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DOMESTIC TORTS IN NEVADA:

A NEW AND POTENTIALLY DANGEROUS FRONTIER FOR THE NEVADA FAMILY LAW PRACTITIONER

by Eric A. Pulver, Esq. and Ronald Logar, Esq.

As every family law practitioner knows, people can behave terribly towards their family members. Whether the behavior is intentional or merely negligent, many possible tort actions arise out of the family context. The Nevada family law practitioner must be increasingly cognizant of a wide variety of domestic torts. This essay will delve into the history of domestic tort case law in Nevada, the state of domestic tort law today, and what changes are likely to come. The essay will briefly explore the domestic torts which the Nevada family law practitioner may encounter, and the procedural concerns and malpractice pitfalls associated with domestic tort actions when they are coupled with family law proceedings.

THE DOCTRINE OF INTERSPOUSAL IMMUNITY

One cannot examine domestic torts in Nevada without addressing the doctrine of interspousal immunity. The development of domestic torts in Nevada has been impeded by the doctrine of interspousal tort immunity. Nevada has stubbornly adhered to the doctrine because of NRS 1.030[1], and the archaic notion that a wife's legal identity merged into that of her husband upon marriage. The doctrine of interspousal tort immunity has slowly been eroded in Nevada.

The Doctrine's use in Nevada can be traced back to *Kennedy v.*

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Domestic Torts cont.

Kennedy, 76 Nev. 302, 352 P.2d 833 (1960). In *Kennedy* a husband negligently shot his wife. The sole issue of the case was, "whether a wife has a cause of action against her husband for personal injuries caused by his negligence." *Id.* Wife conceded that no common law action for tort or contract existed against her husband, but argued that the doctrine of interspousal immunity was abrogated by NRS 12.020. In 1960, NRS 12.020 stated that when a married woman was sued, her husband had to be joined as a party, except for suits concerning her separate property, her homestead, or when the action is between herself and her husband, she may sue or be sued alone. In addressing the issue the court compared NRS 12.020 to an identical California statute and cited with approval the California cases *Peters v. Peters*, (1909), 156 Cal. 32, 103 P.219, 23 L.R.A., N.S., 699 and *Watson v. Watson*, (1952), 39 Cal.2d 305, 246 P.2d 19. The *Kennedy* court held that, NRS 12.020 did not abrogate the common law rule that a wife could not sue her husband for personal injuries:

> It would be a forced interpretation to attempt to discern in that declaration, or in any of the provisions of the Civil Code, an intent to make a departure from the common law so radical, and so opposed to its general policy, as the authorization of a suit by the husband or wife against the other for injuries to the person or character.

Kennedy at 305 (citing *Peters* and *Watson*).

The wife then argued that since personal injury damages were her separate property, such damages allowed her to sue alone under NRS 12.020. The court held that the separate property nature of personal injury damages did not create any new cause of action in favor of a wife, nor did it broaden the scope of NRS 12.020 as to abrogate the common law rule of interspousal immunity. *Id.*

Thus, the Nevada Supreme Court in *Kennedy*, articulated for the first time that a wife cannot sue her husband for a personal tort in the absence of a permissive statute to the contrary. *Id.* That decision, while eroded, still resonates in Nevada law today.

The issue of whether domestic torts could be maintained against a husband arose again in *Morrissett v. Morrissett*, 80 Nev 566, 397 P.2d 184 (1964). This time a wife brought suit against her husband for personal injuries sustained in an automobile accident. Citing *Kennedy*, *supra,* the *Morrissett* court upheld the common law rule that a wife could not bring suit against her husband in the absence of a permissive statute. *Id.* at 569. The court adhered to the common law rule even though it noted that the California case law upon which *Kennedy* was based, namely *Peters* and *Watson*, had been expressly overruled by the California Supreme Court in 1962. *Id.* The court chose to dodge the issue that Nevada law relied on *Kennedy*, and the *Kennedy* case relied on overruled California authority. Instead, the court elected to chalk its decision up to legislative deference. *Id.* The court stated:

> When the Legislature sees fit to change the common

law rule it is able-**as we are not**-to view the problem in all its ramifications and to provide the necessary safeguards against abuses of the law.[2]

Id. (emphasis added). The *Morrissett* decision ensured that the common law doctrine of interspousal tort immunity would remain unchanged in Nevada for another decade.

