NFLR
NEVADA FAMILY LAW REPORT

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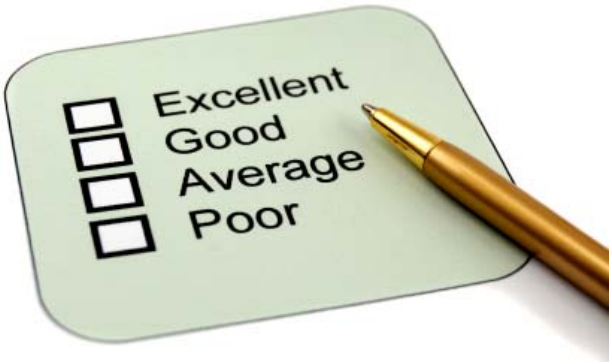
BRIEF FOCUSED ASSESSMENTS



by Amber Robinson, Esq.

INTRODUCTION

In your practice, you have more than likely had clients who have been sent for Child Custody Evaluations (CCE), and you have probably had clients who need a CCE done, but simply cannot afford the high cost of one. There are increases in caseloads around the country and limited funds for full-blown assessments. For example, the Annual Report of the Nevada Judiciary Fiscal Year 2009 demonstrated that both litigants are pro se in 65 percent of family filings. More and more family courts are turning to the Brief Focused Assessments (BFA) models, which are issue specific assessments. BFAs are narrower in scope, timelier, and far less expensive than CCEs.

THE NORTH

As we learned at the Ely Family Law Conference 2010, the Reno Family Court has recently begun using BFAs. Prior to BFAs, where resources were limited and a child custody evaluation would be far too costly, the Reno Family Court relied on Court Appointed Special Advocates (CASA) for help in those particular cases. These advocates would

(cont'd. inside on page 3)

IN THIS ISSUE:

EDITOR'S NOTES

By Shelly Booth Cooley, Esq.

This is my first issue as editor of the Nevada Family Law Report (NFLR). I am excited that I was presented with the opportunity to act as editor of the NFLR. I hope to follow in our esteemed former editor, Robert Cerceo's, footsteps by presenting articles that are informative and interesting to my colleagues. As an attorney practicing exclusively in the area of family law, I found the NFLR to be a wonderful resource. My hope is to further that tradition so that the NFLR will continue to be a resource for other domestic relations practitioners.

As editor, I am always looking for individuals who are interested in submitting articles to the NFLR. If you would like to submit an article, please contact me or submit your article directly to me via e-mail. If you need ideas, then I would be happy to discuss suggestions, etc. Please feel free to contact me via telephone and/or e-mail.

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Specialization Exam:

The next test is set for Nevada Day 2010. Find the applications at: www.nvbar.org/sections/FamilyLaw/specialization_app.pdf

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

Shelly can be reached at (702) 265-4505, or scooley@cooleylawlv.com.

FAMILY LAW CONFERENCE

Keep an eye out for the date announcement for the 2011 Family Law Conference in Ely, Nevada.

ASSESSMENTS

cont'd. from page 1

go to the litigants' homes, visit the child's school, interview the child's parents, teachers, doctors, etc. They would also observe the child's interactions with the parents. As the CASA volunteer was the child's mouthpiece in court, the judges utilized the advocates' observations of the child's home life when determining custody. Budget cutbacks resulted in the significantly reduced availability of CASA to the court. The Honorable Chuck Weller of the Second Judicial District Court, for one, felt blinded when CASA was cut back, and headed the team that helped form the BFA program in Reno.

The BFAs that the Reno Family Court are now using are court ordered and are focused on the NRS §125.480 factors such as the physical health of the parents, the level of conflict of the parents, and/or the wishes of the child. There are three different levels of assessments, and costs depend on the level of assessment, the number of children, and the professional providing the assessment. A level one assessment only gathers information such as the physical health of the parents and includes a home visit to observe safety or cleanliness concerns. A level two assessment consists of information gathering and an assessment, and a level three assessment involves information gathering and a more advanced assessment that, for example, delves deeper into issues such as the mental health of the parents.

A BFA completed by a Ph.D. professional, assuming there are two parents and one child would cost around $900.00 for a level one, $1,875.00 for a level two, and $2,362.00 for a level three. A Marriage Family Therapist or other master-level professional conducting a BFA would provide a level one for $600.00, a level two for $1,250.00 and level three for $1,575.00. University of Nevada Reno students, supervised by faculty, would provide a level one assessment for $300.00.

