NFLR
NEVADA FAMILY LAW REPORT

Volume 27, Issue 1 Winter 2014

Malpractice Traps When Preparing and Reviewing Prenuptial Agreements

By Robert P. Dickerson, Esq. and Josef Karacsoni, Esq.

The Dickerson Law Group

I. Introduction

Preparing or reviewing a premarital agreement can be one of the most challenging and stressful endeavors a domestic relations attorney ever encounters in his or her practice. Generally speaking, one or both parties entering into a premarital agreement will have substantial net worth and/or income, thereby creating substantial liability for any malpractice on the part of the attorneys involved. This paper provides an overview of Nevada statutory and case law concerning premarital agreements and their enforcement. This paper also examines a number of areas of concern for the family law practitioner preparing or reviewing a premarital agreement and provides a number of practice tips intended to alleviate such concerns. Every case, of course, is different, and poses its own unique challenges, but by fully understanding Nevada law concerning the enforcement of premarital agreements, and recognizing the more common risks associated with preparing or reviewing premarital agreements in general, one can significantly reduce the possibility of ever being the subject of a legal malpractice suit.

II. Overview of Nevada's Uniform Premarital Agreement Act and Enforcement of Premarital Agreements

The most common way to find yourself subject to a malpractice lawsuit is having a premarital agreement that you prepared or reviewed invalidated by a court. The damages sought will likely be the difference between the judgment your client would have received had his or her premarital agreement been enforced and the judgment ultimately rendered in the absence of the premarital agreement. As already discussed, such damages could be substantial, perhaps even crippling to your business. Accordingly, the most

(cont'd. inside on page 3)

IN THIS ISSUE:

Nevada Family Law Report

Editor:
Shelly Booth Cooley

Design/Production
Christina Alberts, State Bar of Nevada

NEVADA FAMILY LAW REPORT is an electronic publication of the Family Law Section of the State Bar of Nevada. To subscribe, please send a request to: publications@nvbar.org.

The *NEVADA FAMILY LAW REPORT* is intended to provide family law–related material and information to the bench and bar with the understanding that neither the State Bar of Nevada, Family Law Section editorial staff nor the authors intend that its content constitutes legal advice. Services of a lawyer should be obtained if assistance is required. Opinions expressed are not necessarily those of the State Bar of Nevada or the editorial staff.

This publication may be cited as Nev. Fam. L. Rep., Vol. 27, No. 1, 201 at ____.

The Nevada Family Law Report is supported by the State Bar of Nevada and its Family Law Section.

A Note from the Editor

By Shelly Booth Cooley, Esq.

In our first article, Robert P. Dickerson and Josef M. Karacsonyi provide an overview of Nevada statutory and case law concerning premarital agreements and their enforcement, examine a number of areas of concern for the family law practitioner preparing or reviewing a premarital agreement, and provide a number of practice tips intended to alleviate such concerns. In our second feature, Margaret Pickard provides an overview of the work the Child Witness Committee is doing regarding consideration of children as witnesses in custody hearings, child interviews as reported in custody evaluations, and the role of judicial child interviews in determining custody issues, creating guidelines for the Nevada Judiciary for children participating in custodial proceedings. Lastly, Katherine L. Provost summarizes the recent presentation she attended at the American Bar Association Section of Family Law Spring CLE Conference in Anchorage, Alaska, entitled "All the Things You Need to Know About Child-Related Tax Issues," and provides a great refresher for the key tips to keep in mind when drafting provisions in a Stipulation, Marital Settlement Agreement, or Decree of Divorce.

Specialization Exam:

The Family Law Section is offering a test date on March 1, 2014 (the Saturday prior to the Family Law Conference). Good luck to all the folks taking the exam.

If you are interested in taking the Specialization Exam next year (which will likely be scheduled for the Saturday prior to the Family Law Conference), the deadline to submit your completed application is December 31, 2014.

Find the applications at:
www.nvbar.org/sites/default/files/Family%20Law%20Specialization%20Application%20revised%201.7.13.pdf

Find the standards at:
www.nvbar.org/sites/default/files/Specialization_Standards.pdf

(cont'd. on page 3)

Issue Editor

cont'd. from page 2

Family Law Conference:

Registration has just closed for the 2014 Family Law Conference in Ely. The topic this year is "Understanding the Players: Social Intelligence and Skills for Exceptional Family Law Practitioners." Be prepared to learn about the new science of human relationships and have fun socializing with our colleagues, judges and Nevada Supreme Court justices, with the added benefit of completing your required CLEs for the year.

Here are some of the exciting seminars being offered this year:

- Skills of Exceptional Lawyers - Social Intelligence and the Human Dimension; Jeff Newman, Esq.;
- Divorce and the Rules of Bankruptcy Security and Collection of Judgments; Brett Axelrod, Esq. and Tom Standish, Esq.; and
- The Science, Speculation and Sorcery of Attachment Theory; Robert A. Simon, Ph.D.

I hope to see you there!

Shelly Booth Cooley is the Principal of The Cooley Law Firm, where she practices exclusively in the area of family law. Shelly can be reached at 10161 Park Run Drive, Suite 150, Las Vegas, Nevada 89145; Telephone: (702) 265-4505; Facsimile: (702) 645-9924; E-mail: scooley@cooleylawlv.com

ARTICLE SUBMISSIONS

Articles are invited! The Family Law Section is accepting articles for the Nevada Family Law Report. The next release of the NFLR is expected in **May, 2014**, with a submission deadline of **April 15, 2014**.

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

Malpractice Traps

cont'd. from page 1

essential function of the attorney representing a party entering into a premarital agreement (especially when representing the spouse with the greater wealth or income, who almost always has the most to lose if the agreement is ultimately invalidated) is ensuring the enforceability of the premarital agreement.

A. The UPAA and the burden of proof

In 1989, the Nevada Legislature adopted the Uniform Premarital Agreement Act (UPAA), codified in Nevada Revised Statutes (NRS) Chapter 123A. NRS 123A.080 (2014) provides:

Enforcement: Generally.

1. A premarital agreement is not enforceable **if the party against whom enforcement is sought proves that**:
   a) That party did not execute the agreement voluntarily;
   b) The agreement was unconscionable **when it was executed**; or
   c) Before execution of the agreement, that party:
      1) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; **[and]**
      2) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; **and**
      3) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.
2. If a provision of a premarital agreement modifies or eliminates alimony or support or maintenance of a spouse, and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.
3. An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

(Emphasis added.) As can be seen, there are only three bases for a party to challenge the validity of a premarital agreement under Nevada law: (1) that he or she did not execute the agreement voluntarily; (2) that the agreement was unconscionable when entered into; **or** (3) that before execution of the agreement, the party lacked a fair and reasonable disclosure of the other party's property, **and** did not waive the right to further disclosure beyond what was provided, **and** did not have actual or constructive knowledge of the other spouse's property. NRS 123A.080(1). The good news for the family law practitioner is that it is extremely difficult to invalidate a well-drafted premarital agreement. Premarital agreements are presumed to be valid, and the burden of proving invalidity lies with the challenging party. *Id.*; *Kantor v. Kantor*, 116 Nev. 886, 8 P.3d 825, 830 (2000).