The dissent by Justice J. Thompson is the most interesting facet of the *Morrissett* decision, because it gives clues as to what is to come. Thompson noted that the common law principle of interspousal immunity was archaic and unreasonable. *Id.* at 570. He stated that the modern trend in the fifty states was to abandon the common law rule. *Id.* Thompson also addressed some of the common rationalizations of interspousal tort immunity. Preventing fraud and collusion were often cited as justifications for interspousal tort immunity. He argued that fraud and collusion between husband and wife did not justify adherence to the common law rule. Fraudulent claims would be ferreted out by the justice system, juries, cross examination, scientific investigation, and modern technology. *Id.* at 572. Still, the doctrine of interspousal immunity remained the law of the land in Nevada.

The first chink in the doctrine of interspousal tort immunity in Nevada law came in the case *Pearce v. Boberg*, 89 Nev. 266, 510 P.2d 1358 (1973). In *Pearce*, a wife sued her husband for personal injuries she received in an automobile negligently driven by her husband before the parties were married. The court remarked that a number of jurisdictions had repudiated the common law doctrine of interspousal tort immunity. Id. at 267. However, the court stated that since the tort occurred before the parties' marriage they did not need to reexamine the holding in *Morrissett*. *Id.* (emphasis added). The rule that emerged from *Pearce* was, a plaintiff's action for personal injuries that accrued before marriage was not extinguished by subsequent marriage of the parties. *Pearce* set the stage for the court to reexamine the holdings of *Kennedy* and *Morrissett*.

That chance came just one year later in the case of *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1012 (1974). The *Rupert* case was two consolidated cases. The first consolidated case was the *Stienne* matter. The *Stienne* matter arose when a wife was injured while riding in an automobile driven by her husband, and the issue was whether the doctrine of interspousal immunity precluded recovery for the wife's personal injuries. The second of the consolidated cases was *Rupert*. The *Rupert* matter arose when a son was injured while riding in the car of his mother. The son, through his father as guardian ad litem, brought a tort action against his mother for his injuries. The issue in the *Rupert* matter was whether interspousal immunity and parental immunity prevented the son's recovery.

The *Rupert* court tackled the issue of interspousal immunity first. *Rupert* overruled *Kennedy* and *Morrissett*, and abrogated the doctrine of interspousal tort immunity at least in regard to vehicular torts. *Id.* at 404.

In so holding, the court had to justify its deviation from the common law and NRS 1.030. The court stated that despite NRS 1.030 the court is not forever required to follow the doctrine of interspousal immunity, as courts may reject the common law where it is not applicable to local conditions. *Id.* at 399. The court cited with approval *In re Hood*, 227 P. 1065, 1083, 114 Ore. 112 (1924)which stated:

The very essence of the common law is flexibility

> and adaptability... If the common law should become so crystalized and its expression must take on the same form wherever the common law system prevails, irrespective of physical, social, or other conditions peculiar to the locality, it would cease to be the common law of history, and would be an inelastic and arbitrary code.

Rupert at 400. The *Rupert* court added that the doctrine of *Stare Decisis* must not be so narrowly pursued that the body of the common law is forever encased in a straight jacket. *Id.*

Having decided to review a common law principle, the court reexamined and debunked the justifications perpetuating the doctrine of interspousal immunity.

Interspousal tort immunity developed from the archaic notion that the legal existence of a wife merged into that of her husband. *Id.* at 401. As such, neither spouse could maintain an action against the other for wrongful conduct whether intentional or negligent. *Id.* The *Rupert* court acknowledged that the doctrine of interspousal immunity had little place in modern law. *Id.*

The doctrine of interspousal immunity was perpetuated by the notion that tort suits among family members leads to marital discord, and that the doctrine prevented fraudulent and collusive suits. *Id.* The court reasoned that this notion went against the fundamental concept of tort law. *Id.* at 402. If a person is proximately injured by another, whether willfully or negligently, they should be compensated as long as it is not against public policy. *Id.* There was no greater risk of fraud and collusion in suits between spouses than in other tort cases. The court reasoned the legal system would ferret out the non-meritorious claims and dispatch those who would practice fraud upon the courts. *Id.* at 401. (citing Justice Thompson's Dissent in *Morrissett*, and *Klein v. Klein*, 376 P.2d 70 (Cal. 1962)(overruling *Peters* and *Watson*, *supra)).*

Similarly, the court was unimpressed by the argument that interspousal suits would lead to marital discord. Interspousal suits could be maintained in other areas of the law, so, the state of matrimony alone was an insufficient justification for preventing a tort suit on an actionable wrong:

> Interspousal suits are allowed in actions not sounding in tort. In Nevada a husband has been permitted to bring an action and recover money loaned by him to his wife for improvements on her separate property. In numerous cases decided in other jurisdictions one spouse has been permitted to bring an action against the other for a variety of torts committed against the complaining spouse's property rights.

