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NEVADA FAMILY LAW REPORT

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ARCELLA AND PRACTICAL GUIDANCE FOR LITIGATING SCHOOL DISPUTES

By Nicole Widdis-Hernandez, Esq.

Nevada courts routinely face disputes between parents concerning their children's schools. Separated parents often argue over where their child will attend school, and these conflicts should be anticipated by their family law attorneys. As a result, school disputes can be incredibly difficult with the decisions having lasting consequences and impacting the day-to-day lives of children and their futures. The Nevada Supreme Court recently offered guidance to lower courts and counsel for use in disputes over children's schools in *Arcella v. Arcella*, 133 Nev. Adv. Op. 104, 407 P.3d 341 (Dec. 26 2017).

At first glance, *Arcella* is a case about a religious dispute between joint legal custodians. The opinion states at its outset that the Court was tasked with "determining what weight, if any, a court should afford one parent's objection to the child receiving a religious education." Specifically, the case focuses on whether or not a parent's religious objections are dispositive in a dispute where one parent prefers a religious school and the other objects. Additionally, like many recent child custody opinions, *Arcella* reminds lower courts that they must make specific factual findings, supported by evidence, when issuing orders regarding a child's best interest.

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In *Arcella*, the child's father asked that the child attend a religious private school. The child's mother objected to the child attending a religious school, arguing that the public school for which the child was zoned was highly-ranked and closer to the child's primary residence. Without conducting an evidentiary hearing, the lower court found that *both* schools would be in the child's best interests, but ordered the child to attend the public school requested by the mother, after it took into consideration the mother's religious objection.

The Nevada Supreme Court found that the lower court erred by disfavoring the religious school, in violation of the First Amendment's Establishment Clause, because the lower court should have exercised neutrality when addressing religion. The Nevada Supreme Court further held that the lower court erred by failing to conduct an evidentiary hearing and by failing to support its order with factual findings concerning the child's best interests.

However, while *Arcella's* primary issue was a religious educational dispute between joint legal custodians, the opinion is most useful in its general application in all cases in disputes between parents over a child's schooling.

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Letter from the Family Law Executive Council

Dear Section Members,

We hope everyone enjoyed the 2018 Family Law Conference held in Bishop, California at the Tri-County Fairgrounds.

Based on the positive feedback from section members, the council has voted to hold the 2019 Family Law Conference in Bishop, California for the third consecutive year. Mark your calendars for the 2019 Family Conference scheduled for February 28 - March 1, 2019.

The Family Law Executive Committee

2019 Family Law Conference
February 28 — March 1, 2019

Arcella and Practical Guidance for Litigating School Disputes

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The Court acknowledged that the lower court may have "struggled with the lack of statutory guidance as to *how to* determine which school is in the child's best interests." The Court therefore went on to provide a framework of factors providing guidance to the lower courts when determining a child's "educational placement." The Court held as follows:

> The school that accords with the child's best interest does not necessarily mean the most expensive or the highest ranked school; it means the school best tailored to the needs of the particular child. Based on our examination of this case and others that have addressed this issue, *see, e.g., Jordan*, 212 P.3d at 928, the following factors will likely be relevant to a court's determination:
>
> (1) The wishes of the child, to the extent that the child is of sufficient age and capacity to form an intelligent preference;
>
> (2) The child's educational needs and each school's ability to meet them;
>
> (3) The curriculum, method of teaching, and quality of instruction at each school;
>
> (4) The child's past scholastic achievement and predicted performance at each school;
>
> (5) The child's medical needs and each school's ability to meet them;
>
> (6) The child's extracurricular interests and each school's ability to satisfy them;
>
> (7) Whether leaving the child's current school would disrupt the child's academic progress (footnote omitted);

> (8) The child's ability to adapt to an unfamiliar environment;
>
> (9) The length of commute to each school and other logistical concerns;
>
> (10) Whether enrolling the child at a school is likely to alienate the child from a parent.

The Court made clear that the listed factors were intended to be illustrative and not exhaustive. The Court further stated that the list was intended as a starting point for the lower court's analysis. The lower court is to "consider any other factors presented by the particular dispute," and the court is to "use its discretion to decide how much weight to afford each factor." Ultimately, the Court made clear that the factor-based analysis of the child's best interests should focus not on which school is "best," but rather which school is best for the child.

