NFLR
NEVADA FAMILY LAW REPORT

Volume 24, Issue 2 Spring 2011

Representing the Special Needs Child in Child Custody and Divorce

By K. Beth Luna, Esq.

Family law requires an ability to recognize that each family, divorce or custody case differs based upon the needs of each individual family. This includes consideration when dealing with families of children that have special needs, whether the result of a disability, an injury or health concern. As an attorney, these cases must be assessed and handled differently than a typical child custody case because they involve additional, sometimes complicated, issues that often present themselves in a very unique manner.

The statistics indicate numerous families have at least one family member with a disability. Statistics show that approximately 1 in 110 children will have a form of autism. Catherine Rice, PhD, Center for Disease Control and Prevention, "Prevalence of Autism Spectrum Disorders," (2006) available at: http://www.cdc.gov/ncbddd/autism/data.html. Approximately 53 million adults in the United States have some form of disability. Eight percent of children under the age of 15, or five million children, have some form of disability based upon the 1999 Survey of Income and Program Participation. U.S. Census Bureau, Population Profile of the United States: 2000 (Internet Release) available at: http://www.census.gov/population/pop-profile/2000/chap19.pdf.

One report indicates that Nevada has had a 157 percent increase in the number of disabled individuals residing within the state in the past 10 years. That is compared to a 2 percent increase elsewhere. In 2005, 1 in 10 students in Nevada was labeled as having a disability. *Disability Rights and Resources*. In Dmitri N. Shalin, editor, *The Social Health of Nevada: Leading Indicators and Quality of Life in the Silver State*. CDC Publications, 2006 available at: http://www.unlv.edu/centers/cdclv/healthnv/disabilities.html.

Families that are caring for special needs children have a substantially increased probability of divorce. Some numbers indicate that up to 85 percent of all marriages with special needs children will end in divorce (Margaret S. Price, "The Special Needs Child and Divorce, A Practical Guide to Evaluating and Handling Cases," (2009) citing M. Kraus, *Planning is Important even when life*

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Editor's Notes

By Shelly Booth Cooley, Esq.

This issue of the Nevada Family Law Report (NFLR) is our first issue with Bob Cerceo as the Chair of the Family Law Section. Welcome, Bob!

In our first feature, K. Beth Luna provides guidance and insight into representing litigants with special needs children. Our second feature, by Bruce I. Shapiro, outlines the evolution of child support law in Nevada. Next, Andrew L. Kynaston provides an overview of the Bench/Bar meetings, which took place on February 24 and April 7, 2011, in Clark County, Nevada. If anyone from Northern Nevada is interested in providing a quarterly Bench/Bar Report for the NFLR, please let me know. Lastly, Bruce I. Shapiro, discusses the conflict between settling cases versus taking matters to trial.

Specialization Exam:

The Family Law Section is offering specialization testing on Nevada Day 2011. Those people interested in sitting for the October exam should apply no later than August 1, 2011.

Applications are Available at:
http://www.nvbar.org/sections/FamilyLaw/specialization_app.pdf

Family Law Conference:

Mark your calendars! The Family Law Conference has been scheduled for March 1 and 2, 2012, in Ely, Nevada.

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doesn't go the way we planned, Family Court review, 43(4) (2005)). Of the families that include a member with disabilities, the majority are headed by single parents. Only 27.3 percent are married couples (U.S. Census Bureau, Population Profile of the United States: 2000 (Internet Release) available at: http://www.census.gov/population/pop-profile/2000/chap19.pdf).

With these numbers, every divorce or child custody attorney will at some point find himself (or herself) dealing with the issues related to caring for a child with special needs. It is increasingly an area in which all attorneys should seek to further their knowledge in order to better serve these clients.

There are a number of areas that deserve attention with respect to special needs children and the law. These areas may include enforcing a special needs child's educational rights under the school system, obtaining proper medical care, guardianships and long-term care plans. The focus of this article is specifically on how to best represent the individual parent in the case of a divorce or child custody litigation involving a special needs child. These cases simply cannot be approached in the same manner as every other divorce or child custody case. They involve multiple issues related to the special needs of the child. At times, the parents may not agree on the child's diagnosis or treatment, requiring counsel to be knowledgeable enough to make the necessary arguments to protect the best interest of his client and that of the child.

Special needs children are those children who have developmental delays, health issues, behavioral conditions, mental conditions or physical conditions that are beyond that of a normal child (Margaret S. Price, "The Special Needs Child and Divorce, A Practical Guide to Evaluating and Handling Cases,"(2009)). Nevada specifically provides that a handicapped child, for purposes of child support, is one where the physical or mental impairment will last for a continuous period of at least 12 months (NRS 125B.110(2)). A client may identify his or her child as special needs; however counsel should be on the look out for this type of issue during the initial interview. The initial interview should include questions that identify whether special educational, health or other concerns exist with regards to the child(ren).

Below is a list of 10 items to consider when preparing a custody case involving special needs children. It is not all-inclusive, but covers the basic areas that should be addressed in preparing a custody action involving a disabled child.

1. Know the disability/ health concern.

One of the first things an attorney must do to effectively represent a client with a special needs child is to understand the special needs and where/why they exist. To argue his client's case, counsel must become an expert in that area. It is an attorney's job to educate the Court. Counsel must understand the care requirements and the impact that the child's special needs may have on a custodial arrangement as well as his own arguments.

There are a number of ways to become knowledgeable regarding a child's disability. It is first necessary to ascertain the child's diagnosis. This can be done by reviewing medical records and researching the diagnosis. It may also be possible to obtain information regarding the disability from the Center for Disease Control and Prevention (CDC), National Center on Birth Defects and Developmental Disabilities, local doctors and therapists practicing in that area, and Nevada Early Intervention, amongst others. The CDC is often a wonderful resource for better understanding the special needs child. The CDC website provides overviews that include statistics, symptoms, treatment and links to other resources available in a particular region. Counsel should begin researching the child's disability at the very beginning of the case and create a folder in his client's file dedicated to this information. More importantly, counsel must make sure they understand the information, as their client may not.

When researching the disability, counsel should note the possible effects the disability may have on potential visitation. Often a child's disability can affect the other parent's visitation rights depending on the type and severity. If the attorney understands the disability, they can assist their client in developing a visitation plan that truly takes into consideration the child's specific needs. For example, an autistic child may not do well in loud, noisy places. As such, having visitation take place at Chuck E. Cheese's, where there is an abundance of noise, may not be in the child's best interest. The visita-

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tion and custody plan should address any such issues with specifics, if necessary.

