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REIMBURSING SEPARATE PROPERTY CONTRIBUTIONS TO COMMUNITY LIVING EXPENSES

by Whitney Selert, Associate, Silverman & Decaria, Chtd., Reno, Nevada.

Oh, lemme tell ya' story 'bout a man named Fred;
Poor insurance broker couldn't keep his family fed;
Then one day while he's wishin' he had food;
Along comes Cheryl to make things really good;
With food that is, and mortgage payments from her separate property.
Well the first thing you know Fred's gonna be a millionaire;
The business is doing better but Cheryl's older and not so fair;
He finds himself a girlfriend and settles on divorce;
Tells Cheryl "thanks for nothing, you can keep the horse."[1]

The hypothetical describes a situation where the wife uses her premarital separate estate to supplement community earnings in years when those earnings are insufficient to cover community expenses. The issue is whether Cheryl is entitled to some form of reimbursement from the now solvent community for the monies she used from her separate property estate to maintain the community in those lean years.

The answer appears to differ as between Nevada and California.

As a starting point, it is helpful to note several relatively unremarkable tenets of our community property law as it applies to separate property. Property owned before marriage or acquired during marriage by gift, bequest or device is separate property.[2] Our statutes protect one spouse's separate property from claims[3] or premarital debts of the other.[4] Statutory protection of separate property is not absolute. Thus, the community may acquire an interest via contract[5] or act, e.g., commingling separate and community funds.

Like the legislature, our Supreme Court has long afforded special protection for one's separate estate. In *Barrett v. Franke*, 46 Nev. 170, 176-77, 208 P. 435 (1922) for example, the Court stated "the right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will presume that it maintains that character until some direct evidence to the contrary is made to appear."

In Cheryl's and Fred's case, Fred recognizes the separate nature of the property Cheryl supplied to maintain the community. Fred's argument to avoid reim-

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FROM THE CHAIRMAN

by Marshal S. Willick

This is an amazing time for the Section. Pursuing the active agenda promised last year at Tonopah, we have completed the 1996 Child Support Report for the Nevada legislature per NRS 125B.070(2). A committee has come up with a proposal for a guideline for alimony determinations that gives the district courts some starting point for analysis. And we have submitted the Section-approved plan for certification of specialization to the Board of Governors for forwarding to the Nevada Supreme Court. We are also heading for an exciting annual Tonopah seminar. Each of these deserves separate attention.

We had some problems with the Board of Governors regarding the 1996 Child Support Report. The problems are not, generally, substantive, but procedural. As a group, the body has expressed concern about "separation of powers" and a desire to avoid "potential liability from disgruntled members." Whatever the actual motivations behind these concerns, the effect has been making it harder to do anything to improve the lives of the people of this state through the legislative end of the legal process. Certain members of the Board indicated that they would try to block the Report from ever going to the Legislature. Ultimately, with the assistance of the congenial Peter Jaquette, the Board of Governors agreed to forward the Committee's 1996 Report to the Nevada Legislature. The final Report includes a provision taking the Bar formally out of the quadrennial review process, calling for it to be done by a Committee of the Legislature with "recommendations" from the Family Law Section.

In accordance with our Mission Statement, the Family Law Section seeks to improve the administration of justice by applying our collective expertise to suggesting improvements to the substantive and procedural rules of the courts in which we work, and to improve the lives of those for whom we work. We have been absolutely above-board and unbiased in our procedures and intentions, and scrupulously honest in disclosure, analysis, and reporting. In my opinion, the alternative to our involvement is to have special interest groups pressure uneducated lawmakers about a technical subject and just pray that somehow policies passed in ignorance happen to make sense. Yet some on the Board, and even on the Council, label legislative involvement and advice as "arrogance," and claim to see no difference between trying to improve the substance and procedure of the family law code, and making political statements — such as efforts in another time to protest the war in Vietnam. I, at least, see what we are doing as "improvements in the administration of justice," which is exactly what we **should** be doing. If we do not, we will spend the next ten years as we have the last ten — shaking our heads and wondering just who came up with some of the stuff we have to work with on a daily basis.

On to alimony. There has long been a sentiment that alimony constitutes the last great "crap shoot" in domestic relations cases, where oratory or obfuscation allow a tactically-minded lawyer to score points, and thus get, or save, money for a client irrespective of the relative merits of the case. It is without doubt an area where there is little consistency, still less coherent guidance, and not even much agreement as to a proper analysis. There are at least three separate informal "guidelines" floating around the state. Repeated seminars put on by this Section have failed to discover any uniformly-respected methodology for analysis, which is exactly what formation of the Family Court system was supposed to give us.

Accordingly, a committee of the Coun-

cil has managed to put together a proposal that will allow a baseline for analyzing alimony cases to be established in every case. Of course, it provides only a starting point — the judges will have discretion to apply any of a laundry list of factors (or other factors unique to that case) in varying from the baseline in either direction. It is hoped that having some form of prescribed analysis, however, will assist us in delivering on the promises of increasing the predictability of results and the uniformity of results across departments. The ultimate result should be to lower costs, generally, for the population, since less litigation will be required to reach conclusions.

To those who complain that this would take all the "fun" out of lawyering, I suggest that rigorous analysis and open and honest litigation of questions is fun enough for the well-intentioned; those that would prefer litigation by forum shopping, ambush, omission, or results driven less by the merits than by the oratory of the practitioner, should consider moving to a field where the results will be less personally devastating to the lives of those affected. The proposal for an alimony guideline, as to both the general idea and the specific proposal being made, will be open to debate at Tonopah by the entire Section. Your input would be most appreciated, and the result of our debate will be forwarded to the Legislature.

As to Specialization, if I read the situation correctly, we should expect a substantial delay in the Board of Governors before our proposal even gets forwarded to the Nevada Supreme Court for consideration. On this item, at least, a delay is reasonable; after all, if a proposal is adopted, it would have procedural and budgetary impact on the Bar itself, and not just the Section. It will be up to the successors of the current Council, however, to make sure that our carefully considered, extensively debated, and publicly beneficial proposal does not get forgotten while it is being "considered" by the Board of Governors, or delayed for so long that the otherwise-inevitable alternatives we were hoping to avoid, of unregulated "specialists" proliferating everywhere, overtake us before we can act. We shall see, but I don't find it encouraging that most members of the Board of Governors appeared unfamiliar with the contents of the report of (now-Justice) William Maupin on the topic. Still, hope springs eternal, and if a proposal is ever forwarded to the Court Justice Maupin's familiarity with the subject and its alternatives should well serve the Bar and the people of this State.

Finally, as to Tonopah, it looks as if we are going to have a truly outstanding year of CLE in store, thanks primarily to the hard work of Mary Anne Decaria, to whom all attendees owe a great deal of thanks. Kudos also to Ishi Kunin, who has again (almost voluntarily) taken on the task of finding a way to entertain a couple of hundred divorce lawyers. Details of this year's planned program should be printed elsewhere in this issue, so I will not repeat. It should be noted, however, that much of what the annual seminar looks like is derived from the comments and suggestions of those who attend, so please do share your opinions with a Council member.

This will be my last column as Chair of this Section. Thank you for giving me this opportunity to represent you; I have tried to carry through on giving substance to the promises of the Section's Mission Statement. I apologize for my failures, and appreciate the support and encouragement I have received in the efforts made throughout my term.

FAMILY LAW SEMINAR UPDATE

by Mary Ane Decaria,
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Spring time in Tonopah is just around the corner, and you know what that means! The Annual Family Law Seminar sponsored by the Family Law Section and the State Bar of Nevada Board of Continuing Legal Education will be held in Tonopah, Nevada, March 20, 21 and 22, 1997.

This year, a total of fourteen hours of CLE is being offered. Many malpractice insurance companies give a premium discount to those attending three or more hours of ethics CLE per year. Therefore, we have on tap three hours of ethics CLE, which will be taught by James Fox Miller, the most entertaining (and ethical) lawyer in Florida, and Rob Bare, the funniest bar counsel this side of the Pequops (just kidding, Rob).

