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This article is the counterpoint of the "Best Interest of Child Legislation" article by Shawn B. Meador printed in the Fall I, 1995 issue of NFLR.

WHO SPEAKS FOR THE CHILD?

Hon. Frances-Ann Fine[1]

The following scenario graphically demonstrates why the argument for parental preference over best interests must fail.[2]

"Please, Mommy, don't make me go alone. Please go with me, Mommy." The 4-year old child known to many of us as Baby Richard, whose real name we have since learned, was Danny Warburton, was sobbing so convulsively he seemed barely able to breathe. His adoptive mother was holding him, inside the home in Schaumburg, Illinois, where Danny had lived his whole life. This was just before 3:00 p.m. Sunday, April 30, 1995.

"I don't want to go." The boy tried to scream through his sobs, but the words were choking him. "Don't make me leave."

There was no way for the woman he has always known as his mother to answer him. She was sobbing, too. "We'll love you forever," she man-

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DEATH, DIVORCE, AND THE ESTATE TAX IN NEVADA

By Todd L. Torvinen

In the midst of a difficult and hard-fought divorce litigation, or in the midst of lengthy settlement negotiations between divorcing parties, few lawyers, and even fewer of their clients, think about possible United States Estate Tax consequences which may later arise from the divorce and division of property.

THE ISSUE OF DEDUCTIBILITY

A key issue which may arise upon the death of a divorced payor spouse is: If the decedent's Estate has obligations to transfer property or pay alimony or child support under a decree or settlement, are these transfers or payments deductible from the decedent's Gross Estate thus reducing the estate's exposure to the Federal Estate Tax?[1]

3 WAYS TO SUPPORT A DIVORCE-RELATED DEDUCTION FROM GROSS ESTATE

There are three distinct avenues by which a divorced decedent's estate may take a deduction for post-death divorce obligations in order to reduce the divorced decedent's Gross Estate:[2] 1) Obligations created pursuant to a decree of divorce. 2) Obligations deemed to be for adequate and full consideration(emphasis added). 3) Obligations founded upon a promise or agreement for adequate and full consideration.

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Child con't

aged to say.
"But don't make me go," he begged. "Please. Please. Don't send me away."
Seeing that his adoptive mother was unable to get any words out, that she was as devastated as he—he turned to his adoptive father, a foot away.
"You, Daddy," he called, stopping the crying for a moment, allowing himself a few seconds of hope. "You can come with me."
His adoptive father, a firefighter, dissolved into tears.
Danny's older brother—7 years old—stood, weeping, looking up at this.
Danny reached his arm toward his brother. "Come with me," Danny called down to him. "I don't want to go on the sleep over alone."
Danny's brother's face was a mask of pure agony. He took Danny's hand in his, and Danny tried to pull the older boy off the floor and up to him. "Come to the sleep over with me," Danny begged his brother. "I don't want to go to the sleep over."
Apparently this was what, in his panic and confusion, Danny was partially able to process—that he was going to a sleep over of uncertain duration at a house where he had never been. The thought appeared to terrify him. "Why do I have to have a sleep over by myself?" he said to his brother.
"I'll be good," Danny sobbed to his adoptive mother, "don't make me leave, I'll be good."

Danny, age four years, was packed and ready to be taken by a man he had never met before, his biological father, because five prevailing justices of the Illinois Supreme Court had so ordered. Those five justices decreed that he should not be permitted to have a hearing to determine — with witnesses testifying under oath — the truth about his life. The five justices had ordered that Danny be turned over to the biological father and thus to the woman who had said that he was dead — to a household the justices knew nothing about — "forthwith," They ruled that he was *not* entitled to a **best interests hearing**—that the rights of the biological father were absolute.

On April 30, 1995, Danny Warburton, who had been legally adopted in 1992, was given to his biological father, Otaker Kirchner. A man who after admitting that he never believed that his child was still born in March of 1991, waited in excess of six months, September 23, 1991, to file his Petition to Declare Paternity. A man who, since the child's birth, did not contribute to his child's care or support, emotionally or financially, though authorized to do so. A man who did not visit or even attempt to establish a parent-child relationship with this little boy although the District Court of the State of Illinois gave him that opportunity.