While the client may offer this information, it is best if counsel is educated and/or advised by the child's own therapist that an issue exists. It is necessary to take the time to truly understand the impact on custody and visitation presented by the disability. It is not uncommon for the other parent to be unwilling to accept the child's restraints and insist on visitation that is inappropriate. It may be necessary to offer arguments to the court that the restriction is warranted based on the child's individual needs or, on the other hand, that such a restriction is overly protective and not necessary. Regardless, knowing the child's limitations based upon his or her diagnosis and understanding the nature of the disability and the treatment becomes vital to an attorney's ability to represent the parent.

2. Understand the testing procedure involved in diagnosing the disability.

In addition to understanding the disability, an attorney may also need to know how the disability is diagnosed and understand the testing procedures used to determine the disability. This information can be vital to a case where the parents do not agree on the child's diagnosis. Counsel should know the standard testing that is accepted by practitioners and therapists for diagnosis in each problem area. If the child has not received any such testing, it may be necessary to encourage the client

to have the testing performed when there are suspicions from either parent that the child is suffering from some form of disability. This may require obtaining consent from the other parent or, if the other parent refuses to consent, requesting a court order to allow for the testing.

In addition to understanding the testing procedure, it is important to find out who is qualified to do the testing. Not everyone is able to test and counsel should ensure that the test has been given by a qualified professional. In most cases, this may be Nevada Early Intervention Services, the child's pediatrician or a psychologist. If it is a learning disability, the testing may be performed through resources available within the school system.

Not every case is ripe for conclusive testing. For example, children who are suspected of having autism often show symptoms around 18 months; however the diagnosis may not be made until much later (Center for Disease Control and Prevention available at: http://www.cdc.gov/ncbddd/autism/screening.html).

Early intervention can make a difference with the child's development; however when there is no final, firm diagnosis, an individual parent may deny there is a problem. This can result in a lot of disagreement between divorcing parents as to the child's true needs. Parents faced with learning a child is disabled or has special needs often go through a grieving process similar to cancer patients or those experiencing the loss of a loved one. This includes denial, which often presents itself when litigation is ongoing.

If the client disagrees with the diagnosis, a second test may be requested from a qualified doctor or testing facility. This can give the client an independent opinion as to the child's needs. An attorney should remember that the client may be going through denial as a part of the grieving process. If it appears the diagnosis is reliable, counsel should advise the client of that fact and the difficulties in opposing it in court. It

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may be better for purposes of custody and visitation to help ease the client towards acceptance and obtaining education on how to care for the child. If there is reasonable doubt, a second test absolutely should be performed.

3. Understand the treatment required for the type of disability.

Most children with a disability will be involved with therapists, teachers, doctors and others who are assisting with treatment or in teaching skills the child will need throughout his life. Treatment can involve days full of doctor's appointments, therapy, group sessions and other activities. These activities, while necessary, can interfere with the visitation schedule and involve substantial amounts of time. Crafting a visitation schedule or custody arrangement requires an attorney to take these appointments into consideration and ensure the child is in attendance at those that are required.

It is not uncommon for the primary caregiver to believe the other parent is not capable of getting the child to and from appointments or even providing the necessary care at home. In this case, when representing the less-active parent, an attorney should urge the client to seek out training and other information to better understand the care needed and how to administer it. This can include meeting with the child's therapists and doctors, joining family support groups and attending parenting or other training classes. This can help eliminate the argument that visitation should be restricted or that the parent cannot care for the child for long periods of time.

Other issues may also include that the child has certain equipment that is necessary for his care. Some equipment can easily be moved back and forth between the parents' respective homes for use by the child. In cases where the equipment is fairly affordable, parents can obtain the equipment for each household. Again, when representing the parent who has not been the primary caregiver, it may be wise to have them obtain any necessary equipment needed for their own home.

4. Know what quality and type of treatment is offered in your area.

Where a case involves parents residing in different states, it is important to know the quality and type of treatment available in both states in order to help create an argument that the child may benefit from living with one parent or the other. For example, if one parent is living in rural Nevada with extremely limited services and the other is living in San Francisco with an abundance of programs, the child may be better served living in San Francisco. Again to really know this, an attorney has to know the programs, doctors and treatment centers available in each parent's home city.

Nevada Early Intervention (NEI) is almost always involved in the treatment of young children following diagnosis in the State of Nevada. NEI has offices in Reno, Las Vegas, Elko, Ely and Carson City. They are staffed with a variety of therapists, counselors and others to assist Nevada children. They have a variety of helpful information and programs for Nevada families and should be considered as a resource in any custody case involving a special needs child in Nevada.

5. Provide expert testimony.

Regardless of whether an attorney represents the primary care giver parent, a parent who questions the diagnosis or a parent who wants to be more involved in the child's care giving, it is important to consider hiring an expert for trial. This expert should be someone who is qualified and understands the child's disability. An attorney should be able to rely on the expert to educate the Court on the disability, testing procedures, available treatments, particular concerns relating to the individual child and the proposed treatment for the child. An expert may also be valuable in addressing concerns related to visitation.

6. Know the parent's involvement and beliefs regarding their child's needs.

During the initial interview with the client, an attorney should be sure to request information regarding the client's involvement with the child and beliefs regarding the child's needs and treatment. It is important to discover the basis for the client's

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beliefs and concerns. Parents may be in complete disagreement regarding the care of the child. It is critical to know the client's position when addressing custody and visitation issues. If the client's beliefs are unreasonable, it may be necessary to assist him in understanding the facts and options.

It may also be necessary during a case to ask for specific rights to decision-making on health care and treatment issues. For example, a parent with a child who has a learning disability may refuse to have them tested. Although teachers and others have requested it, the refusing parent may not want to be faced with the reality of the test results. In these cases, the court may end up being the decision maker for the parties. If the parties are far apart on treatment, an attorney should request that one of the parents be given the legal authority to make health care decisions on behalf of the child. This will prevent parents from having to run to the courthouse over every little question or concern.

7. Determine child support or other care needs and whether they will be required after the child turns 18.

A special needs child may require care after the age of 18. This can include ongoing medical care and even full-time care for a child who is unable to care for himself even into adulthood. Nevada has specific statutory language addressing the ongoing needs of handicapped children set out in NRS 125B.110.

