NFLR Nevada Family Law Report

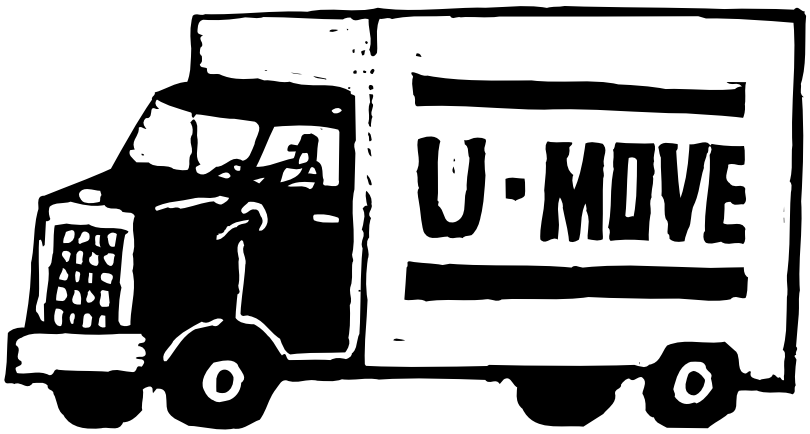
VOLUME 16, NUMBER 2 MARCH, 2001

RELOCATION: STILL CRAZY AFTER ALL THESE YEARS

by Randy A. Drake, Woodburn and Wedge

The topic of relocation has been a hotly debated issue among family law practitioners in recent years. The obvious reason for that has been the number of relocation cases decided and published by the Nevada Supreme Court over the past seven years, and the confusion and concern such cases have caused for family law practitioners. The center of the confusion and concern has been the difficulty in applying the law and reasoning as set forth in the relocation cases in our everyday practices. A popular sentiment has been that the cases that followed Nevada's first relocation case, *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991), seriously undermined the *Schwartz* test and factors that a custodial parent had to meet before moving to an-

cont. page 2



IN THIS ISSUE

NEVADA FAMILY LAW REPORT is a quarterly publication of the Family Law Section of the State Bar of Nevada.

Subscription price for non-section members is $35 payable in advance annually from January 1 to December 31. There are no prorations.

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.

This publication may be cited as Nev. Fam. L. Rep, Vol. 16, No.2, 2001 at ____.

Nevada Family Law Report is supported by the Family Law Section of the State Bar of Nevada and NFLR subscriptions.

Relocation cont.

other state. The principal concern among lawyers was that giving up primary custody in a divorce action gave rise to the likelihood, rather than possibility, that the other party could move with the children out of the state of Nevada if the custodial parent came up with a "good faith" reason to leave the state.

The obvious strategy to counter the weakening of *Schwartz* for those representing the non-custodial parent (often the father) in a divorce action was to attempt to negotiate a settlement in which both parties were awarded joint physical custody of the children with roughly equal visitation rights. One of the first questions to a divorcing father was whether he thought it was a possibility that his wife would want to move out of the state at any time in the future. If he thought it was a possibility, then he had to be informed that the Nevada Supreme Court has made it relatively easy to make such a move with the children.

If we were representing the custodial parent (usually the mother) in a divorce action, one of the first questions was whether she has any desire to move out of the state following the divorce. Maybe, for example, she wanted to move to Ohio with her three year old son to live with her wealthy boyfriend who was making $80,000 per year. Surely, the exiled father and the extended families of both parties would be able to maintain a thriving relationship with the child through reasonable, alternative visitation. In any event, if this was a possibility, then it became a focus in the divorce to receive primary physical custody instead of merely joint physical custody.

At the end of 1998, the Nevada Supreme Court issued four new decisions regarding the law of relocation. After reviewing those decisions, it appeared that we may have been confused about the correct advice to give clients. The Court issued the decisions with the stated intent to clear up relocation law in Nevada. As set forth below, however, the Court did everything *but* clear up the issue of relocation in Nevada.

SCHWARTZ AND ITS PROGENY

Recent relocation law began with *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991). An analysis of *Schwartz* is necessary to demonstrate the ebb and flow in relocation law in Nevada since the *Schwartz* decision. In *Schwartz*, the Court articulated the standard for evaluating relocation motions pursuant to NRS § 125A.350. The Court stated that the district court must first determine whether the custodial parent has demonstrated that an actual advantage will be realized by the children and the custodial parent in moving to a location that will preclude a regular visitation schedule. *Schwartz*, 107 Nev. at 382. If the movant satisfied this "threshold requirement", the district court was then required to weigh a series of five factors and their impact on all members of the family. The factors focus on both parents' motives and the opportunity for the non-custodial parent to maintain an adequate visita-

tion schedule. *Id*. at 383.