While the list of factors is not exhaustive, counsel should be prepared in school disputes to address those factors and any other facts which are specific to the minor child in the case. Lower courts will be looking to that information in a case-by-case analysis to determine which school is right for the individual child.

Nicole Widdis-Hernandez is law clerk to the Honorable Chuck Weller in the Second Judicial District Court of the State of Nevada, Washoe County. She graduated from the University of Nevada, Reno before attending law school at the William S. Boyd School of Law, University of Nevada, Las Vegas. Nicole has been licensed to practice law in the State of Nevada since 2010, and clerked for Judge Weller from 2010 to 2013. She practiced family law at the Barber Law Group in Reno from 2013 to 2015 and returned to District Court in 2015.

Effectively Representing Your Clients in the Appellate Courts

By Elizabeth Bassett, Esq.

Knowing how to best present your client's case on appeal is always a difficult task for any attorney. In the years that I spent reviewing hundreds of appeals as a Staff Attorney at the Nevada Supreme Court—including many family law appeals—I had the chance to see some of the most (and least) effective and successful approaches taken by attorneys in drafting their appellate briefs. While some advice for a successful appeal—like making your record in the district court—is fundamental, some of the other things I learned from reviewing appellate briefs is less obvious. These are a few of the things that I learned from the other side of appeals that can help you draft a more effective appellate brief.

The Written Order is Your Most Important Document on Appeal

Every time I was assigned an appeal to review, the first thing I would always do, even before reading any of the parties' arguments, was read the district court's order. I would see what kind of order it was—to determine the standard of review that applied—and see if it appeared to follow the correct standards and to be well reasoned and supported by evidence. The district court's order is likely the first and always the most important document that the appellate court will consider in your appeal. Therefore, regardless of which side of the appeal you are on, it is crucial to determine whether the final written order is adequate and accurate. This is particularly true in family law cases, because great deference is given to the district court's findings.

If your client is the prevailing party, it's important to ensure that the written order shows the appellate court that the district court considered all of the appropriate factors and made decisions that were supported by

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specific and sufficient evidence. You do not want to run the risk that the appellate court will conclude that an inadequate order is itself an abuse of discretion or that it will conduct its own review of the record for evidence to support the district court's decision only to decide that the evidence should have led to a different result.

If your client did not prevail and you think the district court got it wrong, it's important for the written order to accurately reflect the judge's application of law or facts that you believe was an abuse of discretion. If the prevailing party's draft order adds to or omits portions of the judge's oral ruling, provide the district court with your own order or file an objection to the proposed order. You may lose your grounds for appeal if the written order does not reflect the district court's reversible mistake, and it's only the written order—not the judge's comments at a hearing—that constitute the actual order of the court.

Don't Make Arguments on Which the Appellate Court Can't Afford Relief

The review of a case at the appellate level differs greatly from the district court, especially in family law cases. Deference is given to the factual findings of the district court as the appellate court does not have the chance to hear testimony and to weigh the credibility of witnesses. Therefore, arguments that ask the appellate court to make determinations as to which witnesses to believe or which testimony or evidence to ascribe more weight to are not likely to obtain a reversal for your client.

Instead, focus on the areas where the appellate court can afford your client relief. Argue that the district court misapplied the law or applied the wrong law altogether. Argue that the district court's findings were not supported by substantial evidence. But if the essence of your argument is really that the district court weighed the evidence wrong, you're unlikely to obtain a reversal of the district court's order.

Look at Your Approach With Fresh Eyes

A common practice of many attorneys who litigate a case in district court and then take the same case through the appellate process is to remain invested in presenting their case in the same way that they did in the district court. Oftentimes this prevents attorneys from seeing the best way to frame their argument on appeal and to miss issues raised by the district court's order. The standard of review and the audience are vastly different on appeal. It's therefore important to consider whether the presentation of your case should be different as well.

Try to take a step back from the approach you took in the district court and see if it holds up in light of the district court's ruling and the standard of review. Run your arguments by as many colleagues as possible to see whether they still find your arguments persuasive. It's important to remember that the focus in the appellate court is on the district court's order and whether it should be reversed or vacated, not on trying to prove your client's case.