NRS 125B.110(1) provides that where a child is handicapped, support is required past the age of majority. That support can continue until the child is no longer handicapped or becomes self-supporting. The statute defines handicapped as "...an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months" (NRS 125B.110(4)). "Substantial gainful activity" is defined as "work activity that results in the child being financially self-supporting" (*Edgington v. Edgington*, 119 Nev. 577, 587, 80 P.3d 1281, 1289 (2003)). *Edgington* further requires that the basis for the child's failure to engage in "substantial gainful activity" is the child's impairment. If the child's impairment is not the basis for their failure to support themselves, then child support continuing past majority is not warranted under NRS 125B.110 (Id. at 586, 1289).

These cases simply cannot be approached in the same manner as every other divorce or child custody case.

Treatment and medical records should provide information describing the duration of a disability and whether it is continuous. The child's ability to support himself can further be determined by his ability to work and the type of employment and income available to him. The child's doctors, therapists and other caregivers can provide information regarding the impact of the child's impairment on his ability to work and earn a living. Other sources of information may include prior employers who can provide information as to the child's work abilities.

Where the child is receiving public assistance past majority and it is sufficient to meet the needs of the child, the child can be considered self-supporting for purposes of the statute. NRS 125B.110(2). In examining whether the child is self-sufficient, the child's costs including living expenses, medical care, transportation and other needs should be determined and compared to any public assistance received. If there is a deficiency, child support should continue.

It should be noted that since Nevada has made it clear within the statutes that child support should continue for handicapped children past the age of majority, parties cannot stipulate away the right to support. An attorney should be sure that child support for disabled children is in place and ordered to continue past majority prior to the child turning eighteen or otherwise reaching majority age.

During the child's minority, the court can award additional support for special education needs (NRS 125B.080(9)(c)). Disabled children may have such costs relating to tutoring or other educational needs designed to assist them with their disability. Those costs should be determined and addressed during the calculation of child support in the

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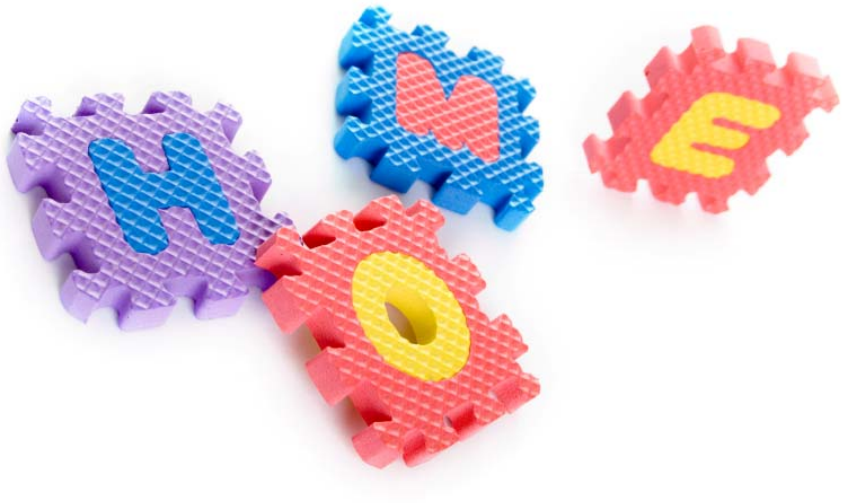
case. There is no provision within Nevada law that specifically requires a parent to continue to pay these costs after the child reaches majority (NRS 125B.080(9)). These expenses are very clearly included in the statute on determining the amount of child support payment in NRS 125B.080(9)(c). As such, an argument exists that the court could consider them in determining the amount of child support in an ongoing support case. At a minimum, they are expenses that clearly should be considered when determining if the child is self-supporting for purposes of continuing child support.

During the minority of a child, parents will also be required to share the uncovered medical expenses for the child (NRS 125.450(1)). But, what happens when the child reaches majority? Again, in looking at NRS 125B.080(9), the court can consider, in determining a child support payment, any necessary expense for the benefit of the child. Health care expenses could be used as a basis to argue for an increase in the statutory amount of child support.

In the case of a child who is still a minor, counsel should be careful to include the cost of special education needs, medical needs, day care and other costs as a basis to increase child support under NRS 125B.080. Evidence should be provided to the court showing the need for those additional expenses and their amounts. A special needs child may need daycare long past the normal age. That cost can be significantly higher due to the special care required for the child's disability. This cost or others should not be overlooked when calculating child support.



8. Evaluate the parents' needs for support purposes.

The nature of caring for a child with special needs can have an impact on the parents' individual abilities to advance their own careers. There may be numerous appointments that the child must attend during normal business hours. Often at least one parent must be readily available to pick up the child from school or daycare if a problem erupts. There may also be difficulty finding affordable daycare with a special needs child. The result of all of this makes it hard for the primary caregiving parent to hold down employment or advance his own career.

You should always examine in these cases whether or not alimony is appropriate. The primary caregiver will most likely have difficulty supporting themselves and caring for the child. They also will have little ability to earn retirement for later in life. The primary caregiver's sacrifice means that they may find themselves living in poverty in old age if alimony and retirement needs are not addressed. In a divorce, the attorney should be sure to address the caregiving parent's own ongoing needs and request alimony be awarded accordingly.

9. Evaluate the visitation options for the nonprimary caregiving parent.

One difficulty in these cases is the understanding of judges and attorneys as to the child's needs and justifying visitation/time with both parents. An autistic child for example may do better with greater stability; as such, a rotating schedule may be out of the question. Where parents do not agree to the type of visitation that benefits the child, it may be necessary to involve experts and

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other therapists who can educate all parties on what benefits the best interest of the child. Experts may also be required to assist in the decision making regarding treatment of the child where the parents do not agree. Lawyers, judges and clients should take the time to understand the nature of the child's special needs and place the child's need for treatment and care as a priority. These types of visitation and parenting arrangements must be uniquely tailored to the individual child and involve the input of the child's treating therapists.

You may also find clues to the appropriate visitation just by reviewing the child's medical and therapy records. Contact the therapist and ask what recommendations they may have in terms of appropriate visitation with the other parent.

One item that should not be forgotten when visitation is examined is the non-special needs child in the family. This child needs special time with each parent without the constant need for giving attention to the special needs child. These children will also have needs that may be met by simply allowing them occasional one-on-one time with the individual parents.