Furthermore, the standard of proof that the challenging party bears is significant. The "standard of proof" is basically a statement of how much proof is necessary. The standard of proof with respect to proving the invalidity of a premarital agreement is not specifically addressed in Nevada Revised Statutes or Nevada Supreme Court case law. However, several jurisdictions that have enacted the UPAA and addressed the standard of proof have held that a party seeking to invalidate a premarital agreement must prove each element establishing invalidity by clear and convincing evidence. *See, e.g., Marsocci v. Marsocci*, 911 A.2d 690, 696-97 (R.I. 2006); *In re Estate of Shinn*, 925 A.2d 88, 92, 394 N.J. Super. 55, 62 (N.J. App. 2007). The Nevada Supreme Court has defined clear and convincing evidence as follows:

(cont'd. on page 5)

Malpractice Traps

cont'd. from page 4

> This court has held that clear and convincing evidence must be satisfactory proof that is: "so strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest. It need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference may be drawn." [Citation omitted].
>
> *In re Discipline of Drakulich*, 908 P.2d 709, 715, 111 Nev. 1556 (1995). In short, a premarital agreement is presumed to be valid and enforceable unless the party challenging the agreement proves by clear and convincing evidence that the agreement is invalid under the UPAA.

B. Nevada Supreme Court decisions

The two most important, and most recent, decisions dealing with the enforceability of premarital agreements are *Sogg v. Nevada State Bank*, 108 Nev. 308, 832 P.2d 781 (1992), and *Fick v. Fick*, 109 Nev. 458, 851 P.2d 445 (1993). Both cases analyzed premarital agreements entered into prior to enactment of the UPAA. Nonetheless, the Nevada Supreme Court stated that it would uphold the validity of the premarital agreement at issue in either case if such agreement met the requirements of the UPAA, or conformed to the common law. Accordingly, *Sogg* and *Fick* provide a great deal of insight into the facts and circumstances that are relevant under Nevada law in determining the validity of a premarital agreement, and a discussion of those cases is warranted.

In *Sogg*, a husband took his wife to his attorney to sign a premarital agreement the day before the parties' wedding ceremony was scheduled. *Id.* 108 Nev. at 310. The wife testified that she was not given a copy of the agreement, but rather was told by husband's attorney that she should review the agreement with her own attorney. *Id.* Husband's attorney,

who had represented wife in a previous divorce, prearranged for wife to meet with another attorney "whose office was down the hall" from husband's attorney. *Id.* Wife's new attorney met with wife and "began reading parts of the agreement to her." *Id*. Wife immediately had questions, but before wife and her attorney could finish reviewing the agreement, and before wife's attorney could offer his advice, husband disrupted the meeting. *Id.* The parties began to argue, and wife left in tears. *Id.* Husband was aware when wife left that wife was upset about certain provisions in his proposed premarital agreement. After the meeting, husband called off the wedding and the parties stopped talking. *Id.* at 311.

"Several weeks later, the parties reconciled, and a new wedding date was set." *Id.* The parties, however, "did not discuss the premarital agreement again until shortly before the wedding." *Id.* Wife testified that she and husband went to husband's attorney's office to sign the premarital agreement the day before their wedding. Wife did not read the agreement prior to signing, because husband stated that he had not had an opportunity to make any changes. *Id.* After the parties were married, husband's attorney requested that wife's attorney "sign the attorney's certificate stating that he had counseled [wife] with respect to the agreement," but wife's attorney refused. *Id.* Wife's attorney would not sign the certificate because it would be "misleading under the circumstances" as he "had not even seen the complete agreement prior to the parties' marriage, because the copy he received did not contain any of the financial docu-

(cont'd. on page 6)

Malpractice Traps

cont'd. from page 5

ments referred to as 'attachments' in the agreement." *Id.*

Eight months after the parties' marriage, husband filed for divorce. After filing, a second attorney was asked to review the agreement on wife's behalf. *Id.* The second attorney met with husband and wife but never had the opportunity to review the entire agreement. *Id.*

The Nevada Supreme Court held that the premarital agreement entered into in *Sogg* was invalid and unenforceable for a number of reasons: (1) wife did not have the benefit of counsel, nor did she have the opportunity to hire independent counsel of her choosing; (2) the circumstances surrounding wife's execution of the premarital agreement imposed time pressure on wife ("the disadvantaged party") such that wife was prevented "from adequately protecting her rights;" (3) wife did not have substantial business experience which would have enabled her to protect her own rights; and (4) husband did not fully disclose his assets to wife prior to her execution of the premarital agreement. *Id.* at 312-15.

In *Fick*, a couple entered into a premarital agreement drafted by husband shortly before the parties' wedding. *Id.* 109 Nev. at 460. The agreement, among other things, waived husband and wife's rights to alimony. *Id*. The "agreement acknowledged that each party attached a schedule of their various premarital assets and obligations." *Id*. "However, [husband] did not attach his schedule until a year after [the parties] signed the agreement." *Id*. Husband testified at trial that when the parties signed their premarital agreement "he had not finished compiling his schedule of assets." *Id*. at 464. The district court invalidated the alimony provisions of the parties' premarital agreement based on the parties' failure to prove a full and fair disclosure of their respective assets, and the Nevada Supreme Court affirmed the trial court's decision. *Id.*

Specifically, the Nevada Supreme Court held that "given the extensive list of [husband's] possessions, [wife] could not have known the full magnitude of [husband's] assets and obligations before marriage." *Id.* Even though husband provided a disclosure after marriage, the agreement was still held invalid "because full disclosure must occur before contract execution." *Id.*

While the *Sogg* and *Fick* cases are summarized above, it is important that the family law practitioner representing parties to premarital agreements in Nevada read these decisions and familiarize themselves with the Nevada Supreme Court's analysis and reasoning. As will be discussed below, these two decisions provide a great deal of guidance on the facts and circumstances Nevada courts must examine when deciding the validity of a premarital agreement.

C. Was the premarital agreement entered into voluntarily?

In order to determine whether a premarital agreement was entered into voluntarily, a court will look at the facts and circumstances surrounding preparation, negotiation, and execution of the premarital agreement. *See*, *Sogg*, 108 Nev. at 313. As is evidenced by *Sogg*, two of the most important facts surrounding execution when determining validity and voluntariness[1] are (1) the timing surrounding preparation, negotiation, and execution of the premarital agreement at issue, and (2) whether the parties were represented by counsel, or given ample opportunity to retain independent counsel.

If you are asked to draft a premarital agreement, it is extremely important that you advise and encourage your client to begin the process as soon as possible prior to marriage. In this regard you should discuss the decision in *Sogg* with your client, and the risks involved in rushing into an agreement immediately prior to the wedding ceremony. Ideally, your client would want to have his or her agreement fully executed before the wedding plans are fully finalized. This, of course, will only be possible in a very limited number of cases, given that wedding preparations can be made months in advance. In those cases where it is not possible, it will suffice to begin the drafting and negotiations several months in advance of the wedding, so that there is adequate time

(cont'd. on page 7)

Malpractice Traps

cont'd. from page 6

for the parties to negotiate terms and cancel or postpone their wedding arrangements, if necessary.