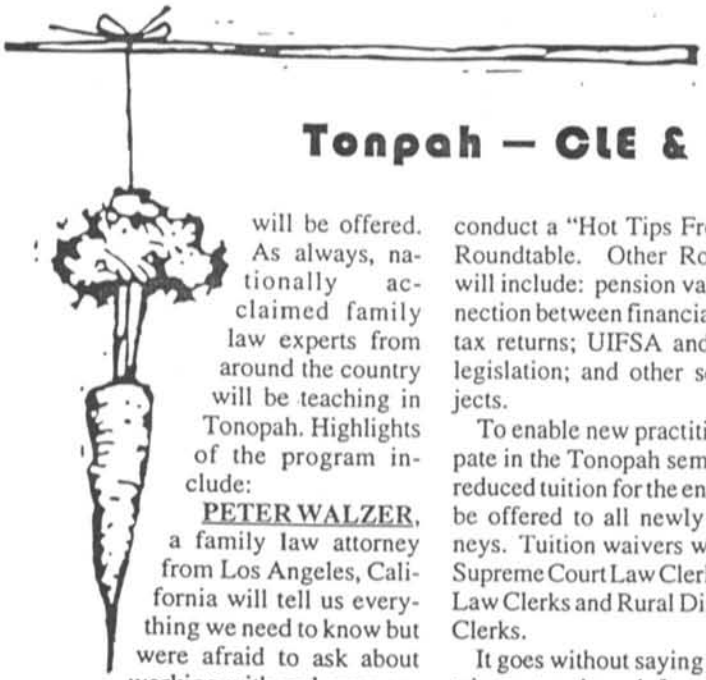
For new lawyers or those new to the practice of family law, five hours of CLE on the nuts and bolts of family practice

Articles, Case Summaries
Wanted for NFLR

The Nevada Family Law Report seeks to provide interesting and substantive family law material to educate both the bench and the bar. NFLR needs articles for upcoming issues. If you are interested in writing critiques of pertinent cases, reports/opinions of family law legislation or discussions of family law trends and issues, please request authors guidelines from Editor Mary Rose Zingale, 528 Commercial St., Elko, NV 89801.

Articles published in the NFLR are eligible for continuing legal education credits. Contact the MCLE Board, 329-4443, for applications.

The Section's publication needs your input and contributions. Please contact an editor to discuss any article topic, critique or book review.



Tonopah – CLE & Fun!

will be offered. As always, nationally acclaimed family law experts from around the country will be teaching in Tonopah. Highlights of the program include:

PETER WALZER, a family law attorney from Los Angeles, California will tell us everything we need to know but were afraid to ask about working with and cross examining a psychologist.

Our very own JANET CHUBB, in conjunction with a surprise guest, will walk us through the intricacies of bankruptcy and divorce.

MARSHA ELSER, a former president of the American Academy of Matrimonial Lawyers and former chair of the Florida Bar Family Law Section will join Gary Silverman to help us understand the plethora of information to be culled from a tax return.

Alimony will be the hot topic this year. There is much talk of an alimony formula and likely legislation to codify an alimony statute. ROGER WIRTH will give a brief overview of the current state of alimony law in Nevada and a review of the proposed alimony statute. He will then moderate a debate between LYNN Z. GOLD-BIKEN, former chair of the ABA Family Law Section and BRUCE KAUFMAN, President Elect of the ABA Family Law Section, on the benefits and detriments of an alimony formula. Arbiters of the debate will be members of the judiciary. This controversial question will be open to the audience for discussion and a straw poll will be taken to determine whether the family practitioners of this state favor or oppose an alimony formula.

Our experts and out of town guests will conduct a "Hot Tips From the Experts' Roundtable. Other Roundtable topics will include: pension valuation; the connection between financial statements and tax returns; UIFSA and recent welfare legislation; and other scintillating subjects.

To enable new practitioners to participate in the Tonopah seminar, a specially reduced tuition for the entire seminar will be offered to all newly admitted attorneys. Tuition waivers will be granted to Supreme Court Law Clerks, Family Court Law Clerks and Rural District Court Law Clerks.

It goes without saying that great entertainment and much fun will be on tap, as always, in Tonopah.

There will be several vacancies on the Family Law Section Executive Council. I urge anyone who is interested to throw his or her hat in the ring and run for a seat on the council. New faces and ideas are needed to keep the section vital and ensure its continued growth and excellence. Get involved. You will receive as much from the experience as you give.

Judge McGee will again host a picnic at his ranch. If you have never been, plan to return to Reno on Saturday, March 22, 1997 via the McGee Homestead. The food, scenery and generosity of Judge McGee ar well worth the slight detour.

If you have never attended the family law seminar in Tonopah, find out this year what over 200 lawyers and judges from around the state discovered last year. The quality of CLE cannot be beat. Tonopah is fun, educational and relaxing. (Have you ever seen anyone in Tonopah wearing a three-piece suit or carrying a cell phone?) Judges and lawyers from around the state socialize and interact in a friendly, informal setting conducive to camaraderie, not competition. There is much to learn and much to gain from the "Tonopah" experience. Don't miss it.

Reimbursing con't

bursement is twofold: 1) Cheryl was obligated by law to use her separate property to support the community; and 2) Carol's act constituted a gift.

The two Nevada cases that come closest to addressing this point are *Robison v. Robison*, 100 Nev. 668, 671, 691 P.2d 451 (1984) and *Cord v. Cord*, 98 Nev. 210, 644 P.2d 1026 (1982). In *Cord*, the issue was whether the district court had erred in ordering that Mr. Cord's separate property estate be reimbursed for expenditures on community property expenses after community assets were exhausted. The appellant relied heavily on the California case of *See v. See*, 64 Cal. 2d 778, 415 P.2d 776 (Cal. 1966), which had broadly held that a "husband who elects to use his separate property instead of community property to meet community expenses cannot claim reimbursement."[6] In the absence of agreement to the contrary, the *See* Court held, such an act constitutes a gift to the community.[7]

The *Cord* Court observed that in *See*, the husband had "made a conscious election to spend his separate wealth on community expenses" and was therefore "guilty of commingling" the separate and community funds. The Court noted that in Mr. Cord's case, he had acted throughout the marriage under the assumption that all of his income was separate property. Therefore, the Court held, he could not have made the conscious choice required to constitute the act as one of gift. By analogy to another California case with similar facts,[8] the *Cord* Court summarized its own holding thus: "If E.L. Cord had made a conscious choice to use his separate property, rather than available community property, to pay community expenses, such use of his separate property would have constituted a gift to the community for which reimbursement could not be claimed."[9]

With this language, the *Cord* Court seemingly moderated *See's* broad holding by imposing two requirements not obvious from the language of the California cases. To constitute a gift, one must *consciously choose* to use his separate property rather than *available* community property. *Cord* focused primarily on

the requirement of conscious choice. The contemporaneous requirement of available community property was addressed two years later in *Robison v. Robison*.

In *Robison*, the husband contended the district court erred by characterizing as separate property two homes that were purchased by his spouse before marriage, but which were paid for in part with community funds during marriage. In this pre-*Malmquist*[10] case, the Court reversed, holding that the community earned a *pro tanto* interest in the properties because the mortgages were paid with community earnings.[11]

The district court also considered the benefit Mr. Robison received from living in his wife's separate property home during marriage and used the value of that benefit to offset any claimed community interest. In other words, Mrs. Robison had claimed that her separate estate was entitled to reimbursement for the value Mr. Robison received by living in the separate property home. The reimbursement, she argued, offset any community interest.[12] The Supreme Court reversed, citing verbatim the *Cord* Court's holding regarding conscious choice and available community resources. The Court then specifically held: "[i]n the case at hand, the use of Sylvia's real property as a community residence is equivalent to the use of one spouse's separate funds to pay community expenses. Since there were sufficient community funds from which to support Charles and Sylvia, in the absence of an agreement to the contrary, the use of the . . . property constitutes a gift of the rental value of the property to the community."[13]

The language of *Cord* and *Robison* seems relatively straight forward: One's use of her separate estate to pay community expenses is a gift if: 1) community property was available at the time to pay community expenses; and 2) the contributing spouse made a conscious choice to use her separate property instead of the available community property to pay the community's expenses. Where one or both of the requirements fail, the contributing spouse should be entitled to reimbursement.[14]

Careful analysis of the issue would suggest the requirements are not only conjunctive, but interdependent. Where there are no available community funds in a time of need, it is difficult to argue that Cheryl's use of her separate property could be a "conscious choice" to make a gift. Although the act might be consciously made in the strictest sense of that phrase, keep in mind this is the choice to make a gift, something requiring some degree of scienter greater than mere consciousness. That was the case in *Cord*, where Mr. Cord's state of mind: his misapprehension regarding the separate nature of the property he contributed, was sufficient to defeat the gift presumption.

