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NEVADA FAMILY LAW REPORT

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Establishing and Developing a New Family Law Practice:

Part 4: Marketing

By Bruce Shapiro, Esq.

In part four of "Establishing and Developing a New Family Law Practice," we discuss the concept of marketing. Marketing is something that every lawyer must do all the time. Although as lawyers we do not consider ourselves "salespeople" — selling a good like a car, a home or a pair of shoes — that is exactly what we are: we sell our services. This objective is accomplished by marketing to meet short-term needs and marketing to accomplish long-term objectives — and both must always be considered.

When Does One Market Himself or Herself?

One should constantly think of marketing. Every person you meet, every document you prepare, and every time you make a court appearance, you are creating a reputation — and therefore a marketing plan is in effect. Of course, there is never time to market, so a practitioner must make time. We must schedule at least an hour a week, every week, to consider our marketing plan. Naturally, when you are busy you do not feel as though you need to market and tend not to actively market. If, however, you are having a slow period and only then start to think about marketing, it's probably too late to conduct effective short-term marketing.

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Committees, Organizations, Clubs, Blogs and Articles

As described above, everything we do should be viewed as a marketing plan. While you may not want to be that lawyer who is always "on" — talking about being a lawyer and handing out business cards — it is important to have a business card available to hand out if you are asking for one, or if the opportunity arises. Joining a state bar or county bar committee or other community organization is one of the few marketing opportunities you will have to "market" yourself without being overt. Writing a blog on an interesting legal topic may elicit questions from other lawyers or potential clients. Publishing an article in a bar magazine or publication instantly makes you knowledgeable and a "go to" person on a particular subject.

CLE, Moot Court and Mentoring

Presenting continuing legal education or programs where you are the expert will provide you an immediate referral base. However, just participating in a CLE program that is outside your area of knowledge or outside your normal referral base expands your base of possible referrals and provides multiple marketing opportunities. Being involved in legal activities, such as judging a moot court competition or mentoring a student or young lawyer gives you instant exposure and credibility, and presents marketing opportunities.

Website and Social Media

Having a website and enhancing it with social media may seem obvious, but how these tools are used is not always obvious. You need not spend a lot of money on a website or internet advertising to be effective. It is important, however, to have a professionally-designed website that acts like an electronic resume or brochure. It is also important to keep your website fresh and updated. While there is a risk of appearing arrogant or opportunistic, you should also take the occasional opportunity to use social media to describe what are you are doing in your career and opining on important issues.

Customer Service and Reputation

Whether we are meeting with a client, a potential client, or a stranger at the mall, every contact we have with every person is a potential marketing activity. Like every sales technique, the best way to sell yourself is by not looking like you are trying to sell anything but how you conduct yourself, especially professionally. The way you deal with opposing counsel will determine whether you will ever receive a referral from that lawyer. Even being respectful to the opposing party may lead to a future business opportunity. Being respectful does not mean you are not zealously representing your client; it simply means that you are being a civil human

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Nevada Family Law Report

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A Letter From the Family Law Executive Council

Dear Section Members:

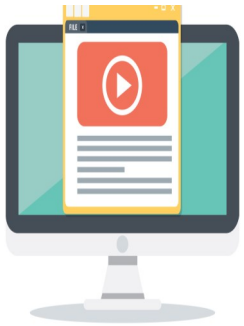
First of all, we want to thank everyone who attended the 2019 Annual Family Law Conference in Bishop, California. We hope you all had a wonderful time celebrating the 30th anniversary of the annual conference and found the courses presented by the numerous speakers informative.

Second, the Eighth Judicial District Court Family Division has started the process of tweaking the Eighth Judicial District Court Rules (EDCRs) enacted in 2016 to address observed conflicts, contradictions and problems. A committee has been formed to address these issues made up of attorneys and judges, with the attorneys consisting of Jennifer Abrams, Michael Carmen, Vincent Mayo and Marshal Willick.

As with the major re-write a few years ago, the intent will be to post to the Family Law Listserv proposed revisions as they are completed — for commentary, and response and presumably a final list/redline at the end — before submission to the judges (first, all of family court, then the entire Eighth Judicial District, then the Supreme Court) for approval.

Therefore, if anyone practicing in the Eighth Judicial District Court has identified problems with the revised EDCR 5 — divergent interpretations, practical problems with following them, or anything that should be added, deleted, or altered — please contact the attorney members of the Committee with any additional identified problems, being as specific as possible, and proposing a solution if at all possible.