We have all had those clients who have come to us at the eleventh hour (a week or two before their wedding), requesting an agreement as soon as possible. In such cases, counsel must advise the client to postpone his or her wedding plans if possible, explain the decision in *Sogg* and the reason for such advice, and memorialize such advice in a correspondence to the client if he or she insists on proceeding with an agreement on such short notice. Counsel will also want to inquire whether there have been any discussions or negotiations between the parties regarding a premarital agreement before the client approached counsel, or whether the agreement is going to be "sprung" on the other party for the first time. If there have been discussions and negotiations prior, counsel should memorialize such facts in the recitals to the premarital agreement, a topic that will be discussed in greater detail, below.

You also must always advise your client that his or her future spouse must be represented by his or her own counsel. If you represent the spouse with the greater assets and income, advise him or her to offer to pay for counsel for his or her future spouse to prevent any claim by the future spouse that he or she was prevented from retaining counsel due to a lack of funds. Oftentimes, you may be called upon to "refer" attorneys to the future spouse. In such cases, you should always offer a list of highly reputable attorneys to the future spouse, and allow for him or her to choose from the list, or to find another attorney, if desired.

There are those cases where your client's future spouse insists on representing himself or herself. If that is the case, you will want to document in detail the advice you gave to your client's future spouse to obtain counsel, and the timing of such advice. As was shown in *Sogg*, it is not enough to simply advise the other spouse to obtain counsel; the other spouse must be given adequate time to retain his or her own counsel. Finally, confirm in the recitals to the premarital agreement that you advised the other spouse to retain counsel, that the other spouse was offered sufficient funds to retain his or her own counsel, and that the other spouse freely and voluntarily, after ample time to deliberate and consider the consequences of his or her actions, chose not to be represented by counsel.

D. Preventing claims of unconscionability

There are two types of unconscionability: procedural and substantive. In order to prevail on a claim of unconscionability, a party must prove the existence of both. *See, e.g., D.R. Horton, Inc. v. Green*, 120 Nev. 549, 96 P.3d 1159, 1162 (2004) ("Generally, both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a clause as unconscionable.").

Substantive unconscionability focuses on whether the terms of an agreement are one-sided. *Id.* "Generally, in considering substantive unconscionability, courts look for terms that are 'oppressive.'" *Gonski v. Second Judicial Dist. Ct.*, 126 Nev. Adv. Op. No. 51 (2010). The Nevada Legislature, in adopting the UPAA, has expressly approved the rights of parties to a premarital agreement to contract with respect to "the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located," "the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property," "the disposition of property upon . . . marital dissolution," and "the modification or elimination of alimony or support or maintenance of a spouse," amongst other things. NRS 123A.050. While the Nevada Legislature has expressly permitted parties to eliminate community property and/or alimony in a premarital agreement, in order to ensure that a court will not find an agreement substantively unconscionable, the terms should not be grossly one-sided or unfair. To that end, if one spouse has a disproportionate amount of income or assets, the other spouse should not be left

(cont'd. on page 8)

Malpractice Traps
cont'd. from page 7

with nothing upon dissolution, death, or separation. Instead, the agreement should provide for some form of payment to the disadvantaged spouse, either after a certain number of years of marriage, or upon termination. The form and amount of payment is up to the parties, but should seem somewhat reasonable when considering the length of the marriage upon termination, and the relative wealth of the parties. Whether you are the drafting or reviewing attorney, you should advise your clients to offer or negotiate for reasonable terms. In doing so, you will have assisted both parties in ensuring that their agreement is enforceable upon termination of their marriage.

Whether you are the drafting or reviewing attorney, you should advise your clients to offer or negotiate for reasonable terms. In doing so, you will have assisted both parties in ensuring that their agreement is enforceable upon termination of their marriage.

A "clause [or contract] is procedurally unconscionable when a party lacks a meaningful opportunity to agree to the clause [or contract's] terms either because of unequal bargaining power, as in an adhesion contract, or because the clause [or contract] and its effects are not readily ascertainable upon a review of the contract." *D.R. Horton, Inc.*, 96 P.3d at 1162. In this regard, it is again critically important to encourage both parties to be represented by counsel, and to allow ample time for negotiation and deliberation. Although the issue has not yet been addressed by the Nevada Supreme Court, "numerous courts have considered the presence and advice of counsel to constitute circumstantial, if not conclusive, evidence that a contract is not [procedurally] unconscionable." *Resource Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1045 (Utah 1985); *Bernina Distributors, Inc. v. Bernina Sewing Mach.*, 646 F.2d 434, 440 (10th Cir. 1981).[2] The rationale behind this rule is clear – one cannot have unequal bargaining power or be unable to ascertain or understand the terms of a contract when advised by counsel – and if the issue is brought before the Nevada Supreme Court, it will likely follow suit. *See Burch v. Dist. Ct.*, 118 Nev. 438, 442, 49 P.3d 647, 649 (2002) ("The distinctive feature of an adhesion contract is that the weaker party has no choice as to its terms."). *In KJH & RDA Investor Group v. Turnberry/MGM Grand Towers,* 2009 Nev. Lexis 89 at *2-3 (April 22, 2009), an unpublished decision, the Nevada Supreme Court failed to find procedural unconscionability in part because a party "had the chance to consult with an attorney."

E. Full disclosure

The final basis for invalidating a premarital agreement under NRS 123A.080 requires a party to prove that, at the time of execution of the agreement, the party lacked a fair and reasonable disclosure of the other spouse's property, **and** did not waive the right to such disclosure, **and** did not have actual or constructive knowledge of the other spouse's property. "Property" is defined in NRS 123A.030(2) as "an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings." A party to a premarital agreement must be instructed to provide a full and accurate disclosure of his or her property, including his or her income. If certain assets require appraisals or valuations, encourage the client to obtain such appraisals or valuations to show that he or she has made a good faith effort to provide the most accurate value possible. One can never rely on, or assume, that the other spouse has "actual or constructive knowledge of [his or her] property." In fact, in neither *Sogg* nor *Fick* did the Nevada Supreme Court find such knowledge, and it would be very difficult to prove "actual or constructive knowledge" in the vast majority of cases.

In addition, every agreement should include a waiver of any further disclosure beyond the disclosures provided, but

(cont'd. on page 9)

Malpractice Traps

cont'd. from page 8

just as a precautionary measure. While it appears permissible to waive a disclosure altogether, a party is ill-advised to rely on this provision. That is because while a waiver of any disclosure is permissible, and may not provide a basis for invalidating a premarital agreement in and of itself, a court could find the terms of the agreement to have been involuntary based on the parties' lack of knowledge of one another's financial situation.

III. Practice Tips, and Common Areas of Concern

Having discussed the enforceability of premarital agreements generally, this paper will now focus on some general practice tips and areas of concern for the family law practitioner representing parties to premarital agreements in Nevada.