Where there are no community resources, the mother or father with the separate estate would face a Hobson's choice: "protect my separate estate," or "watch my spouse and children go unfed or underclothed." The choice is really no choice at all. The compulsion would be profound and (we hope) the spouse with property would act to supplement the community's earnings to any degree necessary. The law should at least encourage, if not require, the spouse to so act.

By contrast, where community funds exist but one spouse nevertheless pays rent or buys furniture or food with her separate property, it is difficult to believe she intended to be reimbursed. It is the availability of another resource that frees the spouse to consciously choose

to make a gift. It is precisely because no other rationale makes sense that the law creates a presumption of gift in this context. Conscious choice and availability of community resources are therefore interdependent requirements that dovetail to define the parameters of the gift presumption in Nevada.

What, then is the controversy? Our *Cord* case relied in part on California's *See* case, albeit not adopting it outright. In California, *See* and its progeny have undergone many changes, evolving most recently into a statutory codification of the reimbursement rule that, when compared to the rule set forth in the Nevada cases, would lead to reimbursement in exactly the opposite situation as that permitted in Nevada. The point of this article is to clarify that this is one area of community property law where the two States diverge.

In *See*, the California Supreme Court held in no uncertain terms that when one spouse uses his separate property for community purposes, he has made a gift of that separate property to the community.[15] In 1980, the California Supreme Court in *Lucas v. Lucas* extended the *See* holding beyond the context of separate property contributions for community living expenses and applied it to separate property contributions to the acquisition of real property.[16] As one might expect given the drastic appreciation of California real estate in the 1970s and 1980s, this ruling was extremely unpopular with many separate property contributors.

By 1984, the clamor in California over *See* and its extension in *Lucas* became such that the legislature acted to overrule *Lucas*. The legislature enacted California Civil Code § 4800.2, which stated:

> b) In the division of the community estate . . . unless a party has made a written waiver of the right to reimbursement . . . the party shall be reimbursed for the party's contributions to the acquisition of the property to the extent the party traces the contributions to a separate source . . .[17]

The California legislature later moderated the *See* holding to provide for reimbursement in certain circumstances for the spouse who contributes separate property to community living expenses. The new California Family Code makes clear that one spouse shall support the other during marriage even if that means using separate property funds[18] but if you use your separate property to pay debts incurred for necessaries while married and there is available community property or the other spouse had separate property he did not use, then you may be reimbursed.[19]

See was arguably the major starting point for both Nevada and California on the subject of reimbursing separate property contributions to community expenses. The progression from that point in each State has led to different conclusions. In Nevada, the spouse who uses her separate estate to supplement the insolvent community will be reimbursed. In California, she would not. In Nevada, the separate property contributor makes a gift *if* she contributed the property when there were available community resources. In California, she makes a gift

unless there were available community resources, in which case she would receive reimbursement.

Analyzing in depth the various policies possibly supporting each State's solution is beyond the scope of this article, but it appears Nevada has the better rule. In California, the spouse is required by law to support the community with her separate property when there are insufficient community funds to do so. That use of separate property is then presumed to be a gift, despite the legal compulsion. How a legal compulsion and an intent to make a gift can simultaneously co-exist is perplexing even for a legal fiction. The money once spent is forever gone even where the community is solvent at the time of divorce and capable of repaying the debt.

In Nevada, by contrast, the gift presumption arises only where one spouse consciously contributes the separate property to community expenses at a time when the separate property was not needed. The gift presumption is consistent with the circumstances. But if the community was exhausted when the spouse contributed her separate property, then the community will reimburse the separate estate if able to do so at divorce. In essence, Nevada requires the community to simply say "thank you."

Notes

[1] Sung to the tune of the Beverly Hill Billies if you're in the mood. The names and events in this hypothetical, while based loosely on a real case, are entirely fictitious. Any resemblance to actual names, instances or characters is entirely coincidental and unintentional.

[2] NRS 123.130 (also includes property acquired during marriage by descent or damages for personal injuries and the rents, issues and profits of the separate estate).

[3] NRS 123.060

[4] NRS 123.050

[5] NRS 123.070

[6] *Id.* at 213.

[7] *Id.*

[8] *Beam v. Bank of America*, 6 Cal.3d 12, 98 Cal. Rptr. 137, 490 P.2d 257 (1971).

[9] *Id.* at 214.

[10] *See Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990) adopting the complex formula developed by Professor Carol Bruch of the University of California, Davis for determining the relative separate and community claims to property.

[11] 100 Nev. 668, 670-71 (1984).

[12] In other words, Mrs. Robison wanted Mr. Robison to use his community property interest in the home to pay her for the reasonable value Mr. Robison received by living there.

[13] *Id.* at 671

[14] Because the presumption of gift is rebuttable and not conclusive, one could technically rebut the presumption and also gain reimbursement if sufficient evidence were adduced regarding intent.

[15] *See v. See*, 415 P.2d 776 (1966).

[16] *In re Marriage of Lucas*, 614 P.2d 285, 289 (Cal. 1980).

[17] The provision continues in effect today but has been recodified at California Family Code § 2640.

[18] Cal. Fam. Code § 4301 (1993).

[19] Cal. Fam. Code § 914(b) (1993)

CASE SUMMARIES

Divorcing attorneys simply should not have their spouses sign papers

Cook v. Cook, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 24, Feb. 29, 1996) Parties married in 1978; husband started a law practice the same year. In December, 1992, husband-lawyer drafted property settlement agreement providing that he received the law practice as his separate property, and waiving wife's interest in income for 1990-1992. Another provision, however, held her liable for taxes on the firm's income from 1990 and 1991. Wife had an attorney review the property settlement agreement, but she signed it in proper person. Both husband and his attorney signed the agreement.

Later in December, 1992, husband filed for divorce. Wife signed proper person answer. The decree was granted the same day.

Within the six-month NRCP 60(b) time limit [Ed. note: by six days, apparently] wife filed a motion to "vacate the divorce decree and for a new trial." Wife's affidavit said she was coerced into signing agreement by husband's threat that if she hired a lawyer, he would "lose his law practice, face imprisonment and resort to leaving the country due to tax evasion. Wife's expert (Ken Fortney, CPA, Reno) evaluated community property based on information known to wife and concluded that wife received approximately $100,000.00 to husband's $600,000.00 in net community property, and that in his "professional opinion, the [agreement] was grossly inequitable and unfair to the wife" and that from his interview of her, he believed she "had very little understanding or conception of the nature of the community property these parties had and did not fully understand that she had a community property interest in her husband's law firm . . . ."

The District Court (Foley) denied the wife's motion, finding that she had independent competent counsel to represent her and that she was not coerced.

The Supreme Court found an abuse of the lower court's "wide discretion in deciding whether to grant or deny" a motion under NRCP 60(b), and reversed. The Court found "no competent evidence" to support the district court's finding. Specifically, the Court found that she signed all relevant documents in proper person [the Court entirely ignored the effect, if any, of having had an attorney review the agreement before she signed it].