Schwartz created little controversy and appeared to be a rational solution to a complicated and sensitive issue. While a custodial parent could rightfully seek to move from Nevada under NRS § 125A.350, *Schwartz* set forth standards designed to test the legitimacy of the move, and the prospects for the non-custodial parent to maintain a positive relationship with the children.

Schwartz remained the sole authority on relocation until 1994, when the Court issued a series of decisions that seriously weakened *Schwartz* and, in some minds, effectively overruled *Schwartz*. Beginning with *Jones v. Jones*, 110 Nev. 1253, 885 P.2d 563 (1994), and continuing with *Trent v. Trent*, 111 Nev. 309, 890 P.2d 1309 (1995), and *Gandee v. Gandee*, 111 Nev. 754, 895 P.2d 1285 (1995), the Court significantly lessened the burden a movant faces when seeking to relocate with the children to another state. In *Jones*, the Court defined the "threshold requirement" of *Schwartz* as a showing of a "sensible, good faith reason for the move." *Jones*, 110 Nev. at 1266. The Court then stated that the district court should focus on whether reasonable, alternative visitation is feasible for the non-custodial parent. *Id*. By defining the "actual advantage" requirement of *Schwartz* as a "sensible, good faith reason" to relocate, the Court in *Jones* took the teeth out of *Schwartz* and, as discussed above, changed how family law practitioners were forced to approach relocation cases.

The Court continued this trend in *Trent*, in which the mother sought to move from Las Vegas to Ohio with her young son. The district court denied the move, applying the *Schwartz* "actual advantage" test. The district court found that, although the mother demonstrated that she would realize an actual advantage, she did not clearly demonstrate that the child would realize such an advantage. *Trent*, 111 Nev. at 313. The court further found that the father would not be able to maintain a visitation schedule that would adequately foster and preserve the parental relationship. *Id*. at 314. Clearly, the district court in *Trent* analyzed the case by applying the test and factors enunciated in *Schwartz*. The district court undoubtedly believed that it properly applied the *Schwartz* test and factors as the Nevada Supreme Court had expressly upheld *Schwartz* in the *Jones* case. *Jones* at 1265.

The Nevada Supreme Court, however, held that the district court did not properly apply *Schwartz*. The Court overruled the district court's decision, finding it "disturbing" that many district courts were using NRS § 125A.350 "as a means to chain custodial parents, most often women, to the state of Nevada." *Trent*, at 315. The Court went on to state, without citation to any authority, that NRS § 125A.350 "is primarily a notice statute intended to prevent one parent from in effect 'stealing' the children away from the other parent by moving them away to another state and attempting to sever contact." *Id*.

The policy language in *Trent* is a far cry from the "actual advantage" test enunciated in *Schwartz* that, according to the Court in its decision, remained good law. For whatever reason, however, the Court did not even acknowledge the distinction. Further, and in what continued until at least 1999, the Court apparently did not recognize how *Jones* and *Trent* would influence how family law practitioners evaluate divorce settlement negotiations and relocation cases.

Following *Jones*, *Trent*, and *Gandee*, members of the Family Law Section of the State Bar of Nevada met in Tonopah in 1996 for the seventh annual Family Law at Tonopah CLE meeting. Many lawyers expressed concern over the recent relocation decisions and commented on how the decisions would influence their practices. The most common concern was that the new relocation cases would have a direct impact on advice given to clients when negotiating physical custody. If relocation was even a possibility following the divorce, lawyers were forced to focus on the perceived difference between primary physical custody and joint physical custody. Common advice to fathers amounted to the following: "If she has primary physical custody, she will most likely be able to move out of the state with the children unless the sole reason to move is to prevent visitation." Is this the intended result of *Schwartz*?

While many lawyers believe that the language in *Schwartz* should not cause such a result, the holdings of *Jones*, *Trent*, and *Gandee* were accepted as the law of Nevada. Since all four cases involved situations in which the parent seeking to move had primary physical custody, most, if not all, family law lawyers assumed that the law only applied to primary custodial arrangements. The question remained, however, how lawyers and dis-

trict court judges should evaluate relocation cases that involve joint custody situations.

THE UNEXPECTED EXTENSION OF SCHWARTZ

Until the beginning of 1999, logic suggested that since *Schwartz* and its progeny all involve primary physical custody arrangements, the holdings of those cases were limited to those situations. This conclusion was bolstered by the fact that it appears difficult to achieve "reasonable, alternative visitation" in a joint physical custody arrangement in which custody was shared on a roughly equal basis. A move out of the state would alter the custodial arrangement so dramatically that a true joint physical custody arrangement would not seem possible following the move.

