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New Findings and Considerations for Shared Parenting Plans for Infants

By Margaret Pickard, Esq. and Stephanie Holland, Ph.D.

Courts often craft unique parenting plans to protect the best interests of infants and toddlers, while also preserving the rights of parents to have frequent and continuing contact with their children. The constitutional rights of parents are outweighed only when state intervention is necessary to protect the interests of the children. The standardization of parenting plans, and, in particular, those routinely adopting joint physical custody for infants and toddlers, must continually be assessed on a case-by-case basis, in order to meet the needs of the children involved and the ability of their parents to effectively meet those needs.

At the 51st Annual Association of Family and Conciliation Courts, held in May in Toronto, Canada, legal and mental health professionals from around the world gathered to address shared parenting issues, at the conference, which was entitled, "Navigating the Waters of Shared Parenting: Guidance from the Harbour." The three-and-a-half day conference offered 82 workshops on associated topics. Of particular interest to family law practitioners and judges were a series of workshops offering perspectives on the psycho-social impact of shared parenting arrangements for young children. The purpose of this article is to highlight the relevant information from two of these workshops, in order to assist Nevada family law attorneys and to provide guidance for judges in creating and assessing parenting plans for infants and toddlers.

The first of these workshops, "Overnights and Young Children: Unified Principles from Attachment and Parenting Involvement and a New Practice Framework," was standing room only, as esteemed social science researchers Jennifer McIntosh, Ph.D, Marsha Kline Pruett, Ph.D, MSL, and Joan B. Kelly, Ph.D ("the McIntosh team") reported on their research findings, published in the April 2014, FAMILY LAW REPORTS, addressing the impact of overnight visitations on infants and toddlers. *See* McIntosh, J., Kline Pruett, M. and Kelly, J.B. (2014), *Parental Separation and Overnight Care of Young Children, Part II: Putting Theory into Practice,* Family Court Review, 256-262. The McIntosh team offered practitioners a research-based perspective on issues for consideration in overnight visitations in shared parenting of infants and toddlers; however, the overall consensus was that there is little agreement between

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Nevada Family Law Report

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A Note from the Editor

By Shelly Booth Cooley, Esq.

In our first article, Margaret Pickard and Stephanie Holland provide research and factors to consider when crafting infant parenting plans. In our second feature, Robert Cerceo and Rayna Brachmann provide a guideline of how contested child custody cases may occur in Washoe County and Clark County. The third article, by Emily McFarling, compares the holdings in *Lozano v. Montoya Alvarez*, 572 U.S. __ (2014) and *Druckman v. Ruscitti*, 130 Nev. Adv. Op. 50, (2014), and how the holdings are at odds in analyzing whether a child is "well-settled." The fourth feature, the second part of a two-part article, Mark E. Sullivan addresses retirement issues for Reserve Component members. Lastly, in an article submitted by Kathy DiCenso, provides steps to help protect a client's credit score during divorce.

Specialization Exam:

Good luck to our colleagues sitting for the Specialization Exam on February 28, 2015 (the Saturday prior to the Family Law Conference).

Family Law Conference:

The Family Law Conference is March 5 through 6, 2015, in Ely, Nevada. I am looking forward to seeing everyone there. Safe Travels!

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professionals regarding the long-term impact of infants having overnight visitations with both parents.

The second workshop, "New Findings on Infant Overnights and Relocation," presented by Karina Sokol, Ph.D, a faculty member at Glendale Community College, William Fabricius, Ph.D, an associate professor at Arizona State University, and Matthew Stevenson, Ph.D, a former graduate student at ASU, offered two correlated empirical research studies that documented the long-term benefits for adult children who have experienced regular overnight visitations with both parents in healthy co-parenting relationships.

These two workshops, taken together, can provide family law practitioners important guidance on developing appropriate overnight parenting schedules for infants and toddlers. The McIntosh team looked to move beyond the polarized positions which the adversarial system creates to offer, instead, solutions taking into account the psychological and developmental needs of children, ages one to four. The first four years of life are crucial to a child's long-term mental health. During this stage of their development, children begin to regulate and express emotions, form close and trusting relationships, and learn by exploring their environment, and so much depends upon a caregiver's ability to recognize and respond to the needs of a young child.

Lengthy separations from a primary caregiver (the person children turn to in times of stress) have empirically been considered a developmental risk factor for children. The McIntosh team asked legal professionals to understand while children can be attached to multiple caregivers, they generally prefer proximity to a particular caregiver in their first 18 months of life. While babies don't respond to gender as much as to quality caregiving, the researchers found that mothers were generally better able to recognize and respond to their infant's stress levels, while fathers were better at stimulating the children's play and learning behaviors. Similar studies on related topics clearly document the advantages of a father's involvement in his children's lives. *See e.g.*, George, C., Solomon, J. and McIntosh, J. (2011). *Divorce in the Nursery: On Infants and Overnight Care,* Family Court Review, 49: 521-529. To meet these needs, the McIntosh team recommended that courts adopt parenting plans that

gradually increase overnights away from the primary caregiver in custody cases. While this may not meet the needs of parents to have shared physical custody, the McIntosh team suggested that "step-up" plans would have significant long-term emotional and mental health benefits for the child.

Although the members of the McIntosh team disagreed on standard guidelines for overnight visitations for infants aged 0-48 months, they all agreed that infants benefit from frequent and continuing contact with both parents, in the absence of abuse or neglect. The researchers found that the empirical cautions against *any* overnight care away from a primary caregiver during the first three years have not been supported, concluding that some overnights, coupled with daytime visits away from a primary caregiver, were not harmful to infants.

The McIntosh team's points of consensus, which they labeled "Points of Integration," established basic parameters for considering shared parenting arrangements for young children.

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Specifically, they highlighted the following points:

1. Early childhood, that is, a child's first three or four years, is a period critical to a their psychosocial and emotional development and requires planning in family law matters;
2. A child's healthy development is dependent on the capacity of caregivers to protect the child from physical harm and undue stress by being a consistent and responsive presence;
3. Healthy child development is dependent on the capacity of the caregivers to stimulate and support the child's independent exploration;
4. Secure development requires multiple support systems from family, community, and cultural connections to create continuity in care giving;
5. The optimal environment is supported by a healthy co-parenting relationship that supports a child's relationship with each parent;
6. The authors caution against high-frequency overnight time schedules when the child's "security with a parent is unformed" or the parents cannot agree on how to share care of the child;
7. Variables in assessing the impact of overnight timeshares include the parents' psychological and social resources, the nature of the parent-child relationship prior to parental separation and the parental dynamic, with a particular concern about the impact of a conflicted parental dynamic.

Based upon these protective factors, the McIntosh team offered eight factors to be weighed in determining the extent and frequency of overnight timeshares for young children. Specifically, ***if a child's basic emotional needs are met, overnight timeshares can be beneficial for young children***. In order to begin the discussion of overnight visitations, the first level assumptions must be met, which are, specifically:

1. ***Safety:*** The child is safe with, and can be comforted by, both parents;
2. ***Trust and Security***: The child has an established (six months or more) relationship with both parents and seeks comfort from each parent in the absence of the other.

Assuming these assumptions are met, then a parenting plan should consider:

3. ***Parents' Mental Health***: The parents are able to meet the child's needs and have either no drug, alcohol and/or mental health issues, or such issues are well-managed;
4. ***Child's Health and Development***: The timeshare supports the child's developmental needs, including breast-feeding infants;
5. ***Behavioral Adjustment***: The plan provides increased timeshares based on the child's coping responses, observing persistent behaviors (over three to four weeks) of irritability (without a medical cause), excessive clinging on separation; frequent crying/distress, aggression and/or self-harm, regression (*e.g.,* soiling), delayed play/learning;
6. ***Co-Parenting Relationship***: Reflect the parent's ability to manage conflicts and shield the child from conflict;
7. ***Pragmatic Considerations***: Realistically account for parental geographical distance and work commitments to maximize the child's care by parents or family members in a parent's absence; and
8. ***Family Factors***: Foster positive relationships with siblings by maintaining similar schedules and maintain other secure relationships including grandparent relationship and cultural and religious practices.

If the basic assumptions of safety and protection are NOT met, the priority of the decision maker is to ensure that one organized (trusting) attachment is formed, even if that delays the other parent in spending time with the child. This may include situations involving neglect, domestic violence, personality disorders, mental illness, or parenting relationships involving geographic distances or *high conflict.*

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The McIntosh team members all agreed that even in ideal circumstances, high-frequency overnights are difficult for infants up to 18 months old, as well as for older infants and toddlers who demonstrate regulation difficulties or are stressed by the arrangements. In these situations, a "step-up" plan to increase overnight timeshares is recommended to allow increased timeshares based on a child's maturation and/or counseling supports for the parents. However, ***if parents are able to mutually agree on a schedule, even if that schedule is outside of the factors outlined, that timeshare should be adopted, as parental conflict, or its absence, is one of the strongest indicators of whether or not a child will make a healthy adjustment to new circumstances.***

The integrated research of the McIntosh team, coupled with the empirical analyses presented at the second workshop, "New Findings on Overnights and Relocations," presented by Karina Sokol, Ph.D, William Fabricus, Ph.D, and William Stevenson, Ph.D, supports the importance of shared parenting arrangements, even for very young children, under the right conditions.

