disputes are not in the enumerated exclusive jurisdiction of the Family Court, and therefore normally fall into the "general" jurisdiction of the Civil/Criminal Division.

Second is the construction of Article 6, §6(2)(b) of the Nevada Constitution in *Barelli v. Barelli*, 113 Nev. 873, 944 P.2d 246 (1997). The Nevada Supreme Court held that proceedings to reform or rescind an un-merged property settlement (i.e., a contract) could be adjudicated in Family Court instead, at least where it was a"matter related to" the jurisdictional authority of the Family Court. The Court held that the ruling works both ways: "both the family and the general divisions of the district court have the power to resolve issues that fall outside their jurisdiction when necessary for the resolution of those claims over which jurisdiction is properly exercised." 113 Nev.

at 878, 944 P.2d at 248-249.

Third is the "One Family, One Court Rule." In 1999, the Nevada Legislature enacted AB 154, and amended NRS 3.025 and NRS 3.223 to resolve any perceived conflict, by providing that a matter previously decided as a domestic relations case is ***required*** to be assigned to the same court where the case originated.

The enactment clarified the rule previously known in the Family Courts as the "One Case, One Court Rule." It is regulated in Clark County by EDCR 5.42, and in Washoe County by WDCR 37. The Judges of the Eighth Judicial District have expressed various opinions as to whether, after passage of the statutory and rule amendments, tort claims should be filed as part of Family Court actions, or in separate actions, or filed separately and then consolidated.

National authority is of little help. Some states have evolved rules which ***require*** tort claims to be brought within a family law case, or be forever barred. Others have established procedures ***forbidding*** tort claims within family law actions, and requiring their separate litigation. Still others have ruled that they may be litigated in the divorce case, or not, and the usual question arises when one spouse files a post-divorce tort claim and the other moves to dismiss it under some doctrine of claim or issue preclusion.

In Nevada, there has been no guidance on this issue from the Nevada Supreme Court to date, leaving the required balancing act the one described in the Nevada Family Law Practice Manual, 2003 edition, §§ 1.28-1.29, 1.266-1.268, & 1.280-1.281.

Barelli made clear that the Family Court has the jurisdiction to resolve issues falling outside its constitutional jurisdiction when necessary for the resolution of those claims over which jurisdiction is properly exercised, or "where family law issues are implicated," and likewise the Civil Division could reach a family law "issue" where necessary to resolve a claim "that would ordinarily

fall within its jurisdiction, such as reformation or rescission."[2] But the case gave little guidance as to which Court ***should*** hear such claims.

In practice, the case law has led to the "consolidation of cases," either in the Civil Division, or more commonly in the Family Court, where actions between the same parties, using the same evidence, and addressing the same rights and duties, ended up pending in both the Civil Division and the Family Court.

Where a putative tort claim is presented in a Family Court action, the Court is required to make a decision as to how it should proceed. (Where the parties have each filed in different courts, the two courts typically confer and one court or the other – usually the Family Court – makes the requisite call.)

The Court has several options. First, the Court could allow the matter to proceed by motion in the existing Family Law case, allowing the aggrieved party to simply amend pleadings under NRCP 15 as necessary, and calling for supplemental briefings as required to "fill out" the record.

Second, the Court could direct the aggrieved party to file a Civil Division action as an "independent" complaint for relief, and then file a motion to consolidate ***all*** actions into the Family Court case number.[3]

When the new claim appears to be one legitimately litigated, under other circumstances, in the Civil/Criminal division (such as a marital tort), the Court has a third possible course. Using the persuasive powers of the Bench, the Court can attempt to compel, or at least "corral," both counsel into a stipulation on the record regarding the scope of the marital tort claims, and tailor the methodology and relief available upon mutually agreeable terms of the parties.

For example, a judge could get the parties to agree that no jury would be demanded, that the Court would hear all claims relating to the alleged tort, and that relief would be limited to

compensatory damages, or a potential alteration of support otherwise payable, or a possible "compelling circumstance" for unequal property division. The benefit for both sides is avoidance of duplicative and expensive re-litigation of the case in a regular Civil action, and this is often the preferable course for smaller claims that just do not justify the expense of a full-blown separate action.

If, for whatever reason, such an agreement could not be reached, the Family Court record should be made clear that the claim is not part of the Family Court resolution, and thus preserved for an independent action.

This third option is not meant to imply that any inappropriate coercion should come from the Bench, but to suggest a rational means of actually having all claims heard and resolved within the constraints of time and money of people who are usually already stressed as to both. Judges usually have a pretty clear idea of how they would like to proceed on certain matters, and practitioners can use the procedural assistance of the Court to avoid protracted two-Court litigation using the same evidence for different issues, while still allowing all parties their "day in court."

As a practice tip, these possibilities should be discussed in advance with the client – along with the realistic costs and possible benefits – and counsel should be prepared to inform the Family Court of the extent of relief the client seeks, and whether it could be reached in the primary case. If it looks and feels and sounds like a jury verdict – file in the Civil Division. If it can be limited to increasing an award of attorney's fees or an unequal distribution of property, then file it as part of the Family Court action.

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www.WillickLawGroup.com. After a long and fruitful association, Mr. Willick is pleased to announce that Mr. Cerceo will be joining the Northern Nevada Lawyer correspondent, Mary Anne Decaria, in practice with SILVERMAN DECARIA AND KATTELMAN in Reno.

1. There are really two species of such secondary actions. The first is the class of claims revisiting the divorce itself because of omitted assets or debts, or changes brought about by bankruptcy or some other alteration of the expectations of the parties growing out of the divorce. The second is the class of ancillary claims, such as tort claims, which are only involved in the family law case because of the identity of the parties, witnesses, and circumstances. This article addresses only the second group, of such truly ancillary claims.

2. *Barelli v. Barelli*, 113 Nev. 873, 944 P.2d 246 (1997).

3. Before the most recent statutory and rule amendments, this was the usual directive even in partition cases. However, those amendments made it virtually inevitable that such cases would simply return to the same court, after an expensive delay of a month or two, and most judges have acknowledged that there is just no good reason to cause the parties such delay and extra costs. So most partition actions today proceed by motion in the main Family Court case.