NFLR
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Awarding the family Business to the Wife

By Ronald J. Logar, Esq.

This article originally appeared in the Winter 1987 NFLR

It is difficult to convince the trial court to set aside the family business to the wife. The reasons for denying such relief are persuasive: the husband has been the operating spouse, with wife having little if any participation in its operation; where the husband has the special skill and training, the wife does not have experience in the field. Simply, the operating spouse is favored to continue in the sole management of the family business after dissolution.[1]

The presence of other factors, however, may support the wife's position. A recent case provides certain guidelines to follow, *In Re Marriage of Kozen* (9/29/86).[2]

In *Kozen*, the parties owned two Burger King franchises in southern California – one "highly profitable" in Hollywood and another, newer operation in Burbank, owned with a partner. The husband had been solely responsible for their management. Wife, during the 13-year marriage, had been a homemaker and mother to their children. The Hollywood Burger King was valued at $1,187,000, and their residence at $700,000.

Wife decided to become the Burger Queen of Hollywood by requesting that the larger and more profitable Hollywood franchise be set aside to her. A representative

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Nevada Family Law Report

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The *NEVADA FAMILY LAW REPORT* is intended to provide family law-related material and information to the bench and bar with the understanding that neither the State Bar of Nevada, Family Law Section editorial staff nor the authors intend that its content constitutes legal advice. Services of a lawyer should be obtained if assistance is required. Opinions expressed are not necessarily those of the State Bar of Nevada or the editorial staff.

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Editor's Notes

By Shelly Booth Cooley, Esq.

This issue of the NFLR is dedicated to the recipients of the Pillar Award. The Pillar Award was created by the Family Law Section of the State Bar of Nevada in 2009 to honor attorneys who have epitomized the values and principles of the profession and its role in protecting the family. Recipients of the Pillar Award are recognized for their leadership and service in the advancement of Family Law. Since its inception, three attorneys have been awarded this prestigious Award: Ronald J. Logar was the first recipient of the Pillar Award in 2009, Marshal S. Willick received the award in 2010, and Gary R. Silverman was awarded in 2011.

In our first feature, by Ronald J. Logar, Mr. Logar provides guidelines for deciding who should be awarded the family business. Mr. Logar's article first appeared in the Winter 1987 issue of the NFLR and the formal NFLR citation is stated above its title. Our second feature, by Marshal S. Willick, outlines the evolution of the concept of marriage in Nevada and its effect on property and support obligations. Our third feature, by Gary R. Silverman, defines and discusses "waste" and suggests adopting an "explicit, forthright rule for addressing waste in family law cases." Abbreviated versions of Mr. Willick's and Mr. Silverman's articles appeared in the May 2011 *Nevada Lawyer* (Volume 19, Issue 5), addressing family law issues.

Mr. Logar, Mr. Willick and Mr. Silverman – your leadership, devotion and service to the advancement of family law is truly appreciated.

Specialization Exam:

The Family Law Section is offering a test date on February 25, 2012 (the Saturday prior to the Family Law Conference), rather than Nevada Day 2011. Those people interested in sitting for the exam should apply no later than December 31, 2011.

Find the applications at:
https://www.nvbar.org/sites/default/files/Family_Law_Specialization_App_2011.pdf

Find the Standards at:
https://www.nvbar.org/sites/default/files/FL%20Specialization_Standards.pdf

Advanced Family Law Program CLE:

On December 1, 2011, from 8:45 a.m. - 4:45 p.m., at the Federal Courthouse, located at 333 Las Vegas Boulevard South, Las Vegas, Nevada, the State Bar of Nevada will be offering *(cont'd. on page 4)*

Family Business

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of Burger King testified that the franchisor maintained a management training program available to all franchisees, that the wife could satisfactorily complete the program, and that the company would accept her as an owner-franchisee.

Much to husband's dismay, the trial court awarded the Hollywood franchise to wife, awarded the residence and Burbank franchise to husband, required wife to make an equalizing payment to husband, and ordered husband to assume the remaining debt on the Hollywood Burger King.

The trial court explained that wife carried the burden of proving that she could operate the business profitably. It found that she could learn the business with no prior experience, much like the husband did when the first franchise was developed. Further, the court pointed out that wife could support herself and the children from the profits, without relying upon the husband in a dissolution given to acrimony between the two parties. Husband's motion for reconsideration and a new trial was denied. On appeal, the decision was affirmed – the appellate court distinguishing the many cases cited by the husband as authority for overruling the trial court, as being inopposite.

In *In Re Marriage of Burlini* (1983),[3] the family business was a coin laundry operation consisting of washers and dryers located at various apartment complexes. The court denied wife's request for one-half of the business since only the husband had the skill and experience to service the machines, which was necessary to prevent the destruction of the business.

Similarly, in *In Re Marriage of Smith* (1978),[4] the husband had performed the technical work for the family's custom sign-making business while the wife performed the clerical and bookkeeping duties. Again, the business was awarded to husband since his technical knowledge and experience were necessary to the business.

In *Kozen*, the evidence clearly showed that wife could do as good a job as the husband at running the business even though the husband had formed and developed it. There was no showing that the husband had any special training when the franchise was acquired years ago. There was no reason that the wife could not perform the same functions as the husband – and as well – such as "interfacing" with the franchisor, restaurant managers, purveyors, equipment manufacturers and the insurance company.

The *Kozen* decision provides certain guidelines to be applied where both parties seek the family business. First, if it is the husband who has operated the business, then the wife must provide proof that she possess the necessary skills to run the business, or that she can learn the skills without substantial impairment of its operation. An expert witness should be used for this purpose. Second, show that the income from the business is necessary to support the wife, children or another legitimate need. Third, establish that the wife needs to be self-sufficient without dependence upon the husband. (This latter consideration is relevant where the divorce has been acrimonious or where husband's income fluctuates.)

Kozen can serve the practitioner well by providing guidelines for reasonable consideration of the wife's request for the family business.

References

1. *Goss v. Edwards*, 68 CA 3.d 264, 137 CR 252 (1977).
2. California Court of Appeals, 2 Civil B008375 and B009412 (DIV.4) _____ CA 3.d _____, 230 CR 304.
3. 143 Cal. App. 3.d 65, 70-71, 191 Cal. Rptr. 541.
4. 79 Cal. App. 3.d 726, 748-751, 145 Cal. Rptr. 205.

Ronald J. Logar is certified as a Family Law Specialist by the State Bar of Nevada. He founded the Family Law Section of the state bar, and served as its president for several years. He is the founder and editor emeritus of the Nevada Family Law Report. He has been a Fellow of the American Academy of Matrimonial Lawyers since 1981. He lectures on most matrimonial issues and has numerous legal articles widely published. He specializes in complex marital estates and multi-state jurisdictional disputes. He has been certified and trained in all disciplines of alternative dispute resolution.

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an Advanced Family Law Program seminar. Bruce I. Shapiro will be the moderator.

Presenters will cover the following topics:

- **Humberto Rodriguez** of SOS Litigation Services – What you should know about court reporters and the rules their ethical rules;
- **Gary Silverman** – Litigating Relocation Cases;
- **Judge Rob Bare** – Ethical Issues From the Bench;
- **Howard Ecker** – Cohabitation Agreements;
- **James J. Jimmerson** – Decree of Divorce versus Decree of Separate Maintenance and how to avoid malpractice;
- **Judge Charles Hoskin** – Trial Practice in Family Court;
- **Robert Dickerson**, Malpractice Traps When Preparing and Reviewing Prenuptial Agreement;
- **Marshal Willick & Ed Kainen** – The Great Debates (Ed and Marshal will debate current trends and issues in Nevada family law);
- **Radford Smith** – Evidentiary Issues In Family Court;
- **Tom Standish** – Presenting Property Distributions at Trial.

Supreme Court Justices Kristina Pickering and Nancy Saitta will give an update on Supreme Court Family Law .

Lastly, there will be a Family Court Judges Forum, where Family Court Judges Bryce Duckworth, Frank Sullivan, Cynthia Guiliani, Charles Hoskin, Cheryl Moss, Robert Teuton, Cynthia Diane Steele, Mathew Harter, William Potter, William Voy and Vincent Ochoa will discuss important issues in the Family Court and answer participant questions.

Family Law Conference:

The Family Law Conference has been scheduled for March 1 through 2, 2012, in Ely, Nevada.

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Article Submissions

Articles are Invited! The Family Law Section is accepting articles for the Nevada Family Law Report. The next release of the NFLR is expected in November, 2011, with a submission deadline of October 15, 2011.

Please contact Shelly Cooley at scooley@cooleylawlv.com with your proposed articles anytime before the next submission date. We're targeting articles between 350 words and 1,500 words, but we're always flexible if the information requires more space.

