COHABITATION AND ALIMONY PAYMENTS: UNDERSTAND THE LAWS IN NEVADA

by

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I. DEFINING "ALIMONY" AND "COHABITATION"

A. "Alimony" Has No Concise Definition

In large part, the evolution of "marriage" is what has continuously disrupted the understanding and approaches to the purpose of alimony. The transformation of marriage is continuing, if not greatly accelerating.[1]

[1] Daniel I. Weiner, *The Uncertain Future of Marriage and the Alternatives*, 16 UCLA WOMEN'S L.J. 97 (2007); Marshal S. Willick, *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-Marital Property and Support Law*, 19 NEV. LAW. 6 (May, 2011). *See also* Appendix 1.

A full analysis of the history of marriage in Nevada is beyond the scope of this paper, but is available.[2] At one time, cohabitation was looked at as an element of common-law marriage,[3] but Nevada outlawed common-law marriage as of 1943,[4] and it ceased to be a factor in marital formation at that time.

The closest the Nevada Supreme Court has come to explaining its perception of the purpose of alimony is its statement in 1998 that "property and alimony awards differ in effect," with alimony constituting "an equitable award serving to meet the post-divorce needs and rights of the former spouse."[5]

The Nevada Supreme Court emphasized the point of alimony being a no-fault proposition in 2000, when it dramatically held that fault is not to be considered in the making of alimony awards at all, so alimony is not "a sword to level the wrongdoer" or "a prize to reward virtue."[6]

Historically, ***most*** of the comments by the Nevada Supreme Court as to the nature and function of alimony have been in the "subtractive" – saying what alimony is ***not***, rather than what it is, and stating why its grant, denial, or amount was improper, rather than when or how much ***is*** proper.

Thus, according to the Court, in addition to alimony ***not*** being a sword or prize, courts are ***not*** required to award alimony so as to equalize future income.[7] Property equalization payments "do ***not*** serve" as a substitute for alimony (or presumably vice versa).[8] And alimony is ***not*** an assignable property right.[9]

But that begs the question of what it ***is*** – or is supposed to be. The repeated reference to negatives is reasonable, given the absence (in Nevada law or nationally) of any viable defined purpose for

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[2] *See*, *e.g.*, Marshal Willick, *The History and Nature of marriage in Nevada*, posted at http://www.willicklawgroup.com/marriage-in-nevada/.

[3] *See*, *e.g.*, *Parker v. DeBernardi*, 40 Nev. 361, 164 P. 645 (1917).

[4] NRS 122.010.

[5] *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998), *citing Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996). The *Shydler* decision is discussed in greater detail below. *See infra* discussion in text at notes 50-51, 151.

[6] *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000). The Court closely examined the legislative history of the 1993 amendment to NRS 125.150, and concluded that the Legislature deleted the language about the "respective merits of the parties" in direct response to the Court's decisions in previous cases suggesting that marital fault could be considered in determining both alimony and property distribution.

[7] *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998).

[8] *Id*.

[9] *Foy v. Estate of Smith*, 58 Nev. 371, 81 P.2d 1065 (1938).

alimony awards. The Nevada Supreme Court has still set out a number and variety of explanations over the past 50 years for what it was trying to accomplish and why, as it groped its way from reviewing for a facial "abuse of discretion" to deciding whether the trial court paid at least lip service to "consideration" of changing lists of "factors." Those factors were enshrined in the statute by the Nevada Legislature without improving their actual usefulness in any way.

In her work for the American Academy of Matrimonial Lawyers' alimony project, Professor Mary Kay Kisthardt provided a summary description of the English common law evolution of divorce and the importation of the concept of alimony to the United States with the rest of English law. She then turned to the evolution of alimony in the United States.[10]

As imported to this country, alimony seemed to be most commonly analogized for damages for breach of the marital contract, with a strong "fault" determiner as to both eligibility and amount.[11] Tracing the history of its "modern era" to the 1970s, Professor Kisthardt noted the expansion of property allocation to wives upon divorce, and the spread of no-fault divorce (with accompanying fading of fault in alimony determinations) as giving rise to a focus on "need."[12]

The aim of newly re-titled "maintenance" of making recipients self-supporting in the shortest possible time generated enormous differences in post-divorce economic trajectories for men and women (i.e., men got much richer post-divorce, while women became much poorer). This gave rise to a "second wave" of reform in the 1990s, looking beyond "need" to provide compensation for losses in earning capacity and for homemaker services rendered in common divisions of marital duties, but some commentators deemed those reform efforts "unsuccessful."[13]

Professor Kisthardt classified various modern academic alimony proposals as having been intended to shift from "need" to "compensation" for the "marriage cost" of loss of earning capacity that

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[10] Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. LAW. 61 (2008).

[11] *Id*. at 66-67. *See also* Larry R. Spain, *The Elimination of Marital Fault in Awarding Spousal Support: the Minnesota Experience*, 28 Wm. Mitchell L. Rev. 861, 867 (2001) (describing some views of fault in making alimony awards).

