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NEVADA FAMILY LAW REPORT
Volume 8, Number 3
Fall, 1993

Herz v. Gabler-Herz: Wealth as a Proper Consideration in Setting Child Support Award

Bruce I. Shapiro, Las Vegas, Nevada

In a recent issue of *Inter Alia*[1] attorney Ronald F. Logar criticized the Nevada Supreme Court for its decision in *Herz* v. *Gabler-Herz*.[2] Mr. Logar's criticism was premised on his opinion that the Nevada legislature, in adopting NRS 125B.070 and 125B.080 "intended any deviation [from the statutory guidelines to] be based primarily upon need, as opposed to the wealth of the payor, or any other factor."[3] Mr. Logar also criticized the Court for its failure to require specific findings of fact to justify a deviation from the statutory sum.[4]

This article is intended to provide a brief history of the Nevada Legislature's adoption of Nevada's child support guidelines and an analysis of the Supreme Court's holding in *Herz*. This article concludes that the Supreme Court's decision in *Herz* was justified, but that the Court should have required the trial court to justify its deviation with specific written findings.

Facts of *Herz*

In *Herz* v. *Gabler-Herz*,[5] appellant, the noncustodial parent, argued that the district court abused its discretion in awarding child support in the amount of $1,000.00 per month, per child, for two children. Appellant argued that, pursuant to NRS 125B.070, a district court may not award child support in excess of $500.00 per month, per child, without proving that the additional amount is necessary to meet the child's needs.[6] The Nevada Supreme Court upheld the district court's award based on the findings that the award was "fair and equitable" due to the "vastly different incomes and the financial resources of the parties and the amount of time each parent spent with the children."[7]

Legislative Background of Child Support Statute

The Child Support Enforcement amendments of 1984 required all states to develop advisory mathematical guidelines to calculate child support awards by October 1, 1987.[8] As a result, in 1987 the Nevada Legislature enacted NRS 125B.070 and 125B.080, which were modeled after Wisconsin's percentage of income formula.[9]

The Family Support Act of 1988 created a rebuttable presumption that the

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NEVADA FAMILY LAW REPORT is a quarterly publication of the Family Law Section of the State Bar of Nevada.
Subscription price for non-section members is $35 payable in advance annually from January 1 to December 31. There are no prorations.
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, Fall, 1993, at _____.
Nevada Family Law Report is supported by the Family Law Section of the State Bar of Nevada and NFLR subscriptions.

From the Editor

by Marshal S. Willick

Nevada's State Delegate to the ABA House of Delegates, Jim Jimmerson, has again taken the time and trouble to send out notices of ABA positions taken at the last annual meeting. The Family Law matter acted upon was approval of a resolution opposing legislation restricting discovery of mental health professionals' records, including raw test data (this was a topic of debate at the Tonopah Showcase two years ago).

Bits and Pieces

The Nevada Family Practice Manual project is well underway, but there are a few areas where an additional contributing author would be welcome. If you would like to volunteer, please contact Editor In Chief Judge John McGroarty at 455-3306, or Managing Editor Marshal Willick at 384-3440.

The Section is sponsoring new semi-monthly (in the South) or quarterly (in the North) meetings for the purpose of giving the domestic relations Bar an opportunity to give feedback to the bench, and for the purpose of fostering professionalism, permitting social interaction outside the court room, and allowing a forum for staying up to date on the procedure and substance of Nevada family law. The Section has now grown to a point where this sort of ongoing dialogue should be useful to all and self-sustaining. Recommendations on how to proceed and what topics should be addressed should be directed to Mary Ann Decaria in Reno (322-3223), or Rhonda Mushkin in Las Vegas (388-0617). The first Southern meeting will be held November 9 at noon in the court house jury room.

Letters to the Editor

Dear Editor:

I read with interest Cheryl Schorr's article in the Summer 1993 *Nevada Family Law Report* entitled "Stepparent Custodial/Visittion Rights." While her article seems well thought out and well-researched, it neglected one primary force in domestic relations law in the State of Nevada; that is, the principles of statutory construction. The Nevada Supreme Court repeatedly relies quite strictly upon the statutes and the exact wording of those statutes in making determinations with respect to family law in the State of Nevada. For example *Hoover v. Hoover, Barbagallo v. Barbagallo, Heim v. Heim, Herz v. Herz*, etc.

