POST-TRIAL MATERIALS: THE BASICS OF FAMILY COURT TRIAL PROCEDURES

by

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TABLE OF CONTENTS

A. FINDINGS, CONCLUSIONS, AND ORDERS

In modern times, Nevada's reviewing courts have issued more reversals on the essentially procedural basis of a failure to adequately enumerate findings supporting the decisions reached than for actual disagreement with actual orders.

For example, see this explanation from *Davis v. Ewalefo*[1]:

> Crucially, the decree or order must tie the child's best interest, as informed by specific, relevant findings respecting the NRS 125.480(4) and any other relevant factors, to the custody determination made. *Bluestein v. Bluestein*, 131 Nev., Adv. Op. 14, 345 P.3d 1044, 1049 (2015) (reversing and remanding a custody modification order for further proceedings because "the district court abused its discretion by failing to set forth specific findings that modifying the parties' custodial agreement to designate [mother] as primary physical custodian was in the best interest of the child"); *see* NRS 125.510(5) ("Any order awarding a party a limited right of custody to a child must define that right with sufficient particularity to ensure that the rights of the parties can be properly enforced and that the best interest of the child is achieved.") (emphasis added); NRS 125C.010(1)(a) (identical, except it substitutes "a right of visitation of a minor child" for "a limited right of custody"); *Smith v. Smith*, 726 P.2d 423, 426 (Utah 1986) (deeming it "essential" that a custody determination set forth "the basic facts which show why that ultimate conclusion is justified").
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> Specific findings and an adequate explanation of the reasons for the custody determination "are crucial to enforce or modify a custody order and for appellate review." *Rivero*, 125 Nev. at 430, 216 P.3d at 227. Without them, this court cannot say with assurance that the custody determination was made for appropriate legal reasons. *See Sims*, 109 Nev. at 1148, 865 P.2d at 330; *Ivy v. Ivy*, 863 So. 2d 1010, 1013 (Miss. Ct. App. 2004) ("[M]eaningful appellate review . . . requires that the chancellor make on-the-record findings of fact as to issues relating to custody as well as some analysis of how these facts affected the ultimate custodial decision."); *Dixon v. Dixon*, 312 S.E.2d 669, 672 (N.C. Ct. App. 1984) ("[C]ustody orders are routinely vacated where the 'findings of fact' consist of mere conclusory statements. . . .") (citation omitted); *Keita v. Keita*, 823 N.W.2d 726, 730 (N.D. 2012) ("A district court's factual findings should be stated with sufficient specificity to enable this Court to understand the basis for its decision.").

The lesson for trial counsel is simple: if you are on the prevailing side of a decision, your work is not finished. You must ensure that the actual court order contains findings of fact and conclusions

[1] *Davis v. Ewalefo*, 131 Nev. ___, 352 P.3d 1139 (Adv. Opn. No. 45, July 2, 2015).

of law sufficient to withstand scrutiny on appeal – or your client may end up having to do it all over again after appeal and remand.

B. NOTICE OF ENTRY OF ORDERS

Equally critical is the necessity of making sure that a notice of entry of order is actually filed and served. The failure to do so could leave the order open to challenge for years after its entry.

For example, in *Hui v. Rogers-Hui*,[2] the a Court of Appeals upheld a district court order finding that an NRCP 60(b) motion filed more than ***six years*** after entry of a QDRO was nevertheless timely because the prevailing party had never filed and served a notice of entry of that order.

C. QDROS

In any divorce involving at least one spouse who is a member of a union, or works for the government, is in the military, or works for a company that provides any retirement or savings plan like a 401(k), 403(a), or 403(b), a QDRO[3] or other kind of pension division order is probably needed.

Not ***every*** retirement account requires a QDRO – for example, individual retirement accounts ("IRAs") do not need a QDRO. Government pensions are divisible but require other kinds of special orders. For instance a federal government pension is divided by a Court Order Acceptable for Processing or "COAP." A military pension is divided using a Military Benefits Division Order or "MBDO," also called an "Order Incident to Decree." Nevada PERS requires a special form of order as well, ***called*** a QDRO, but governed by entirely different (Nevada) statutes rather than the federal law governing QDROs.[4]

The key questions are who gets what money while everyone is alive (and when they get it), and who gets what if the other party dies first (survivorship benefits). Then there is the question of who pays for any costs or premiums.