THE SOUTH

The Honorable Cheryl B. Moss from the Eighth Judicial District Court is part of a committee that is looking into the viability of instituting the BFA program in Las Vegas. She likes the idea of a BFA program in that the assessment will get to the heart of the matter through a cheaper and timelier route. The Honorable Frank Sullivan, also of the Eighth Judicial District Court, rarely uses CCEs. What he sees happen most often is that the parties are referred to a therapist for a CCE, and at the return hearing the therapist has had to ask for a continuance since the parties have not paid the retainer to begin services. Another return hearing is set, and the parties have still not paid, so now 12 weeks have gone by without any progress being made on the case. Judge Sullivan cautions the overuse of CCEs and BFAs since custody is the judge's determination, and many times the needed information will be revealed through child interviews and the parties' testimony. However, there are times he feels BFAs would be appropriate, and if the Eighth Judicial District Court were to adopt the Reno Model, he sees himself using a level three assessment most often, a level two on occasion, and probably never using a level one. He would still use CCEs when there has been child abuse, the parent(s) has mental health issues, or the child has severe behavioral issues.

ADVANTAGES AND THE DOWNSIDE

The advantages of BFAs are that they are cheaper and the case will more than likely be resolved faster. Further, the BFA may preclude the need for a CCE. Judge Weller likes that BFAs focus in specifically on the NRS §125.480 factors, which allow the judge to make the decision as to custody, instead of the more analytic approach of the CCE where the evaluator gives his or her opinion in regards to custody. Judge Weller says the downside to BFAs is that they still cost money. The level three assessment is still between $1,500.00 and $2,400.00, which is still a lot of money for many of the litigants.

CONCLUSION

BFAs can hone in on specific issues for which the judge may want more information when there is no need for a CCE, and the cheaper cost would make the services of a Ph.D. or therapist available to more litigants. Something to keep in mind, and as stated by the Association of Family and Conciliation

(cont'd. on page 4)

ASSESSMENTS

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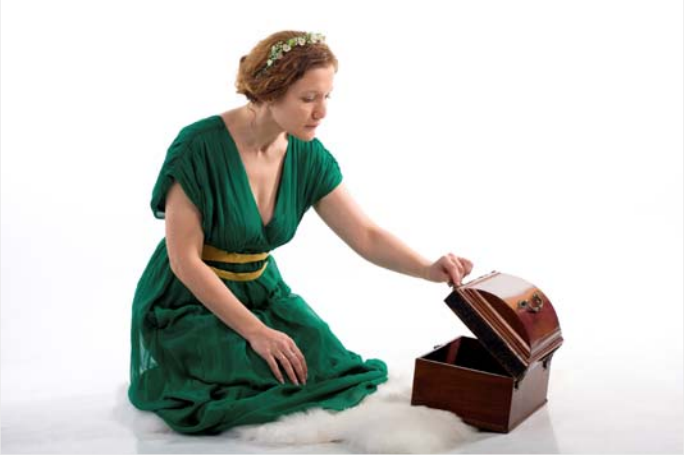
Courts, "BFAs must not be substituted as an inexpensive alternative where a comprehensive CCE is necessary to address the concerns of the court and the family. Such practice could result in a two-tiered system in which low income clients routinely receive less comprehensive services than those who can afford to pay for more, building an injustice into the very legal system established to serve all families equally."

Amber Robinson, Esq. is an Associate at Lin & Associates, a firm in Las Vegas practicing primarily in the field of family law. She is a former law clerk to the Honorable Cheryl B. Moss, and Nicholas Del Vecchio. Ms. Robinson can be reached at 1801 South Rainbow, Suite 270, Las Vegas, Nevada 89146. Her phone number is (702) 243-0900, and her fax is (702) 243-0342. E-mail can be directed to arobinson@linassoc.com.

A "PANDORA'S BOX:"

Landreth v. Malik, 125 Nev. Adv. Op. No. 61 (December 24, 2009).

by Robert W. Lueck, Esq.



In Greek mythology, Pandora was the first woman created by the Greek gods. Prometheus gave the gift of fire to humans, and this made Zeus angry. Zeus decided to give mankind another gift to compensate for the boon they had been given in the form of fire. Zeus commanded Hephaestus to create the first woman. He does so with contributions from other gods who collectively made a beautiful but devilish woman he named Pandora.