[12] *Id*. at 66-68, citing the UNIF. MARRIAGE AND DIVORCE ACT § 308, 9a U.L.A. 147, 347 (1987) as the legal regime removing from alimony its "punitive rationale," and subordinating the marital standard of living to one of six factors intended to create usually short-term awards making recipients "self-supporting" as quickly as possible.

[13] Kisthardt, *supra* note 10, at 68-70, citing, *inter alia*, Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227; Brett R. Turner, *Rehabilitative Alimony Reconsidered: The Second Wave of Spousal Support Reform*, 10 DIVORCE LITIG. 185 (1998).

otherwise would have accrued, career development being subordinated to child-rearing, or an interest in the future earnings of the more highly-compensated spouse.[14]

Throughout that evolution, alimony has remained available to courts as "a remedy without a rationale."[15] As noted by almost every theoretical commentator on alimony, the absence of a coherent theoretical basis for such an award, and the resulting absence of consistency or predictability in such awards, impedes settlement, increases litigation costs, and undermines confidence in the fairness of the judicial system.[16]

The level of resources expended by both the parties and the courts is often disproportionate to the economic stakes actually involved in such cases. In a word, the current system of making alimony determinations is inefficient. Professor J. Thomas Oldham concisely refers to alimony as "the most controversial aspect of American divorce law."[17]

In 2002, after eleven years of work and four drafts, the American Law Institute ("ALI") published its *Principles of the Law of Family Dissolution: Analysis and Recommendations* ("*Principles*"). Consisting of 1,187 pages of single-spaced exposition, explanations, theoretical bases, and citations, the *Principles* considered many of the foundational questions in family law surrounding divorce, cohabitation, same-sex relationships, and parentage.

The Director's Foreword noted that this ALI effort was different from its usual attempts to summarize the law of the various States as it actually existed – this was not a "restatement," but an exposition of principles "because much of the relevant law is statutory, and what seemed to be needed was guidance to legislatures as well as to courts."[18]

Among the topics tackled by the *Principles* – consisting of its Chapter 5 – was alimony, a term which it recast as "Compensatory Spousal Payments." The Chief Reporter's Foreword to the

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[14] Kisthardt, *supra* note 10, at 70-72, citing, *inter alia*, Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23 (2001). Professor Kisthardt classified my earlier writings in this subject area into this category of alimony analyses. *See* Marshal Willick, *In Search of a Coherent Theoretical Model for Alimony*, 15 NEV. LAW. 40 (Apr. 2007).

[15] Kisthardt, *supra* note 10, at 64, citing Ira Mark Ellman, *The Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 FAM. L.Q. 801, 809 (1999).

[16] David Hardy, *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 NEV. L. J. 325 (2009); Kisthardt, *supra* note 10, at 62-63; Laura W. Morgan, *Current Trends in Alimony Law: Where Are We Now?*, 34 FAM. ADVOC. 8, 10 (Winter 2012); Brett R. Turner, *Spousal Support in Chaos*, 25 FAM. ADVOC. 14, 18 (Spring 2003).

[17] J. Thomas Oldham, *Changes in the Economic Consequences of Divorces*, 1958-2008, 21 J. AM. ACAD. MATRIM. LAW. 419 at 437 (2008).

[18] Foreword dated Nov. 16, 2001, by Lance Liebman, Director, American Law Institute, A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) ("*Principles*"), at XIII.

Principles explained that the ALI approached an area of law going by 3 different names (alimony, spousal support, or maintenance) and consisting mainly of a "judge-made elaboration of relatively general statutory principles."[19]

After extensive discussion and analysis, the *Principles* noted that the current law of alimony, nationally, has "no coherent rationale," and that alimony continues to be a "residual category . . . defined as those . . . awards . . . in connection with the dissolution of a marriage that are not child support or the division of property."[20] Concluding that a "unifying concept must be sought in other terms," it found such a concept in reframing the question of alimony from one of discerning and addressing ***need*** to one of discerning and addressing ***loss***.

The "bottom line" is that there is no universally-accepted definition of what alimony is, or is intended to be, in Nevada or elsewhere, which is a reality that practitioners ignore at their peril.

B. "Cohabitation" Has No Concise Definition, Either

It might be thought that "cohabitation" would be a simple concept, but that does not seem borne out by history.[21] At one point Nevada's divorce law had as a ground for divorce "three years separation without cohabitation,"[22] and the cases discussing the activities of parties are as fact-based as those that continue in California, which measures the end of the marital community as of "final separation."[23]

The "dictionary definition" of "cohabitation" depends on which dictionary you use. The Oxford English Dictionary gives three definitions in descending order: living together, living together as husband and wife, especially without legal marriage, and an irrelevant political term.[24]

Black's Law Dictionary suggests "the fact or state of living together, especially as partners in life, usually with the suggestion of sexual relations," and providing three cross references to "illicit cohabitation," matrimonial cohabitation, and "notorious cohabitation."[25]

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[19] Foreword dated May 7, 2001, by Ira Mark Ellman, Chief Reporter, *Principles*, *supra* note 99, at XVII.