Always deal with the retirement benefits ***before*** finishing the divorce. There are still divorce lawyers who just can't, or won't, take the time and make the effort to deal with retirement and pension issues during divorce. As one commentator lamented, "Increasingly, pensions and other qualified retirement plans are the largest assets in the marriage yet very little time is spent discussing the value,

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[2] *Hui v. Rogers-Hui*, No. 68186, Order of Reversal and Remand, (Unpublished Disposition, Mar. 31, 2016).

[3] "Qualified Domestic Relations Order."

[4] ERISA ("Employee Retirement Income Security Act") and the REA ("Retirement Equity Act"); *see* Section 414(p) of the Internal Revenue Code of 1986, as amended by the Retirement Equity Act of 1984, Pub. L. No 98-397, Section 206(d) of the Employee Retirement Income Security Act of 1974, as amended, codified at 29 U.S.C. § 1056(d).

terms and conditions and the benefits to each party in a divorce. . . . some attorneys include more language to divide the lawn tools than they do for the division of the pension."

It's true, and it is dangerous for all concerned. If someone should die before survivorship interests are protected by formal court order, a lifetime stream of benefits can be lost.

And counsel looking out for their own enlightened self-interest should pay attention to this point. Now-retired attorney Edwin Schilling of Colorado estimated that 90% of his malpractice consultations involved failure to address survivor beneficiary issues. Lawyer's Weekly USA, Oct. 18, 1999, at 22 (99 LWUSA 956). This continues to be true – the majority of large-sum malpractice cases against family law attorneys lawyers appears to be in cases in which practitioners were alleged to have not properly seen to securing retirement or survivorship benefits for a spouse. The case law indicates that the scope of damages is whatever funds the client did not receive because of the error.

The solution is simple. If a retirement is in issue, obtain expert assistance to draft the orders ***before*** negotiating or litigating the rest of the case. There is a very practical reason for doing so: the non-employee loses all leverage to negotiate terms once the MSA or decree is completed. Also, discovery is only available under NRCP 16.21 ***prior*** to the completion of the divorce, and the risk of completely losing retirement or survivorship interest arises at the moment of divorce, and continues escalating with each day that goes by thereafter.

The work is not finished when the QDRO or other retirement order is drafted, either, as illustrated by *Kennedy v. Plan Adm'r for DuPont Sav. and Inv.*, ___ U.S. ___, 129 S. Ct. 865, 172 L. Ed.2d 662 (2009).

In 1974, Bill designated his then-spouse Liv as beneficiary of his ERISA-based account balance (savings) plan. In 1994, the parties divorced, and the Decree included a provision stating that Liv waived all interests in that plan (and others).

In 2001, Bill died, having never sent the "beneficiary change" form to the pension plan. His heir made a claim, but the plan paid the ex-wife, Liv, anyway, notwithstanding her explicit waiver of the benefits in the Decree. And after eight years of litigation, the United States Supreme Court said the plan was right in doing so, because plan administrators should be able to rely on the documents in their files, without having to look at "extraneous" documents like divorce decrees.

In other words, the highest court in the U.S. has said that the administrative convenience of plan administrators is more important than obeying divorce court orders, or following the intent of parties.

The divorce lawyer, who probably thought he had finished his job when he got the waiver put in the decree, faced a possible malpractice suit from the intended beneficiary for not ensuring that the right form was sent to the plan at the conclusion of the divorce.

It's not enough to just draft the order, and its not enough to just file the order with the court. The QDRO must be served on, and approved by, the plan, and it is a very good idea to get verification that it ***was*** served on the plan. Anecdotal reports continue to appear of pension plans that pay benefits out contrary to court orders, and when challenged, simply deny having received the orders in the first place.

A little paranoia on the part of divorce lawyers is justified – to get verification of service, and to make sure the client gets a copy of that verification. Filing the proof of service with the court entering the decree and QDRO is also a good idea.

