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KOGOD CONTRADICTIONS, PRACTICAL PROBLEMS, AND REQUIRED STATUTORY FIXES: PART 2

By Marshal S. Willick, Esq.

I. BACKGROUND AND SUMMARY

This is the second part of the analysis of *Kogod v. Cioffi-Kogod*, 135 Nev. ___, 439 P.3d 397 (Adv. Opn. No. 9, Apr. 25, 2019). Part 1 was published in the Spring 2020 edition of the NFLR, posted at https://www.nvbar.org/member-services-3895/sections/family-law-section/.

The Court was apparently not informed that its holding as to the termination of the community contradicted several of its own prior pronouncements, nor was it informed of the resulting problems for district court judges; if this cannot be rectified by case law, a statutory correction is warranted.

Similarly, the opinion made conflicting analyses on the issue of waste that are likely to lead to divergent results in future cases.

Additionally, while the opinion made some advances in alimony theory in Nevada, some unfortunate phrasing might cause practitioners to stop short of presenting everything they should when facing alimony issues.

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A LETTER FROM THE EDITORS AND THE FAMILY LAW EXECUTIVE COUNCIL

Dear Section Members:

Thanks to all who participated in the 30th Annual Family Law Conference in March. We were fortunate to have met in person this year before all large public events were moved online.

We hope that all those in attendance gained relevant and useful information and were able to meet with old and new colleagues, friends, and associates.

Don't forget — we welcome article writers for the *Nevada Family Law Report*. Please contact Vincent Mayo at vmayo@theabramslawfirm.com or Lauren Berkich at lauren@berkichluceylaw.com with your proposed articles or any questions. We are targeting articles between 350 words and 1,500 words, but we are flexible if you require more space.

—The Family Law Executive Council

article writing

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II. TERMINATION OF THE COMMUNITY AT TRIAL, DECREE ENTRY, OR OTHER

The wife cross-appealed on the question of whether she should get a portion of the property being earned by her husband between the divorce trial and the formal date of entry of the decree. The *Kogod* Court agreed with her, noting that under NRCP and *Rust,*[1] "an oral pronouncement of judgment is not valid for any purpose."

The effect was to require an evaluation — and division — of all salary earned, and all earnings and property accrued between the date the parties were declared divorced, and the date the decree was filed. The creation of case law essentially required a second mini-trial in ***every*** case where the decree is not entered on the date of trial — which is essentially every contested case — greatly increasing the workload of our already-burdened family courts.

This was unfortunate, and unnecessary. The procedural history indicates that the parties agreed that evidence was closed and to submit closing arguments in writing, which the trial court allowed. It took the parties some time to accomplish their tasks, and while the trial court ruled shortly after final submissions, several months passed between trial and entry of the decree.

More complete briefing might have informed the Court that the rule pronounced in *Kogod* was at odds with precedent, out-of-step with some salient authority from elsewhere, and problematic public policy.

A. Practical Problems and Their Solution by Ending the Community at the Divorce Trial

It is true that the "default" has been to refer to the file-stamp date on an order, but many legal documents memorialize facts as of certain prior dates, and this has often been so for Nevada divorce decrees.[2]

Case law has long held that separation is irrelevant to continuity of the community, which continues until the time of "divorce."[3] In *Forrest*, the Nevada Supreme Court, issuing instructions for the trial court on remand, treated the trial and the divorce as synonymous. Pointing out that property rights accrued "during marriage" and did not terminate upon separation, the Court's remand referenced the financial facts as they existed at the moment of trial, and directed the trial court to address those specific numbers.

This was so even though the procedural history of *Forrest* reflected that motions were filed which tolled the date of final judgment for some time *after* the trial, and despite the existence of other cases indicating that a case is not actually "final" until all appeals are concluded.[4]

In other cases holding that community property accrues "until the parties are divorced," the Court has treated the trial date and the divorce as synonymous, even when the decree was entered months later, so "until divorce" has usually meant until the divorce trial.[5]

In the *Fox* appeals, which moved between the district court and the appellate court several times, the Supreme Court made it clear that the hearings on remand were not to allow any new evidence or testimony, but only to complete the judicial act of entry of a judgment. Thus, the critical time period as to evidence of who owned what property and what it was worth was the time of the divorce trial, not that of the (much delayed) filing of the decree. Collectively, the *Fox* cases hold that the outcome was to be based on the information presented at the divorce trial.