The Court found its decision in Williams v. Waldman, 108 Nev. 466, 836 P.2d 614 (1992) to be directly on point, and it reiterated the facts and holding of that decision, stressing that when a lawyer-husband drafts a property settlement agreement, he has a fiduciary relationship to his wife, in addition to the fiduciary relationship formed by the marriage itself, and that all such agreements would be "closely scrutinized" on appeal. The Court declared as "ramifications" for an attorney spouse drafting a property settlement agreement that: the agreement is subject to close scrutiny on appeal; the attorney has a duty of full and fair disclosure; and "the attorney must demonstrate by a higher standard of clear and satisfactory evidence that the transaction was fundamentally fair and free of professional overreaching."

In this case the Court found to be significant the "nuances" that: the husband threatened the wife not to retain counsel; here, the agreement did mention the law practice, but awarded it to the husband without ascribing it any value; the wife was not given any income for certain years, but was held liable for taxes for

those same years.

The Court held that these provisions "as a matter of law" showed the husband's breach of his legal duties, chose not to reach the "coercion" ground, reversed the order denying the wife's motion, and remanded, taking pains to note that the dissolution of the marriage was not affected, but the parties were only to "litigate the division of their property" upon remand.

Deed from one spouse to the other creates a presumption of gift

Kerley v. Kerley, 112 Nev. ___, ___ P.2d___ (Adv. Opn. No. 6, Jan. 31, 1996) (On rehearing, the Court concluded that its opinion in this case (111 Nev. 462, 893 P.2d 358 (1995) contained an error law, namely that the deeds in question created a presumption of community property.

The Court now states that it has "consistently held that 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," and that, "[m]oreover, property acquired by gift during marriage is separate property pursuant to NRS 123.130, and therefore is not community property pursuant to NRS 123.220."

The Court therefore concludes that the second deed, transferring the property from the two parties as joint tenants to the husband, is presumed to be a gift of the wife's interest. The Court remanded for further proceedings.

Termination of parental right, round 1; Court does not find jurisdictional grounds from mother's alcoholism where less than six consecutive months of no contact ever occurred

In re Montgomery (Montgomery v. State ex rel. Dept. of Human Resources), 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 92, May 30, 1996) Mother is an alcoholic who has had two other children placed with their respective fathers. When police intervened in a family fight in Las Vegas, they took three year old child to Child Haven because Mother was intoxicated. Child was made ward of state, Mother complied with intensive alcohol treatment program, and child was returned to her. Mother relapsed, child was taken by DCFS (Department of Child and Family Services) and Mother disappeared for five months. She tried calling occasionally, but never spoke with either the child or her case worker. In December, 1994, DCFS moved to terminate. Mother had returned to Las Vegas, resumed AA meetings, secured employment, and contacted DCFS; she opposed the termination petition through a court-appointed attorney.

In March, 1995, case worker testified that the child would be best off with Mother if she could be rehabilitated, but that her history indicated that her chronic alcoholism could not be corrected. Mother had remarried, appeared sober and stable in her employment.

District court (Hardcastle) stated that jurisdictional grounds of abandonment and unfitness had been proved "without a doubt." Judge indicated inclination to terminate, but granted Mother four months, with no guarantee at the end of that time, to prove continued sobriety. After four months, mother had complied with plan and stayed sober, but DCFS worker still urged termination based on history of relapses. DCFS mental health counselor testified that child expressed fear, insecurity, and chronic post-traumatic stress syndrome, and that reunification would take at least six months. Judge Hardcastle terminated parental rights, concerned about a relapse and feeling that the child "deserved some sort of permanency in her life."

On appeal, Court agreed that there was insufficient evidence of abandonment, unfitness, or failure of parental adjustment under NRS 128.105. Court reiterates that the power to terminate parental rights is an "awesome power," Champagne v. Welfare Division, 100 Nev. 640, 645, 691 P.2d 849, 853 (1984), that is "tantamount to a civil death penalty." Drury v. Lang, 105 Nev. 430, 433, 776 P.2d 843, 845 (1989). This merits close scrutiny on appeal, but Court states that it will uphold terminations based on substantial evidence, and will not substitute judgment for that of the trial court judges.

Court reiterates need to find jurisdictional ground (fault or condition directly related to parent) and dispositional ground (focused on best interest of child). Both require "clear and convincing" evidence.

"Abandonment" per NRS 128.105 is "any conduct on the part of one or both parents which evinces a settled purpose on the part of one or both parents to forego all parental custody and relinquish all claims to the child." Intent is the decisive factor and may be shown by the facts and circumstances, and a presumption of abandonment arises after six months without support or communication. Here, there was less than six months of non-contact, so the presumption does not apply. Court's review of the record establishes "anything but" a settled purpose to forego parental custody.

"Unfitness" per NRS 128.015 is defined as "any parent of a child who, by reason of his fault or habit or conduct toward the child or other persons, fails to provide such child with proper care, guidance and support." Conditions which "diminish suitability as a parent" include substance abuse and inability of agencies to reunite the family despite "reasonable efforts." Quoting at length from Champagne, the Court stressed that "unsuitable" is a conclusion that should not be reached unless the parent has an "irremediable inability to function as a proper and acceptable parent." here, the Court does not find clear and convincing evidence of unfitness. The Court refers to alcoholism as "a devastating disease" with "tragic consequences" but the Court does not find itself able to conclude that the Mother's condition is "irremediable."

The Court looked askance at "failure of parental adjustment" as a ground under NRS 128.015 because it holds a child in limbo and is "fraught with difficulties." On the record, of the 22 months that the child was a ward of the court, there were five months of no efforts to adjust, and three months of partial efforts; otherwise, the record shows consistent attempts by the Mother. The Court distinguished Kobinski v. State, 103 Nev. 293, 738 P.2d 895 (1987) on the ground that there the Mother had obtained employment, a home, a fiancee and sobriety only after 10 year of frequent state intervention, during which time she "completely failed to meet minimal requirements." Without defining the term, the Court found a lack of clear and convincing evidence that the mother had failed "within a reasonable time" to correct her drinking problem.

Since jurisdictional grounds were lacking, the Court did not reach review of the dispositional grounds cited. DCFS was

ordered to come up with a plan to reunite the family, although Mother had not been allowed contact from December 1994 to May, 1996.

Justices Shearing and Young dissent, believing that there was sufficient evidence to support the lower court's termination.

Termination of parental right, round 2; Court finds jurisdictional and dispositional grounds from father's incorrigible behavior despite "slipshod" DCFS work

In re Weinper (Weinper v. State ex rel. Dept. of Human Resources), 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 91, May 30, 1996) In 1992, child was removed from home shared by drug-abusing Father and his mother, whom the Father sometimes physically abused, by DCFS (Department of Child and Family Services). A reunification case plan was adopted; Father did not show up at the review hearing, the report said "no progress," and Father paid no support. Father visited child, got some drug treatment (on probation for a criminal case) and had $156.00 garnished from wages. He was arrested twice more in 1993 for drugs, and tested positive on numerous occasions, and in September, 1991, DCFS filed a petition to terminate. Father appeared at hearing and requested counsel, which was granted.

Termination trial was held in February, 1995, by which time Father was held for assaulting his mother with a deadly weapon. In March, the district court (Hardcastle) terminated his parental rights.

Court held that although DCFS performance in this case was "slipshod," Father received due process. Recognizing the essential liberty interest in child/parent relationship, the Court found that Father received procedural due process by getting a clear and definite statement of the allegations of the petition, notice of the hearing and the opportunity to be heard, and the right to counsel. The Court found "at least clear and convincing evidence" of both jurisdictional and dispositional grounds for termination of parental rights. Lengthy history of drug use and criminal activity was proven; theft from and assault of Father's mother by Father justified the Court finding "no question" of Father's unfitness as a parent. Child was thriving in foster home she had lived in for 2 _ years, since she was 9 months old.

Justice Springer dissented, finding that fraud of welfare workers in failing to monitor Father's compliance with "ultimatum" during review period made termination inappropriate.

