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NEVADA FAMILY LAW REPORT

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How a Juvenile Delinquency Case Proceeds in Clark County, Nevada

by Susan Roske, Esq.

Representing children in juvenile delinquency proceedings requires specialized skill and training. In addition to criminal defense skills, the juvenile defender must also have a special understanding of the principles of child and adolescent development; brain development; maturity and competency issues; mental health issues, common childhood diagnoses and other disabilities; special education rights and remedies; immigration issues regarding children; an ability to communicate with young children and adolescents unfamiliar with legal terms and concepts; and much more. Paramount in the representation of a child client is

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IN THIS ISSUE:

EDITOR'S NOTES

By Shelly Booth Cooley, Esq.

In this issue, we have an article from Ray Dietrich regarding the *Kennedy* case and its impact on retirement account issues. In our efforts to promote differing views, we direct you to an analysis of the *Kennedy* case by Marshal S. Willick in our prior issue Winter 2009, Volume 3.

Specialization Exam:

Have you been contemplating taking the Family Law Specialization Exam? If so, now might be the time. Gone are the days where you have to list each and every family law case for which you have been principal counsel in the past five years, etc. Rather, the application has been updated in a way that should please many folks. Now, you can answer "yes" or "no" to the following questions:

- "In each of the last five calendar years, have you been the principal counsel in at least thirty (30) contested family law cases each calendar year?"
- "In the last five calendar years have you been principal counsel in at least ten (10) contested hearings or trials, which are two (2) hours or more in length and involve testimony of witnesses?"

If you answer "no" to either question, then you will have to provide additional information to enable you to take the exam. However, for those of you who are able to answer "yes" to both of these questions, the application process has been significantly simplified. The Family Law Section is hoping that these changes to the application will encourage more individuals to take the exam.

The next test is scheduled for Nevada Day 2010. The Family Law Section is also offering a second testing date on March 3, 2011, in Ely, Nevada, during the hours of the Nuts and Bolts class (8 a.m. to 12 p.m.). Those people interested in sitting for the March exam should apply no later than January 15, 2011.

Find the applications at: http://www.nvbar.org/sections/FamilyLaw/specialization_app.pdf.

Find the Standards at: http://www.nvbar.org/sections/FamilyLaw/Specialization_Standards.pdf.

Family Law Conference:

The Family Law Conference is scheduled to take place in Ely, Nevada from March 3 to March 4, 2011.

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an understanding that counsel is bound to zealously represent their client's expressed interests. The role of defense counsel is to provide the delivery of zealous, comprehensive and quality legal representation to which children charged with crimes are constitutionally entitled.

Compared to adult criminal proceedings, the juvenile delinquency proceedings are rather informal and processed very rapidly. Although children are entitled to many due process rights guaranteed to individuals in adult criminal proceedings, they are not entitled to bail, a pre-trial evidentiary probable cause hearing or to a jury trial. The practitioners in the juvenile system tend to speak in acronyms, which can be quite confusing to the uninitiated.

The Juvenile Delinquency Prosecution Process

Children are typically brought into the juvenile justice system either by having been given a citation by a law enforcement official or by custodial arrest. Children who are not already on probation will meet with an Intake Probation Officer before the case is referred to the district attorney's office for filing of formal charges. Juvenile Probation Officers have the authority to dispose of minor misdemeanor offenses informally without referring the case to the district attorney.

Citations

The child and his or her parent must appear at the family courthouse on the date indicated on the citation. They will report to Intake Services and meet with a Juvenile Probation Officer (JPO). If the child is already on probation, the citation will be sent to the assigned JPO rather than to an Intake JPO. The JPO has discretion in misdemeanor level offenses to handle the case informally or to refer the minor to a diversion program.

Children that admit to the alleged misdemeanor offense in the citation at intake can be referred by the JPO for a variety of services or consequences in lieu of formal charges (i.e. a diversion program). The child may be required to perform community service hours, attend a petit larceny program, an alcohol education program or similar services. Children may merely receive a warning by the JPO. Upon successful completion of the diversion program, the matter is closed and the case is not referred to the District Attorney's Office for filing of formal charges. However, if the child fails to comply or is cited or arrested again during this period, the charges will be referred to the District Attorney.

Children that either deny the allegations, are not diverted through intake or are charged with gross misdemeanor or felony-level offenses will be scheduled for a plea hearing. The matter is then referred to the District Attorney to determine whether formal charges will be filed. The JPO may determine that even a minor offense be referred to the District Attorney for the filing of a petition. The child and the parent will be given a date to appear in court for a plea hearing.

The District Attorney may decide not to file the charge for a number of reasons. If the charges are denied for prosecution, the District Attorney's Office will notify the parent by mail that the charges are "denied" and that they need not appear on the scheduled plea date.

Custodial Arrest

Police may arrest and take a child into custody for any offense, even for a misdemeanor offense (traffic offenses excluded) which does not occur in the officer's presence. NRS 62C.010 (1), NRS 62C.070. When a child is booked into juvenile detention, the parent shall immediately be notified without undue delay. The intake JPO will determine whether the child can be released to his or her parent or detained in the juvenile detention facility. The JPO uses a detention point criteria to make this decision. The Risk Assessment Instrument (R.A.I.) attributes points for the severity of the crime and other factors. If the child gets 15 or more points, the child is "eligible for detention." In practice, all children reaching 15 points in Clark County will be detained. The JPO will meet with the child and parent(s) to prepare a "Service Assessment Sum-

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mary" (SAS), which addresses a multitude of social issues pertaining to the minor and family. The SAS can be very useful to the defense attorney. The SAS contains a social history, family functioning information and prior services given to the minor. If the child is already on probation or parole, the Intake JPO will not prepare a SAS, but contact the assigned JPO to determine whether to release the child if the child does not meet the point criteria for detention.

If the child is released, the child and parent will sign a release agreement promising to appear on the date set for a plea hearing. The matter will be referred to the District Attorney to determine whether charges will be filed.

If the child is detained, the youth will appear the next morning (or next court date if arrested on a weekend or holiday) before a Hearing Master for a detention hearing. Attorneys from the Public Defender's Office meet with the detained children every morning before the 9 a.m. detention hearings and represent them for purposes of the detention hearing. Children who are detained will be appointed counsel unless the family intends to retain counsel. If there is a potential conflict of interest with the Public Defender's Office, the court will appoint one of the attorneys under contract with the county to represent conflict cases. The Hearing Master will review the declaration of arrest to determine whether probable cause exists and if so, whether to release or detain the minor. If the child is detained, the District Attorney must file a petition within eight days of the arrest or the child must be released (NRS 62C.100(6)). Counsel can orally object to the detention finding of the Hearing Master. If requested, the Hearing Master will schedule a hearing before the Juvenile Court Judge on the judge's next calendar for detention review.

Plea Hearings

Children are given a copy of the petition and a statement of rights at the plea hearing. NRS 62D.030(1) provides that "[i]f a child is alleged to be delinquent or in need of supervision, the juvenile court shall advise the child and the parent or guardian of the child that the child is entitled to be represented by an attorney at all stages of the proceedings." If the child requests counsel, the plea hearing will be continued for the parent to obtain retained or appointed counsel.

The majority of cases are negotiated at the plea phase of the hearings. Often the "disposition" of the case can also be handled at that same hearing. There is an intake JPO at every plea hearing. If the child admits guilt, the JPO may make recommendations as to a particular disposition or will ask the court to schedule the matter for a formal Report and Disposition Hearing (R&D) before the district court judge. If the JPO has a verbal recommendation for disposition at the plea hearing, the court will likely proceed. However, if the child elects to have a formal R&D, the court will schedule one. Usually, only those cases where the JPO intends to recommend incarceration or cases that have difficult placement issues are set for formal R&D.

Adjudication Hearings

The adjudication hearing in this jurisdiction is called a contested hearing. This is the equivalent of a trial in adult criminal proceedings. Children are entitled to certain due process guarantees. Minimum due process guarantees in delinquency proceedings were established in the United States Supreme Court decision, *In re Gault*, 387 US 1 (1967). NRS 62D.010 provides that juvenile delinquency proceedings are not criminal in nature and must be heard separately from the trial of cases against adults and without a jury. The hearing may be conducted in an informal manner and is open to the general public unless the judge or hearing master determines the proceeding must be closed.