Similarly, the partition cases have made clear that the only property at issue in such actions is property that had accrued prior to, and could have been litigated at, the divorce trial.[6]

In *every* contested case, there is some period of delay between the close of evidence and the formal entry of a decree, since the paperwork has to be drafted. There are an unfortunate number of cases in which a party has deliberately stalled entry of an order and then sought to take advantage by asserting that the other party (presumably working for a living) was accruing "unadjudicated assets" or paying down debt during that pendency which are then subject to further proceedings or division.

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Previously, the Supreme Court has said "no" to such efforts at manufactured advantage. For example, in *Wichert v. Wichert*,[7] the Court considered a situation in which the trial court found the trial was "closed" and all evidence was "final" as of the last day of trial and gave the parties an additional few days to supply written closing arguments, at which point the case was "under advisement." The judge took a month to issue his minute order, and it took wife's counsel ***another*** month to draft the written Findings of Fact, Conclusions of Law, and Decree of Divorce.

The wife then filed a motion seeking half of the wages the husband had earned between the trial and date of entry of the decree, which the trial court granted.

The Supreme Court reversed that decision. The *Wichert* briefs argued that it would be poor public policy to allow the wife to take advantage of her own attorney's delay in drafting the paperwork in order to "find" additional property in the form of any money the husband earned by working after the divorce trial, and that no valid public policy would be served by allowing a party to take advantage of the delay in the judge's rendering of the decision.

The briefs also discussed the "procedural nightmare" that would result from ruling that parties continued to accrue property rights in each other's efforts and earnings after a trial or hearing but before written entry of the resulting order, since the wife's reasoning would also give her a ***third*** bite at the apple for whatever was earned between the second hearing and determination and actual entry of ***that*** written order.

The *Wichert* Court agreed, holding that "Generally, post-trial assets are not considered to be community property, unless the assets are omitted at the time of trial."

The same result appears to be the consensus in published cases from other jurisdictions, reflecting a policy choice of encouraging promptness rather than delay in completion of court orders after trial.[8]

There are a host of things that can (and do) delay entry of a decree, including parties switching lawyers, administrative re-assignment of cases between departments, or disputes as to an issue to be reflected in the decree. Such disputes could result in negotiations, motion practice in the divorce court, or even lengthy intervening proceedings in some other forum such as bankruptcy court or an appellate court. Months can easily go by; sometimes, years.

The *Kogod* holding that the community ends at entry of the decree rather than at the conclusion of trial is problematic for the district courts. It will inevitably increase the workload in those courts by requiring additional hearings without serving any apparent legitimate public policy purpose, and it provides a financial incentive for delay. The holding is likely to cause far more mischief than it prevents.

B. A Possible "Out"

The *Kogod* decision agreeing with the wife's argument to extend the close of community until entry of the decree stated that it was being made "under these circumstances." It is hard, however, to know which "circumstances" were being referred to.

Wichert was also a case where the husband continued to work and earn income after trial, the decision was taken under advisement, and post-trial closings were filed. If anything, the conditional words used in *Kogod* have simply created uncertainty as to whether the announced rule applies in all cases.

Additionally, in the wake of *Kogod*, some trial courts that do not want to have a second mini-trial in every contested case have discussed entering orders at the close of trial sufficient to terminate the community, while reserving decision on some issues taken under advisement, despite potentially running afoul of the anti-bifurcation doctrine.[9]

That would solve the property-continues-to-accrue problem in those cases, but at the expense of having varying results from court to court depending on the actions of the judges and litigants. In a reality where more than half of divorce cases are between *pro se* parties, it creates a real possibility of

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different legal results between the "haves" who can afford counsel and the "have-nots" who can't.

Uncertainty from case to case about when the community ends is even worse than a rule permitting gamesmanship by extending termination of the community to the decree filing date. Unless the Court does a full reversal on this topic — which seems unlikely — the best fix appears to be legislative.

C. The Arizona Rule

More than 30 years ago, the family law section debated the subject of when the community should end, considering the three primary alternatives: at final separation (California); upon filing and service (Arizona); or "upon divorce" (Nevada, however we define that date).

California cases endlessly litigate the maybe-subjective, maybe-objective question of when separation "really" happens, and Nevada's rule, especially as just interpreted in *Kogod*, multiplies proceedings and invites abusive delay. Of the three, Arizona's appeared during the debate to be the least problematic, and it certainly appears so now. While half-hearted requests were made over the years, no one ever seriously pushed a bill to alter Nevada law on this point.