[20] *Principles*, *supra* note 99, at 875 (§ 5.01).

[21] "The life of the law has not been logic; it has been experience." Oliver Wendell Holmes, *The Common Law* (1881).

[22] *See*, *e.g.*, *Lemp v. Lemp*, 62 Nev. 91, 141 P.2d 212 (1945).

[23] *See*, *e.g.*, *In re Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661(Cal. Ct. App. 1985).

[24] Shorter Oxford English Dictionary On Historical Principles (5th ed. 2002) at 444.

[25] Black's Law Dictionary (7th ed. 1999) at 254.

A Google search[26] brings up two un-sourced definitions, "the state of living together and having a sexual relationship without being married," and "the state or fact of living or existing at the same time or in the same place."

But what about two people incapable of or uninterested in a sexual relationship? Does that render living together in the same place something other than "cohabitation"? The sheer number and variety of definitions indicates that the term is inherently subjective, and includes value judgments and assumptions that can vary from one user of the term to another.

C. Cohabitation Clauses and Their Impact

It is possible to alter the outcome of a cohabitation and alimony intersection either by contract or by court order, as illustrated by two Nevada cases from the 1990s.

In *Spector*,[27] the divorce decree entered after a lengthy marriage called for permanent alimony "until [wife] cohabits with an adult male not a member of her family in a romantic relationship, dies or remarries."

The husband later brought a motion to terminate alimony contending the wife had violated that provision. At the hearing, the wife admitted to having sex with a male cohabitant, but denied that the relationship was "romantic." The district court (Stone) held the cohabitation clause void as against public policy and therefore *void ab initio*, and denied the motion.

The Supreme Court reversed, noting both the legal authority supplied by husband upholding anti-cohabitation provisions from several other jurisdictions and that the wife had submitted no authority to the contrary. The Court concluded that a cohabitation provision in a separation agreement and decree was not against public policy, and remanded.

Gilman[28] was a consolidated appeal. In *Gilman*, the decree ordered that "spousal support shall terminate upon the death or remarriage of [the wife] and the court will consider the issue of spousal support in the event of co-habitation by [the wife] with an adult male who significantly contributes to her support." The district court denied the husband's motion to reduce or terminate alimony, finding that the boyfriend had not significantly contributed to the wife's support, and that Nevada law contained no presumption that spousal support should terminate if the recipient resided with another person.

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[26] February 27, 2017.

[27] *Spector v. Spector*, 112 Nev. 1395, 929 P.2d 964 (1996).

[28] *Gilman v. Gilman*, 114 Nev. 416, 956 P.2d 761 (1998).

The second case was *Callahan*, in which the decree stated that the husband's obligation to pay spousal support would terminate upon his death or the wife's remarriage. There was no reference to cohabitation. The wife later moved in with her boyfriend. The district court denied the husband's request to terminate alimony.

The Supreme Court affirmed both decisions. For *Callahan*, the Court adopted and applied the "economic needs" test: "the amount of spousal support reduction, if any, depends upon a factual examination of the financial effects of the cohabitation on the recipient spouse. . . . Shared living arrangements unaccompanied by evidence of a decrease in actual financial needs are generally insufficient to call for alimony modification."[29] The Court noted that the economic needs test properly considered the rights and needs, both fiscal and personal, of the payor and recipient.

Evidence that an alimony recipient is either expending spousal support to support another, or has decreased needs due to the contribution of the other, could lead to a reduction or elimination of support payments.

But spousal support is not to be rescinded simply because the recipient was cohabiting. The Court held that "a showing that the recipient spouse has an actual decreased financial need for spousal support due to the fiscal impact of a cohabitant may constitute changed circumstances sufficient to require a modification of unaccrued payments under that support obligation."[30]

In *Gilman*, because the matter was contractual, the Court declined to apply NRS 125.150(7) or the economic needs test. The Court affirmed the holding of the district court that the parties were free to put such a provision in their decree and that the provision was valid, citing *Spector*.[31] But the Court affirmed the finding of the district court that the cohabitant had not "significantly contributed" to the wife's support, finding the contract silent as to any use of support received by the wife to support the cohabitant.

The lessons from these cases seem pretty straightforward:

- It is permissible to have a cohabitation clause in a divorce decree terminating alimony in the event the recipient cohabits with another after divorce.

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[29] *Id*. at 422-423.

[30] *Id*. at 424.

[31] *Spector v. Spector*, 112 Nev. 1395, 929 P.2d 964 (1996).

- If a lawyer drafts such a provision, do not be euphemistic[32], but define exactly what relationship or condition will or will not be relevant to an alimony reduction/termination motion.[33]

- If you are going to file an alimony reduction motion based on post-divorce cohabitation of the recipient, know ***exactly*** what the order requires to be proven to alter the existing award, and be prepared to have, or get, adequate economic information to prove it.