The soon-to-be-approved rules for the Eighth Judicial District include new EDCR 5.520(b) ("Issuance of decisions"), providing:

> (b) Counsel for the parties must provide such orders, provisions, and documents as are necessary to achieve distribution or finalization of all interests at issue in the proceedings, or specify on the record when, how, and by whom that distribution or finalization is to be achieved.

What this means, among other things, is that it is the responsibility of trial counsel to figure out who is going to actually submit the orders and documents required to achieve distribution of interests in the proceedings (e.g., QDROs), or specify on the record how, when, and by whom that will be accomplished.

The bottom line is that divorce lawyers must deal with retirement benefits during the divorce. Sooner or later, something will go wrong (for example, if survivorship interests are not secured, it tends to be discovered when people happen to die in an inconvenient order), and the lawyer will look like a target of opportunity.

It is ***possible***, of course, that with adequate CYA letters, etc., lawyers could make it their clients' problems to figure out what to do after the divorce and try to get it done. But it is far better lawyering – in the client's interest and that of the attorney seeking to avoid potential liability – to deal with the retirement benefits at the time of divorce. Doing so means making sure the proper orders are in place at the time of entry of the decree – and making sure the relevant retirement plans acknowledge getting them.

D. PROPERTY TRANSFERS AND RE-TITLING/RECORDING

It should – but does not – go without saying that court orders are not self-effectuating – they do not actually alter the ownership of houses, cars, etc. without further steps being taken. A lawyer's work is not done until those things are done.

It is important to move quickly – but not too quickly. Transfer deeds should be recorded ***after*** the *Decree* is filed, but as close to that time as possible, to prevent the possibility that a third party obtains and records a judgment against the other party, and that judgment becomes a liability to the client getting the property.[5] The actual owners of all property to be transferred should be verified, and the legal description of the property must match exactly for the transfer to be legitimate.

If property is held in joint tenancy, it is converted to a tenants in common upon entry of a decree of divorce.[6] If a *lis pendens* was obtained earlier in the litigation to prevent the other party from transferring the property to some third party before it could be adjudicated, that *lis pendens* should be discharged after the divorce, since failure to do so could cloud title and hinder the sale of the property.

Under NRCP 70, if the opposing party refuses to comply with a court order or decree transferring property ownership, the Court can directly transfer the property ownership by direct order, or direct the Clerk of the Court to perform the ministerial exercise of executing the requisite paperwork on behalf of the recalcitrant party.

It is to facilitate such proceedings that a typical clause in a *Decree* provides:

> Both parties shall execute any and all escrow, document transfers of title, and other instruments that may be required in order to effectuate transfer of any and all interests which either may have in and to the property of the other as specified herein, and to do any other act or sign any other documents reasonably necessary and proper for the consummation, effectuation, or implementation of this *Decree* and its intent and purposes. Should either party fail to execute any documents to transfer interest to the other, either party may request that this Court have the Clerk of the Court sign in place of the other in accordance with NRCP 70.

Having such a clause makes the motion, if required, merely one of enforcement of a pre-existing order, which is typically faster and easier than it would be to prove all the underlying facts in a post-divorce motion.

A party forced to go through such additional steps to re-title property may properly request an award of fees. Attorney's fees may be awarded in a pre-or post-divorce motion under NRS 18.010(2)(b) and NRS 125.150(3).[7] Further, EDCR 7.60(b) provides:

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[5] This tip, and the several to follow, were shamelessly appropriated from the presentation by Thomas Standish entitled "Real Estate Issues and Malpractice Traps in Divorce," presented at the Advanced Family law Program by the State Bar of Nevada on December 3, 2015.

[6] NRS 111.781(1)(b).

[7] *See Love v. Love*, 114 Nev. 572, 959 P.2d 523 (1998); *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998); *Halbrook v. Halbrook*, 114 Nev. 1455, 971 P.2d 1262 (1998); *Korbel v. Korbel*, 101 Nev. 140, 696 P.2d 993 (1985); *Fletcher v. Fletcher*, 89 Nev. 540, 516 P.2d 103 (1973); *Leeming v. Leeming*, 87 Nev. 530, 490 P.2d 342 (1971).

