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NEVADA FAMILY LAW REPORT

Volume 25, Issue 3 Fall 2012

The Overruling of *Magiera v. Luera*

By Bruce I. Shapiro, Esq.

I. Introduction

In 1999, this author wrote an article tilted "*Magiera v. Luera*: Reexamination of Children's Surnames in Paternity Cases," 14 N.F.LR. 1 (Winter, 1999). The Nevada Supreme Court, however, has not addressed this issue since the publication of that article, and based on the evolution of custody decisions, it is time that this precedent is overruled. This article will briefly summarize the previous article and provide further analysis regarding surnames in paternity cases.

II. The Facts of *Magiera*

In *Magiera v. Luera*, the Nevada Supreme Court concluded that a father is not entitled to have an out-of-wedlock child bear his surname *merely and solely* so that he may receive a "tangible benefit" for paying his child support. *Magiera* involved a child born to unwed parents. The father acknowledged paternity and signed the child's birth certificate. The surname of the child, according to the birth certificate, reflected that of the mother. Following his acknowledgment of paternity, the father failed to stay current in his child support obligation and he did not seek visitation rights with the child until the child was 3 years old. When he was subsequently required to pay an increased child support obligation and to make payments on child support arrears, the father requested that the child's surname be changed to his.

When addressing the matter, the Nevada Supreme Court noted that under NRS 125B.020, a father has a duty to support his child. The court ruled, however, that a father is entitled to "no tangible benefit" for fulfilling his responsibility to pay child support, and that "[t]he father has no greater right than the mother to have a child bear his surname." The court also held that "the burden is on the party seeking the name change to prove, by clear and convincing evidence, that the substantial welfare of the child necessitates a name change."

The presumption and burden that the Nevada Supreme Court thus created are troublesome. The decision creates a presumption that an out-of-wedlock child should bear the surname of the moth-

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Editor's Notes

by Shelly Booth Cooley, Esq., Editor

In our first feature, by Bruce I. Shapiro, he suggests overruling the *Magiera v. Luera* case, which addresses surnames in paternity cases. Our second article, by Sarah Hardy-Cooper, Esq., and Eric Pulver, Esq., explains what constitutes a "day" pursuant to *Rivero v. Rivero*. Next, Margaret M. Crowley, Esq., outlines the Second Judicial District's Dependency Mediation pilot program. Lastly, Mark E. Sullivan provides a "question and answer" article regarding how to get government records into evidence.

Specialization Exam:

The Family Law Section is offering a test date on March 2, 2013 (the Saturday prior to the Family Law Conference). Those interested in sitting for the exam should apply no later than December 31, 2012.

Find the applications at:
https://www.nvbar.org/sites/default/files/Family_Law_Specialization_App_2011.pdf

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https://www.nvbar.org/sites/default/files/FL%20Specialization_Standards.pdf

Family Law Conference:

The Family Law Conference has been scheduled for March 7 through 8, 2013, in Ely, Nevada. This year's conference will focus on finance and evidence and will include presentations on topics such as:

- Developing alimony cases
- Valuation problems
- A review of retirement benefits
- And more!

If you registered by October 31, 2012 early bird rates apply. To register for this conference, visit: www.regonline.com/2013familylawconference.

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er's choice and creates a virtually impossible burden for a father to overcome.

III. Application of *Magiera*

As noted above, the Nevada Supreme Court, in *Magiera*, held that the father of a child born out of wedlock "has no greater right than the mother to have a child bear his surname." If the father has no greater right than the mother to have the child bear his surname, it should therefore follow that a mother has no greater right than the father to have a child bear her surname. *Magiera* should not be interpreted as holding that the mother is always entitled to have the sole choice of the child's surname.

In *Magiera* the Nevada Supreme Court stated that the only relevant factor in determining the surname of a child is what is in the child's best interest. It is not logical to follow that it is always in the best interest of the child that he has his mother's surname. Therefore, the mother should not be given such a presumption that the party attempting to change the child's name must "prove by clear and compelling evidence that the substantial welfare of the child necessitates a name change." Since the mother is usually able to name a child born out-of-wedlock, the father will usually be in the position of seeking the name change and of having to meet the almost insurmountable burden of showing that the change is in the child's best interest.

Magiera should not be interpreted as creating a presumption that a child will bear the name that the mother is unilaterally free to give the child at birth. Why should fathers always have the burden of proving by clear and compelling evidence that their children should bear their surnames? While this standard may have been fair under the facts in *Magiera*, where the father waited three years before initiating any action, failed to pay child support, and did not even exercise visitation with the child, it may not be fair under many other circumstances that the mother has the sole right.

IV. National Authority

Naming a child is one of the first and most important decisions parents make. A child's name reflects tradition and heritage. In Nevada, the trial court has jurisdiction to decide this issue pursuant to NRS 125.480. In fact, until recently, it was assumed as a matter of common understanding that children would bear their father's surname and this assumption was rarely contested.

Courts in other jurisdictions have set forth many factors to be considered in determining a child's surname. Especially important among these factors is the length of time that the child has used a surname. If the child has used the surname for a negligible period, "other factors may be controlling." Besides the length of time that a child has used a particular name, courts have also considered such factors as how the child's surname will affect the child's identity as a member of a household, how the child's surname will affect the child's relationship with each parent, what potential
anxiety or embarrassment the child may experience if the child bears a different surname from the custodial parent, what preference the child may have regarding his surname, whether there was misconduct by one of the parents, failure to support the child, failure to maintain contact with the child, whether there are siblings of the child and whether the father attempted to influence or negotiate the child's name at birth. The courts, however, have also acknowledged the difficulty of applying the best interest of the child standard to this issue.