Id. at 402. (citing *Kraemer v. Kraemer*, 76 Nev. 265, 352 P.2d 253 (1960)). The court observed that *Pearce, supra,* allowed a wife to recover damages against her husband for injuries from an automobile accident which occurred before marriage. The court reasoned, the specter of fraud, collusion, and marital discord "lurked" in *Pearce*, but in that case the doctrine of interspousal immunity was not allowed to bar the wife's lawsuit. *Rupert*, at 402-403.

Congestion of the court system did not sway the court from abandoning the doctrine of interspousal tort immunity. The court noted, that jurisdictions that abandoned the doctrine did not experience increased congestion from interspousal suits. *Id.* at 403.

The court noted that Nevada law requires drivers to carry insurance to cover any person who suffers loss or injury from an automobile accident. *Id.* at 403. The court reasoned, why should a spouse not recover the same as any other injured person?

The court addressed on the fact that a spouse's personal injury damages were characterized as his or her separate property. *Id.* Why should a spouse, but for her marital status, not be able to sue for damages when the recovery would be her own separate property?

Thus, the *Rupert* court concluded that the justifications for interspousal immunity were without merit and modern conditions demanded that the court depart from the common law. *Id.* at 404. The court overruled *Morrissett*, and abrogated the doctrine of interspousal tort immunity at least in regard to vehicular torts. *Id.*

PARENTAL IMMUNITY

The *Rupert* court turned its attention to the issue of parental immunity. It stated that the doctrine of parental immunity is not found in the common law of England. *Id.* Yet, the Nevada Court in *Strong v. Strong*, 70 Nev. 290, 267 P.2d 240, 269 (1954), had improperly given parental im-

munity common law status. *Id.* at 404-405. Thus, the *Strong* court erroneously stated a rule that did not exist in the common law of England or in any Nevada Statute. *Rupert* held that in Nevada the right of a child to sue a parent in tort, and vice versa, is without restriction.[3] *Id.* at 405.

THE FUTURE OF DOMESTIC TORTS IN NEVADA

The *Rupert* case is the current state of the law in Nevada. Interspousal tort immunity is abrogated at least in regard to vehicular torts. *Id.* at 404. *Rupert* expressly limited its holding to vehicle accidents, but certainly left the door open when it stated:

> The propriety of further departure from the doctrine in other tort situations must await presentation of the issue as those situations may arise.
>
> *Id.* at 403.

The Supreme Court has not reexamined the issue since *Rupert* was decided in 1974. The doctrine of interspousal immunity has not been fully abrogated. Nevada now holds the minority view, as most states have fully dispensed with the doctrine. See, Karp, Leonard, Karp, Ph.D., Cheryl, *Domestic Torts: Family Violence, Conflict, and Sexual Abuse*, Cumulative Supplement, Ap. B. (1998).

Based on the language in *Rupert*, it is likely that the Nevada Supreme Court will eventually abrogate the doctrine of interspousal immunity. The implications raised by the full abrogation of interfamily tort immunity are immense. The family practitioner will no longer be able to confine his or her practice to the routine issues of family law, but will have to become an expert in prosecuting and defending a myriad of tort claims. The Nevada practitioner must be able to field torts arising out of spousal abuse, sexually transmittable diseases, emotionally or physically battered children, sexually exploited children, interference with parental rights, invasion of privacy,[4] and alienations of affections. [5] The claim of alienation of affections is prohibited by the Nevada legislature. NRS 41.3370; NRS 41.380. In addition, there is generally no cause of action for a parent's alienation of a child's affections. *Restatement (Second) of Torts* ß 699.

PROCEDURAL CONSIDERATIONS RAISED BY DOMESTIC TORTS

A court must provide a jury trial on tort issues if it is properly requested. A party is guaranteed the right to a jury trial in Nevada. Article I, § 3 of the Nevada State Constitution secures the right to trial by jury. NRCP 42(b) recognizes that the right to a jury trial is inviolate.