These researchers presented statistical correlations of positive outcomes for children who maintained consistent contact with *both* parents during infant overnights and/or parental relocation cases. Sokol's research assessed the impact of infant overnights with fathers on the mother-child attachment. Specifically, Sokol was looking to assess whether father-infant overnights negatively impacted the infants' secure attachment to the mother. Sokol found that they did not and, in fact, of the 14 analyses of children's behavioral adjustment, there was one effect: Overnight timeshares at age three were associated with *more* positive behaviors at age five. Sokol extrapolated from the "Fragile Families and Child Well-Being" study of Tornello *et al.* (2013). Tornello, S. L., Emery, R., Rowen, J., Potter, D., Ocker, B. and Xu, Y. (2013), Overnight Custody Arrangements, Attachment, and Adjustment Among Very Young Children, Journal of Marriage and Family, *75,* 871–885. Most study participants were racial/ethnic minorities and low-income status. The researchers found that overnight timeshares with fathers at age three were associated with *more* positive behaviors at age five. Using Tornello's work to extrapolate further, Sokol used the same data to determine the effect of a child's relationship with the mother when children spend 55 percent or more of the custodial time with the father. Sokol posited that with increasing overnights, the children would have more insecure relationships with their mothers. However, surprisingly, Sokol's research found that father-custody infants had *less* insecurity with their mothers at age 1, not more. The peer-reviewed study relied on self-reports from the mothers, who may have subjectively perceived their relationships as stronger than they may, in fact, have been, although this would not account for the statistically significant positive outcome.

In a corresponding study, William Fabricius, Ph.D, a noted expert on father-child relationships in divorced families, aided by William Stevenson, Ph.D, refuted "the accepted wisdom in divorce literature that quantity of parenting time is less important than quality of time." The argument is often made, according to Fabricius, by a mother arguing to the court that overnight stays with the father for a child under the age of three will create insecure attachments for the child which will negatively impact the child throughout life. However, Fabricius noted that previous studies on infant-child attachment have only looked for short-term effects of infant's frequent overnights with a secondary caregiver, when the real concern should be the long-term effects of attachment-related anxiety for these children. Therefore, Fabricious' research focused on the long-term effects of infant overnights on the child's relationship with *both* parents.

To address this issue and debunk the social science myth that infant overnights with a second caregiver create insecure attachments, Fabricius studied college students whose parents divorced when they were 0-3. The

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students completed a parental inventory survey, analyzing their current relationship with each parent, and self-reported the status of their current physical health. Fabricius' research correlated with that of Sokol, finding that increased overnights with a second caregiver did not create a disorganized attachment to the first caregiver, dispelling years of research that overnights with a second care provider negatively impacted children's mental and emotional health. These findings were statistically significant and controlled for parental conflict and educational variables. While Sokol's research focused on racial/ethnic minorities and low-income families, research in this area is scarce and these findings can be extrapolated to the larger populations. In fact, the research confirmed that overnight parenting by a secondary provider (in this study, fathers), is beneficial for the child's long-term relationship with both parents. Fabricius weighed this against the substantial detriment to the long-term father-child relationship associated with the lack of overnight parenting time with fathers and analyzed whether children who had early overnights with a second caregiver (the father in this study), had any long-term stress-related health concerns. He found that a child's positive parental relationship is statistically more important to long-term health overall than lifestyle and hereditary factors.

These two workshops provide important guidance to legal professionals in creating parenting plans that meet the needs of infants and toddlers, as well as their parents. All experts agree that the most important factor for children's long-term adjustment in separated and divorced families is the level of parental conflict. The concept of conflict includes being highly reactive toward one and other, not being able to cooperatively parent in more than one area, the inability or unwillingness to coordinate schedules and/or ensure environments are more similar than not and are unsupportive when it comes to participation in special family events or celebrations.

Conclusions

When legal professionals are called upon to craft parenting plans, they must remember that while one or both parents may object to the other parent's involvement in the child's life, frequent and consistent contact with both parents is generally beneficial to a child's psychological well-being. Infants, defined as those 0-48 months, do best with step-up plans, which gradually and appropriately increase infants' overnights with their secondary caregivers. Such plans must be created with specificity, including clear days and times for each parent's timeshare, third party exchange locations, and minimal transitions to protect children from exposure to the parental conflict.

Far too many existing parenting plans require frequent face-to-face parental exchanges, which creates conflict that negatively impacts children's emotional well-being. Ultimately, parenting plans must be periodically reviewed by the parents or the court to assess the functioning of the family system and the viability of the plan, in order to ensure that the developmental needs of the children are being met.

While no blanket mandate for or against overnight visits for young children is currently supported by the social science research, there is universal recognition that supporting the parent-child relationship is vitally important for children. The benefits of consistent contact with the non-residential parent, absence abuse or neglect, typically outweigh the risk factors of overnight visitation. It's important that legal professionals create plans that

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Contested Custody Matters in Nevada, Frequently Asked Questions

By Robert Cerceo, Las Vegas, and Rayna Brachmann, Reno

Contested child custody cases are emotionally driven, often highly contested and rarely easy. This article provides a guideline of how these cases may occur in Washoe County and Clark County, along with some suggestions for discovery and sample language for orders.

The FAQ format is designed as a "roadmap," and where possible, we have included detail for further reading and exploration.

1. Is there a good and inexpensive book on Nevada child custody?

The most often used single book treatise on all aspects of family law is the *Nevada Family Law Practice Manual*. The latest version is the 2013 3rd Edition.

It is available in both binder form ($139) and electronic form ($85) and can be ordered at: http://www.nvbar.org/content/nevada-family-law-practice-manual.

2. Under what circumstances do custody cases usually arise?

The Nevada Revised Statutes ("NRS") permit litigation over the custody of minor children in Dissolution of Marriages (NRS 125) and Parentage (Paternity) matters (NRS 126).

The standard of review is the "best interest of the child," and this standard is also referenced in other areas of the NRS. The burden of proof is the preponderance of the evidence. Whenever the term "best interest of the child" arises, assemble your proof in the form of the statutory factors set forth in NRS 125.480(4). In other words, anytime you are faced with the "best interest of the child," the statutory factors should guide the evidence presented and arguments made.

In Clark County, a hybrid paternity custody case has emerged. It is styled as a Complaint for Custody. These cases are filed without reference to formalizing paternity under NRS 126, it receives a standard "D" case number, is not shielded the way "P" cases are (e.g., not visible on the online public records), and it bypasses other requirements in NRS 126. Reliance is placed on the establishment of paternity 60 days after the filing of an Affidavit of Paternity. NRS 126.053. Even though this is a parentage statute, the Clark County court "jumps" right into custody litigation as if it were a "divorce custody" proceeding. There are no known cases or statutory authority supporting the hybrid filing outside of NRS 126, however, it has been used for at least 10 years in Clark County and is unlikely to change in the near future.

See http://health.nv.gov/PDFs/FP_Forms/2010-12/Declaration_Paternity.pdf for the form in current use as the basis for the hybrid cases.

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3. What are the "best interest of the child" factors?

In evaluating the "best interest" of a child, the court must look to the factors set forth in NRS 125.480(4):

a. The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to their custody.
b. Any nomination by a parent or a guardian for the child.
c. Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.
d. The level of conflict between the parents.
e. The ability of the parents to cooperate to meet the needs of the child.
f. The mental and physical health of the parents.
g. The physical, developmental and emotional needs of the child.
h. The nature of the relationship of the child with each parent.
i. The ability of the child to maintain a relationship with any sibling.
j. Any history of parental abuse or neglect of the child or a sibling of the child.
k. Whether either parent or any other person seeking custody has engaged in an act of domestic violence (defined at NRS 33.018) against the child, a parent of the child or any other person residing with the child.
l. Whether either parent or any other person seeking custody has committed any act of abduction against the child or any other child.

4. Who are the parties to the action?

The parties are parents or guardians legally responsible for the children. Usually, the parties are the biological parents of the child. However, with the increase in artificial reproductive technologies and the expansion of the definition of families across the U.S. (e.g., same-sex relationships, surrogacy and adoptions), the persons standing in the primary parental role will be the parties to the action.

There is an increasing body of law for non-parents who have developed a relationship with the minor child, usually grandparents or step-parents. The NRS permits litigation to formalize the "rights of contact" for adults who have developed a loving relationship with the child over a period of time and have provided some fashion of their financial support. NRS 125C.050 is the applicable rule and it sets forth its own statutory factors, therefore, the "best interest of the child factors" are not used. Keep in mind, this form of litigation will never produce a custody result comparable in scope to custody cases brought under NRS 125.480.

5. What about representation for the child?

Children are rarely represented by counsel in custody cases due to limited resources, among other factors. However, the court may appoint a guardian ad litem. The practical question usually posed by the court is whether the "voice" of the child will be heard in the proceedings. For example, the court will usually deem the "voice" heard through a child custody evaluation expert, or an interview of the child set with either the judge or a court designee (CASA or the Family Mediation Center).

6. Where will the case be heard?

For subject matter jurisdiction, NRS 125A sets forth the jurisdictional requirements for custody litigation. Essentially, the Nevada court will hear the case if both parents have made an appearance in the case (standard civil litigation rules apply), or if the child has resided in Nevada for at least six months and there are no other orders impacting the children from other jurisdictions. For venue, standard civil litigation rules apply.

There are exceptions, and a good read on the topic can be found at: http://willicklawgroup.com/wp-content/uploads/2012/04/Child-Custody-Jurisdiction-in-Nevada.pdf.

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7. Is it a different jurisdictional test for child support?

Yes, stated as simply as possible, absent an appearance in the Nevada court by both parents, the child support matter must be brought in the state where the obligor resides.

8. Once the custody case gets rolling, what are the main steps?

The answers are slightly different in Washoe County and Clark Counties.

A. Case Management Conferences

The Washoe Court applies NRCP 16.2 with a Case Management Conference (CMC), where a meeting of both counsel, the parties, and the judge is held. The judge issues interim orders on all aspects of the case, including temporary custody orders, using the CMC Statements filed by each side. Additionally, the Washoe court will act upon a motion request to issue a temporary custody order.