Some courts have held that the "presumption that the parent who exercises physical custody or sole legal custody should determine the surname of the child is firmly grounded in the judicial and legislative recognition that the custodial parent will act in the best interest of the child." Some courts have found that if a name is important to the strengthening of the father-child relationship, it is just as important to the strengthening of the mother-child relationship. This, however, fails to recognize that a father-child relationship may be "... even more tenuous in the case of an unwed father who has never lived with his child and thus has lacked the opportunity to discharge his parental responsibilities on a day-to-day basis . . . Hence, society's interest in sustaining the custom of having the child bear the paternal surname is particularly urgent when the situation involves a child born out of

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wedlock." Many of the cases that presented this issue to the courts, however, involved circumstances like those in *Magiera*, where the father's conduct was egregious and unsympathetic.

In a case involving an infant, it cannot be reasonably argued that it is contrary to the child's best interest for the child to have the surname of either party. At minimum, the court may exercise its equitable powers to order a hyphenated name that would constitute a compromise that would likely serve the best interest of the child and the parties. There is authority that if both parents have custody and cannot agree on a surname, the child should be given a hyphenated surname based on alphabetical order.

Magiera may be distinguished from many cases. In *Magiera*, the child was 3 years old and, to some extent, already had an identity. The father waited three years and suddenly, without any apparent reason, wanted the child to bear his surname. The mother's embarrassment or inconvenience is an antiquated idea and is not a sufficient reason to deny the child father's surname. Further, the stability of the child must be considered. The court should also consider that if the child is given the mother's surname, the mother could subsequently marry, change her name and have subsequent children with different surnames.

V. Evolution of Custody Law in Nevada Since *Magiera*

Since *Magiera*, was decided in 1990, custody law in this state has evolved to recognize fathers can be equal parents. NRS 125.460 contains the declaration of the Nevada Legislature that is the policy of this state to ensure that minor children have frequent association and a continuing relationship with both parents after the parents have separated, and to encourage such parents to share the rights and responsibilities of child-rearing. NRS 125.480 provides that in determining custody of a minor child, the sole consideration of the court is the best interest of the child.

The Nevada Supreme Court has spoken on the subject of frequent association and sharing the rights and responsibilities of child-rearing. In *Mosley v. Figliuzzi*, 113 Nev. 51, 930 P.2d 1110 (1997), the Nevada Supreme Court commented that the enactment of 125.460 was a remarkable historical event. Throughout most history Legislators and courts have been blind to the reality that most children are, in most cases, much better off after the parents separate if they can continue to have two parents rather than only one. The realization that children are better off with both parents has been a long time in coming. Courts, until recently, seem to have been unable to grasp the rather simple fact that most children have two loving parents and are entitled to the love of both – to the greatest extent possible – in the event that two parents decide not to live in one household. 113 Nev. at 117; 930 P.2d 1110, 1117.

The Supreme Court went on to point out that after the tender years doctrine had gone out of vogue, the next step was "... the recognition that the best parent is both parents." The court then cited a broad political and scientific consensus that "... children do better when they have two actively involved parents." It follows that if "frequent associations and the continuing relationship with both parents" means shared rights and shared responsibilities, that the child's surname should also be shared. NRS 125.460*; Mosley v. Figliuzzi*, 113 Nev 51, 59 930 P.2d 1110, 1116 (1997).

VI. Equal Protection

Magiera gives an unwed mother the presumption, rebuttable by only clear and convincing evidence, that her choice of surname is binding upon both parties. Unlike other issues relating to custody, this authority does not give the district court adequate discretion to find what surname would be in the child's best interest.

It is submitted that *Magiera* is not only poor public policy, but that it also is unconstitutional. The Equal Protection Clause provides: "[N]or [shall] any State] deny to any person within its jurisdiction the equal protection of the laws."

This fundamental right protected by the United States Constitution entails two separate rights that should not, and cannot be segregated

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or selectively enforced by parties or the state. The Nevada Supreme Court's decision in question on its face unconstitutionally discriminates against men because it mandates that in all cases where unmarried persons have a child, the woman receives the arbitrary presumption of giving the child a legal surname.

In considering whether state law violates the Equal Protection Clause of the Fourteenth Amendment, this court applies different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

Gender-based classifications and discriminatory practices as set forth in *Magiera* do not serve any viable and/or important governmental objective under any interpretation of the facts, and further are not substantially related to any such objective. Such practices as set forth in *Magiera* are an unequivocal violation of equal protection. Such practices and procedures impose special, broad and dissimilar responsibilities and obligations upon men, while affording certain privileges, rights and choices to be unilaterally made and exercised by females. This results in societal, financial, emotional, psychological and other detriment to men, and possibly, the children involved. This law cannot withstand the applicable scrutiny and legal tests of the Equal Protection Clause of the United States Constitution or the Nevada Constitution and must be overruled.

States such as Mississippi give the party wanting to change the child's surname the burden of showing by a preponderance of the evidence, rather than clear and convincing, that the change is in the best interest of the child. This is certainly more reasonable, but still gives the mother an unfair advantage, even if the father acts promptly in his request to have the child bear his surname. The factors which a court may consider in determining what surname is in the child's best interest vary depending on the age of the child, but include wishes of the parents and child, relationship between child and parents, relationship with stepparents, siblings and other family members, the child's adjustment to school and community, the length of time a child has had an existing surname, motives of the parents, the difficultly or embarrassment the child may experience when he bears a surname different from the custodial parent, or misconduct by a parent.

VII. Conclusion

It is submitted that the standard as declared in *Magiera* is unconstitutional and should be overruled. Nevada law is clear that the sole consideration in determining a child's surname is the best interest standard. It should not, however, always be the burden of unwed fathers to prove by clear and convincing evidence that their child should bear his surname. As set forth above, the public policy of this state has developed that shared "rights" as well as shared responsibilities are in children's best interest. It cannot be said that parents have "shared" rights when one parent unilaterally gets to make one of the most important decisions in a child's life. It is submitted that the interests of both parents and the child can be served in paternity cases with a rebuttable presumption that favors a compound surname. "A dual name would help the child to identify with both parents, a state of mind psychologists say is essential." It gives the child a sense of belonging, an identity with extended family, and maintains the integrity of the parents' identity.

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, the 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.