The Arizona statute, A.R.S. 25-211, was altered in 1998 to read:

> 25-211. Property acquired during marriage as community property; exceptions; effect of service of a petition
>
> A. All property acquired by either husband or wife during the marriage is the community property of the husband and wife except for property that is:
>
> 1. Acquired by gift, devise or descent.
>
> 2. Acquired after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal separation or annulment.
>
> B. Notwithstanding subsection A, paragraph 2, service of a petition for dissolution of marriage, legal separation or annulment does not:
>
> 1. Alter the status of preexisting community property.
>
> 2. Change the status of community property used to acquire new property or the status of that new property as community property.
>
> 3. Alter the duties and rights of either spouse with respect to the management of community property except as prescribed pursuant to section 25-315, subsection A, paragraph 1, subdivision (a).

The concept is to remove incentives for delay on the part of a potential spouse-recipient, and so to align the process to encourage all parties to resolve cases on their merits as promptly as is consistent with doing justice to their cases.

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There seems to be a remarkable lack of literature since 1998 discussing the statutory change in Arizona; if any controversies or problems stemmed from it, no one seems to be writing about them.

There are even a lot of marriages in *Nevada* to which the Arizona rules apply. Since NRS 123.220 permits "an agreement in writing" to alter what is and is not community property, it is extremely common for premarital agreements in this state to contain a termination-of-community rule effective upon the filing and service of a complaint for divorce. The fact that so many people in Nevada have chosen this variation is noteworthy.

Under current law, for reasons both practical and of public policy, courts and counsel should generally do whatever they can to have the "date of divorce" be the date of the conclusion of the divorce trial — no matter how much longer it takes to actually get a decree written, approved by the other side, signed by a judge, and filed.

And for all the reasons discussed above, it may be time to change Nevada statutory law to provide for termination of the community upon service of a complaint for divorce.

III. ARE "WASTE" CLAIMS CONFINED TO THE TIME PERIOD OF BREAKDOWN OF THE MARRIAGE?

Kogod goes both ways on this question, in its varying analysis of three waste claims: "possible community waste" expenses for multiple years leading up to the divorce; money expended on extramarital affairs; and money spent on gifts to friends and relatives.

A. Background and Issue

The Court's stated facts recite that the husband picked up his second "wife" in 2004 and had children with her in 2007. At trial, the husband claimed that the parties "were essentially living separate lives" as of 2009, but the wife disputed that and claimed that through that time they spoke every day, sometimes multiple times per day.

The husband had filed for divorce in 2010, but dismissed the case, and the parties "informally separated" the same year. The wife filed for divorce in 2013, and found out about the "second wife" sometime thereafter. The husband picked up yet another girlfriend in 2015. The divorce decree was filed in 2016.

In its opening, quoting the Am Jur treatise, the Court stated that waste, which it found synonymous with "dissipation," "refers to one spouse's use of marital property for a selfish purpose unrelated to the marriage in contemplation of divorce or at a time when the marriage is in serious jeopardy or is undergoing an irretrievable breakdown." Emphasizing the point of timing, the Court referred to Black's Law Dictionary that it is "use of community property for personal benefit when a divorce is imminent."

This fits with the Court's prior case law on the subject, which explicitly distinguished non-compensable "undercontributing or overconsuming" community property during a marriage from "secreting or wasting assets while divorce proceedings are pending."[10]

But the Court only applied its doctrine that waste claims are confined to the time of divorce litigation, rather than during the rest of the marriage (half the time in this case), leading to contradictory guidance.

B. Miscellaneous Expenses: Timing *is* Relevant

The Court followed its precedent when it reversed the trial court's "waste" finding against the husband for his inability to fully explain approximately $2 million in assorted expenditures since 2010 that were labeled by an accountant "potential community waste," and included expenditures "before this divorce action began."

During this portion of its discussion, the Court touched on, but did not identify, the concept of "proportionality" by

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noting that high-income individuals often have expenses that would be considered noteworthy in other cases. The idea is that spending thousands on, say, a dinner, or gambling, or a night out, could be dramatic evidence in a marriage of limited means, but may constitute business as normal in some high-wealth cases. What might be seen as a hobby or recreation in one case could be viewed as a marriage-ending compulsion in another. Confusion may arise since the Court did not analyze the extent to which, if at all, the factor of proportionality to income would take precedence over the subject matter of the expenditure.