10. Discuss long-term planning.

While most divorces or child custody matters do not deal with long term care of a child, a disabled child's needs may extend past the lives of their parents. For example, a child with Down syndrome will need someone to assist with his day-to-day care for life. It is appropriate in these cases to discuss this possibility and, if possible, develop a long-term plan. Life insurance, trusts and other long-term planning tools should be considered as options to provide for the child's care following the death of the parents. Start by evaluating the realistic long term needs of the child and be sure to include this issue in your requests to the court.

In every case, an attorney should urge his client to discuss long term planning with an attorney who specializes in probate, trust and estate work. This can be done at the end of the case; however it should always be recommended.

Lastly, in representation, counsel must not forget the parent is under a lot of stress. This includes the strain of caring for a special needs child and the additional stress of dealing with a family law case. The attorney should make sure his client's personal needs are being met by reducing the stress and fear of the legal process. This should include educating the client on the court process and the laws affecting the case. It is important that these clients know that their attorneys understand that their cases have a unique aspect. Clients in these cases need to know that the attorneys advocating for them and their children are making an effort to understand their children's needs and ensure their cases are presented effectively to the court. Care, compassion and attempts to truly understand clients in this situation can go a long way to creating a positive client relationship.

The above is just an overview. There are numerous resources available to attorneys to help educate them on children with disabilities. I encourage anyone representing parents with children of special needs to consider purchasing and reading *The Special Needs Child and Divorce* by Margaret "Pegi" S. Price, offered by the American Bar Association. In addition to providing useful information, the author has also included a number of helpful checklists for interviewing and representing these clients. Other resources also include:

- http://health.nv.gov/BEIS_Contacts.htm (Nevada Early Intervention Services)
- http://www.cdc.gov/ (Center of Disease Control and Prevention)
- http://www.nationalautismassociation.org/index.php (National Autism Association)
- *The American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Washington D.C., American Psychiatric Association, 1994.
- http://www.nads.org/pages_new/facts.html (National Association of Down Syndrome)
- http://www.ncld.org/ (National Center for Learning Disabilities)
- http://www.mchb.hrsa.gov/ (Maternal and Child Health Bureau)

K. Beth Luna, Esq. is licensed in Nevada, Tennessee and Florida and currently practices family law in Reno, Nevada. Ms. Luna established the Luna Law Firm in 2010 and may be reached at beth@thelunalawfirm.com or 200 South Virginia Street, 8th Floor, Reno, Nevada 89501.

Message from the Section Chair:

By Robert Cerceo, Esq.

New section Chair Robert Cerceo thanks previous chair Ray Oster for his dedication to the section

Thanks Ray!

Under Ray Oster's leadership with a healthy combination of work and fun (or fun and work), the Family Law Section (FLS) had record attendance levels at the 2011 Ely Conference. Ray has also made significant contributions to the development of the law through his coordination and contributions to a high volume of amicus briefs. Thanks! I expect to see him at the next Ely Conference with "Chair Emeritus" printed on the front of a T-shirt with "Yea Baby" written on the back.

Many of the new developments for our section have been put into the works during Ray's term, and I am fortunate to be driving an already forward-moving train.

Specialization

We have reached the five year mark for the specialization program. It is now up for re-approval with the state bar Board of Governors at the June meeting. Although the standards have not been changed, Ray has streamlined both the application process and renewal process for individuals. Using fewer words — Ray made it easier to both apply for and to maintain the status for each certified family law specialist.

Those recently passing the exam within the past year include:

Jennifer Abrams;
Kathy Breckenridge;
Rebecca Burton;
John Kelleher;
Emily McFarling-Benson;
Eric Pulver; and
Marilyn York.

I congratulate each of you.

I encourage you all to consider sitting for the exam. From my view, the benefit of polishing our knowledge by preparing for the test is the true benefit. And the recognition of being a Board Certified Family Law Specialist is, as Marshal says, "a wonderful thing."

Pro Bono

The need is great, and we are in the position to give. The FLS made a donation to help host the 2011 ABA Equal Justice Conference in Las Vegas, and we sent one executive council member to the course. It is my hope to

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Chair's Message

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develop a closer working relationship with all of the pro bono service agencies in Nevada and to contribute to the efforts statewide.

One good strategy is for new admittees and those new to family law to take on a case and to reach out to the more experienced family law attorneys for mentorship. We can "learn through service" and also develop your form bank for later cases.

Ely

The agenda is under development.

At the request of the 2011 Ely Paralegal Professionals, is an expansion of the paralegal program is expected, including to two full days of training with more coordination of the main topics with specialized presentations by the main and advance track session speakers, and an expanded judges' panel, to be held at the Elks Lodge.

Video or Live Entertainment

We hear many comments expressing a preference for one or the other. Which camp are you? Let us know. All are welcome to contribute.

Send your questions and comments to: rcerceo@theabramslawfirm.com.

Robert Cerceo is the chair of the Family Law Section, a Certified Family Law Specialist, and a Fellow to the IAML. He is new to the Abrams Law Firm and can be reached at www.TheAbramsLawFirm.com.

Save The Date!