A MESSAGE FROM THE CHAIR

By Robert Cerceo, Esq.

In five months we will be meeting in Ely for the Annual Family Law Conference. Planning is underway now. The March dates are set for 2013 and 2014. Rooms are going quickly so do not delay in making reservations.

Similar in format to this past March with an emphasis on recurring evidentiary problems, the CLE will be directed towards property, debt and alimony. The new form of financial disclosure will be covered in detail, along with timelines to assist in following the new rules. The paralegal and advance tracks will also be tied into the main session classes so no one will miss out on the hot topics.

Many new projects are underway by the Executive Council, including child witness and legislation review committees, the third pressing of the *Nevada Family Practice Manual*, etc. All projects will be discussed at the annual meeting, which takes place in Ely on Friday afternoon of the CLE. You have a chance to become more active in the Family Law Section. Each of the Executive Council members have active projects and can use assistance. It is permissible to approach them to help, and I promise most of them do not bite.

On the topic of involvement, the annual meeting is your forum to raise issues, be heard on any subject, a time for new ideas and directions. Please consider contacting me in advance to get new matter on the agenda for March. Send your questions and comments to rcerceo@theabramslawfirm.com.

Article Submissions

Articles are invited! The Family Law Section is accepting articles for the Nevada Family Law Report. The next release of the NFLR is expected in **February, 2013**, with a submission deadline of **January 15, 2013**.

Please contact Shelly Cooley at scooley@cooleylawlv.com with your proposed articles any time before the next submission date. We're targeting articles that are between 350 and 1,500 words, but we're always flexible if the information requires more space.

What Constitutes a "Day" pursuant to *Rivero v. Rivero*[1]?: *Stipp v. Stipp*[2]

By Sarah Hardy-Cooper, Esq., and Eric Pulver, Esq.

I. Introduction

In response to the Nevada Supreme Court's request for an amicus brief on "counting day" under *Rivero*, the Family Law Section of the Executive Council responded with the following:

II. The Current State of the Law

Approximately three years ago, the Nevada Supreme Court issued *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009), a seminal and far-reaching child custody case dealing with issues of legal custody, physical custody and child support. In *Rivero* the court set forth definitions of physical custody. These definitions are "crucial" to the legal standards applied in custody modifications, child support and relocation issues. *Id.* at 422.

The court confirmed that joint physical custody schedules "must approximate an equal timeshare, [but] given the variations inherent in child rearing, such as school schedules, sports, vacations, and parents' work schedules, to name a few, an exactly equal timeshare is not always possible. Therefore, there must be some flexibility in the timeshare requirement." *Id.* at 424-25. As the *Rivero* Court framed the question, "When does a timeshare become so unequal that it is no longer joint physical custody?" *Id.* at 425. To address that question, the court established that parents with unequal timeshares share joint physical custody so long as each parent has physical custody of the child at least 40 percent of the time. *Id.* at 425-26.

By ruling so, the court confirmed that joint physical custodians have essentially equal time, with the outer limits of joint physical custody being a 60-40 percent timeshare. Thus, the 40 percent timeshare is the threshold for defining the bare minimum of joint physical custody. After all, the goal as stated by the *Rivero* Court and the Nevada Legislature is "[t]o encourage such parents to share the rights and responsibilities of child rearing." *Id.* at 423 (citing NRS 125.460). Further, the goal is to "... educate and encourage parents regarding joint custody arrangements, encourage parents to cooperate and work out a custody arrangement before going to court to finalize the divorce, ensure the healthiest psychological arrangement for children, and minimize the adversarial, winner-take-all approach to custody disputes." *Id.* at 423 (citing *Mosley v. Figliuzzi*, 113 Nev. 51, 63-64, 930 P.2d 1110, 1118 (1997)). Both the letter and the spirit of the *Rivero* holding and the concept of joint physical custody reflect an equal or nearly equal division of parenting time and duties. The law should not be used as a tool to cobble together a joint custody order where one parent routinely takes on greater responsibility for a child than the other.

III. The Outer Boundary and the Practical Effects

A. The 40 Percent Outer Boundary

With these concepts and goals in mind, the authors opine that the 40 percent timeshare is the outer boundary of what constitutes essentially equal time. The authors further opine and agree with the Nevada Supreme Court that a parent who does not reach the 40 percent

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timeshare is not a joint physical custodian.

The practical question becomes "How does a District Court determine when a parent reaches the threshold 40 percent?" The *Rivero* court provides significant guidance. Specifically, it instructs in calculating timeshares over the course of a calendar year:

> [T]he district court should look at the number of days during which a party provided supervision of the child, the child resided with the party, and during which the party made the day-to-day decisions regarding the child. The district court should not focus on, for example, the exact number of hours the child was in the care of the parent, whether the child was sleeping, or whether the child was in the care of a third-party caregiver or spent time with a friend or relative during the period of time in question.
> *Id*. at 427.

Rivero clearly states 40 percent of the time is approximately three days per week or 146 days per year. *Id.* at 427, 430. The 146 days may include vacation time and extended periods during summer months. *Id.* at 427. Again, this is in line with the general concept that when parents share joint physical custody they have nearly equal custodial time with the child; not less than 40 percent.

The *Stipp* appeal deals with a situation where the parents were not equal custodians with a schedule that provided one parent with less than 40 percent of the time with the child. From the perspective of the authors and judges informally polled, a significant number of litigated custody cases appear to involve a parent who nearly meets, but does not totally meet, the 40 percent mark. The authors believe the district courts will benefit from greater guidance from the court in determining what constitutes a "day" pursuant to *Rivero*. Litigants and the district courts need clarity to establish custody schedules, and by determining a "day," predictability will benefit everyone involved, and it is likely to promote settlement.

B. What is a day?

Webster's Dictionary defines a day as "The time established by usage or law for work, school, or business" and "The average solar day of 24 hours." The authors, relying in part upon the published works and alchemy of Marshal S. Willick, also believe that a day is 24 hours. However, the informal polling of the district court judges and practitioners by the authors demonstrate the need for a modest amount of flexibility and discretion to the district court judges, rather than a rigid definition and application of a 24-hour period.