A. Negotiate

As already discussed, an attorney drafting a premarital agreement should advise his or her client to begin the process as soon as possible before the wedding ceremony. One of the reasons this is important is to allow for negotiations. Far too often we see premarital agreements that are drafted and entered into without any real negotiation. As an attorney drafting or reviewing a premarital agreement, you should not only encourage negotiations, but should require some negotiation. You should also document negotiations by keeping the various drafts of the premarital agreement, and correspondences showing the negotiations that occurred. A premarital agreement that has been negotiated between parties is highly unlikely to be found unconscionable, or involuntarily entered into.

Furthermore, negotiation is especially critical to the reviewing attorney, or attorney representing the less wealthy spouse. It is the attorney's function to ensure that his or her client's rights are protected, and that his or her client does not enter into a one-sided agreement without being advised against it. By encouraging and convincing a client to negotiate for terms which are equitable, an attorney reduces the risk of a malpractice claim, while at the same time doing everyone a favor by making the premarital agreement more likely to be enforced. Do not be the attorney who just signs off on the agreement presented to your client, without first imploring your client to negotiate.

B. Research unique provisions, and be well versed in contract law

In a great number of cases, parties will have requests that are unique, and are not found in the attorney's regular premarital agreement form. Before you draft such provisions, make sure you have adequately researched the enforceability of such provisions. For example, recently we have seen a number of premarital agreements with liquidated damages clauses for certain acts during marriage. Some of these clauses are of questionable enforceability, and the attorneys who were asked to draft such clauses should, at the very least, have advised their clients of the questionable enforceability of such provisions in writing prior to signing off on the premarital agreement.

It is also important to have a working knowledge of contract law, and the law regarding contract interpretation. Knowing the terms of the UPAA, and the decisions in *Sogg* and *Fick*, will not answer every question which may arise, and in such instances, the courts will turn to general rules regarding contract enforcement and interpretation when examining such questions.

Finally, every premarital agreement should include a severability provision in case one provision in the agreement is found to be invalid or unenforceable. Such provision should provide that in the event any provision of the agreement is deemed to be invalid or unenforceable, such provision shall be deemed severable from the remainder of the agreement and shall not cause the remainder of the agreement to be invalid or unenforceable.

(cont'd. on page 10)

Malpractice Traps

cont'd. from page 9

C. Advise in favor of certainty; avoid contingencies

We have all had the wealthy client who wants to "hedge his or her bet" by offering their future spouse a percentage of income or wealth in the event of divorce, so as to account for any decreases in wealth or income. While such provisions seem favorable in theory, they actually may result in the extensive litigation the parties sought to avoid by entering into a premarital agreement. For example, if a spouse is to receive 5 percent of the other spouses wealth if the parties' marriage is terminated after eight (8) years, there could be extensive litigation over what is the payor spouse's wealth. Advise the client of this risk, and encourage him or her to agree to a sum certain. If he or she still insists on a contingent outcome, then confirm your advice in writing. The same can be said of any type of contingent provision which will require discovery, and possibly litigation, upon termination of marriage.

D. Avoid inconsistencies

Inconsistencies in the provision of the agreement are perhaps the second greatest cause of litigation in divorces between parties who entered into a premarital agreement prior to marriage; litigation cause by inconsistencies are second only to litigation caused by issues concerning the validity of the agreement. This is far too prevalent, and can be avoided by meticulous attention to the details of the agreement by the attorneys involved. Attorneys should not rely on, and skim over boilerplate language from their premarital agreement forms, but rather should read every word of every agreement slowly and meticulously, contemplating the relationship and interplay between every single provision. For example, we often see premarital agreements entered into between parties solely to protect premarital assets. In such cases, the parties agree that property acquired during marriage will be community property. The attorneys representing these parties must clearly define what will occur if community property is contributed towards separate property, to ensure that the parties' expectations are met.

E. Memorialize facts within the agreement

The Nevada Rules of Evidence, specifically NRS 47.240, provides, in pertinent part, as follows:

> **NRS 47.240 Conclusive presumptions.** The following presumptions, and no others, are conclusive:
> 2. The truth of the fact recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title, but this rule does not apply to the recital of a consideration.

(Emphasis added). Accordingly, any fact stated in a premarital agreement's recitals cannot be overcome. The importance of this rule cannot be overstated. By reciting the facts regarding preparation, negotiation, and execution of your clients' premarital agreements, you can prevent the clients from ever having to litigate such facts. Every agreement should, therefore, recite the facts surrounding the negotiations between the parties that occurred prior to execution, the time period for same, each party's decision with respect to counsel, each party's voluntary entry into the premarital agreement, each parties' full and complete disclosure of assets, and any other facts and circumstances surrounding the parties' premarital agreement which may be relevant if the agreement is ever subject to litigation.

F. Consider recorded signings

Although not required, attorneys should consider having the execution of the premarital agreement transcribed and/or videotaped. At the very least, the client should be offered this option. This provides an excellent opportunity to further confirm that each party is entering into the agreement freely and voluntarily, has had the opportunity to negotiate the terms, understands all the terms, and is satisfied with the agreement being entered into.

(cont'd. on page 11)

Malpractice Traps

cont'd. from page 10

G. Confirm the objectives, the advice given, and the process

Finally, an attorney should always detail in writing the client's goals, the advice given to the client, and the process surrounding negotiation and execution. By doing so, an attorney can document that he or she has met the client's objectives, and advised the client in a reasonable manner. Given the great amount of potential liability for a premarital agreement gone awry, maintain your premarital agreement files indefinitely, which in today's electronic age, is not difficult.

IV. Conclusion

As stated in the introduction, every case is different and poses its own unique challenges, and it would be impossible to fully document every possible way an attorney could become subject to malpractice suit for his or representation in drafting, or reviewing a premarital agreement. However, by fully understanding Nevada law concerning the enforcement of premarital agreements, recognizing the more common risks associated with preparing or reviewing premarital agreements in general, and following some basic and sound practice principles, one can significantly reduce the possibility of ever being the subject to such a suit.

Endnotes:

[1.] The Nevada Supreme Court never used the word "voluntary" in *Sogg*, and instead stated that the circumstances surrounding wife's execution of the premarital agreement imposed time pressure on wife such that wife was prevented "from adequately protecting her rights." *Id*. 108 Nev. at 313-14. There is little doubt, however, that the Nevada Supreme Court would engage in the same "time pressure" analysis when examining whether a premarital agreement entered into pursuant to the UPAA was entered into voluntarily.

[2.] These cases cite to numerous other jurisdictions which have held the same.

Biographies

Bob Dickerson has practiced law in Las Vegas since 1976. Bob's practice of law in Nevada over the past 38 years has included both civil and criminal litigation in Nevada's federal and state courts, as well as the handling of real estate, business, and other transactional matters. Over the past 23 years, Bob's practice has been primarily in the area of family law.