C. Extramarital Affairs: Timing is *Not* Relevant

The Court ignored its precedent and definitional restriction as to timing when it affirmed the trial court's waste finding against the husband of approximately $2 million of sums "spent on the extramarital funds and children" which dated back to 2004. All authority cited in that section of the opinion was from elsewhere, applying other states' often-very-different laws regarding asset division (some of which are explicitly fault based, in direct opposition to the law of Nevada).[11]

D. Gifts to Family: Timing is *Partially* Relevant

The Court's third waste analysis category, dealing with the husband's gifts to family, did little to clarify the subject. Basically, the Court found "regular and customary" gifts to be unobjectionable, but that unprecedented gifts during the divorce can be considered compensable waste.

This analysis, in isolation, is consistent with prior holdings but the reliance on Kentucky and Virginia case law as opposed to Nevada law is questionable and squandered an opportunity to clarify long-standing Nevada precedent of questionable application in the modern world, which was not referenced at all.

A better analysis would have started with the 1975 change to Nevada's management and control statute, NRS 123.230, which includes a provision stating that "Neither spouse may make a gift of community property without the express or implied consent of the other," and then explored what constitutes "implied consent" in a case in which the husband had been making gifts to his family members for many years "without consulting" the wife, as the *Kogod* court claimed was the fact here.

Most of the Nevada law in the field of management and control predates the 1975 amendments, and thus its current application essentially follows the concept of "what used to apply to just the husband now applies to both." This sometimes, but not always, provides rational guidelines.

For example, the prior case law that the spouse actively managing the community assets is deemed a "trustee" for the other spouse's share of the community property[12] is easily carried into the neutral, so it can logically be applied to any financial transaction undertaken by either spouse.

Neither *Lofgren* nor *Putterman* (both of which were after the 1975 change in the management and control statute) expressly stated a standard of review for gifts beyond examining whatever the district court did for an "abuse of discretion." The cases indicate that there is a fairly wide scope of judicial discretion, which in turn signals that the essential inquiry for gifts is now "reasonableness."

It is difficult to be precise as to the degree to which established legal standards shifted once the review was made applicable to both spouses in 1975, and *Kogod* missed the opportunity to expressly address the Nevada precedent one way or the other. For example, under the prior statutes, the case law declared that a husband could make voluntary dispositions of "some" of the community property without the consent of the wife, except that he could not "make excessive gifts with the intent to injure or defraud" the wife, who would have a right to sue both him and the recipient of the property if he did so.[13]

These are subjective calls — "some," "intent to injure," and "excessive" are all inherently subjective terms that virtually beg the questions involved in their usage, giving the trial courts considerable discretion to make findings sufficient to satisfy

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their individual views of equity. The current statute, NRS 123.230 (2), ***appears*** to be harsher, stating that "neither spouse may make a gift of community property without the express or implied consent of the other," which would appear to apply to ***any*** sum of community property, no matter how small.

In practice, the pre-1975 level of discretion may be undisturbed. While *Lofgren* and *Putterman* speak to "unauthorized gifts," as a practical matter trial courts have proven reluctant to find gifts of community property to third parties "unauthorized" in any circumstances short of outright theft or fraud, finding implied spousal consent from acquiescence or silence following virtually any degree of notice to or knowledge of the spouse that the transfers occurred.

This is essentially, although not clearly, what was declared in *Kogod*, and is probably wise, since any harsher requirement of proving "consent" could create an impossible burden of proof of agreement to long-past gifts. But as to the timing issue, the analysis of gifts is unhelpful, as the Court did not expressly rule gifts in, or out, of the doctrine as a function of the precise time they were made.

If anything, the discussion of gifts hinted toward application of the "during the divorce only" rule, since it found four transfers to be prohibited waste, in part, because they were made "after the Joint Preliminary Injunction."

Whatever the Court's ruling on the above questions would have been, the case law from elsewhere could have been deemed either persuasive or distinguishable, and applied to Nevada law. But apparently neither side briefed the matter of Nevada's management and control statute or early case law on the subject of unilateral gifts, and the Court did not explore it on its own.

E. Analysis

Timing either is, or is not, a critical element for making a waste claim. If it is, and confined to the period of the breakdown of the marriage when "divorce is imminent," then the waste claims from 2004 to 2010 relating to the husband's extramarital affairs should have been labeled "overconsumption during the marriage" under *Putterman*, regardless of their purpose, as to which "retrospective accounting" should not have been permitted.

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Some attorneys object to that analysis, and state that the fact that the husband had a second wife and a mistress itself shows that "the marriage was in serious jeopardy." But many marriages endure affairs and other sometimes egregious behavior and expenses, and it seems intellectually dishonest to permit retroactive analysis — whether the marriage in fact ever did come to an end — to dictate the answer.