The district courts require modest flexibility when determining if a parent enjoys a significant portion of the day, such that he or she should be awarded that day for calculation purposes. But, a significant portion of the day must be within only a few hours of a 24-hour period. As it happens often now, a common nonsensical result is reached where both parents are assigned the same day by a qualitative recasting to accommodate activities and involvement with a child. This occurs most often following litigation at the outer boundaries of the 40 percent when trying to determine "joint" or "primary."

Stated differently, if the district courts and litigants are reminded that in order to truly share joint physical custody, then parties must share equal, or nearly equal, time with their child. And this is a different conceptual construct from the more common outer boundary arguments over custodial schedules, which provide numerous partial days (often for exchanges). When calculating days to reach the threshold of 146 days per year (the 40 percent), significant portions of a particular day, something less than 24 hours, may be counted providing it is close to the 24-hour mark.

C. What other states do

Not all states count days as 24-hour periods. Many states count overnights, when necessary under their rules, typically for custody analysis, child support or eligibility for public benefits. Frequently, the overnight rule is flexible. Some states take into consideration situations where the child has significant time periods in the physical custody of the other parent during the day but does not stay the night. Other states have complex counting formulas, which may result in unnecessary complications and concomitant litigation. Finally, there are at least two states

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that define a day as a period of 24 hours for certain purposes, again with some discretion and flexibility.

The Internal Revenue Code also uses overnights as the starting point for determining which parent is the custodial parent for purposes of allocation of the child dependency exemption. The Internal Revenue Code also includes flexibility if a parent's nighttime work schedule prevents overnights and the child lives with that parent a greater number of days.

It is tempting to count where a child lays his or her head at night as the foundational basis for counting a day with a parent. It seems an easy bright line rule to apply, and some argue this approach is more child-centered (from the perspective of the "eyes of the child").

The authors do not agree that counting overnights is the appropriate method to calculate the *Rivero* timeshare for several reasons. First, in states that define a "day" as an overnight rather than a 24-hour unit, it was accomplished legislatively rather than by the judiciary. To date, the Nevada Legislature remains silent on this issue. Second, *Rivero* says not to focus on whether a child was sleeping in the timeshare analysis. *Rivero* at 427. Third, by focusing on overnights, the schedule may be manipulated even when the other parent actually has the significant portion of the remaining day (for example,
picking up the child at 7 a.m.). It becomes clear very quickly that overnight counting is insufficient to address parenting responsibilities and child involvement.

As noted, Nevada custodial schedules reflect every conceivable arrangement to accommodate a child's best interest and the parents' work schedules. Given the 24-hour nature of the lives of many Nevadans, especially those involved in hospital care, emergency services and casinos, the overnight test may not work as well as in other states where the majority of professions seem to fall into "day jobs." Accordingly, the authors do not recommend adopting an overnight counting rule.

IV. The *Stipp* Custody Schedule Does Not Meet the 40 Percent Threshold Set Forth in *Rivero* or the Spirit of Joint Custody

In the instant appeal, the district court ordered a custodial schedule that provided Mr. Stipp with the children on the first, third and fifth (when there is a fifth weekend in the month) weekends of each month. On the first and fifth weekends, Mr. Stipp's time would begin Friday at 6 p.m. through Sunday at 6 p.m. On the third weekend, Mr. Stipp's time would begin at 9 a.m., rather than 6 p.m. On the second and fourth weekends of the month, Mr. Stipp had the children from Thursday at 6 p.m. through Sunday at 6 p.m. Mrs. Stipp had the option of having the children for the first weekend of the month, but if she exercised this option, Mr. Stipp would then have the children from Wednesday at 6 p.m. through Friday at 6 p.m.

Under the authors' interpretation of this timeshare, Mr. Stipp has the children for two days on the weekends that his time begins on Friday at 6 p.m., and for three days on the weekends that his time begins on Thursday at 6 p.m. Without considering holiday visits, Mr. Stipp has 130 days (26 weeks x 2 days + 26 weeks x 3 days) or an approximate 36 percent timeshare.

When the two-week contiguous vacation time is considered, Mr. Stipp gains nine days when he exercises vacation (not including the weekends that were already counted in the above total), but he loses five days (two of his weekends) for Mrs. Stipp's vacation time.

As to the three-day holiday weekends, there are four specified. Since they are alternated, the presumption is two are assigned to Mr. Stipp, and two are assigned to Mrs. Stipp. On those weekends, Mr. Stipp loses an entire weekend on Mrs. Stipp's three-day holiday weekends (at least two days, sometimes three days), and Mr. Stipp gains a day on his holiday weekend.

For the children's birthdays, Mr. Stipp loses two days overall because Mrs. Stipp receives the children for one of his weekend days.

The remainder of the holidays appear to have no net effect because they are split or are alternated one-day holidays.

In total, when holidays and birthdays are added and subtracted to the normal schedule, Mr. Stipp has physical custody between 128 and 130 days per year, or approximately 35.6 percent of the time.

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The above analysis did not take into account the eight hours from 9 a.m. until 6 p.m. on the third weekend of each month because it is not significant under the above interpretation of *Rivero*. However, even if the additional eight-hour periods were considered full "days," the schedule still only provides Mr. Stipp with 142 days total per year, which is approximately 38.9 percent of the custodial time and accordingly not joint physical custody.

V. THE RECOMMENDATION

The schedule defined as joint physical custody by the lower court in the *Stipp* matter is unsupportable under *Rivero*, and the governing rules set forth under *Rivero* do not need to be revised or clarified. However, if this court is inclined to issue a clarification, the authors recommend that it hails from the Nevada Legislature. We note states that count days for important decisions, such as child support, largely do so by way of statute. Thus far, the Nevada Legislature has not offered clarification on this issue.