A family law practitioner will often find tort issues intertwined with divorce or child custody and visitation issues.[6] The procedure for pursuing domestic torts coupled with family law matters can be handled in numerous ways. The first way is to simply allow the family court

judge to hear all of the issues at a bench trial. Secondly, the family court judge could hear the family law issues, and then in that same trial empanel a jury to hear the tort issues. In the alternative, the family law judge could bifurcate the trial and still hear both the family law and tort matters, or the family court judge could bifurcate the trial and assign the tort issue to another court. In addition, the practitioner could file two separate actions, one of which sounds in tort and the other in family law.

In order for the practitioner to wade his or her way through this procedural maze it is important to keep some simple legal principles in mind.

The District Court may order separate trials for the divorce proceedings and tort issues presented in a case. NRCP 42(b) states:

> *Separate Trials*. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third party claims, or issues, always preserving inviolate the right of trial by jury.

A District Court Judge has great discretion in determining how a case will be heard. NRS 50.115 provides in relevant part:

> 1. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence:
>
> (a) To make the interrogation and presentation effective for the ascertainment of the truth;
>
> (b) To avoid needless consumption of time; and
>
> (c) To protect witnesses from undue harassment or embarrassment.

In addition,the family law practitioner must use caution when bifurcating a divorce case. While a court is authorized to conduct separate evidentiary hearings on any issue, the court is without jurisdiction to enter a divorce decree without contemporaneously disposing of the community property of the marriage. *Gojack v. District Court*, 95 Nev. 443, 445, 596 P.2d 237 (1979); *Forrest v. Forrest*, 99 Nev. 602, 607, 668 P.2d 275 (1983); *see also Marcum v. Marcum*, 110 Nev. 972, 975 n. 5, and 982, 879 P.2d 748 (1994); *Smith v. Smith*, 100 Nev. 610, 613, n. 1, 691 P.2d 428 (1984).

The family law practitioner must anticipate how the tort issue might impact on the parties' property distribution, and ensure that he or she does not run afoul of *Gojak*.

With these simple legal principles in mind the family law practitioner should be able to pick their way through the procedural maze created by domestic torts.

RES JUDICATA AND COLLATERAL ESTOPPEL-FAMILY LAW PRACTITIONER BEWARE

The family law practitioner must be careful that completed divorce proceedings do not bar the bringing of a suit in tort. The doctrine of *res judicata* or claim preclusion prevents the litigation in a subsequent action of all matters that were or could have been adjudicated in the prior action. *Willerton v. Bassham*, 111 Nev 10, 17, 889 P.2d 823 (1995). The doctrine of collateral estoppel or issue preclusion prevents a party from relitigating a cause of action or issue which has already been actually litigated and finally determined by the court. *University of Nevada v. Tarkanian*, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994); *Executive Mgmt. v. Ticor Title Co.*, 114 Nev. 823, 834, 963 P.2d 465 (1998).

The important distinction between the two doctrines is that *res judicata* prevents a suit for issues that **could** have been litigated in the prior action but were not. For example, the family law practitioner must be aware that if the tort issue arose during marriage, and could have been litigated in the divorce case, the tort claim might be subsequently barred by *res judicata*.[7] Therefor careful planning is necessary, and a practitioner must be ready to argue that the tort and the family law proceeding are distinct, and not based on the same underlying events.

DOMESTIC TORTS AND MALPRACTICE LIABILITY EXPOSURE

Failure to pursue a domestic tort on behalf of a client going through a divorce or other domestic relations matter could lead to malpractice exposure. At least one Nevada attorney found that out the hard way in a case that spawned two appeals to the Nevada Supreme Court and ten years of litigation.[8] In 1989, a attorney named Sharon

McDonald was retained by Katie Allyn for a divorce proceeding. During their initial meeting, they discussed the potential of filing a domestic tort action against Allyn's husband based on his physical, emotional, and sexual abuse of Allyn. *Allyn v. McDonald*, 112 Nev. 68, 69, 910 P.2d 262, 265, (1996). McDonald advised Allyn that she would consider taking the suit depending on the strength of the suit, the ability to fund the suit, and the possibility of a favorable judgement. *Id.* at 70.