If ***either*** party to this case had been asked in 2004, or 2008, they would have said the marriage was doing just fine. The parties to the case had a deal, however implicit and unusual, by which they were living their lives, even if that was because the husband enjoyed having two families, and the first wife was in the dark, asked no questions, and had no idea what he was doing or spending his time or money on while the community was vastly increasing in wealth.

Others have protested that such an analysis is unfair if the wife lacked notice of the husband's actions. But the relevant distinction can't be a matter of the first wife's ***knowledge*** of the husband's expenditures when made. If ***that*** was the key element, the gifts to third parties that the husband "routinely" made for years "without the wife's knowledge" would not have passed muster as "long-standing and acceptable."

Rather, it seems inescapable that "fault" has worked its way back into the property analysis in Nevada, at least in consideration of waste claims. Combining the sections of the Court's property and waste analysis, they appear to stand for the proposition that "fault is irrelevant in Nevada property division and expenditures may only be considered waste if they are made after the marital breakdown when divorce is imminent — unless the husband had an affair, however far back that might have been."

This does not appear to be analytically sound, and does not provide adequate guidance in an age when the definition of "marriage" has changed considerably, in which plural marriage is openly examined in popular culture and discussed as a potential legal challenge to existing norms, and where Monday morning quarterbacks might have very different views of the morality and acceptability of the personal lives of others.

It is particularly ironic for this dichotomy to be present in an opinion in which the Court collectively reversed the district court's alimony award, in part, based on a stated concern that it had been based on a secret "fault" finding by the district court judge despite protestations to the contrary in the lower court's lengthy written decision. The two dissenting justices noted, and criticized, the majority's holding on that point.

The contradictory analyses of waste in *Kogod* are irreconcilable and have injected uncertainty into the Nevada law regarding waste claims, making them something of a schemozzle (a confused mess). It is no longer clear whether common law "fault" is relevant, or when expenditures have to have been made to be considered potential waste as opposed to self-indulgent but irrelevant "over-consumption," or even the categories of expenditures that may or may not be considered fair game for making such a claim. And the old case law, apparently not briefed by either side, was likewise not addressed by the Court.

F. Suggested Resolution

If anything seems clear from *Kogod*, it is that a lot more litigation will occur, and at least one further decision, or some clarifying legislation, will be necessary to figure out when, whether, and what waste claims are appropriate in Nevada.

If the Court elects to do so, it should start with deciding whether its test should be objective, subjective, or mixed. Objective factors would include the timing of the expenditure and the knowledge of the other spouse. Subjective factors would include proportionality of expense to income and conceivably "fault," however that is defined or restricted.

Whatever choices are made, a test that can be applied from one case to another would be a superior result to uncertainty or contradiction.

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IV. CONCLUSIONS

As noted in Part 1, courts can only be expected to issue orders, and opinions, consistent with community property and alimony theory if the appropriate legal theories are cogently presented by counsel in their filings and argument.

Kogod was an outlier of a case on its facts, and while it was a useful advance in expanding the published Nevada authority on family law issues, and may have well reached proper conclusions on the facts of the case at hand, it fell unfortunately short in several areas of logic, theory, and public policy that will require either further cases or legislation to correct.

Finding that the community continues after the close of evidence at the divorce trial greatly burdens the district courts without any sound reason for doing so, requiring second — or third — hearings to dispose of property issues, and invites gamesmanship to lengthen proceedings for improper purposes.

If the Court will not alter that conclusion, the district courts should implement procedures providing for termination of the community at the close of trial. In the larger picture, for purposes of uniformity and otherwise, it may be time for Nevada to follow Arizona and terminate the community at the time of filing and service of a divorce complaint.

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The Nevada law of "waste" or "dissipation" has been rendered less clear — or at least less analytically applicable — than it had been previously. We need either an opinion, or in its absence, legislation, indicating what may and may not properly be considered waste. Additionally, it probably is past time for the Court to reverse course and put the waste analysis into the alimony, rather than the property, analysis, where it better fits and is more readily useful in a greater number of cases.

Kogod provides some useful holdings, but it has created some procedural problems, inserted doubt into some legal doctrines, and altered others without providing a comprehensive framework for analysis. The Nevada law regarding duration of the community, waste claims, and alimony bases all remain works in progress.

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ENDNOTES

[1] *Rust v. Clark County Sch. Dist.*, 103 Nev. 686, 747 P.2d 1380 (1987).

[2] *See, e.g.*, Legal Note Vol. 48 (When Does a Divorce Actually Happen), Jan. 23, 2012, posted at https://www.willicklawgroup.com/vol-48-when-does-a-divorce-actually-happen/.