This privilege was in effect until May 6, 1992, when the trial court found Mr. Kirchner to be an unfit parent. Mr. Kirchner's unfitness hearing was held before Judge Eugene Wachowski on May 5 and 6, 1992. The Judge ruled by clear and convincing evidence that Mr. Kirchner had failed to demonstrate a reasonable degree of interest, concern, or responsibility as to the welfare of a newborn child during the first 30 days after birth, that he was unfit and that his parental rights were terminated; and that his consent to Danny's adoption was, by law, not required.

Not only had he failed to demonstrate any reasonable degree of interest or responsibility during Danny's first 30 days of life, but he did nothing other than manipulate the legal system during the first year of little Danny's life.

On May 13, 1992, Danny's legal adoption was finalized.

Over six months after the finding of unfitness and the finalization of the adoption, Mr. Kirchner filed his brief for appeal with the Illinois Appellate Court. (Danny was then one year and eight months old).

The Appellate Court agreed and affirmed Judge Wachowski. They said Mr. Kirchner was "not a fit person to have custody of the child," that Kirchner's statements were self-serving, uncorroborated and lacked credibility, and that it would be contrary to the **best interest of Danny** to switch parents at this stage in his life.

On December 4, 1993, when Danny was almost three years old, the Illinois Supreme Court not only granted Mr. Kirchner's appeal, but on June 16, 1994, seven months later, **overturned** the unfitness ruling of the two lower courts offering **no legal basis on which to do so.** The Court held that **the best interests of Danny should NOT be considered.**

Approximately, ten months later, with all appeals exhausted, and the adoption set aside, all parental and custodial rights of Danny Warburton were transferred to Otakar Kirchner, his biological father, who promised in the presence of a Lutheran minister that Danny could speak to the Warburtons and his brother whenever he wanted to. This promise has never been fulfilled. Of course, Mr. Kirchner says that his son has never asked to have contact. Whether you believe Mr. Kirchner, or choose to believe that Danny feels abandoned is only conjecture. The fact remains that this should never have been permitted to occur.

Quite a scenario to demonstrate that the argument for **PARENTAL PREFERENCE** over **BEST INTERESTS** must fail. Although the foregoing scenario is rare and highly dramatic, it is cases such as this that draw our attention to the devastation caused by preferring the parents interest over the child's.

The majority of cases that would utilize the standard of parental preference over best interests are cases involving the mistreatment, abuse and neglect of our young people today. Cases where children are removed from their homes due to parental neglect, such as parental drug abuse, abandonment or lack of care, and physical or sexual abuse.

The prior philosophy of the Family Court espoused the idea that families belong together. However, so often parents who could not care for their children, were allowed to do so, to the detriment of these young lives.

In 1992, the United States statistics reflected 2.9 million cases of maltreatment were made to child abuse registries or child protective agencies nationally.[3] Moreover, over 1,000 children are known to die annually as a result of abuse or neglect.[4]

This article focuses on why the standard known to the Courts as the "best interests" of the child should be the accepted standard today.

The Supreme Court of Nevada has set forth a two prong test when deciding cases involving the termination of parental rights. The first prong is labeled the "jurisdictional" ground. The second prong is the "dispositional" ground. The considerations of the first prong relates to the jurisdiction of the Court in evaluating the conduct of the parent, while the second prong focuses on the disposition which will determine the best interests of the child.[5]

The "best interest" standard allows courts to focus on the needs of the child to prevent them from remaining in families where they are likely to be subjected to continuing abuse or neglect.

Because of the sanctity of parental rights, a standard of proof of at least clear and convincing evidence is required in Nevada before a court can terminate parental rights.[6]

In 1989, the Legislature amending NRS 128.105 in response to *Champagne*, set forth the grounds for termination of parental rights.