The Evolving Concept of Marriage

By Marshal S. Willick, Esq.

INTRODUCTION: "FAMILIES" AND LAW

It is no secret that the development of law tends to lag behind real life by a period of years to decades. So it is not surprising that demographic shifts have altered what was previously thought of as "marriage" and "family," and what elements are, and should be, in play in the dissolution of marital and non-marital relationships.

In modern America, millions of households consist of unmarried cohabitants, both with and without children, and consisting of both opposite-sex and same-sex couples. According to the government, one-third of all children in the United States reside with only one biological parent.[1] Some sources indicate that in Europe, the majority of children grow up in households without two natural, married parents.

The concept of what constitutes a "family unit" appears to be more a matter of decision than empirical fact, and is so fluid that the label is of very little value as a legal test, especially over time.[2] Popular conceptions are fickle, and as the gay marriage debate goes on, some demographers have observed that portions of the population see arbitrary and logically unsupportable distinctions, such as recognizing opposite-sex couples as a family, whether or not they have children, but same-sex relationships as a family when children are present, but not otherwise.[3]

These changing demographic realities and perceptions are important, because the legal concepts of property ownership, and of support obligations, derive from underlying assumptions about what relationships "merit" recognition of co-ownership of assets acquired, or of possible claims to support should the relationship terminate. If legal tests and remedies do not keep some pace with the reality of living arrangements, family law runs the risk of becoming a source of unfairness, rather than a mechanism for achieving equity.[4]

All trends point toward an increase in cohabitant cases. A February, 2011, survey of the American Academy of Matrimonial Lawyers revealed that nearly half of them have noted a spike in the number of suits between former cohabitants, and 39 percent noted an increase in the number of cohabitation agreements between live-in couples – mostly for opposite-sex couples. Both the frequency of suits between cohabitants, and the prevalence of agreements intended to head off such suits, are increasing dramatically.

This article does not purport to be a comprehensive cataloging of either demographic trends or the law governing marriage, divorce, cohabi-

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tation, property, and support. Rather, it intends to identify some of the paths those disparate matters are tracing, with the objective of helping Nevada lawyers and judges increase the likelihood of achieving substantial justice for individuals in a variety of relationships who find themselves engaged with the legal system.

CLASSICAL NOTIONS AND RAMIFICATIONS OF MARRIAGE

Marital or Community Property Measuring Periods Generally

Common law marriage[5] was widespread from Colonial times through the 19 century, when state regulations more consistently required a license from the state and some ceremonial proceeding before a marriage was recognized under law.

In previous years, it was relatively simple, in most places, to determine whether property was accrued by a single person or a couple. The period of joint acquisition started with a marriage, either common-law or ceremonial, and depending on the law of the jurisdiction, ended upon final separation,[6] filing and service of a complaint for divorce,[7] or a divorce trial or decree.[8]

In a minority of places, marriage was considered more transformative as to property. Giving literal meaning to the words "with all my worldly goods I thee endow," the "hotchpot" jurisdictions[9] placed all property of both spouses, whether accrued before or during marriage, at least theoretically before the court for distribution upon divorce.

Whatever timing focus or distributive scheme, family courts have long been accustomed to having fixed measuring points for determining what property could be considered belonging to a couple and distributing it between them in accordance with the relevant state's rules for property distribution upon dissolution.

The Nevada Law of Marriage and Putative Marriage

In Nevada, the critical elements of a common-law marriage were:

1) "Present assent, between parties capable of contracting marriage;"
2) Followed by "subsequent cohabitation as husband and wife;" and
3) "And the holding out to the world of each other as such."[10]

As discussed below, some of these elements have rather sloppily leaked into evaluation of cohabitation cases, causing much unnecessary confusion.

Nevada's first statutes were passed in 1861, styled the "Laws of the Territory of Nevada." They were passed at the first regular session of the territorial legislative assembly, which convened from October 1 to November 29, 1861, in Carson City, and laid the groundwork for a body of laws to be enacted upon entry into the Union.

That first legislative set fell into line completely with the conceptualization of marriage as determined by the mid-19th century, and declared: "That marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting, is essential." The early case law opined that Nevada's adoption of a statutory, regulated procedure for marriage was presumed to be ***in addition*** to the tradition of common-law marriage.[12]

In 1943, the Nevada Legislature did away with common-law marriage, adding a sentence to the definition of marriage that had existed since the original Territorial Statutes:

> "Consent alone will not constitute marriage; it must be followed by solemnization as authorized and provided by this chapter."[13]

But existing common-law marriages remained valid; the new provision applied only to marriages contracted after the date of enactment.

In the 1948 *Wolford* case,[14] the husband alleged that he was still married to another at the time he entered into the marriage ceremony with the wife, although at that time he thought his earlier wife was dead. He requested an annulment and half of the property. The district court granted the annulment and divided the property in half. The Supreme Court affirmed.

By the time of *Williams*[15] nearly 60 years later, everyone had forgotten about *Wolford*, and neither party cited the earlier opinion, leading the Nevada Supreme Court to incorrectly believe it was dealing with "an issue of first impression." *Williams* was, however, the first Nevada case to explicitly recognize the "putative spouse doctrine" by name in an annulment case – the kind of case in which parties live together as man

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and wife, often for many years, and only discover when one of them files for a divorce that there was a legal impediment to their marriage in the first place.

While stating what kind of a case *Williams* was ***not***, Justice Nancy Becker stated that recognition of the putative spouse doctrine would not interfere with public policy supporting lawful marriage, after which she added the unfortunate dicta: "Nor does the doctrine conflict with Nevada's policy in refusing to recognize common-law marriages or palimony suits." This was not a holding, but it is problematic, because while there ***is*** a statutory statement of public policy in NRS 122.010 prohibiting formation of common law marriages, there is ***no*** such statement relating to palimony suits, in any case, statute, or court rule.

Alimony[16]

Nevada provisions empowering courts to make awards of "support of the wife and children" go all the way back to the territorial laws of 1861.[17] 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.[18]
- **Temporary spousal support** – a specified post-divorce award intended to terminate at a specified future time or upon a specified future event.[19]
- **Permanent alimony** – a specified post-divorce award intended to continue indefinitely, unless modified by later court order (usually upon "changed circumstances" of some sort).[20]
- **Rehabilitative alimony** – a specified post-divorce award for the purpose of obtaining training or education relating to a job, career or profession.[21]
- **Lump-sum alimony**, which presumably requires a set aside of one spouse's separate property to the other.[22]

In practice, these categories are sometimes blurred and overlap. 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.[23] 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."[24] While the judiciary has criticized the legislature for not providing any objective criteria for alimony,[25] it also has not provided such guidance, but only reiterated "factors" to be "considered" – which were in turn rather uselessly adopted as statutory criteria.[26]

For purposes of this examination, however, the point is that Nevada has never recognized a right to compel payment of support from one person to another except within the context of a marital relationship. In *Williams*, the court provided one exception to that bright line (despite Justice Becker's comment to the contrary) – support payments can be ordered from one unmarried person to another unmarried person where the two parties went through a marriage ceremony, the parties apparently believed themselves to be married, and there was evidence of fraud, bad faith or bad conduct, such as cruelty, on the part of the potential obligor.[27]

COHABITANT LAW IN NEVADA[28]

As to Property

Starting with the sensible holding that the public policy of encouraging legal marriage would not be "well served by allowing one participant in a meretricious relation-

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ship to abscond with the bulk of the couple's acquisitions,"[29] the Nevada Supreme Court issued a series of cases finding that property may be jointly acquired, and divided, even when it was accrued by parties who were not married at the time the property was acquired.

Through a process that has come to be known as "tacking," property accrued during a period of premarital cohabitation may be divided between the cohabiting parties after they marry, and later divorce.[30]

The same holds true for cohabiting parties when the time-line is reversed. Where parties marry, divorce, and then live together in a meretricious relationship, the property accrued by either of them during the cohabitation period may be equally divided when the relationship ends.[31]

As discussed above, the same applies when two parties think that they are married, but they are not by reason of a legal impediment making any attempted marriage between them void.[32]

The same result occurs when there is no purported marriage at all, but the parties have either an express or implied agreement to accrue property together, which becomes community property by analogy.[33]

The Nevada Supreme Court has explained that it is not critical in such cases whether the parties lived together full time, or apparently for any particular time at all.[34] This mirrors holdings elsewhere, which have concluded that a part-time relationship between parties that planned to marry at a future date can be the basis for a palimony award.[35]

These holdings and precedents can be applied in a large number of factual contexts having a big impact on property distributions, going to subjects as diverse as appreciation of real estate, contributions to and increases in value of retirement benefits, and *Pereira/Van Camp* analyses[36] of a domestic partner's interest in a separately owned business.