Clearly, the domestic relations statutes in the State of Nevada give stepparents no greater rights than any other non-related third person. Consequently, until the legislature accords stepparents additional rights, the simple fact of the matter is that they have no statutory right to visitation and on the issue of custody they are relegated to the lowest order of preference as "any other person" NRS 125.480(3)(d). consequently, I believe it would be a great disservice for any attorney on the basis of Ms. Schorr's letter to lead a client to believe that they had some particular right to a child for custody or visitation purposes on the basis that they are or were a stepparent.

Victor Lee Miller, Esq.

Herz from page 1

guidelines represent the proper child support award and that a deviation from the guidelines will be allowed only upon a written finding that application of the guidelines would result in an unjust or inappropriate mathematical award.[10] These federal laws recognized the need for more realistic and equitable child support awards which would provide children with a standard of living comparable to that of their noncustodial parent.[11]

The congressional mandate for 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 described as:

1. A shortfall in the adequacy of child support orders when compared with the true costs of rearing children, as measured by economic studies;
2. Inconsistent orders causing inequitable treatment of parties in similarly situated cases; and
3. Inefficient adjudication of child support awards in the absence of uniform standards.[12]

Philosophical Basis for the Duty of Support

There is an equal duty of both parents to contribute toward the support of their children in proportion to their respective incomes.[13] The needs of a child are in part determined by the income level of the parents and the ability of each parent to contribute support in proportion to his or her income level.

The presumptive amount of child support paid by the noncustodial parent is generally not expected or intended to literally meet one-half of the child's needs. Rather, the contribution of the noncustodial parent is implicitly matched by equal or greater expenditures in the home of the custodial parents. The percentage of income approach reflects a public policy that, after a family separation, parents should spend on their children the approximate percentage of income that they would have had the family stayed intact.[14] The statutory sum considers the child's needs, as well as the income that each parent should contribute to the financial responsibility of his or her child. The guidelines, at least in part, are based on the benefit a child will enjoy by receiving a fair portion of the noncustodial parent's income. Since the custodial parent spends all of his or her income on a combined parent-child household, it is assumed that at least the same percentage will be spent on the child by the noncustodial parent.

The Wisconsin percentage of income presumption generally does not consider the income of the custodial parent. It presumes that the custodial parent will spend the same percentage directly on the "basic needs" of the child as the noncustodial parent is assessed for child support.[15]

In reality, the proportion of income contributed by the custodial parent to the child's needs may well be greater than that contributed by the noncustodial parent through the support award. The original data upon which the Wisconsin guideline was based showed that, on the average, an intact two parent household spend 25% of both parents' incomes for the care of one child. To reflect that data, drafters originally proposed a guideline imposing a support obligation of 25% of gross income for one child.[16] Politically, however, the 25% figure was viewed as too burdensome. Through political compromise, the lower figure contained in NRS 125B.070 was adopted.[17] This political process was evident in Nevada whereby, through compromise, the legislature increased Wisconsin's presumptive amount by one percent to 18% for one child.[18]

Purpose and Effect of Statutory Maximum

It may be concluded that the presumptive maximum was an implied legislative conclusion that the basic needs of a child would be met by the time the $500.00 per month, per child in support was paid and that the statute was designed to meet only those needs. The structure of the statute, however, appears to have been designed to facilitate a child sharing in the comparative wealth of a parent.[19] This conclusion is supported by the *Herz* decision as well as *Chambers* v. *Sanderson*.[20]

The presumptive maximum level of support is a primary concern to those payors who are relatively well off or to those that have the fewest children. The statutory presumptive maximum, like the statutory minimum, has a differential impact on persons at different income levels depending of the number children involved. The ceiling becomes a factor with one child once the payor's income reaches $33,335.00 per year; for two children, $48,000.00; for three children, $62,100.00, and for four children, $77,450.00.[21]

The practical effect of the ceiling is to impose the same child support obligation on a group of payors across a variety of income levels. The payor with an annual income of $35,000.00 to $50,000.00 is more likely to benefit from the application of the ceiling than the payor with an income of $50,000.00 to $100,000.00 per year, because it is more likely that in the latter range that a court would find grounds to exceed the presumptive maximum.[22] Thus, children with noncustodial parents earning income greater than $35,000.00 are being denied the benefit of additional income. Further, it should be noted that inflation since the passage of the original legislation is sufficient cause for change in and of itself; the ceiling would have to be raised to $608.35 to have the same effect it had in 1987 when the maximum was adopted.[23] Based on the above referenced factors, it has been suggested that the presumptive ceiling be raised from $500.00 to $1,000.00 per month, per child.[24] Without the appropriate supporting economic data, however, it seems a maximum of $1,000.00 would be as arbitrary as $500.00.