> "An order of the court for termination of parental rights must be made in light of the considerations set forth in this section and NRS 128.106, 128.107 and 128.108, with the initial and primary consideration being whether *the best interests of the child would be served by the termination, but requiring a finding that the conduct of the parent or parents demonstrated at least one of the following*:
> 1. Abandonment of the child;
> 2. Neglect of the child;
> 3. Unfitness of the parent;
> 4. Failure of the parental adjustment;
> 5. Risk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home of his parent or parents;
> 6. Only token efforts by the parent or parents:
> (a) To support or communicate with the child;
> (b) To prevent neglect of the child;
> (c) To avoid being an unfit parent; or
> (d) To eliminate the risk of serious physical, mental or emotional injury to the child; or
> 7. With respect to termination of the parental rights of one parent, the abandonment of that parent.

[Emphasis added]. The language making the initial and primary consideration being the focus of the termination hearing was added in 1989.

The Due Process Clause of the Fourteenth Amendment of the United States

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Constitution mandates this requirement. *Santosky v. Kramer.*[7] The Constitution guarantees that each citizen shall be entitled to certain privileges and immunities.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

There is no qualification that such a citizen will be of a certain age. This law not only applies to parents in protecting their fundamental right to bear children, but also applies to those children in allowing them to be protected from parents who cannot provide and protect them.

If we believe that children are citizens and are guaranteed the rights of citizenship, then who speaks for the child? It is the obligation of the State to act as *parens patriae* if the parents are unable to so do. In that vein, if the parents are given the opportunity to rehabilitate themselves and fail to so do, then the responsibility of providing for these children cannot remain with the State, for to do so would deprive these children of permanency, security and family.

Under NRS 128.105, a lower court may terminate a parent's rights if it finds by clear and convincing evidence that the parent has abandoned the child and that terminating the parent's rights is in the best interest of the child. The Supreme Court will uphold an order terminating parental rights if substantial evidence supports the District Court's finding that both of these grounds have been established by clear and convincing evidence. *Greeson v. Barnes,*[8] and *Kobinski v. State.*[9]

By focusing on the best interest standard, a child shall have the rights guaranteed by our Constitution, and will have opportunities otherwise unavailable to him or her if mandated to remain in the care of parents unfit to raise them.

By acquiescing to a parental preference standard, the Courts may be forced to commit a child to a family where there is potential abuse and neglect without giving the child a chance to be heard. The best interests standard does not afford the child an opportunity to speak his mind in Court, but it does allow the child's needs and wants to be considered before a crucial decision is made.

The Nevada Legislature continually has the rights of children in mind. This was evident when it recently passed A.B. 177 and A.B. 302 which amend NRS 128.105, 128.106, 128.109, NRS 423B.540, and 423B.590 to again confirm and reflect the "best interests of the child standard" in termination of parental rights cases. These bills provide a presumption that parent(s) have only made token efforts to care for their child if that child has resided outside the home for 18 of any consecutive 24 month period. No months prior to January 1, 1995 may be considered, and that based upon the evidence, the "best interests of the child" will be served by the termination of parental rights.

Judge Scott Jordan, 2nd Judicial District Court, Family Division, testifying on March 21, 1995, in favor of these Bills stated that most cases dealing with termination of parental rights involve parents with addiction problems making them incapable of providing proper parental care.

Continuing, Judge Jordan indicated, there is a presumption that when a child who has been removed from the home for 18 months with no effort by the parent toward reunification, then termination of parental rights is in the best interests of the child.

It is often the case, that parents who are aware of im-pending hearings will make sporadic attempts to contact the child. Such visitation often confuses the child and sets the child up for disappointment when the parent later fails to follow through. These limited and sporadic efforts of parents cannot be construed as good faith. At this phase of the proceedings, there may be a prospective adoptive family. To interfere and disrupt the bonding process at the whim of a parent who has been unable to care for this child in the past is self-serving and unfair to the child.

Deputy Attorney General Donald W. Winne, Jr., stated there is a certain time frame where there is little or no contact with a parent. A case plan is developed. The parents appear once or twice at a hearing. No other cooperation is received in the next six months. After an additional 18 months the parents have been allowed enough time for reunification. If the parents have not accomplished reunification in this period, the parent has the burden of proving they complied with the court plan in order to be reunited with the child. The best interest of the child must be shown.