All of this law is "judge-made," insofar as none of it is found in any specific provision of the NRS. Courts throughout the country have reviewed cases in which assets were accrued before, during, or after cohabitation relationships that did or did not include marriage, whether that marriage was before or after the cohabitation.[37] As the Nevada Family Law Practice Manual notes, in appropriate circumstances, all assets acquired during a couple's relationship should be equally divided, because courts of equity would determine that "any possible alternative to that rule would be worse."[38]

In sum, the law of cohabitant relationships, as it is has evolved in Nevada, is essentially a contract analysis, directing a court to look for evidence of an express contract, implied contract, or to enter into a partnership or joint venture, the core concept of which is that "courts will protect [parties'] reasonable expectations with respect to transactions concerning property rights."[39]

As to Support Obligations

As an aside, it is worth noting that there are two nearly-unrelated concepts of "palimony" in the United States. In the west, the term is used as shorthand for *Michoff*-like divisions of property accrued during a relationship by analogy to community property.

On the east coast, however, the term has a completely different meaning. In New Jersey, in *Kozlowski*,[40] the court recognized that unmarried adult partners, even those who may be married to others, have the right to choose to cohabit together in a marital-like relationship, and that if one of those partners is induced to do so by a promise of support given her by the other, that promise will be enforced.

The court held that the palimony contract may be oral and usually is because "[p]arties entering this type of relationship usually do not record their understanding in specific legalese . . . ." The contract may be express or implied. Consequently, the existence of the contract and its terms are ordinarily determinable not merely by what was said but "primarily by the parties' acts and conduct in light of . . . [their] subject matter and the surrounding circumstances."

A plaintiff seeking to make out a prima facie case for such is required to present competent evidence conclusively showing: (1) that the parties cohabited; (2) in a marriage-type relationship; (3) that, during this period of cohabitation, defendant promised plaintiff that he/she would support him/her for life; and (4) that this promise was made in exchange for valid consideration. On that last point, the law nationally has been quite consistent – there is no measurable "consideration" required for enforcement of a promise to support, and the fact that the parties had a

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sexual relationship is no kind of bar to enforcement of such promises.

The New Jersey Supreme Court found money damages to be adequate in remedying a non-matrimonial partner's breach of his contract to provide lifetime support to an aggrieved partner, measured by the reasonable actuarially-determined lifetime support needs of the cohabitant.[41]

The parallel of the New Jersey reasoning to the Nevada analysis for parties intending to co-own property is obvious. To date, no Nevada case squarely addresses such a claim, but there is no immediately-apparent reason why such a case could not be brought.

The Statute of Frauds, NRS 111.220, has been on the books since Nevada was a territory, and forbids the enforcement of any alleged "oral contract" not to be performed within one year, ***or*** to answer for the debt or default or another, ***or*** to loan money or grant or extend credit to another.

However, it would apparently not bar enforcement of a promise of "support for life," because such a promise is one that ***could*** be completed within a year, depending on facts that neither party knows when the promise is made. The Nevada Supreme Court has held that the Statute of Frauds only bars contracts that ***necessarily*** cannot be completed within a year: "[A]ny agreement which, by fair interpretation and in view of all circumstances existing at the time, **does not admit of performance within a year from the time of its making** is void under the statute."[42]

Holdings such as that one were the underlying law in New Jersey upon which its more specific palimony holdings were later based,[43] specifically holding that the Statute of Frauds is no barrier to enforcement of a promise for lifetime support.[44]

In other words, the *Williams* dicta notwithstanding, "support palimony" does not appear any more incompatible with Nevada law than does the "property palimony" already recognized. Testing this hypothesis, however, will apparently require a trip to the Nevada Supreme Court.

Impact of the Nevada Domestic Partnership Law

If anything, the expansion of palimony from property to also include support rights was made much more likely by the 2009 adoption in Nevada of a Domestic Partnership statute.[45]

The full impact of that law is beyond the scope of this article, but at minimum the legislature seems to have provided at least one explicit form of "statutory authority" looked for in *Williams* for ordering spousal support between persons not lawfully married, since domestic partners are definitionally unmarried, and spousal support is explicitly available upon dissolution of the relationship.[46]

Given this evolution of the statutory authority, it is hard to see a solid basis for arguing that it is within the ambit of district courts to find an agreement to share property as if it was community property, but beyond the power of those courts to find that there was a promise for support which is likewise enforceable.

CONFLICTING AND CONTRADICTORY PRESUMPTIONS IN MARITAL AND COHABITANT CASES

There is much to address and resolve in the case law. The existing authorities treat married and unmarried persons very differently, insofar as legal presumptions concerning their words and actions are concerned.

For example, a "spouse to spouse conveyance of title to real property creates a presumption of gift that can only be overcome by clear and convincing evidence."[47] However, a conveyance of title to an unmarried cohabitant may be entirely disregarded, and the property distributed between the parties in accordance with their actual contributions to its acquisition.[48]

There are many similar examples in Nevada law, going to presumptions, tracing, attributions, and burdens of proof. As the law of marital dissolution and cohabitant breakups continues to converge, all such dichotomies will have to be explicitly confronted, re-analyzed, and explicitly addressed. Matters are even more severe in the federal sphere, where not only Social Security, but myriad tax and other laws vary enormously depending on marital status.[49]

THE FUTURE OF MARITAL AND COHABITANT LAW IN NEVADA

As to Property

Not every instance of parties living in the same place is going to

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create a claim for division of assets accrued during that period, or for support payments thereafter. The parties may have an agreement for extremely separate economic lives, or have some different arrangement. In the cohabitation cases handled by this office, we have tended to watch for facts giving rise to a "common economic unit" – an inter-relation beyond mere presence in the same physical space where the successes and failures of one party have a direct impact on the fortunes of the other.

Such a common economic unit might be very easy to spot, or could be very subtle. If parties merge their finances, jointly acquire property and debts, etc., such an arrangement seems facially apparent. Where such is the case, deposits by one party into an IRA deprive the economic unit they have formed of resources it could have used, in exchange for future tax breaks and rewards – which look a lot like joint investments.

Where one party contributes only services, and the other contributes all cash, the same joint venture composed of unlike contributions can be found. Holdings elsewhere indicate that homemaking services may constitute adequate consideration for a contract to share accrued property.[50] The evidence in such a case, however, might be much scantier, and the chances that the parties would retrospectively disagree as to their expressed intentions would seem increased.

It is possible that the "contract" analysis explained in *Michoff* and *Gilman* could further soften to a simple examination of the parties' intent. Similar evolutions are occurring elsewhere. In a recent Alaska case, the court brushed aside all technical assertions as to contract elements made by the party with title to the property at issue, finding that the words and behavior of the parties manifested a clear intent to co-own it:

> In summary, we hold that courts, when dealing with the property disputes of a man and a woman who have been living together in a non-marital domestic relationship, should distribute the property based upon the express or implied intent of those parties.
>
> ...[W]e affirm under Wood and Beal, which ask what the parties intended, not whether they formed a contract.[51]

As to Support Obligations

As discussed above, the Nevada Supreme Court found that the property accrued during a period of premarital cohabitation could be considered for distribution after those parties later married and then divorced.[52]

Courts elsewhere have applied identical reasoning to spousal support claims. One found that the wife's "very significant and substantial" contributions to the husband's "status and earning capacity," both ***before*** and during marriage, were properly considered in determining a proper award of alimony. The facts showed that the parties cohabited for seven years, while the future-husband completed college and much of medical school. They married in 1993, and the marriage fell apart in 1997, just as the husband completed residency and was beginning his medical career.[53]

These holdings are signs and portents that a court could find pre-marital (or post-divorce) cohabitation just as valid a basis for a claim, or an enlarged claim, to spousal support as it would be for a property claim.

In the larger picture, if non-marital "contributions" to another's career can be considered, valued, and compensated if the parties happen to marry and divorce after those contributions are made, it is hard to discern a rationale for why identical contributions should be considered entirely without value if no such marriage occurs. This makes future judicial approval of entirely non-marital "support palimony" seem even more likely.

As to Procedure

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Currently pending decision on rehearing in the Nevada Supreme Court is the *Landreth*[54] matter. This has greatly expanded beyond its original issues to become a general exploration of the subject matter jurisdiction of the Nevada family courts; it raises the question of what court is best suited to handle all the multiple scenarios in which property division issues between unmarried cohabitants might be raised.

As the court noted in *Gilman*, such actions are based not on ***status***, but on enforcement of an ***agreement***, either express or implied. Where the question is whether conduct has demonstrated an implied contract for "partnership or joint venture," the action does not fit squarely into any of the statutory provisions recited in NRS 3.223.