Analysis

Herz suggested that factors other than need may be properly considered in exceeding the presumptive ceiling, but the opinion does not indicate what other factors might be appropriate. Under its own facts the case suggests that disproportionate wealth is one factor. The Court further indicated that the amount of time that the child spends with each parent was

a factor to be considered in exceeding the statutory presumption. Implicitly, the factors set forth in the Court's opinion in *Barbagallo* v. *Barbagallo*[25] are also relevant to the determination of child support.

Herz clearly implies that a purpose of the child support statute is to permit a child to share in the standard of living enjoyed by each parent. In *Chambers* v. *Sanderson*,[26] the Supreme Court criticized the trial court for incorrectly assuming that support in excess of $500.00 can only be awarded on a showing that the needs of the particular child are not met by that sum. *Chambers* clearly indicates that the Court believes it appropriate for a wealthy noncustodial parent to pay more in child support than a less affluent parent. One may reasonably infer that the statute has a standard-of-living-maintenance purpose, or at least an income-sharing purpose, rather than solely a meeting-of-the-needs purpose.[27]

The noncustodial parent in *Herz* apparently did not argue his inability to pay the support obligation ordered or that the support would not directly benefit the child.[28] The noncustodial parent was a millionaire whose income was determined by the court to be $9,800.00 per month and who had assets of 2-3 million dollars.[29]

Conversely, it may be argued that the noncustodial parent's income has already been properly factored into the analysis by utilization of the graduated schedule. It is his income that has caused support to max out at $500.00 per month, per child.[30] Under this theory, the purpose of the maximum or cap is self evident: the legislature determined that, as a noncustodial parent's gross monthly income reaches a certain level, it no longer makes sense to compute the child support award on the percentage basis.[31] It may be argued that the legislature decided a court should not award an amount of child support in excess of that provided by the graduated schedule, absent a showing than an additional amount was actually needed.[32] A literal reading of NRS 125B.080(5) may support this theory.

It may also be argued that the statutory cap was in part adopted for the purpose of avoiding an award of de facto spousal support to the custodial parent.[33] There is an unavoidable tension between maintenance of a child's standard of living and partially subsidizing the custodial spouse's standard of living. Penalizing the child, however, by keeping support awards low enough that the former spouse would not benefit is the greater of these two evils. Further, most expenses of child rearing are commingled with expenditures benefiting the entire household. May one reasonably expect a court to determine a child's proportionate share of a three bedroom home, transportation of the child to and from school, the child's food, or other expenses?[34]

The intent of the presumptive guidelines was to make the presumptive amount binding absent specific findings justifying a deviation. Nevertheless, the underlying purpose of the child support statute must be looked at before the assumptions may be made. In light of the federal mandate, a review of NRS 125B.070, and the legislative history of Assembly Bill 424, it is clear that the intent of the child support statute was to alleviate the national disgrace of inadequate child support of minor children and not to protect affluent fathers by minimizing child support.[35] Prior to enactment of the guidelines, child support awards were so low that many children and custodial parents were thrust into poverty or suffered a substantially lower standard of living while the noncustodial parent enjoyed a higher standard of living.[36] It is not argued that children should not share a lower standard of living if the parent's separation results in a lower standard of living for both of the parents. Rather, if the standard of living of one or both of the parents should be enhanced subsequent to the separation, the children are entitled to a portion of that enhancement.

The statutory formula is a means of calculating child support so as to maintain the standard of living that a child would have had if the parents had not terminated their relationship.[37] A child's needs, however, contemplates their continual maintenance at the standard of living they have become accustomed to prior to the separation; the supported child is entitled to more than bare necessities.[38] The needs of a child include the "'comforts and luxuries of life that the child would have enjoyed' if not for the dissolution of the relationship"[39] All of the circumstances of the parents must be considered as well as the needs of the child.[40] Child support is not just intended solely to prevent a child from reaching poverty. "Need" has never been interpreted by the Nevada Supreme Court to mean destitution or literal need.[41] The basic needs of a child differ with parental income, and parents spend more on children as they earn more.[42] The concept of a statutory cap is not consistent with this principle.