John Sarb, Former Administrator, Division of Child and Family Services, Department of Human Resources, testified in support of these Assembly Bills that there were approximately 800 children in the foster care system who had been there longer than three years. Mr. Sarb indicated this year Division of Child and Family Services received child support of approximately $1.4 million on a budget to care for children that exceeds $21 million. Of the $1.4 million received, less than $400,000 is from the parents. The remainder is from other benefits such as social security.

By not allowing the new precedent governing the time authorities must wait prior to filing Petitions to Terminate Parental Rights and hence the best interests of the child to govern, the parental preference standard will allow these children to remain, indefinitely, in foster care. If there is no oppor-tunity to terminate the parental rights, the choice for these children will be to remain wards of the State or to return to the home where the suspected abuse is likely to reoccur, and only then can the parental rights be terminated.

Children deserve a permanent, stable home environment, free from potential abuse and deprivation of their own right to liberty.

Again, the Constitution states that we cannot deprive citizens of life, liberty or property without due process of law. It hardly seems that these children are given this right when they must be abused before they can have their right to be free from such a situation terminated.

As a safety measure, A.B. 177 creates a rebuttable presumption, not a foregone conclusion, that someone would lose their parental rights if a child is out of the home in foster care for 18 of the past 24 months. This presumption can be rebutted by evidence that the parent was ill or incapacitated for those 18 months. This law puts

parents on notice that they have only a certain amount of time to get their lives in order and regain custody of their children, or they will lose them for good.

Barry S. Frank, M.D., Director of Pediatric Intensive Care Unit, Washoe Medical Center, testifying in support of A.B. 177 stated that he has, annually, seen 150 to 200 deaths of children due to some form of abuse. He urged the judges be given the tools to make rational caring decisions. Dr. Frank read the following quote, "The death of a child is the single most traumatic event in medicine. To lose a child is to lose a piece of yourself."

By placing parents on notice, the best interests standard recognizes that there is a constitutional right to parent, however, it also notes that this right can be lost if it is no longer deserved. Supporters of these new laws believe that the State makes a lousy parent. This is not to suggest that simply because the State is not the best custodian of our children, that every parent's rights should be terminated so they can leave foster care for a family who will love and care for them. The thrust of this argument is simply to protect children from being forgotten in a system has little or no tools to prevent such devastation as was wreaked in little Danny's case.

The child deserves the right to have a positive family experience when one is available without bending over backwards to find that a parent is unfit in the eyes of the law before we allow this child to be free. "Unfit" is a vague term, and is sometimes colored by the sporadic attempts of the parent to be drug-free and to exercise their visitation. However, by focusing on the best interests of the child, we protect the child's constitutional rights in making decisions of lifelong impact. Under this standard, the Courts will retain the tools to be a sympathetic dispenser of justice. To do otherwise, ties the hands of the judges and forces them to apply the letter of the law — even if it places a child in danger of losing his liberty, or even his or her life.

In conclusion, though Nevada may suffer from numerous maladies, we can be proud of our Legislature. Since 1984 they have imposed safeguards to provide for the best interests of the child, and in recent times they continue to monitor and provide for a child's best interest by establishing parameters as to how long a child must wait before there is finality, security and stability.

Such foresight may prevent the disaster that occurred in Illinois to little Danny Warburton from occurring in our State.

Notes

[1] The author gratefully acknowledges the assistance of Michelle Abrams, Judicial Law Clerk, in preparing this article.

[2] The text included is an excerpt from a recent issue of ULTIMATE ISSUES, "Blood versus Love", Vol. 11, No. 2, 1995. This article describes what columnist Bob Greene of the *Chicago Tribune* witnessed, and published in that newspaper the following day.

[3] Karen McCurdy & Deborah Daro, Current Trends in Child Abuse Reporting Any Fatalities, National Committees for the Prevention of Child Abuse 2 (1993).

[4] U.S. Dept. of Health and Human Services, Family Violence: An Overview (1991).