Report and Disposition

The Report and Disposition is the juvenile equivalent of an adult sentencing hearing. The disposition report will be written by the JPO. After an admission or finding of guilt, children that do not have an assigned JPO will be directed to Probation Administration after the court has scheduled the case for R&D. If the child is already on probation, the assigned JPO will prepare

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and file the disposition report. If the child does not already have an assigned JPO, the file will be sent to one of the probation centers and a JPO will be assigned for the purpose of preparing the report. If the minor is ultimately placed on probation, the minor will be assigned to a JPO at one of the probation centers.

Disposition Alternatives

The typical alternatives that the court considers are as follows:

1. **Diversion** (described in "Citations," above)

2. **Consent Decree**: This is defined in NRS 62C.230. After an admission (guilty plea) or a finding of guilt, the court can withhold an adjudication of delinquency and place the youth on informal supervision for a period of three to four months with conditions (such as counseling and community service). Upon successful completion of the informal supervision, the charge is dismissed. The Consent Decree (CD) is usually only available for those children with no prior adjudication of delinquency and on minor offenses. The court might consider a CD for felony charges if the child is very young. The CD requires the District Attorney to approve and sign off on the supervision agreement.

3. **Formal Probation**: Upon an adjudication of delinquency, the child is typically placed on formal probation for a period of six months, although sometimes it is for a longer period of time. The child will be given paperwork in court that will reflect the special conditions of probation ordered by the judge and the phone number for the various probation centers. The minor will be assigned to a probation center depending upon his zip code. The probation center to which the child is assigned will be indicated on the form and the child and parent will be directed to call the center in five working days. In the meantime, the file will be routed to the probation center and assigned to a particular JPO. When the minor calls the center, the child will learn the name of his JPO and make contact with the JPO. The JPO will arrange a meeting to go over the conditions of probation and have the child and parent sign the Terms of Probation.

4. **Intensive Supervision Program (ISP)**: This is a more intensive probation supervision program for high-risk offenders. The JPO has smaller caseloads and is able to make frequent home visits. This is usually considered the last effort to work with the minor in the community.

5. **Spring Mountain Youth Camp** is a correctional facility for boys. This placement is usually considered for younger, less sophisticated offenders. It is located near Mt. Charleston. It is a behavior-driven program; the youth earns more privileges depending upon his behavior. Boys sent to SMYC will be placed on 12 months of probation. A typical stay at SMYC is approximately six to eight months. After two months, youth are rewarded with weekend furloughs home. They are placed on supervision by a JPO upon their release from the program for the remainder of the probation period. SMYC has a residential center, or halfway house, here in town. Some youth are placed there upon release from the youth camp before being returned home.

6. **Alternative Placements**: There are a number of out-of-home placements that can be made while a child is on juvenile probation, for example: Boys Town Emergency Shelter (short-term care), West Care (residential drug rehabilitation) and group homes.

7. **Commitment to the State of Nevada, Division of Child and Family Services**: The court may commit a child to the State of Nevada Division of Child and Family Services (DCFS) for correctional care. The state has three correctional facilities and will determine which facility to place the child. The court has no control over this placement after the court has committed a child to

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the state for correctional care. All girls are sent to the Caliente Youth Center (formerly the Nevada Girls Training Center) in Caliente, Nevada. The state will also place younger boys in DCFS custody at the Caliente facility. The older boys and more sophisticated or violent offenders are sent to the Nevada Youth Training Center in Elko, Nevada. Those youth that cannot conform to the behavior requirements in the Elko facility in the past were placed at the Summit View facility in Las Vegas. However, with the present fiscal crisis in the state, the Summit View facility has recently closed. The Summit View facility is much like a prison compared to the other institutions and was designed to provide services for the more serious juvenile offender.

The commitments to the state are indeterminate, but a typical stay in the Caliente Youth Center and the Nevada Youth Training Center is six to eight months. The commitments are behavior driven and early release is determined upon compliance in the program. When the minor is released, he is on parole with the DCFS Youth Parole Bureau. The length of parole is unclear, but is usually for approximately one year (See, NRS 62E.520, NRS 63.700 -790).

Juvenile Sex Offense Cases

In Clark County, the Juvenile Sex Offenses cases are heard on a separate calendar. Juvenile Probation has a separate team of officers knowledgeable about these offenses and working with the special needs of these children and families. Children charged with a sex offense face extremely serious consequences which could include lifetime registration and community notification. The Public Defender's Office has a team of attorneys who are experienced in these cases. Any attorney retained to represent a child charged with a sex offense is encouraged to contact the Public Defender's Office to consult on these issues.

The law in this area is very complex and uncertain. New statutes were to go into effect on July 1, 2008. There is presently a permanent injunction on this legislation issued by the United States District Court. Therefore, the statutes which were repealed by the aforementioned legislation remain in effect and the juvenile court is continuing to apply the statutes that were repealed effective July 1, 2008 (NRS 62F.200 - 62F.260). The federal injunction was appealed and is presently pending in the Ninth Circuit Court of Appeals. In a separate court action, the Clark County District Court declared this same legislation unconstitutional as applied in juvenile delinquency cases. This decision was also appealed and is pending in the Supreme Court of Nevada.

Special Proceedings

Certification Hearings

Certification hearings, also called transfer or waiver hearings in other jurisdictions, will determine whether the child will be prosecuted in the juvenile delinquency court or the adult criminal court. Upon the petition by the district attorney to certify a child to stand trial as an adult, the Hearing Master will transfer the case to the Juvenile Judge to schedule a certification hearing. There are two types of certification hearings, discretionary and presumptive. The district attorney can request certification of any child 14 years of age or older at the time the crime was committed and is charged with at least one felony offense. This is a discretionary finding by the juvenile court. The certification of the child is presumptive if the child is 16 or 17 at the time of the offense and a firearm is used in the commission of the crime or the offense is a violent sexual assault (See, NRS 62B.390).

The state will file a petition to certify the minor to stand trial as an adult, in most cases, prior to a plea hearing. The juvenile court will order a full investigation by the probation department and schedule a certification hearing. The deputy district attorney will file a Memorandum of Points and Authorities in support of prosecutive merit. This will include police reports and witness statements to support the elements of the charged offenses. The probation department will prepare the certification report and address the transfer

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criteria. This will include a recommendation as to whether the petition to certify the minor be granted. An opposition to the certification should be filed by defense counsel at least one week prior to the scheduled hearing to allow the deputy district attorney time to respond in writing. Because of the serious nature of these proceedings, and the necessity to investigate mitigating factors, the juvenile court will often grant continuances. These cases can take up to several months of preparation and investigation before the final hearing.

The juvenile court will first address the probable cause determination (prosecutive merit) at the certification hearing. If defense counsel does not concede probable cause, the court will hear argument on this issue. Once probable cause has been determined, the court will hear argument on the transfer criteria. If the juvenile court denies the state's petition to certify the child for adult prosecution, the case will be scheduled for a plea hearing. If the child is certified for adult prosecution, the juvenile court will schedule bail and sign a transport order to transfer the youth to the appropriate adult detention facility. In most cases, the juvenile court will order standard bail. The court will hear argument by counsel for a lower bail. Own recognizance releases are rarely granted.

Appellate Review

The Hearing Masters conduct most of the contested hearings in Clark County. After a contested hearing, the Hearing Master will file and serve on defense counsel his or her written finding of facts and notice of right for review by the district court judge. Upon a finding of guilt, objections to the Hearing Master's findings must be filed within five days after receiving the notice and findings. NRS 62B.030 provides that a hearing before the district court judge must be allowed if an objection to the Hearing Master's findings is filed within five days after the giving of the notice. However, a complete hearing de novo is not mandatory (See, *Trent v. Clark County Juvenile Court Services*, 88 Nev. 573 (1972)).

"Certification Hearings, also called transfer or waiver hearings in other jurisdictions, will determine whether the child will be prosecuted in the juvenile delinquency court or the adult criminal court.."

NRS 62D.500 provides that appeals from orders of the court may be taken to the Supreme Court in the same manner as appeals in civil cases are taken. The notice of appeal must be filed within 30 days of the final order of the court. Disposition orders and certification to adult status orders are considered final orders for appellate purposes.

Juvenile Records

Most juvenile records are automatically sealed when the child reaches 21 years of age (exceptions are listed in NRS 62H.150.6). A juvenile may petition to have his records sealed, prior to his 21st birthday, if three years or more have elapsed since the child was last adjudicated delinquent or referred to the juvenile court. In Clark County, petitions or motions to seal juvenile records are heard by the juvenile court judge. Before ordering the records sealed, the judge must make a finding that the child has been rehabilitated to the satisfaction of the court (See, NRS 62H.100-62H.170).