Is it not an injustice to order a noncustodial parent with an income of $100,000.00 per year to pay the presumptive support amount of only $500.00 per month irrespective of what the child's needs may be? Exceptional circumstances surely include a $100,000.00 per year salary and 2-3 million dollars in assets as the obligor had in *Herz*.[43] As a matter of common sense, a child's needs are greater when a parent earns a greater income.

One possible approach is to make the matter one of evidentiary burdens. The statutory ceiling could be eliminated except in those cases where the payor can prove that its application would not alter the life-style of the child. This would have the effect of eliminating application of the ceiling in the majority of cases, while maintaining the Wisconsin approach. The legislature, however, must express its priorities. This proposal would be reasonable if the primary purpose of the statute was to maintain the child's standard of living rather than protecting payors from subsidizing their former spouses. For example, the statute may provide that the ceiling would not be applicable for payor incomes above $60,000.00 and for these cases a traditional case-by-case analysis would be utilized.[44]

Specific Findings of Fact

The implementation of guidelines as a rebuttable presumption requires a court to apply the guidelines unless the result would be inequitable to the parties or children, in which instance, reasons for the deviation must be stated on the record.[45] NRS. 125B.080(6) requires the court to set forth specific findings of fact as the basis for the deviation from the formula. The basis for the deviation must

be found in unfairness or injustice in applying the formula.[46]

A valid criticism of the *Herz* decision is the court's failure to require specific findings of fact when the presumption was deviated from. Initially, the original draft of N.R.S. 125B.080 required a court to set forth written findings if the award deviated by five percent either higher or lower than the formula's presumptive amount.[47] The five percent provision was deleted from the final version of N.R.S. 125B.080, symbolizing the legislature's conviction that *any* deviation from the formula should be justified. The intent of the statutory presumption was to make the presumptive amount binding absent a judicial finding of "exceptional circumstances."[48]

It is not argued that a court should not have discretion to make justified deviations from the statutory formula. It is certainly appropriate to permit deviations in truly unique cases.[49] Such deviations, however, should not be made routinely and premised on arbitrary "equity" principles. Moreover, when large numbers of cases are exempted from the application of the guidelines, the purpose and goal of the formula is undermined. It is argued that N.R.S. 125B.080(6) was intended to narrow a court's discretion and should be interpreted as requiring a mathematical or an objective basis for a deviation. Although the Supreme Court has not mandated an objective standard for deviation from the formula, the Court has clearly narrowed the discretion of lower courts to deviate from the formula.[50]

Specific findings of fact are, in part, required so that the parties may understand the "justice" of the support award; the parties understanding of the support award may lead to fewer appeals. There should be a requirement that any deviation have a direct relationship to the circumstance that the deviation is purportedly being based on. For example, if a court is going to make a reduction based on the cost of transportation incurred by the noncustodial parent, the actual cost of transportation should be used to calculate any reduction in the support award, rather than simply giving an arbitrary reduction of $100.00 per month.[51] Conversely, any increase should also be based on specific findings. Although it is argued that the holding in *Herz* properly considered the noncustodial parent's substantial income as a proper basis for deviating from the formula, a relationship between the income and the award must be required. A court must be able to justify and substantiate its award with the factors contained in N.R.S. 125B.080(9) and should not have unfettered discretion in setting child support.

Conclusion

If the child support statute was meant only to meet the child's basic needs and not provide for maintenance of the child's standard of living, than the legislature must specifically override the decisions of *Herz* and *Chambers*. The Nevada Supreme Court's holdings in *Herz* and *Chambers* is supported by the legislative history of the child support statutes. It is also clear that recent Supreme Court decisions have narrowed the discretion of the lower courts in deviating downward from the statutory sum while *Herz* and *Chambers* apparently expand the lower courts' discretion in deviating upward from the statutory sum. Alternatively, it may be desirable to make the issue one of evidentiary burden by raising the presumptive ceiling or making the presumption inapplicable when income exceeds a specified amount. In any event, the Supreme Court should give effect to NRS 125B. and require the lower courts to clearly substantiate any deviations from the formula.

Notes

[1] *Wealth, A Substitute For Need, A Critical Look At Gabler-Herz*, April, 1992, page 8 [hereinafter "*Wealth*"].

[2] 107 Nev. Ad. Op. 20, 808 P.2d 1 (1991).