Still, dissolution of a cohabitant relationship is far more similar to the breakdown of a marriage than it is to a contract dispute between strangers. As an Illinois court once put it, a property-accrual agreement between cohabitants is "not the kind of arm's length bargain envisioned by traditional contract principles, but an intimate arrangement of a fundamentally different kind."[55]

And the most appropriate court to hear such cases is the court most familiar with distributing assets between parties terminating such relationships – the family court, which was specifically created and staffed with personnel trained in dealing with subject matters including "actions between unmarried, childless parties who used to live together and who dispute the division of property allegedly acquired during their relationship."[56]

Family courts are quite accustomed to resolving disputes related to such implied or express agreements. Every case involving a premarital, post-nuptial or separation agreement involves parties similarly addressing contractual property matters within the context of such an "intimate arrangement."

Judicially-created causes of action belong in the court assigned the tasks to which the analogy applies. Both community property and spousal support are dealt with in NRS Chapter 125, and the family courts have exclusive jurisdiction to hear cases under that chapter. Cases involving disposition of property accrued "by analogy" to community property, or claims for lifetime support by analogy to alimony, likewise belong in family court.

As the Family Law Section's *Amicus Brief* on rehearing in *Landreth* stated:

> Whether a child has been born, or one or both parties are falsely asserting that they are married, are poor reasons to send some cases one way, and others another. Case assignments should be deliberate, and based on which court is best equipped to handle the subject matter of the dispute, not on the happenstance of unrelated facts, the lies of the parties, or the contents of their competing allegations.

At this writing it is unknown what decision the Nevada Supreme Court will make in *Landreth*. But if, for whatever reason, it sends cases dealing with unmarried cohabitants to the civil/criminal division to be addressed by judges more used to corporate spats and fender-benders, the Nevada Legislature should waste no time amending the relevant statutes to ensure that cases involving the break-up of cohabitant relationships are addressed by judges who "develop the expertise and have the time to study the case law and to understand the current state of the art in family issues" as was intended when the family courts were created.

CONCLUSIONS AND CONVERGENCE

Societal evolution is leading to rapid changes in traditional concepts of property ownership and support duties; relevant law, both substantive and procedural, must change to keep up, or it will be the source of much injustice.

Stepping back from the individual cases and disputes, it seems clear that the entire concept of "family law" is in transition – to ***what*** remains to be seen, but it does seem clear that the law of marital dissolution per se is destined to be an ever-smaller piece of the whole. The lines of authority relating to marital dissolution and unmarried cohabitant break-ups appears to be converging.

There can be little question that the demographics of marriage and family have undergone enormous change in the past century.[57] Some commentators have called for the outright abolition of the institution of marriage as now known, on the basis of traditional gender inequality

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and other grounds.[58] One commentator[59] predicts possible scenarios resulting from the conflicting pressures to "preserve traditional marriage" on the one hand, and to expand marriages to include same-sex unions on the other, ranging from extinction of marriage to its enormous expansion.

However the clash of ideals, demands, initiatives, and reforms evolve, it seems clear that the concepts of both "marriage" and "family" are undergoing significant examination and redefinition, and that change – perhaps drastic, reformative change – can be expected in the immediate future. The immediate front addressed here is the convergence and conflicts in the treatment of married and non-married couples by Nevada law, and the need to derive a legal scheme that can and does treat the parties to all sorts of real-life relationships equitably.

The concepts addressed in family law are fluid of necessity, making it

References

1. United States Census Bureau, *Majority of Children Live With Two Biological Parents* (Feb. 20, 2008) (based on 2004 data, available at http://www.census.gov/newsroom/releases/archives/children/cb08-30.html, last visited Feb. 20, 2011). The report indicates that 19.1 million children lived in single-parent homes (mostly with their mothers), and another 4.1 million lived with their biological mothers and step-fathers.

2. *Compare Robertson v. Western Baptist Hospital*, 267 S.W.2d 395 (Ky. Ct. App. 1954) (1954 conceptualization of family) *with Allen v. State Farm Mutual Automobile Ins. Co.*, 708 N.W.2d 131 (Mich. Ct. App. 2005) (2005 debate among court members for what constitutes a legitimate "family"); *see also*

3. "Definition of Family – Theoretical Definitions," posted at http://family.jrank.org/pages/488/Family-Definition-Theoretical-Definitions.html, recounting eight conceptual approaches to determining what groupings are or are not families, as discussed by multiple studies and papers. "Definition of Family," *supra*.

4. This is not a new concept: "Law must be stable, and yet it cannot stand still." Roscoe Pound (1870 – 1964).

5. A marriage that takes legal effect, without license or ceremony, when a couple live together as husband and wife, intend to be married, and hold themselves out to others as a married couple. A validly-entered common-law marriage is recognized in all states, but the only places still permitting them to be entered into are apparently Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah.

6. *E.g.*, California. *See, e.g., In re Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661 (Cal. Ct. App. 1985).

7. *E.g.*, Arizona. *See* Ariz. Rev. Stat. § 25 – 211 (1998).

8. *E.g.*, Nevada. *See Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

9. Alaska, Delaware, Hawaii, Kansas, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, North Dakota, Oregon, South Dakota, Utah, Vermont, Washington, and Wyoming.

10. *See Dahlquist v. Nev. Indus. Comm'n*, 46 Nev. 107, 206 P. 197 (1922); *In re Keig's Estate*, 59 Cal. App. 2d 812 (Ct. App. 1943) (discussing evolution of Nevada common law marriage cases).

11. *See* Laws of the Territory of Nevada, Ch. 33, § 1 (1861).

12. *See, e.g., State v. Zichfeld*, 23 Nev. 304, 313-14, 46 P. 802, 805 (1896) ("Our statute does not expressly, nor by necessary implication, as we view it, render a marriage had in disregard of its prescribed formalities void. We are to presume that the legislature knew that marriages by contract are valid at common law; that they have thus been entered into from time immemorial, and are liable to continue to be so contracted . . . .")

13. NRS 122.010(1).

14. *Wolford v. Wolford*, 65 Nev. 710, 200 P.2d 988 (1948).

15. *Williams v. Williams*, 120 Nev. 559, 97 P.3d 1124 (2004).

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16. This is a bare pencil sketch of Nevada alimony law. Those interested in the subject are referred to Judge David Hardy's thorough and scholarly review. *See* David A. Hardy, *Nevada Alimony: An Important Policy in Need of Coherent Policy Purpose*, 9 Nevada L.J. 325 (Winter 2009).

17. "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*.

18. 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 financial affidavits.

19. 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.

20. *Id*.

21. 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.

22. 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 "set [ting] 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.

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

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

25. "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).

26. NRS 125.150(8).

27. The insertion of these fault considerations into some alimony determinations, where they are otherwise forbidden from consideration (*see Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000)) is emblematic of a larger logical error in the comprehensive structure of the Nevada law of property and alimony, but that topic will have to wait for another day.

28. Again, this forum does not permit a comprehensive discussion of each related topic. For background, see Marshal Willick, "What Do You Do When They Don't Say 'I Do'? Cohabitant Relationships and Community Property" (Council of Community Property States &

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State Bar of Nevada, 1998), posted at http://www.willicklawgroup.com/palimony_cohabitation.

29. *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984).

30. *Carr – Bricken v. First Interstate Bank*, 105 Nev. 570, 779 P.2d 967 (1989).

31. *Hay v. Hay*, 100 Nev. 196, 199, 678 P.2d 672, 674 (1984).

32. *Williams v. Williams,* 120 Nev. 559, 97 P.3d 1124 (2004).

33. *Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992).

34. *Gilman v. Gilman*, 114 Nev. 416, 427, 956 P.2d 761, 767 (1998) (explaining *Michoff* and noting that the basis of that decision was implied contract, pooling of assets, holding out as husband and wife, treating assets as community property, and building a business together, and finally concluding: "neither cohabitation nor a romantic relationship is the real basis for the *Michoff* holding"). The only thing that does not belong on the list of "contract-like" considerations is "holding out," an unfortunate and apparently ill-thought-out relic of the common-law marriage elements from 100 years ago that really has no place in the concept of express or implied contract to treat property as if it were community.

35. *See Sullivan v. Rooney*, 533 N.E.2d 1372 (Mass. 1989) (where parties had a relationship of approximately 14 years, during seven of which they lived together, were engaged to be married at some "indefinite future date," female cohabitant, who gave up her career and maintained a home for herself and the male cohabitant, was entitled to an imposition of a constructive trust on the property, allotting her a one –half interest in the residence).

36. *See Johnson v. Johnson*, 89 Nev. 244, 510 P.2d 625 (1973) (discussing and applying the theories under which a separately-titled asset which increases in value during a marriage as the result of one spouse's labor and skills creates a property interest in the other spouse, citing *Pereira v. Pereira*, 103 P. 488 (Cal. 1909), and *Van Camp v. Van Camp*, 199 P. 885 (Cal. 1921)).