Related Statutes

NRS 62B.330(3) excludes from juvenile court jurisdiction: (a) murder or attempted murder and any related offense arising from the same facts; (b) sexual assault or attempted sexual assault involving the use or threatened use of force or violence if the person was 16 years of age or older and has previously been adjudicated delinquent for an act that would be a felony if committed by an adult; (c) an offense or attempted offense involving the use of a firearm if the person was 16 years of age or older and has previously been adjudicated delinquent for an act that would have been a felony if committed by an adult; and (d) any other offense if the person had previously been convicted of a criminal offense. Thus, these charges are filed directly in the adult criminal court because the juvenile court lacks the jurisdiction to hear these cases.

NRS 169.025 scope: "This Title (Title 14-Criminal Procedure) gov-

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erns the procedure in the courts of the State of Nevada and before magistrates in all criminal proceedings ... does not apply to proceedings against children under chapter 62 of NRS." The rules of criminal procedure do not apply in juvenile delinquency court, yet Nevada does not have comprehensive rules of procedure for juvenile delinquency cases. For example, there are no rules regarding discovery, competency proceedings, filing of motions, etc. The attorneys practicing regularly in juvenile court will informally give notice of witnesses, notice of alibi defense and discovery to opposing counsel although there are no rules requiring them to do so. The court and counsel many times will look to the criminal procedure statutes for guidance in these situations.

NRS 194.010 Persons capable of committing crimes: "All persons are liable to punishment except those belonging to the following classes: (1) Children under the age of 8 years; (2) Children between the ages of 8 years and 14 years, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness." This statute is found in Title 15 and therefore applicable to juvenile proceedings. See *Winnerford v. State*, 112 Nev. 520 (1996), where the Nevada Supreme Court held that the state did not present sufficient evidence to rebut the presumption that 10-year-old Winnerford was incapable of committing a sexual assault citing NRS 194.010(2).

Conclusion

Without a doubt, any child facing "...the awesome prospect of incarceration" needs "the guiding hand of counsel at every step in the proceedings against him," (*In re Gault*, 387 U.S. 1 (1967)). The juvenile defender plays a critical role as a check on the power of the state as it imperils his or her client's liberty interests and to protect the client's constitutional rights. The standards for attorneys providing indigent defense which are set out in Nevada Supreme Court ADKT No. 411 (filed October 16, 2008) are grounded in defense counsel's mandatory ethical obligations and provide a roadmap for the juvenile defender in every stage of the juvenile delinquency case.

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Bench/Bar Meeting Report: "The South"

by Andrew L. Kynaston, Esq.

Clark County Family Court Bench/Bar meetings were held June 10 and July 22, 2010, at noon at the Family Courts and Services Center in Las Vegas. The meeting was attended by dozens of family law practitioners, members of the judiciary, other interested professionals, and representatives from the clerk's office along with other court administrators and personnel.

At the meeting held June 10, Presiding Judge Gloria Sanchez announced that pursuant to a mandate from the Nevada Supreme Court to assign a second judge to juvenile dependency cases, Judge Frank Sullivan had been reassigned as a full-time juvenile dependency judge. It was further announced that Judge Jennifer Elliott's domestic case load would be increased and she would be absorbing a portion of Judge Sullivan's domestic case load. Practitioners were reminded that pursuant to court rules, upon notice of case reassignment parties would have 10 days to file any peremptory challenges.

It was also announced by the clerk's office that litigants would no longer be charged the $6 e-filing fee for filing the Motion Fee Sheet. Effective immediately, the Motion Fee Sheet can now be attached to back of the litigant's motion and only one $6 e-filing fee would be charged to the motion. This policy was implemented due to multiple complaints from the bar about being charged an e-filing fee for a document required by the clerk's office.

Also attending the meeting was Assembly Speaker Barbara Buckley on behalf of the Legal Aid Center of Southern Nevada (LACSN). Buckley extended a plea to the family law bar to increase their participation in pro bono work, especially in the areas of domestic relations, juvenile abuse and neglect matters. She informed those in attendance that only about one-half of the children presently in foster care in our community are represented by an attorney. Statistics show that children who have an attorney receive better placements, have more access to services, and ultimately receive better overall results. Free training and CLE is available through LACSN. For more information call LACSN at (702)386-1070 or visit their website at www.lacsn.org.

A discussion was then held regarding a number of concerns expressed by members of the bar with regard to the Senior Judge Program. Practitioners expressed concern that having a case heard by a senior judge was presenting unique challenges, increasing litigation costs, and defeating the "one-judge-one-family" emphasis of the family court. It was reported that some senior judges have been unprepared and not up-to-date on case law. Sometimes senior judges can dramatically shift the direction of a case because they are unfamiliar with the history of the matter. The impact is that practitioners have had to file motions for rehearing and incur additional fees to try to correct missteps by the senior judges. Members of the judiciary acknowledged the concerns expressed by members of the bar, but also indicated that the Senior Judge Program was essential to the management of their calendars. Judges are sometimes sick or have other things come up that cause them to be unavailable. Judges also are enti-

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tled to take vacation time and cannot necessarily put their dockets on hold when they are unavailable.

Several suggestions were put forth about how to address some of the concerns regarding the program. One suggestion was that attorneys be provided with advance notice when a senior judge will be sitting and that the attorneys have the option to stipulate (without being required to make an appearance) to continue the matter until the return of the regular sitting judge. Another suggestion was the development of a training manual/program for the senior judges to provide them with specific family law training, making sure they are abreast of current statues, case law and rules before hearing cases in the family court.

As in past meetings, family law practitioners continue to express concerns about the e-filing system. Practitioners continue to notice significant delays between the time a document is submitted for e-filing and when the document is processed. Practitioners were concerned about time-sensitive matters such as orders shortening time and other pleadings that needed to be timely served in accordance with court rules. It was discussed by the bench that it was acceptable to serve unfiled, stamped documents so long as the date and time of the hearing was provided. Practitioners were also reminded to make advance calls to master calendar to get court dates for motions to assure the hearings are placed on the court's calendar.

At the bench/bar meeting held July 22, 2010, Presiding Judge Sanchez announced that the bench was working on addressing the concerns expressed at the last meeting regarding the Senior Judge Program. She indicated that they were working with Justice Cherry of the Nevada Supreme Court, who is responsible for the program, to find solutions to the problems and more information would be provided a later date. Judge Sanchez requested that any additional concerns regarding the program be forwarded to her office. Anyone wanting to send concerns anonymously may do so by e-mailing Mike Carman of the bench/bar committee at mcarman kunincarman.com.

Rob Bare, Bar Counsel for the State Bar of Nevada, attended the meeting at the invitation of the bench/bar committee to address concerns about EDCR 8.08 and the responsibility to maintain original documents under the e-filing rules. Concerns were expressed by attorneys about what specifically was expected with regard to holding original documents for two years under the rule. Due to the e-filing system, it appears that the burden for maintaining original pleadings had shifted from the court to the practitioner. Many law offices are now paperless or are working toward becoming paperless and concern was expressed about the rule placing the expense and burden on counsel to maintain original records for an extended period of time. Also, due to the nature of family law matters and some custody cases remaining open throughout the minority of the child, there is potential that some pleadings would have to be stored for up to 20 years (i.e., two years after a child turns 18).

Bare indicated that the bar would apply a good faith assessment when addressing possible rule violations. He did not foresee a problem with ethical liability so long as the practitioner made a good faith assessment in applying the rule to any particular matter. It was further suggested by the bench that litigants either in the final decree or by stipulation at the end of the case could agree that original documents could be destroyed and opt out of the rule. It was finally determined that a committee would be formed to address the concerns and make recommendations to the rules committee. Judge Cynthia Giuliani volunteered to chair the new committee and the following volunteered as members of the committee: Judge William Henderson, Shann Winesett, Rhonda Forsberg and Marshal Willick.

The next Bench/Bar meeting is scheduled for October 21, 2010, at 12 p.m. at the Family Courts and Services Center located at 601 North Pecos Road, Las Vegas, Nevada 89101. We will see you there.

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The United States Supreme Court's Enforcement of ERISA's Plan Documents Rule:

Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 129 S.Ct. 865 (2009)

by Raymond S. Dietrich, Esq.

The outcome of this case turns on the failure to complete two specific forms: a beneficiary-designation form and a disclaimer form. Had the plan participant designated a new beneficiary to his retirement plan and the former wife disclaimed her interest to plan benefits according to plan procedures, there would have been no controversy.