[3] *Wealth*, at 9.

[4] *Id.* at 11-12.

[5] 107 Nev. Ad. Op. 20 (1991).

[6] *Id.* at 1.

[7] *Id.* at 2. *See* NRS 125B.080(9) (l) and (j), respectively. It is a well established rule that the amount of child support is a matter within the trial court's discretion and that such determinations will not be disturbed on appeal unless there is shown to be a clear abuse of discretion. *Adkins* v. *Adkins*, 50 Nev. 333, 259 P. 288 (1927); *Laird* v. *Laird*, 93 Nev. 687, 572 P.2d 523, 543 (1977). Findings of fact by a trial court will not be set aside unless they are clearly against the weight of the evidence and without reasonable support therein. *Fenkell* v. *Fenkell*, 86 Nev. 403 (1970).

[8] Pub. L. No. 98-378, §18, 98 Stat. 1305, 1321-22 (Codified at 42 U.S.C. § 667 (1987)).

[9] *See* Nevada Child Support Enforcement Commission Minutes, June 23, 24, 1986, page 3.

[10] Pub. L. No. 100-485, 102 Stat. 2343 (Codified at 42 U.S.C.A. §669 (Supp. 1989)).

[11] *Id.*

[12] *See* H. Rep. No. 527, 98th Cong., 1st Sess. 49 (1983). *See also* Williams, *Guidelines For Setting Levels of Child Support Orders*, 21 Fam. Law Quart. 281, 283 (1987); Advisory Panel on Child Support Guidelines, Development Guidelines For Child Support Enforcement, National Center For State Courts I-3, 4 (1987) (hereinafter "Advisory Panel".); *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. Dept. 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*, U.S. Dept. of Health and Human Services (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. 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).

[13] *See* NRS 125B.020(1). *See generally* Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J. Fam. L. 807 (1988-89).

[14] *See* Nevada Commission On Child Support Enforcement, presented to Governor Richard H. Bryan, October, 1983; Uniform Marriage and Divorce Act 309, 9A U.L.A. 167 (1979). *See also Treatment, supra* note 12.

[15] *See* Williams, Development of Guidelines For Child Support Orders, Report To The U.S. Office Of Child Support Enforcement, National Center For State Courts, Sections II and III; Wis. Stat. Ann. 767.25(1) (West 1987). *See also supra* note 2.