[3] *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

[4] *See, e.g.*, *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990) (finding that the wife's right to claim lump sum alimony did not abate, despite the death of the former husband on appeal, because the case was not final while the appeal was pending).

[5] *See Fox v. Fox*, 84 Nev. 368, 441 P.2d 678 (1968); *Fox v. Fox*, 87 Nev. 416, 488 P.2d 548 (1971).

[6] *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992); *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990).

[7] *Wichert v. Wichert*, Nos. 33809 & 34357 (Unpublished Disposition, Mar. 19, 2003).

[8] *See, e.g.*, *Markham v. Markham*, 909 P.2d 602 (Hawaii Ct. App.), *cert. denied*, 910 P.2d 128 (Hawaii 1996); *MacDonald v. MacDonald*, 698 So. 2d 1079 (Miss. 1997); *In re Graff*, 902 P.2d 402 (Colo. Ct. App. 1994); *Heine v. Heine*, 580 N.Y.S.2d 231 (1992); *Grinaker v. Grinaker*, 553 N.W.2d 204 (N.D. 1996); *Zuger v. Zuger*, 563 N.W.2d 804 (N.D. 1997); *Bell v. Bell*, 643 A.2d 846 (Vt. 1994).

[9] *See Gojack v. Second Judicial Dist. Court*, 95 Nev. 443, 596 P.2d 237 (1979). The concern about bifurcation may be overblown. The Nevada Supreme Court has noted the ability to separate orders deciding "status" from orders adjudicating post-decree claims about finances. For example, in *Milender v. Marcum*, 110 Nev. 972, 879 P.2d 748 (1994), the Court held that the district court could modify property or alimony terms without vacating the divorce itself, under the concept of divisible divorce, without violating NRS 125.130. That opinion reversed the property provisions of the default decree but left the divorce itself in place, stating:

> We are unaware of any law or precedent that would have prevented the district court from vacating that part of the decree relating to the property division without setting aside the termination of the marriage.

The Court held this result was compatible with *Gojack*, and did not violate any prohibition on bifurcating decrees.

[10] *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997); *see also Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996).

[11] *See, e.g.*, *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000) ("Our examination of the legislative history of the 1993 amendment reveals that the legislature deleted the noted language in direct response to this court's decisions which suggested that marital fault can be considered in determining alimony and property distribution. . . . The amendment reflects the legislature's intention that as a no-fault divorce state, the fault or bad conduct of a party should not be considered when deciding the issues of alimony and community property division."); *Blanco v. Blanco*, 129 Nev. 723, 311 P.3d 1170 (2013) ("With property division in particular, however, we conclude that community property and debt must be divided in accordance with the law. NRS 125.150(1)(b) requires the court to make an equal disposition of property upon divorce, unless the court finds a compelling reason for an unequal disposition and sets forth that reason in writing.")

[12] *Fox v. Fox*, 81 Nev. 186, 195, 401 P.2d 53 (1965).

[13] *See Nixon v. Brown*, 46 Nev. 439, 214 P. 524 (1923).

Protecting children from Child Abuse and Neglect: What you Can Do to Help

By Judge-Elect Margaret Pickard and Judge David Gibson

Juvenile Dependency, also known as "child welfare" or "child abuse and neglect," is one of seven areas of practice of the Eighth Judicial District Court's Family Division. Currently, three District Court Judges and three Hearing Masters are assigned to hear dependency cases. On average, there are 3,000 children in foster care each year, with even more children who are in the custody of the Department of Family Services (DFS) and placed with extended family or fictive kin (people with whom the children were familiar with prior to coming into care with DFS).

Each child involved in Dependency Proceedings is entitled to be represented by an attorney.[i] However, because of the high volume of children who come into DFS' care each week, compared to the number of available CAP attorneys, many children wait weeks or months for a CAP attorney to be assigned to their case and for their voices to be heard.

Role of a CAP Attorney

CAP attorneys play a crucial role in dependency proceedings. However, many attorneys are confused or overwhelmed by the idea of learning a new area of law and, therefore, may shy away from volunteering as a CAP attorney. In the hopes of simplifying this area of law, codified under NRS 432B, and to encourage more family law attorneys to accept appointment to CAP cases, we offer this brief overview of dependency proceedings.

There are currently over 100 children waiting for a Pro Bono CAP attorney to be assigned to their cases; we encourage you to be the voice of one of these children.