The Supreme Court has set a "bright-line" test for ERISA's Plan Documents Rule.

Under *Kennedy*, the rule now applies to federal common-law waiver of ERISA plan benefits. Previously, the court applied the rule and other ERISA provisions to preempt state law. The *Kennedy* court, however, rejected an ERISA preemption argument. Instead, the court focused on the fiduciary duty ERISA imposes upon a pension plan administrator. Nevertheless, the state law preemption cases still played a significant role in the court's reasoning. Prior decisions in *Boggs* and *Egelhoff* detailed the central goals of ERISA. Moreover, enforcement of the Plan Documents Rule against federal common-law waiver is consistent with the court's prior state law preemption decisions.

The Plan Documents Rule primarily refers to the fiduciary duty imposed by ERISA § 404(a)(1)(D) upon a pension plan administrator. Under the rule, a plan administrator must discharge his duties in "accordance with the documents and instruments governing the plan." No extraneous investigation is required. The Plan Documents Rule mandates that the plan administrator follow plan procedures.

The *Kennedy* court held that ERISA imposes a statutory fiduciary duty upon the plan administrator. The duty imposed by ERISA is the duty to act in accordance with plan procedures in determining who is entitled to beneficiary status under the plan.

Moreover, a plan administrator is required under the rule to disregard a waiver of benefits if that waiver conflicts with plan procedures. The court also concluded that a waiver is not rendered invalid by ERISA's anti-alienation provision.

In theory, the Plan Documents Rule is sound if you are a pension plan administrator. Under a "bright-line" rule, a plan administrator is able to apply clear distribution instructions without going to court. A plan administrator is also alleviated of the responsibility to consider a wide range of subjective determinations relating to a party's intent and state of mind. In practice, the Plan Documents Rule may be untenable if you are a plan participant or beneficiary. The rule requires a party, or his divorce counsel, to follow plan procedures for the designation of plan beneficiaries. Wishful thinking at best – it is likely that few divorce attorneys will undertake this endeavor, let alone alert their client to the issue. Therefore, it is the plan participant or prospective beneficiary who will likely suffer the consequences of the Plan Documents Rule.

Statement of the Case

Holding: The *Kennedy* court held that an ERISA plan administrator is required to act in accordance with plan procedures in determining who is entitled to beneficiary status under the plan. In addition, a plan administrator should disregard a waiver of benefits by a former spouse if that waiver conflicts with plan procedures. The court also concluded that a federal common-law waiver is not rendered invalid by ERISA's anti-alienation provision.

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ERISA Plan Documents Rule

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Facts and Procedural History: William Kennedy worked for E. I. DuPont de Nemours & Company and accrued retirement benefits under an ERISA-based plan: Dupont Savings and Investment Plan. Kennedy had the power to designate a beneficiary under the plan. The plan required all authorizations and designations to be made in a manner prescribed by the plan administrator.

William Kennedy married Liv Kennedy in 1971 and designated her as the beneficiary under the savings plan in 1974. The parties divorced in 1994. Liv disclaimed any interest in William's retirement plans. William, however, did not remove Liv as beneficiary under the savings plan.

William Kennedy died in 2001. Kennedy's estate asked the Dupont Savings Plan administrator to distribute the funds to the estate. The plan declined. Instead, the plan released the proceeds to Liv Kennedy since she was the designated beneficiary. The participant's estate filed suit in federal district court.

The district court held for the estate. The Fifth Circuit reversed on the grounds that Liv Kennedy's waiver constituted a prohibited assignment or alienation of benefits under ERISA. This appeal followed.

Split in Circuits Over Federal Common-Law Waiver: ERISA fails to address the validity of a common-law waiver of plan benefits. As a result, federal courts may resolve any issues by developing federal common law.

A federal court, however, does not have the authority to revise the text of ERISA (*Mertins v. Hewitt Associates*, 508 U.S. 248, 259 (1993)).

Prior to Kennedy, there was a split among the Federal Courts of Appeals and State Supreme Courts over a divorced spouse's ability to waive an interest in ERISA plan benefits without the use of a Qualified Domestic Relations Order (QDRO). The Fourth and Seventh Circuits have held that a federal common-law waiver in a divorce decree does not conflict with ERISA's anti-alienation provision. (See *Altobelli v. IBM*, 77 F.3d 78 (4th Cir. 1996); see also *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275 (7th Cir. 1990).) In contrast, the Third Circuit held that ERISA barred federal common-law waiver of benefits. (See *McGowan v. NJR Serv. Corp.*, 423 F.3d 241 (3rd Cir. 2005).)

In *Altobelli*, the Fourth Circuit held that ERISA's anti-alienation provision does not apply to a beneficiary's waiver. The anti-alienation provisions of ERISA focus on the assignment of benefits of a participant, not the waiver of benefits by a designated beneficiary. Like *Fox Valley*, the Fourth Circuit also held that a common-law waiver would not impose any additional burdens upon the plan administrator.

There is a further split over whether a waiver is valid if it inconsistent with plan documents. (See *Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997) (holding that plan documents control).) The *Kennedy* decision resolves the split in opinions.

Plain Meaning of ERISA Trumps Federal Common-Law Waiver

The Supreme Court relied on the plain meaning of ERISA § 404(a)(1)(D) in reaching its conclusion that the Plan Documents Rule supersedes a federal common-law waiver. Importantly, ERISA § 404 imposes a fiduciary duty upon a plan administrator to discharge his duties to the plan solely in the "...interest of the participants and beneficiaries" and in "...accordance with the documents and instruments governing the plan." In addition, ERISA § 202 mandates the establishment of a written plan instrument specifying the basis on which payments are to be made from the plan. ERISA § 404 and § 202 comprise the Plan Documents Rule.

According to the court, ERISA's statutory scheme is built around the reliance of the plain meaning of the written plan documents (citing *Curtiss-Wright Corp. v Schoonejongen*, 514 U.S. 73, 83 (1995)). The plan documents are supposed to give a plan participant a clear set of instructions for making the appropriate elections, including the designation of beneficiaries. Moreover, failure to follow the Plan Documents Rule would

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ERISA Plan Documents Rule

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increase the administrative and financial burden on plan administrators.

The court rejected the Fifth Circuit's rationale that Liv Kennedy's waiver constituted an improper assignment or alienation under the QDRO provisions of ERISA.

Again, the court relied on the plain meaning of ERISA. Black's Law Dictionary defines "assign" as to transfer property or some interest therein; "alienate" is defined as to convey title of property. Under ERISA § 206(d)(1), benefits may not be assigned or alienated.

The court reasoned that a QDRO by definition requires the creation of a right in an alternate payee to receive an assignment of benefits; a waiver creates no such interest. Thus, the QDRO provisions have no bearing on whether a beneficiary may waive by a non-QDRO. Therefore, Liv Kennedy did not transfer anything.

The Supreme Court also examined the law of trusts to support their statutory interpretation. The court explained that § 206 of ERISA is much like a spend thrift trust provision that bars assignment or alienation. Importantly, a trust beneficiary does have the power to disclaim his or her interest. Common sense and common law both say that the law certainly is not so absurd to force a man to take an estate against his will.

Therefore, a pension plan beneficiary has the same prerogative.

Preemption of State Law under *Boggs* and *Egelhoff*

The *Kennedy* court relied on two state court preemption cases. Specifically, the court looked to its prior holdings in *Boggs* and *Egelhoff*. Importantly, the court used the underlying rationale of *Boggs* and *Egelhoff* to support its holding in *Kennedy*. According to the court, what "...goes for inconsistent state law goes for a federal common law of waiver" that might obscure a plan administrator's duty to act in accordance with plan documents. Therefore, the connection between waiver and state law preemption is crucial.

In *Boggs* and *Egelhoff*, the Supreme Court held that ERISA's Plan Documents Rule preempts state law. *Boggs* enumerated the central purpose of ERISA to protect plan participants and beneficiaries. *Egelhoff* reinforced the importance of a nationally uniform plan administration of pension plans.

ERISA § 514(a) expressly preempts state law that "relates to" any employee benefit plan. ERISA may preempt state law in one of two ways. First, ERISA may preempt a state law by application of its express preemption language of § 514(a). (See *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).) Second, ERISA may preempt a state law under a "classic-conflict" preemption analysis. A state law conflicts with federal law where compliance with both is impossible or where state law stands as an obstacle to the objectives of

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ERISA Plan Documents Rule

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Congress. (See *Boggs v. Boggs*, 520 U.S. 833 (1997).) Most preemption litigation centers on the interpretation of ERISA's "relates to" language.