Third, we welcome writers for the Nevada Family Law Report. The next release of the NFLR is in June 2019 with a submission deadline of May 20, 2019. Please contact Lauren Berkich at lauren@berkichfamilylaw.com and Vincent Mayo at vmayo@theabramslawfirm.com, or any other member of the Executive Council, with your proposed articles any time before the next submission date. We are targeting articles between 350 words and 1500 words, but we are flexible if you require more space.



The Family Law Executive Council

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being. In the long term, your reputation, or lack of a good one, is your ultimate marketing plan.

Use a Trade Name

Doctors and other professionals have been using trade names for years. Historically, however, ethical rules have prohibited or limited lawyers from using trade names. While the ethical rules have been relaxed in recent years, lawyers have been reluctant to take advantage of the obvious benefits.

Whether it is tradition or ego that has deterred lawyers from using a trade name, it is starting to change. Does a lawyer, especially an established lawyer, really need his or her name in the firm name? How many arguments have resulted within firms over who should be a named partner or in which order should the partners be listed? Using a trade name eliminates these issues. Not only is there less friction between named partners and unnamed partners, but there is no longer a clear dichotomy between "partners" and "associates." Moreover, letterhead and signs no longer need to be changed whenever there is a change in partnership.

Just as important, any lawyer can create goodwill in a law firm that does not bear his or her name. Attorney John Doe would find it difficult to sell or transfer his goodwill when he retires. It is far easier to transfer goodwill to an entity. If attorney Smith develops his practice under "Acme Law Group" rather than Smith Law Group, his chances of developing goodwill distinct from his name are increased. Further, while there may be a "Smith Law Group" in every city, a unique trade name that identifies a lawyer by a geographic location or specialty results in better search engine results.

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. Shapiro 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; and 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.

The Nuance in *Nance*: A Brief Analysis and Concerns Regarding Legal Distinctions and Evidentiary Procedure

By Vincent Mayo, Esq.

The Nevada Court of Appeals in *Nance v. Ferraro*[i] was presented with the issue of whether the rulings in *McMonigle v. McMonigle*[ii] and *Castle v. Simmons*[iii] prevent a court from relying on previously known evidence, including evidence of domestic violence, to demonstrate that a modification of custody is not in a child's best interest.[iv] The decision in *Nance* holds they do not.

The core facts in *Nance* are as follows: mother and father, who have one minor child from their marriage, had a tumultuous relationship prior to divorcing.[v] Part of the parties' instability stemmed from mother's allegations of domestic violence by father against her and a child of hers from a prior relationship.[vi] The court originally made orders based on a child custody evaluation but, subsequent to that order, the parties entered into a stipulated parenting plan in 2012 in which the parties agreed to joint legal and physical custody.[vii] Three years later, father filed a motion to modify the parties' prior parenting plan so that father would be awarded primary physical custody.[viii]

Mother opposed father's motion and, as part of her case, sought to enter prior evidence of domestic violence by father in an attempt to demonstrate a custody modification was not in the child's best interests.[ix] Father countered by filing a motion in limine to exclude such evidence on the basis it was inadmissible under *McMonigle and Castle*.[x] The district court agreed with father and precluded the prior evidence of domestic violence.[xi] Mother appealed.

The Court of Appeals in *Nance* determined that when deciding whether the modification of a prior custody order is in a child's best interest, the rulings in *McMonigle* and *Castle* do not bar the district courts from reviewing the facts underpinning their custody determinations nor prohibiting parties from presenting evidence of previously known domestic violence to show a modification is not in a child's best interest. The decision in *Nance* reconciled the holdings in *McMonigle* and *Castle* with its own by distinguishing the reasons behind the substantial change in circumstances and best interest standards.[xii] The Court of Appeals reiterated that the primary purpose of the holdings in *McMonigle* and *Castle* — that a party must show a substantial change in circumstances before a court can consider modifying primary custody — is derived from principles of res judicata.[xiii] These principles are intended to stop "dissatisfied litigants from filing repetitive motions on the same facts until they obtain desired results."[xiv]

In opposing a change of custody in a joint custodial arrangement, however, the sole consideration is the best interest standard.[xv] Res judicata does not apply to facts on which the last custodial determination was based under a best interest analysis as those facts are the foundation upon which the child's best interests were established. Indeed, such an analysis requires a review of the best interest factors set forth in NRS 125C.0035(4), which includes acts of domestic violence.[xvi] The Court of Appeals therefore held that in order to do so, it is logical that district courts would need to review the facts on which their last custodial order was formulated to determine whether modification of custody is warranted.[xvii]