- Employment of such a clause pretty much guarantees the continuing concern by – and therefore attention of – a former spouse with the living and sexual behavior of a former spouse, giving rise to plenty of opportunities for continuing divorce acrimony for years or decades after the divorce itself.[34]

D. Defining and Proving Cohabitation: Economic Units, Physical Proximity, and Sex

The Nevada Supreme Court discussion of *Spector* above appears to simply assume that a sexual relationship is a "romantic" one as prohibited by the language of the cohabitation clause, but there is no indication of what happened on remand. Both sides appeared to consider the wife's relationship one of "cohabitation" without further inquiry, indicating that both considered the term satisfied by the wife "living with a man with whom she was sexually involved."

The Nevada Supreme Court did not equate "romantic" with "sexual," but while that certainly appeared to be the implication, there was no analysis. Left undecided are a host of questions, including what would the results have been if the wife's room-mate had made claims of "love" in writing? What if the parties had been aged, or ill and infirm?[35] Would the results have been identical, at trial or on appeal, based on the parties' capabilities, rather than circumstances?

As noted in the introduction, a given judge's internal predispositions about what constitutes "cohabitation" can completely alter legal analyses. In a trial level case out of Humboldt County, the State was trying to collect $100 per month in child support from one of two spouses going through

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[32] I.e., "romantic" for "sexual."

[33] In the modern world in which same-sex unions are lawful, it may not be appropriate to condition the matter with reference to the gender of the future cohabitant.

[34] *See*, *e.g.*, Cynthia Starnes, *I'll Be Watching You: Alimony and the Cohabitation Rule*, 50 Fam. L. Quarterly No. 2 (ABA Fam. L. Section, Summer, 2016) at 261.

[35] "Sex at age 90 is like trying to shoot pool with a rope." Camille Paglia.

a divorce where their daughter was living separate from both of them.[36] The trial court found the mother (Belinda) to have no child support liability at all, finding:

> She lives with Debbie, John, Perry and Mary (who has been her childhood friend since third grade). She is not cohabiting with any of them. She cleans, cooks, shops, and does yard work for the household. She pays no rent. Belinda's friends provide a residence, food, necessaries, some money and transportation costs for her. She has a boyfriend, who is not providing financial help for Belinda. They do not live together.

Later in the decision, the court further noted:

> The State argues that Belinda is cohabiting with her roommates so that their incomes must be considered. Cohabitation implies sexual intercourse. Cohabitation has not been proven in this case.

The trial court obviously did not consider "living with" people to be cohabitation. Nor having a sexual relationship with someone – so long as it was someone ***other*** than whoever one is living with. So, at least for that judge, "cohabitation" would apparently require both living in the same place ***and*** sex with ***that*** person.

And then there is the question of economics – how exactly could either party prove, or disprove, "contributions" to living expenses in the absence of clear records over an extended period of who obtained what funds and used them for which purposes – requiring exhausting and exhaustive discovery and presentation, all after a divorce is supposedly "final."[37]

Left unanswered are the kinds of questions sometimes looked at in "palimony" and similar cases, as to whether persons who do not actually "live" together full time are nevertheless an economic unit, and what kinds and varieties of relationships could be considered "cohabitation."[38]

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[36] *Aloia v. Aloia*, , 2001 Nev. Dist LEXIS 12 (No. CV 15, 308, Dept. No. 2, March 5, 2001).

[37] Under the current rules, even trying to ***get*** that information could require a motion to re-open discovery. *See* NRCP 16.21.

[38] *See* line of case authority following *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A.2d 902 (1979); *see also Sullivan v. Rooney*, 533 N.E.2d 1372 (Mass. 1989) (where parties had a relationship of approximately 14 years, during 7 of which they lived together, were engaged to be married at some "indefinite future date," female cohabitant, who gave up her career and maintained a home for herself and the male cohabitant, was entitled to an imposition of a constructive trust on the property, allotting her a one–half interest in the residence); *Gilman v. Gilman*, 114 Nev. 416, 427, 956 P.2d 761, 767 (1998) (explaining *Michoff* and noting that the basis of that decision was implied contract, pooling of assets, holding out as husband and wife, treating assets as community property, and building a business together, and finally concluding: "neither cohabitation nor a romantic relationship is the real basis for the *Michoff* holding").

E. Legal Doctrines, Including Lump-sum Alimony and "Unmodifiable" Alimony, and Their Intersection with Cohabitation

As noted above, "cohabitation" ceased to be an element of common law marriage formation in 1943. In the decades since then, cohabitation has appeared at the ***other*** side of marriage – as an element of "separation" as a ground of divorce, as a post-marriage behavior that at one point might have had an impact on child custody decisions,[39] or not,[40] and as referenced in this examination, as a potential factor indicating whether post-divorce alimony should be affected.

But not all alimony awards are the same, and not all such awards might be affected by "cohabitation, however defined, and whether or not provable or proven.