When Pandora was gifted to the humans, she brought with her a jar containing burdensome toil, sickness, diseases and a myriad of other pains to inflict on others. Prometheus warned his brother Epimetheus not to accept this gift from Zeus, but Epimetheus did not listen and accepted Pandora. She promptly scattered the contents of her jar and brought much evil to mankind. These stories originated with two epic poems crafted by Hesiod, a writer in seventh century B.C., the first being *Theogony* and the second being *Works and Days* (www.neworldencyclopedia.org/entry/Pandora'sBox).

Today, the phrase "Pandora's box" is used as a literary device that suggests bringing up an issue that will likely make matters worse and compound problems rather than solving or alleviating them.

In short, it is an apt literary device for asserting that the *Landreth* opinion is far more likely to cause, and has caused, more problems than it will have purportedly fixed. This decision will have an impact far greater than the mere interim resolution of a dispute between two private parties. The "Pandora's box" opened up by the majority opinion entails the de facto creation of two separate and distinct family courts in both Clark and Washoe counties, two separate and unequal classes of district court judges and considerable

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PANDORA'S BOX

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uncertainty for the bench and bar as to where certain "gray area" cases should be filed, i.e. in the family or civil division.

The essential problem with the *Landreth* decision is that it limits the family court judges' jurisdiction to only the types of proceedings specifically enumerated in NRS 3.223. *Landreth* was an action between "unmarried, childless parties who used to live together and who dispute the division of property allegedly acquired during their relationship," a type of proceeding not specifically enumerated in NRS 3.223. The *Landreth* case was a matter of much debate in Ely, both in the classes and in the hallways between counsel and judges. Currently, the matter is on rehearing by the Nevada Supreme Court.

A TALE OF TWO FAMILY COURTS

The core holding of the majority opinion is that any family law case which does not squarely fit within any of the NRS chapters enumerated in NRS 3.223 must be adjudicated in the civil division. Although a case may look, feel and smell like a "family law" case, it cannot be adjudicated in Family Court unless clearly within one of those chapters. The practical result is that a number of cases that were customarily adjudicated in Family Court must now be filed in the civil division.

"The law of unintended consequences" is a rhetorical phrase to illustrate that the results of a legal decision or a statute have consequences that were neither intended nor comprehended when the decision was made or the law passed.

This "law of unintended consequences" applies here because the net practical effect of the majority decision is the de facto creation of two family courts in Clark and Washoe counties. There is the *de jure* Family Court created by the Nevada Constitution and the subsequent enabling legislation, and the *de facto* "mini-family court" in the civil division of the Second and Eighth Judicial Districts. This mini-court will presumably hear and adjudicate family law type cases that don't fall neatly into any of the statutory categories created in NRS 3.223 and newer family law matters that the legislature has neglected to assign to the family courts.

The civil divisions in both courts are already overburdened with cases and the *Landreth* majority ruling will now detour an untold number of "gray area" family law cases into the civil divisions.

The majority opinion misapprehends the concept of "subject matter jurisdiction" as it was used in NRS 3.223 and that misapprehension lead to the court's ruling. Article 6, Section 6 of the Nevada Constitution provides that the district courts are the courts of general original jurisdiction in this state and have jurisdiction over all cases not specifically granted to other courts.

In the domestic relations context, all cases referred to in NRS 3.223 were and are district court cases. In Clark and Washoe Counties, the judges decided how the caseloads and speciality assignments were done.

In the late 1980s, the Nevada Legislature approved the creation of dedicated family courts in Clark and Washoe Counties and the constitutional amendment to do this was approved by the voters in 1990. The Legislature was authorized to craft the list of the cases that would be heard in Family Court. That was done in NRS 3.223.

What the Nevada Legislature did not do was create any new statutory causes of action. At its central core, NRS 3.223 is not truly a jurisdictional statute; it is an ASSIGNMENT AND CLASSIFICATION statute that designated which class of cases were to be filed and heard in the family courts. The goal was to provide a fairly bright line of demarcation for those cases which should belong in family courts and no longer be filed in the civil/criminal division. Because it was an assignment of case categories, nothing in NRS 3.223 or the other enabling statutes for the creation of family court or in the legislative history of these statutes indicated any legislative intention that NRS 3.223 was a LIMITATION on the judicial authority of the district court judges in the family division.

Family Court is not a statutorily created court of limited jurisdiction. It was and still is constitutionally and statutorily described as a division of the District Court. See NRS 3.006 and 3.0105 and Nevada Const. Art. VI, § 6(2). The ostensible goal of

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PANDORA'S BOX

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NRS 3.223 was to ensure that lawyers, pro se litigants, judges and the district court clerical staff know that domestic cases belong in family court and not elsewhere.