In *Boggs*, the Supreme Court dispensed the need to apply ERISA's express preemption language. Instead, the court applied classic-conflict preemption analysis and concluded that the two Louisiana community property laws at issue directly conflicted with ERISA. The Louisiana law permitted the testamentary transfer of an interest in a spouse's pension plan. Therefore, the court concluded that ERISA preempted the Louisiana law.

In *Egelhoff*, the Supreme Court did not base its decision on classic conflict preemption analysis as it did in *Boggs*. Rather, the court relied on the express preemption language of ERISA § 514(a). The *Egelhoff* court held that ERISA expressly preempts a Washington State statute that automatically revokes, upon divorce, any transfer or payments of nonprobate assets to a former spouse. The *Egelhoff* court concluded that state law relates to an ERISA plan if it has a "connection with" or reference to an ERISA plan (citing *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85 (1983). To determine if a state law has a forbidden connection, a court must look to the objectives of ERISA as well as the nature of the effect the state law has on ERISA. The court reasoned that the Washington statute governed the payment of plan benefits, which is a central matter of ERISA plan administration. The Washington statute also had a prohibited connection with ERISA because it interfered with a nationally uniform plan administration.

Although the court used *Boggs* and *Egelhoff* as support, it expressly rejected an ERISA "relates to" preemption argument. The court reasoned that recognizing a waiver in a divorce decree would not be giving effect to state law. Rather, a waiver should be treated as a creature of federal common law. The setting in a state divorce decree would only be happenstance. Thus, a court would only be applying federal law to a document that might also have independent significance under state law.

Avoidance of Third-Party Liability

Failure to follow the Plan Documents Rule may expose a participant's counsel to liability from prospective beneficiaries. To guard against such a claim, divorce counsel has two options. First, counsel may take it upon himself to ensure that plan procedures are followed by his client in the designation of a new beneficiary. Plan waiver procedures must also be followed. If possible, specific plan forms should be executed and incorporated by reference into the divorce decree as an exhibit. Second, counsel may opt to place the client on notice of the *Kennedy* decision. Specifically, the client should be notified, in writing, as to the importance of designating a new beneficiary immediately following the divorce proceeding. Notice should also be given to the client that failure to follow plan procedures may result in a loss of benefits to the client's intended beneficiaries. It is prudent to include the notice in the client's fee agreement.

Alternative Remedies Available Upon Breach of the Plan Documents Rule

A declaratory action in state court may be brought directly against the recipient of the retirement funds. The declaratory action is an alternative to a § 502 ERISA action against the plan administrator. Once distributed, the pension funds are no longer entitled to ERISA protection (*Pardee v. Pardee*, 112 P. 3d 308 (OK.App. 2004)). The action may be based on enforcement of the divorce decree or breach of contract if there is an applicable property settlement agreement. (See *Sweebe v. Sweebe*, 712 N.W.2d 708 (Mich.S.Ct. 2006)(holding that the terms of a prior contractual agreement may prevent the named beneficiary from retaining pension plan proceeds).)

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How Many Days Are in a Week and the Meaning of the *Rivero II* Opinion

by Marshal S. Willick, Esq.

"Reality is that stuff which, no matter what you believe, just won't go away."
– David Paktor

"For every complex problem, there is a solution that is simple, neat, and wrong."
– H.L. Mencken

"There's no better way of exercising the imagination than the study of law. No poet ever interpreted nature as freely as a lawyer interprets truth."
– Jean Giraudoux

Some lawyers and judges are making the determination of custodial time-shares more difficult than necessary, turning a simple problem into a complex one without real cause. As the trial court judiciary has splintered on the matter, unable or unwilling to reach consensus, reaching predictability and consistency in child custody cases will require yet another trip to the Nevada Supreme Court – which is already in process.

I. Background: *Rivero II*

Under *Rivero v. Rivero,* 125 Nev. ___, 216 P.3d 213 (Adv. Opn. No. 34, Aug. 27, 2009) ("*Rivero II*"), all physical custodial regimes involving 60/40 custodial time shares or closer are now considered "joint physical custody."

The opinion is actually pretty far-ranging, and contains a number of holdings touching on the meanings, and rules for modifying, legal custody, physical custody and child support. Unfortunately, certain lawyers and judges have unnecessarily fixated on individual words or sentences in the 40+ page opinion, resulting in application of the case at significant variance from its plain meaning.

Specifically, far too many people have got themselves wrapped around the axle when reviewing a single paragraph of the opinion. Before looking at that paragraph, its context should be noted.

The Family law Section was invited to – and did – submit an amicus curiae brief to assist the court in analyzing the legal issues relating to the definitions of legal and physical custody (the brief is posted at http://www.willicklawgroup.com/appeals).

After stepping through preliminary matters and the facts and procedural history of the case, the court engaged in a discussion outlined essentially the same way as laid out by the section; the portions of the court's outline dealing with the law beyond the parties to that case relevant to this article was:

I. Legal custody

II. Physical custody

A. Joint physical custody

1. Defining joint physical custody

2. The timeshare required for joint physical custody

3. Calculating the timeshare

B. Defining primary physical custody

In short, section II was intended to set out an approach to be followed by courts seeking to resolve disputes. It was ***pre***scriptive, not ***pro***scriptive – intended to give courts a roadmap, not laying out a list of "forbidden fruit." Guidance as to how to use the approach set out was illustrated in section II(B) and actually applied to the parties to the case in section III;

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it is losing the forest for the trees that has led some working in this area astray.

II. The Problem of Defining Time

A. The Words Used in *Rivero II*

Where some lawyers and judges have over-focused is a single paragraph in section II(A)(3), which states:

> The district court should calculate the time during which a party has physical custody of a child over one calendar year. Each parent must have physical custody of the child at least 40 percent of the time, which is 146 days per year. Calculating the timeshare over a one-year period allows the court to consider weekly arrangements as well as any deviations from those arrangements such as emergencies, holidays, and summer vacation. In calculating the time during which a party has physical custody of the child, the 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.

The concepts here are pretty straightforward – a parent has "custody" if a child "resides" with the parent, or if the parent "provides supervision" and "makes day-to-day decisions" regarding the child.

Some judges have fixated on the last sentence of that paragraph, and created their own rules based on that focus. One, in a recent opinion, proclaimed that recognition of the actual custodial time exercised by the parents would violate "counting prohibitions" – a term coined and repeated at least 20 times in the resulting order. Some of the ways judges have spun out based on the court's language are discussed below.

What was meant by the language used in the above quote was explained in Section II(B) ("Defining primary physical custody"), which explains a primary focus on "...the child's residence" so that "the party with primary physical custody is the party that has the primary responsibility for maintaining a home for the child and providing for the child's basic needs." The text there goes on to note that a primary physical custody arrangement "...may encompass a wide array of circumstances."

Unfortunately, this illustrative language has led at least one department of the family court to introduce a second kind of erroneous reading, also discussed below.

All of the "constructed" readings by trial judges ignore the paragraph by the Nevada Supreme Court immediately below the paragraph quoted above – which really does require them to take into account the ***actual custodial time*** of the parents:

> Therefore, absent evidence that joint physical custody is not in the best interest of the child, if each parent has physical custody of the child at least 40 percent of the time, then the arrangement is one of joint physical custody.

B. Why the Nevada Supreme Court Used Those Words

We had suggested to the court that "...the purpose of the 40% threshold is to define a base and ensure that each parent is routinely the custodian of a child for a meaningful and significant period of time." We further cautioned that "anomalous" or transient disruptions in the usual schedule should not be seen or used as opportunities to alter custodial labels.

The court addressed those concerns by adopting the "one-year look-back" provision quoted above, and further explained in section III(B), which some trial courts seem to inexplicably ignore:

> Under the definition of joint physical custody discussed above, each parent must

(cont'd. on page 17)

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cont'd. from page 17

have physical custody of the child at least 40 percent of the time. This would be approximately three days each week. Therefore, the district court properly found that the 5/2 timeshare included in the parties' divorce decree does not constitute joint physical custody. The district court must then look at the actual physical custody timeshare that the parties were exercising to determine what custody arrangement is in effect.

. . .

Specific factual findings are crucial to enforce or modify a custody order and for appellate review. ...the district court must evaluate the true nature of the custodial arrangement, pursuant to the definition of joint physical custody described above, by evaluating the arrangement the parties are exercising in practice, regardless of any contrary language in the divorce decree.