37. In deciding *In re Rolf*, 16 P.3d 345 (Mont. 2000), the court discussed parties who had cohabited for almost three years, and then married, only to divorce less than two more years later. On appeal, the trial court's holdings were affirmed, including that it was proper to consider the premarital cohabitation of the parties in ruling on the fairness of the eventual property distribution, and that "it would be wholly inequitable for the Court to disregard the relationship of the parties as it existed from [the date they began cohabitation]." 16 P.3d at ¶¶ 33-37. Utah law holds similarly. In *Layton v. Layton*, 777 P.2d 504, 505-506 (Utah App. 1989), the court stated "an equitable division of property accumulated by unmarried cohabitants has been sustained upon finding a partnership, contract for services, and/or a trust." (footnotes omitted).

38. Nevada Family Law Practice Manual, 2008 Edition § 1.269.

39. *Western States Constr. v. Michoff*, 108 Nev. 931, 937, 840 P.2d 1220, 1224 (1992).

40. *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A.2d 902 (1979).

41. *Id.*, 80 N.J. at 388-389, 403 A.2d 902.

42. *Stanley v. A. Levy & J. Zentner Co.*, 60 Nev. 432, 112 P.2d 1047 (Nev. 1941) (emphasis added).

43. *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A.2d 902 (1979) ("[An] agreement between adult nonmarital partners, whereby Plaintiff agreed to live with Defendant and run the household, in exchange for Defendant's promise to provide for Plaintiff for the rest of her life, was enforceable, because the agreement was not explicitly and inseparably founded on sexual services. The relationship between the parties was not tainted by the fact that Defendant was married at that time. [A]n agreement between adult parties living together is enforceable to the extent it is not based on a relationship proscribed by law, or on a promise to marry").

44. *See, e.g., Crowe v. De Gioia*, 495

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A.2d 889 (N.J. App. Div. 1985); *Connel v. Diehl*, 938 A.2d 143 (N.J. App. Div. 2008) (an unmarried person has a well settled right to enforce her cohabitant's promise to support her for life).

45. NRS ch. 122A.

46. NRS 122A.200(1)(j)(3).

47. *Kerley v. Kerley*, 112 Nev. 36, 910 P.2d 279 (1996).

48. *Sack v. Tomlin*, 110 Nev. 204, 871 P.2d 298 (1994); *Langevin v. York*, 111 Nev. 1481, 907 P.2d 981 (1995).

49. *See, e.g. Estate of Shapiro v. United States*, ___ F.3d ___, No. 08-17491, slip op. at 2735, fn. 4 (9th Cir., Feb. 22, 2011) ("rightly or wrongly, as a policy choice of Congress the estate tax bestows special status on married couples that it does not bestow on unmarried couples") (J. Tashima, dissenting in part).

50. *See, e.g., Carroll v. Lee*, 712 P.2s 923 (Ariz. 1986); *Chiba v. Greenwald*., 67 Cal. Rptr. 3d 86 (Ct. App. 2007); *Whoreton v. Dillingham*, 248 Cal. Rptr. 405 (Ct. App. 1988).

51. *Tolan v. Kimball*, 33 P.3d 1152 (Alaska 2001).

52. *Carr – Bricken v. First Interstate Bank*, 105 Nev. 570, 779 P.2d 967 (1989).

53. *Meyer v. Meyer*, 606 N.W.2d 184 (Wis. 2000).

54. *Landreth v. Malik*, 125 Nev. ___, 221 P.3d 1265 (Adv. Opn. No. 61, Dec. 24, 2009).

55. *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

56. *Hay* was precisely such a case; the published opinion recites only that one of the parties made a ***claim*** of "holding out" after the fact of their divorce. Both *Hay* and *Michoff* addressed the proof required to establish property rights of cohabitants under theories of contract or other equitable remedies. The majority opinion in *Landreth*, however, seemed to confuse elements of proof tending to show an implied contract to co-own property as components of subject matter jurisdiction.

57. *See* Ira Mark Ellman et al., 3 Family Law: Cases, Text, Problems (1998) (recounting summary of comprehensive demographic changes).

58. *See* Nancy Polikoff, *Ending Marriage as We Know It*, 32 Hofstra L. Rev. 201 (2003-04); Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and other Twentieth Century Tragedies* 161-66 (1995); Judith Stacey, *Good Riddance to "The Family": A Response to David Popenoe*, 55 J. Marriage & Fam. 545 (1993) (asserting that stable marriage depends on inequality).

59. Elizabeth S. Scott, *A World Without Marriage*, 41 Fam. L. Q. No. 3 (ABA Fam. Law Section, Fall, 2007)

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Coming Soon to a Bookshelf Near You:

The Family Law Practice Manual, 2012 Edition

This manual is currently being updated and should be released in 2012.

A Message from the Chair

By Robert Cerceo, Esq.

Meet Your Executive Council

Here is a list of current assignments for the Executive Council. Individual projects may change from quarter to quarter, but these are the current assignments as of September 2011. If you have information to share, an issue to raise, wish to teach a course, submit an article, or wish to participate in the often-goofy entertainment, then please contact the Council member for your area of interest.

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Chair's Message

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Eric Pulver: eric@logarpulver.com Specialization – Test Drafting , Applications for Ely

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Ely 2012 Preview

Reactive to your comments regarding some of the recent past national speakers, we have developed a more home-grown course. The topic will be custody and evidence with a more "how to" focus. Here are some of the details:

General Track

Thursday Afternoon

Jurisdiction under UCCJEA and UIFSA.

Mounting a custody case using the NRS 125.480 factors as a template, reviewing each factor for: what does it mean; how do you prove it; common evidentiary problems; and burdens of proof. Custody expert appointments/designations, whether under NRCP 35 or the Best Interests of the Child, the benefits and burdens of such an expert and a relocation primer.

Friday Morning

Session A – Ethics, including in part: meeting with and interviewing the children; the child witness; violations of Joint Legal Custody by unilateral therapy sessions (Rivero requirements); the taking of ridiculous legal positions (Rules of Professional Conduct and the AAML Bounds of Advocacy); mandatory reporting for abuse (when and how to do it).

Session B – Drug and alcohol abuse and domestic violence overlays during a custody case, and a review of lower level problems (e.g., smoking near children), and common evidentiary problems.

Friday Midday

Case and legislative update.
FLS annual meeting.

Friday Afternoon

Session A – Early childhood development, parental alienation, specific evidentiary issues – including those arising with the use of us custody experts.

Session B – High conflict custody cases involving the use of private investigators, surveillance, e-mail and text messages, social media and cellular phones. Court security and how we can help assess serious threats.

Nuts and Bolts – Not to be missed.

Paralegal Course – An expanded two-day course with select speakers from the main session also teaching in the Paralegal Course.

Advanced Track – Led by Ray, to be presented Thursday afternoon concurrent with the general track will be evidence and custody under Hague Convention, UCCJEA, UIFSA and relocation.

Robert Cerceo is the chair of the Family Law Section, a Certified Family Law Specialist, and a Fellow to the IAML. He is new to the Abrams Law Firm and can be reached at www.TheAbramsLawFirm.com.

"I Spent the Money on Whiskey, Women and Gambling. The Rest, I Wasted."

By Gary Silverman, Esq.

Introduction

The Bench and Bar classically think of waste as the diamond bracelet and sable coat for a girlfriend, high rise apartment for a mistress, "allowance" for the pool boy or hidden account on the Isle of Wight. Those and other uses of community funds are the subject of this article.

This article discusses what may constitute waste, the potential of unequal division, general or punitive damages, and how the case law and NRCP 16.2 deal with the issue. The sanctions set forth in *Lofgren* and *Putterman*, *infra*, and under NRS 125.150 may be superseded by NRCP 16.2, but still help in analysis of a waste case.

I. What is Waste?

First, a definition of terms. Lawyers often speak of "waste." Our Supreme Court in its two most recent decisions on the topic speaks of "compelling reasons" to make an unequal division of community property pursuant to NRS 125.150. In those decisions the court also uses the term "waste." Submitted: the terms mean the same; community property spent, conveyed, hidden or otherwise converted by a spouse which, *inter alia*, compels the court in justice and equity to reinstate the property to the community balance sheet and then divide such property as the facts compel.

This article is not about sanctions for violation of interim court orders – that is a contempt/sanction issue (though such sanctions are intermingled with the notion of waste in the existing case law and NRCP 16.2). It is not about the minefield of seizures, forfeitures and restitution proceedings, even though the subject of those actions is often waste, e.g., a foreign bank account or drug money.[2]

II. NRS 125.150(1)(b) and NRCP 16.2 are the remedies.

NRS 125.150 provides:

> 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.