The 2012 Family Law Conference

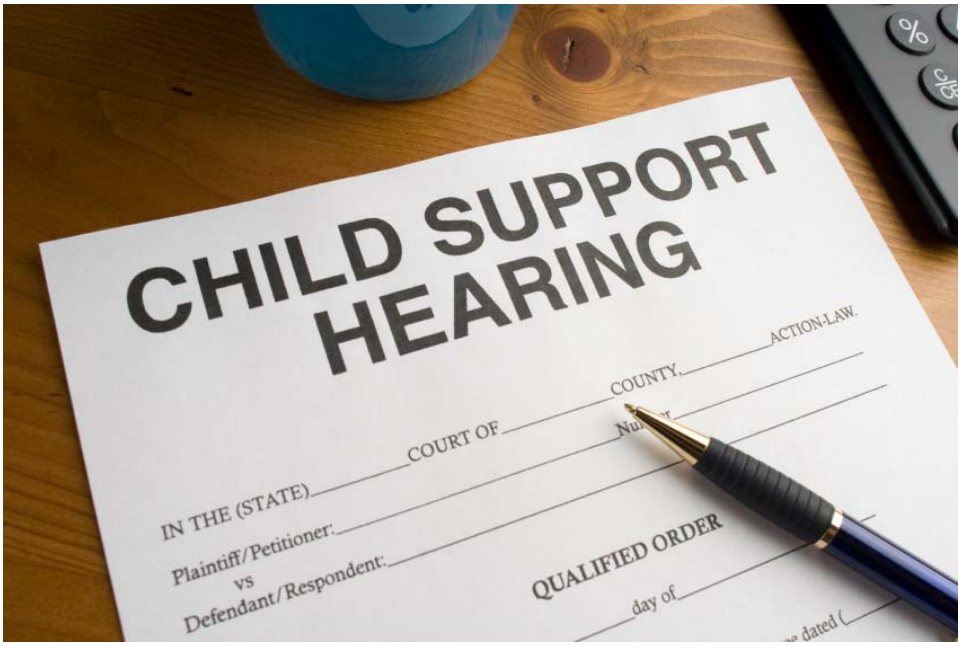
When: March 1-2 , 2012

Where: Ely, Nevada

Don't miss this fun and popular annual event hosted by the Family Law Section!

The Evolution of Nevada Child Support Law

By Bruce I. Shapiro, Esq.



1. The Dark Ages

Before child support guidelines were adopted by the Nevada Legislature in 1987, child support orders were found to be severely deficient when compared to the actual economic costs of rearing children. Judicial discretion, unassisted by any objective guidelines, often resulted in severely deficient child support awards. The federal mandate for the development of guidelines was intended to address several deficiencies in the traditional case-by-case method of setting amounts for child support orders. These deficiencies were:

- A shortfall in the adequacy of child support orders when compared with the true costs of rearing children, as measured by economic studies;
- Inconsistent orders causing inequitable treatment of parties in similarly situated cases; and
- Inefficient adjudication of child support awards in the absence of uniform standards.

2. The Renaissance

The Child Support Enforcement Amendments of 1984 required all states to develop advisory mathematical guidelines to calculate child support awards by October 1, 1987. As a result, the Nevada Legislature enacted NRS 125B.070 and 125B.080 in 1987, which were modeled after Wisconsin's percentage of income formula.

The Family Support Act of 1988 created a rebuttable presumption that guideline amounts represent the proper child support award and that deviation from the guidelines would be allowed only upon written findings that application of the guidelines would result in an unjust or inappropriate mathematical award. These federal laws recognized the need for more realistic and equitable child support awards that provide children with a standard of living comparable to that of their noncustodial parent.

NRS 125B.070 provides a formula based on a percentage of gross monthly income that the non-primary parent shall pay for child support. NRS 125B.080(9) provides that the trial court may consider the following factors when deviating from the child support award called for by NRS 125B.070:

(a) The cost of health insurance;
(b) The cost of child care;
(c) Any special educational needs of the child;
(d) The age of the child;
(e) The responsibility of the parents for the support of others;
(f) The value of services contributed by either parent;

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Child Support Law

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(g) Any public assistance paid to support the child;
(h) Any expenses reasonably related to the mother's pregnancy and confinement;
(i) The cost of transportation of the child to and from visitation if the custodial parent moved with the child from the jurisdiction of the court that ordered the support and the noncustodial parent remained;
(j) The amount of time the child spends with each parent;
(k) Any other necessary expenses for the benefit of the child; and
(l) The relative income of both parents.

3. The Classical Period

Nevada's child support guidelines are contained in NRS 125B.070, while NRS 125B.080 sets forth the methods by which to apply those guidelines and determine a parent's obligation of support for a child. An "obligation of support" is defined, in NRS 125B.080NRS 125B.080(6) provides that if "the amount of the awarded support for a child is greater or less than the amount that would be established under the applicable formula, the court shall:

(a) Set forth findings of fact as to the basis for the deviation from the formula; and
(b) Provide in the findings of fact the amount of support that would have been established under the applicable formula."

Similarly, NRS 125B.070 and NRS 125B.080(2) and (6) clearly allow the parties and court, respectively, to deviate from the formula, and the said statutes provide a method by which to implement such a deviation.

From 1987, after the guidelines were adopted, through *Rivero I* in October 2008, child support orders in Nevada were relatively consistent and in the spirit of the existing legislation. When the district courts made deviations that were contrary to the letter and the spirit of the child support guidelines, they were reversed by the Nevada Supreme Court. More recently, the Nevada Supreme Court has been addressing modifications of child support guidelines.

4. The Modern Era

The legislature provided two ways to trigger review of a child support order in Nevada. An order for the support of a child must be reviewed by the court upon the filing of a request for review by the state NRS 125B.145(1)(b). The legislature has also addressed how often such reviews should be conducted. Child support orders must be reviewed "*at least* every 3 years" NRS 125B.145 (4). In the latter regard, NRS 125B.145(4) was amended in 2003 to include that "a change of 20 percent or more in the gross monthly income of a person who is subject to an order for the support of a child shall be deemed to constitute change in circumstances, requiring a review for modification of the order."NRS 125B.145(4).

Finally, this court had held that a "child support award can be modified in accordance with the statutory formula, regardless of a finding of changed circumstances. *Scott v. Scott*, 107 Nev. 837, 822 P.2d 654 (1991).

The clear meaning of NRS 125B.145(1) is that, as a matter of right, "[a]n order for the support of a child *must* . . . be reviewed by the court at least every 3 years pursuant to this section to determine whether the order should be modified or adjusted." [Emphasis added.] The clear meaning of NRS 125B.145(2)(b) is that "the court *shall* enter an order modifying or adjusting the previous order for support in accordance with the requirements of NRS 125B.070 and NRS 125B.080." [Emphasis added.] And as noted above, the clear meaning of NRS 125B.145 was correctly interpreted as requiring the district court to conduct a de novo review and adjustment of the support obligation.

5. The Reformation

In *Rivero II*, the Nevada Supreme Court held that "the district court only has authority to modify a child support order upon finding that there has been a change of circumstance and the modification is in the best interest of the child." *Rivero v. Rivero*, Nev. Ad. Op. 34, 216 P.3d at 228 (2009). The party seeking the modification bears the burden of showing that changed circumstances warrant modification. It was no longer relevant whether the initial award was determined in

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conformance with the statutory guidelines. In a significant change of law, the court also found that a district court may "review" a support order pursuant to NRS 125.145 without changed circumstances, but may not "modify" it without changed circumstances.