The amicus brief had suggested making custodial time-shares between 40 and 49 percent a trigger for a discretionary labeling of custody as joint. The court elected to make that labeling automatic, indicating a desire to make the matter non-discretionary. Given what trial court judges are doing, this intended direction for consistency has proven to be ironic.

III. What the Courts are Doing

The majority of trial courts are apparently doing as the *Rivero II* panel suggested at the recent Ely conference – looking at what the normal de facto time share is, and apportioning it between the parents in accordance with their supervision of the child. Since kids are normally not exchanged at midnight, this necessarily entails apportioning to parents some partial days – half, one-third, etc., which turn into a percentage of time in view of the one-year lookback. 146 days or more equals 40 percent and is joint custody; less than that does not, and is not.

The majority of trial courts are apparently doing as the Rivero II panel suggested at the recent Ely conference – looking at what the normal de facto time share is, and apportioning it between the parents in accordance with their supervision of the child. Since kids are normally not exchanged at midnight, this necessarily entails apportioning to parents some partial days – half, one third, etc., which turn into a percentage of time in view of the one-year lookback.

Some judges, however, have decided to make up altogether different approaches, which are leading to some bizarre conclusions.

One court has announced that any time a parent touches a child in a day constitutes "custody" for that day. So if the parties saw the child, for any length of time, each got a "day" – theoretically, up to 14 in every week, yielding a 730-day year.

Another court has decided that the language first quoted above has created an "all or nothing" situation, so that if one parent had eight hours out of each 24, that reality must be ignored, and the other parent would be found to have 100 percent custody of the child.

And a third court has managed to so parse the *Rivero II* holding so as to do exactly what the case itself specifically prohibited – calling a 5/2 timeshare "joint custody." The court did so by a combination of what the two other jurists noted above did – first rejecting any partial allocations of days as "counting prohibitions," and then finding that "...it is feasible for both parties to be credited for the same day during a given calendar year," by finding that time is not "mutually exclusive." All of that extended analysis flowed from the court's observation that "Although it easily could have, nowhere does *Rivero II* refer to a day as being defined as a 24 hour period of time."

That court evaluated a timeshare where one parent saw the child from 10 a.m. on Tuesdays until 6 p.m. Wednesdays, and every other weekend (alternated between Friday at 10 a.m. to 3 p.m. Saturday, and

(cont'd. on page 19)

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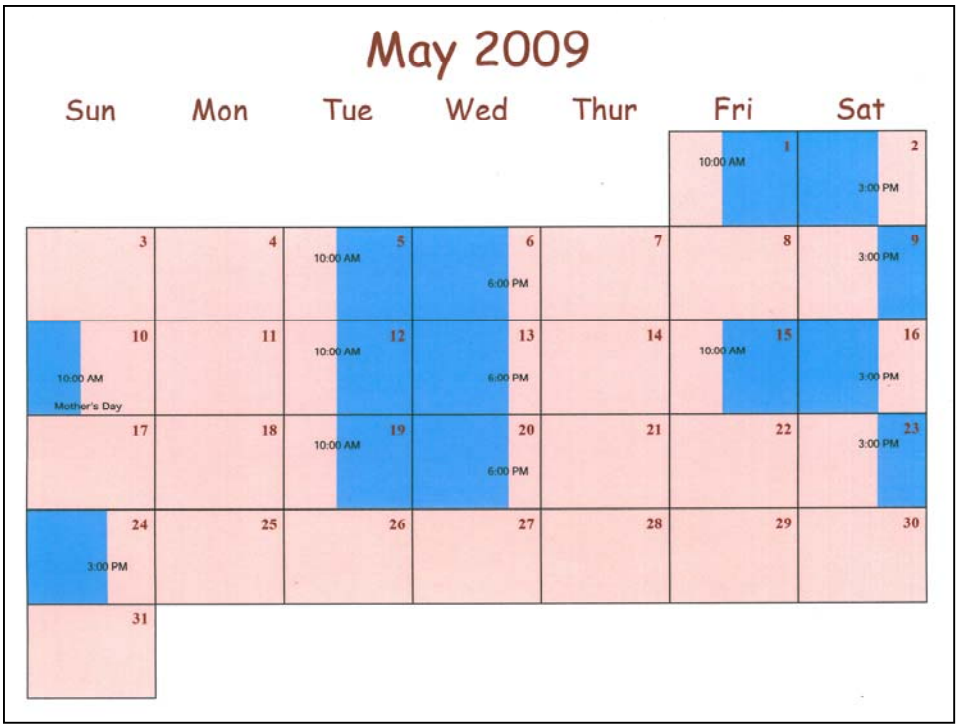
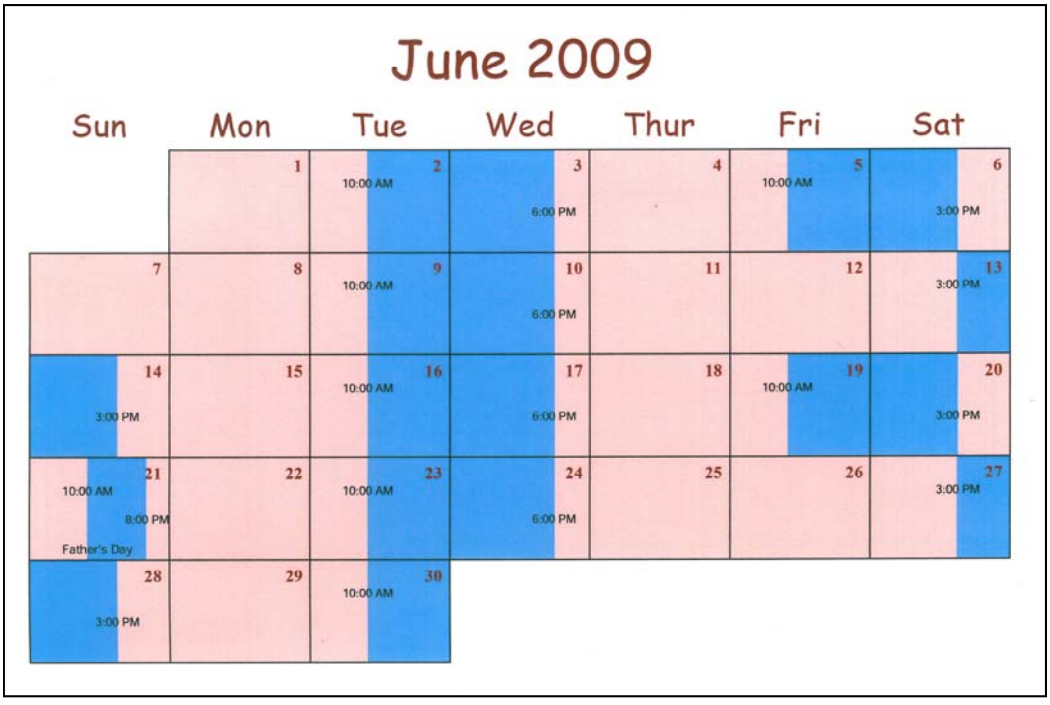
3 p.m. on Saturday until 3 p.m. Sunday).

Graphically, for three typical months, that time-share looked like this:



In fact, this time-share is essentially a 5/2 custody split (expanded by a few hours) – precisely the same as the time share explicitly ruled ***not*** to be "joint custody" in *Rivero II*. But by redefining terms, this court talked itself into labeling the above time-share ***as*** joint custody! As detailed below, the timeshare displayed is actually 67 percent to 33 percent – clearly one of primary custody to one parent and visitation to the other.



IV. Cosmology and Courtrooms

Rivero II contains no "counting prohibitions." It does not require judges to ignore reality, or abandon common sense.

It is true 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. Other states have apparently been warier as to the potential creativity of their judiciary. For example, Virginia statute 20-108.2 G 3 (c) provides:

> Definition of a day. For the purposes of this section, "day" means a period of 24 hours; however, where the parent who has the fewer number of overnight periods during the year has an overnight period with a child, but has physical custody of the shared child for less than 24 hours during such overnight period, there is a presumption that each parent shall be allocated one-half of a day of custody for that period.