However, the decision in *Nance* relies on distinctions that may give rise to a blurring of principles and evidentiary procedure that could result in erroneous decisions. For example, just because a party relies on prior matters like domestic violence in opposing a custody modification does not mean they are free to relitigate those previously decided issues, even defensively, when opposing a modification of custody. The Court of Appeals in *Nance* took note of this concern, clarifying that res judicata is

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a two-way street: a litigant opposing a change in custody cannot do so solely on allegations of domestic violence that were disproven in a prior ruling.[xviii] By the same token, a party who uses domestic violence by the other to restrict the offending party's time cannot then rely on only the same instance of domestic violence to further deny the offending party their custodial time in a subsequent modification.[xix]

Attention must also be paid to how previously relied upon evidence is again presented in order to accurately preserve the record. While a district court may decide to limit its review of such evidence solely to the written findings in its last order, the decision in *Nance* does not limit the court to only written findings.[xx] This means a court can examine exhibits in open court and once again listen to the testimony of witnesses. The risk in doing so is obvious and care must be given to ensure the evidence is presented and given the same consideration it was the first time. Otherwise, a court's view of the evidence can change depending on the passage of time, whether a witness' testimony varies from its original form, the court giving more or less weight to documentation than it had originally due to subtle new arguments by counsel, etc. Because of these concerns, the focus should be on a court's written findings, transcripts of hearings, etc.

The greater concern arises in cases where the parties previously stipulated to custody without including the underlining facts in their custodial order. While this is not a new issue, it is likely to become more prevalent with the holding in *Nance.* In such cases, courts are challenged to accurately and efficiently determine the actual reasons upon which the last decision was based, while avoiding rampant speculation and self-serving arguments by the parties as to what was the actual basis for the last custodial order. The judiciary has tried to assist in this regard, with the Nevada appellate courts making it clear findings need to be in all custody orders,[xxi] which would include even those reached via stipulation. However, this is just a recent push and most custodial orders reached via settlement still do not. It is of note that this was the situation in *Nance* as the parties' last parenting plan that father sought to modify did not make a single reference to any acts of or concerns regarding domestic violence, despite mother claiming it was a major consideration.[xxii]

Vincent Mayo, Esq. is a partner at The Abrams & Mayo Law Firm. He is a Nevada Board Certified Family Law Specialist, a National Board of Family Law Trial Advocacy Specialist, a member in good standing of the State Bar of Nevada, State Bar of Nevada Family Law Section, American Bar Association, Nevada Justice Association and Clark County Bar Association. Mr. Mayo has served on numerous family law related committees and was elected to the Executive Council for the Nevada Family Law Section in 2018, and he continues to serve on the Executive Council. Mr. Mayo has published numerous articles on family law matters and practiced in the area of family law for fifteen years. He can be reached at 6252 South Rainbow Boulevard, Suite 100, Las Vegas, Nevada 89118. Mr. Mayo's number is (702) 222-4021 and his fax is (702) 248-9750. He can be reached via email at vmayo@theabramslawfirm.com.

Again, the holding in *Nance* applies to all best interest custodial modifications, not just those involving domestic violence.[xxiii] Therefore, both attorneys and judges must be familiar with *Nance* and cognizant of its legal distinctions, as well as safeguard against the procedural challenges such cases present.

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[i] *Nance v. Ferraro*, 134 Nev. Adv. Rep. 21, 418 P.3d 679 (2018).

[ii] *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994).

[iii] *Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004).

[iv] *Supra*, 418 P.3d at 681.

[v] *Id.* at 682.

[vi] *Id.*

[vii] *Id.*

[viii] *Id.*

[ix] *Id.*

[x] *Id.*

[xi] *Id.*

[xii] *Id.* at 684.

[xiii] *Id.*

[xiv] *Id.*

[xv] *Id.* at 685.

[xvi] *Id.*; NRS 125C.0035(4)(k).

[xvii] *Id.*

[xviii] *Id.* at 686.

[xix] *Id.*

[xx] *Id.* at 685 and 687.

[xxi] *See generally Summit v. Summit*, No. 71912, Order Affirming in Part, Reversing in Part and Remanding (Unpublished Disposition Aug 17, 2017); *Lewis v. Lewis*, 132 Nev. Adv. Rep. 46 373 P.3d 878 (2016); *Rivero v. Rivero,* 125 Nev. 410, 216 P.3d 213 (2009).

[xxii] *Id.* at 682.

[xxiii] *Id.* at 688.

Family Law and Bankruptcy: Timing Issues

By Holly E. Estes, Esq.

It is important to understand the legal consequences for a party filing bankruptcy and a divorce at or around the same time. Below is a brief outline of what you need to know.