[5] *Greeson v. Barnes*, Nev. Adv. Op. 132, Case No. 24252 (August 24, 1995); citing *Champagne v. Welfare Division*, 100 Nev. 640, 691 P.2d 849 (1984).

[6] NRS 128.090(2); *Champagne v. Welfare Division*, *supra* at p. 648.

[7] 455 U.S. 745, 769-70 (1982).

[8] Nev. Adv. Op. 132, Case No. 24252 (August 24, 1995).

[9] 103 Nev. 293, 296, 738 P.2d 895, 897 (1987)

Estate Tax con't

OBLIGATIONS CREATED PURSUANT TO A DECREE OF DIVORCE

If a final divorce decree requires post-death payments to be made by the estate, the payment is deductible from the divorced decedent's Gross Estate. IRC § 2053(a)(3) provides that the Gross Estate is reduced for claims against the estate. Under Treasury Regulation § 20.2053-4, liabilities imposed by law are deductible. These include obligations of a divorced decedent's estate founded upon a divorce decree ordering payments for property settlement, alimony, or child support (including support of an adult handicapped child). It makes no difference whether the obligations to transfer property, pay alimony or pay child support were created in exchange for adequate and full consideration. Adequate and full consideration is not a necessary element as long as the decree of divorce orders the payments.[3]

Nevada law provides that alimony must cease upon the death of either the payor or payee spouse, unless otherwise ordered by the court.[4] Obviously, if a divorce decree is silent with respect to alimony payments continuing as an obligation of the deceased payor spouse's estate beyond the date of death, they cease. As a result, in such a case, there would be no alimony payments for the deceased payor spouse's estate to deduct. Accordingly, the district court granting the divorce must order that the alimony obligation survive the deceased payor spouse's death in order to have a valid obligation under a decree and a deduction against the Gross Estate. [5]

What happens if a marital settlement agreement providing for periodic property payments, alimony payments, or child support is merged into a final decree pursuant to an uncontested divorce? In this case, the court which adopts and merges the prior agreement into a decree must have independent power and jurisdiction to order the obligations or transfers.[6] Otherwise, the obligations or transfers are considered to be founded upon a promise or agreement and a deduction on the deceased payor spouse's Federal Es-

tate Tax Return is then only available if the obligations were exchanged for adequate and full consideration.[7]

In Nevada, an agreement between a husband and a wife is not binding upon the court in the original divorce proceeding.[8] In addition, by statute, the independent power of a Nevada court consists of the power to order property division;[9] alimony;[10] child support;[11] and support of an adult handicapped child.[12] Accordingly, a Nevada court has independent power and jurisdiction to order the obligations or transfers. As a result, such obligations, pursuant to agreement merged into a decree in an uncontested divorce, are considered obligations imposed by law and created pursuant to a decree of divorce. These are deductible without more on the deceased payor spouse's Federal Estate Tax Return.

OBLIGATIONS UNDER AGREEMENTS DEEMED TO BE FOR ADEQUATE AND FULL CONSIDERATION

What happens if obligations of the deceased payor spouse are created pursuant to a written marital settlement agreement, but the agreement is not merged into a final decree of divorce?[13] Are the obligations still deductible on the deceased payor spouse's Estate Tax return? IRC § 2516 provides the answer. Under this Code Section, if a husband and a wife enter into a written property settlement agreement which creates obligations for settlement of marital rights (alimony), property rights, or child support during minority; and the parties are divorced one year prior to such an agreement or within two years after, whether or not a decree of divorce merges the agreement, then the obligations created pursuant to that written agreement are *deemed* to be for adequate and full consideration (*emphasis added*).[14] Therefore, in this case where these obligations survive the death of the payor spouse, they will be deductible on the deceased payor spouse's Federal Estate Tax Return.[15]