The Clark County court applies NRCP 16.2 differently and the CMC is held only as a "status" hearing and no temporary orders are made except discovery and trial setting orders. CMC reports are rarely filed as many departments reject them as rouge documents even though these filings are permitted under NRCP 16.2. Temporary custodial orders are set only by the agreement of the parties on the record, or by way of filed motions.

B. Referrals to the Family Mediation Center ("FMC")

At the CMC (or the first written motion for interim orders), consistent with the local rules of Washoe County and Clark County, the parties are directed to custody-only mediation without attorneys with the Family Mediation Center. (Attorneys may be present if arrangements are made in advance, but this rarely occurs. We note as of this writing that a new rule change is pending making attorney presence easier to accomplish). The cost of the mediation is scaled to income and it is the most affordable option to resolve matters for parents in contested cases. If successful, a Parenting Plan is agreed upon and signed by the parties. If represented, the draft plan will be forwarded to counsel prior to becoming an Order of the Court. *See* WDCR 52, 53 and 54, EDCR 5.70.

In Clark County, about 45 days later, the matter returns to court for a status check. A final Parenting Plan is entered for settled cases. If not, the court gives the option of proceeding to the custody evidentiary hearing with or without the use of child custody experts and evaluation reports.

C. No custody experts used

If the matter proceeds without custody experts, then the trial will take the shape of a standard bench trial. The parties will call witnesses, and documentary evidence will be in the normal course. By doing things this way, a greater number of witnesses are usually involved.

D. Custody experts used and the appointment conundrum

When a Child Custody Evaluator is used, it can be with competing experts, or one expert acting as a court neutral. This is an expensive process, and often parties stipulate to one expert as the binding neutral (subject to

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cross-examination). However, the use of an expert can, in the long run, be a less expensive option for the client as most, or all, of the non-party witnesses will be interviewed and summarized in the expert's report. Thus, litigation with an expert is often one with many fewer witnesses, and this may result in a lower overall litigation fee.

The process starts with interviews of the parties and basic psychological testing. This is followed by expanded interviews with the parties, children, other adults living in the homes, any other witnesses, school records, medical records, etc. Essentially, the expert reviews and summarizes much of the data normally presented as evidence at trial. At the end of the report, recommendations are made for legal and physical custody provisions, and any further counseling options for the children and parents (if needed). Care must be taken as hearsay and other inadmissible documents are likely to be reviewed during the evaluation process and restated, relied upon or summarized in the report.

A conundrum occurs when the court sua sponte imposes a custody expert upon a case. In Washoe County, authority for imposing a custody evaluator is set by local rule, WDCR 54. Even with the rule in place, Washoe County uses custody evaluators somewhat less frequently than Clark County. There is no corresponding local rule in Clark County, which mandates the use of a custody evaluator, however, the Clark County courts are very quick to designate a court neutral custody evaluator along with an order for the division of costs (e.g., the perceived "money side of the case" is ordered to "front the costs subject to reimbursement at the end of the case"). Can the court sua sponte impose a neutral upon the parties? Is the appointment as a Special Master under NRCP 53? Is the appointment made under a rationale of the "best interests of the child?"

However you arrive there, when the court is inclined to appoint an expert, there is little you can do to stop it. Be prepared to discuss and set the parameters for costs and process, for example:

Prior to the evidentiary hearing, the child custody and visitation issues shall be reviewed by an outsourced evaluation through the Family Mediation Center ("FMC").

The outsourced evaluator shall include as part of the evaluation: a review of each parent's household; interviews with the parties, the child, and all related witnesses; consideration of the full history of both of the parties; any domestic violence considerations; any other relevant matters.

The outsourced evaluator shall issue an opinion on custody and visitation, and if warranted, address any special needs or considerations for the best interests of the child.

The court may freely contact the outsourced evaluator provided it copies both counsel with the communications. Each counsel may provide the evaluator with all relevant court filings and information provided that the other counsel is copied with the communications.

The normal channels of FMC referral and confidential reports to the court from the evaluator shall be followed, and the court shall use its discretion in releasing the reports.

9. What should go into the final custody order?

Other than the statutory provisions mentioned at the end of this section, parenting orders can take any shape. Use of the terms stated below is offered as a guide for a parenting order.

A. Joint Legal Custody

Legal custody establishes the rights and duties of the parents for basic parenting decisions such as: choice of medical providers, attendance at PTA meetings, schooling, etc. Most instances result in the parties being awarded joint legal custody, equal input on parental decisions, rights and duties. Some attorneys choose not to define this scope. If you wish to define with particularity, here are some options:

Neither parent shall do anything that shall estrange the child from the other parent or impair the natural development of the child's love and respect for each of the parents, or disparage the other parent or undermine the parental authority or discipline of the other's household. Additionally, each parent shall instruct their re-

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spective family and friends that no disparaging remarks are to be made regarding the other parent in the presence of the child. Neither parent shall use contact with the child as a means of obtaining information about the other parent. The parents shall consult and cooperate with each other in substantial questions relating to religious upbringing, educational programs, significant changes in social environment, and health care of the child.

The parents shall have access to medical and school records pertaining to the child and shall jointly consult, when possible, with any and all professionals involved with the child.

All schools, health care providers, day care providers, and counselors shall be, when possible, selected by the parties jointly. In the event that the parties cannot agree to the selection of a school, the child shall be maintained in the present school pending mediation and/or further Order of the Court.

Each parent shall be empowered to obtain emergency health care for the child without the consent of the other parent. Each parent shall notify the other parent as soon as reasonably possible of any illness requiring medical attention, or any emergency involving the child.

Each parent shall provide the other parent, upon receipt, information concerning the well-being of the child, including, but not limited to, copies of report cards; school meeting notices; vacation schedules; class programs; requests for conferences; results of standardized or diagnostic tests; notice of activities involving the child; samples of school work; order forms for school pictures; and all communications from health care providers. The parents shall also exchange the names, addresses and telephone numbers of all schools, health care providers, regular day care providers, and counselors who have contact with their child.

Each parent shall provide the other parent, upon receipt, information concerning school, athletic, church, and social events in which the child participates. Both parents may participate in activities for the child, such as open houses, atten-dance at an athletic event, etc.

Each parent shall provide the other parent with the address and telephone number at which the minor child will reside, and shall notify the other parent three days prior to any change of addresses and provide the telephone number as soon as it is assigned.

Each parent shall be entitled to reasonable telephone communication with the child. Each parent is restrained from unreasonably interfering with the child's right to privacy during such telephone conversations.

The parents agree to communicate directly regarding the needs and well-being of their child and agree not to use the child as communicator regarding parental issues.

The parents agree to use self-control and not verbally or physically abuse each other in front of the child.

Each parent shall provide the other parent with a travel itinerary for any travel of more than 48 hours, and telephone numbers at which the child can be reached whenever the child will be away from the parent's home for any period in excess of two days.

The parties agree they shall share joint legal custody of their minor children. By sharing joint legal custody, the parties agree that each shall be involved in all significant decisions regarding their children. The parties agree and acknowledge they are bound by the definition of "joint legal custody" in *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009), which states that parents have basic legal responsibility for their children and making major decisions regarding their children including the children's health, education and religious upbringing. The parties must cooperate, communicate, and compromise to act in the best interest of the children. Further, if the parents sharing joint legal custody reach an impasse and are unable to agree on a decision regarding their children, they may appear in court on equal footing to have the court decide on what is in the best interest of the children.

B. Physical Custody Options

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Contested Custody

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While not defined by the Nevada Supreme Court in this manner, an easy conceptual approach for clients is "where the child sleeps each night" as the measure for a "day." As measured over the course of a year, if less than 146 days are awarded to one parent, then the other is designated as the primary physical custodian. If more than 146 days, then both parents are designated as joint physical custodians.

The following are two very common scenarios for use in timeshare orders:

- **Primary Physical Custody example:** EVERY OTHER WEEKEND – While the primary residence of the children shall be with MOM, the minor children shall reside with DAD every other weekend from Friday afternoon 6 p.m. through Sunday evening until 6 p.m. The receiving parent will pick up the child and provide transportation.
- **Joint Physical Custody examples**: WEEK ON/ WEEK OFF – As of the date of the hearing, the child will reside with MOM one week, and then with DAD the next week, with exchanges taking place on Monday after school, and at the school, or 3 p.m. if school is not in session. The receiving parent will pick up the child and provide transportation.
- **2/2/5 SCHEDULE** – with younger children, often a week on/week off schedule is too long without seeing both parents. In those cases, a 2/2/5 schedule may be considered. In this schedule, every Monday and Tuesday are spent with MOM and every Wednesday and Thursday are spent with DAD. The children alternate long weekends, Friday, Saturday and Sunday between their parents so that in Week One, MOM has the children Monday and Tuesday while DAD has Wednesday through Sunday. In Week Two, MOM has Friday through Tuesday while DAD has Wednesday and Thursday.

Holidays and vacations must also be considered. These "override and replace" the regular weekly visitation. Many pro forma divisional plans are available. The following is a list of notable breaks from school for negotiations on alternating holidays: Spring break; Thanksgiving weekend; winter break (including things like Christmas eve and day or New Year's eve and day); three-day holidays including Veteran's Day, Nevada Admission Day and Halloween, Martin Luther King Day, Labor Day, Memorial Day, Independence Day, etc.; other special days including Mother's Day, mother's birthday, father's day, father's birthday, child's birthday; and, a block of uninterrupted time for each parent for Summer Vacation.