Nevada law provides for five basic flavors of alimony awards:

- "Maintenance" – payments made during the pendency of an action, which terminate upon entry of a final Decree.[41]

- Temporary spousal support – a specified post-divorce award intended to terminate at a specified future date or upon a specified future event.[42]

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[39] *See Sisson v. Sisson*, 77 Nev. 478, 367 P.2d 103 (1961), in which the Nevada Supreme Court reversed a child custody award to an "adulterous mother" who had "subjected her children to a shameful, immoral, unwholesome environment of more than a year's duration," because "such conduct precluded any conclusion that she was a good mother and a fit and proper person to be awarded custody of the children." Nine years later, in *Cooley v. Cooley*, 86 Nev. 220, 467 P.2d 103 (1970), the Court vaguely and partially repudiated *Sisson*, holding that while "adultery is a weighty concern in a custody case," in that particular instance, the trial court's award of custody to the adulterous mother would not be reversed. The asserted grounds for the distinction were that in Cooley, the mother had only "lived, absent benefit of clergy, for over a month with her paramour, whom she later married." *Cooley* has apparently never been overruled.

[40] By 1994, attitudes had changed. *Jones v. Jones*, 110 Nev. 1253, 885 P.2d 563 (1994), was a relocation case usually cited for the proposition that "ties go to the runner." The Court found that the Mother's desire to move to Chico was a result of much thought and research regarding career opportunities and lifestyle choices, rather than a mere whim to pursue a "frivolous, short-term romance." Amid much other discussion, the Court stated that courts are "not free to ignore noneconomic factors likely to contribute to the well-being and general happiness of the custodial parent and the children" in applying the "actual advantage" test. Among these was "the custodial parent's right to pursue another relationship." Sharing living expenses with an opposite sex cohabitant was considered a legitimate improvement in the Mother's economic position. The Court brushed off the Father's claim that the Mother was displaying immorality in view of the children, despite the Mother's statement that she and her intended cohabitant were not engaged and had no present intention to marry in the future.

[41] NRS 125.040 authorizes Nevada courts to make orders for "temporary maintenance for the other party" during the pendency of an action. No standards are provided, and such temporary orders for the purpose of keeping everyone fed, clothed, and housed during the pendency of the case are often made on a perfunctory review of "need and ability," as disclosed solely by preliminary financial disclosure forms.

[42] NRS 125.150(1) authorizes the court to award alimony at the conclusion of a divorce case "as appears just and equitable." No standards are provided there, either.

- Permanent alimony – a specified post-divorce award intended to continue indefinitely, unless modified by later court order (usually upon "changed circumstances" of some sort).[43]

- Rehabilitative alimony – a specified post-divorce award for the purpose of obtaining training or education relating to a job, career, or profession.[44]

- Lump-sum alimony, which presumably requires a set aside of one spouse's separate property to the other.[45]

In practice, these categories are sometimes blurred and overlapping. While conceding the futility of trying to categorize cases rendered over a 120-year span which "lack analytical consistency" and contain overlapping analyses, Judge Hardy nevertheless organized the published case law into four basic kinds of decisions, and ascribed each of the major decisions as seeming to follow at least one of them:[46]

1. Traditional need-based alimony and/or the payor's ability to pay.
2. Non-specific economic loss.
3. Adjunct to property division.
4. Reliance theory of marriage continuation.

Other commentators have grouped the decisions somewhat differently. One analysis labeled the case law as awarding "transitional, rehabilitative, just and equitable, [or] permanent alimony."[47]

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[43] *Id*.

[44] In 1989, the Nevada Legislature added NRS 125.150(8) (now 125.150(9)), requiring a court granting a divorce to "consider the need to grant alimony to a spouse for the purpose of obtaining training or education relating to a job, career or profession." This provision did add some language indicating what such an award would encompass, and at least two factors to consider in making such an award (whether the obligor obtained job skills or education during the marriage, and whether the recipient provided financial support while the obligor did so). Such an order must contain terms for when such training or education will commence.

[45] NRS 125.150(1) considers on its face that alimony might be payable "in a specific principal sum" rather than in installments, and NRS 125.150(4) provides: "In granting a divorce, the court may also set apart such portion of the husband's separate property for the wife's support, the wife's separate property for the husband's support or the separate property of either spouse for the support of their children as is deemed just and equitable." In the meantime, the community property statutes require a presumptive equal division of such property, absent a "compelling reason" for an unequal division and the trial court "sets forth in writing the reasons for making the unequal disposition." NRS 125.150(1). So while "lump sum alimony" could, at least theoretically, be made from community property, the required standard and legal findings are so much lighter under the alimony rubric ("abuse of discretion") than under the property division language ("compelling circumstances") that most lump sum awards seem to be of separate property.

[46] Hardy, *supra* note 16, at 339-343.

[47] *See* Bruce I. Shapiro & John D. Jones, *Alimony in Nevada, Part I*, 25 NEV. FAM. L. REP. 1 (Summer 2012), available at http://www.nvbar.org/sections/FamilyLaw/NFLR/sept2002.pdf (last visited Sept. 29, 2013).