This exact question came up at the ninth annual Family Law at Tonopah CLE meeting in March 1998. Several district court judges and two Supreme Court Justices answered questions posed by lawyers at the meeting. A lawyer asked how the judges and Justices would evaluate a petition to relocate in a joint custody situation. It is noteworthy that the lawyer did not ask if the judges and Justices would apply *Schwartz* and its progeny to joint custody situations. Apparently it was assumed that such analysis would not apply. One district court judge from Las Vegas answered the question by saying that she would definitely view the case as a change of custody case, and first apply a change of custody analysis before moving on to the relocation issue. Other district court judges agreed with her analysis. The two Supreme Court Justices did not respond to the question – until December 30, 1998.

On that day, The Nevada Supreme Court issued its decision in *McGuinness v. McGuinness*, 114 Nev. 1431, 970 P.2d 1074 (1998). The following day, the Court issued decisions in *Blaich v. Blaich*, 114 Nev. 1446, 971 P.2d 822 (1998), *Halbrook v. Halbrook*, 114 Nev. 1455, 971 P.2d 1262 (1998), and *Davis v. Davis*, 114 Nev. 1461, 971 P.2d 813 (1998). *McGuinness*, *Blaich*, and *Halbrook* all involved mothers with joint legal and joint physical custody of their children who sought to relocate with the children to another state. *Davis* involved a visitation schedule in which the mother and father had physical custody of the child on an essentially equal basis.

The four respective family court judges in Las Vegas denied the mothers' petitions to relocate. The family court judges in *McGuinness*, *Blaich*, and *Halbrook* all decided the cases under a change of custody analysis. All three decisions were reversed and remanded by the Nevada Supreme Court with instructions to apply Nevada relocation analysis, rather than change of custody analysis. Justice Shearing authored the Court's opinion in each case, with Justices Maupin, Rose, and Young concurring. Justice Springer dissented in all three cases.

In *Davis*, the mother technically had primary physical custody of the parties' two children under a temporary custody order. The parties, however, shared physical custody of the children on an equal basis. Perhaps because there existed a temporary primary physical custody order, the family court judge analyzed the case pursuant to relocation law and denied the mother's petition to relocate. The Nevada Supreme Court approved the family court's analysis and affirmed the court's denial of the mother's petition to relocate.

The Nevada Supreme Court's summary analysis, which focused primarily on procedure rather than substantive facts, suggests that the Court was more interested in the posture of relocation cases, rather than the facts and reality of the cases. Indeed, the Court undeniably focused on the mechanics of the case, and not the circumstances surrounding a proposed relocation in the joint custody cases and the practical affect of the decision on the parties, the children, and the lawyers.

In *McGuinness*, both parties sought primary physical custody of their son. After a hearing on the matter, Judge Hardcastle awarded the parties joint legal and joint physical custody. One month after the hearing, the mother sought to move with the parties' son from Las Vegas to Virginia following her mother's death to be closer to her siblings and begin a teaching career. The father opposed her request, arguing that the move offered no actual advantage to the mother or the child, and that the move would disturb the current joint physical custody arrangement. Judge Hardcastle denied the mother's petition to relocate, finding that there is a preference for joint physical custody, and that the appropriate analysis in a joint physical custody case is whether the proposed relocation is in the best interests of the child, in effect, a

change of custody analysis. *McGuinness*, 114 Nev. at 1434. Judge Hardcastle reasoned that it would be inappropriate for one party to defeat a joint physical custody order by requesting a move pursuant to NRS § 125A.350. *Id*.

The Nevada Supreme Court rejected Judge Hardcastle's analysis. Rather than addressing the reality of the parties' shared custody arrangement, the Court's analysis began with the language of Nevada's relocation statute, NRS § 125A.350. The Court reasoned that the petitioner sought to relocate to another state, and had not technically requested a change of custody. At the time of the decision, NRS § 125A.350 specifically applied to "the custodial parent or a parent having joint custody." Based on this statutory language the Court stated as follows: "Clearly, NRS 125A.350 applies to a parent who shares joint custody and seeks to move to a state other than Nevada." *Id*. at 1435. One could argue that the Court's analysis was overly technical and simplistic. As the Court reasoned, NRS § 125A.350 applies to joint custodians, and because *Schwartz* and its progeny "do not explicitly or impliedly limit their applicability to parents with primarily physical custody," those cases should guide the district courts in such relocation cases. *Id*.