(Emphasis added.) The statute does not set forth any

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reasons for an unequal division, thus the substantive rules setting out the rights under which an unequal division might be ordered lie elsewhere.

> NRCP 16.2(A)(1)(B)states:
> If a party intentionally fails to include a material asset or liability in the party's financial disclosure form, the court, after notice and hearing, may impose an appropriate sanction, including but not limited to the following:
> (i) An order awarding the omitted asset to the opposing party as his or her separate property or making another form of unequal division of community property;
> (ii) An order treating the party's failure as a contempt of court; or
> (iii) An order requiring the party failing to make the disclosure to pay the other party's or opposing party's reasonable expenses, including attorney's fees and costs, related to the omitted items.

III. The hypothesis of this article is that the fiduciary relationship is the source of the right.

Spouses are in a fiduciary relationship. NRS 123.070 provides:

> Either husband or wife may enter into any contract, engagement or transaction with the other, or with any other person respecting property, which either might enter into if unmarried, subject in any contract, engagement or transaction between themselves, to the general rules which control the actions of persons occupying relations of confidence and trust toward each other. [Emphasis added.]

Also, *Sogg v. Sogg*, 108 Nev. 308, 312 (1992) (even affianced parties are in a presumed fiduciary relationship).

"The law's model for marriage is the partnership model: "It is generally recognized that the marital community is a partnership to which both parties contribute. Each spouse contributes his or her industry in order to further the goals of the marriage." York v. York, 102 Nev. 179, 180 (1986).

IV. What Kind of Fiduciary Relationship do Spouses Enjoy?

A fiduciary relationship is a fiduciary relationship is a fiduciary relationship, but the kind of fiduciary relationship between spouses is that of partners. The law's model for marriage is the partnership model: "It is generally recognized that the marital community is a partnership to which both parties contribute. Each spouse contributes his or her industry in order to further the goals of the marriage." *York v. York*, 102 Nev. 179, 180 (1986).

Case law reinforces the notion of a fiduciary relationship. Relations of trust and confidence are defined in *Crawford v. Crawford*, 24 Nev. 410 (1899) at p. 417, *et. seq.*,[3] and *Peardon v. Peardon*, 65 Nev. 717, 767, 201 P.2d 309, 333 (1948). The cases hold that the doctrine of undue influence "reaches every case, and grants relief 'where influence is acquired and abused, or where confidence is reposed." *Crawford*, *supra.* Absent, perhaps, a prenuptial agreement to the contrary, marriage is such a relationship.[4]

V. What, exactly, are fiduciary duties?

The rules of intra-partnership duties are set out in *Clark v. Lubritz*, 113 Nev. 1089, 944 P.2d 861 (1997) at p. 1095:

> The fiduciary duty among partners is generally one of full and frank disclosure of all relevant information for just, equitable and open dealings at full value and consideration. Each partner has a right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in anything relating to the partnership affairs. The requirement of full disclosure among partners in partnership business cannot be escaped...Each partner must...not deceive another partner by concealment of material facts.

[Emphasis added.]

The *Lubritz* court went on to say: "In addition, *a partner's motives or intent do not determine whether his actions violate his fiduciary duty* ... Despite the contractual source of partners' duties inter se, ... it is well established that when a fiduciary du-

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ty exists between the parties, and the conduct complained of constitutes a breach of that duty, the claim sounds in tort regardless of the contractual underpinnings. Id. at 1284 n.24 (quoting *Wagman v. Lee*, 457 A.2d 401, 404 (D.C. 1983))." *Lubritz*, p. 1098. Emphasis added.

Under *Putterman* and *Lofgren*, *infra*, a spouse has a fiduciary duty to account for all community funds. In a case regarding law partners, *Foley v. Morse & Mowbray*,109 Nev. 116, 121 (1993) the court said:

> Foley claims that the court erred when it awarded *Morse & Mowbray* an interest in three contingency fee cases identified as Father Kenny, Lawyer Johnson, and Cynthia Gifford. In a similar case concerning a law firm dissolution, the California Court of Appeals ruled that every partner must account to the partnership for any benefit and hold as trustee for it any profits derived without the consent of the other partners from any transaction of the partnership or from any use of its property. *Rosenfeld, Meyer & Susman v. Cohen*, 237 Cal.Rptr. 14, 22-23 (Ct.App. 1987).

In *Lofgren*, the court spoke of intentional behavior ("...we hold that if community property is lost, expended or destroyed through the intentional misconduct of one spouse, the court may consider such misconduct as a compelling reason..." at p. 1283.

In *Putterman*, the court spoke of negligent behavior ("There are, of course, other possible compelling reasons, such as negligent loss or destruction of community property..." *Putterman* at p. 608.) The duties of a fiduciary apparently include the duty of care.

The question as to what constitutes negligence as between fiduciaries is not clear. Do persons in a fiduciary relationship suffer greater damages if they are negligent with community property? Is there a higher duty than that owed to strangers? Does accidently losing a material sum of community property create a punitive damage claim? Seemingly not under NRS 42.001.

The partnership model should not be exclusive. There is also guardian and ward and parent and child, e.g., *In Re Tiffany Living Trust 2001*, 124 Nev. Adv. Rep. 8 177 P3d 1060, (2008). As stated, a fiduciary relationship is a fiduciary relationship is a fiduciary relationship.

VI. Burden of Proof; Which Party and What Quantum?

In a fiduciary relationship, the party who gains an advantage over the other must justify that result by clear and convincing evidence, *In re Tiffany Living Trust 2001*, 124 Nev. Adv. Op. ____(2008):

> A presumption of undue influence arises when a fiduciary relationship exists and the fiduciary benefits from the questioned transaction. A fiduciary relationship between Dabney and Jane existed in this case because Dabney's law firm partner Woloson, had prepared Jane's living trust, which benefitted Dabney in that he was the beneficiary of Jane's house. Thus, when Dabney substantially benefitted from Jane's estate plan, a presumption of undue influence arose.

We have previously noted, in the context of an attorney obtaining a business advantage from a client, that a presumption of impropriety may be overcome only by clear and satisfactory evidence. As it appears that this court has never precisely defined "clear and satisfactory" evidence, we clarify that "clear and satisfactory" evidence is equivalent to "clear and convincing" evidence. Indeed, in *In re Drakulich*, we recognized that clear and convincing evidence must produce "satisfactory" proof that is so strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act

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upon that conviction in matters of the highest concern and importance to his own interest. It need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference . . . may be drawn. Thus, regardless of the terminology used— whether "clear and satisfactory" or "clear and convincing"— as the Tennessee Court of Appeals has noted, "the evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence."

Only this heightened standard can overcome the presumption of undue influence because "[u]nder our case law, when an attorney deals with a client for the former's benefit, the attorney must demonstrate by a higher standard of clear and satisfactory evidence that the transaction was fundamentally fair and free of professional overreaching." This higher standard ensures that the law will protect those who cannot protect themselves. [Fn. omitted.]

In the *Foley* case, supra, the court spoke to the burden of proof as follows:

The court stated that failure to account properly was a burden of proof that rested with the fiduciary who had contravened duties enabling allocation and accounting. *Id.* at 23. Foley, who was in a position to make the allocation, failed to do so. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946). Since Foley failed to bear his burden to account, we conclude that the trial court's rulings in favor of *Morse & Mowbray* with respect to the three contingency fee cases were not erroneous.

VII. Defenses

The usual defenses of contributory negligence, waiver, accord and satisfaction and ratification seem to hold. The issues of statute of limitations and, laches are discussed below. But, at least one defense seems particular to divorce cases: materiality.

"The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265 (1946).

The case for the defense of materiality is *Nixon v. Brown*, 46 Nev. 439 (1923). During marriage U.S. Senator George Nixon conveyed to the City of Winnemucca a hall for various performances. "It is admitted that the property conveyed by the deed of trust was community property, not a portion of a homestead; and that the wife never signed or otherwise consented in writing to the conveyance." The value of the hall and parcel was approximately $50,000. The gift was made as part of a ceremony which Wife attended. "Senator Nixons' wealth at the time of making the gift was estimated at between three and five million dollars, and at the time of his death he was admitted to be a millionaire." After Husband's death, Wife sought to set aside the deed on the grounds she had not signed it and had not consented to the gift. The trial court found "the instrument in question [is]...void for failure on the part of the donor to obtain the written consent of his wife."

Held: reversed. "The first question squarely presents the proposition: Can the husband in Nevada, during coverture, make a gift of a portion of the community property without obtaining the written consent of the wife? A gift negatives any idea of a consideration, either nominal or substantial, to the community interest." The applicable statute, Section 2160 of the Revised Laws of Nevada stated "The husband has the entire management and control of the community property, with the like absolute power of disposition thereof...as of his own separate estate.