McDonald claimed that she investigated the potential domestic tort claim and advised her client that she would not pursue the domestic tort. *Id.* Unfortunately for McDonald, there was no evidence that she advised her client of this fact in writing. *Id.*

Allyn claimed that during her divorce proceedings, McDonald repeatedly stated that the domestic tort action had not been addressed in the divorce case and would be handled during the "next case." *Id.* However, the statute of limitations for the domestic tort expired in April 1990, and McDonald had not filed the domestic tort action, nor had she referred the claim out to another attorney *Id.*

Allyn sued McDonald for malpractice for failing to file the domestic tort action before the statute of limitations expired. The district court granted McDonald a summary judgment, because Allyn did not produce an expert witness to establish McDonald's breach of her standard of care for failing to file the domestic tort. *Id.* at 71. The Supreme Court reversed and remanded stating that no expert witness was necessary to establish a breach in the standard of care, because it was such an obvious breach for an attorney to allow the statute of limitations to expire without filing the claim. *Id.* The Supreme Court also found the district court in error for granting the summary judgment because there was a genuine issue of material fact as to whether McDonald promised Allyn that she would file the domestic tort. *Id.* at 73.

Upon remittitur, Allyn's attorney waited almost two years to submit a motion in limine arguing that the issue of whether her husband had abused her was *res judicata* as the issue had been fully litigated in the divorce trial *Allyn v. McDonald*, 117 Nev. Adv. Op No. 73, 34 P.3d 584 (2000). The district court agreed that the issue of spousal abuse had been fully litigated in the divorce and was therefore barred by *res judicata* . McDonald, in turn moved to have the entire case dismissed. McDonald argued that Allyn suffered no damages by McDonald's failure to file a domestic tort because *res judicata* provided Allyn's husband a complete defense to the domestic tort claim. *Id.* The district court agreed with McDonald and found that Allyn's domestic tort action against her husband was barred by *res judicata*.

In addition, the district court held that an issue remained as to whether Allyn had given McDonald any instructions as to forum selection for the domestic tort. *Id.*

Allyn was given leave to amend her complaint to reflect the district court's ruling. However, Allyn waited several months to file the amended complaint. By the time she finally filed the complaint, three years had passed since the remittitur from the first appeal was filed. McDonald filed a NRCP 41 (e) motion to dismiss the amended complaint as the rule requires the plaintiff to bring the action to trial within three years of remittitur. The district court granted the NRCP 41 (e) motion, and dismissed Allyn's entire malpractice suit.

Thus, the second appeal was born. Allyn claimed she had brought the case "to trial" when she challenged McDonald's motion to dismiss on *res judicata* grounds. *Id.* The Supreme court disagreed and stated that Allyn had only brought one issue to trial. NRCP 41 (e) demands that the entire action be brought to trial within three years from remittitur of an appeal. Thus, Allyn failed to bring the case "to trial"within the meaning of the rule, and the Supreme Court upheld the district court's dismissal of the malpractice suit.

After ten years, two appeals and a procedural nightmare, McDonald escaped liability for not filing a domestic tort. Hopefully, the careful practitioner can learn from McDonald's folly.

A few simple steps may help to minimize the practitioner's malpractice exposure. Obviously, the practitioner must recognize possible claims for domestic torts. Besides going through normal checklist for a divorce or domestic relations case, the careful practitioner should create a checklist of domestic torts at the beginning of any domestic relations case.

The practitioner should notify the client in writing of any possible claims, the possibility of a jury trial in a tort case, the statute of limitations for filing the tort claim, and the possibility

that the tort claim could be barred by *res judicata* if the domestic relations claim is tried without properly preserving the tort claim.

If the practitioner does not wish to tackle the domestic tort claim, he or she should notify the client in writing. The careful practitioner should explain in the letter that the domestic tort claim could be lost if the domestic relations claim is tried on the merits, or not filed within the statute of limitations. The client must be informed of the possibility of a jury trial on the tort matter. The practitioner should recommend that the client seek independent counsel on the domestic tort issue.

Whether the practitioner takes the domestic tort action or not, he or she must ensure that the client signs an acknowledgment that the client was fully appraised of his or her rights on the domestic tort claims, and the consequences that a trial on a domestic relations claim could have on a domestic tort claim.

CONCLUSION

The modern trend is to allow domestic tort actions to proceed uninhibited by common law doctrines and concerns of collusion or familial discord. In Nevada, tort suits between non-married family members may proceed without limitation. Nevada also allows actions sounding in tort to proceed between spouses in automobile injury cases. It is likely that the doctrine of interspousal immunity will be fully abrogated when the right case makes its way to the Nevada Supreme Court.

A new frontier awaits the Nevada family law practitioner. They must be mindful of a variety of domestic torts, and the procedural concerns and malpractice pitfalls associated with domestic torts. The Nevada family law practitioner must be prepared to prosecute and defend a wide variety of torts that may be inextricably intertwined with the client's family law cases.