The Supreme Court rejected the argument that the joint custody preference enunciated in *Mosley v. Figliuzzi*, 113 Nev. 51, 930 P.2d 1110 (1997), should prohibit a joint custodial parent's proposed move. While frequent associations with both parents is favored, physical separation "does not preclude each parent from maintaining significant and substantial involvement in a child's life." *Id*. at 1436. According to the Court, telephone calls, e-mail messages, letters, and frequent visitation will assist the other parent who was left behind in maintaining a meaningful relationship. *Id*. The Court did not explain how such limited contact could come close to approximating the relationship between the parent and child before the move. The Court's analysis largely ignored the existence of the joint physical custody arrangement and the magnitude of the change in the custodial relationship following the relocation.

The Court then proceeded to its trump cards in relocation cases: *Jones*, *Trent*, and *Gandee*. The Court explained that the requirement of a "sensible, good faith reason" for the move set forth in *Jones* merely "refined" the "actual advantage" test of *Schwartz*. *Id*. at 1437. As discussed above, however, this "refinement" took the teeth out of *Schwartz* and forced practitioners to change how we approach not only relocation cases, but divorce settlements as well.

The Court relied upon *Gandee* to support the proposition that relocation cannot be denied simply because the move will prevent weekly visitation. The Court apparently saw no differences between parents with essentially equal custody and the primary custody arrangement in *Gandee*. The Court then cited the famous language from *Trent* that has undoubtedly been quoted in every petition to relocate since 1995, that being NRS § 125A.350 is "primarily a notice statute" that should not be used to "chain custodial parents, most often women, to the state of Nevada." *Id*. at 1438.

The Court did attempt to explain their reasoning beyond the strict terms of NRS § 125A.350. The Court explained that Judge Hardcastle, as well as other family court judges, had ignored the needs of the parents when analyzing relocation motions. The Court reasoned that the needs of the parents are "vital to, and an integral part of, the considerations in determining the best interest of the children." *Id*. According to the Court, the premise of *Schwartz* and its progeny is that, "unless the parents' interests are considered as part of the calculus of these decisions, a parent properly seeking a motion to move would be irrevocably chained to this state by our child custody laws." *Id*. An obvious problem with this rationale is that it largely ignores the interests of the non-moving parent and the impact on that parent of losing the joint physical custody and shared visitation arrangement. The practical effect is the creation of a *de facto* presumption that a joint physical custodian who has a good faith reason to move from the state of Nevada should be given primary physical custody of the child or children.

Justice Springer recognized these problems and addressed them in his dissent. Justice Springer passionately disagreed with the majority, stating that: "I do not see how this court can fail to see that the mother's motion to take the child to Virginia is the same as her previously denied plea for primary custody. The district court saw it." *Id*. at 1440. Justice Springer noted that once the family court made its final joint custody decision, "it was

correct in ruling that it would be 'inconsistent' with the joint custody award to permit one joint custodian 'to defeat the [joint custody] order by requesting to move under NRS 125A.350.'" *Id*. Justice Springer thoughtfully summarized his analysis as follows:

In cases of joint custody [and in shared visitation situations], there is inherent in any substantial relocation by one of the joint custodians a radical change in circumstances that not only warrants, but requires, a re-examination of the entire custodial situation. Under such circumstances, the district court cannot naively decide the custody controversy simply as a relocation case, but must, of necessity, first reconsider the entire case purely as a custody matter, decided on the basis of what is found to be in the best interest of the child. *Id*. at 1441-1442.

REACTION TO MCGUINNESS

As some family law practitioners may recall, *McGuinness* and the other joint physical custody relocation cases were a hot topic of conversation at the tenth annual Family Law at Tonopah CLE meeting in March 1999. The popular sentiment among practitioners was that the Nevada Supreme Court further weakened *Schwartz* and oversimplified the relocation issue, especially with respect to joint physical custody cases. One highlight of the seminar was again the question and answer period with the judges and Justices.

Justice Shearing, who authored the opinions, graciously agreed to address the cases. After listening to our concerns regarding the joint custody relocation cases, Justice Shearing emphasized that *Schwartz* was still good law, and that the factors set forth in *Schwartz* must still be applied in all relocation cases. While there may have been some cynics in the crowd who believed that such emphasis was a reaction to the stated concerns, the Nevada Supreme Court backed up Justice Shearing's statements in *Mason v. Mason*, 975 P.2d 340 (1999).