Despite this, if the court determines that a clarification is appropriate, the authors suggest the starting point to recognize when counting a day, the district courts should begin with the 24-hour unit of measure. The district courts must have flexibility when the parent has physical custody of the child for a significant portion of a 24-hour day, but it should be a close approximation of the 24-hour unit.

The authors do not believe parties will benefit by a rule splitting or excepting school days and daycare time. Regardless of whether a child is in school or daycare, the parent who has custodial responsibility that day has primary control and decision making for the child even when the child is at school. The custodial parent must make arrangements for the child to be prepared for and get to and from school, as well as to deal with issues, which may arise during the school hours, such as illnesses or discipline problems. This custodial responsibility role does not diminish the legal custody obligations to communicate with each other on these issues, and communication with each other should be encouraged.

The authors similarly do not believe sleeping hours should be disregarded. The child is in the parent's physical custody and that parent has tremendous responsibility should anything occur, such as illness or an emergency during sleeping hours. The authors suggest that, to the extent further clarification is warranted, days are 24-hour periods, or for a significant portion thereof.

VI. CONCLUSION

The authors reiterate that joint physical custody is equal or nearly equal custodial time, but no less than 40 percent of the total custodial time. If a parent with nearly 40 percent of the custodial time is to be designated a joint physical custodian, then the bright line outer limit becomes diluted such that the parents neither have essentially equal physical time with the child, nor share equal parenting responsibilities. When joint physical custody is appropriately in a child's best interest considering the individual facts of the case, there should be no difficulty in crafting a nearly equal timeshare with each parent having physical custody of the child for at least 40 percent of the time. If it is not possible, joint physical custody is not in the child's best interest.

ENDNOTES

[1]125 Nev. 410 (2009)

[2] Supreme Court of the State of Nevada Case No. 57327

[3] The court appropriately noted that the legislature has not explicitly defined joint physical custody. "However, despite these gaps, attorneys must still advise their clients, public policy still favors settlement, and parties are still entitled to consistent and fair resolution of their disputes." *Rivero* at 426. The authors reiterate that defining joint physical custody is properly a legislative function and thus far, the legislature is silent on the issue.

[4] Nevada law "… presumes that joint physical custody approximates a 50/50 timeshare." *Rivero* at 424 (citing *Wesley v. Foster*, 119 Nev. 110, 112-13, 65 P.3d 251, 252-53 (2003) (discussing shared custody arrangements and equal timeshare); *Wright v. Osburn*, 114 Nev. 1367, 1368, 970 P.2d 1071, 1072 (1998) (discussing joint physical custody and equal timeshare).

[5] The authors do not ignore or diminish the important role of a secondary custodian who may also be an active, involved parent, and instrumental to the development of his or her child. The designation of joint physical custody is focused on the parents having nearly equal custodial

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What Constitutes a Day?

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time and the nearly equal responsibilities that flow from that time.

[6] As stated by Marshall S. Willick in How Many Days are in a Week and the Meaning of *Rivero* II Opinion, Nev. Fam. L. Rep., Vol. 23, No. 3, 2010, *Rivero* "… does not require judges to ignore reality, or abandon common sense." *Id*. at 18. Willick, a co-author of the FLS amicus brief on the *Rivero* rehearing, acknowledges that "Neither the Section's Amicus Brief, or the Court's Opinion, defined a 'day.' Frankly, we thought Copernicus had taken care of that problem, and that it wasn't necessary." *Id*. at 18. He presumes the instant or similar appeal was already in the works, and made a case for simply asking courts to take judicial notice of a day being a 24-hour period, with seven days in a week, and 365 days in most years until the Court or legislature clarifies the issue.

[7] For example, Utah defines joint physical custody as 30 percent or more overnights with a parent. Utah Code Ann. § 78-45-2 (13). West Virginia defines joint custody as more than 35 percent of overnights per year. WV Code § 48-1-239. Virginia law states that a day is 24 hours, with the presumption that overnights with one parent less than 24 hours is counted as a divided day. VA Code Ann. § 20-108.2 (G)(c)(3). Please note that a full summation of the law of the 50 states with respect to custody determination was included as an appendix to Brief of Amicus Curiae, Family Law Section of the State Bar of Nevada, *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009) (No. 46915), as Exhibit A. For further reference, the FLS's *Rivero* rehearing Amicus Brief discusses other states that use overnights at least as a starting point to determine the physical custody timeshare percentage for child support purposes. See, e.g., Brief of Amicus Curiae, Family Law Section of Nevada State Bar, *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009) (No. 46915) at Exhibit 3.

[8] For example, Oregon calculates child support based in part on the number of overnights the child is in each parent's physical custody to calculate the percentage timeshare. However, it allows the use of a "… method other than overnights if the parents have an alternative parenting time schedule in which a parent has significant time periods where the child is in the parent's physical custody but does not stay overnight." Oregon Administrative Rule 137-050-0730(2)(c). The rule gives examples:

> 12 continuous hours may be counted as a day. Additionally, four to 12 hour blocks may be counted as half-days, but not in conjunction with overnights. Regardless of the method used, blocks of time may not be used to equal more than one full day per 24-hour period.

[9] California's complex presumptive child support calculation requires a calculation of the total number of hours a parent has primary physical custody of a child. There are cases in that state that deal with how to assign the hours a child spends in school. *DaSilva v. DaSilva*, 119 Cal.App.4th 1030, 15 Cal.Rptr.3d 59 (2004). Once the total number of hours are calculated in a given year for each parent, the percentage timeshare is calculated using the total number of hours available in a year or dividing the total hours by 24 to yield the number of days assigned to each parent.

[10] VA Code Ann. § 20-108.2(G)(c)(3). *In re Marriage of Hansen*, 81 Wash.App. 494, 914 P.2d 799 (1996).

[11] Under IRC § 152(e), the custodial parent is the parent with whom the child lived for a greater number of nights during the year. If the child lived with each parent for an equal number of nights, the custodial parent is the one with the higher adjusted gross income. However, the IRS recognizes an exception and gives the exemption to the parent whose nighttime work schedule prevents overnights and the child lives a greater number of days but not nights with that parent. See also, IRS Publication 504 (2011), Divorced or Separated Individuals.