Notes

1 NRS 1.030 states: The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the constitution and laws of this state, shall be the rule and decision in all the courts of this state.

2 Notice that the *Morrissett* holding implies that the courts do not have the power to modify the common law. Arguably, the court felt it had to wait for a permissive statute, since the common law rule as interpreted by the Nevada Supreme Court stated that a wife cannot sue her husband for personal tort damages in the absence of a permissive statute. In any event, the *Rupert* case, *infra*, would dispel the notion that the courts lacked the power to modify the common law.

3 Most jurisdictions either never adopted parent-child tort immunity or have abrogated the rule. *See, Warren v. Warren*, 650 A.2d 252 (MD Ct. App. 1994).

4 *See Elson v. Bowen*, 83 Nev 515, 436 P.2d 12 (1967); but *see Perfit v. Perfit*, 693 F. Supp 851 (C.D. Cal. 1988); *See also*, NRS 200.650.

5 Alienation of affections is defined as: A tort claim for willful or malicious interference with a marriage by a third party without justification or excuse. *Black's Law Dictionary*, (7th ed 1999)(emphasis added.) The Restatement (Second) of Torts § 683 defines spousal alienation of affections as: One who purposely alienates one spouse's affections from the other spouse is subject to the liability for the harm thus caused to any of the other spouse's legally protected marital interests.

6 In addition to the procedural concerns presented by domestic torts, the Nevada family law practitioner will have to reevaluate their billing practices because their client's tort issues can be taken on a contingency basis.

7 The issue of domestic violence is one situation where the practitioner could run afoul of the doctrine of *res judicata*. The ramifications of domestic abuse can resonate throughout an entire divorce or custody proceeding. NRS. 125.480(5) creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Similarly, if spousal abuse or marital misconduct has an adverse economic impact on the victim spouse, the court may consider it when determining whether an unequal division of community property is warranted. *Wheeler v. Upton-Wheeler*, 113 Nev. 1185, 946 P.2d 200 (1997)

8 This author first learned of the *Allyn v. McDonald* cases from an article published by Mary Anne Decaria, Esq., in *The Writ*, March 2002, Vo. 24, No. 3., P.8.

THE SO-CALLED "TONOPAH FORMULA" FOR ALIMONY EXPLAINED

By Todd L. Torvinen

THE MOST ESTEEMED MR. SILVERMAN DOTH COMPLAIN

At the annual Family Law Conference in Ely, there was a lively debate about spousal support formulas. Gary Silverman, Esquire, expressed his displeasure with the notion of a spousal support formula. He and other practitioners in attendance were also critical of the so-called "Tonopah Formula" because the assumption was that the Formula had no connection to Nevada Case Law. However, this writer would like to set the record straight. The Tonopah Formula is based upon Nevada case law.

DEVELOPMENT & HISTORY OF THE TONOPAH FORMULA

Sometime in 1997, the Family Law Section Executive Council of the State Bar voted to explore the development of a spousal support formula. The need then, as now, was created by what was perceived as widely divergent spousal support awards on similar facts. In short, the amount of spousal support was dependent to some extent, upon the judge hearing the case.

Your author was assigned the task of proposing several different formulas to the Family Law Section Executive Council for approval. Several Formulas were examined. The Executive Council chose what is now referred to as the "Tonopah Formula."

In the cases of ***Sprenger v. Sprenger***, 110 Nev. 855, 878 P.2d 284 (1994); ***Gardner v. Gardner,*** 110 Nev. 1053, 881 P.2d 645 (1994); ***Rutar v. Rutar***, 108 Nev. 203, 827 P.2d 829 (1992); ***Fondi v. Fondi***, 106 Nev. 856, 802 P.2d 1264 (1990); and ***Heim v. Heim,*** 104 Nev. 605, 763 P.2d 678 (1988), the Nevada Supreme Court listed seven alimony factors a trial court should consider when awarding alimony: (1) the wife's career prior to marriage; (2) the length of the marriage; (3) the husband's education during the marriage; (4) the wife's marketability; (5) the wife's ability to support herself; (6) whether the wife stayed home with the children; and (7) the wife's award, in addition to child support and alimony. ***Sprenger***, 110 Nev. at 860, 878 P.2d at 287-88 also indicates that the recipient spouse is to live "as nearly as fairly possible in the station of life enjoyed before divorce." This is obviously a direction to examine the income differences of the parties.