C. Medical Insurance for the Child

NRS 125B.085 mandates all child support orders to include medical insurance for the children. For the prospective orders, it is common to use the "30/30" reimbursement, for example:

> The parent incurring the expense shall timely submit the request for reimbursement to the other in writing within 30 days of it being incurred. The obligor shall then pay the reimbursement within 30 days. The range of benefits to be covered include, but are not limited to medical, dental, orthodontic, psychological and/or psychiatric treatment and any special needs treatments. If no timely claim is made for reimbursement, then the claim shall be deemed waived by the court.

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Contested Custody

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This "30/30" reimbursement language can also be applied to approach the parent's sharing of the children's extra-curricular expenses.

D. Behavioral Orders

Essentially, this is a "be decent to each other" order and can be customized as needed:

The parties are hereby ordered to do the following:

1. No abusive telephone calls to either party.
2. No name calling.
3. No foul language.
4. Avoid conflicts/contacts with the other party's "significant other."
5. Do not use child as a weapon against the other parent.
6. No harassment at places of employment.
7. No copies of letters to anyone associated with a party.
8. No phone calls to other people associated with the other party.
9. Focus to remain on best interest of child.
10. Maintain respect toward the other party's relatives and friends.
11. You will advise all of your friends, relatives and significant others, (if any) not to disparage, criticize or harass the other party.
12. Child custody exchanges, visitations, etc. shall be done in a civil, law abiding manner and reasonably close to the times specified by the court.
13. No threats of violence or harm to any other party, any other relative and/or friends of any party.
14. Neither party shall interrogate the child or children as to the activities or events at the other parent's residence, etc. and shall try to respect the child's privacy and relationship with the other parent.
15. In the event of an emergency or unforeseen circumstance that could affect an exchange of the child or the time of the exchange, a party shall call or contact the other party as soon as is reasonably possible.

E. Statutory Proclamations

NRS 125.510(6) and (7) mandate the inclusion of statutory provisions for custody orders. Failure to include them will result in the rejection of proposed custody orders. Also included here for completeness are the child support statutory provisions:

NOTICE IS HEREBY GIVEN that the parties are subject to the provisions of NRS 125C.200, and formerly, NRS 200.359, which provide: "If custody has been established and the custodial parent or a parent having joint custody intends to move his residence to a place outside of this state and to take the child with them, they must, as soon as possible and before the planned move, attempt to obtain the written consent of the other parent to move the child from the state. If the noncustodial parent or other parent having joint custody refuses to give that consent, the parent planning the move shall, before they leave the state with the child, petition the court for permission to move the child. The failure of a parent to comply with the provisions of this section may be considered as a factor if a change of custody is requested by the noncustodial parent or other parent having joint custody;" as well as NRS 125.510(6) which provides:

PENALTY FOR VIOLATION OF ORDER: THE ABDUCTION, CONCEALMENT OR DETENTION OF A CHILD IN VIOLATION OF THIS ORDER IS PUNISHABLE , AS A CATEGORY D FELONY, BY UP TO 6 YEARS IN PRISON AS PROVIDED IN NRS 193.130. NRS 200.359 provides that every person having a limited right of custody to a child or any parent having no right of custody to the child who willfully detains, conceals or removes the child from the parent, guardian or other person having lawful custody or a right of visitation of the child in violation of an order of this court, or

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Contested Custody

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removes the child from the jurisdiction of the court without the consent of either the court or all persons who have the right to custody or visitation is subject to being punished by imprisonment in the state prison for not less than 1 year nor more than 6 years, or by a fine of not less than $1,000 nor more than $5,000, or by both fine and imprisonment.

NOTICE IS HEREBY GIVEN, that pursuant to NRS 125.510(7) and (8), the terms of the Hague Convention of October 25, 1980, adopted by the 14th Session of the Hague Conference on Private International Law are applicable to the parties. Nevada is hereby declared the State, and the United States of America is hereby declared the country, of habitual residence of the children for the purposes of applying the terms of the Hague Convention as set forth above.

NOTICE IS HEREBY GIVEN that under the terms of the Parental Kidnapping Prevention Act, 28 USC § 1738A, and the Uniform Child Custody Jurisdiction Act, NRS 125A.010 Et seq., the courts of Nevada have exclusive modification jurisdiction of the custody, visitation and child support terms relating to the child at issue in this case so long as either of the parties, or the child, continues to reside in this jurisdiction.

NOTICE IS HEREBY GIVEN to both parties that the parent having the child support obligation is subject to NRS 125.450 and NRS 31A.020 - .230, inclusive, regarding the immediate withholding or assignment of wages, commissions or bonuses for payment of child support, whether current or delinquent.

NOTICE IS HEREBY GIVEN that pursuant to NRS 125B.145, either party may request that the court review the child support obligation every three years or upon changed circumstances.

NOTICE IS HEREBY GIVEN that pursuant to NRS 125B.140, if an installment of an obligation to pay support for a child becomes delinquent, the court shall determine interest upon the arrearages at a rate established pursuant to NRS 99.040, from the time each amount became due. Interest shall continue to accrue on the amount ordered until it is paid, and additional attorney's fees must be allowed if required for collection.

NOTICE IS HEREBY GIVEN that pursuant to NRS 125B.095, if an installment of an obligation to pay support for a child becomes delinquent in the amount owed for one month's support, a 10 percent per annum penalty must be added to the delinquent amount.

10. Modifications to the initial custody order.

A. Authority for a motion

NRS 125.510(1)(b) gives Nevada courts continuing jurisdiction during the minority of the child to modify or vacate its prior orders. This is the authority for "why" you can file a modification motion.

B. Simple change in visitation

If you are seeking to simply rearrange visitation time and not the custodial designation, then a noticed motion based upon the "best interests of the child" is sufficient authority to go forward and the court can modify timeshare without holding an evidentiary hearing. See *Wallace v. Wallace,* 112 Nev. 1015, 922 P.2d 541 (1996). However, as a matter of practice, in Washoe County, even a modification of visitation but not custody will almost certainly be subject to an evidentiary hearing on the matter.

C. Change in custodial designation, "adequate cause" required

Something has to have happened in order to warrant a change in custody. This event is referred to as "adequate cause?"

The court has discretion to summarily deny a motion to change custodial designation without holding an

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evidentiary hearing if the moving party cannot demonstrate "adequate cause" for a change. *Rooney v. Rooney,* 109 Nev. 540, 853 P.2d 123 (1993). "Adequate cause" requires something more than allegations which, if proven, might permit an inference sufficient to establish grounds for a custody change. Id.; *see Roorda v. Roorda*, 611 P.2d 794, 796 (Wash. Ct. App. 1980). "Adequate cause" arises where the moving party presents a prima facie case for modification. To constitute a prima facie case, the moving party must show that: 1) the facts alleged in the affidavits are relevant to the grounds for modification; and 2) the evidence is not merely cumulative or impeaching. Rooney at 543.

D. How far back can the moving party look when asserting adequate cause?

The court may retain and use its intuitional memory of cases for context. However, there are restrictions to the introduction of evidence prior to the last custodial order. In *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994), the Supreme Court held that the moving party in a custody proceeding must show that the circumstances of the parties has materially changed "since the most recent custodial order," and events which took place before are inadmissible to establish a change of circumstances. In *Hopper v. Hopper*, 113 Nev. 1138, 946 P.2d 171 (1997), the Supreme Court reversed a post-decree change of custody where the circumstances relied upon all existed at the time of the original custody proceeding and were known to both parties and the court, at that time. Consequently, there was no material change of circumstances since the last court order on which to base a change in custody.

However, the *McMonigle* and *Hopper* "prior in time" prohibition does not encompass items that have occurred prior to the last custody hearing, but only matters that were "raised" in that hearing. In other words even circumstances that occurred earlier in time, but have never been made the subject of a court decision, could justify a change in custody or visitation without running afoul of *McMonigle* and *Hopper*. *See Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004).

In negotiation for custody settlements, be prepared to choose to "hold the door open" on the use of past events, or the "close" it with an agreement mentioning *McMonigle*, *Hopper* and no exception available under *Castle*.

E. The basic standards of review for custody

Joint Physical Custody: *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009) affirms the "best interest of the child" standard while defining what "joint physical custody" means, and how child support is affected in such a relationship. The test for modifying joint physical custody remains unchanged from *Truax v. Truax*, 110 Nev. 437, 874 P.2d 10 (1994), where custody reviews are subject to the "best interest of the child" standard of review, and *Mosley v. Figliuzzi,* 113 Nev. 51, 930 P.2d 1110 (1997), holding, in part, that the child's best interests are best served by having both a father and a mother involved in being responsible for the child, and for the child knowing each parent.

Primary Physical Custody: The standard for review for primary physical custody determinations is set in *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007). Modifying the former standard set out in *Murphy v. Murphy*, 84 Nev. 710, 447 P.2d 664 (1968), the current test is that a modification is warranted only when: 1) there has been a substantial change in circumstances affecting the welfare of the child; and, 2) the modification will serve the child's best interest.

11. Relocation requests and litigation

While the results from relocation trials are often sweeping (and therefore, easy to apply), relocation litigation is very difficult. If the distances are too far to drive, then one parent will likely be the "school year" parent, and the other will be the "spring break and summer break" parent, and Thanksgiving and winter break will be alternated in some fashion. If the distances are drivable, then the visitation schedule will

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likely include the three-day holiday weekends to the distance parent in addition to an apportionment of spring break and the summer break. Variants are few.

The court will consider the factors for the "best interest of the child" in addition to the factors set forth for either a "primary" or "joint" custody analysis.