(b) The court may, after notice and an opportunity to be heard, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause:

. . .

(3) ***So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously***. [Emphasis added].

(4) Fails or refuses to comply with these rules.

Either the lawyer should take care of ensuring that all required property transfers are actually done, or at minimum the client should be instructed to do so promptly. Failure to do so within 6 years of entry could give rise to claims that the *Decree* had become unenforceable under the statute of limitations.[8]

E. MODIFYING ORDERS/MOTION FOR NEW TRIAL AND NRCP 60(B)

1. Types of Filings and Time Limitations

A party wishing to change orders has certain time deadlines within which action must be taken.

If there is an error in language from the entered order, then the appropriate mechanism is a *Motion to Alter or Amend the Judgment* under NRCP 59. The motion must be filed and served ***on or before the tenth day after Notice of Entry of the order***.

Unless they are appealed, ***all*** orders contained in the *Decree/Order* are ***final thirty days after the notice of entry of the final decree***. A party wishing to appeal the orders in the *Decree* must file a *Notice of Appeal* within that time under NRAP 3(a).

A party asserting that there has been a mathematical or clerical error in a decree may file a motion under NRCP 60(a) at any time in the future.

A party asserting that there is an error based on claims of mistake, inadvertence, excusable neglect, fraud (but not fraud on the court) may file a motion under NRCP 60(b) ***within six months of the entry of the Order or Decree***.[9]

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[8] *See* NRS 11.190(1)(a).

[9] Under very limited circumstances, an independent action may be initiated beyond the six month period. The procedural mechanism for doing so varies from department to department as some discretion rests with the District Court Judges. Three rules must be balanced: *Barelli v. Barelli*, 113 Nev. 873, 944 P.2d 246 (1997) (where the Family Court may adjudicate matters ***related*** to its jurisdictional authority); the Civil Division subject matter jurisdiction under Article 6 of the Nevada Constitution; and, the "One Family, One Court Rule" under NRS 3.025, NRS 3.223, and EDCR 5.42, (and in Washoe County by WDCR 37). The Judges of this judicial district have expressed various opinions as to whether, after passage of the one-family, one judge amendments to NRS 3.025, NRS 3.223, and EDCR 5.42, tort claims

Some portions of a *Decree of Divorce* or *Order* are modifiable upon future changes of circumstances. Certain matters, such as child custody, visitation, and support, and (usually) alimony, can be altered by the Court upon future motion and post-decree orders, upon showing of a substantial change of circumstances.

Normally, modification of orders must be done prospectively. This means that the court can only modify these orders from the date of the filing of a motion or petition to do so, forward, and almost always, only on the basis of things that have occurred since the ***last*** order.[10] The court generally cannot retroactively modify court orders. Any agreements to modify these orders must be in writing, executed by both parties, and ***entered by the court as an order***, or such an agreement is not binding.

1. Child Custody Relocations

An individual who has been awarded primary physical custody of a child must obtain agreement of the other parent, or a court order, before moving the child to a residence that is outside the state.[11] Clients should be advised to not wait until after the move to discuss the issue with an attorney, as the statutes have been changed to make doing do extremely hazardous to the relocating parent.

2. Property and Debt Issues

Absent a reservation of jurisdiction over property rights, the property distribution in a decree of divorce is final after six months.[12] However, the six-month limitation will not bar a request to set aside the property distribution where fraud was committed upon the Court.[13] Fraud upon the court consists of such conduct that prevents a real trial upon the issues involved. What those terms mean, and what actions constitute satisfaction of them, has changed a great deal over the years. However, such a claim generally requires "extreme circumstances" to set aside a decree after six months, e.g., bribery of a judge or the fabrication of evidence.[14]

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should be filed as part of family court actions, or in separate actions, or filed separately and then consolidated. *See also* Nevada Family Law practice Manual, 2003 edition, §§ 1.29 and 1.30.

[10] *See*, *e.g.*, *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994).

[11] NRS 125C.006, 125C.0065, 125C.007.

[12] *Kramer v. Kramer*, 96 Nev. 759, 762, 616 P.2d 395, 397 (1980).