Another stated that alimony, as it has been developed in Nevada, could be "distilled into three different concepts": bridge the gap alimony; rehabilitative alimony; and compensatory or contract alimony.[48] That author described the 3 categories this way:

> Bridge the gap alimony is appropriate in a short-term marriage where one of the spouses needs a short period to place themselves in an economically independent position.
>
> Rehabilitative alimony permits a disadvantaged party to retrain or update a career, and move toward economic independence in a reasonable period.
>
> Compensatory or contract alimony is designed to compensate a party for their investment in the career of the other spouse, and to ensure the party can live in a manner approaching the lifestyle he or she lived during the marriage.[49]

A casual comparison of these retrospective efforts at categorization and the cases referenced to support them shows that they are vague, overlapping, and sometimes contradictory.

Respectfully, it appears that all such efforts are an intellectual dead-end for the same reason that the "Tonopah formula" automation of the Nevada case law (discussed below) was ultimately a failure.[50] The decisions being analyzed (or mathematically modeled) do not conform to any theoretical basis, approach, or reasoning, and it is therefore impossible that a distillation of those decisions, or a mathematical model based upon them, is going to make any theoretical sense either. Coherence cannot be divined from chaos.

Nevada cases have a lengthy familiarity with "lump-sum" alimony awards, but the overall law governing such awards is as confusing as all the other categories. A lump-sum award is sometimes designated as providing for temporary or permanent alimony.[51]

NRS 125.150(1)(a) permits an award of post-divorce alimony "in a specified principal sum," as distinguished from "specified periodic payments." This money could come from the obligor's separate property existing during the marriage or to be acquired later, or even from that spouse's share of community property divided upon divorce.

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[48] *See* Radford Smith, *Advanced Child and Spousal Support Issues*, in ADVANCED FAMILY LAW (NBI, Nov. 2012).

[49] The author ascribed this category to Richard A. Posner, ECONOMIC ANALYSIS OF THE LAW 151 (7th ed. 2007).

[50] *See infra* discussion of Tonopah formula in text at notes 72-77.

[51] *See Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972) (explaining that the reason for the payment of alimony in lump sum was to ensure that the spouse would actually receive payments that might otherwise be made by way of periodic payments).

NRS 125.150(4) allows the set aside of separate property from a spouse for the support of the other spouse or their children as is deemed "just and equitable." Applying this statute would apparently require a finding that some separate property of the obligor spouse existed upon divorce.

The Court's discussions of lump sum alimony over the years[52] do not clearly explain whether it is applied as a remedy or some separate species of available award. In either case, the Court has expressed the sentiment that there is a need for lump sum alimony to be available to avoid a party being left without the ability of self support or to prevent efforts by the payor spouse to frustrate a divorce court's order.[53]

There is some fuzziness in what awards terminate upon remarriage. Traditionally, in the absence of the district court "otherwise ordering," all future payments cease upon remarriage, but it would appear that a periodic payment of lump sum alimony or even (after *Waltz*[54]) a designation of "permanent alimony" is sufficient to prevent remarriage from constituting a terminating event. Since lump-sum alimony need not even be paid in "lump sum" under *Kishner*,[55] it seems possible that this entire category is just a euphemism for "unmodifiable." Left unclear is whether there are ***any*** contingencies that could affect the recipient's entitlement to full collection of such an ordered "lump sum award."

There is no crystal-clear authority on point, but from the published opinions, it appears that an award of alimony labeled "lump-sum" or "unmodifiable" could be asserted as being immune to modification upon the subsequent cohabitation of the alimony recipient. The precise language used in the order in question could be critical to the analysis.

Since the foundation of rehabilitative alimony is the finding that a spouse is in need of education or training in order to properly provide self-support, an argument could be made that termination of such support based on cohabitation is improper. The response to that argument would be that resources are available from the cohabitant, and that the economic needs test already factors in all necessary considerations. But it may take a test case to see how those arguments would be taken, on either side.

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[52] *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972); *Kishner v. Kishner*, 93 Nev. 220, 562 P.2d 493 (1977); *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990); *Schwartz v. Schwartz*, 126 Nev. ___, 225 P.3d 1273 (2010).

[53] *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990).

[54] *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994).

[55] *Kishner v. Kishner*, 93 Nev. 220, 562 P.2d 493 (1977).

II. CALCULATING ALIMONY

Defenders of leaving alimony in the judicial toolbox have been hampered by the lack of any concise explanation of why it belongs there.[56] Throughout the past several decades, the goals of those proposing alimony guidelines have remained consistent – predictability, consistency, adequacy, and theoretical soundness. Essentially every formulaic proposal, however, has been supplemented by so many wide-ranging modification or deviation factors that the process is returned to a muddle of exceptions giving the appearance, and perhaps the substance, that the original goal has been lost.