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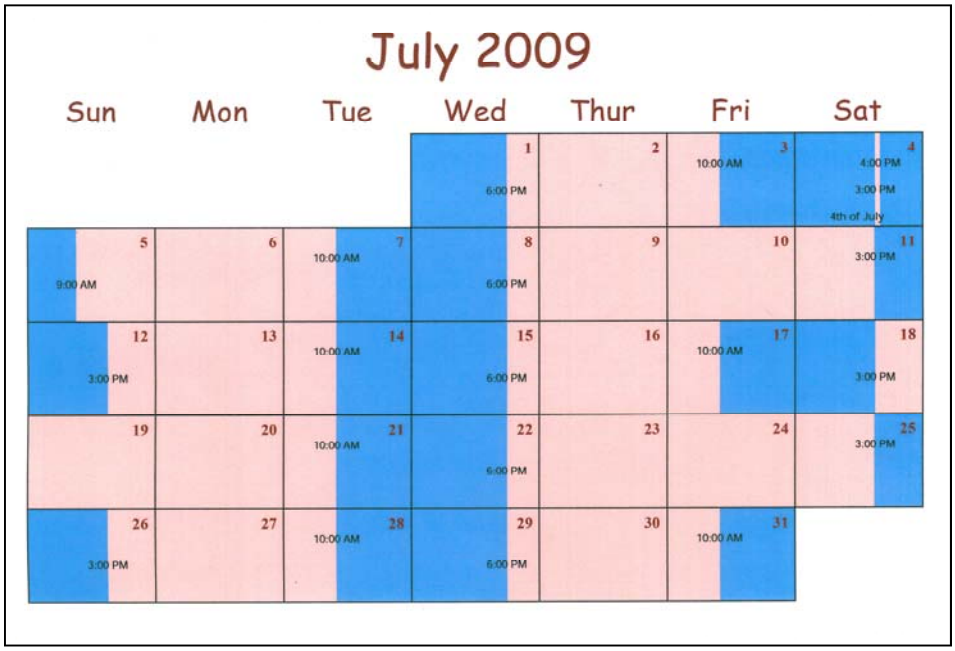
Presumably, the Nevada Supreme Court will have to take on this matter when the next case reaches it. But in the meantime, I do not think it is asking too much for our courts to acknowledge that there are 24 hours in a day. Seven days in a week. 365 days in a year (most years). This is pretty basic "judicial notice" stuff.

Attached to the *Rivero II* amicus brief was a chart giving typical "measurements of custodial time." It is posted at http://www.willicklawgroup.com/child_custody_visitation under the heading "Percentage of Custodial Time in Typical Custody Schedules." This really is not all that difficult – a typical every-other-weekend schedule, for example, equates to 14 percent. Every other weekend, plus one overnight per week: 29 percent. And every other weekend (52 days), plus two weeks in summer (14 days), plus Mother's Day or Father's Day (one day), plus Thanksgiving or Christmas (two days), plus birthdays (two days), plus a miscellaneous day (one day): 20 percent, etc.



Likewise, it's not hard to convert a number of overnights to approximate percentages of custodial time – 37 = 10 percent; 146 = 40 percent; 183 = 50 percent. As always, however, what the parents actually ***do*** defines their actual time-share, especially in a 24-hour town where one parent may be responsible for a child, providing supervision and making day-to-day decisions for part of a day – even every day – but the child sleeps at the other parent's home, where ***that*** parent necessarily is "responsible" for that time.

As noted by the court in the text quoted above, the idea of a full one-year look-back is to take into account both the normal "weekly arrangements" and the reality of emergencies, holidays, summer vacation, etc. to determine the reality of who has ***actually*** been providing what percentage of physical custody of a child. It makes no sense to ignore reality while purporting to measure it.

V. Tools

For those that find it too difficult to "see" a time-share from words, there are several tools available. This office, for example, typically uses "CustodyXChange" (see www.custodyxchange.com), which reports that as for the case discussed in detail above, the overall time-share is 67 percent to 33 percent, while the "overnights" (if that was relevant for any reason) would be 73 percent to 27 percent. It produced the graphics

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Rivero II

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displayed on the previous page, as well. Obviously, other such software exists.

Using such tools, it is relatively simple to load in a "normal" schedule, and any superseding holiday and vacation schedules, and see what the time share actually is. Does this "count hours?" Well, only in the sense of not defying or ignoring reality – over the course of a year, eight hours a day is about 122 days!

VI. Conclusions

The purpose of *Rivero II* was to bring consistency and predictability to child custody and support proceedings. As the court put it:

> District courts can use their discretion to make fair determinations in individual child custody cases. However, this becomes unfair when different parties similarly situated obtain different results. Such unreliable outcomes also make it difficult for attorneys to advise their clients and for parties to settle their disputes. Therefore, the timeshare requirement that this opinion establishes is both necessary to ensure consistent and fair application of the law and proper under this court's precedent.

The failure of the trial court judiciary to achieve consensus on such basic matters as what constitutes a "day" and how many of them pass by in a year will apparently require yet further direction from the Nevada Supreme Court. It can only be hoped that the necessary direction comes soon, simply, and consistently with cosmological reality.

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Community Waste in Nevada

by Bruce I. Shapiro, Esq.

NRS 125.150(1)(b) provides that in a divorce action, a court shall attempt to make an equal division of the community property "...except that the court may make an unequal disposition of community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition." The statute begs the question: what constitutes a "compelling reason" for the unequal distribution of community property?

The Nevada Supreme Court held in *Lofgren v. Lofgren*, 112 Nev. 1282, 1283, 926 P.2d 296, 297 (1996), that "...if community property is lost, expended or destroyed through the intentional misconduct of one spouse, the court may consider such misconduct as a compelling reason for making an unequal disposition of community property." The financial misconduct in *Lofgren* was "...found in the husband's having transferred funds to his father and in his having used community funds for his own purposes, all in violation of the court's preliminary injunction" (*Lofgren* at 1284, 297). The Nevada Supreme Court noted this in *Putterman v. Putterman*, 113 Nev. 606, 607, 939 P.2d 1047, 1048 (1997), and went on to observe that "[t]here are, of course, other possible compelling reasons, such as negligent loss or destruction of community property, unauthorized gifts of community property and even, possibly, compensation for losses occasioned by marriage and its breakup" (*Putterman* at 608, 1048).

Generally, once an allegation of waste or hiding of community assets has been made in a divorce proceeding, and there is evidence of a missing or damaged asset, the spouse accused of dissipating the asset has the burden of proving how the specific funds were spent. (See *In Re Marriage of Seversen*, 228 Ill. App.3d 820, 593 N.E.2d 747 (1992); *Morrison v. Morrison*, 713 S.W.3d 377 (1986) ("...because a trust relationship exists between husband and wife as to that community property controlled by each spouse, the burden of proof to show fairness in disposing of community assets is upon the disposing spouse").) In other words, if an asset existed at the time of divorce, or shortly before the divorce, and was spent or lost in contemplation of a divorce, the spouse who lost or dissipated the asset will have the burden of showing that the asset was not lost or wasted, but transferred or spent consistent with a legitimate community purpose.

Gambling Losses

Gambling losses may clearly be considered a "...negligent loss or destruction of community property" (*Putterman* at 608, 1048). Some Clark County family court judges, however, view gambling merely as a form of "entertainment." One party may take vacations, have spa days, or go to concerts for entertainment, while the other may gamble. In determining whether gambling losses constitute community waste, a court may consider historical gambling patterns, or the amount of loss and the timing of the losses relative to the divorce. There does not appear to be any distinction between legal or illegal gambling.

Oddly, there are no Nevada cases dealing with gambling as community waste. But in many other states, financial misconduct in the form of gambling is considered a dissipation of assets justifying an unequal disposition of community property. This is based largely on the incredible financial toll that gambling has on marital assets. In an article titled "Addiction and Family Law" (1998 Wiley Family Update, Chapter 3, §3.14), Eric Drogin and Curtis Barrett address this issue most poignantly. Drogin and

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Barrett use the term "pathological gambling," and define it as an addiction without substance. They explain that pathological gamblers believe they have a money problem and not a gambling problem. They also state that pathological gamblers think and act tactically and strategically. An element of deception is included in this tactical and strategic thinking, and no one is more susceptible to being deceived than the family members of a pathological gambler. A spouse may be aware of some level of gambling being engaged in by the other spouse, but if the non-gambling spouse is unaware of the extent of the gambling spouse's losses because the gambling spouse has intentionally hidden the nature of the losses, a court could find that community waste has occurred.