[12] It has a certain logic whereby each parent would be mutually disadvantaged, but that is contrary to the goals of trying to reach justice and equity.

[13] In addition to being fairly complex, this schedule does not readily lend itself to easy calculation of time. For example, on average it provides Mr. Stipp with 130 days per year, but can range from 129 days to 131 days depending on the leap year. However under any count, Mr. Stipp is still not a joint physical custodian.

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Dependency Mediation

By Margaret Crowley, Esq.

In August 2011, the Second Judicial District Court initiated a pilot Dependency Mediation program. The program is funded through a Court Improvement Program (CIP) Grant from the Department of Health and Human Services, Administration for Children and Families in accordance with Section 438 of the Social Security Act. The CIP was established in 1994 in a response to an increase in child abuse and neglect cases. CIP funds are awarded to state supreme courts to assess their foster care systems, adoption laws and judicial processes and to implement programs for system improvements.

The Dependency Mediation program is meant to offer an alternative to judicial proceedings. The program provides families and professionals with an opportunity to consider the best interests of the child(ren) in a confidential, nonjudgmental process facilitated by a trained professional. In jurisdictions across the country, mediation has presented itself as a viable option for resolving disputes about child protection matters. Mediation is seen to be an appropriate process for many reasons:

- The importance of maintaining a good working relationship between parents and the social worker.
- Court proceedings, by their nature, often become emotionally charged. From the parents' perspective, court proceedings can become an exercise in proving, in effect, that the parents are inadequate. Mediation can help preserve relationships between the parties because it is designed to minimize the tendency of disputing parties to polarize.
- The conflicting interests that emerge once the child protection agency involves itself in a family to protect a child have traditionally been dealt with in the courtroom, but experience with mediation suggests that those interests can be fairly and safely dealt with in a less adversarial way.
- Mediation assists parties with reframing their issues. For social workers, the mediation process can help them consider options for resolving the disputed issue and for parents, mediation offers a setting that allows them to tell their story, identify issues/interests and focus on future plans.

The Family Court will automatically set mediation sessions for:

- All cases set for a contested Termination of Parental Rights trial;
- All contested permanency plan hearings (those set for time excessive of a usual docket setting); and
- All contested placement or visitation hearings in JV cases.

In addition, when the court determines that an issue is contested, or otherwise appropriate for mediation, the court may order the case to mediation. Once a matter is referred to the Dependency Mediation program by the court, participation in mediation is mandatory. Children may be included in the process on a case-by-case basis.

The grant is administered by staff of the Second Judicial District. There are three independent contractors who serve as mediators: Jeanette K. Belz of JK Belz and Associates jb@jkbelz.com, Nancy S. Cleaves of Carson Mediation Center, nancycleaves@yahoo.com, and Margaret M. Crowley of Crowley Legal Solutions, margaretmcrowley@sbcglobal.net. Mediator qualifications should comply with the recommended standards of the previous program and current protocol. At a minimum, dependency mediators should have a master's degree, preferably in social work, mental health, or behavioral or social sciences, or hold a law degree, have

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completed a 40 hour basic mediation training and a 40 hour advanced mediation training, including domestic violence training. Of additional help would be specific dependency mediation training. No dependency mediation training related to the Second Judicial District's program is currently planned. As for the professional participants, the mediators conducted training/orientation sessions with them when the program began. The mediators are independent contractors for the court and they receive a flat fee per mediation, paid for by the grant funding – there is no cost to participants in the dependency mediation program. Mediations may involve participation by parents, guardians, social workers, CASAs, foster parents, relatives, adoptive parents, parents' attorneys, agency attorneys, children's attorneys and the child(ren), if appropriate.

The parameters for establishing the mediation program are set forth in the grant between the CIP and the Second Judicial District Court. The basic premise is for the Second Judicial District to reinstate a previous dependency mediation program with the intention of developing a model program with protocols easily transferable to other jurisdictions. The Eighth Judicial District plans to combine the Early Resolution Pilot Program and the Facilitated Petition Pilot Program into juvenile dependency mediation as an alternative to judicial proceedings.

Pursuant to the CIP grant, the project goals are:

- The Second Judicial District Mediation Program will mediate at least 30 sibling group cases during the initial year;
- Seventy percent of the mediations that take place will result in full, partial or verbal agreement;
- The average time from petition to any form of permanency for mediated cases will be 18 months or less;
- Eighty percent of the mediated cases in which agreement is reached come to a permanency outcome.

In many ways, dependency mediation is similar to other mediation as far as the techniques used by the mediator. They are, however, generally more complex than an ordinary mediation. For example: there are multiple parties involved, some parties are professionals who know the process very well (e.g. social workers, attorneys), whereas to others, the process is foreign (e.g. parents) – this can create an imbalance of power; some participants require interpreters or are present on the phone; the mediator must have a basic working knowledge of the dependency process; quite a bit of work is done up front, talking to most parties involved before sitting down to mediation; there is usually an orientation session held between the mediator and the parents and their legal counsel to familiarize them with the process and what to expect (This session is not held with the professional participants, as they have already been oriented to the process).

Thus far, Dependency Mediation has addressed the following, recurring types of situations:

a. **Termination of Parental Rights (TPR)**: More than half of our cases have been TPRs. A common mediation scenario has been with parents, who have previously been non-compliant, but who recently have begun participating. In mediation, the parties discuss the current situation, possibly detailing what steps the parents need to continue to take. This scenario often results in social services agreeing to hold the TPR trial in abeyance for a specified amount of time to give the parents a greater opportunity to get their child(ren) back.

   Another TPR mediation scenario is when parents, after having the opportunity to hear and discuss the facts in a different, less intimidating setting, agree to voluntarily relinquish their parental rights.

   A third common TPR mediation scenario is when there are potential post-adoptive parents. The birth parents can discuss possible terms of a post-adoption contact agreement with the adoptive parents, which often results in the birth parents relinquishing their parental rights.

b. **Petition Language**: Some of our mediations have involved changes to the petition language.