There are many guidelines, "formulas," and rules of thumb extant in various States and suggested in various articles, but none of them are directly applicable to the subject matter of these materials. While there is no concise reference to all of the formulaic attempts to address alimony that have been suggested, it is possible to review some articles that try to do so.[57]

III. ALIMONY MODIFICATION AND "CHANGED CIRCUMSTANCES"

A. Statutory

In Nevada, alimony is explicitly modifiable as to future payments in most circumstances:

> If a decree of divorce, or an agreement between the parties which was ratified, adopted or approved in a decree of divorce, provides for specified periodic payments of alimony, the decree or agreement is not subject to modification by the court as to accrued payments. Payments pursuant to a decree entered on or after July 1, 1975, which have not accrued at the time a motion for modification is filed may be modified upon a showing of changed circumstances, whether or not the court has expressly retained jurisdiction for the modification. In addition to any other factors the court considers relevant in determining whether to modify the order, the court shall consider whether the income of the spouse who is ordered to pay alimony, as indicated on the spouse's federal income tax return for the

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[56] *See* comments of Florida Family Law Section Chair Carin Porra: "Their group is basically made up of people who pay alimony and are not happy about that and want to get rid of the obligation. We represent both sides and it's our job to make sure the laws are fair for people on both sides of that question . . . . they keep calling it permanent and it's really not. While the term may be permanent, what it really is is a long-term alimony that can always be modified if the circumstances are appropriate. . . . [e]liminating it entirely would be detrimental to the folks out there in need of that type of long-term award. Even though society has changed . . . there are still homes where there are older folks or families where they have made the decision for one person to stay home and care for the children. That affects those persons' ability at some time in the future to support themselves if those marriages terminate," *Florida Bar News*, Feb. 15, 2013, *available at* http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/SMTGT/Alimony%20bill%20expected%20to%20be%20a%20hot%20topic (last visited Sep. 29, 2013).

[57] *See* Marshal Willick, *A Universal Approach to Alimony: How Alimony Awards Should Be Calculated, and Why*, 27 J. Am. Acad. Matrim. Law. 153 (2015).

preceding calendar year, has been reduced to such a level that the spouse is financially unable to pay the amount of alimony the spouse has been ordered to pay.[58]

B. Common Law

For purposes of these materials, the questions relating to modifiability of alimony awards upon the subsequent cohabitation of the alimony recipient are fairly encompassed in the "economic needs" test identified by the Nevada Supreme Court in *Gilman*, *supra* – unless the terms of the underlying agreement or order dictate a different, contractual standard, as also explained in that case.[59]

IV. OTHER RELATED TOPICS

A. Alimony and Palimony

There are two nearly-unrelated concepts of "palimony" in the United States. In the West, the term is used as shorthand for *Michoff*-like divisions of property accrued during a relationship by analogy to community property.[60]

On the East coast, however, the term has a completely different meaning. In New Jersey, in *Kozlowski*,[61] the court recognized that unmarried adult partners, even those who may be married to others, have the right to choose to cohabit together in a marital-like relationship, and that if one of those partners is induced to do so by a promise of support given her by the other, that promise will be enforced.

A discussion of the scope of such cases is beyond the scope of these materials, but multiple States have concluded that support obligations may be agreed by contract, express or implied. If a support-for-life agreement is violated, money damages are owed, measured by the reasonable actuarially-determined lifetime support needs of the cohabitant.[62] "Cohabitation" is often a component of those discussions and holdings.

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[58] NRS 125.150(7).

[59] *See also Harrison v. Harrison*, 132 Nev. ___, ___ P. 3d ___ (Adv. Opn. No. 56, July 28, 2016) ("parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy," citing *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009)).

[60] *Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992).

[61] *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A.2d 902 (1979).

[62] *Id.*, 80 N.J. at 388-389, 403 A.2d 902; *Crowe v. De Gioia*, 495 A.2d 889 (N.J. App. Divorce. 1985); *Connel v. Diehl*, 938 A.2d 143 (N.J. App. Divorce. 2008) (an unmarried person has a well settled right to enforce her cohabitant's promise to support her for life).

For purposes of these materials, it is sufficient to note that the assertion of a "cohabitation" relationship could form the foundation of a claim for property or support from an alleged cohabitant, and almost reflexively a basis for re-examination of economic commitments stemming from the dissolution of a prior relationship.

B. Nevada Alimony Law (Short Course)

Nevada's marriage and divorce laws trace to the territorial laws of 1861, and provisions empowering courts to make awards of "support of the wife and children" go all the way back to that time.[63] They remained in the form of husbands paying support for wives until the whole statutory scheme was reworded in 1975, during the debate regarding the proposed Equal Rights Amendment. After that time, alimony could theoretically flow in either direction.

NRS 125.150(1) authorizes the court to award alimony at the conclusion of a divorce case. Unless otherwise ordered by the court, alimony terminates in the event of the death of either party or the subsequent remarriage of the spouse receiving periodic payments pursuant to NRS 125.150(5). Pursuant to NRS 125.150(7), prior to the expiration of the term during which alimony is being paid, either party may file a motion for a modification of the award upon a showing of a change of circumstances.