There were some unpublished opinions that suggested the court was considering a change in this direction. When confronted with clarifying custody, the court also took the opportunity in *Rivero* to clarify its previously unpublished position on modifying child support. Then in *Fernandez v. Fernandez*, 126 Nev. Ad. Op. 3, 222 P.3d 1031 (2010), the court repeated that the mere passage of time is insufficient to justify a modification of child support. To prevail on a motion for a modification of child support, there must first be a showing of changed circumstances (*Fernandez* at 17). The court's position become emboldened in subsequent unpublished opinions.

For better or worse, the law is now clear that a child support obligation may not be modified unless there has been a change of circumstance and a finding that the modification serves the best interest of the child. It may be argued, however, that the Nevada Supreme Court's misplaced reliance on the isolated term "best interests of the child," with respect to the initial determination and any subsequent modification of a child support order, contravenes the legislature's intent as well as the prior established precedent of this court. The best interests of the child are already contemplated in NRS 125B.080(5), which states in relevant part that:

It is presumed that the basic needs of a child are met by the formulas set forth in NRS 125B.070. This presumption may be rebutted by evidence proving that the needs of a particular child are not met by the applicable formula.

Under *Scott*, however, notwithstanding any other factors, the court always maintained the jurisdiction to modify a child support obligation to make the order consistent with the statute. In other words, if the parties stipulated and the court adopted their stipulation, the parties could agree to a child support order above or below the statutory presumption. It therefore followed and the parties could modify that order in the future so that it conformed with the statutory presumption. Reversing *Scott* was not necessarily good public policy because it discourages parents from agreeing to pay support in excess of the statutory guidelines knowing that they may not be able to modify it in the future.

6. The Post Modern Era

It is fundamental child support law that future support of a child cannot be waived by either parent and that the parties cannot usurp the authority of the court to ultimately determine child support. Indeed, parents cannot agree to prospectively waive child support. This includes agreements to not impute any income to the recipient. Any such agreements are against public policy and unenforceable, even if contained in a final order agreed upon by the parties and not appealed. An agreement not to review child support in the future is akin to a prospective waiver of child support (*Fernandez v. Fernandez*, 126 Nev. Ad. Op. 3, 222 P.3d 1031 (2010)).

An unintended consequence of the Nevada Supreme Court's decision in *Rivero* is that it erroneously establishes a different standard of review for child support modifications than for initial determinations of support. NRS 125B.145 establishes a mandatory right to review of child support orders. It does not proscribe a different standard of review for a child support modification than already exists for an initial setting of support. Rather, it provides that if the court has jurisdiction, it shall "enter an order modifying or adjusting [a] previous order of support in accordance with the requirements of NRS 125B.070 and NRS 125B.080." The Nevada Supreme Court had specifically found that equitable factors alone are insufficient (*Khaldy v. Khaldy*, 111 Nev. 374, 892 P.2d 584 (1995)).

Under NRS 125B.080(1), "a court of this state shall apply the appropriate formula set forth in NRS 125B.070 to [either] (a) Determine the required support in any case involving the support of children [or] (b) any request filed after July 1, 1987, to change the amount of the required child support of children." Thus, by statute, there should no difference between applying the formula in initial child support determinations or in modification proceedings.

In the unpublished opinion leading up to *Rivero*, the father had

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agreed to pay $1,500 per month child support at a time when the presumptive maximum was only $500 per month per child. After three years, the father requested a de novo review and asked that his child support be modified to reflect the then-statutory presumption of $968 per month. The District Court agreed, but the Supreme Court reversed. The decree of divorce specifically provided that the support obligation would be reviewed in three years. Under *Rivero*, since the district courts are deprived of jurisdiction to reduce child support orders made in excess of the presumption, it would be financially risky for any parent to voluntarily agree to pay a support obligation beyond what they are legally required to pay. If a parent believes it is in his or her child's best interest to pay child support beyond the presumption, competent counsel must advise that parent that he or she may be "stuck" with that child support award absent extraordinary circumstances.

Conclusion

Rivero is poor public policy to the extent that it deters parents from volunteering to pay child support beyond the child support provided by law because in order to obtain a subsequent modification, a simple change of circumstances is insufficient to obtain a reduction. The moving parent in addition to showing a change of circumstances, must also show that a change in the support obligation would be in the child's best interest. But when would a reduction of child support ever be in a child's best interest? Although Fernandez states that "more child support is not necessarily better," the burden of showing any reduction is significant. One could imagine a situation where an obligor was ordered to pay so much of his net monthly income that he was unable to provide the child with the basic necessities during his or her visitation, but absent such a showing, when would a reduction possibly promote the best interest of a child. *Scott v. Scott* was good law and the "change of circumstances" standard served Nevada well for more than 20 years. *Rivero* should be reversed to the extent that a change of circumstances is sufficient to modify child support so as to be consistent with the statutory guidelines.

References

1. See Williams, *Guidelines For Setting Levels of Child Support Orders*, 21 Fam. Law Quart. 281, 283 (1987); *Child Support Guidelines: Formula To Protect Our Children From Poverty and the Economic Hardships of Divorce*, 23 Creighton 835 (1990); Goldfarb, *Child Support Guidelines: A Model For Fair Allocation of Child Care, Medical, And Educational Expenses*, 21 Fam. Law Quart. 335 (1987); U.S. Department Of Health And Human Services, Administration For Children and Families, Office Of Child Support Enforcement, The Treatment of Multiple Family Cases Under State Child Support Guidelines, July, 1991 pages 1-4 (hereinafter "Treatment") citing U.S. Bureau of the Census, U.S. Dept. of Commerce, Divorce, Custody and Child Support, Current Population Reports, Series P-23, No. 84 (1979), Bureau of the Census, U.S. Dept. of Commerce, Child Support and Alimony - 1983, Current Population Reports, Series P-23 No. 141 (1985); Bureau of the Census, U.S. Dept. of Commerce, Child Support and Alimony: 1985 (Supplemental Report), Current Population Report, Series P-23, No. 154 (1989).

2. See Williams, *Guidelines For Setting Levels of Child Support Orders*, 21 Fam. Law Quart. 281, 282, 326 (1987). *See also* Advisory Panel On Child Support Guidelines, Development Of Guidelines For Child Support Enforcement, National Center For State Courts I-3, 4 (1987) (hereinafter "Advisory Panel").