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> Sometimes parents will deny the petition simply based on the language. Once given the opportunity to have their objections heard/ understood and to get some of that language changed, parents are often willing to submit to the petition. Social Services also may be willing to change the finding in a petition or convert the case to a voluntary case plan.

The CIP grant language recognizes the opportunities provided by mediation vs. litigation. It states:

> It provides both families and professionals with an opportunity to discuss emotional issues openly in a confidential, non-judgmental process facilitated by a trained professional and, then, to begin making decisions about what is best for the children ... [Dependency mediation programs] have repeatedly demonstrated that they offer an improvement over traditional child welfare practice and traditional litigation of child abuse and neglect related cases. Mediation has shown to be a more efficient and cost-effective means of moving children into permanency.

For example, in a TPR matter, if mediation is not used, the case is set for a trial, generally for two to three days. The parents do not gain any extra time to perhaps get their children back or are not as inclined to voluntarily relinquish. Either way, far more court time is used and there is not a thorough discussion of the circumstances. In the case of parental issues with Petition Language, if mediation is not used, the parents often deny the petition, necessitating an evidentiary hearing.

On or about October 9, 2012, a Juvenile Dependency Mediation Quarterly Report was submitted. The report uses data collected from April 1, 2012, through September 30, 2012, from mediator case records as well as Participant Survey results collected at the conclusion of each mediation. A total of 27 dependency cases were mediated over this six-month reporting period. There were nine cases mediated in the April 1 - June 30, 2012, period increasing to 18 cases in the July 1 - September 30, 2012, period. Across both quarters, mediation services were provided at all stages of abuse and neglect cases from

initial petition to termination of parental rights (TPR) including mediating post-adoption contact agreements. The program mediated 17 sibling group cases over this six-month time period. Additionally, mediator notes reflect that for the cases proceeding to mediation, agreement resulted in vacating eight TPR trials, seven settlement conferences, one placement hearing and five other hearings. Below is a brief summary of the outcomes, successes, challenges and next steps.

Mediation Outcomes:

From April 1, 2012 - June 30, 2012, nine mediations were held. These mediations resulted in:

Table 1	No. of Cases
Written Agreement	6
Verbal Agreement	2
No Agreement	1
Total	**9**

- Agreement was reached in eight out of nine cases. This is an agreement rate of 88 percent.
- Examining the focus of mediation in these cases shows the disputed issue was most often TPR.

Table 2	No. of Cases
Contested Petition / Petition Language	3
Service for Children / Visitation	0
Contested Permanency Plan	0
Placement	1
TPR	4
Post-Adoption Contact	1
Total	**9**

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Dependency Mediation

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From July 1- September 30, 2012, 18 Mediations were held. These mediations resulted in:

Table 3	No. of Cases
Written Agreement	8
Verbal Agreement	4
No Agreement	2
Failed to Show	4
Total	**18**

- Excluding the cases where parents did not appear for mediation, agreement was reached in 12 of the 14 cases. This is an agreement rate of 86 percent.

- Examining the focus of mediation in these cases shows the disputed issue was, again, most frequently TPR.

Table 4	No. of Cases
Consented Petition / Petition Language	1
Services for Children / Visitation	0
Contested Permanency Plan	2
Placement	0
TPR	12
Post Adoption Contact	2
Other	1
Total	**18**

Participant Survey Results

Participants in mediation over the April 1 - September 30, 2012, reporting period provide support to the findings that participants are highly satisfied with the mediation process. Three questions from the Juvenile Dependency Mediation Survey are particularly relevant to this point. Following is a sample of opinions from the survey:

Q: What did you find most helpful about the mediation session?

- Getting almost everyone around the table
- Open discussion
- Allowing my client to share her current life situation
- All parties heard the information
- Having all parties together
- The ability to really talk honestly in a facilitated session
- Knowing the current wishes of the client
- Getting everyone at the table including the prospective adoptive parent
- Being able to sit down and freely express myself
- Open forum
- Everyone is being heard
- Team participation
- Open communication and movement
- Got everybody same information, on same page
- Allowing my client to express his thoughts and wishes
- Everyone got a voice/input

Q: How does the mediated agreement (if reached) compare with court orders?

- Each person was given the opportunity to speak and come to compromise.
- Easier to discuss issues
- Allows for more flexibility
- More open, less structured discussion of issues
- It's not formal and gave everyone the opportunity to voice their thoughts/feelings
- Negotiated terms
- More individualized
- More practical, everyone's opinion is being heard
- Better because we have more input
- More time to be specific

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Q: In cases where there was an impasse, why do you think an agreement could not be reached?

- Parents did not attend
- Difficult issues
- Too many unknowns
- Client not willing to relinquish; agency not willing to drop petition
- More information needed
- Different goals for the case and different ideas about how much/little progress is being made
- Indecision
- My client wasn't ready to resolve

Overall outcomes for juvenile dependency mediation in the Second Judicial District suggest that mediation is an effective tool for helping families understand and feel more engaged in and comfortable with the process. It appears from all participants (professionals and parents) that mediation facilitates communication and problem solving. Participant feedback also suggests mediation encourages exploration of options and provides an opportunity for collaboration. For families in particular, those that tried it, liked it.

The level of agreement for this reporting period is particularly noteworthy. Indeed, most mediations resulted in agreement. When this project started, one of the four outcome goals was that 70 percent of the mediations that take place will result in full, partial or verbal agreement. Over both quarters of this reporting period, the agreement rate has, in fact, exceeded 80 percent.

Though the sample size of mediations has been relatively small (less than 30 cases for the six months of this report), the evaluation results have been very encouraging.

Mediators' Greatest Successes:

The mediators collectively agree the greatest success experienced in mediation is the open communication that takes place between the parties. The adversarial process in child abuse and neglect cases often breaks down communications, creating hostility and position-taking between the parties. Additionally, parties are often represented by attorneys in court and do not have the opportunity to directly express their thoughts regarding the case. Mediation ensures they have that opportunity. This positive outcome is often reflected in the post mediation surveys that are completed by the participants.