In *Mason*, the Court affirmed the family court's denial of the mother's petition to move to Florida, ruling that the family court "addressed all of the required factors as set forth in *Schwartz v. Schwartz*." *Mason* at 340-341. The Court reaffirmed that the petitioner must demonstrate a sensible, good-faith reason for the move, and there must exist reasonable, alternative visitation. The Court specifically recognized, however, that all five of the *Schwartz* factors should be reviewed. The Court explained the applicability of *Schwartz* as follows:

> We now take the opportunity to further elaborate on our jurisprudence in this area. We conclude that the frustration of the non-moving parent's parental relationship may be part of the calculus of the final Schwartz factor, that being whether, assuming all of the other factors have been considered, reasonable alternate visitation is available.

Id. at 341.

It is interesting that the petitioner in *Mason* was the child's primary physical custodian. Therefore, after issuing several opinions that appeared to greatly weaken *Schwartz*, and then extending such weakened relocation analysis to joint physical custody situations, the Court reasserted the importance of *Schwartz* and denied a primary physical custodian's request to relocate. While we may never know what role the concerns regarding *McGuinness* that were passionately expressed by members of the Bar at Tonopah played in the *Mason* decision, the repeated references to *Schwartz* are certainly noteworthy.

RELOCATION TO ANOTHER COUNTRY

The final piece of the relocation puzzle actually occurred two months prior to *Mason*, and, based on recent first-hand experience, may ensure that we continue to see relocation cases appealed to the Nevada Supreme Court. In *Hayes v. Gallacher*, 972 P.2d 1138 (1999), the mother had primary physical custody of the parties' three children, with the father exercising visitation two days per week, alternate holidays and two weeks in the summer. The mother sought to relocate with the children because her new husband was in the military and was being transferred to Japan. The father responded by filing a motion for change of custody if the mother moved to Japan. Without holding an evidentiary hearing, the family court denied the mother's petition to relocate with the children to Japan and granted the husband's countermotion. *Id*. at 1139.

On appeal, the Nevada Supreme Court recognized that the requested move "is so far away from the non-custodial parent that frequent visitation is precluded and longer visits may be prohibitively expensive." *Id*.

The Court further recognized that there are three important interests and policies that arise in such situations:

> the right of children to have frequent associations and a continuing relationship with both parents after a divorce. NRS § 125.460(1); the individual right of a parent to change his or her residence; and the right of a parent to have access to his or her children.

Id. The Court appropriately recognized that the decision in such cases requires the mother to choose between her husband and her children, or that the father risk losing significant physical contact with his children.

Based on the above issues and concerns, the Court adopted a new test to be applied in relocation cases in which the requested relocation would "substantially obliterate the possibility of a traditional alternative visitation." *Id*. The Court adopted the principles set forth by the American Law Institute ("ALI") in the Principles of the Law of Family Dissolution, Tentative Draft No. 3, March 20, 1998. The ALI principles adopted by the Court involve a two-part analysis. The first part of the analysis is to determine whether or not the requesting party should be allowed to relocate out of the state of Nevada. The custodial parent may be allowed to relocate so long as the proposed relocation is: (1) for a legitimate purpose, and (2) to a location that is reasonable in light of the purpose. *Id*. at 1141. The ALI principles state that a move with a legitimate purpose is reasonable unless its purpose is shown to be substantially achievable without moving or by moving to a location that is substantially less disruptive of the other parent's relationship to the child. *Id*.

If the custodial parent satisfies the first prong of the analysis, the district court must then evaluate the effect of the proposed relocation on the other parent. *Id*. If the proposed relocation significantly impairs the other parent's ability to exercise **"the responsibilities he had been exercising"**, then the proposed relocation "constitutes substantially changed circumstances which justify a re-examination of custody based on the best interest of the children, taking into account all relevant factors, including the effects of the relocation." *Id*. (emphasis added).

The emphasized language above may be extremely important. In a recent unreported relocation case, the mother sought to move to England with her new husband and the parties' six year old daughter. The mother's new husband was from England, and her stated reasons for relocating to England were so that her husband could make $20 per hour as a welder instead of $16 per hour that he was making as a welder in Lake Tahoe. The mother further stated that her new husband could work more overtime in England, thereby allowing her to be a stay at home mother.

Although not married at the time, the parties lived at Lake Tahoe when they had their child. The father then moved to Las Vegas for career purposes in 1998. Even though he was actively involved in his daughter's life when he lived in Lake Tahoe, he exercised fairly typical long distance visitation subsequent to his move to Las Vegas. He had visitation for extended periods of time during the summer and for extended periods of time at or near holidays during the rest of the year.