[13] NRCP 60(b).

[14] *See*, *e.g.*, Partition Actions and Fraud Upon the Court (CLE, Las Vegas, Oct. 15, 2004), posted at http://www.willicklawgroup.com/published-works/#.

Notwithstanding that requirement, parties are free to amend the *Decree of Divorce* or final *Order* by written agreement signed by both parties and filed with the court as an order.[15]

In addition, in the event a piece of property or debt was omitted from the *Decree of Divorce* or final *Order*, Nevada law allows for the partition of that omitted asset or debt.[16] However, there are deadlines associated with making such a request and strict technical requirements. Delay once an omitted asset is identified is never advisable.

F. APPEALS

Currently, the Supreme Court uses a mediation process to resolve appeals where possible. If that fails, a briefing schedule is set and the appeal continues on its regular path through briefing and oral argument, to decision. Historically, this process often took years, however, with the creation of the Nevada Court of Appeals, the timing and resolution of appeals may be lessened.[17]

G. OTHER STEPS TO TAKE OR ADVISE AFTER JUDGMENT

1. Beneficiaries

Existing wills, trusts, life insurance, annuities, pension and profit-sharing plans, and other types of insuring agreements in which the client named the former spouse as a beneficiary should be reviewed and altered. A party who does not want the former spouse to remain a beneficiary upon the policies or plans, ***must*** change the designated beneficiary on the beneficiary selection forms of the relevant pension plan; a party may ***not*** rely just upon the terms of the *Decree of Divorce*.[18]

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[15] NRS 125.150(7).

[16] NRS 125.150(3). *See* Marshal Willick, "Partition Actions: What Every Nevada Divorce Lawyer Needs to Know," in *Advanced Family Law* (State Bar of Nevada, Las Vegas, Nevada, 2015), posted at http://www.willicklawgroup.com/published-works/.

[17] The "push down model" under which most family law appeals are reassigned to the Court of Appeals is beyond the scope of these materials. For a short general explanation of the appellate process, see http://www.willicklawgroup.com/appeals/; Marshal Willick, Family Law Appeals (CLE materials, Las Vegas, Dec. 13, 2012), posted at http://www.willicklawgroup.com/cle-materials/.

[18] *Carmona v. Carmona* 544 F.3d 988 (9th Cir. 2008); *In re Marriage of Padgett*, 172 Cal. App. 4th 830, 91 Cal. Rptr. 3d 475 (Ct. App. 2009); *Kennedy v. Plan Adm'r for DuPont Sav. And Inv.* ___ *U.S.* ___, 129 S. Ct. 865, 172 L. Ed.2d 662 (2009).

2. Insurance

Health benefits may be available through the former spouse's current place of employment. Pursuant to COBRA, non-employee spouses (of those employed in the private sector) may be eligible after the divorce is final for certain insurance coverage at group rates. The insurance can continue up to 36 months, depending on the situation, and the premiums should not exceed 105 percent of the current group rate. However, normally the divorced party ***must*** apply for this within ***60 days*** of the date that the dissolution was final. There are similar sorts of insurance continuation policies for state, federal, and military former spouses, as well.

3. Check List [Actions to Consider After Decree is Entered]

A brief check list of possible items of concern to newly divorced clients follows below. Not all of these may apply to each case, but reviewing them and acting upon those which are pertinent in applicable cases is called for:

- ☐ Transfer automobile titles per the provisions in the *Decree*.

- ☐ Remove former spouse's name from any jointly held assets awarded, such as bank and investment accounts, stocks, bonds, or close/cancel those accounts.

- ☐ Contact each insurance company or agent including, but not limited to, life, household, automobile, fire, casualty or liability insurance, to ensure coverage and ***beneficiary*** designations are appropriate. Failure to do so could result in payments being made to the former spouse no matter what the *Decree* provides.

- ☐ Have a new will drafted that reflects new status. Provisions made for the former spouse in a will drafted prior to divorce may no longer be valid, or may not be followed in the way desired, if a new will is not in place at the time of death. (It is extremely important to void or destroy any copies of the old will so as not to cause a reason for a contest of beneficiaries.)