The mediators found that when the parent(s) have an opportunity to communicate in a non-adversarial setting, they are less defensive and comfortable in sharing information with the child protection agency. Often, it is information the agency was unaware of, and in many cases the new information has contributed to the parties reaching an agreement. The mediation process has also afforded the child protection agency the chance to engage the parent(s) in their case plan and to detail the events that lead the parties to the disputed issue. It has also provided opportunity for the agency attorney to explain the legal/procedural process. When the parent(s) have a better understanding of these processes, the tone of the conversation changes, again often leading to an agreement.

Mediator's Greatest Challenges:

The biggest challenge the mediators have experienced to date, is when a parent or parents fail to attend the mediation session. Some parents have limited resources and do not have stable housing or ways to communicate (e.g. phone, e-mail, or like means). Sometimes, the attorneys are unable to contact their clients prior to the mediation session or a during a mediation session because they lack contact information. When the parent(s) don't attend, the mediation cannot move forward.

Childhood is seven times shorter than adulthood. A single month's delay for a child may result in a significant negative impact on that child's life as the child's physical, developmental and emotional needs may not be being met during this period of time. It is important to be ever mindful of the "child's clock" as we strive to ensure that children are protected from

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abuse and neglect while finding them safe, permanent families who will love, nurture, protect and guide them.

Margaret Crawley has been licensed to practice law in Nevada since 1991. For more than 15 years, she has served as a Civil Deputy District Attorney for Washoe County. During that time, she practiced in multiple areas, including labor/employment law, contract law, litigation and administrative law, and in multiple settings such as mediations, arbitrations, administrative hearings and state and federal courts.

Crawley began mediating in 2008 and has a private mediation practice focusing in elder care, family, employment and general civil issues. In addition to serving as a Supreme Court Settlement Judge, Crawley is a mediator for: The Second and Ninth Judicial Districts' Custody Mediation Panel, the Second Judicial District's Dependency Mediation Program; the Equal Employment Opportunity Commission and the Neighborhood Mediation Center. She is also a member of the Nevada Dispute Resolution Coalition and currently holds the office of president.

Crawley graduated with distinction from the University of Nevada, Reno in 1987 (Bachelor of arts in English Literature) and from the University of California, Davis in 1991 (Juris Doctorate).

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Getting Government Records into Evidence

By Mark E. Sullivan, Esq.

Q. How do you get government records into evidence if you have to go to trial and the other side won't stipulate to their admissibility?

A. You'll need to check your state's rules of evidence to find out the requirements for admission of business records. Each state is different. Some have adopted the Federal Rules of Evidence (FRE), and some have their own evidence codes. The business records rule is contained at FRE 902 (11), but your rule might be slightly or entirely different. Make sure you know what is needed as essential statements in the affidavit.

Q. Don't these agencies have a template they can use for the affidavit? I'm being told that I have to submit to the agency a sample of what the wording should be.

A. "One size fits all" is not the rule in this area. There are no standard affidavits which are universally used among the agencies. It is a common practice to require the applicant's attorney to draft the affidavit, which is then reviewed and revised by the legal office in the agency. You must submit the wording to the federal office that has the records and they can adopt or adapt the language as needed.

Q. So do they just say that they've provided the records and they're accurate?

A. In terms of trial practice, that would be a major mistake. How will the court know what records were provided? How will the judge know that the documents that you have are the ones that the agency sent to you? The records must be attached to the affidavit, not merely referred to.

Q. But the agency sends the affidavit to me, right? Or is it sent to the court?

A. That's your decision. If the records and affidavit –the "packet" – is sent to the court under seal, then there can be no legitimate question as to whether you have substituted documents or altered them. The judge is the one who will open the packet and determine what records have been provided. On the other hand, unless you get an extra copy of what's in the packet, you won't know what is in the records until the court opens them. This leads to three alternatives:

- Get a copy from the agency (by consent of the individual concerned or by court order or judge -signed subpoena). Then request the documents again, along with a business records affidavit that accompanies your request.
-
- Get the documents (as above) from the agency, and then send them back to the agency with your business records affidavit, so they can certify that these are indeed the records provided, and then can attach them to the affidavit.

- Have the agency send the packet to the court, but also send copies to the attorneys.

Q. This is all so complicated – do you have an example that I can use for these affidavits?

A. Of course. It's on the next page.

Mark Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 2nd Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys nationwide as a consultant on military divorce issues and to draft military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

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Phone: 919-832-6677

BUSINESS RECORDS DECLARATION
Pursuant to 28 U.S.C. § 1746

This is a certification of authenticity of domestic business records pursuant to Federal Rules of Evidence 902 (11).

I, Larry G. West, attest under the penalties of perjury (or criminal punishment for false statement or false attestation) that:

1) I am employed by the United States Department of Veterans Affairs (DVA).
2) My official title is Paralegal.
3) I am a custodian of records for the DVA.
4) Each of the records attached hereto is the original record or a true and accurate duplicate of the original record in the custody of the DVA, and I am a custodian of the attached records.
5) The records attached to this certificate were made at or near the time of the occurrence of the matters set forth.
6) The records attached were made by (or from information transmitted by) a person with knowledge of those matters.
7) Such records were kept in the course of a regularly conducted business activity of the DVA.
8) Such records were made by the DVA as a regular business practice.

The enclosed records are:

- Letter to Jacob Harris Stein, XXX-XX-5566, dated April 12, 2010, titled "Your Original VA Disability Rating and Reasons for the Rating" and
- Letter to Jacob Harris Stein, XXX-XX-5566, dated June 15, 2012, titled "Your Revised VA Disability Rating and Reasons for the Rating."

Dated: July 13, 2012

Larry G. West
Larry G. West, Paralegal

Subscribed and sworn to before me this ____ day of _____, 2012.

_____
Notary signature My commission expires: _____