3. Pub. L. No. 98-38, section 18, 98 Stat. 1305.

4. See Nevada Child Support Enforcement Commission Minutes, June 23, 24, 1986, page 3.

5. Pub. L. No. 100-485, 102 Stat

6. *Id.*

7. *Id.*

8. NRS 125B.070, at the time, provided as follows:
   Definitions.
   1. As used in this section and NRS 125B.080, unless the context otherwise requires:
      (a) "Gross monthly income" means the total amount of income from any source of a wage-earning employee or the gross income from any source of a self-employed person, after deduction of all legitimate business expenses, but without deduction for personal income taxes, contributions for retirement benefits, contributions to a pension or for any other personal expenses.
      (b) "Obligation for support" means the amount determined according to the following schedule:
         1. For one child, 18 percent;
         2. For two children, 25 percent;
         3. For three children, 29

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percent;

4. For four children, 31 percent; and
5. For each additional child, an additional 2 percent, of a parent's gross monthly income, but not more than $500 month per child for an obligation for support determined pursuant to subparagraphs (1) to (4), inclusive, unless the court sets forth findings of fact as to the basis for a different amount pursuant to subsection 6 of NRS 125B.080.

2. On or before January 18, 1993, and on or before the third Monday in January every four years thereafter, the State Bar of Nevada shall review the formulas set forth in this section to determine whether any modifications are advisable and report to the legislature their findings and any proposed amendments.

9. NRS 125B.080(9).

10. *See Barbagallo v. Barbagallo,* 105 Nev. 546, 779 P.2d 532 (1989); *Hoover v. Hoover*, 106 Nev. 388, 793 P.2d 1329 (1990); *Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992); *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998)

11. *Torres v. Torres*, No. 49076 (Nev. April 9, 2009). Despite the request in Respondent's Petition for Rehearing, the court declined to publish this decision, effectively denying notice to those paying child support they will have an increase burden of reducing child support orders they voluntarily agree to pay in excess of the presumptive amount.

12. *See Torres v. Torres*, No. 49076 (Nev. April 9, 2009), Order of Reversal at page 3, stating that "although respondent's child support obligation is modifiable, the district court failed to make factual findings as to whether a reduction in respondent's child support obligation was in the children's best interest. NRS 125B.145(2)(b)."

13. *Dechant v. Florida Dept. of Revenue ex rel. Rees*, 915 So.2d 215 (Fla. 3d DCA 2005) *Dechant v. Florida Dept. of Revenue ex rel. Rees*, 915 So.2d 215 (Fla. 3d DCA 2005) (custodial parent's waiver of a child's right to all support would clearly be contrary to public policy and unenforceable by the courts because it is not in the best interests of the child); *Maschoff v. Leiding*, 696 N.W.2d 834 (Minn. Ct. App. 2005) *Maschoff v. Leiding*, 696 N.W.2d 834 (Minn. Ct. App. 2005) (agreement to waive child support is not enforceable because it is contrary to public policy); *Chen v. Warner* 280 Wis.2d 344, 695 N.W.2d 758 (2005) Chen v. Warner 280 Wis.2d 344, 695 N.W.2d 758 (2005) (divorcing parents cannot child support or give up the children's present and future rights to receive child support; waivers of child support are void as against public policy); *Hammack v. Hammack*, 114 Wash.App. 805, 60 P.3d 663 (2003) *Hammack v. Hammack*, 114 Wash.App. 805, 60 P.3d 663 (2003) (parents cannot agree to waive child support obligations; such agreements are against public policy and do not affect subsequent requests for child support); *Thomas v. Hague*, 639 N.W.2d 520 (S.D. 2002) *Thomas v. Hague*, 639 N.W.2d 520 (S.D. 2002) (court approved stipulation of divorced parties permanently and irrevocably waiving child support was contrary to public policy of state, invalid, and void); *Tyrone W. v. Danielle R.*, 129 Md.App. 260, 741 A.2d 553 (1999)Tyrone W. v. Danielle R., 129 Md.App. 260, 741 A.2d 553 (1999) (duty to pay child support is rooted in public policy and may not be bargained away or waived). *See also* L. Morgan, Child Support Guidelines: Interpretation and Application, section 4.09[a]L. Morgan, Child Support Guidelines: Interpretation and Application, section 4.09[a].

14. *In re Marriage of Goodell*, 130 Wn. App. 381, 122 P.3d 929 (2005)*In re Marriage of Goodell*, 130 Wash. App. 381, 390, 122 P.3d 929 (2005); *Hammack v. Hammack*, 114 Wash. App. 805, 808, 60 P.3d 663 (2003); *In re Marriage of Fox*, 58 Wn. App. 935, 795 P.2d 1170 (1990)In re Marriage of Fox, 58 Wn. App. 935, 937 n.3, 795 P.2d 1170, 1171 (1990); *Pippins v. Jankelson*, 110 Wn.2d 475, 754 P.2d 105 (1988) *Pippins v. Jankelson*, 110 Wash..2d 475, 479, 754 P.2d 105, 107 (1988).

15. *Pippins v. Jankelson*, 110 Wn.2d 475, 479, 754 P.2d 105 (1988).

16. NRS 125B.145 generally.

17. NRS 125B.145(2)(b).

Mr. Bruce 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.

Mr. 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. Mr. Shapiro also served on the Board of Governors for the State Bar of Nevada from 2003-2005 and 2008-2010.

Bench/Bar Meeting Report: "The South"

By Andrew L. Kynaston, Esq.

Members of the judiciary, representatives from the clerk's office and court administration, and family law practitioners throughout Southern Nevada met at the Family Court and Services Center for Bench/Bar meetings held February 24 and April 4, 2011. Both meetings were well attended with those in attendance well prepared to discuss matters relevant to the ever-evolving practice of family law in Southern Nevada.

At the meeting held February 24, Presiding Family Court Judge Gloria Sanchez reminded attendees of the ongoing availability of the Senior Judge Settlement Program, which continues to have great success in helping litigants resolve cases without trial, minimizing the level of conflict and reducing the court's litigation load. Attendees were further advised that proposed revisions to Eighth Judicial District Court Rules regarding e-filing and governing the preservation of original documents have been approved by the District Court and are presently being reviewed by the Nevada Supreme Court. Finally, Judge Sanchez announced that Judges Steven Jones and Cynthia Dianne Steel were being reassigned effective March 14,, with Judge Jones beginning to handle juvenile matters and Judge Steel hearing domestic matters.