- ☐ The former spouse's name should be removed from any jointly titled bills, such as utilities and phones.

- ☐ Income-tax withholdings should be reviewed with employer and/or accountant to determine what is appropriate in light of new status.

- ☐ Check with your accountant to determine what your estimated income tax payments should be, in light of your new status and any payments you are making or receiving from your former spouse pursuant to your *Decree*.

☐ Send letters to creditors regarding pertinent parts of the court order; if necessary, send a copy of the order or transcript (for example, letter to mortgage company to copy out-spouse with notice of deficiency/delinquency to trigger right to re-enter).

☐ Conduct whatever steps are required to complete retirement applications, survivorship eligibility, or change of named beneficiary, etc., keeping in mind that a divorce may not automatically change a beneficiary designation on a retirement account. Failure to do so could result in payments being made to your former spouse, no matter what the *Decree* provides.

☐ Make prompt application for carry-over health benefits, noting strict time limits for civil service, military-related coverage, or COBRA.

4. Tax Related Reminders

The ***general*** rules below provide some general information, but before any tax return is signed or other action taken with respect to federal or state income returns, the situation should be reviewed with a tax advisor.

1. Officially notify the IRS of any changed mailing address from the address used on the last tax return by filing IRS Form 8822.

2. Spousal support or alimony is usually taxable to the recipient and deductible from the income of the payor if all IRS requirements are met, and if the *Decree* does not alter that result.

3. Child support payments are ***not*** deductible from the income of the payor or taxable to the recipient.

4. Unless specifically addressed in the *Decree/Order*, generally the custodial parent will be entitled to claim the dependency exemption on his or her income tax return. The custodial parent may execute IRS Form 8332, releasing the dependency exemption to the noncustodial parent. Keep in mind that this situation is increasingly complex, involving multiple exemptions, deductions, credits, and limits and should be discussed in depth with a tax advisor for specific guidance.

5. Generally, there is no tax gain or loss recognized as a result of the division of property between spouses upon divorce. Thus, there may be no tax incurred by dividing the property.

6. It is important to know the tax basis of the property received in the division of assets. The basis is generally the cost of acquiring, and in some cases maintaining, a capital asset. If the asset has appreciated, the person who receives that asset will be responsible for tax on the appreciation when the asset is sold.

Again, these tax pointers are general in nature. ***Only*** a qualified tax advisor can advise about their application to a specific case.

5. Social Security Benefits

A party married for more than ten years to a spouse who paid into the Social Security Trust Fund may be entitled to spouse's or survivor benefits on the former spouse's account upon reaching age 62, regardless of whether the former spouse has retired at that time. These benefits are provided by the federal government and are not usually addressed in a *Decree*.

The Social Security Administration advises contacting it three months in advance of the anticipated eligibility date. For survivor benefits, this could be as early as three months before turning age 60; for spouse's benefits, three months before turning age 62.

While there is some contrary authority elsewhere, Nevada case law is in the mainstream of case law stating that Social Security benefits may not be divided or taken into account, directly or indirectly, when dividing property. [19]

H. WITHDRAWAL – OR NOT

In many offices, formally withdrawing from a case at the conclusion of representation is standard procedure. Few attorneys maintain tabs on all their former clients, and if the attorney has withdrawn, the client will be notified directly in the event that anyone files anything in the client's case.[20]

Other attorneys remain as counsel of record in their completed cases. This is convenient if future litigation is anticipated, and if the attorney is confident of continuing to be retained (and paid) for that future work, but it can otherwise lead to a scramble to withdraw and an awkward decision to oppose any new filings on their merits, or not, while remaining counsel of record.

I. LIENS AND COLLECTIONS

It is a trite (but true) maxim that the best way to ensure getting paid for legal work is to be paid in advance; one anonymous lawyer put it this way: "Nothing has less value than yesterday's legal services."

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[19] *Boulter v. Boulter*, 113 Nev. 74, 930 P.2d 112 (1997); *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996). This is entirely separate from consideration of some forms of Social Security disability in child support arrears cases. *See Metz v. Metz*, 120 Nev. 786, 101 P.3d 779 (2004).