In *Siegel v. Siegel*, 574 A.2d 54 (N.J. Super. Ct. 1990), the New Jersey Superior Court was asked to determine whether gambling losses incurred *before* the filing of a complaint for divorce, "...but when the marriage was irreparably fractured," constituted waste. The court ruled that the gambling losses *do* "...equate with a 'dissipation' of funds to be borne solely by the one who placed the family treasury at risk." The court concluded that "...requiring [the gambler] to fully assume the gambling indebtedness not only places the parties where they belong, but also where they positioned themselves," with respect to the proceedings.

Illinois courts have taken a similar view of gambling as a dissipation of assets entitling the non-gambling spouse to an offset for community property wasted on gambling. *In re Marriage of Morrical*, 576 N.E.2d 465 (Ill.App. 3 Dist. 1991), was concerned with evidence showing that the husband "...had sold stock worth up to $32,000.00" at a time when both parties admitted "...that the marriage was undergoing serious problems." The husband "...never gave a satisfactory accounting of what happened to the proceeds from the sale of the stock, [but] he did admit that he gambled with some of the money." The Appellate Court of Illinois held that the trial court did not err in determining that the husband had dissipated $32,000.00 of the marital property and that the wife was entitled to compensation for one-half of that amount. (See also *In re Marriage of Hagshenas,* 600 N.E.2d 437 (Ill.App. 2 Dist. 1992).)

Another example is *Kozlowski v. Kozlowski*, 633 N.Y.S.2d 523 (A.D. 2 Dept. 1995), where in an action for divorce, the trial court awarded the wife 100 percent of the interest in the parties' marital home. Evidence showed that "...the bulk of the funds used in purchasing the home came from wife's separate property" and "...that husband has a history of dissipating assets by gambling." Based on this evidence, the New York Supreme Court, Appellate Division, determined that "...the trial court's equitable distribution award was proper" (*Id.* at 524). (See also *Lindsay v. Lindsay*, 115 Ariz. 322, 565 P.2d 199 (Ariz. Ct. App. 1977) (husband sold community interest in airplane and "lost" the proceeds "in gambling"); *In re Marriage of Smith*, 114 Ill. App. 3d 47, 448 N.E.2d 545 (1983); *Wheeler v. Wheeler*, 2001036, Court of Civil Appeals of Alabama, 831 So. 2d 629 (2002) (court did not abuse discretion in considering husband's gambling in dividing marital assets). See also unpublished opinion in *Wisniewski v. Wisniewski,* FA 990067303, Superior Court of Connecticut (2000) (non-gambling spouse was given a larger share of the marital assets due in part to negative financial effect of other spouses gambling).)

Consumer Purchases

In an unpublished opinion, the Nevada Supreme Court found that a "wasteful and secretive" purchase made during the pendency of a divorce action in violation of a restraining order, and the acquisition of debt on a community credit card to pay for unauthorized gifts of community property, were compelling reasons to make an unequal disposition of the community property ("Order of Affirmance," *Evans v. Evans*, No. 50979 (June 30, 2009)).

The test for analyzing waste regarding consumer purchases is generally "...whether the assets were actually wasted or misused" (*Goodman v. Goodman,* 754 N.E.2d 595, 598 (Ind.Ct.App. 2001), citing, *In re Marriage of Coyle*, 671 N.E.2d 938, 942, 943 (Ind.Ct.App.1996)).

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Community Waste

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"Factors to consider in determining whether dissipation has occurred include:

1. Whether the expenditure benefitted the marriage or was made for a purpose entirely unrelated to the marriage;
2. The timing of the transaction in relation to the divorce;
3. The amount of the expenditure in relation to the value of the community; and
4. Whether the wasting party intended to hide or divert the asset."

A South Carolina opinion examined whether trial courts should consider "preseparation" expenses, as well as postseparation expenses in considering whether or not there has been community waste. The court developed a logical analysis finding a trial court should consider preseparation and postseparation actions if the preseparation actions were "...(1) in contemplation of divorce or separation; or (2) while the marriage is in serious jeopardy or is undergoing an irretrievable breakdown" (*Finan v. Finan*, 949 A.2d 468 (Conn. 2008)). (See also, *In re Marriage of Smith*, 114 Ill. App. 3d 47, 51, 448 N.E.2d 545, 548 (Ill. App. Ct. 1983) ("Dissipation of marital assets by one spouse in contemplation of dissolution of marriage is an unacceptable practice that will not be sanctioned."); *In re Marriage of Coyle*, *supra*, 671 N.E.2d 938, 942, 943 ("...transactions which occur during the breakdown of the marriage, just prior to filing a petition of during the pendency of an action, may require heightened scrutiny").)

The court in *Putterman* provided an explanation to support this reasoning, opining that "...[i]t should be kept in mind that the secreting or wasting of community assets *while divorce proceedings are pending* is to be distinguished from undercontributing or overconsuming of community assets *during the marriage*" [emphasis added]. The same community property principal applies to income as to expenditures. "When one party to a marriage contributes less to the community than the other, this cannot, especially in a community property state, entitle the other party to a retrospective accounting of expenditures made during the marriage or entitlement to more than an equal share of the community property." The court further noted that "Almost all marriages involve some disproportion in contribution or consumption of community property," and that "...such retrospective considerations are not and should not be relevant to community property allocation and do not present 'compelling reasons' for an unequal disposition; whereas, hiding or wasting of community assets or misappropriating community assets for personal gain may indeed provide compelling reasons for unequal disposition of community property" (*Putterman* at 609,1048-9).

The Court of Appeals of Indiana elaborated on this point, stating that "...[o]ne spouse's claim of improvident spending by the other spouse can be a powerful weapon in an attempt to secure a larger share of the marital estate. However, a trial court presiding over a dissolution proceeding in which dissipation is an issue should not be required to perform an audit of expenditures made during the marriage in order to determine which spouse was the more prudent investor and spender. [Citation omitted.] The institution of marriage would be ill-served if spouses were encouraged to maintain a continuous record of expenditures and transactions during the marriage for use in the event they are ever divorced." In sum, allegations of waste occurring during the breakdown of the marriage, just prior to commencement of a divorce action, or during the pendency of an action receive higher scrutiny than allegations of waste occurring at other times during the marriage.

Negligent Investments

Shortly before divorce, or even during divorce, one spouse purchases stock or invests in some other type of investment. By the time of trial, the value of the investment decreases. Is this a loss to the community or is it a separate loss of the investing spouse?

If the investment creates value for the community, there would be no argument under Nevada law that the increase was community

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property. The real question that generally arises is when the investment loses value. A distinction may also be made depending on whether or not the investment was in the normal actions of the community during marriage.

The appropriate test was articulated in *Sien v. Sien*, 889 P.2d 1268 (Okla.App. 1994). Here, the husband made investments totaling more than $1 million over an eight-year period. The contribution of capital may not have been necessary, but was made in good faith. The court essentially found that long term investments made during the marriage "...were legitimate investments for the intended benefit of the parties."

In sum, the investing spouse assumes the risk of making any unilateral investments when a divorce or separation is contemplated by either party. If the value of the investment increases it will almost certainly be community while any losses may be found to be separate.

Other Possible Waste Issues

As noted above, the Nevada Supreme Court, in *Putterman*, opined that "There are, of course, other possible compelling reasons, such as negligent loss or destruction of community property, unauthorized gifts of community property and even, possibly, compensation for losses occasioned by marriage and its breakup" (*Putterman* at 608;1048).

The concept of "...losses occasioned by marriage and its breakup" is particularly intriguing. In *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981), which was cited by the Nevada Supreme Court in *Putterman*, wife worked to allow husband to pursue his undergraduate and medical school education on a full-time basis. Because all of the working spouse's income was used for joint expenses, there was no "savings" to divide upon divorce when the newly educated spouse was ready to start reaping the financial benefits of his education. Although there was no waste, the Minnesota Supreme Court found "...that the trial court did not abuse its discretion in making an equitable award to [wife] for the financial support she provided to [husband] during his schooling" (*DeLa Rosa* at 758). By citing this case, the Nevada Supreme Court arguably suggested it may entertain a similar argument under the right circumstances.

Conclusion

Cases published by the Nevada Supreme Court and courts in other states have identified specific acts that may constitute community waste and therefore justify an unequal division of community property. There are, however, other possible compelling reasons for a court to give an unequal disposition of property, such as negligent loss, destruction and unauthorized gifts of community property. Based on the published decisions, the court may also be open to other "equitable reasons" for an unequal division of community property. Any finding of waste or unequal distribution of property, however, must be supported by specific findings of fact.

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Endnote:

1. David J. Kenney, a legal assistant with Pecos Law Group, contributed to the research and preparation of this article.