Primary Physical Custody: If the parent with primary physical custody of the child wishes to relocate out of Nevada with the child, then that parent must seek written consent from the other to relocate. NRS 125C.200.

Most often discussed is *Schwartz v. Schwartz*, 107 Nev. 378 (1991), which states "in determining the issue of removal, the court must first find whether the custodial parent has demonstrated that an actual advantage will be realized by both the children and the custodial parent in moving to a location so far removed from the current residence that weekly visitation by the noncustodial parent is virtually precluded." The Nevada Supreme Court stated five factors for consideration:

"If the custodial parent satisfies the threshold requirement set forth above, then the court must weigh the following additional factors and their impact on all members of the family, including the extent to which the compelling interests of each member of the family are accommodated:"

1. The extent to which the move is likely to improve the quality of life for both the children and the custodial parent;
2. Whether the custodial parent's motives are honorable, and not designed to frustrate or defeat visitation rights accorded to the noncustodial parent;
3. Whether, if permission to remove is granted, the custodial parent will comply with any substitute visitation orders issued by the court;
4. Whether the noncustodian's motives are honorable in resisting the motion for permission to remove, or to what extent, if any, the opposition is intended to secure a financial advantage in the form of ongoing support obligations or otherwise;
5. Whether, if removal is allowed, there will be a realistic opportunity for the noncustodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship with the noncustodial parent."

Joint Physical Custody: If the parents share joint physical custody and one parent seeks to relocate outside of Nevada with the child, an additional step is required. *Potter v. Potter*, 121 Nev. 613 (2005), requires when a parent with joint physical custody of a child wishes to relocate outside of Nevada with the child, "the parent must move for primary physical custody for the purposes of relocating." *Id.* at 618. Further, "[t]he District Court must consider the motion for primary custody under the best interest of the child standard established for joint custody situations in NRS 125.510 and *Truax v. Truax*, 110 Nev. 437 (1994)." *Id.* NRS 125.510(2), provides:

> Any order for joint custody may be modified or terminated by the court upon the petition of one or both parents or on the court's own motion if it is shown that the best interest of the child requires modification or termination. The court shall state in its decision the reason for the order of modification or termination if either parent opposes it.

"Any order for joint custody may be modified or terminated by the Court ... if it is shown that the best interests of the child requires the modification or termination." *Id.*

"In considering this motion, the District Court must determine whether the moving parent will be relocating outside of Nevada with the child if he or she obtains primary custody." *Id.* "The District Court may also consider, among other specters, the locales of the parents and whether one parent had de facto primary custody of the child prior to

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> the motion." *Id.* "The moving party has the burden of establishing that it is in the child's best interest to reside outside of Nevada with the moving parent as a primary physical custodian." *Id.*

The test in *Potter* is "The issue is whether it is in the best interest of the child to live with Parent A in a different state or Parent B in Nevada." *Id.*

Factors the court may consider include: "In determining whether the move will improve the quality of life, the court should consider subfactors, such as: whether positive family care and support will be enhanced, whether housing and living conditions will be improved, whether educational advantages will result for the children, whether the custodial parent's employment and income will improve, whether special needs of a child will be better served, and whether, in the child's opinion, circumstances and relationships will be improved." *Jones v. Jones*, 110 Nev. 1253, 885 P.2d 563 (November 30, 1994).

Additional factors the court should consider include: "In weighing and balancing the above factors, the court will, of course, have to consider any number of sub-factors that may assist the court in reaching an appropriate decision. For example, in determining whether, and the extent to which the move will likely improve the quality of life for the children and the custodial parent, the court may require evidence concerning such matters as: 1) whether positive family care and support, including that of the extended family, will be enhanced; 2) whether housing and environmental living conditions will be improved; 3) whether educational advantages for the children will result; 4) whether the custodial parent's employment and income will improve; 5) whether special needs of a child, medical or otherwise, will be better served; and, 6) whether, in the child's opinion, circumstances and relationships will be improved. The foregoing list is by no means exhaustive, and is only illustrative of the many sub-factors that the court may, in the exercise of good common sense, feel the need to pursue prior to ruling on the issue of removal. In certain instances, the court may even conclude that a professional opinion or evaluation by a psychiatrist or psychologist will be desirable in assessing the impact of the move on a child."

Finally, the Supreme Court held "the court should not insist that the advantages of the move be sacrificed and the opportunity for a better and more comfortable life style for the mother [custodial parent] and children be forfeited solely to maintain weekly visitation by the father [noncustodial parent] where reasonable alternative visitation is available and where the advantages of the move are substantial."

1. Discovery sanctions cannot be used in custody determinations.

In custody proceedings, the court cannot use discovery sanctions and/or noncompliance by a party as a basis for an award of custody. *Blanco v. Blanco*, 129 Nev. Adv. Op 77 (Oct. 31, 2013). In short, always be prepared to present your custody case.

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Since becoming a Nevada Lawyer in 1994, Bob has worked in both Clark and Washoe counties as a Family Law litigator, mediator, arbitrator and pro tem juvenile court hearing master. With top tier mentors and hard work along the way, Bob has become one of the few Nevada Certified Family Law Specialists and a fellow to both the American Academy of Matrimonial Lawyers (AAML) and the International Academy of Matrimonial Lawyers (IAML). In 2012, Bob was recognized by the State Bar of Nevada as the volunteer attorney of the year. Bob is licensed to practice in Nevada and the USDC, the Ninth Circuit USCA and the USSC, and is a member of the Clark, Washoe and American Bar Associations.

A Tale of Two Courts: Analyzing Whether a Child is Well-Settled in the New Environment under *Lozano v. Montoya Alvarez* and *Druckman v. Ruscitti*

By Emily McFarling, Esq.

When a "settled child" is taken to another state by a parent, there are applicable state and federal cases that may be useful in aiding the impacted parent.

When a child has been kidnapped and taken to another county by one parent, the parent left behind can file a petition for return of the minor child in the country to where the child has been taken if both countries are a party to the Hague Convention of October 25, 1980. The Hague Convention requires that the court make a quick determination on any petition filed regarding the return of a child and provides for return of a child who has been wrongfully removed with very limited exception or defenses.

Under Article 12 of the Hague Convention, when a petition for return of a child is filed in a country that is a party to the Treaty, the court shall order the return of the child forthwith if the petition is filed within one year of the child's removal. If a petition is filed more than one year after removal, then the court shall order the return of the child, "unless it is demonstrated that the child is now settled in its new environment." The Hague Convention specifically does not provide for a custody determination to be made, only for the return of a child.

In *Lozano v. Montoya Alvarez*, 572 U.S. __ (2014), a parent who filed for return more than a year after removal challenged the one-year period asking for the court to consider equitable tolling when the removing parent had hidden the child, making it impossible to file the petition within one-year. The U.S. Supreme Court held that there could be no equitable tolling and that the one year time period was not a statute of limitations, as there was a remedy beyond the one-year timeframe. The court found that the expiration of the one-year timeframe, "opens the door to consideration of a third party's interests i.e., the child's interest in the settlement." The court specifically considered the issue of a child being hidden for more than a year and concluded that the timeframe begins at removal, not at discovery of the child's whereabouts. The court did note that U.S. and courts in other Hague signatory countries have considered concealment as a factor in determining whether a child is settled. The court did note, though, that failure to file for return within one year would, in some cases, render the return remedy unavailable.

Basically, if a parent kidnaps a child and hides the child for more than one year and fully settles the child in the new environment, the left-behind parent will have an uphill battle in getting the child returned. Such a precedent certainly encourages a kidnapping parent to conceal the child during that first year after removal, although the act of concealing can be taken into account in analyzing whether the child is settled.

In the recent Nevada Supreme Court decision, *Druckman v. Ruscitti*, 130 Nev. Adv. Op. 50, (2014), the court stated, "Removal of a child over the other parent's objection may create unfair legal and practical advantages for the relocating parent in subsequent custody proceedings. The child would likely develop a routine and become accustomed to life in the new state. This factor would weigh in favor of awarding the relocating parent primary custody because stability is important in a child's

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New Environment

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life." *Id* at 6. *Druckman* requires that a parent with equal custody rights must get a court order to relocate outside of Nevada. The court in *Druckman* went on to hold, "If a parent unlawfully relocates his or her child out of Nevada and later moves for primary physical custody, the district court should not consider any factors from the child's time in the new state- such as the child's new school, friends or routine — in the best — interest determination." In affirming the district court's order for primary custody with the relocating parent, the Nevada Supreme Court noted that the district court, "did not incorporate any factors resulting from the child's time in California into its decision." *Id* at 9.

The *Druckman* decision further explained in footnote 6 that pursuant to NRS 125.480(7), the relocation without a court order at issue did not constitute abduction and was made in good faith but further provided that "removal without consent violates the spirit of the law and may subject the offending parent to negative consequences." *Id* at 8. Under NRS 125.480, there is a presumption that a parent who has abducted a child should not have physical custody. The *Druckman* decision has left the finding of abduction up to the specific facts of each case regarding whether the move was made in good faith.

While *Lozano* is a case concerning a petition for return of a child and *Druckman* is a child custody determination, their stances on how to analyze the fact that a child has settled in a new environment are at direct odds. A Hague Petition filed after one year following the wrongful removal of a child requires the court to not return the child if the child has become settled, but if a parent were to remove a child from Nevada without a court order, the court may not consider the same facts of the child becoming settled in the new environment in making a custody determination.

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Guard and Reserve Pensions on the Day of Divorce: Part Two

By Mark E. Sullivan, Esq.