Beginning with a discussion of the law of the Visigoths, the Nevada Supreme Court went on to reason as follows:

"...[Husband] may make a voluntary disposition of a portion of the community property, reasonable in reference to the whole amount, in the absence of a fraudulent intent to defeat the wife's claims.

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2. Whether or not the gift is reasonable or unreasonable, is a question to be decided by the courts in each particular instance, and no hard-and-fixed rule can be laid down as to just what proportion of the community interest can be so disposed of by the husband.

3. ...it is admitted that Senator Nixon, at the time of making the gift, was wealthy; that his wealth was estimated as between three and five million dollars; that at the time of his death he was rated as a millionaire. And we have searched the petition in vain to find an allegation on the part of the respondents that the gift was made with the intention of depriving the wife of her just interest in the community property. We do not believe it is so large in proportion to the whole estate that a fraudulent intent can be inferred, or that it was unreasonable with reference to the value of the entire estate. And the acts and conduct of respondent Kate I. Nixon negative any thought that she possessed the idea for a minute that Senator Nixon was in any way attempting to deprive her of any portion of her rightful interest in and to the community property; but on the contrary leads us to the conclusion that she was in full accord with the senator's plans, and that she did not for a moment think the gift was unreasonable, considering their financial circumstances, either at the time it was made or at the time of the senator's death. We therefore must conclude that the instrument in question was not and is not void for the reason that Senator Nixon did not procure his wife's consent thereto in writing.

(Note above in the last paragraph that the court implicitly recognizes the defense of ratification or waiver.)

In *Nixon*, above, the court further states: "For the reasons stated above, and, in view of the order to be made in this case, we deem it unnecessary to pass upon the question of laches, equitable estoppel and the statute of limitations urged by appellants, as being a bar to the action." Implicitly the defenses were held to exist.

The question is whether those defenses are tolled during marriage. As to laches, later case law holds the defense is tolled during marriage. *Cord v. Neuhoff*, 94 Nev. 21, 25 (1978). As to the statute of limitations, the issue has not been decided.[5] The arguments for and against tolling the statute are well-known. With abolition of fault and the easy availability of divorce, the viability of the defense is compelling. Tolling of the statute of limitations would also muddle the claims of waiver or ratification. The argument for tolling is highlighted in the hypothetical case where Husband is wasting the community assets gambling. Should the policy of the law be that a mother of three young children must file for divorce sooner rather than later just to save her claim. The public policy of Nevada is to foster marital accord and discourage marital discord: "The policy of the law is to refrain from fostering domestic discord which

may follow from litigation between spouses commenced for fear that the bar of laches would attach by lapse of time." *Cord v. Neuhoff*, 94 Nev. 21, 25 (1978). The logic of laches would seem to apply to statutes of repose.

The rule that the statute only begins to run when the victim knew or should have known of the tort or violation of trust would not be impaired.[6]

VIII. Remedies

Common law remedies for breach of a fiduciary duty are set forth in *Clark v. Lubritz*, supra:

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> Despite the contractual source of partners' duties inter se, ... it is well established that when a fiduciary duty exists between the parties, and the conduct complained of constitutes a breach of that duty, the claim sounds in tort regardless of the contractual underpinnings. *Id.* at 1284 n.24 (quoting *Wagman v. Lee*, 457 A.2d 401, 404 (D.C. 1983)).
>
> Therefore, we conclude that the breach of fiduciary duty arising from the partnership agreement is a separate tort upon which punitive damages may be based.
>
> Under NRS 42.001(3), "express malice" is "conduct which is intended to injure a person;" "implied malice" is "despicable conduct which is engaged in with a conscious disregard of the rights ... of others.
>
> ... a conscious decision was made not to inform Lubritz about the decision to reduce Lubritz's share. For many years appellants "pocketed as profit," a disproportionate distribution, by reducing Lubritz's share and not telling him about the reduction. In addition, appellants concede that the decision not to inform Lubritz of the unequal year-end distribution was "not unconscious or accidental.
>
> Even if there were not clear and convincing evidence of intent to injure, there is certainly clear and convincing evidence here of implied malice in the form of "despicable conduct" accompanied by a "conscious disregard of the rights" of Lubritz.
>
> Because there is ample evidence to support a punitive damage judgment based on malice, we do not consider it necessary to discuss fraud or oppression. We therefore affirm the punitive damage award."

Besides common law tort remedies, another remedy exists under NRS 125.150(1)(b) – unequal division. Those remedies are found in the *Lofgren* and *Putterman* cases. In both *Lofgren v. Lofgren*, 112 Nev. 1282 (1996) and *Putterman v. Putterman*, 113 Nev. 606 (1997, an order of the court was violated and in *Putterman* the husband had apparently lied to the court. Arguably, other sanctions would be available for perjury and contempt of court, but in both cases the spouse also hid or failed to reveal assets or spent community money on things which apparently did not benefit the community.

In *Lofgren*, the effect of the court's decision was not an unequal division – there was an equal division. Community funds spent and gone were placed on husband's side of the community balance sheet. He had had the use of the now-phantom funds and at trial those funds were set over to him. At the bottom of the balance sheet and ultimately as the net result of the decision, all community funds were accounted-for and divided equally.

In *Putterman*, wife was awarded one-half all known community property and a "valuable" country club membership and "certain stock" (not further described) as a "just and equitable" division. It is not clear if the trial court had "evened up" the community with the missing and unaccounted-for funds or awarded the innocent spouse something more. If the country club membership and the stock which the court awarded to wife were indeed more valuable than the missing property then an unequal division occurred. The facts do not clearly reveal if the membership and stock "evened up" the division or somehow exceeded it on the wife's side and imposed a sort of penalty on husband.

In both cases the court deemed the restitution of the phantom monies to be a just result. It is submitted that putting back on the balance sheet that which the malefactor had already enjoyed is simply not an unequal division. It is (1) an equal division of funds in the case of the party who simply will not account for them: They may well exist in an overseas account or (2) an equal division of a (usually) finite amount which one of the spouses has already enjoyed, i.e., spent on the diamond bracelet, the fur and the object of his affections. It is submitted that if the court does not sanction the malefactor, there is no incentive not to try to steal or hide funds or to spend them on the proverbial chorus girl. Only if there is a sanction from the post-division property of the malefactor at the least in the form of an award of fees and costs incurred in determining the breach/defalcation, there is no incentive for the guilty party not to try to get away with the wrong. It is submitted that the courts should

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create a clear disincentive to the potential tortfeasor (thief).

A hard question arises when the tortfeasor comes forth without the aggrieved party incurring costs and fees, and admits to the defalcation. The answer seems to lie in the language of *Clark v. Lubritz*, *supra.*, that the taking is what is to be the subject of punitive damages. An award of interest, at the least, should be considered.

Another question arises when the defalcation directly and proximately causes such a shortfall in the community that it cannot take advantage of a business opportunity, e.g., because of the breach not enough cash is available for investment in what turns out to be a lucrative stock offering. Or, when the business opportunity is seized by a spouse who uses her separate property to exploit it; interference with an opportunity. The law of business opportunities is outside the scope of this article, but once the fiduciary approach is adopted, the analysis becomes much easier.

IX. Advantages of Analysis as Breach of Fiduciary Duty v. *ad hoc* Cases

Bruce Shapiro's fine article "Community Waste in Nevada" (NFLR Fall, 2010) cites to the various cases defining waste and discusses those activities which in Nevada have not yet been defined as waste, e.g., gambling. His provocative article points out the difficulties in the *Putterman* and *Lofgren* cases – they are essentially an *ad hoc* approach. At bottom, lawyers are predictors: They are asked by their clients to foretell how a court will act on a specific set of facts, whether it be an activity covered by the Federal securities laws, the Internal Revenue Code or covered by our more mundane (exalted?) NRS Chapter 125. When a set of facts is dealt with predictably, those facts tend not to become triable issues because both sides reasonably predict the outcome. Thus, a coherent, overarching rule of law which would permit lawyers to predict the outcome of a set of facts will save the courts time and the clients' money.

The range of human behavior in the waste aspects of family law is so vast that a specific description of what may constitute "waste" or "compelling reasons" is impossible to set forth in either a statute or case rule. But the common law of fiduciary relationships is wide and deep, perhaps because, in part, avarice has always been with us. The law of fiduciaries, having "seen it all," provides substantial guidance to the courts and practitioners. While not every form of deceit has yet been conceived, most have, and those schemes have likely all been discovered and litigated. The body of fiduciary law gives counsel the power to say that while he or she may not be able to describe it, they know a breach when they see it and so will their adversary and the court. Creating a rule with substantial case law behind it permits the courts, the lawyers and clients to predict results from a set of facts and thereby avoid litigation the predictive function which the law exalts.