No matter who or what you worship, you need lawyers; there is no right to self-representation in Nevada Supreme Court under First Amendment

Blandino v. State, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 50, April 3, 1996) Defendant was convicted of violation of custody rights, and insisted on defending himself below (he did not trust lawyers). He attempted to represent himself on appeal as well, which the Nevada Supreme Court denied under NRAP 46. The Court remanded the case to the court below for the purpose of appointment of counsel. The Court held that the Sixth Amendment applies only to criminal trials, and there is no right of self-representation on appeal. The Court declined to create such a right, finding that the Court has a duty to ensure that appellants receive a fair appeal, that documents filed by untrained persons are often incoherent and fail to identify issues, and that such documents would "add to the already overwhelming workload of this court." Court was not impressed that appellant claimed First Amendment violation, claiming that God ordered him to represent himself; the effect is incidental on religious beliefs.

Dropping lengthy legal fight, even on the day of the hearing, prevents other side from getting attorney's fees as "prevailing party"; temporary support paid during lengthy pre-trial procedures did not count against prenuptial contractual alimony due

Dimick v. Dimick, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 56, Apr. 30, 1996) Parties had a child, and decided to marry. They entered into a prenuptial agreement the day before their wedding in August, 1989, which provided that in the event of divorce, husband would pay wife $200.00 spousal support for each month that they had been married, that community property would be split 75%/25% in wife's favor, and that if the agreement was contested, the non-prevailing party would pay all attorney's fees.

Husband filed for divorce in September, 1992. Wife contested the validity of the agreement, but stipulated to its validity the day before the evidentiary hearing on that issue. District court (Fine) entered a decree, and the husband appealed on four issues.

The Supreme Court affirmed the lower court's denial of attorney's fees to the husband, since he did not file suit to enforce the agreement, but to get a divorce. The Court reasoned that since the wife stipulated to the validity of the agreement "before any hearing was held or evidence presented," she cannot be considered a "non-prevailing party." The Court stated that contract provisions for payment of attorney's fees by the loser give an incentive to settle that would be lost if a party could not settle or abandon a claim without risking being held to pay those fees.

The prenuptial agreement required the husband to pay $200.00 per month into a trust account, which he never did during the marriage. During the pendency of the case, the husband was ordered to pay the monthly mortgage expenses for the home occupied by the wife. The Court ruled that the husband's temporary spousal support obligation "is separate entirely" from the obligation to pay post-divorce alimony intended "to provide additional spousal support to [the wife] in the event of dissolution of marriage." The mortgage payments were not allowed to be credited by the husband against his post-divorce support obligation.

Husband was a contractor, and he signed both his and the wife's names to a trade-out purchase agreement for a parcel of real estate. Both parties signed "vesting instructions" for the escrow company to make them joint tenants of the property at the close of escrow. When the company ran into financial problems, husband assigned the right to acquire the parcel to a creditor. Wife refused to sign the assignment, so husband signed for her. The district court had found that the property had been "placed in joint tenancy" and awarded the wife 75% of its value, and sanctioned the husband $2,000.00 for signing her name to the

assignment. The Supreme Court reversed, stating that under NRS 111.105, none of the documents signed by the husband, or by both parties, actually transferred a property interest to the wife. Merely signing a purchase agreement is insufficient to convey an interest in property.

Finally, the Court reversed the lower court's order that each party retain such personal property as was in his or her possession at the time of trial. While NRS 125.150(4) provides that the separate property of a spouse may be awarded to the other spouse as support, there was no indication of any intent to make such an award in this case. It was error for the district court to fail to order the return of each party's personal separate property to that party.

Visitation decision is a "custody determination" requiring same due process safeguards as any custody case; visitation schedule based on non-custodian's relocation without accepting evidence or hearing argument on "the ramifications of such visitation" was "precipitous"; no abatements allowed for move of non-custodian

Wallace v. Wallace, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 130, Aug. 16, 1996) Mother had physical custody of son after divorce, and later remarried. The parties had joint legal custody; original visitation was to be "reasonable" per decree.

The Court recounted testimony indicating some inappropriate comments by Mother to child, and threats to remove the child from the Father's life. The Father had obtained an offer of a better job in Georgia.

The district court (McGee) stated that the case boiled down to whether the five-year old child should spend Wednesday nights with his father, that the Mother did not want to disrupt the child's routine, but was in fact undermining the relationship between Father and child. The district court expressed an intention to improve the child's view of his father beyond what Mother told the child, by increasing visitation, and entered a contingent order that if the Father moved, he would have one weekend per month, plus holidays and seven weeks in the summer, with a reduction in support of $100.00 in any month in which he traveled to Reno or the child traveled to Georgia, with a complete abatement during the summer visitation. The Court further ordered that if the child could not be with Father, the child would stay with Father's mother for that period. Father did move, and Mother appealed.

On appeal, the Court concluded that the lower court had imposed a visitation schedule without adequate notice or hearing, noting that NRS 125A.290(1)(a) requires visitation be ordered with "sufficient particularity to ensure that the rights of the parties can be properly enforced and that the best interest of the child is achieved." The Court held that a visitation decision is a "custody determination."

Again holding that matters relating to custody and support are within the lower courts' discretion, the Court held that discretion abused, finding that the lower court imposed a visitation schedule based on the Father's relocation without accepting evidence or hearing argument on "the ramifications of such visitation." While expressly not questioning the lower court's conclusion that the Mother was interfering in the child's relationship with the Father and that it was in the child's best interest to spend more time with the Father, there was no evidence on the impact of the relocation on an appropriate visitation schedule. The judgment was therefore reversed as "precipitous."

Turning to the legal grounds for this determination, the Court held that the actual order went beyond the issues that had been noticed to the Mother as before the lower court; she had no notice that the court would be considering visitation across thousands of miles, and therefore no opportunity to present evidence on that issue; under Wiese v. Granata, 110 Nev. 1410, 1413, 887 P.2d 744, 746 (1994), a party threatened with a loss of parental rights must be given an opportunity to disprove evidence presented; under Moser v. Moser, 108 Nev. 572, 576-77, 836 P.2d 63, 66 (1992), litigants have a right to a full and fair hearing, and preconditions to change of custody award must be supported by factual evidence. [EDITOR'S NOTE: This is an extension of the change-of-custody cases to apparently encompass all changes to visitation, which must now pass due-process muster to stand.]

Next, turning to the ordered abatements to support, the Court cited Anastassatos v. Anastassatos, 112 Nev. 317, 320, 913 P.2d 652, 654 (1996), and reiterated that the child support formulas set out in NRS 125B.070 is to be followed and that any deviation "must be based upon the statutory factors provided under NRS 125B.080(9)." The Court held that no abatement was allowable when it was the non-custodial parent that moved, speculating on possible legislative intent that some non-custodial parents would move for the purpose of spending money on transportation rather providing child support. Equity does not allow extending this statutory factor to non-custodial parents. Further, the court below failed to set forth findings of fact for its deviation as required by NRS 125B.080(6) for either the partial or entire abatements ordered, which the Court addressed as "plain error" even though not raised by the Mother.

The Court reversed the ordered grandparental visitation, citing NRS 125A.330(1); since the statute requires that the court in ordering such visitation "shall" consider the listed factors, the court below was required to receive evidence concerning, and consider, all enumerated factors.

Justice Springer dissented, calling the Court's decision a "clearly unwarranted invasion" of the lower court's discretion, and criticizes the Mother for her alienating behavior, stating that "the intention of NRS 125.480 is to reward cooperative behavior by a parent and to punish the kind of behavior engaged in by this mother .... In my opinion, this statute mandated the kind of order issued in this case, if not a complete change of custody from the mother to the father." He expressed disdain for every part of the majority opinion.

Correct decisions will be affirmed even if issued for wrong reasons below [apparently, no matter what was said in *Sims*]

Motenko v. MGM Dist., Inc., 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 132, Aug. 16, 1996) (non-family law case) Among other things, the Court reaffirmed its decision in Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 403, 632 P.2d 1155, 1158

(1981), that "If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon the wrong reasons."