At the hearing, the father argued that the mother could not establish that moving to England was reasonable in light of the purpose. As discussed above, the ALI principles state that a move with a legitimate purpose is reasonable unless its purpose is shown to be substantially achievable without moving or by moving to a location that is substantially less disruptive of the other parent's relationship to the child. *Mason* at 1141. The possibility of a four dollar raise with some extra overtime appeared to be relatively insignificant when compared with the expected disruption of the father's relationship and time with his daughter. The trial court recognized this dynamic but rejected the father's position.

The father then argued that the proposed relocation to England clearly impaired his parenting responsibilities and, therefore, the court must hold an evidentiary custody hearing. Again, the court rejected his argument. The court focused on the phrase "the responsibilities he had been exercising," and held that the father could continue to exercise similar extended blocks of visitation during the summer and alternate holidays after the mother's relocation to England. Based on that finding, the court reasoned that a custody hearing was not necessary and allowed the mother to relocate to England.

Did the Nevada Supreme Court intend for the district court to strictly analyze the specific parenting responsibilities exercised by the non-custodial parent prior to the proposed re-

location? Is such an analysis appropriate public policy? Despite what is undoubtedly its good faith effort to bring clarity to the law of relocation, it is clear that the result has not yet been attained. Further clarification by the Nevada Supreme Court will clearly be necessary with respect to this issue.

FINAL THOUGHTS

Since the *Schwartz* decision in 1991, it truly has been difficult to get a good handle on relocation law in Nevada. I believe, however, that some relocation issues have been clarified in the last couple of years by the Nevada Supreme Court and the Nevada legislature. In 1999, the Nevada legislature transferred Nevada's relocation statute from NRS § 125A.350 to NRS § 125C.200. The legislature removed the joint custody language from the statute, indicating that the terms and conditions of the relocation statute now only apply to primary custodial situations. While the Nevada Supreme Court has not interpreted the new statute, this should provide more comfort to family law practitioners when confronted with relocation and custodial issues.

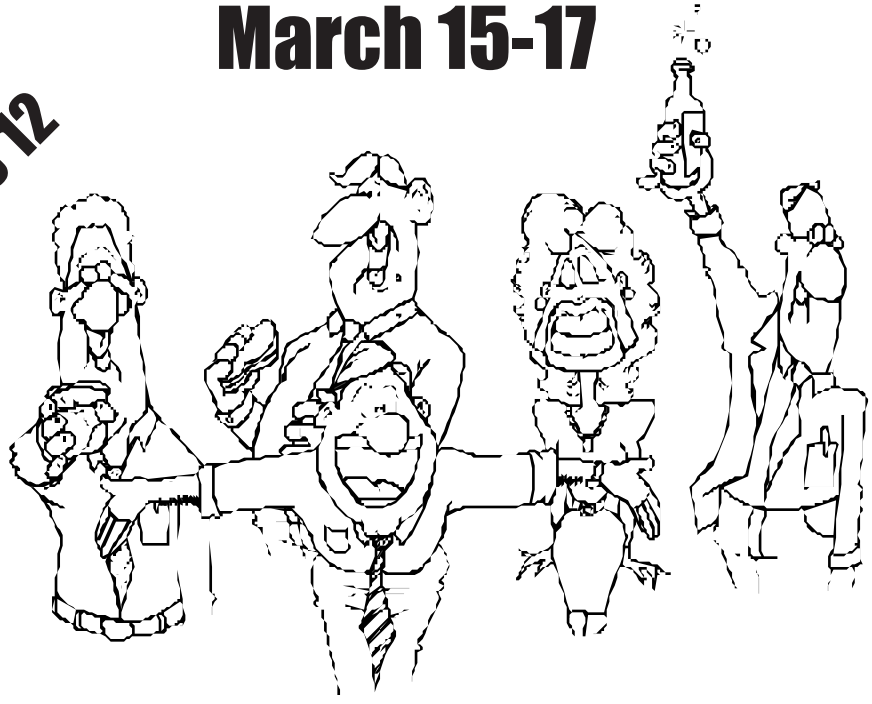
Furthermore, as discussed above, the Court's repeated references to *Schwartz* in the *Mason* decision indicate that the Court intends place renewed emphasis on all of the *Schwartz* factors in future relocation cases. This should result in a closer examination by district courts of the legitimacy of the purported reasons behind any future petition to relocate.

CONCLUSION

Nevada relocation law is truly amazing because of the seriousness of the issue and the ebb and flow of the Nevada Supreme Court decisions. It is a potential land mine in every divorce involving children. The confusion arising out of the Nevada Supreme Court decisions has made it difficult for family law practitioners to give clients sound advice regarding how such cases will be decided now, let alone in the future. While there has been some positive changes in the past two years, we certainly cannot predict with certainty how any given district court will interpret the Nevada Supreme Court's relocation decisions. We can be sure of only one thing: Any future relocation decisions from the Nevada Supreme Court will be on the agenda for the next family law seminar in Tonopah.