Therefore, it is submitted that in lieu of an ad hoc, case-by-case review, the court should adopt an explicit, forthright rule (or the Legislature amend the statute) which provides that all claims for misbehavior under NRS 125.150(1)(b) be examined in light of the fiduciary duties already imposed on spouses under NRS 123.070. The proposed rule might be read*: Any material breach of the duty of good faith, fair dealing and disclosure to the community will be deemed "waste" recoverable by the community and to be divided as justice requires under NRS 125.150(1)(b) and NRCP 16.2, but in no less than full reimbursement to the community, including but not limited to interest, consequential damages, punitive damages, interest and costs and fees incurred in such recovery.*[7]

Will this rule create more litigation, especially in the claim for general or punitive damages? Is that what the law should encourage? Will this rule create more litigation, not less? It is submitted this rule now exists in a fragmented form. The rule is based in existing case law and statutes and fairly restates the current law from the cases (*Putterman* and *Lubritz*), the statute (NRS 125.150) and the procedural rule (NRCP 16.2). These

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claims are endemic in family law practice. It is submitted the court may want to impose on them order and predictability and end uncertainty and disarray.[8]

(Thanks to Radford Smith, Jim Jimmerson, Marshall Willick, Bob Cerceo and Bruce Shapiro for their review and input. All errors are theirs; the author is blameless.)

Note: The preceding article appeared in the May 2011 Issue of the *Nevada Lawyer* magazine, a publication of the State Bar of Nevada. This reprint contains the entire article.

References

1. Attributed to actor George Raft who made, and squandered, about $10 million in his movie career: "Part of the loot went for gambling, part for horses and part for women. The rest I spent foolishly." English soccer star George Best: "I spent a lot of money on booze, birds and fast cars. The rest I just squandered."

2. See "No Honor Among Thieves or Spouses–Issues Confronting the Divorce Spouse in Disgorgement, Forfeiture, and Restitution Proceedings, 44 Fam Law Qtrly, Summer 2010 (ABA).

3. *Crawford,* id.: "Coming now to the question of constructive fraud, we find that our statute provides that either husband or wife may enter into any contract, engagement, or transaction with the other, or with any other person respecting property, which either might enter into if unmarried, subject, in any contract, engagement, or transaction between themselves, to the general rules which control the actions of persons occupying relations of confidence and trust towards each other. (Gen. Stats. 517.)

4. The general rule of equity regulating dealings between parties occupying fiduciary relations, or relations of trust and confidence, is well known. It is said: "In this class of cases there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which courts of equity act in regard thereto stands, independent of any such ingredient, upon a motive of general public policy; and it is designed in some degree as a protection to the parties against the effect of overweening confidence and self-delusion and the infirmities of hasty and precipitate judgment." (Story's Eq. Jur. sec. 307.)

5. It is also said: "The doctrine to be examined arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of a valid transaction between the two parties, yet, because every fiduciary relation implies a condition of superiority held by one of the parties over the other in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and thereby overcoming the presumption." (Pomeroy's Eq. Jur. sec. 956.)"

4. This creates an issue to consider in the drafting of nuptial agreements.

5. "This court, in *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974), abrogated the doctrine of interspousal immunity regarding claims arising out of motor vehicle accidents. Prior to *Rupert*, interspousal immunity barred a tort action by one spouse against the other. *Morrissett v. Morrissett,* 80 Nev. 566, 397 P.2d 184 (1964)." *Ziglinski v. Farmers Insurance*, 93 Nev. 23, 24 (1977). The author could find no case in Nevada which abrogates the statute of limitations between spouses or which tolls it.

6. NRS 11.190 (3)(d): "... actions...may only be commenced ... [w]ithin 3 years ... an action for relief on the ground of fraud or mistake, but the cause of action in such a case shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud or mistake." It may be argued the two year statute would apply. That is for another article by another author.

7. This rule would not impair the ability of a court to make an unequal division of community property by reason of a child's or spouse's security for payment of support, etc.

8. The question remains in which court, civil or domestic, such claims might be brought, also.

Gary R. Silverman is an author of the Bounds of Advocacy (a book on ethics in divorce cases for the American Academy of Matrimonial Lawyers), the Academy's Client Relations Handbook. He has published an article on evidence in the American Bar Association's family law publication. He was President of the Washoe County Bar Association and Chair of the Family Law Section of the State Bar. He was a Pro Bono Lawyer of the Year. In 1996, 1997 and 2005, the firm was the Pro Bono Law Firm of the Year. Mr. Silverman can be reached at Silverman, Decaria & Kattelman, Chtd., 6140 Plumas Street, Suite 200, Reno, Nevada 89519; Telephone: 775-322-3223; Facsimile: 775-322-3649.

Bench /Bar Meeting Report: "The South"

For the Meeting Held June 30, 2011

By Andrew L. Kynaston, Esq.

Members of the judiciary, representatives from the clerk's office and court administration, and family law practitioners throughout Southern Nevada met at the Family Court and Services Center for Bench/Bar meetings held February 24 and April 4, 2011. Both meetings were well attended with those in attendance well prepared to discuss matters relevant to the ever-evolving practice of family law in Southern Nevada.

At the meeting held February 24, Presiding Family Court Judge Gloria Sanchez reminded attendees of the ongoing availability of the Senior Judge Settlement Program, which continues to have great success in helping litigants resolve cases without trial, minimizing the level of conflict and reducing the court's litigation load. Attendees were further advised that proposed revisions to Eighth Judicial District Court Rules regarding e-filing and governing the preservation of original documents have been approved by the District Court and are presently being reviewed by the Nevada Supreme Court. Finally, Judge Sanchez announced that Judges Steven Jones and Cynthia Dianne Steel were being reassigned effective March 14, with Judge Jones beginning to handle juvenile matters and Judge Steel hearing domestic matters.

Judge Sandra Pomrenze briefly spoke regarding motions for attorneys' fees and stressed the importance of including an analysis under the factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345 (1969), in any motion requesting attorneys' fees. She recommended that attorneys err on the side of caution and include such analysis even in cases where attorneys' fees may otherwise be warranted under other legal precedents such as pursuant to *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972), or provisions of NRS Chapter 18. Judge Pomrenze indicated that the District Court judges are routinely being reversed and remanded on awards of attorneys' fees when the same are awarded without making specific findings under *Brunzell*. The attorneys' fees analysis should include the following factors:

1. the qualities of the advocate (ability, training, education, experience, professional standing and skill);
2. the character and difficulty of the work performed (intricacy, importance, time and skill required, responsibility imposed, and prominence and character of the parties where they affect the importance of litigation);
3. the work actually performed by the attorney (time, skill, and attention given to the work); and
4. the result obtained (whether the attorney was successful and what benefits were derived).

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An open forum discussion then occurred regarding the important role of the judges' law clerks in the efficient functioning of the Family Court. The law clerks play a key role as a buffer between the court and the practitioners. Some frustration was expressed by both the law clerks and the practitioners in attendance at the meeting regarding a certain level of incivility occurring in communications between practitioners and law clerks. The law clerks expressed that some attorneys are rude when they call, or inappropriately try to argue their cases to the law clerks. Practitioners were concerned that the law clerk relied too much on checklists when reviewing decrees and orders and that there was a lack of uniformity between departments with regard to checklists utilized by the law clerks. There was a general consensus that law clerks and attorneys must be able to have appropriate open lines of communication and mutual respect. Further, there is no excuse for rude behavior when communicating with law clerks and practitioners must respect the fact that the law clerks provide a valuable service to both the judges they serve and the family law bar. The law clerks in attendance agreed to meet to discuss the concerns raised during the meeting and to review and revise existing checklists.

Additional important matters were discussed during the meeting held April 4. It was announced that the court is in need of additional Pro Tem Hearing Masters and any practitioners interested in providing such services should contact the court. Also announced was a change in the business hours of the Clerk's Office. Effective May 9, 2011, the Clerk's Office hours for in-person filing were changed to 9 a.m. to 4 p.m. E-filing services remain available anytime.

By way of follow-up to the discussion regarding law clerks at the February 24 meeting, it was reported that the law clerks were still working on revising checklists. Practitioners were advised that the revised Financial Disclosure Form is still available for review and comment on Marshal Willick's web page: http://www.willicklawgroup.com/clark_county_bench_bar.

Also, it was announced that the short form affidavit proposal was passed by the judiciary, which now allows attorneys to include a short summary affidavit with pleadings rather than being required to restate each and every fact set forth in the body of the pleading in the supporting affidavit. An example of the short form affidavit can be found on Marshal Willick's website.

If you have any discussion items you would like to include on the agenda of any future Bench/Bar meetings please e-mail Corinne Price, Esq. at:

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