Clarity

Clarity is one of the most crucial things that every attorney should strive for in an appellate brief. If the person reading your appeal doesn't understand what you want, they cannot give it to you. Every opening brief should clearly state, near the beginning, what errors you believe the district court made and what you want the appellate court to do about each of them.

Clarity is also essential when it comes to presenting the facts of your case. The person reviewing your appeal knows nothing about your case until they start to read your brief. If you include too many facts that aren't relevant to your appeal or skip over information that is necessary to understand your arguments, the points you are trying to make may be totally lost on your reader. Don't just use the same statement of facts that was included in all of your district court briefs. Draft a new statement of facts that is tailored specifically to your arguments on appeal. And remember—not every fact in your case is relevant on appeal.

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Similarly, more is not more on appeal. Unless your case absolutely warrants it, don't go over the page or word limit for your briefs. Incredibly long appellate briefs are rarely necessary, lead to reader fatigue, and will distract from the points you are trying to make. A focused brief that clearly lays out how you assert the district court erred and provides the law and the facts to support that argument has more impact on the reader than pages of argument that are not focused on the particular issues being addressed on appeal.

Cite to the Record

And lastly, as anyone who reads appellate briefs will stress to you, always cite to the record. If your brief says that a motion was filed, an argument was made, or a ruling was entered, you must direct the reader to where in the record they can find evidence of what you are asserting. If the reader has to search the record on their own, they may not find what you claim is there. If that happens, the appellate court will either conclude that the evidence does not exist or note in its ruling that you did not point to where any such evidence was contained in the record and that it therefore cannot consider that evidence in its ruling. Citing to the record is the best way to make sure that the appellate court considers all of the portions of the record that support your arguments and for you to show the reader that your brief is well supported.

ELIZABETH BASSETT is an associate attorney at Blanchard Krasner & French and is responsible for the firm's Nevada litigation and appellate matters. Before joining Blanchard Krasner & French, Elizabeth served as a Staff Attorney at the Supreme Court of Nevada for more than six years. Prior to working at the Court, Elizabeth litigated numerous cases with a private law firm for eight years, representing individuals and business in all phases of litigation and in appeals. Elizabeth also practiced at an appellate specialty law firm in California, drafting appeals and extraordinary writ petitions for law firms and individual clients.

Establishing and Developing a New Family Law Practice

Part 3: Hiring the Right Personnel

By Bruce I. Shapiro, Esq.

In part three of "Establishing and Developing a New Family Law Practice," we discuss the concept of hiring the right personnel. While sometimes short-term demands supersede long-term needs, hiring the right personnel, at the right time, is essential for long-term growth and prosperity.

The resume is telling. The resume is often underestimated. Poor grammar, an illogical, sloppy format, disorganization and multiple employers in a short period are all red flags.

If a prospective employee does not take the time to proofread and spell check their own resume, do you really want them responsible for your work product? If their resume is poorly organized and in a format that does not make sense, can you really trust them with your work assignments? Likewise, if a prospect cannot answer simple questions about their resume or are vague about their skills, you may want to steer clear.

Multiple employers within a relatively short period of time is often a big red flag. If a prospective employee has had multiple jobs in the past several years and has left all of them within a couple months because of "personality conflicts" with other employees, the person may have trouble getting along with others and will not be a good addition. Occasionally, however, the person may have a good reason for holding numerous jobs, such as following an attorney who made multiple moves in a short period or a spouse relocating.

Cut your losses early. In my experience, you generally find the best people when you don't need them.

Counterintuitive? Not really. When you are busy and don't have the personnel to meet the demands of your clients, you will often hire a staff member, or even a lawyer, that you know is not a good fit, but you feel desperate to hire someone. When you urgently need to hire someone, and hire out of necessity, it often results in a mistake. We have all made this mistake, but we often aggravate this

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mistake by hanging onto the employee too long. We do this either out of necessity, hoping things will change, or just out of cowardice and not wanting to fire the employee. It is amazing that an occupation known for being so aggressive has so many lawyers who are reluctant and apprehensive about firing employees, even when they are not working out. It is like a bad marriage: It's sometimes easier to deal with the bad "known," rather than an unknown that is likely better.

The bottom line is that if you have made a mistake in a hire, do not compound the mistake by failing to acknowledge that you made a mistake and cutting your losses. A poor hire can breed resentment with other staff and ultimately hinder productivity.