In the first part of this article, we learned of the dilemma facing Sam Green, the soon-to-be-ex of Janet Green, a Navy Reservist. Visiting his lawyer, Sam was expressing his frustration and confusion in the attempts he had made to find out about what her benefits would be, what she would receive in retired pay, how much was his share, and what he'd receive if she died before him. Part One of this article explained what is required for a Reserve Component (RC) or "non-regular" retirement, that is, one involving the National Guard or Reserves. It covered how retirement points are acquired, what a "points statement" looks like, and how one's retired pay will be calculated.

RC Pensions and Divorce

The Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC § 1408, provides the rules for military retired pay and its division upon divorce. It applies to RC and regular retirements.[1] There are two key considerations in dividing RC retirement rights. First, since RC SMs (service members) usually do not begin to get paid until age 60 (regardless of when they stop drilling and apply for transfer to retired status), this deferral of payment must be taken into account in the negotiations and in any present value calculations. There will almost always be a "gap" between applying for retirement and "pay status" for the military member.

Second, the "marital fraction" should usually be computed twice – once using *marital years of service* over total years of service, and then again using *marital retirement points* over total retirement points – to determine which computation will best benefit the client. When dealing with RC retirements, be sure to get a copy of the SM's most recent statement from the Retirement Points Accounting System (RPAS), also known as the "points statement." This will show how many total points have been acquired and how many were earned during the marriage.

Computations – An Example

An example will help illustrate what a difference this might make. Major Bill Smith has four years of active duty and 16 years of service in the Army Reserve. He married when he left active duty.

To calculate the marital fraction using points, we start by counting the points he acquired during active duty by multiplying 4 times 365 to get 1,460 points. Then we count his Reserve points. During his time as a

Reservist assume that he acquired 73 points a year – 15 each year for membership, 44 points for 11 months of weekend drill, and 14 points for two weeks of annual training. This totals 1,168 points for 16 years. Thus, his total points at 20 years are 2,628 (1,460 plus 1168), of which 1,168 (*or about 44%*) are marital. This should mean that 44 percent of his retired pay is marital, assuming retirement and date of separation both occur at year 20.

Now, let's use years in calculating the marital fraction. He was married for 16 years out of the 20 years of creditable service. Note the result: if we use years in applying the marital fraction to his retirement pay, then the marital share of his pension is 16 divided by 20. This means that it is 80 percent marital.

What a difference! Recognition of these two ways of calculating the

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Pension Pay

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marital benefit, and the difference when Major Smith's pension is calculated, is essential to competent representation in the Guard/Reserve pension case.

The issue is complicated by the interplay between federal and state law. How to divide a pension, in general, is the province of state cases and statutes. Some states recognize the use of points for pension division, while others will only allow a "time rule" for the marital fraction.[2] Some states, on the other hand, require calculation of the marital fraction based on time, not "points" or some other factor. *See, e.g.*, N.C. Gen. Stat. § 50-20.1(d), which states, "The award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested pension, retirement, or deferred compensation benefit, to the total amount of time of employment." In Virginia, where the division of a pension is according to years instead of points, the Court of Appeals upheld a time-rule division as within the trial court's discretion. *Jordan v. Jordan*, 2004 Va. App. LEXIS 285 (June 22, 2004).

Nothing in USFSPA says how to divide a Guard/Reserve pension or how to calculate the marital fraction, whether Guard/Reserve or active-duty. It is completely silent on this. The retired pay center, which is usually Defense Finance and Accounting Center (DFAS), will not honor a formula clause in an RC pension division order which contains a marital fraction using months or years and the RC member is still drilling.[3] In fact, the Coast Guard, PHS, and NOAA pay centers are separate entities. See DoDFMR (Department of Defense Finance Management Regulation), Vol. 7B, ch. 29, § 290403 for names and addresses of the designated agents for each branch of service. There are two reasons for this.

First, in practical terms, one cannot speak of RC service in terms of months or years. The Defense Department doesn't keep track of RC service in terms of time, since RC points are the method of computing retired pay at DFAS.

In addition, the regulation which DFAS uses requires that a formula clause containing a marital fraction must be written in terms of retirement points, not years or months:

For members qualifying for a reserve (i.e., non-regular service) retirement, retiring from Reserve duty, the numerator expressed in terms of Reserve retirement points earned during the marriage must be provided in the court order. If the numerator is not provided in the court order, then either the court will have to clarify the award or the parties will have to agree on the numerator and provide it to the designated agent in a notarized statement signed by both parties.[4] Acceptable formula award language is contained in the "Military Retired Pay Division Order" at Appendix A in the chapter.

What can the family law practitioner do if the time calculation is more favorable to the client? There is no alternative formula clause that is acceptable to DFAS when the RC member is still drilling. If, however, the member has stopped drilling and applied for retirement status, or is already in pay status, then one can use any of the four available pension share clauses which DFAS will accept: set dollar amount, percentage, formula clause (using years or points) and hypothetical clause.[5] Thus a probable approach to pension division in the above case, assuming the RC member is not still drilling, is to use a percentage clause, not a formula clause. This is also the case when state law "fixes" the spousal interest at the date of divorce or separation, as is the case in Florida, Texas, Tennessee, Kentucky and Oklahoma. It is a simple matter to convert the marital formula into a percentage since all of the terms – spouse's share (usually 50 percent), numerator and denominator of the marital fraction, and benefit to be divided – are known. A court order containing a percentage or a hypothetical award will be honored by DFAS if it leaves nothing out (other than data available to DFAS).

DFAS will also accept a set dollar amount that is specified in a military pension division order. However, the amount will not be adjusted annually for COLAs (cost of living allowance) for the non-military partner.[6] Such an award might state: "Sam Green will receive $400 a month from Janet Green's Naval Reserve retired pay."

PRACTICE TIP

These days, with the high number of Guard/Reserve mobilizations, it is increasingly possible for an RC member of the Reserve Components (RC) to accumulate enough years to con-

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sider "hanging on" for active-duty retirement after completion of 20 years of creditable service. What happens if Janet Green has eight creditable years of RC service, four initial years of active duty, and now four years of mobilized active-duty service in support of Operation Brass Key in the Duchy of Grand Fenwick? Involved in a pending divorce, what should Sam Green do when he is confronted with the almost equal possibility of her retirement from the "active side" or the "Reserve side," in terms of an order for present pension division?

In addition to the court's reserving jurisdiction until a final decision is made, the court could enter an order that provided for *one* of the two retirements, with the parties' property settlement agreement containing the following clauses:

During 153 months of the parties' marriage, the defendant-wife has served both on active duty and as a member of the United States Naval Reserve. She either will become eligible to apply for Reserve retired status after serving 20 qualifying years of Reserve service in 2018, with Reserve military retirement payable at about age 60, or will become eligible for active duty retirement after 20 creditable years of active duty service. The parties recognize the plaintiff's rights to a percentage of whichever of these two retirements that the defendant ultimately receives.

Due to the complexity of the military retirement system and in the interest of affording plaintiff an equitable share, a formula should be used in order to divide the pension. This will cover the contingencies of defendant's continued Reserve service or a return to active duty, as well as her continued advancement in grade and time in service. Any retirement paid to plaintiff under either retirement plan is referred to as "Military Retired Pay." In either of these situations, the SBP (Survivor Benefit Plan) premium for former-spouse coverage for plaintiff will be deducted from total retired pay to arrive at Military Retired Pay.

The parties will cooperate in the drafting and entry in the District Court for Coriander County, East Virginia, of an order dividing defendant's Military Retired Pay, so that plaintiff shall receive a portion of either monthly benefit payment according to the formula set forth below. The order shall be drafted as an order dividing active duty retired pay, but shall specifically state that the parties reserve the right to enter a "clarifying order" in the event that defendant-wife retires as a Reservist. In this latter event, the parties will cooperate in the drafting and entry of a clarifying order, and the parties will equally divide the cost of drafting the clarifying order.

If defendant-wife retires from active duty, the plaintiff's share of the monthly pension benefit will be governed by the time rule and will be computed according to the following formula: 50 percent of the monthly benefit multiplied by a fraction, the numerator of which shall be the number of months the parties were married (153) up to the separation, and the denominator of which shall be the number of creditable months served by the defendant-wife earning the Military Retired Pay.

If defendant retires as a Reservist, the order dividing Military Retired Pay will be entered as soon as reasonably practicable after defendant's application for Reserve retirement. The plaintiff's share of the monthly pension benefit will be governed by the acquisition of Reserve retirement points and will be computed according to the following formula: 50 percent of the monthly benefit multiplied by a fraction, the numerator of which will be the number of Reserve retirement points acquired during the marriage up to the separation, which is 2,345 points, and the denominator of which will be the total number of Reserve retirement points at the date of defendant's Reserve retirement orders.

Where to Send the Court Order

The Military Pension Division Order (MPDO) is sent to the appropriate "designated agent" for payments. See DoDFMR (Department of Defense Finance Management Regulation), Vol. 7B, ch. 29, § 290403 for the names and addresses of the designated agents for each branch of service.[7] Note that the order is not called a Qualified Domestic Relations Order (QDRO) because military retirement is a statutory governmental program, not a "qualified plan" divided by a QDRO.

Which Military Retirement Plan?

Military personnel get a monthly Leave and Earnings Statement (LES). The Active Duty

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LES contains blocks reading "RETPLAN" and "DIEMS," while the Reserve and Guard LES may lack these blocks. The "RETPLAN" block tells which retirement plan the member will retire under: Final Basic Pay, High-3, or REDUX. That plan is in turn determined by the Date of Initial Entry into Military Service (DIEMS). As explained in Part One of this article, DIEMS before September 1, 1980 means Final Basic Pay. DIEMS between 1980 and 1988 means High-3. Finally, DIEMS after 1988 means CSB/REDUX. DIEMS is determined by the first date of military service. It is unaffected by a break in service and so can differ from Pay Entry Base Date, or PEBD.[8] The date the member swore into the Academy as a Cadet or Midshipman fixes DIEMS even if the member didn't graduate from the Academy. Service Academy dropouts who later re-enter military service should ensure their Academy discharge is recorded in their military record and that their Academy service is reflected in their Retirement Point Accounting System (RPAS) statements. The non-serving spouse of such a service member with a break in service around 1980 or 1988 will want to ensure that Academy service qualifying for the earlier retirement plan is entered into the RPAS.