IRC § 2516 raises an interesting question when the effect of Nevada State law is also considered. As stated above, under NRS 125.150.5., any obligation for alimony must cease upon the death of either the payor or the payee spouse unless otherwise ordered by the court. So, what happens if a marital settlement agreement provides for alimony which survives the death of the payor spouse; and the marital settlement agreement is not merged into the decree of divorce effective within either one year prior or two years after the date of the written marital settlement agreement? Under NRS 125.150.5., such a post death alimony obligation may not be enforceable under state law, since it was not ordered by the court. However, the obligation would seem deductible as it fits squarely within the deemed adequate and full consideration rule. In order to prevent an estate from taking the position that the alimony obligation is a deduction from Gross Estate, yet not actually have to pay the obligation because it is not enforceable under Nevada law, the Code requires that the claim be allowable by the laws of the jurisdiction in which the Estate is being administered to be deductible.[16]

It is axiomatic that the surviving divorced spouse would bring a claim against the estate for the post death alimony and argue that regular contract principles apply to allow the exchange of such marital rights to support an obligation created for alimony under state law.[17] If enforceable under state law, such a claim would be a deduction from Gross Estate.

Also of interest is the effect of NRS 125B.110. NRS. 125B.110 provides for the continued obligation of support for a handicapped child beyond majority. However, IRC § 2516 specifically provides that an obligation for support of children is only deemed to be made for adequate and full consideration and thus deductible from Gross Estate on the deceased payor spouse's Estate Tax Return if it is for the support of *minor* children. Presumably, such an obligation for support of a handicapped child beyond majority would not be deductible under the deemed adequate and full consideration rule.

OBLIGATIONS UNDER AGREEMENTS FOR ADEQUATE AND FULL CONSIDERATION

What happens if a husband and wife enter into a property settlement agreement and are not divorced either one year prior to the agreement or two years after (the deemed adequate and full consideration rule not applicable) and the agreement is not merged into the final decree of divorce when it is actually effective (obligation pursuant to decree rule not applicable)? In this case, the estate of the deceased payor spouse will only be allowed a deduction from Gross Estate for obligations created under such agreements where the obligations were created in exchange for adequate and full consideration.[18]

Obligations created pursuant to the release of marital support rights (alimony) and the release of an obligation for support of minor children are considered to be for adequate and full consideration.[19] However, the release of dower, curtesy, or a statutory estate created in lieu of dower, curtesy, or other marital rights in the decedent's property is not adequate and full consideration in money or money's worth and, therefore, not deductible from Gross Estate under this rule.[20]

What is the effect of community property? In Nevada, a community property interest is a present vested interest. Suppose a Nevada husband and wife with a long-term marriage entered into a property settlement agreement which was not merged into a final decree issued more than two years after the date of the property settlement agreement and subsequently the payor spouse dies. In addition, the marital settlement agreement provides for periodic payments from the payor to the payee spouse in order to equalize the community estate. One would think that upon the death of the payor spouse, that the obligation still due from the deceased payor spouse's estate would be deductible from the Gross Estate on deceased payor spouse's Estate Tax Return. However, this is not the case, at least in the Ninth Circuit.

Trust Services of America, Inc. v. U.S., 885 F.2d 561 (9th Cir. 1989), holds that the release of community property rights in exchange for an obligation for payment is not an exchange for adequate and full consideration where the actual divorce occurred more than two years after the date of the agreement and the agreement was not merged into a decree. Accordingly, the payor spouse's estate could not deduct such obligation from Gross Estate on its Federal Estate Tax Return. The Ninth Circuit literally interprets IRC 2043(b)(1) without recognizing the unique rights of married couples in community property.

Strangely, if the same circumstances occurred in the Fourth Circuit, a deduction would be available. ***Estate of Waters v. C.I.R., 48 F.3d 838 (4th Cir. 1995)***, holds that at least in North Carolina, which adopted a type of quasi-community property law, the relinquishment of a community property interest in exchange for an obligation requiring payments equalizing the payee spouse's community property interest is for adequate and full consideration. It is indeed different than relinquishment of a dower or curtesy right as it is a present, vested interest. The Fourth Circuit allows the Estate of the deceased payor spouse a deduction from Gross Estate for the obligation which arose pursuant to agreement which was not merged into a decree and the parties were divorced more than two years after the date of the agreement. It is more than surprising that the Fourth Circuit appears to be more logical in recognizing the unique nature of community property than the Ninth Circuit, since the Ninth Circuit contains the majority of community property states.