12th Annual Family Law at Tonopah
March 15-17

Details page 12



HOW TO MARRY A MILLIONAIRE- TWICE

By Rebecca A. Miller, Alverson, Taylor, Mortensen, Nelson & Sanders

What are the chances, you ask, of marrying a millionaire, but he is not actually a millionaire yet, divorcing him by the laws of the Dominican Republic, he wins $16,000,000.00 in the California lottery 10 years after the divorce and 20 years after separation, and "abracadabra", your divorce decree is invalid and you and your sweetheart are still married? The chances, I would tell you, are a million-to-one, but it happened to one of my clients and this is my case summary of one of the most intriguing and emotional cases I ever litigated.

Cary and Marilyn Grant (not their real names, of course) were married in 1968 and had two sons. Marilyn had a daughter from a previous relationship and Cary raised her like his own. Cary and Marilyn were middle-class working people who separated in 1977 but remained married until 1987.

In 1987, Marilyn read an ad in the newspaper which advertised an inexpensive, quick divorce in the Dominican Republic. She contacted the designated person, an alleged paralegal, who prepared the necessary paperwork.

Cary and Marilyn's signatures on their affidavits indicated that the divorce was requested by "mutual consent" and the parties were authorizing attorneys-in-fact to represent to the Court of the First Instance in the Judicial District of Peravia in the City of Bani that they agreed to be divorced with all of the formalities established by Divorce Law of the Dominican Republic 1306-bis, dated May 12,1937.

The divorce was handled by proxy and Dr. C. Cornielle, a Dominican Attorney appeared in Court for the Grants on January 30, 1987. Neither Cary nor Marilyn appeared in Court in the Dominican Republic on that fateful January 30, 1987, a mistake for which Cary would pay dearly 12 years later as a result of foreign greed and the injustice which takes place in our American judicial system.

It is now 1997, and Cary is quite content being single, having raised the children without any assistance, financially or emotionally, from Marilyn for the past 20 years since the parties first separated. Marilyn is simply too busy, going from man to man, trying to get married and doing everything she could to obtain money without working. Cary sells advertisement space for newspapers and buys lottery tickets once in awhile. One particular day, while on his long commute to work, Cary's mother telephones him to read him the lottery numbers of the day. The total award is $32,000,000.00 and Cary and an-

other gentlemen have picked all 5 numbers correctly!

Cary spends the next approximate two years paying his bills, buying his mother and children houses and cars and even shares some of the wealth with Marilyn, who now resides in Las Vegas, Nevada with her retired parents. One of the Grant's sons lives in Las Vegas and Cary purchases him an apartment and the whole "family" spends the holidays and other weekends in Las Vegas together during those years.

When Cary meets his current wife and rebuffs Marilyn's continued advances, the "family scene" changes and war is declared. Marilyn seeks legal counsel to file a Complaint for Divorce in Clark County, Nevada and is determined to prove that the Dominican Republic Divorce Decree of 1987 is invalid and she is married to a millionaire, her dream come true. Greed has consumed Marilyn to even a higher level, and, unfortunately for Cary, their Dominican Republic Decree of Divorce is invalid.

The various depositions and statements from Dominican Republic attorneys reflect that the Dominican Republic operates under a French code system wherein the law is contained in statute and is not supported by a common law tradition. Divorce law is contained in Law of Divorce No. 1036 bis of May 21, 1937. As relevant here, the statute was amended in 1971 to add Paragraph V to Article 28. Paragraph V states:

> "Foreigners who are in the country, although not residents, may have themselves divorced by Mutual Consent provided, however, that at least one of the parties must be physically present at the hearing and the other represented by the holder of a special power of attorney in fact. They expressly agree to attribute jurisdiction to a Judge of First Instance in the instrument of conventions and stipulations executed by a Notary Public of the very jurisdiction of the Court designated by them. For a case as it is provided for in this Paragraph, the provisions of Article 27 of this law shall not be applicable" (emphasis added).

The depositions of Victor Villegas and Francisco Caraballo, two Dominican Republic experts retained by Marilyn, are accepted by the Court as appropriate interpretations of the law of the Dominican Republic. To that extent, Dominican Republic law does not allow foreigners to be validly divorced if neither party appears at the divorce hearing.