Note: The most recent spousal support case, ***Rodriguez v. Rodriguez,*** 116 Nev._____, 13 P.3d 415, 418 (2000) reiterates what have commonly been known as the ***Buchanan*** factors. See ***Buchanan v. Buchanan***, 90 Nev. 209, 523 P.2d 1 (1974). The Buchanan factors appear to be substantially the same factors as specifically enumerated in ***Sprenger, Gardner, Rutar, Fondi***, and ***Heim***. Indeed, Justice Agosti said as much in the ***Rodriguez*** Opinion. See 13 P.3d at 419.

The Tonopah Formula measures the following factors: (1) the difference in the incomes of the parties (adjusted for child support payments, if any), (2) the years of marriage, (3) the age of the alimony payee, (4) the education level of the alimony payee, and (5) the disability of the alimony payee. These factors are used to determine both the duration and the amount of the alimony award. The Tonopah Formula adopts the factors used in what is known as the Minnesota Spousal Calculator. These

factors were developed by an economist at the University Of Minnesota, and the Minnesota Bar Association. In addition, the factors are similar to the ***Sprenger-Buchanan*** factors, but are easier to measure.

Probably 6 or 7 different formulas were considered. All formulas considered were compared to the amounts and durations ordered by the Nevada Supreme Court in ***Sprenger, Gardner, Rutar, Fondi***, and ***Heim***. The formula ultimately chosen by the Executive Council most closely matches the amounts and durations ordered in those cases. Practically, the input factors above were adjusted up or down through multiple output tests and experiments, so that the amount and Duration Formulas line up as closely as possible to ***Sprenger, Gardner, Rutar, Heim*** **and** ***Fondi*****.**

THE TONOPAH FORMULA(S)

The formulas are described as follows:

AMOUNT FORMULA: Multiply difference in net after tax incomes after deduction only of child support by cumulative percentages determined as follows: add 1.25% for each additional year of marriage after 5 years; add 7.5% if high school education, 5.0% if some college, 2.5% if College, none if graduate or professional; add 8% if total permanent disability, add 6% if permanent partial disability, add 4% if total temporary disability, or add 2% if temporary partial disability; add .50% for each year of age of the obligee which exceed the age of 30. Limited to 50% of the difference of the net after tax incomes.

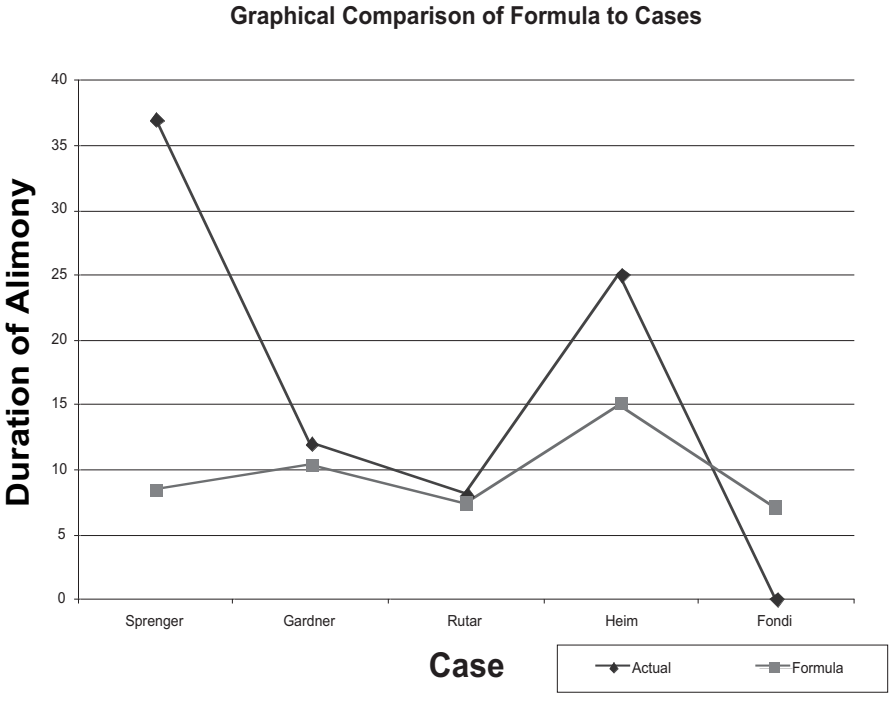
DURATION FORMULA: .375 yrs for ea. yr. mar. > than 5 +.10 yrs for ea. yr age of obligee > 30 + 1.5 years if high school or less, 1 year if some college,.5 years if undergraduate degree, or zero years if graduate or professional degree+ 6 years if total permanent disability, 4.5 years if permanent partial disability, 3 years if temporary total disability, 1.5 years if temporary partial disability, or 0 if no disability.