As the dissent correctly points out, family court judges are district court judges for all legal intents and purposes. They have the same pay and benefits, same titles, are elected in the same fashion and any final decisions are appealable to the Nevada Supreme Court. There is no distinction between those who serve in the family division and those who serve in the civil/criminal division.

For the overwhelming bulk of cases, there is no question of where to file the lawsuit. But due to the changing nature of society, there are gray areas that don't admit of any clean, neat answers. The majority opinion notes that the district courts have long adjudicated unmarried couple cases such as *Hay v. Hay*, 100 Nev. 196 (1984) and *Western States Construction v. Michoff*, 108 Nev. 931 (1992). Those cases and a few others preceded the creation of family courts in Nevada and no doubt they were district court cases. Family courts did not exist then so jurisdictional claims could not have been an issue. In those cases the parties did hold themselves out as husband and wife although not legally married. After acknowledging these two cases and that the parties therein held property "as co-owners or as though they were a marital community," the court distinguishes the instant case by stating:

"Although the parties dispute whether they hold property as co-owners, neither party claims to have held themselves out as a married couple *or otherwise qualify as a familial unit*, therefore, *Hay* and *Michoff* are not applicable." *Emphasis supplied.* (Page 9 of opinion.)

This creates multiple serious conceptual and practical problems for lawyers and judges alike. First, is this court saying that Family Court will continue to have jurisdiction over unmarried couples who co-own property together and hold themselves out as husband and wife but who have no children? That seems to be the distinguishing jurisdictional feature and one which allows the family court to handle such cases.

"For the overwhelming bulk of cases, there is no question of where to file the lawsuit. But due to the changing nature of society, there are gray areas that don't admit of any clean, neat answers."

Yet even this is highly problematic because there is nothing in the language of NRS 3.223 that even remotely refers to unmarried couples living and owning property together. That statute was a collection and recitation of a list of family law chapters in the Nevada Revised Statutes. *Hay* and *Michoff* are judicially crafted remedies for meretricious relationship cases and was part of the major trend in legal developments following the famous *Marvin* case in California in the mid-1970s.

If meretricious relationship cases are not mentioned in the statute, then why should family court continue to hear such cases except for child custody and support issues? The majority opinion does not explain this distinction at all and it does not make sense in light of this language from *Michoff* [108 Nev. at 935]:

"After a trial, the district court found that there existed an express and an implied agreement between the parties to acquire and hold the properties as if they were married. The court ruled that the community property laws should apply by analogy and thus entered judgment in favor of Lois and against Max and Western States for one-half of the net assets less the value of the property already taken."

The concepts of "as if they were married" and "community property by analogy" are purely judicial creations. Nothing remotely resembling these concepts appears in NRS 3.223 and yet this court seems to imply, very confusingly so, that unmarried couples who hold themselves out as married couples can bring their actions in family court despite the lack of enabling language in NRS 3.223 that allows such actions.

Now consider another possible scenario. An unmarried couple has lived together and acquired property together. One says they have held themselves out as a married couple and therefore files the dissolution/division action in family court. The

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PANDORA'S BOX

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other party disputes that they held themselves out as a married couple. The case goes to trial and the judge rules that they did NOT hold themselves out as a married couple. That means an instant loss of jurisdiction.

Yet another scenario. An unmarried couple has children and has acquired some assets but neither has held themselves out as a married couple. They were content simply to remain in an unmarried status. Under the *Landreth* case, the custody, support and visitation issues are heard in family court but the property and debt issues have to be resolved in a separate suit filed in the civil division. That would be the strict, literal interpretation and application of *Landreth*. Or would the family court have some form of ancillary jurisdiction to hear their property and debt issues in conjunction with the custody and support matters?

Now consider this problem for the civil division. The legal rights regarding property for an unmarried couple acquiring assets together while they were in their own familial relationship is considerably different from the law applicable to partners, joint venturers, etc. who own property together but are not in anything other than a business relationship. Dissolution of a non-marital relationship is far more similar to a divorce than to a straight civil dispute. The property accrual agreements between co-habitants is substantially different than from traditional contract principles. *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

The other major conceptual problem with the above paragraph rests in the phrase, "or otherwise qualify as a familial unit." That phrase, left undefined further by the court's opinion, is highly problematic. The meaning of "family" has greatly changed over the past forty years and the traditional nuclear family of a married mother, father and child(ren) is very much a minority in recent years. There is nothing written that only those people with children can constitute a "family" but an unmarried couple living together cannot constitute a "family."