Joint legal custody means what it says; only preponderance of evidence necessary for non-custodian to prevail over custodian in school choice question

Mack v. Ashlock, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 134, Aug. 16, 1996) The parties were divorced in 1991, and had joint legal custody, with Mother having primary physical custody, under the terms of a property settlement agreement that specifically required consultation by the Mother with the Father on various matters, including selection of schools. In July, 1995, the Father started looking into private schools. He informed the Mother of the results of his research in August. She considered his efforts to be last-minute, and wanted to investigate the possibility for the following school year, since school was scheduled to begin in September. The parties disagreed about whether the Mother refused to receive information, provide data regarding the children, or discuss the matter. She was unhappy about the prospective hardship of transportation.

The Father filed a motion to have the children enrolled in a Montessori school at his expense. The district court (McGee) held an in-chambers meeting with counsel on short notice, and found that the non-custodial parent had to overcome, by clear and convincing evidence, a decision by the primary custodial parent as to school choice. The lower court also awarded the Mother $680.00 in attorney's fees.

On appeal, the Court held that in child custody matters, "the sole consideration of the court is the best interest of the child" pursuant to NRS 125.480 and NRS 125.510(a). Again reciting the "broad discretion" of the district courts, the Court here found that discretion abused by requiring the "clear and convincing" standard of evidence. Only a preponderance of evidence is required to resolve a civil matter, absent clear legislative intent to the contrary. The award of attorney's fees was reversed because of the lower court's failure to mention its basis for granting the request.

Justice Shearing, concurring, would have gone further and held that "joint legal custody" gives the parents an equal right to make the determination in question.

For purpose of attorney's fees, question of frivolousness is determined as of time action is initiated, and is determined claim by claim

Barozzi v. Benna, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 84, May 30, 1996) Non family law case in which the Court re-emphasized its holding in Duff v. Foster, 110 Nev. 1306, 1308, 885 P.2d 589, 591 (1994), that in determining the validity of an award of attorney's fees under NRS 18.010(2)(b), "if an action is not frivolous when it is initiated, then the fact that it later becomes frivolous will not support an award of fees." The Court now fleshes out that the focus is the time of initiation of the action, not the time of trial, and remanded to apportion attorney's fees between the claims that had no reasonable grounds, and those that did have reasonable grounds. Quoting its holding in Bergmann v. Boyce, 109 Nev. 670, 675 P.2d 560, 563 (1993), the Court stated: "The prosecution of one colorable claim does not excuse the prosecution of [other] groundless claims." Justice Springer dissented.

Husband's waste or secretion of assets was sufficient "compelling reason" to redistribute remaining property

Lofgren v. Lofgren, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 156, Nov. 7, 1996) First interpretation of 1993 amendment to NRS 125.150 requiring trial courts to make an equal distribution of community property unless "the court finds compelling reasons" to do otherwise. Here, the district court judge (Gaston) did not seek to define "compelling reasons" but did find the husband's financial misconduct warranted an unequal distribution of the remaining property. Husband transferred funds to his father and used community funds for his own purposes, in violation of the joint preliminary injunction (JPI). "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 for making an unequal disposition of community property and may appropriately augment the other spouse's share of the remaining community property."

Here, the husband had transferred $100,000.00 to his father; while he got most of it back, some $39,800.00 remained unaccounted-for, which the court found was either wasted or secreted. Husband also "transferred $17,000.00 for his personal use" [Editor's note: since all litigants have some living expenses, the meaning of this finding is unclear], used $11,200.00 to improve and $10,000.00 to furnish his [apparently separate property]

"Liquidity safety, or convenient liquidity. That is the question, Ethel!"

house, transferred another $13,000.00 to his father, paid $5,000.00 to his children. Adding these sums to the missing $39,800.00 totaled some $96,000.00. The trial court's "augmentation" of the wife's share by half that sum, or $48,000.00, was approved.

Child abuse statutes not unconstitutionally vague

Smith v. State, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 155, Nov. 7, 1996) NRS 200.508(1)(a) & (b) are upheld as not unconstitutionally vague, for conviction of custodial mother for child abuse or neglect when her live-in boyfriend murdered her child. Specifically, the phrase "placed in a situation where the child may suffer physical pain or mental suffering as a result of abuse or neglect" was such that all the terms in the phrase were adequately defined so that the mother was provided with notice that her conduct was proscribed by law. Here, the mother knew or should have known that the boyfriend was beating the child, but refused to seek medical attention out of fear that the child would be taken away from her. Springer, J., dissents on the basis that the Court could not determine whether she was convicted of count one or count two.

Due process requires notice of issues to be raised at hearing or in decision; in lengthy dicta, Court says summer abatements improper without proof of more than time spent with noncustodian; lower court can choose filing or hearing as effective date of support changes; silent affirmation of half of health insurance premium as proper offset to child support

Anastassatos v. Anastassatos, 112 Nev. 317, 320, 913 P.2d 652, 654 (1996) District Court (Fondi) entered an order modifying child support at wife's request. Wife appealed due to other orders made. Divorce was in 1987, and Father paid $900.00 child support for three children. Mother requested a review of the amount of support pursuant to NRS 125B.080(1)(b) and NRS 125.145(1) on April 20, 1995. Negotiations failed, and the matter was decided by submission to Judge Fondi.

Father moved to set aside the resulting order, and filed an opposition and countermotion. He conceded that support should be set at the "statutory cap" of $500.00 per child, but wanted an offset for half of the health insurance premiums of $67.50 per month. he also wanted revised visitation. Mother opposed Father's requests, and both parties submitted proposed orders.

Mother, served with Father's proposed order, filed a formal objection to it, alleging that it addressed issues and sought relief not previously set out in the motions before the court. The lower court "effectively" adopted the Father's proposed order on August 8.

The Court accepted Mother's complaint that the relief granted was not raised in the pleadings and represented matters concerning which she neither received notice nor an opportunity to be heard, "the twin hallmarks of due process." While Nevada is a notice pleading state, a party must be given reasonable advance notice of an issue to be raised, and an opportunity to respond.

One of the issues not properly before the lower court was the Father's request (and the lower court's order) for abatement of child support during the summer visitation. While acknowledging that any discussion is unnecessary, the Supreme Court took "this opportunity to reiterate this court's position on the issue."

The courts' discretion is limited by the legislature as to child support, and any deviation must be based upon the statutory factors set out in the statute. Lewis v. Hicks, 108 Nev. 1107, 843 P.2d 828 (1992); Westgate v. Westgate, 110 Nev. 1377, 887 P.2d 737 (1994). The Court stated that "the compelling force of the statutory guidelines is of such a magnitude that in the event of a deviation from the statutory formula . . . the justification for the non-conformity must be specified in written findings of fact. Additionally, citing Barbagallo v. Barbagallo, 105 Nev. 546, 779 P.2d 532 (1989), the "basis for deviation" must be found in "the unfairness, the injustice, which may result to the secondary custodian if he or she, after making a substantial contribution of a financial or equivalent nature to the support of the child, were required to pay the full formula amount."

Here, the Court rejected the Father's position that no further finding was needed beyond that the children would spend four weeks with him in the summer, quoting at length from the Barbagallo caution about the fixed expenses of the primary custodian not decreasing just because the secondary custodian's expenses increase. The Court therefore reversed the lower court's deviation since it was not "adequately supported."

Finally, the Mother's complaint that the lower court made the child support increase effective as of the order date, rather than the date of filing the motion, was rejected. NRS 125B.140 allows the courts to make any changes effective at filing, but since the district court apparently found the delay to be unintentional, the Court found no abuse of discretion in the delay.

Primary custodian's *Parkinson* waiver of child support bars state agency from collecting reimbursement for welfare payments to custodian

State of Montana v. Lopez, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 147, Oct. 22, 1996) Custodial parent's waiver of child support payments bars a state agency from obtaining reimbursement for public assistance paid as child support. Here, mother had vanished with the kids in 1978. In 1990, the state of Montana garnished the father's wages; he claimed he had never received any contact from the mother or children, or any demand for support, and that the mother's concealment of the children for 14 years constituted a waiver of child support under Parkinson v.