Other Requirements for Direct Pay of the Pension Share

The MPDO can only be used for direct payments if, pursuant to 10 USC § 1408(c)(4), there is court jurisdiction because the SM:

- Is domiciled in the state in which the suit for the divorce or property division occurs; or
- Resides in the state in which the lawsuit occurs (other than because of military assignment); or
- Consents to the jurisdiction of the court in which the lawsuit occurs.[9]

If the order states that jurisdiction is based on one of the above grounds, it must also state the basis for the finding (i.e., member's residence, member's domicile or member's consent).[10]

Virtually every former spouse wants to receive monthly payments from the retired pay center, not from the military retiree. Pension garnishments (as property division, as opposed to alimony or child support) require that the parties have been married for at least 10 years while the military member performed at least 10 years of creditable service; this is known as "the 10/10 Rule."[11]

Note that the "ten-year rule" is not a *jurisdictional requirement* for dividing military pensions. There is no limitation on the number of years of marriage overlapping military service as a requirement for military pension division, although this is a widely held misconception in the civilian bar. A military pension may be divided by court order whether the spouse has 30 years of marriage to the SM or 30 days of marriage. Rather, this time requirement is a prerequisite to *enforcement through DFAS*. The payment mechanism of a garnishment of the member's retired pay is not available unless this test is met.[12]

Note that some states don't use the term "garnishment" for support payments. But that is the terminology used in 42 USC § 659 and 5 CFR Part 581, and that term should be employed when dealing with any federal pension, whether military or civilian.

When there are 10 years of combined Guard/Reserve and active service, DFAS will aggregate them to allow the 10-year rule to be met.[13] It should be noted that being in the

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Guard or Reserves for 10 years is not necessarily the same thing as "having ten good years" which are creditable toward retirement. A "good year" is one in which the Guard/Reserve SM has accumulated at least 50 points. A year with fewer points means that the year is not creditable toward retirement (a minimum of 20 good years) although the points in that year still count in calculating retired pay.

The order must also provide for payment from military retired pay in an acceptable clause.[14] The court order must be authenticated or certified within the 90 days immediately before its service on DFAS, and it must state the eligibility of the spouse or former spouse under the "10/10 rule" stated above. The right information must be in the order (e.g., names, addresses, jurisdictional facts), and the amount for the former spouse must be within the maximum limits (i.e., 50 percent of disposable retired pay for most orders). The SM remains liable for any amount still owing. In cases where there is an application for the direct payment of court-ordered division of military retired pay and a garnishment issued pursuant to 42 USC § 659 (child or spousal support), DFAS is authorized to deduct higher maximum amounts.[15] The parties have taxes deducted from their respective shares before the checks are sent.

The Hypothetical Clause

There are, in general, four acceptable methods of dividing military retired pay. The set dollar amount, percentage and formula clause have been covered above. The fourth is a hypothetical clause, which is an award based on a pay grade or term of years of service that is different from what exists when the SM actually retires. This is usually used when the parties' interests are fixed as of some specific valuation date. For example, if the parties divorced while the wife was a Navy chief petty officer with 18 years of creditable military service, the hypothetical clause might state:

> Husband is granted ___% of what a chief petty officer (E-7) would earn if she were to retire with 18 years of military service with a retired pay base of $_____.
>
> A hypothetical clause in a military pension division order for a still-serving RC member might be worded as follows:
>
> Husband is awarded _____% of the disposable military retired pay that wife would have received had she become eligible to receive military retired pay with a retired pay base of $_____ and with _____ Reserve retirement points on (date).

If the wording isn't right, DFAS will return it for entry of a "clarifying order" by the court. Since there is no pre-signing review of draft MPDOs available at DFAS, counsel must get it right the first time. The "Attorney Instructions" and the sample military retired pay division order explain how to word the clauses. [16]

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We Need Your Articles!

Articles are Invited! The Family Law Section is accepting articles for the Nevada Family Law Report. The next release of the NFLR is expected in **May, 2015**, with a submission deadline of **April 15, 2015**.

When submitting an article to the NFLR, please note that automatically embedded footnotes/endnotes do not carry over into the State Bar of Nevada's publishing program. As such, if at all possible, we would ask that you utilize endnotes that are not automatically embedded (Please do not use the Footnote/Endnote function of your word processing program.).

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

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The Servicemembers Civil Relief Act (SCRA)

There must be a statement in the pension division order that "the member's rights under the Servicemember Civil Relief Act (50 USC App. 501 Et seq.) were observed."[17] The Servicemembers Civil Relief Act offers protection for military members who are on active duty at the time of the property division or divorce; it does not apply to retirees, but it would be a better practice to include such wording in all military pension division orders.

What protections for Janet Green are involved? A checklist for SCRA protections would include at least the following:

SCRA Checklist for Servicemember Pension Division Protections

- ☐ 1. If the SM, Janet Green, has not entered an appearance in the divorce case, or the pension or property division lawsuit, a stay (continuance) must be granted for at least 90 days if:
- ☐ a. The judge determines that there may be a defense to the action, and such defense cannot be presented in the SM's absence; or
- ☐ b. With the exercise of due diligence, counsel has been unable to contact the SM (or otherwise determine if a meritorious defense exists). 50 USC App. § 521(d).
- ☐ 2. If Janet has actual notice of the lawsuit, a similar mandatory 90-day stay (minimum) of proceedings applies if she requests it properly. 50 USC App. § 522.
- ☐ 3. She may ask for an additional stay at the time of the original request or later. 50 USC App. § 522 (d)(2). If the judge will not grant an additional stay, then counsel must be appointed to represent her in the action. 50 USC App. § 522(d)(2).
- ☐ 4. The stay request does not constitute an appearance for jurisdictional purposes in the lawsuit, and it does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction). 50 USC App. § 522(c)
- ☐ 5. If Janet has been served but has not entered an appearance by filing an answer or otherwise, her husband may not obtain a default judgment (meaning an adverse ruling) under 50 USC App. § 521 unless the court first determines whether she is in military service. This means that Sam Green must file an affidavit stating "whether or not the defendant is in military service and showing necessary facts in support of the affidavit." 50 USC App. § 521(c).
- ☐ 6. If Sam Green states in the affidavit that Janet is a member of the armed forces, no default may be taken until the court has appointed an attorney for Janet in the pension division case.
- ☐ 7. If the appointed attorney cannot locate Janet, actions by the attorney may not waive any defense she has or otherwise bind her in the pension action. 50 U.S.C. App. § 521(b)(2).
- ☐ 8. If a default decree is entered against Janet during active duty or within 60 days thereafter and she has not received notice of the proceeding, she may move to reopen it so long as:
- ☐ a. She does so while on active duty or within 90 days thereafter. 50 USC App. § 521(g); and
- ☐ b. She can prove that, at the time the judgment was rendered, she was prejudiced in her ability to defend herself due to military service; and
- ☐ c. She has a meritorious or legal defense to the initial claim.

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If, at a minimum, these rights have been honored, then the court order for pension division could truthfully state that Janet Green's rights under the SCRA had been observed. Such a statement would read:

> **The court has complied with the rights of the defendant, Janet Green, under the Servicemember Civil Relief Act (50 USC App. 501 Et seq.).**

Other Terms for Consideration

A well-written MPDO will protect Sam by stating terms for indemnification if Janet later is determined to be disabled. Disability payments received after retirement can reduce the amount that Sam Green should be receiving. An indemnification clause might read:

> **If Janet Green does anything that reduces the amount or share of retired pay to which Sam Green is entitled, such as the receipt of disability pay, then she will promptly make direct payments to Sam Green to indemnify him and hold him harmless from any reduction, costs or damages which he may incur.**

Starting the Process

The spouse or former spouse usually starts the process of division of the military pension by notifying DFAS by facsimile or electronic submission, by mail, or by personal service; service is effective when a complete application is received by DFAS. The notification form is DD Form 2293 ("Request for Former Spouse Payments From Retired Pay").[18] Payments are made once a month, starting no earlier than 90 days after service of the decree on DFAS or the start of retired pay, whichever is later. The payments end no later than the death of the member or spouse, whichever occurs first.[19] Payments are prospective only; no arrears are allowed. USFSPA does not provide for garnishment of payments missed prior to the approval of the application by DFAS.

Survivor Benefit Plan

In regard to Sam Green's questions about the death of Janet before him, the answers about continued payments lie in the Survivor Benefit Plan (SBP), which is a joint and survivor annuity available to active-duty and RC retirees to ensure the continuation of payments after the SM/retiree dies. The surviving spouse or ex-spouse, when this is chosen, receives 55 percent of the selected base amount for the rest of his life, so long as he does not remarry before age 55. This should always be considered in a settlement or trial judgment when one represents the former spouse.[20]

When Janet got her "20-year letter," also known as the NOE (Notice of Eligibility), she also received a form for making a decision as to SBP. Shown on DD Form 2656-5 were these options:

- Option A – defer the decision until "pay status," which is usually age 60.
- Option B – elect coverage, but defer the payments until the SM would have attained pay status, usually at age 60.
- Option C – immediate coverage, which means that the survivor receives payments starting when the SM dies.