CONCLUSION

If the payor spouse's obligations to pay alimony or child support or make other transfers will survive the payor's death, the payor spouse's attorney must ensure that the payments will be deductible from the payor spouse's Gross Estate. The best way to ensure such deductions is to merge all these obligations into the final decree. The practitioner should be aware of the risk that all obligations are not included in a divorce decree where divorcing parties have had a long-term separation, or where it is possible the parties have made "side agreements."

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Notes

[1] For a general definition of a Gross Estate of a decedent for United States Estate Tax purposes, see Internal Revenue Code (IRC) § 2031. See also, IRC § 2032-2045. For a definition of a Taxable Estate of a decedent which is produced after certain deductions from Gross Estate are allowed, see IRC § 2051-2056A.

[2] In general, if there are installment obligations, the amount of the deduction from Gross Estate is equal to the present value. For example, see *Van Horne Est. v. Comr.* 720 F.2d 1114 (9th Cir. 1983), Cert. denied, 466 U.S. 980 (1984), (alimony).

[3] See *Commissioner v. Converse*, 163 F.2d 131, 133 (2nd Cir. 1947). In addition, see discussion below, "Obligations Under Agreements for Adequate and Full Consideration."

[4] See NRS 125.150.5. Additionally, a post-death alimony obligation may be appropriate when both parties are aged; when there is a substantial disparity in ages; when the payor is terminally ill; or when there are minor children.

[5] *Commissioner v. Converse*, 163 F.2d 131 (2nd Cir. 1947). Also see discussion below, under "Obligations Under Agreements Deemed to be for Adequate and Full Consideration."

[6] Revenue Ruling 75-395, 1975-2 C.B. 370.

[7] Id.

[8] *Lewis v. Lewis*, 53 Nev. 398, 2 P.2d 131 (1931); NRS 125.070.

[9] See NRS 125.150.1, 2, and 4.

[10] NRS 125.150.8

11 NRS 125.450(1).

[12] NRS 125B.110

[13] Most practitioners probably have at least witnessed a divorcing client try to cut a "side deal" outside the marital settlement agreement or decree with the other spouse. See also *Ballin v. Ballin* 78 Nev. 224, 371 P.2d 32 (1962).

[14] IRC § 2516

[15] See IRC §§ 2053(a)(3) and 2053(c)(1) which generally allow deductions from Gross Estate for obligations which are for adequate and full consideration. See also IRC § 2043(b)(2).

[16] IRC § 2053(a); Treas. Reg. § 20.2053-1(c).

[17] For example of a non-merged property settlement agreement enforceable outside of a decree, see Ballin v. Ballin 78 Nev. 224, 317 P.2d 32 (1962).

[18] IRC § 2053(c)(1)(A)

[19] Revenue Ruling 71-67, 1971-1 C.B. 271. In addition, the issue of deductibility from Gross Estate for such an alimony claim following enforceability under Nevada Law also exists. See discussion above under "Obligations Under Agreements Deemed to be for Adequate and Full Consideration."

[20] IRC § 2043(b)(1)

[21] See NRS 123.225. Further, a community property interest is clearly different than the inchoate rights of dower, curtesy, and statutory estate.

CASE SUMMARIES

The Move Statute is a "Notice" Statute; Once Custodian Shows "Actual Advantage" (and Marrying a Rich Person is Good Enough), the Availability of Reasonable Substitute Visitation is All That Is Required to Approve a Move

Trent v. Trent, 111 Nev.___,___(Adv.Opn. No. 16, Mar. 2, 1995) Primary physical custodial mother's request to move with child to Ohio per NRS 125A.350 was denied by the district court (Marren). Child sharing arrangement was for every other weekend, plus two week days, plus four weeks in the summer. The child was born in Las Vegas, and raised to age two here, and had multiple extended family members (on both sides) here. Both Mother and Father were born and raised in Las Vegas. Mom's new boyfriend/finance was from Ohio, and had far relationship with the stay-behind parent did not mean preserving the existing visiting visitation pattern, and that here the boyfriend/finance could afford to send the child back "regularly." The Court also reiterated its mention in Schwartz that an expanded summer visit could serve in place of weekend visitation to maintain the parent-child bond.