Parkinson, 106 Nev. 481, 796 P.2d 229 (1990).

The district court (Jordan) held that the concealment constituted an intentional waiver of support, which also barred collection by the state of Montana.

The Supreme Court affirmed, holding that under NRS 130.100, a public agency stands in the shoes of the parent to whom public assistance was paid, with no greater rights, rejecting Montana's public policy argument grounded in serving the taxpayers. No one challenged the finding below that the mother had waived child support by intentional concealment of the children. The Court rejected contrary RURESA cases, instead following

one contrary case from California, which held in part that "assignment of a sow's ear to the county cannot transform it into a silk purse."

One party's bankruptcy can be considered by court in determining alimony and property distributions

Allen v. Allen, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 149, Oct. 22, 1996) Husband and wife entered into oral property settlement in April, 1992; the wife waived child support, and the husband agreed to pay certain debts and pay $16,250.00 to the wife "to equalize the division of community property." The agreement was made during a "settlement conference" held by the district court (McGee), but was not reduced to writing for a year, until April, 1993, when the court entered a divorce decree "nunc pro tunc" adopting the agreement.

In the interim, the husband filed bankruptcy, and was "released" from most of the financial obligations. The wife claimed that the husband used the bankruptcy to defraud her out of her share of the community property and that because of the bankruptcy there was a failure to equalize the division of community property as intended. The wife moved to set aside the decree, which was denied by the district court as "barred by federal law."

The Supreme Court, noting that the district court knew all these facts, expressed no understanding of why the district court would enter the decree in the first place, but held that in any event, it was error to refuse to set it aside. Noting its holding in Siragusa v. Siragusa, 108 Nev. 987, 843 P.2d 807 (1992), the Court again held that the lower court could consider the effect of the husband's bankruptcy upon the community and the rights of the parties, "but this is not to say the state court would be interfering in any way with the bankruptcy court's decree." The Court expressly rejected the husband's assertion that the wife's fraud claim was waived under 11 U.S.C. sec. 524 because she failed to file a complaint in the bankruptcy action.

Finally, the Court concluded, that even aside from the question of fraud, the decree entered was inherently unfair and should be set aside: "Under no circumstances, bankruptcy or no bankruptcy, should one party to a divorce be allowed to take all of the benefits of the divorce settlement and leave the other party at the disadvantage suffered by the wife in the present case."

Extreme case of desiring to resolve case on merits despite counsel's delay of about a year in transmission of the record; counsel sanctioned

Hansen v. Universal Health Servs., 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 151, Oct. 22, 1996) Non-family law case involving appeal of medical malpractice case. The underlying order was entered in January, 1994, and the appeal was filed in February. The record on appeal was never transmitted. Respondents moved to dismiss once, seven months later. The Court denied the motion, but sanctioned the appellants' attorney $500.00. Appellant moved for yet another extension in February, 1995; the Court granted that motion in June, allowing another thirty days. In August, respondents moved to dismiss a second time. The Court noted that appellants' counsel had no real excuse for failing to cause transmission of the record (his second response, a year after the first, was essentially identical to the first one), but that "the compelling nature of the facts in the underlying dispute persuades us to allow this appeal to proceed. Moreover, in light of this court's preference for deciding cases on the merits, see, e.g., Price v. Dunn, 106 Nev. 100, 105, 787 P.2d 785, 787 (1990); Hotel Last Frontier v. Frontier Prop., 79 Nev. 150, 155, 380 P.2d 293, 295 (1963), and because the dilatory conduct in this matter has been occasioned solely by counsel's inexcusable neglect, rather than his client's conduct, we decline to dismiss this appeal." The Court sanctioned appellants' counsel $5,000.00 ($1,000.00 to respondents' counsel, and the rest to the law library), and gave him 20 days to submit the record or face further sanctions, including dismissal.

Social security is not be considered in any way; distribution of spousal share at eligibility of worker spouse to retire upheld; spousal support may not be substituted

Wolff v. Wolff, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 163, Dec. 20, 1996) At divorce, 11.71 years of husband's 21.65 years of service with PERS (highway patrol) were during marriage, creating a 54% community interest. Husband became eligible to retire three months after divorce, but elected to keep working. The district court (McGee) ordered that the community share of the retirement was $1,155.12 per month, and that husband had to pay that sum from his salary until he actually retired. The lower court also apparently held that an "equivalency" must "reflect [the husband's] obligation to transfer his vested community property interest in [the wife's] social security benefits" and must "reflect" that the husband was paying taxes on his current salary. Still, the district court apparently held that the amount of the wife's community share of the husband's retirement, when he entitled to receive it, will never be less than $578.00. The lower court awarded $450.00 per month in "Limited Temporary Spousal Support" until the husband retired, as a "reasonable equivalency," ordered that her payments would not terminate upon her remarriage, or her death, and that the support was taxable to her and deductible to him.

The Supreme Court first held its review limited to the standard of abuse of discretion. Next, citing Walsh v. Walsh, 103 Nev. 287, 738 P.2d 117 (1987) and Carrell v. Carrell, 108 Nev. 670, 836 P.2d 1243 (1992), the Court held that pension payments cannot be classified as temporary spousal support, because such support is subject to possible future modification.

Next, the Court noted that under Gemma v. Gemma, 105 Nev. 459, 778 P.2d 429 (1989) and Sertic v. Sertic, 111 Nev. 1192, 901 P.2d 148 (1995), the wife acknowledged the district court's valuation of the spousal share as correct. The Court found inadequate, however, the lower court's explanation that the gap from $450.00 to $577.56 was reflective of "the taxable consequences" of the payments; it found the reduction "arbitrary" and held that it violated the equal distribution presumption of NRS 125.150(1)(b).

The Court rejected the husband's attack on Gemma, in which he argued that it was "fatally flawed" for non-recognition of the "passive appreciation of the

sole and separate portion" of the retirement during the marriage, and it affirmed Gemma, Sertic, and Fondi v. Fondi, 106 Nev. 856, 802 P.2d 1264 (1990).

The Court reversed the lower court's requirement that the husband purchase a life insurance policy to cover a loss of benefits to the wife if the husband died prior to retirement, since there was no existing insurance policy, and there was no corresponding liability to the wife, and it therefore constituted an unequal distribution of debt. The Court found that if the husband died before he retired, the wife still may be entitled to a portion of the retirement, citing NRS 286.6703.

The Court specifically affirmed the lower court's order that the wife's share would not revert to the husband if she predeceased him, but would instead continue being paid to her estate. The Court held that the community interest was divided upon divorce to two sole and separate interests, citing 15A Am. Jur. 2d Community Property Sec. 101 (1976), so that even if the estate was not listed as an alternate payee in NRS 286.6703(4), her estate was entitled to the payments that she would have received if alive.

Citing the A.L.R., federal and California cases, and law review articles, the Court rejected the husband's request for consideration of the wife's accrual of social security benefits, quoting language that the benefits are not "a form of deferred compensation, and therefore not . . . community property subject to division between the spouses." The Court held that "social security benefits, or the payments used to derive those benefits, cannot be divided in a property settlement agreement." The Court went on: "Further, they cannot be given any consideration in 'offsetting' one spouse's community property interest in the other spouse's retirement benefits," citing Hisquierdo v. Hisquierdo, 439 U.S. 572 (1978). The Court noted the lower court's statement that it was not awarding an offset of the social security benefits when he reduced the monthly payments to the wife, but that "Calling a duck a horse does not change the fact that it is still a duck. 'Considering' [the wife's] social security benefits does not change the fact that this is still an offset, and therefore, error." The Court cited several cases holding that social security benefits cannot be considered, distributed, or offset in marital property divisions. [EDITOR'S NOTE: This appears to call into question the Court's holding in Anderson v. Anderson, 107 Nev. 570, 816 P.2d 463 (1991), where it used the husband's receipt of twice as much per month in Social Security as the wife received as support for the unequal division of marital assets.] Reversing the reduction in the wife's monthly share as based in part on such a prohibited consideration, the Court affirmed the holding below that each party's social security benefit was separate property.