The majority opinion did not cite any authority for that phrase. It is contrary to accepted social norms today. Unmarried couple cases have far more in common with their married brethren in family court than with civil cases in the civil division. The legal recognition of these dramatic changes in "family" has been observed in published opinions even by the United States Supreme Court in *Troxel v. Granville*:

"The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, 1997 Population Profile of the United States 27 (1998). Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children – or 5.6 percent of all children under age 18 – lived in the household of their grandparents. U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, Marital Status and Living Arrangements: March 1998 (update), p. *I* (1998)." [530 U.S. 57, 63 (2000)]

Similar observations were made by the Supreme Judicial Court of Massachusetts in *Turner v. Lewis*:

"Our conclusion is supported by sound public policy. We take judicial notice of the social reality that the concept of 'family' is varied and evolving and that, as a result, different types of 'family' members will be forced into potentially unwanted contact with one another. The recent increases in both single parent and grandparent headed households are two examples of this trend. With respect to the increase in single parent headed households, children under age [eighteen] are considerably more likely to be living with only one parent today than two decades ago." [749 N.E.2d 122, 125 (MA 2001)] Marital Status and Living Arrangements: March 1994, Bureau of the Census, United States Department of Commerce (Feb. 1996). See Marital Status and Living Arrangements: March 1998 (update) Bureau of the Census (Dec. 1998) (between 1970 and 1998, proportion of chil-

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PANDORA'S BOX

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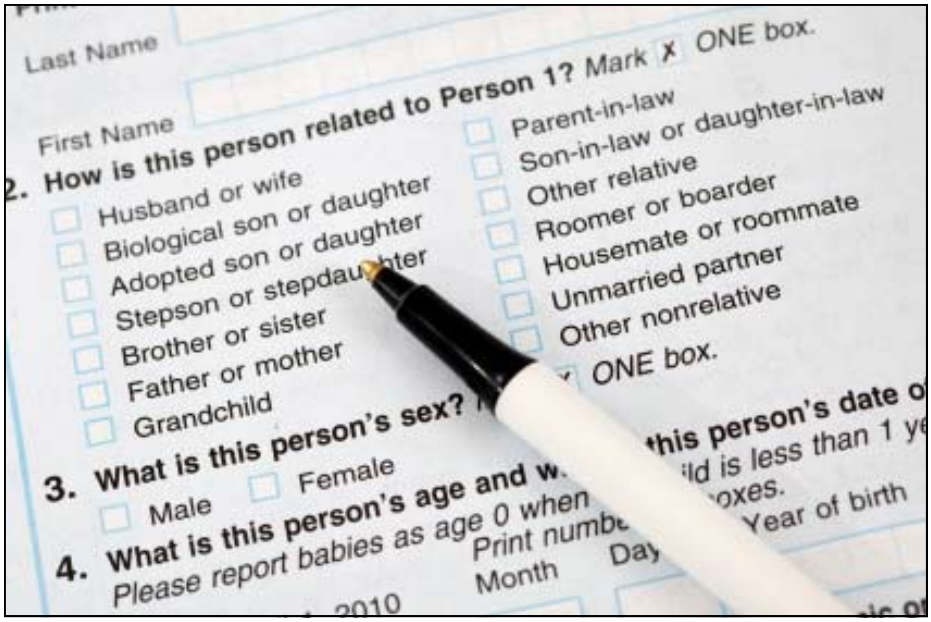

dren under age of 18 years living with single parent grew from 12 percent to 27.7 percent). "High levels of divorce and postponement of first marriage are among the changes that have reshaped the living arrangements of children and adults since the 1970's." *Id*. In the majority of these cases, women are the head of the household. *Id*. (84 percent of children who lived with single parent in 1998 lived with mother). The often contentious nature of custody arrangements necessitates the protection of these single parents through legislation like G. L. c. 209A."

The Census Bureau is soon to start the decennial census of the United States. It will take months to gather and assess the data. The results will start being released in the spring of 2011. In between the decennial census events, the Census Bureau and demographers still work to trace evolutions in American living and economic patterns. Demographic expert Peter Francese, founder of the American Demographics Magazine, has recently written "2010 America," a 32-page white paper for Ad Age, an industry trade association. He concludes that the concept of the "average American" is gone and predicts that the forthcoming census will find that no household type describes even one third of the households. The traditional American family, married parents with children, will account for a mere 22 percent of the households. The new census form will give Americans 14 choices to define their household relationships. This will allow the Census Bureau to better define blended families, single parent families, multi-generational families, etc. *Advertising Age* magazine published Oct. 12, 2009 viewed online at http://adage.com/article?article_id=139592 (website visited 1/19/10).