While we tend to make bad hires when we are desperate, we tend to find the best hires when we really do not need additional staff. Good personnel, however, are not easy to find, and sometimes it is best to make that hire, even if you are not necessarily in desperate need of new staff. It is always a good idea to keep abreast of who is available and seeking new employment for when you are ready to hire. If, however, you are not ready to hire immediately, make it clear to your prospective interviewee that you are not planning on hiring immediately so that they may make the decision whether to take the time to meet with you.

Beware when money is the sole motivating factor. Competence, loyalty and reliability are the most important characteristics in a prospective employee. Without one, the others mean little. For the best long-term fit for your firm, it is important that you hire someone with each of these characteristics. While having a productive employee who can make you money may also be important, it is a "double-edged sword."

Compensation is important to almost everyone, but people prioritize it differently. I do not believe that everyone necessarily works where they can make the most money. Money is one factor, along with flexibility, respect and working environment, that most employees consider. Hiring those who are primarily concerned with money can be detrimental in more ways than one.

Most employers realize that a well-rounded person, who has a life outside of the office, makes the best employee and makes the best long-term contribution to the firm. The employee overly motivated by compensation, who has no life or no outside interests, may make an employer money in the short term, but is not necessarily going to contribute to the firm on a long-term basis. Moreover, the employee overly obsessed with making money will often breed resentment with other staff who are as not as motivated by money and are more concerned with producing a quality product and promoting a pleasant working environment.

Further, the employee motivated primarily by money may be competent and may be reliable but is often not necessarily going to be loyal. A person who is motivated primarily by financial concerns does not make him or her a bad person but may not make him or her the ideal employee. A person who is motivated by money may not care as much about producing a quality work product, may not be concerned about reflecting a good image for the firm and may not care about a pleasant work environment and quality of life. More importantly, a person who is loyal to money will not be loyal to a person or firm. A person whose primary motivation is money can always be bought by the highest bidder, and these individuals cannot be counted on to be long-term employees.

Employment contracts. For a profession that makes its living on memorializing and drafting contracts on behalf of clients, it is amazing how few lawyers fail to document their relationships with each other or associate lawyers. Every relationship between lawyers should be documented, whether between partners or associates. Like a prenuptial agreement, addressing potential conflict at the beginning of a relationship is much easier than when the conflict has started.

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Like in a marriage, there is excitement in creating a new employment relationship, and little thought is given should the relationship break down. There may be legitimate disagreements as to the terms of the partnership or employment agreement, especially if it was created years before the dissolution.

Non-lawyer employment agreements are not necessary, but simple agreements for partnership or employment of associates are essential. Elements that describe compensation, benefits, what is expected from each side and how to unwind the relationship are all that is necessary. A plan for what to do if an employment relationship deteriorates is crucial. A basic employment agreement between lawyers should include a provision that provides that upon the termination of the partnership, or departure of an attorney, both sides will write a joint letter to clients informing the client that he or she has the following options: (1) the client may stay with the firm; (2) the client may take his or her case with the departing attorney; (3) the client may represent himself or herself; or (4) the client may find new counsel. The letter asks the client to make a written request of his or her preference within a specific number of days and that whatever decision the client makes, both sides will make their best efforts to ensure that the client's interests are protected.

In sum, an employment agreement is the best way to avoid any potential conflicts, especially conflicts which may put your clients in the middle and will embarrass both sides.

BRUCE I. SHAPIRO attended the University of Nevada, Las Vegas and received his bachelor's degree in 1984 and his master's degree in 1986. He graduated from Whittier College School of Law in 1990, magna cum laude. He has practiced in family law since 1990 and has served as a Domestic Violence Commissioner, pro tempore; URESA/Paternity Hearing Master, Alternate; Municipal Court Judge, Alternate; Judicial Referee, Las Vegas Justice Court, Small Claims. Shapiro has written several articles in the area of family law and has served on the Nevada Children's Justice Task Force, Clark County Family Court Bench-Bar Committee, State Bar of Nevada, Child Support Review Committee, State Bar of Nevada Southern Nevada Disciplinary Board, State Bar of Nevada Standing Committee on Judicial Ethics and Election Practices and the Continuing Legal Education Committee. Shapiro also served on the Board of Governors for the State Bar of Nevada from 2003-2005 and 2008 -2010.