Judge Sandra Pomrenze briefly spoke regarding motions for attorneys' fees and stressed the importance of including an analysis under the factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345 (1969), in any motion requesting attorneys' fees. She recommended that attorneys err on the side of caution and include such analysis even in cases where attorneys' fees may otherwise be warranted under other legal precedents such as pursuant to *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972), or provisions of NRS Chapter 18. Judge Pomrenze indicated that the District Court judges are routinely being reversed and remanded on awards of attorneys' fees when the same are awarded without making specific findings under *Brunzell*. The attorneys' fees analysis should include the following factors:

1. the qualities of the advocate (ability, training, education, experience, professional standing and skill);
2. the character and difficulty of the work performed (intricacy, importance, time and skill required, responsibility imposed, and prominence and character of the parties where they affect the importance of litigation);
3. the work actually performed by the attorney (time, skill, and attention given to the work); and
4. the result obtained (whether the attorney was successful and what benefits were derived).

An open forum discussion then occurred regarding the important role of the judges' law clerks in the efficient functioning of the Family Court. The law clerks play a key role as a buffer between the court and the practitioners. Some frustration was expressed by both the law clerks and the practitioners in attendance at the meeting regarding a certain level of incivility occurring in communications between practitioners and law clerks. The law clerks expressed that some attorneys are rude when they call, or inappropriately try to argue their cases to the law clerks. Practitioners were concerned that the law clerk relied too much on checklists when reviewing decrees and orders and that there was a lack of uniformity between departments with regard to checklists utilized by the law clerks. There was a general consensus that law clerks and attorneys must be able to have appropriate open lines of communication and mutual respect. Further, there is no excuse for rude behavior when communicating with law clerks and practitioners must

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respect the fact that the law clerks provide a valuable service to both the judges they serve and the family law bar. The law clerks in attendance agreed to meet to discuss the concerns raised during the meeting and to review and revise existing checklists.

Additional important matters were discussed during the meeting held April 4. It was announced that the court is in need of additional Pro Tem Hearing Masters and any practitioners interested in providing such services should contact the court. Also announced was a change in the business hours of the Clerk's Office. Effective May 9, 2011, the Clerk's Office hours for in person filing were changed to 9 a.m. to 4 p.m. E-filing services remain available anytime.

By way of follow-up to the discussion regarding law clerks at the February 24 meeting, it was reported that the law clerks were still working on revising checklists. Practitioners were advised that the revised Financial Disclosure Form is still available for review and comment on Marshal Willick's web page: http://www.willicklawgroup.com/clark_county_bench_bar.

Also, it was announced that the short form affidavit proposal was passed by the judiciary, which now allows attorneys to include a short summary affidavit with pleadings rather than being required to restate each and every fact set forth in the body of the pleading in the supporting affidavit. An example of the short form affidavit can be found on Marshal Willick's website.

Please join us for the next Bench/Bar meetings scheduled for May 26 and June 30 at 12 p.m. at the Family Courts and Services Center located at 601 North Pecos Road, Las Vegas, Nevada 89101. If you have any discussion items you would like to include on the agenda of any future Bench/Bar meetings please e-mail Corinne Price, Esq. at: Corinne@thefinelawgroup.com.

Andrew L. Kynaston, Esq., is a partner at the law firm of Ecker & Kainen, Chartered, where he practices exclusively in the area of family law. Mr. Kynaston can be reached at: andrew@eckerkainen.com.

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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 August, 2011 with a submission deadline of July 15, 2011.

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

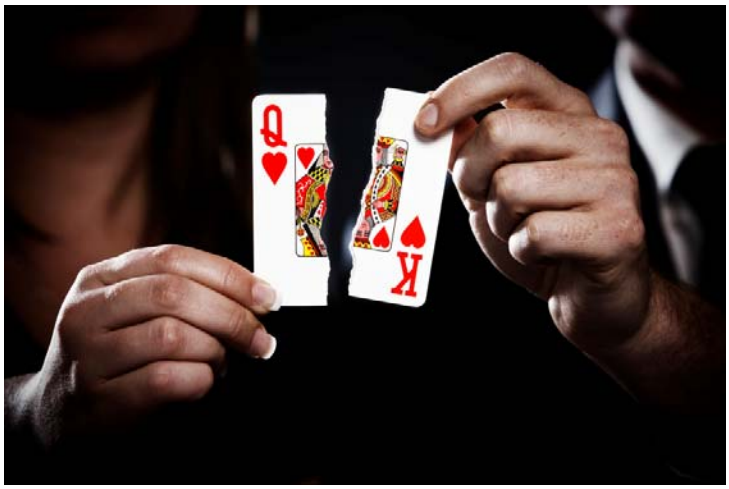
With Divorce Trials, "Less" Is More

By Bruce Shapiro, Esq.

How many divorce cases are you taking to trial in a year? A dozen? Two dozen? More than that? In an informal survey with the top divorce lawyers in Las Vegas, would it surprise you that the top divorce lawyers, on average, take less than four cases to trial each year?

I have recently heard several young lawyers boast about how many trials they have and how "busy" they are getting ready for trial. Do they have many trials because they do not know how to negotiate a reasonable divorce settlement? They do not understand that having a lot of trials is nothing to be proud of as a lawyer. As Tom Standish stated, "Those lawyers are misinformed and misguided." All lawyers should be more proud of resolving cases through negotiation or mediation, rather through the expensive trial process.

Taking a case to trial is a lose-lose proposition. With 20 Family Court judges, decisions are becoming even less consistent and predictable. In most cases, a competent attorney is going to choose to control a settlement, rather than take the chances of an arbitrary decision of the court. Settlements are not only less expensive, but when parties settle the case on their own, they are likely to be happier with the result, talk more favorably about their lawyer and have more confidence



in the judicial system as a whole. Further, as an attorney, you have far better chance being paid in full for your services when the case is resolved, rather than having a contested trial.

In sum, "real lawyers" settle cases and avoid trial at all costs. Other than a relocation case and the occasional alimony dispute, most divorce cases should not go to trial. Trials should be the last resort, not the ultimate objective. Next time you are taking a case to trial, think about how much better it would be for you to boast that you have settled every case and have not had any trials.

Mr. Bruce 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.

Mr. 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. Mr. Shapiro also served on the Board of Governors for the State Bar of Nevada from 2003-2005 and 2008-2010.