[20] *See*, *e.g.*, EDCR 7.40.

Obviously, it is easier said than done. Counsel trying to avoid going unpaid must always monitor funds remaining on retainer, and one popular coping mechanism is an "evergreen" retainer which requires a client to always have money on retainer until the final billing cycle of a case, or by replenishment of the deposit at each billing cycle.

In any event, it is always a good idea to have a ***written*** clear, plain English fee agreement which contains a clear and enforceable section on Liens and Adjudication. Some offices have increased their billing frequency from once to twice per month, or even weekly, trading the increased staff time for a lessening of how far upside down a case can get before withdrawal for non-payment is started.

Where services have been rendered but the bill remains unpaid, the usual way of attempting collection of unpaid fees is through assertion of a lien – "The legal claim of one person upon the property of another person to secure the payment of a debt or the satisfaction of an obligation."

Lien claims are statutory – provided by statute under NRS 18.010(1), "The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law." An attorney's lien "is for the amount of any fee which has been agreed upon by the attorney and client" (or, in the absence of an agreement, for the reasonable value of services rendered).[21]

A "Retaining" or "General" lien was established at common law, which allows a discharged attorney to withhold the client's file and other property until the court, at the request or consent of the client, adjudicates the client's rights and obligations with respect to the lien; whereas a "Charging" lien is a creature of statute that gives the attorney the right to attach his lien to any judgment or settlement the attorney has obtained for the client.[22]

For many years, the lien adjudication process permitted clients to have representation, and attorneys some reasonable assurance that they would eventually get paid for their efforts. All of which was intended to serve the Nevada Supreme Court's pronouncement that the purpose of NRS 18.015 is to secure attorney's fees and to "encourage attorneys to take cases of those who could not otherwise afford to litigate."[23]

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[21] NRS 18.015(1).

[22] *Figliuzzi v. Dist. Court*, 111 Nev. 338, 890 P.2d 798 (1995).

[23] *Muije v. A. North Las Vegas Cab Co.*, 106 Nev. 664, 667, 799 P.2d 559, 561 (1990); *see Ber-Wachs v. Law Offices of Logar & Pulver*, 123 Nev. 71, 157 P.2d 704 (2007).

All that was thrown into some doubt and confusion by the decision in *Argentena*,[24] which severely limited attorney liens, until the lien statutes were amended in 2013 to effectively restore the pre-existing practice.

Additionally, it is permissible for an attorney to seek a security interest in the client's real property.[25] However, there is a risk of loss of that security, since in any divorce there is a possibility of transfer of that property during the litigation to other spouse.

An attorney seeking to adjudicate a lien must actually ***file*** a Lien for Attorney's Fees (pursuant to NRS 18.015) with a copy of the retainer agreement and billing statements, and then file a motion to adjudicate that lien, including all required representations and application of factors under *Brunzell* and *Wilfong*.[26] Although all this extra work is a burden, it is still a lot faster, easier, cheaper and ***much*** less risky than filing a separate action for recovery against a client.

There is one alternative. The State Bar of Nevada has a fee dispute process, but there are varying views of how efficient, timely, and economical that process might be. The process can be invoked by either the attorney or the client, within 6 years of end of the attorney/client relationship. If the claim is already pending before a court that has asserted jurisdiction to resolve it, the Bar process rules state that the Bar lacks jurisdiction to proceed. Section XII(B) of the bylaws of the program state that any award rendered may be enforced by ***any*** court of competent jurisdiction.

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[24] *Argentena Consol. Min. Co. v. Jolley Urga*, 125 Nev. 527, 216 P.3d 779 (2009) (in the absence of an enforceable charging lien (which is generally non-existent in divorce cases), a client's request to liquidate a retaining lien, or a client's consent to the district court's adjudication of a retaining lien, the district court lacks jurisdiction to adjudicate an attorney/client dispute as to fees owed).

[25] Formal Opinion # 37, Feb. 1, 2007. Requirement of compliance with SCR 158 (now NRPC 1.8).

[26] *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P. 2d 31 (1969); *Miller v. Wilfong*, 121 Nev. 619, 119 P. 3d 727 (2005).