Any choice except Option C requires the consent of one's spouse. If the executed form is not returned within 90 days of receipt by the SM, he or she is defaulted into Option C.

To review the form, it will be necessary to have Janet produce a copy in discovery. If that doesn't work, then Sam must obtain a court order or a subpoena signed by a judge, for a copy of Janet's DD Form 2656-5. The subpoena or order is sent to the address under Instructions if Janet is not yet in pay status; it is sent to DFAS in Indianapolis if she is receiving retired pay. It usually takes a month or two to obtain delivery.

There is one hitch in coverage for Sam, however. He will lose his "spouse coverage" upon divorce. If he decides to request SBP coverage, he needs to obtain a court order requiring Janet to elect "former spouse" coverage for him. His submission of such an order, along with the divorce decree and his "deemed election" (on DD Form 2656-10) within one year of the order, ensures that he will be covered. If Janet submits an election for his coverage, it must be done within one year of the divorce decree.

Endnotes

1. See Captain Karen A. MacIntyre, "Division of U.S. Army Reserve and

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National Guard Pay upon Divorce," 102 Mil. L. Rev. 23 (1983).

2. For cases holding that classification of the marital part of a Reserve Component (Guard/ Reserve) pension may be based on "marital points" divided by "total points," *see Faulkner v. Goldfuss*, 46 P.3d 993 (Alaska 2002), *Hasselback v. Hasselback*, 2007 Ohio 762, 2007 Ohio App. Lexis 644 (2007), Woodson v. Saldana, 165 Md. App. 480, 885 A.2d 907 (2005), *Bloomer v. Bloomer*, 927 S.W.2d 118 (Tex. App. 1996), *In re Beckman*, 800 P.2d 1376 (Colo. Ct. App. 1990) and *In re Poppe*, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (1979).
3. The pay center, or "designated agent," for most USFSPA pension division orders is DFAS, since it handles orders for the Army, Navy, Air Force and Marine Corps; thus that abbreviation is used throughout this article.
4. DoDFMR, Vol. 7B, ch. 29, § 290607.B.
5. See DoDFMR, Vol. 7B, ch. 29, § 290608 for the specific DFAS rules regarding permissible and required terms in the "hypothetical retired pay award."
6. DoDFMR, Vol. 7B, ch. 29, § 290601.C and 290902.
7. The DoDFMR can be found at http://comptroller.defense.gov/fmr.
8. Service Academy (e.g., West Point) time as a Cadet or Midshipman, while not creditable for retirement or pay, impacts DIEMS.
9. DoDFMR, Vol. 7B, ch. 29, § 290604.A. *See also* 10 USC § 1408 (c)(4).
10. DoDFMR, Vol. 7B, ch. 29, § 290605.
11. DoDFMR, Vol. 7B, ch. 29, § 290604.B. *See also* 10 USC § 1408 (d)(2).
12. *See, e.g., Carranza v. Carranza*, 765 S.W. 2d 32 (Ky. App. 1989).
13. E-mail, Phoenix attorney Michael McCarthy, to the author, subject: 10/10 issues for your book/question re: requirements for member to delete SBP (September 2, 2004) (on file with the author).
14. 10 USC § 1408(a)(2)(C).
15. DoDFMR, Vol. 7B, ch. 29, § 290901.
16. The Attorney Instructions may be found at www.dfas.mil > Garnishment Information > Former Spouses' Protection Act > Attorney Guidance. Also at the "Former Spouses' Protection Act" tab are notes on "Legal Overview," how to apply for payments from DFAS, the "maximum amount" rules, receipt of payments (including taxes and direct deposit information), and Frequently Asked Questions.
17. DoDFMR, Vol. 7B, ch. 29, § 290602.B; see also 10 USC § 1408 (b)(1)(D).
18. This can be found by typing "DD Form 2293" into Google, Yahoo or any other search engine.
19. DoDFMR, Vol. 7B, ch. 29, § 291102.A.
20. A full explanation of how this works is found at the www.nclamp.gov > Silent Partner > Military Pension Division: The Spouse's Strategy.

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Credit where credit's due

How to protect your credit score during divorce

By Kathy DiCenso, CDFA

Rachel is the sort of person who plays by the rules. A stay-at-home mother of three, she has always lived within the family budget and paid bills on time. When she and her husband, Jack, split up, she followed her obligations under their divorce decree to the letter. She was therefore shocked to find out, after her divorce, that her mortgage application had been turned down because her husband had destroyed her credit rating.

"He'd always paid our mortgage on time during our marriage," Rachel says. "So when the court ordered him to keep up the payments until we sold our marital home, I didn't think anything of it. Besides," she adds, "I couldn't have made those payments myself during our divorce proceedings. He was the one earning the salary. Where was I supposed to get the money from?"

Take control

It is important for divorcing couples to understand early on that if they have joint debt, their credit ratings are inextricably linked until they separate their obligations. Therefore, it is in their mutual self-interest to make payments on time. A bad credit score makes it difficult for both parties to move on. The time to act is before there has been a missed payment. Divorce is stressful and can sometimes lead to erratic financial behavior on the part of a spouse. It is therefore advisable for divorcing persons to take control of payments that affect their credit rating as soon as possible.

Remember, court orders aren't magic

Most divorcing couples believe that a divorce decree can relieve a spouse of a joint financial obligation. Not true! Court orders and divorce decrees can't save divorcing couples from financial peril if one or both spouses act irresponsibly. "People have a naive expectation toward court orders, like they're magic," says Barbara Stark, divorce lawyer and principal of Divorce Resolutions Resources. "But court orders are not magic. People have to learn to take responsibility for their own finances and their own lives. The sooner they learn this, the more quickly they'll be able to limit the damage [to their credit rating]."

David Cross, mortgage broker at Landmark Financial LLC agrees with Stark's assessment that court orders can't do much to protect a divorcing couple's credit rating. This is because when a married couple signs a joint loan application, both spouses make a legal agreement with the creditor to pay back the debt. A court cannot overturn this contract (unless it is unlawful for some other reason). An amendment to any contract requires the agreement of all parties, including the creditor. In Rachel's case, her ex-spouse stopped making mortgage payments and Rachel's credit score plummeted. "The only way to get her name off the mortgage note was to pay it off or refinance," Cross explains.

In certain circumstances a divorce decree can help a mortgage broker "explain" a borrower's, like Rachel's erratic payment history to a mortgage lender. But Cross warns that this process, which requires the borrower to submit a letter of explanation and the lender to customize its underwriting, doesn't always work. "It's possible to get an exception but difficult," he says.

Why credit bureaus will disregard your divorce decree

Credit scores matter because they measure for businesses what sort of a credit risk you are. According to Cross, they are "the driving force" in determining how much you will pay for a loan. The higher your risk (i.e., the lower your score), the more money you will pay to borrow — whether for a mortgage, auto loan, or credit card.

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The most widely recognized credit score is FICO, computed by Fair Isaac & Co. In the U.S., your FICO score is based on financial information tracked by three major credit bureaus: Equifax, Experion, and Trans Union. (For a free credit report from these agencies, go to www.annualcreditreport.com). In Canada, the three major credit bureaus are Equifax Canada, NCB Inc. and TransUnion Canada. (Visit www.canadian-creditreport.com for a free credit report.)

FICO takes into account a lot of different credit information in determining your score; more than half of the calculation comes from your payment history and the amounts you owe. So if your mortgage payment or other loan is past due because your spouse has failed to make a court-ordered payment, this will still have a direct impact on your FICO score.

How to protect your all-important credit score during divorce

Regardless of what your divorce decree says or what is fair, if you have a joint debt, you're responsible for it. So it's important to take the following steps to protect your score:

Identify all joint accounts. A good way to do this is to get your credit report from each major credit bureau: Experian Trans Union, and Equifax. These reports will show open department store credit cards that you might not have used in years. If you're not sure whether your spouse is authorized to use a particular card, check with the creditor directly.

If possible, close all joint accounts immediately. This is easy to do if there is no outstanding debt. If, however, you owe something on the account and can't close it, freeze it so that no one can continue to use it. Then transfer the joint debt from joint name to sole name. This has to be done equitably.

Make sure to make at least the minimum payments on joint credit card bills while you are in the process of closing/freezing joint accounts. Even one late payment can affect your FICO score.

If you don't have a credit card in your own name, now is the time to get one. Building your own credit history takes time, so it's best to get started.

In the case of a joint mortgage (secured debt), your best options are either to sell the marital home and pay off the mortgage (cleanest choice), or to refinance the mortgage in the sole name of the person responsible for paying it. If you decide to refinance, make sure to do so before the divorce is final. Sometimes one spouse won't qualify for refinancing on his/her own; it's best to know this upfront.

While you're waiting either to sell your home or refinance it, make sure your mortgage payments are current – even if it is your spouse's responsibility and you have to borrow from friends/family to do so. Remember that missed payments affect your credit rating, too. According to Stark, a client in Rachel's situation would have been better off making the mortgage payments herself and then Jack reimburse her under court order if necessary. "The only way to protect your credit rating is to make payments yourself," Stark says.

Make sure not to take your name off the title if your name is still on the loan. This will only remove your name from ownership — not from your obligation to pay off the debt.

If only I'd known...

It's been two years since Rachel's divorce and she is still repairing her credit score. Jack's failure to pay the mortgage will stay on her credit report for up to seven years. Fortunately, her prompt payment of bills in her own name since her divorce has caused her FICO score to improve enough that she can now get a mortgage — albeit at a higher rate. "If only I'd known how credit scores worked before my divorce was final, I would have done things differently," Rachel said. "I would have saved a lot of money."

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