COMPARISON OF THE COMPUTED FORMULA AMOUNTS TO NEVADA CASES

Each of the cases above (***Sprenger, Gardner, Rutar, Fondi*** *and* ***Heim***), is compared to its probable formula output. The formula amounts as compared to the actual outcomes of the cases are shown in the chart below:

	ACTUAL	FORMULA
Sprenger	$1,500	$1,886
Gardner	$1,000	$659
Rutar	$1,700	$2,267
Heim	$1,500	$1,542
Fondi	$0	$684

This is represented more clearly by the following graph:



To the extent one could draw a line and track the amount awarded in ***Sprenger, Gardner, Rutar***, and ***Heim***, the Amount Formula attempts to follow that line. ***Fondi*** (essentially a $0 award) is an aberration, and the formula will not track it.

The duration of the alimony awards of the actual cases compared to the formula is shown below:

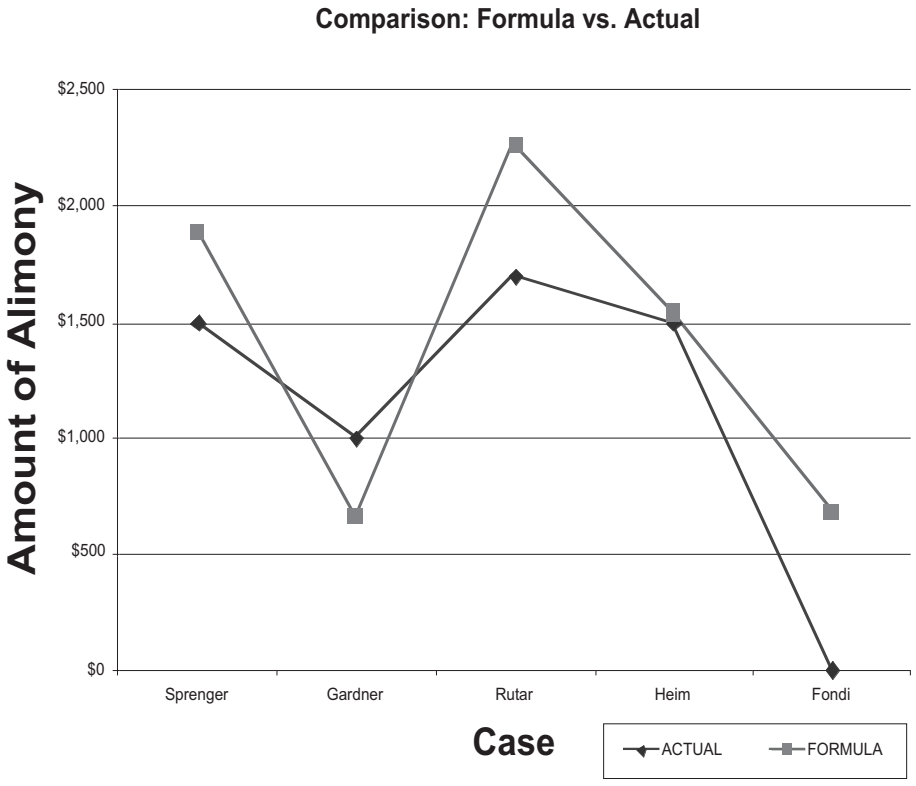
This is also represented more clearly by the graph below:

Again, to the extent the formula can track the duration of alimony ordered in the leading cases, it does so. However, an obvious weakness of the Duration Formula is apparent here. Because of ***Heim*** and ***Sprenger,*** lifetime alimony is generally thought to be awarded where there is a twenty-year or longer marriage, and the obligee spouse is not a professional or high earner. The formula does not take this geometric effect of a twenty-year marriage into account. The formula is arithmetic, and evenly measures and credits each year of marriage. There is no large kicker when 20 years is reached.

CONCLUSION

I hope the explanation is clear for the most esteemed Mr. Gary Silverman, Esq. The so-called Tonopah Formula is indeed based on Nevada Law.

	ACTUAL	FORMULA
Sprenger	37	8.4
Gardner	12	10.3
Rutar	8	7.4
Heim	25	15
Fondi	0	7



State Bar of Nevada
Family Law Section
600 E. Charleston Blvd.
Las Vegas, NV 89104