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The Children's Attorney Project (CAP)

The Children's Attorney Project of LACSN (Legal Aid Center of Southern Nevada) currently has 26 full-time staff attorneys, representing 2,628 children and 208 young adults aged 18-20 who are under the voluntary jurisdiction of the Court. In addition to these attorneys, LACSN sponsors Pro Bono CAP Attorneys, who volunteer their time to represent a child who is in DFS' care. Currently, CAP attorneys represent 941 children.[ii] A CAP attorney follows a child throughout the time s/he remains under the jurisdiction of the court and, in the event the child subsequently returns to the care of DFS, the CAP attorney can return to represent the child.

It is crucial that the Court hear from a child's attorney, as well as the child, regarding his or her wishes, at each stage of the proceeding.

How a Dependency Proceeding Begins

The Department of Family Services (DFS), through Child Protective Services (CPS), becomes involved with a family when a report of abuse or neglect is received. Initial child welfare reports are generally made by law enforcement, school counselors, daycare providers, family members or through anonymous reports to the CPS Hotline at (702) 399-0081. Common circumstances that cause a report to be made include on-going domestic violence (between parents, caregivers, or other household members), homelessness and/or a lack of resources (food, clothing and shelter), injuries to a child of a non-accidental nature (unusual or excessive bruising, burns or broken bones), untreated medical needs of a child (untreated diabetes, severe depression/suicidal ideations), sexual abuse by a parent or others, inability or unwillingness of a parent to provide for the child due to a parent's mental health issues, developmental disability or substance use, absence of an available parent/caregiver as the result of a parent's incarceration/institutionalization, or a parent's unwillingness to care for a child.[iii]

Once CPS receives a report, an investigation begins into the family's circumstances. The CPS investigator reviews the family's history with DFS, the parents' criminal history, and any other relevant information. Initially, CPS will determine if a child can remain at home with an in-home safety plan. An in-home safety plan may include in-home service providers who provide Basic Skills Training (BST), psychosocial rehabilitation (PSR), therapy, or observe/assist parents who may struggle with mental health, substance abuse, or developmental delays. In the event that CPS determines that it is not safe for the child to remain at home, the child will be brought into protective custody with the Department of Family Services.

If a child is removed from his/her parent/caregiver, CPS will first attempt to place the child with an out-of-home parent who is deemed to be safe (the "non-offending parent"), an extended family member, or fictive kin (someone known to the child). As a last resort, a child will be placed in a foster home or, if a foster home is not yet available, at Child Haven, a congregate care housing facility located just north of the Family Court.

Preliminary Protective Hearing (PPH)

Purpose: 72-Hour Review + Appointment of Counsel + Set Adjudicatory Hearing

Within 72 hours of a child being removed by CPS from his or her caregivers, a preliminary protective hearing is held by the Court. Upon reviewing the information in the Preliminary Protective Hearing Report, filed by CPS, the Court must determine if there is reasonable cause to believe that it is contrary to the welfare of the child to remain in the home and whether reasonable efforts have been made to prevent the removal of the child from his or her home.[iv] At the PPH hearing, also called a Protective Custody (PC) hearing, the Judge/Hearing Master explains to the parents that the Court is not a criminal court, but rather, a civil court, created to ensure the safety of children.

The initial goal of the Court is to have DFS assist the parents with services to create a safe home so the child can be returned to their care. The Court will appoint an attorney to each parent who is present at the hearing to represent him and/or her during the court proceedings. If a parent is incarcerated or housed at a mental health facility, the Court will also appoint

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that parent an attorney. The child will also be appointed an attorney through the Children's Attorney Project.

The Court will then set the date which the State must file the Petition for Abuse/Neglect. This date must be within 10 days of the PPH, and the Adjudicatory Hearing, or Plea Hearing, which must be held within 30 days of the filing of the Petition.[v]

Adjudicatory Hearing

Purpose: Parents enter a Plea or Denial to the Allegations in the Petition

At an adjudicatory hearing, the parent, legal guardian, or other adult regularly found in the home and responsible for the care of the child, can enter a plea, admitting, pleading no contest, or denying the allegations of the Petition for Abuse/Neglect. If a denial is entered, the matter is set for an adjudicatory trial.[vi]

Once the parent or caregiver enters a plea, or an evidentiary hearing is held, the Court determines whether the State has demonstrated the allegations of the Petition by a preponderance of the evidence. If the Court finds that the State has satisfied this burden, the Court will sustain the Petition for Abuse/Neglect and set a Dispositional Hearing within 15 working days.[vii] During this time, a DFS Specialist will work with the parent to create a Case Plan, a list of services the parent will engage in to address the safety issues that brought the child into care.