In passing, the Supreme Court validated the district court judges brining "some real life experiences into the courtroom" such as incidents in the judges' own lives.

Grandparents Can Be Denied All Contact With Children When Parents With Full Legal Rights Think That They Should Be Denied

Steward v. Steward, 111 Nev.___,___P.2d___ (Adv.Opn.No.21, Mar. 2, 1995) Divorced natural parents with joint legal and physical custody agreed that father's parents should not see

child. Per NRS 125A.340, grandparents petitioned for and were granted visitation with the child by district court (Christensen) despite recommendation from child custody specialist that no visitation should occur. Some states statutes elsewhere specifically permit grandparental visitation over the objection of both natural parents. Others are silent. Some find grandparental rights derivative from their child (i.e. the parent related to the grandparent in question), and thus no help to grandparents when the custodian of the children is the grandparent's child.

Statutes must be interpreted consistently with the intent of the legislature in enacting them. In addition, the ascribed legislative intent must accomplish a reasonable result. Any doubt as to legislative intent must be resolved in favor of what is reasonable, as against what is unreasonable, so as to avoid absurd results.

Here, the legislature was concerned with "egregious circumstances." Thus, the Court interpreted NRS 125A.340 to set up a presumption against court-ordered grandparental visitation when divorced parents with full legal rights to the children agree that it is not in the child's best interest to see the grandparents. Clear and convincing evidence otherwise is required before a court should interfere with the decision of the natural parents.

In this case, an evaluation of the factors set out in NRS 125A.330 shows that ordering visitation is not in the child's best interest. That the grandparents allowed the natural father and the child to move in for six months was not considered particularly persuasive. The referee was criticized for ignoring the parties' testimony and the child custody specialist's report, and the district judge was criticized for failing to "adequately review the record" or address the written objections or oral arguments of the parties in question.

Law Firm Could Not Compel Lien in Unrelated Case to Secure Fees in Place of Common Law Retaining Lien

Figliuzzi v. District Court, 111 Nev.___,___P.2d.___(Adv. Opn. No. 21, Mar. 2, 1995) Petitioner (client) retained Reno law firm, which charged her over $25,000 for work performed. Client had paid $5,000.00 retainer and executed partial assignment of proceeds for another $15,000 in an unrelated case. Client, dissatisfied, requested return of her file. The firm requested a second partial assignment of proceeds for the $6,700.00 remaining outstanding. Client refused, and no formal discharge of the firm ever occurred. The firm filed a motion to increase assignment of proceeds in the other case, and the judge granted it, ordering client to execute a second partial assignment of proceeds, and (when the client ignored the order) had the clerk of the court sign for the client.

Under NRS 34.020(2), a writ of certiorari will be granted when the lower court exceeds its jurisdiction and there is no plain, speedy, and adequate remedy or right of appeal.

In Nevada, there are two types of attorney liens for fees: (1) a special or charging lien on the judgment or settlement the attorney obtained for the client, under NRS 18.015(1) and Morse v. Eighth Judicial District Court, 65 Nev. 275, 195 P 2d 199 (1948), and (2) a general or retaining lien that entitles the attorney to keep the client's papers, property, or money until a court, at the request of the client, requires the attorney to deliver the retained items upon the client's furnishing of payment or security for the attorney's fees. Here, no settlement or judgment for the client had been obtained, so only the general or retaining lien was at issue. The lien is strictly passive, and cannot be actively enforced in judicial proceedings, but courts may not discharge and destroy such liens without providing for the payment or security for payment.

The district court exceeded its jurisdiction because the firm, not the client, requested the substitution of security. Further, the court's authority is limited to ordering the firm to turn over the file, etc. upon voluntary presentation of substitute security, so the court could not order execution of an assignment, or for the clerk to sign in place of the client. It is the client that thus places a value on the retained papers.

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