[16] Espenshade, *Investing In Children: New Estimates of Parental Expenditures* (1984).
[17] *See* Skyless and Zink, Child Support In Wisconsin: Income Sharing As A Standard Of Law, Women's Legal Defense Fund, Critical Issues, Critical Choices: Special Topics In Child Support Guidelines Development (1987). *See also supra* note 12.
[18] *See* Nevada Child Support Enforcement Minutes, June 16, 17, 1986, page 6, Legislative History.
[19] Child Support Statute Review Committee Report, August 1, 1992 (hereinafter "Committee Report") at 15.
[20] 107 Nev. Ad. Op. 132 (1991).
[21] Committee Report at 16.
[22] *Id.* at 16-17.
[23] Committee Report at 17, using the Consumer Price Index for All Urban Consumers, per the U.S. Department of Labor, Bureau of Labor Statistics.
[24] Committee Report at 20.
[25] 105 Nev. 546, 779 P.2d 532 (1989).
[26] 107 Nev. Ad. Op. 132 (1991).
[27] Committee Report at 18.
[28] Respondent's Opening Brief at 2.
[29] *Id.* at 6.
[30] *Id.* at 15.
[31] *Id.* at 3.
[32] *Id.* at 4.
[33] *Id.* at 11.
[34] Williams, *Guidelines For Setting Levels of Child Support Orders*, 21 Fam. Law Quart. 281, 287 (1987).
[35] Respondent's Opening Brief at 10. *See also supra* note 12.
[36] According to one study, the post divorce standard of living for the custodial parent and the children falls by 73% while the noncustodial parent's standard of living increases by 42%. Brackney, Battling Inconsistency and Inadequacy: Child Support Guidelines In The States, 11 Har. Woman's L. J. 197, 199 (1988). *See also* L. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences For Woman and Children In America 339 (1985). *See also* note 12.
[37] *See Advisory Panel*, I-3, *supra* note 12.
[38] *Id.*
[39] *Smith* v. *Smith*, 626 P.2d 342 (Ore. 1981).
[40] *Id.* at 221. "The parents of a child have a duty to provide the child necessary maintenance, health care, education, and support." NRS 125B.020(1).
[41] *See Engebretson* v. *Engebretson*, 75 Nev. 237, 338 P.2d 75 (1959); *Sargeant* v. *Sargeant*, 88 Nev. 223, 229, 495 P.2d 618 (1972).
[42] Williams, *Guidelines For Setting Levels of Child Support Orders*, 21 Fam. Law Quart. 281, 288 (1987).
[43] Respondent's Opening Brief at 6.
[44] *See* Committee Report at 19-20.
[45] *See Barbagallo* v. *Barbagallo*, 105 Nev 546 at 552.
[46] *See Barbagallo* v. *Barbagallo*, 105 Nev. 546, 779 P.2d 532. *See also Advisory Panel* at I-7, 13; *Lewis* v. *Hicks*, 108 Nev.__, __ P.2d __ (Nev. Ad. Op. 173 December 22, 1992).
[47] *See* Nevada Legislative History, 87-89, A.B. 424 of the 64th Session, Child Support at 77.
[48] *Barbagallo* v. *Barbagallo*, 105 Nev. 546, 779 P.2d 532, *supra*; *Lewis* v. *Hicks*, 108 Nev. __, P.2d __ (Nev. Ad. Op. 173, December 22, 1992) *supra*; *Advisory Panel*, *supra* I-7.
[49] See Goldfarb, *Child Support Guidelines: A Model For Fair Allocation of Child Care, Medical, And Educational Expenses*, 21 Fam. Law Quart. 335 (1987).
[50] *See Hoover* v. *Hoover*, 106 Nev. 388, 793 P.2d 1329 (1990); *Barbagallo* v. *Barbagallo*, 105 Nev. 546, 779 P.2d 532; *Lewis* v. *Hicks*, 108 Nev. __, __ P.2d __ (Nev. Ad. Op. 173, December 22, 1992).
[51] If the cost of transportation is $600.00 per year, than it would proper to give the noncustodial parent an offset of $50.00 per month. It is submitted that any reduction should have a direct relationship to the factor being considered. A court should simply find that there is a transportation expense involved and give an offset in an arbitrary amount.

Case Summaries

Nevada Supreme Court Appellate Judgment, Order and Settlement Reports

Family Court Cannot Make Trust Pay, Then Make It a Party to Allow Appeal

Gladys Baker Olsen Fam. Trust v. Olsen, 109 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 128, Aug. 25, 1993) Family Court (Fine) entered order "substantially and adversely" affected the trust in ongoing efforts by wife to enforce spousal support provisions. Court basically ordered turnover of assets to former wife, and various administrative changes. Court allowed intervention by Trust under NRCP 24 for purpose of allowing Trust to appeal under NRAP 3A(a). Supreme Court dismissed appeal, claiming no authority in district court to allow post-judgment intervention to appeal an order already entered; court's allowance of intervention was beyond its jurisdiction. Therefore, appeal must be dismissed. probably, little effect from dismissal, since Trust allowed to petition by extraordinary writ for same relief.

Family Court Reports

Knowing what is happening at the trial level in Family Law will help all of us to be better practitioners. Please share with the Section what is happening in any case you think is significant, either because it typifies rulings in an area, or appears to be contrary to normal rulings in that area.

Master may not use past hearing information to reach decision.

Newsome v. D'Anjou, 4/26/93, Clark County, Dept. C, Hon. Steven Jones, #D152014. Submitted by Marshal S. Willick

Custody: Where Paternity Master had relied in part on newspaper article ready by Master after case was argued and the standard of Murphy (84 Nev. 710, 447 P.2d 664(1968)) was not applied despite the existence of an earlier custody order, recommendation of custody to father vacated and remanded to Master for new evidentiary hearing.

Filing abortive Joint Petition constitutes submission to prior jurisdcition of court.

Arthur v. Arthur 5/7/93, Pre-Trial Motion, Douglas County, Dept. 2, Hon. Norman Robison, #29564. Submitted by Mary Jo Hart

Procedure: Wife resident of Nevada 1990-93. Husband resident of California.