This was the finding of a Nevada District Judge, of the Family Division, after an evidentiary hearing in April of 1999. The Court further found that because the Dominican Republic proceedings were invalid under current Dominican Republic, the Court could not consider comity in Nevada. Only two states had ever extended comity to a *bona fide* Dominican Republic or Mexican divorce and all other states which addressed the issue have not extended comity. No American court has ever extended comity to a "mail order" divorce. Physical presence of one of the parties is an absolute necessity, but extensive research by the parties' counsel in this case revealed that Dominican Republic divorces obtained through newspaper articles in the U.S. equal big money and there are many victims like the Grant case.

Now, you guessed it, the lottery funds and/or Cary's "assets" are community funds, or so says Marilyn's attorney. The Court hinted to us all that Cary most likely could not prove that he purchased the lottery ticket with separate funds. Does Cary go to trial and take his chances that the Court conservative assigned to the case will adopt an "equitable argument" that Marilyn should not reap one penny from the fortuitous winnings, or that the Court would divide equally the lottery winnings and call it "support?" Not if I am your attorney.

We settled quickly and quietly, but unfortunately not until after all friends and off-spring of the parties have testified against Marilyn in Court and Marilyn is ostracized from the family. Cary still comes out ahead financially, remarries, moves from the State of California and is living happily ever after. Maybe justice prevails after all, but winning the lottery in a community property state definitely is not to be favored or taken lightly. The moral of the story: check your Decree of Divorce before you buy lottery tickets.

MENTOR/MENTEE PROGRAM

The State Bar of Nevada and the Family Law Executive Council are creating a mentor/mentee program to assist new family law attorneys in the development of their family law practice.

The program will be introduced at the Nuts and Bolts program at the annual family law seminar in Tonopah. The Nuts and Bolts program is scheduled for Thursday, March 15, 2001, from 10:00 p.m. - 5:30 p.m.

The State Bar of Nevada and the Family Law Executive Council are seeking mentors from southern Nevada, northern Nevada, and rural counties so that mentees may be paired with a local mentor

Prospective mentors should be experienced family law practitioners with a desire to spend some time with attorneys who are seeking to gain experience and insight into the practice of family law. Prospective mentors should intend to be at the family law seminar in Tonopah and meet their assigned mentees at the Nuts and Bolts program on Thursday afternoon.

Attorneys who are interested in becoming a mentor should fill out the form below and send it by facsimile to Edward L. Kainen as soon as possible.

NAME:_____

FIRM:_____
ADDRESS:_____

TELEPHONE NUMBER:_____

FAX NUMBER:_____

YEAR ADMITTED TO BAR:_____

Please mail or fax the complete form to:

Edward L. Kainen
Ecker & Standish
300 South Fourth Street, Suite 611
Las Vegas, Nevada 89101-6017
Telephone: 702-384-1700
Facsimile: 702-384-8150

12th Annual Family Law at Tonopah, March 15-17

Mark your calendars…better yet register now for the 12th Annual Family Law at Tonopah March 15 – 17, 2001. Ann McCarthy, Esq. and Denise Gentile, Esq. have been working hard to produce the most stimulating (and not just educationally) experience to date. This year's program will once again feature 12 hours of Continuing Legal Education credit (including 2 ethics hours). Each day will feature local and national practitioners.

As always the program kicks off Thursday morning with the "Ed and Gary Show" otherwise known as *Nuts n' Bolts of Family Law*. This is an excellent session for new attorneys, more experienced practitioners just venturing into the Family Law area of practice, or paralegals. As an added bonus, those attending the Nuts n' Bolts session will receive a FREE copy of the soon-to-be-published Family Law Practice Manual (all other Tonopah participants will receive a $30 off coupon for the manual).

This year's program will feature Randy Kessler (Atlanta, Georgia) presenting an interactive and entertaining look at **Trial Practice** on Thursday; by popular demand William Hilton (Santa Clara, California) returns to Tonopah to cover **Jurisdictional Issues**; Kent Kasting (Bozeman, Montana) and Brian Florence (Ogden, Utah) conclude the program on Saturday with "**Big Sky Ethics in Area 51**".

Other topics to be covered include a legislative update; business valuation; electronic discovery; unbundled legal services; law office technology; calculating interest on judgments; tax; UIFSA; and returning for the second year, a joint session with the Bankruptcy Section.

Not to be outdone by the CLE offerings Denise Gentile, has coordinated a non-stop social calendar. This year your tuition (which has been the same for the last three years) will include all meals. We have added a dinner with entertainment by Las Vegas Bailiff Steve Rushfield and his band, Flashback, on Thursday evening. Friday night's Annual Banquet is shaping up to be more…shall we say…of a bang than ever before but Denise is keeping it top secret for now.

For a schedule of events or registration form call Gale in the CLE department at the State Bar (702) 382-2200.