Bob has earned an "AV" peer review rating by Martindale-Hubbell Law Directory. During his career, Bob has been active in bar related activities, having served as President of the State Bar of Nevada, President of the Clark County Bar Association, and as a member of the State Bar's Board of Bar Examiners.

Josef Karacsonyi is an attorney at The Dickerson Law Group. Josef received his

B.A. in Political Science from the University of Southern California, and earned his J.D., *cum laude*, from the University of Miami School of Law. Josef has practiced domestic relations law almost exclusively since he was admitted to the State Bar of Nevada in 2007. Prior to entering private practice, Josef served as Law Clerk to the Honorable T. Arthur Ritchie, Jr. during his tenure as Presiding Judge of the Eighth Judicial District Court, Family Division. Josef was elected to the Executive Council for the State Bar of Nevada Family Law Section in 2011, and continues to serve on the Executive Council. Josef also serves on the Advisory Council to the Legal Aid Center of Southern Nevada Pro Bono Project.

Should Nevada Judges Interview Children in Child Custody Proceedings? International Perspectives

By Margaret Pickard, Esq.

In 2012, the Family Law Section of the State Bar of Nevada appointed the Child Witness Committee to conduct a multi-state review of standards for children as witnesses in family court proceedings. The Child Witness Committee is currently in the process of reviewing practices of the Nevada Judiciary in assessing the application of NRS 125.480(4)(a), including but not limited to:

- Consideration of children as witnesses in custody hearings;
- Child interviews as reported in custody evaluations; and
- The role of judicial child interviews in determining custody issues.

The goal of the task force is to create guidelines for the Nevada Judiciary that balance the needs of the courts to obtain information while considering the short and long-term psychological impact on children participating in custodial proceedings.

Whether or not judges should interview children in child custody cases is hotly debated and highly litigated. The primary objection to child witness testimony is that there is often "little apparent concern with how these meetings 'fit' with notions of due process." Birnbaum and Bala, *Judicial Interviews with Children in Custody and Access Cases: Comparing Evidence in Ontario and Ohio*, 24 Int'l J. L. Pol'y & Fam. 300 at 323 (2010). Children often report that they want to speak to the judge who is making decisions about where they will live, where they will go to school and, ultimately, with whom they will spend their days. However, while some children are eager to enter the courthouse and tell the judge what is on their minds, others are terrified by the thought of having to choose between their parents or saying something that is going to upset their parents.

In May 2013, the Association of Family and Conciliation Courts ("AFCC") held their 50th Anniversary Conference entitled "Riding the Wave of the Future: Global Voices, Expanding Choices". This conference hosted family law practitioners, mental health professionals and judges from around the world, offering presentations on a myriad of topics. Of particular interest to members of the state bar's Child Witness Committee was the Judicial Officers' Institute presentation: Taking the Testimony of Children. This presentation featured well-known professionals who offered legal and mental health considerations on the risks and benefits of judges interviewing children.[1] The institute was followed by a workshop on Judicial Interviewing: The New Zealand Experience, which offered perspectives from judicial officers in New Zealand who regularly welcome children into their courtrooms to hear what many consider the "most important voice in the room."

Professionals across the world agree that children may have important information to provide the court in disputed custody cases, however, this information is often tainted by the differing, and often hostile, influences of their parents. It is widely recognized that there are usually four stories to hear in a conflicted custody case: (1) the mother's story, (2) the father's story, (3) the true story and (4) the child's perception of the story. Obtaining information from children who are caught in the middle of their parents' con-

(cont'd. on page 13)

Interviewing Children

cont'd. from page 12

flict may come at a significant cost to the children who may be emotionally and psychologically scarred by the process if it is not done correctly. For this reason, children have historically been interviewed by mental health professionals, who report to the court their findings and recommendations. However, courts are increasingly taking direct testimony from children to avoid the filters that are provided when third parties interview children.

No one doubts the risks and complexities of interviewing children, including obtaining inaccurate or misleading information, placing them in loyalty binds between their parents, and recognizing that everything we do may have developmental consequences on children. Most experts agree that the voice of the child should not be ignored, as this often leaves children feeling powerless and frustrated that decisions are being made about them while they have no input or control over their own lives. M. Powell & S. Lancaster, *Guidelines for Interviewing Children During Child Custody Evaluations*, 38 Australian Psychologist 1, 46-54 (March 2003). Thus, the ultimate balance that needs to be achieved by the bench, the bar, and mental health professionals alike is how to interview children in disputed custody cases in order to hear their voices without harming them in the process.

It is tempting for child interviewers, including judges, to view the children's input as the "tie breaker" in a difficult child custody case. This situation obviously puts an excessive burden on a child. Therefore, the process and protocol for interviewing children must necessarily be determined and established in advance of determining whether a child interview should occur, and if it does, how it will proceed in family law cases in Nevada.

The results of the child witness committee's 2013 Judicial Survey, which collected information on judicial practices throughout Nevada, clearly demonstrated that there is no standard protocol for determining if, when, or how judicial interviews are conducted. This is the ultimate goal of the bar's child witness committee.

Therefore, the purpose of this article is to provide the Nevada bench and bar with a glimpse of international perspectives on judicial interviewing, with the intent to create a standard procedure for Nevada Courts. Given the limited resources of Nevada courts, as well as the varied perspectives of our judges on the practice of interviewing children in disputed custody cases, it is challenging to reach a consensus on an appropriate uniform practice and protocol for our family courts.

The United Nations Convention on the Rights of the Child, Article 12 provides, "States parties[2] shall assure the right of the child who is capable of forming his or her own views the right to express those views freely . … For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings … either directly or … in a manner consistent with the procedural rules of national law." The United Nations Report of the Committee on the Rights of the Child clearly defines this right to include non-verbal communication, including play, body language, facial expressions, drawing and painting. UN Committee on the Rights of the Child (CRC), *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: www.refworld.org/docid/4ae562c52.html [accessed 28 January 2014]. This also includes the right of the child *not* to be heard by choosing to decline a judicial invitation to speak.

Culture is highly influential in determining the extent to which judicial interviewing takes place. See Birnhaum and Bala, Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio, 24 Int'l J. L. Pol'y & Fam. 300, 315-316 and 324-325 (2010).Canada and New Zealand are trailblazers in adopting legislative guidelines to direct when and if a child will be interviewed by a judicial body, as well as how the interview will occur. For example, in Ontario, Canada the Children's Law Reform Act § 64 provides: "In considering custo-

(cont'd. on page 14)