Parties married in 1976 in Nevada, honeymooned in Nevada for one week. Parties resided in California prior to September. In 1993 (January, approximately), husband comes to Nevada requests wife to file Joint Petition for Divorce in Douglas County with aid of paralegal. Husband then learns in Nevada community ends date of divorce (in California community ends date of separation). Husband requests Nevada counsel to file Notice of Revocation of Joint Petition. Wife files another complaint and personally serves husband in California. Husband files for divorce in California and has wife personally served in Nevada. Husband files Motion to Quash Service of Process in Douglas County, Nevada.

Wife files Motion to Stay California proceeding until Nevada Douglas County Court rules on Motion to Quash. Sacramento Superior Court agrees to stay California proceeding pending Nevada's decision.

Douglas County Court denies husband's Motion to Quash holding that "Defendant submitted himself to jurisdiction when he filed Joint Petition for Summary Divorce. . . [facts] . . . meet the due process requirements that there exist sufficient contacts between husband and the forum relevant to the cause of action to satisfy "traditional notions of fair play and substantial justice." Mizner 84 Nev. 268.

A little lie is big enough to deny permission to move.

Neitzke v. Neitzke, 4/26/93, Post-Trial Motion, Clark County, Hon. Terrance Marren. Submitted by Ishi Kunin.

Motion to Relocate: Custodial parent desired to move out of state because 1) family support and 2) constant harassment of ex-spouse. Evidence showed ex-spouse to be passive/aggressive and "push custodial parents' buttons." But custodial parent was found to have lied about a small issue regarding initials placed on an envelope. Court found if it couldn't trust custodial parent on small issues, how could it trust parent in maintaining contact once out of state.

Spousal Abuse is ok reason for relocation order.

May 21, 1993, Trial/Settlement, Washoe County, Hon. Scott Jordan

Divorce, after four year marriage. One child, two years old. Mom had temporary custody, and had obtained a Temporary Protective Order, which she claimed was repeatedly violated. Mom sought to move to Massachusetts with the child; dad sought a change in primary custody if mom wanted to remove the child. Turning to *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991), the court identified two factual detrminations critical to the case. First, the court found on conflicting evidence that the court could take judicial notice of the "battered woman's syndrome" as a valid paradigm of behavior, and that both parties' behavior fit the paradigm well enough that the court concluded that the husband was abusive and controlling, and that the syndrome accurately described the dynamics of their relationship. The court found 19 separate violations of the Temporary Protective Order.

Since all agreed that mom had been the child's primary caretaker to date and was fit to continue doing so, mom was awarded primary custody. Grounds included dad's abusive conduct, the history of mom as primary caretaker, and dad's motive in seeking primary to prevent mom's departure from the state with the child.

Move request granted. Offer in Massachusetts of grandparental assistance with childcare and support, plus "the primary benefit" of removal from dad's "interference and abuse." Benefit to mom obvious; benefit to child is to be freed from being in the middle of active conflict; "there is no longer any question that children of abusive relationships suffer wevere emotional harm by virtue of the violence and conflict going on around them." Threshhold of "good faith" motive in move found due to legitimacy of desire to get away from abuser, rather than to frustrate visitation. *Schwartz* laundry list of factors gone over; despite significant impact on relationship between father and two-year-old son, move considered on balance to be in child's best interest.

Articles, Case Summaries Wanted for NFLR

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FAMILY LAW SECTION

The mission statement:

THE MISSION OF THE STATE BAR OF NEVADA FAMILY LAW SECTION IS TO SERVE AS THE LEADING FORCE IN THIS STATE FOR THE PROFESSIONAL AND ETHICAL ADVANCEMENT OF POLICIES, PROCEDURES, AND ACTIONS IN THE FIELD OF MARITAL AND FAMILY LAW.

To accomplish its mission, the Council has adopted the following six goals for the Section:

I. TO PROMOTE AND IMPROVE THE FAMILY.

II. TO BE THE PRE-EMINENT LEGAL VOICE IN THE STATE ON MARITAL AND FAMILY ISSUES.

III. TO SERVE OUR MEMBERS.

IV. TO IMPROVE PUBLIC AND PROFESSIONAL UNDERSTANDING ABOUT MARITAL AND FAMILY LAW ISSUES AND PRACTITIONERS.

V. TO INCREASE THE DIVERSITY AND PARTICIPATION OF OUR MEMBERSHIP.

VI. TO IMPROVE PROFESSIONALISM OF ALL PARTICIPANTS IN THE ADMINISTRATION AND PRACTICE OF MARITAL AND FAMILY LAW.

Nevada Family Law Report
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