Filing Bankruptcy During a Divorce Proceeding

If a party chooses to file petition for bankruptcy protection during the course of a divorce proceeding, the consequence may be a stay of both or either action. When a party files for bankruptcy protection, an automatic stay is put into place which stays all actions to collect a debt against the petitioner. Many state court and family court judges interpret the stay to apply to family law proceedings as well and, as a result, will stay the divorce proceedings until the bankruptcy case is resolved by dismissal, stay relief, or discharge. On the other hand, the bankruptcy court is likely to need to understand the division of assets from the divorce case before proceeding with the bankruptcy case. Accordingly, the result may be that both courts want to stay the proceeding before them in order to see how the other proceeding is resolved. To avoid the potential impasse, the parties should consider filing the divorce proceeding after a bankruptcy has been resolved or with the understanding that a bankruptcy case will not be commenced until after the divorce proceeding and the division of assets and liabilities between the couple is final.

Filing Bankruptcy Before Filing for Divorce

If a couple is considering legal separation or divorce, and is suffering financial hardship, they should consider whether filing a petition for bankruptcy is an advisable option for their particular financial circumstance. It is generally preferable that someone file for bankruptcy protection before a divorce proceeding has been commenced, or after it has concluded. A married couple filing for bankruptcy prior to divorce can file a joint petition for bankruptcy which would include both spouses' assets and liabilities, although either spouse can choose to file a bankruptcy petition separately. Filing jointly can eliminate a subsequent fight over debt in the divorce case, as many joint and unsecured debts can be discharged, thereby simplifying matters for the Family Court judge and allowing for the timely administration of the divorce.

Filing Bankruptcy After Filing for Divorce

Filing bankruptcy after a divorce proceeding has concluded will provide a clear picture of the bankruptcy petitioner's assets, income, and liabilities. Filing post-divorce may change the chapter of bankruptcy the petitioner qualifies for, and can result in different available options for the petitioner's liquidation or reorganization of his or her financial affairs. Further, filing for bankruptcy after a divorce proceeding has concluded will generally expedite the process.

While this article provides some considerations to be taken, it is no substitute for consulting a bankruptcy attorney and a family law attorney when a couple is considering both divorce and bankruptcy, as there are many considerations and legal consequences beyond those mentioned here. The best practice is to gather a team of professionals to obtain the best result for the client and the client's individual circumstances.

Holly E. Estes is the owner of Estes Law, P.C. — a boutique bankruptcy law practice located in Reno, Nevada. Her practice focuses on business and individual reorganizations, liquidations, bankruptcy trustee representation, creditors' rights, and bankruptcy appellate practice. She has successfully represented corporations, limited liability companies, individuals, partnerships, bankruptcy trustees, creditors and purchasers of bankruptcy estate assets in chapter 11 reorganizations and chapter 7 liquidations. She has acted as counsel in several bankruptcy appeals with successful results for her clients. Among her recent accomplishments is a victory decision from the Ninth Circuit Bankruptcy Appellate Panel in *Vill. at Lakeridge, LLC v. U.S. Bank N.A.* (*In re Vill. at Lakeridge, LLC*), 2013 Bankr. LEXIS 2329, 2013 WL 13977447 (B.A.P. 9th Cir. Apr. 5, 2013), which has been affirmed by the United States Court of Appeals for the Ninth Circuit. *U.S. Bank N.A. v. Vill. at Lakeridge, LLC* (*In re Vill. at Lakeridge, LLC*), 814 F.3d 993 (9th Cir. 2016). The U.S. Supreme Court has granted certiorari in part. *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 137 S.Ct. 1381 (U.S. Mar. 27, 2017). Ms. Estes recently spoke at the 24th Annual Southwest Bankruptcy Conference 2016 on the panel entitled Selling an Insider's Claim and Buying Plan Confirmation. Her article, *Transfer of a Claim Held by Insider Does Not an Insider Claim Make*, was published in the ABI Journal in April 2016. She is a member of the American Bankruptcy Institute, the Federal Bar Association, Northern Nevada Bankruptcy Bar Association, and the Northern Nevada Women Lawyers Association. Ms. Estes has been certified by the American Board of Certification in business bankruptcy law. She is a graduate of the William S. Boyd School of Law at the University of Nevada, Las Vegas. She is admitted to the bars of the United States Bankruptcy Courts for the District of Nevada and the Districts of California, the United States District Court of Nevada, the United States Bankruptcy Appellate Panel for the Ninth Circuit, the Ninth Circuit Court of Appeals, and the Supreme Court of the United States.