Interviewing Children

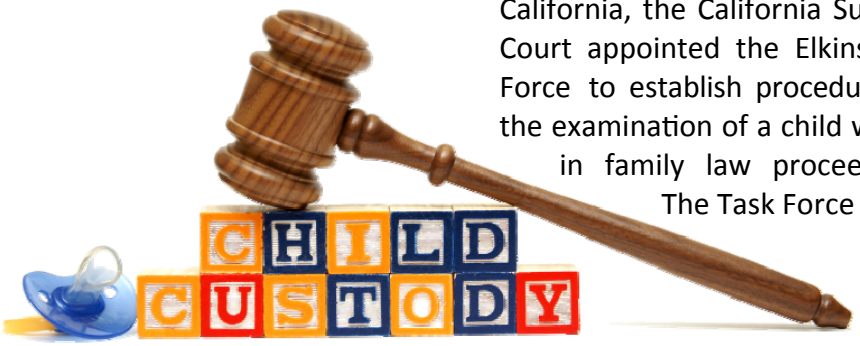
cont'd. from page 13

dy and access applications, a child is entitled to be heard. …The court may interview the child to determine these views and preferences. The interview shall be recorded and the child is entitled to have his or her counselor present during the interview."[3] While judges in Toronto, Ontario routinely conduct child interviews, other judges in the province are not eager to interview children in family law cases, although judges are increasingly accepting the mandate to include children in the process.[4]

By contrast, in Quebec, judicial child interviews are mandated by the Civ. Code of Quebec, Article 34, and routinely conducted.[5] Other Canadian territories are following suit and requiring the judiciary to take an active role in meeting with children involved in custody disputes. *See e.g., B.J.G. v. D.L.G.*, 2010 UKSC 44 (2010) Y.J. No. 119, Martinson, J. ("The [United Nations] Convention [on the Rights of the Child] is very clear that all children have these legal rights to be heard … It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. … *If the child does wish to participate* then there *must* be a determination of the method by which the child *will* participate." (Emphasis in the original). This approach is also widely seen in New Zealand, Germany, Israel, and England where judicial interviewing is common, [6]. but is rejected in Australia, where the traditional view is that the role of judges is not inquisitorial.[7]

In the United States, jurisdictions vary widely on whether or not it is the role of family court judges to interview children. The state bar Child Witness Committee is currently surveying the legislative guidelines and local practices of family courts across the country and assessing the various perspectives on if, when, and how to bring the voice of the child into the courtroom. California is a forerunner in judicial child interviewing and provides specific directives on both practice and procedure. California Family Code § 3042 sets forth, "If [a] child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so, unless the court determines that doing so is not in the child's best interests. In that case, the court shall state its reasons for that finding on the record." After public outcry over family court practices in California, the California Supreme Court appointed the Elkins' Task Force to establish procedures for the examination of a child witness in family law proceedings.[8] The Task Force set forth clear guidelines for judicial child interviewing (adopted as California Rule of Court 5.250), along with the expectation that judges would routinely interview children 14 years old or older or otherwise make findings as to why it was not in the child's best interests to testify. Children under 14 may also be interviewed, although the court must "take special care to protect [the child] from undue harassment or embarrassment … ensure that questions are stated in a form which is appropriate to the age or cognitive level of the witness." Cal. Evid. Code § 765. If the court interviews a witness under 14, there must be specific findings that the testimony was in the child's best interests. This, of course, closely parallels NRS 50.580, Standards for determining whether child witness may testify by alternate method. Even with the directive and guidelines, however, judges in California vary significantly as to whether or not they will interview or take the testimony of children of all ages.

When children testify in a court proceeding, or provide information through an alternative source, such as a court-appointed child interviewer, there are significant concerns that the words coming out of their mouths are not theirs, but their parents. Mental health professionals uniformly agree that interviewing children follows a bell curve return. Specifically, interviewing children under the age of 7 will generally not help a trier or fact gather objective information because they are highly



(cont'd. on page 15)

Interviewing Children

cont'd. from page 14

influenced by their parents. *See* Poole, D.A. & Lindsey, D.S., *Children's Eyewitness Reports After Exposure to Misinformation from Parents*, J. Experimental Psychol. 7 (1) 27-50 (2001) (In the absence of suggestion even very young preschoolers can provide highly accurate reports. However, by the time a child witness appears before a judicial officer, they have undoubtedly been exposed to significant outside influences, otherwise known as parents and extended family members.) In sharp contrast, children 7-11 are likely to be open and honest about what is occurring in their homes and thus, this is likely the age when an interviewer can obtain the most accurate information from a child who is *properly* interviewed, which requires substantial child development training. While the amount of accurate information obtained from a child interview after age 11 is highly influenced by their own ego-centric agenda, it is generally recognized that children 12 and older can best assimilate relevant information, understand the interview process and provide independent relevant information to an interviewer. Fidler, B., *Children and Divorce: The Voice of the Child and Interventions When Children Resist Parental Contact*, AFCC Conf. (December 7, 2011).

Admittedly, however, there are no clear lines that can be drawn, as there is huge variability in the ability of children to accurately recall information and their ability to do so. In fact, as any parent will testify, although children have the ability to tell the truth, they may not always be willing to do so. This is true of children who are in conflicted homes and non-conflicted homes alike, as children perceive their reality through the eyes of their parents and parental suggestion is incorporated into their memory. See Id. (This article is particularly relevant in child custody cases when parents are intentionally misleading children to misremember. The study found that "Contrary to claims that misleading suggestions rarely affect children's free-recall narratives, a substantial percentage of the events children reported in response to open-ended prompts were non-experienced events described [by their parents]." *Id.* at 33. More surprisingly there was "no significant tendency for reports of non-experienced events to decline with age." Id.) Even in the absence of coaching, children naturally protect their parents; in fact, if a child is openly hostile and completely rejecting of one parent, it is generally a "red flag" suggesting parental alienation.

Because children's primary exposure to judges is through television shows, particularly police dramas, children may believe that they are going to jail if they say the wrong thing.

An additional consideration for child interviewers is that children's recall is likely to be impaired when they are under stress; for most children, an interview by a judge is particularly stressful. Because children's primary exposure to judges is through television shows, particularly police dramas, children may believe that they are going to jail if they say the wrong thing. In fact, setting the right stage for a judicial interview is as crucial as how the interview itself is conducted. For example, it is preferable that the interviewer de-emphasizes his or her authority, including but not limited to conducting an interview in chambers or at counsel table without wearing a judge's robe. While the realities of judicial economy may not allow a judge to spend a significant amount of time developing a relationship with the child before asking direct questions, if approached correctly, a judge can learn background information about the child's life while they are getting to know them in the interview. This, of course, requires having proper training and avoiding land-mine questions such as "What is your address" or "Tell me about your family." When a child has two homes or two families, these questions pose an immediate dilemma.

In addition, children's developmental functioning and vocabulary are generally not as advanced as their interviewers and they may not understand the questions that they are being asked and may be too embarrassed to admit it. Social

(cont'd. on page 16)

Interviewing Children

cont'd. from page 15

science research suggests that the "right way" to conduct an interview is to follow a standard protocol, which usually requires interviewing the parents first to gain perspective on the family dynamic. Experienced child interviewers recognize that it is difficult to interview children in a vacuum. Arguably, judges have extensive, although conflicting, information about the family dynamic before they interview a child, as judges generally do not interview a child unless and until they have reviewed or heard extensive arguments by parents, directly or through counsel.[9]

While judicial interviews may not be as extensive as child interviews conducted during a custodial evaluation, they can provide judges valuable information about the family dynamic which has not been brought to light by other sources. A 2012 survey of New Zealand family court judges, conducted by the Principal Family Court Judge, provides one of the most extensive overviews of child interviewing practices of any jurisdiction, nationally or internationally.[10] The study, which 100 percent of the New Zealand family court judiciary participated in, provided extensive feedback on both the practice and efficacy of interviewing children from the bench. While some judges were reticent to interview children because it puts them "on the frontline," the majority of judges, who had been trained in child interviewing techniques, appeared to embrace the general perspective that "children can be a great teacher if we let them."