Finally, the Court rejected the husband's argument that there was a compelling reason for unequal distribution based on the wife's education and experience during marriage as a mortgage broker, which he asserted gave her double his earning potential, finding it waived on appeal because not presented below, citing Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 623 P.2d 981 (1981).

Rose, J., dissented, citing a prohibition of considering the effect of social security to one party "patently unfair." He would hold that a trial court consider such future eligibility as part of the "totality of the circumstances" so that there was no windfall and hardship "merely because of the type of pension benefits received from employment."

The parental preference for custody is reaffirmed and the factors to be weighed are set out

Locklin v. Duka, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 177, Dec. 20, 1996) Child was born in 1985; while mother did not smoke, drink, or use drugs during pregnancy, by the time the child was a year old, the marriage soured and mother began to use methamphetamine. Mother took child to live with maternal grandparents. In July, 1988, a California Superior Court appointed the grandparents as the child's guardians, with no objection to mother. Mother infrequently had contact, and provided no personal or monetary support.

Mother tried to remove the guardianship in late 1989, alleging interference with visitation, but abandoned the effort because her drug dependency made her unfit. In 1991, mother moved to Chicago and entered a drug rehabilitation program. The grandparents moved from California to Nevada. There was some visitation, in Nevada and Illinois, at least four times. Mother married, in Chicago, in 1993, and moved back to Nevada to be near the child, visiting "pretty much every day."

Mother had marital difficulties (including some battery by her husband), resulting in some medical care, but the child was not exposed to it, and the husband got counseling. In January, 1995, mother filed a petition to dissolve foreign guardianship; the grandparents opposed it. Once mother filed the petition, the grandparents made visitation more difficult. On mother's request, a court granted visitation every other weekend and one night per week, and ordered mother to begin paying child support. Mother complied in every way.

At the eventual hearing, the mother was found to be a fit parent by the court based on the testimony of the parties-appointed psychologist, of the court-appointed guardian ad litem, and of the grandparents. The psychologist suggested placement with the grandparents because the child was "slightly more secure" there, and because the mother's re-entry into the child's life "still carries with it some lack of continuity," but that the child could strongly bond with the mother, that the mother presented no danger to the child, and that placement with the mother would created no psychological injury that could not be overcome.

The district court (Griffin) found that the mother (1) exhibit concern for the child over the years; (2) never showed any intent to abandon the child; (3) desired to be with the child enough to motivate her to kick her drug dependency; (4) had consistently been involved with the child since ending her drug dependency; and (5) realistically took considerable time to create a relationship with the child and did not selfishly seek her own interests. The court awarded custody to mother (effective at the end of the school year), and specifically that the sporadic contact over the four years preceding the last three years of more regular contact, was not a sufficiently inordinate circumstance to overcome the parental presumption set forth in NRS 125.500(1).

Reaffirming Litz v. Bennum, 111 Nev. 35, 888 P.2d 438 (1995), the court found that the parental preference may only be overcome by a showing that the parent is unfit or other extraordinary circumstances." The court found the facts in this case quite similar to Litz, and that the Court there held that the parental preference may be overcome only "when it clearly appears that the child's welfare requires a change of custody."

The Court adopted "a composite of the factors identified under the case law of the states of Wisconsin, New York, and Maryland" to "best provide our courts with a foundation for determining when there are sufficiently compelling, or extraordinary circumstances to overcome the parental preference." Such circumstances are those which result in serious detriment to the child. Factors which may be considered in evaluating whether such extraordinary circumstances include: abandonment or persistent neglect of the child by the parent; likelihood of serious physical or emotional harm to the child if placed in the parent's custody; extended, unjustifiable absence of parental custody; continuing neglect or abdication of parental responsibilities; provision of the child's physical, emotional and other needs by persons other than the parent over a significant period of time; the existence of a bonded relationship between the child and the non-parent custodian sufficient to cause significant emotional harm to the child in the event of a change in custody; the age of the child during the period when his or her care is provided by a non-parent; the child's well-being has been substantially enhanced under the care of the non-parent; the extent of the parent's delay in seeking to acquire custody of the child; the demonstrated quality of the parent's commitment to raising the child; the likely degree of stability and security in the child's future with the parent; the extent to which the child's right to an education would be impaired while in the custody of the parent; and any other circumstances that would substantially and adversely impact the welfare of the child. The best interests of the child must still be considered even after a finding of extraordinary circumstances that overcome the parental preference presumption.

Here, the mother testified that the guardianship placement was voluntary, but the grandparents said that the mother had "essentially disappeared." The weight and credibility to be given to trial testimony is solely the province of the trier of fact, and findings are not to be set aside unless clearly erroneous. The evidence supported the lower court's finding that the mother "exhibited concern" for the child during the period of sporadic contact, and she had never "showed an intent to abandon" the child. The lower court's decision was affirmed.

Parents can be so unintelligent that their parental rights may be terminated

Bush v. Bush, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 159, Dec. 20, 1996) Three-justice majority opinion affirming order by district court (Hardcastle) terminating parental rights of parents who have IQS of 65 and 71, whose two children are also "mentally challenged". The lower court found grounds for termination on the grounds of parental unsuitability and failure of parental adjustment. They were unable, even when willing, to "assimilate and practice the lessons being taught" and the Court found statutory grounds under NRS 128.105 and 128.106 were supported by the evidence. Despite six years of efforts by social workers, parents were "unable to meet the immediate and continuing needs of the children." Finding the five years that the children had been in foster care "dismaying," the Court stated that "the parents' right to retain their children is an important consideration in the analysis" but found that "the rights of the children to a stable future with a loving family must be paramount" and therefore affirmed the termination. J. Steffen concurred in the result, noting the "Hobson's choice" of preserving parental rights at the expense of children or sacrificing the parents in order to salvage the lives and future of those children. He mainly affirmed based on the seven years that had gone by while the children grew up in foster care. J. Springer filed an 18-page, scathing dissent, phrasing the result below to be that the parents "are 'incapable of obtaining the skills' in parenting that parents must now possess in order to avoid the threat of having the State take away their children and give them to new, more skillful parents." He chastised "these onslaughts on the poor and the handicapped," tracing them to legislative language and an overly intrusive bureaucracy, which he blamed not on the workers, but on the Court for not giving guidance of proper constitutional limitations, and chastised the Court for ducking the "chilling" questions of when the State could take children away from fault free parents deemed "incapable" of raising children — "Many of us today would not have been allowed to remain with our parents if the only basis for permanently taking us away from our parents was that there were some better parents around the corner."

"No, we're not officially married. I'm leasing my husbands these days!"

NFLR JUDGMENT, ORDER, AND SETTLEMENT REPORT FORM

Knowing what is happening at the trial level in Family Law will help all of us to be better practitioners. Please share with the Section what is happening in any case you think is significant, either because it typifies rulings in an area, or appears to be contrary to normal rulings in that area.

CASE NAME: _____ DATE:

PROCEDURAL STATUS: [ ]-Pre-Trial Motion [ ]-Trial/Settlement [ ]-Post-Trial Motion

COUNTY: _____ DEPT./JUDGE: _____ CASE NO.: _____

POINT OF PRIMARY INTEREST: [ ]-Procedure [ ]-Custody [ ]-Visitation
[ ]-Child Support [ ]-Spousal Support/Alimony
[ ]-Property Division [ ]-Other

EXPLANATION/SUMMARY: _____

_____

_____

_____

_____

_____

_____

ATTORNEY(S): PLAINTIFF: _____ DEFENDANT: _____

OTHER RELEVANT PERSONS—EXPERTS/WITNESSES/ETC: _____

_____

WHO ARE YOU?: _____
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