In 1989, the legislature amended the alimony statute to require "consideration" of rehabilitative alimony, further requiring a court to consider a spouse's need for obtaining career-related training, whether the spouse who would pay such alimony obtained greater job skills during the marriage, and whether the spouse who would receive such alimony provided financial support while the other spouse obtained job skills or education.

Until 1993, some consideration of "fault" was at least impliedly in play in Nevada's alimony law. That year, the Legislature resolved the potential conflict between the concept of a no-fault divorce, on the one hand, and the consideration of marital misconduct, on the other hand, when determining an award of alimony by deleting the phrase "having regard to the respective merits of the parties" from NRS 125.150(1).

In 2007, the Nevada Legislature codified 11 "guideline factors" lifted directly from Nevada Supreme Court decisions, which a district court is required to "consider" in making an alimony award. The legislative history adopting those factors is devoid of any discussion or consideration of whether the factors listed make any sense individually or in combination or how they were to be prioritized, weighted, or applied in making awards.

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[63] "Support" is a word of "broad signification," permitting the separate property of the husband to be set aside for the wife and children for "everything, necessities and luxuries, which the wife in like circumstances is entitled to have and enjoy." *Lake v. Bender*, 18 Nev. 361, 403, 4 P. 711, 7 P. 74 (1884) *opn. on reh'g*.

Nevada District Court Judge David A. Hardy's detailed analysis of Nevada alimony law[64] attempted to categorize the statutory factors in accordance with the purposes they were apparently conceived to serve:

> 1. The financial condition of each spouse.[65] This guideline focuses on the recipient's need and the payor's ability to pay.
>
> 2. The nature and value of the respective property of each spouse.[66] This guideline focuses on the recipient's need and the payor's ability to pay.
>
> 3. The contribution of each spouse to any property held by the spouses pursuant to section 123.030 of the Nevada Revised Statutes.[67] This guideline focuses on the spouses' respective financial conditions and is therefore an extension of the need and ability to pay considerations.
>
> 4. The duration of marriage.[68] This guideline focuses on the reliance theory of marriage continuation.
>
> 5. The income, earning capacity, age and health of each spouse.[69] This guideline focuses on the recipient's need, the payor's ability to pay, the payor's career asset, and the reliance theory of marriage continuation.
>
> 6. The standard of living during the marriage.[70] This guideline focuses on the reliance theory of marriage continuation.
>
> 7. The career before the marriage of the spouse who would receive the alimony.[71] This guideline focuses on the recipient's economic loss resulting from career subordination.

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[64] Hardy, *supra* note 16, at 336-37.

[65] NRS 125.150(8)(a).

[66] NRS 125.150(8)(b).

[67] NRS 125.150(8)(c).

[68] NRS 125.150(8)(d).

[69] NRS 125.150(8)(e).

[70] NRS 125.150(8)(f).

[71] NRS 125.150(8)(g).

8. The existence of specialized education or training or the level of marketable skills attained by each spouse during the marriage.[72] This guideline focuses on the career asset as an adjunct to property division and economic loss resulting from career subordination.

9. The contribution of either spouse as homemaker.[73] This guideline focuses on economic loss resulting from career subordination.

10. The award of property granted by the court in the divorce, other than child support and alimony, to the spouse who would receive the alimony.[74] This guideline focuses on the recipient's need.

11. The physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse.[75] This guideline focuses on the recipient's need and the payor's ability to pay.

It hardly need be said that the above statutory list is not particularly helpful in actually determining how much, if any, alimony should be awarded and, if so, for how long.[76]

V. CONCLUSIONS

Every divorce lawyer should be versed in the statutory and case discussions of the meaning of the terms "alimony" and "cohabitation" and the interplay between those concepts. Terms do not always mean what they might seem to mean at first blush, and other terms (like "unmodifiable") might completely alter the utility of the analysis.

Great care is appropriate in the crafting of separation agreements, decrees, and other documents, with an eye toward the possible or probable future behavior of the parties to a divorce, and whether those future actions will, or should, have any effect on the orders reached in the divorce case.

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[72] NRS 125.150(8)(h).

[73] NRS 125.150(8)(i).

[74] NRS 125.150(8)(j).

[75] NRS 125.150(8)(k).

[76] Sadly, the quote Judge Hardy used in the introduction of his article seems as applicable to the current statute and its list of factors as when the Nevada Supreme Court approved this excerpt from the argument of counsel before it in a divorce case 120 years ago:

> The popular ignorance, even in the legal profession, of the law of marriage and divorce, has, in times not long past, been so dense as almost to exclude from the legislation on this subject [alimony] its proper forms. Largely the statutes contain expressions and provisions of whose meanings, and especially of whose consequential effects, their makers pretty certainly had no clear idea whatever. Instead of consistency and verbal propriety, they abound in absurdities. They are often chaos.

Lake v. Bender, 7 P. 74, 75 (Nev. 1885).