While some Nevada family court judges approach child interviews with a similar perspective, there is no uniformity among the state's judges on this issue. In fact, in the Nevada Eighth Judicial District, testimony by child witnesses seems to be the exception rather than the rule. EDCR 5.06 provides:

> Unless authorized in advance … no minor child of the parties shall be brought to the courthouse for any court hearing, trial, CASA or FMC appointment which concerns that child or the child's parents. In exception al cases, the judge, master or commissioner may interview minor children in chambers outside the presence of counsel and the parties. Minor children will not be permitted to testify in open court unless the judge, master, or commissioner determines that the probative value of the child's testimony substantially outweighs the potential harm to the child.

See EDCR 5.06. By contrast, in Northern Nevada, testimony by child witnesses is a more common occurrence. The application of the rule varies significantly based on the assigned department. Child interviews can provide an important source of information in family law cases, but in the process, we must protect children from being interjected into adversarial proceedings and serving as tie-breaking witnesses in their parents' conflict. There are many issues[11] for the state bar's Child Witness Committee to explore including how, why, what and where judicial interviews should occur. The committee has undertaken an extensive review of guidelines and practices from across the country. A glimpse of international perspectives on judicial interviewing clearly indicates that courts are increasingly cutting out the "middle man," with judges personally conducting child interviews. Nevada needs to establish uniformity in our approach to child interviewing in disputed custody cases, before "jumping on the bandwagon," and consider the most appropriate protocol to protect child witnesses. These questions must all be answered in a consistent way in order for child witness testimony to be properly considered by Nevada family courts as competent and accurate evidence, while also guaranteeing the parents' due process rights.

Endnotes

[1] Lyn Greenberg, PhD (California), Hon. Emile Kruzik (Toronto, Ontario), Aaron Robb, M.Ed. (Texas), and the Honorable Maureen F. Hallahan (California).

[2] "States parties" is the correct term to refer to countries who adopt the guidelines of the UN Convention on the Rights of the Child.

(cont'd. on page 17)

Interviewing Children

cont'd. from page 16

[3] *But see*, *Dudman v. Dudman*, (1990) O.J. No 3246 (C.J.) *S.E.C. v. G.P.* (2003) O.J. No. 2744 (S.C.), holding that "a child should not be called to give views where (1) the child is fearful of coming to court; (2) the experience would be traumatic for the child, (3) the child's answer would be an attempt to please a parent, or (4) the child's responses are not reliable because they vary depending on who asks the question."

[4] The "prevailing judicial philosophy is that it is really dangerous to interview children" and, in fact, judicial interviewing is rare in many Canadian provinces, with growing interest. The Honorable Emile Druzick, Superior Court of Justice, Toronto, Ontario. *See also*, Williams, S., *Listening to Children Directly in Separation and Divorce Proceedings*, Nat'l Jud. Inst. Can. Fam. L. Program, Toronto (2010) "We are on the 'cusp of cultural change."

[5] The Civil Code of Quebec, Article 34, provides: "The court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it."

[6] *See e.g., Ward v. Laverty* (1925) AC 101 at 107 per Viscount Cave (the judge is "entitled" to see a child and that is "important."). New Zealand adopted the German practice with the enactment of the Care of Children Act in 2004.

[7] *See Fernando*, *What Do Australian Family Law Judges Think About Meeting With Children*, 26 Australian L. J. Fam. L. 51 at 70 (2012); *cf.*, Sir Nicholas Wilson, *The Ears of the Child in Family Proceedings*, IFL 130, WILSON L. J. (2008).

[8] The task force was coined "The Elkins' Task Force," created after the case *Elkins v. Superior Court*, 41 Cal. App. 4th 1337 (2007), which required that the court receive live, competent evidence unless there is good reason not to. A full report of the Elkins' Task Force can be found at: www.courts.ca.gov/documents/elkins-finalreport.pdf.

[9] For an outline of standard protocol, see M. Pickard, *The Authentic Voice of the Child: Strategies and Techniques for Effective Interviewing by the Bench* (2012).

[10] The report entitled *Judicial Interviews of Children: Documenting Practice Within the New Zealand Family Court* by N. Taylor, J. Caldwell, and Judge P. Boshier (2013) was presented at the AFCC 50th Anniversary Conference and is available through this author.

[11] The issues that are under consideration by the State Bar of Nevada child witness committee include, inter alia: whether judges should uniformly interview children in chambers or in the courtroom, whether judicial interviews should be recorded or not, whether the recordings should be sealed subject to an appeal by the Nevada Supreme Court, whether or not counsel should be present at the interview, or, in the alternative, whether a *pro se* parent should be permitted to be present at the interview, whether counsel or the parents should be entitled to ask questions or submit questions to the judge.)

Margret Pickard, Esq. is the developer of the UNLV Cooperative Parenting Program and serves as a Parenting Coordinator/Special Master for the Eighth Judicial District Court.

Recognizing Various Tax Considerations When Children are at Issue

By Katherine Provost, Esq.

Tax season. From January 1 until April 15 each year those two little words loom large over our lives. In the United States, individuals are required to file their annual federal tax return by April 15 and report all of their prior year's reportable earnings. This busy time is dreaded by most, though for individuals who are fortunate enough to be owed a tax refund, April 15 cannot come fast enough.

This past Spring I was fortunate enough to be able to attend the American Bar Association Section of Family Law Spring CLE Conference in Anchorage, Alaska. In addition to the pleasure of meeting family law practitioners from around the nation and enjoying a beautiful setting, the continuing education programs offered during this conference were top notch. Though I have practiced family law for 10 years, I do not profess to be a "tax expert." In fact, as I believe most family law practitioners do, my fee agreement specifically advises a client that I cannot and do not provide tax advice. While most family law practitioners are not "tax experts," attending a presentation on tax issues, such as the presentation by David Adams, CPA, Kathleen Robertson, Esq. and Mario Ventrelli, Esq., entitled "All the Things You Need to Know About Child-Related Tax Issues" at the ABA Conference, provided a great refresher for the key tips to keep in mind when drafting provisions in a stipulation, marital settlement agreement, or decree of divorce. This article will briefly summarize those tips with the goal of making us all better practitioners.

1. The Value of "Filing Status"

The choice an individual has for his or her filing status is most affected by marital status, which is determined on December 31 of each year. If an individual remains married on December 31, he or she is considered married and cannot file a tax return as a single person, though some married individuals may qualify to file as head of household. An individual's filing status can have great impact upon his or her overall tax liability for a year.