Dispositional Hearing

Purpose: Review Parents' Case Plan + Establish Wardship of the Child + Set Review Hearing

The purpose of a Dispositional Hearing is to allow the parent/guardian to work with DFS to create a Case Plan. A Case Plan is a list of services that the parent/legal guardian should participate in to make the behavioral changes necessary to create a safe home environment so that the child can return to the home. Case Plan services generally include substance abuse treatment, mental health counseling, domestic violence counseling, family and/or individual counseling, and/or parenting classes.

Prior to the Dispositional Hearing, the parent/guardian will review the Case Plan with his/her attorney. Once the Case Plan is approved by counsel, the Court will adopt the Case Plan, place the child(ren) under the jurisdiction of the Court (this is known as "taking wardship of the child"), and set a review hearing in six months.

Review Hearing

Purpose: Six-month Review of Parents' Progress and Children's Well-Being + Permanency Goal

Every six months, the Court is required to review the progress of the parents on their respective Case Plans, the well-being of the children (including placement, school progress and records), and establish the Court's permanency goal for placement of the children. These hearings are known as "Review Hearings" at the six-month mark and "Permanency Planning Hearings" at the one-year mark.

In addition to reviewing the progress of the parents and the well-being of the children, the court will determine if a child can return home, if it is necessary to maintain wardship of the child, and whether DFS has made reasonable efforts towards the Court's permanency plan goal during the last six-month period. At each six-month hearing, the Court will set forth the Court's permanency goal for the next review period. The Court can establish any of the following permanency goals and often adopts concurrent goals: Reunification, Guardianship, Termination of Parental Rights/Adoption, Other Planned Permanent Living Arrangements (OPPLA) (for children 16 and over).[viii]

Review hearings are crucial for the parents, children, and the Court, and often serve as a catalyst for parents to begin making changes shortly before the hearing, knowing that they will stand accountable before the Court on their progress. Review hearings are also important for the children. The Court anticipates that CAP attorneys will speak to their clients shortly before the review hearings in order to provide the Court with an update about the children, including their

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position on where they are placed, school progress, as well as their wishes regarding permanent placement, including whether or not they would like to return to the care of their parents.

What You Can Do to Help

In the end, the most important point to remember in representing a child in a dependency proceeding is that CAP attorneys give a child a voice. The mantra of foster children everywhere is "Nothing about us without us."

We hope that this brief overview of NRS 432B cases will encourage you to reach out to the Legal Aid Center of Southern Nevada and be the voice of a child through the Children's Attorney Project. For more information, please call Noah Malgeri at LACSN at 702-386-1070 ext. 1429 or nmalgeri@lacsn.org.

Endnotes

[i] See NRS 432B.420.

[ii] A child or sibling group is generally referred to the Children's Attorney Project at the court's first hearing, called a Preliminary Protective Hearing. The supervising CAP attorney will then decide if the case will be assigned to a LACSN staff attorney or referred out to a Pro Bono Attorney. If there a conflict of interest between a sibling group, such as when one child wishes to return home and another child wishes to be adopted or age out of the system, one of the siblings may be assigned a Pro Bono CAP attorney to represent their respective interests.

[iii] Pursuant to NRS 432B.330, "abuse" means:

(1) Physical or mental injury of a nonaccidental nature; or

(2) Sexual abuse or sexual exploitation, of a child caused or allowed by a person responsible for the welfare of the child under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.

"Neglect" means abandonment or failure to:

(1) Provide for the needs of a child set forth in paragraph (b) of subsection 2; or

(2) Provide proper care, control and supervision of a child as necessary for the well-being of the child because of the faults or habits of the person responsible for the welfare of the child or the neglect or refusal of the person to provide them when able to do so.

[iv] If the child is of Native American descent, the Court must find that active efforts were made to prevent removal of the child. These cases are then referred to as ICWA cases, Indian Child Welfare Act.

[v] See NRS 432B.470 and NRS 432B.530.

[vi] If an adjudicatory trial is set, it is important to counsel to be aware of the provisions of NRS 432B.530. Specifically, NRS 432B.530(3) provides that in an adjudicatory hearing, "all relevant and material evidence helpful in determining the questions presented" may be considered by the Court.

[vii] See NRS 432B.530.

[viii] In the event the State files a Motion to Terminate the Rights of the Parents, the Court may conduct an evidentiary hearing to determine if (1) termination of parental rights is in the best interests of the child and (2) parental fault exists. See NRS 128.105 and In the Matter of Termination of Parental Rights as to N.J., 116 Nev. 790 (2000).