The ability to file a tax return as "head of household" confers upon an individual a higher standard deduction and lower tax rate than if the same individual filed a "single" tax return or a "married filing separately" tax return. In addition to these benefits, filing as head of household will allow the filing party to be treated as a "single" taxpayer for purposes of capital loss carryovers and for mortgage interest deduction limitations. For parents of minor children engaged in divorce discussions, careful planning and knowledgeable discussion can serve to confer the most favorable filing status upon each parent, reducing the overall tax implications upon the family, and freeing up more money for use by the children.

The general requirements to file as head of household can be found in IRS Publication 501 (2013) and include being unmarried, subject to an order of legal separation, or widowed at the end

(cont'd. on page 19)

Tax Considerations

cont'd. from page 18

of a tax year. The filing individual must pay at least one-half the costs of maintaining a household, must share the home with one, or more, qualifying individual for at least half of the year, and the filing individual cannot be a nonresident alien at any time during the tax year.

A "qualifying child" for the purposes of determining whether an individual may file as head of household has been defined by the IRS as a tax payer's child or sibling (including step relationships) or descendant of child or sibling with whom the individual has had the same principal place of abode for more than half of the year. The qualifying child must be under the age of 19 (24 if attending school), and younger than the tax payer. Finally the qualifying child must not have provided more than one half of his or her own support for the calendar year. Consideration should also be given to other qualifying individuals, such as if the tax payer is providing support for a parent or other family member that would otherwise meet the criteria explained above.

Individuals who remain married on December 31 can still qualify to file a head of household tax return if the individual files a separate return from his or her spouse (i.e., filed married filing separately), the taxpayer maintains as his or her home a household that for more than one half of the year is the principal place of abode of a dependent child, the taxpayer furnishes over one half of the cost of maintaining the household, and during the last six months of the year, the tax payer's spouse is not a member of the tax payer's household.

Family law counsel should be aware that unlike the ability to claim the child dependency exemption, divorced parents cannot confer upon a non-custodial parent the right to file a tax return as head of household. An individual tax payer either meets the criteria for this filing status or they do not. There is no in-between. In my office, when attempting to confer head of household status upon both parents, we will include language recognizing the parents' agreement to share joint physical custody of their children in the settlement documents and will clarify that child #1 shall reside in mother's home for at least 183 days each year, while that same child will reside in father's home for no more than 181 days each year. The same in reverse will be stated for child #2. Additionally we suggest that each parent maintain accurate records reflecting he or she paid more than half the cost of maintaining a household for his or her qualifying child and a log to record when such child actually resides with that parent. Thus far we have not had a client experience an issue with the IRS when supporting his or her filing status in this manner.

2. Utilizing the Child and Dependent Care Credit

The child and dependent care credit is often referred to as the daycare credit. IRS Publication 503 (2013) establishes the criteria for a taxpayer to receive this credit that is intended to help offset some of the costs that are paid for the care of children or other dependents who are under age 13 whose parents work or attend school. The ability to utilize this credit is income determinative. For 2013 families with income below $15,000 qualify for a full 35 percent tax credit of qualifying child care expenses (up to $3,000 of expenses for the first child and up to $6,000 of expenses for two or more children). That rate falls by 1 percentage point for each additional $2,000 of income (or part thereof) until it reaches 20 percent for families with income of $43,000 or more.

3. Utilizing the Child Dependency Exemption Allowance

The child dependency exemption is not a tax credit. It is a personal exemption that can be claimed by a tax payer for each qualifying child that serves to reduce the household's overall tax liability. IRS Publication 17 (2013) sets forth the current amount of the individual exemption as well as the requirements of a "qualifying child." A

(cont'd. on page 20)

Tax Considerations

cont'd. from page 19

qualifying child cannot file a joint return, must meet all citizenship requirements, has had the same principal abode as the tax payer for more than 50 percent of the year, does not provide to his or her own support, and has not attained the age of 19 (24 for full-time students). For 2013 the individual exemption is $3,900, but this is subject to phase out and partial loss if a tax payer's adjusted gross income is more than a certain amount. For 2013, this threshold amount is $150,000 for a married individual filing a separate return; $250,000 for a single individual; $275,000 for a head of household; and $300,000 for married individuals filing jointly or a qualifying widow(er).

Unlike the "you have it or you don't" situation for the various other tax related issues discussed above in this article, the child dependency exemption allowance can be shifted by agreement from the custodial parent to the non-custodial parent provided certain criteria are met. Typically, the exemption is the right of the parent with primary legal or physical custody. Physical custody for the IRS is determined based upon which parent has the greatest number of overnights (a clearly defined standard). However, a non-custodial parent can claim the dependency exemption if the child received more than 50 percent of his or her support from both parents, the child is in the custody of one or both parents for more than one half of the year, the parents are divorced or legally separated, separated under a written separation agreement, or who lived apart during the last six months of the calendar year, and the custodial parent releases the dependency exemption by completing IRS Form 8332. This form must be attached to the non-custodial parent's tax return. When this is contemplated it is good practice for the divorcing parties settlement agreement or decree of divorce to include a specific provision indicating the transfer of the child dependency exemption has been agreed upon and a date by which the custodial parent shall execute IRS Form 8332. This transfer may be for a single year or multiple years, including all future years. IRS Form 8332 must be filed even if language conferring this transfer is set forth in the settlement or divorce documents. Should the parents' agreement ever change a new IRS Form 8332 must be filed revoking a previous release of the exemption by the custodial parent.

4. Utilizing the $1,000 Per Child Tax Credit

Through 2017, individuals filing a federal tax return may claim a $1,000 tax credit per qualifying child provided his or her modified adjusted gross income is under the threshold established by the IRS. IRS Publication 972 (2013) establishes this threshold for the current tax year at $110,000 for tax payers filing a married filing jointly return, $75,000 as a single, head of household, or qualifying widower tax return, and $55,000 when filing a married filing separately tax return. For the purposes of this tax credit a qualifying child is defined as a child under age 17 at the end of the tax year, who meets the definition as the taxpayer's qualifying child for purposes of utilizing the dependency exemption, and is the tax payer's dependent. This tax credit goes hand in hand with the child dependency exemption. The parent who takes the former is the only parent able to claim this credit.

Biography:

Katherine L. Provost practices with The Dickerson Law Group in Las Vegas, Nevada. She is a Certified Family Law Specialist and regularly lectures on various family law topics throughout the state. In addition to being holding memberships in the Nevada bar, American Bar Association Family Law Section, Clark County Bar Association, and Nevada Justice Association, Katherine presently serves as the Vice-Chair of the State Bar of Nevada Family Law Section Executive Council. Katherine is a contributing author to the *Nevada Family Law Practice Manual* (Third Edition) updating the chapter on Preliminary Matters and Motions and authoring the publication's first chapter on Military Divorce. Prior to joining the Dickerson Law Group Katherine worked as a law clerk in the Family Court of the Eighth Judicial District Court of Nevada. She is a graduate of Seton Hall University School of Law and has received recognition in the field of Family Law as a Rising Star by Super Lawyers and for her contributions to pro bono service by the Legal Aid Center of Southern Nevada.