The website for the Alternatives to Marriage Project also lists numerous statistics including those showing that unmarried Americans head more than 51 million households (citing 2007 Census Bureau data), www.unmarried.org/statistics.html, (website last visited January 19, 2010).

Suffice it to say that what constitutes a "family" has changed greatly since family courts were created in Nevada some two decades ago. As times have changed, there is nothing wrong with the courts and the laws changing along with social changes. Indeed, in *Galloway v. Truesdell*, this court said that "The constitution is a living thing and is to be interpreted in light of changing conditions" [83 Nev. 13, 21 (1967)].

Since the nature of "family" has rapidly changed in recent years, there is no reason why that can't be reflected in this decision. Family court judges presumably have more expertise in family dynamics and the family division should continue to hear all cases that are family centered, regardless of how that family unit is defined or constituted. The last thing the civil division needs is more cases that are outside its normal area of expertise.

The 2009 Nevada Legislature passed the domestic partnership act in Senate Bill 283. It creates a new chapter in Title 11 of NRS, but nowhere in that bill is there a section that says dissolution disputes are to be filed in family court. Section 9 of the bill states that such actions should follow the general procedures of NRS Chapter 125 for divorce.

(cont'd. on page 9)

PANDORA'S BOX

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However, since this is not expressly mentioned in NRS 3.223, logically all such actions will now have to be heard by the civil division and not in family court.

We have now preliminarily seen that a number of "family" law scenarios fall into that gray zone of cases not fitting neatly into one of the NRS chapters allocated to the family courts. Future case law will flesh out those borderline cases and possibly result in more appeals to this court.

THE MAJORITY OPINION HAS CREATED TWO CLASSES OF DISTRICT JUDGES: SEPARATE AND UNEQUAL

The existence of NRS 3.220 was referred to in the supplemental points and authorities filed by respondent on October 24, 2008. That statute reads as follows:

"Equal coextensive and concurrent jurisdiction. The district judges shall possess equal coextensive and concurrent jurisdiction and power. They each shall have power to hold court in any county of this State. They each shall exercise and perform the powers, duties and functions of the court and of judges thereof and of judges at chambers. The decision in an action or proceeding may be written or signed at any place in the State by the judge who acted on the trial and may be forwarded to and filed by the clerk, who shall thereupon enter judgment as directed in the decision, or judgment may be rendered in open court, and, if so rendered, shall be entered by the clerk accordingly. If the public business requires, each judge may try causes and transact judicial business in the same county at the same time. Each judge shall have power to transact business which may be done in chambers at any point within the State, and court shall be held in each county at least once in every 6 months and as often and as long as the business of the county requires. All of this section is subject to the provision that each judge may direct and control the business in his own district and shall see that it is properly performed."

The majority decision impliedly repeals that section insofar as family court judges are "co-equal and co-extensive" with their civil/criminal division colleagues. By voiding this decision under the theory that the family court had no jurisdiction, the majority opinion is also saying that no family court judge, even with the status of being lawfully recognized as a district court judge, can act on any case or legal matter outside the scope of NRS 3.223.

The court's decision creates two classes of separate and unequal district court judges. This is untenable and is already having a ripple effect on the judicial administration of the Eighth Judicial District Court. The current chief judge is Family Court Judge Art Ritchie. He relocated his chambers down to the RJC while he serves as chief judge. Because of the *Landreth* opinion, Judge Ritchie has relinquished his judicial responsibilities for the bond forfeiture calendar and for hearing objections to the probate commissioner's decisions.

Judge Jennifer Elliott still presides over adult drug court and those defendants come out of the criminal division and are still considered criminal cases even though it is a specialty court. Drug courts are not part of the family court jurisdiction outlined in NRS 3.223. Footnote 2 on page 10 in the opinion relates that the *Landreth* decision does not apply to specialty court assignments, yet that statement cannot be consistent with the majority opinion, i.e. family court judges cannot hear and decide matters outside of NRS 3.223. Either they can hear all district court matters or they can't. Jurisprudential waffling does not lend itself to promoting clarity and consistency.

Family Court judges have long held the same authority to review search warrant applications and sign search warrants when sought by law enforcement. It is conceivable that a criminal defendant could successfully challenge any search warrant signed by a family court judge. Some criminal prosecutions could be in jeopardy. Furthermore, eliminating family court judges from the available pool of judges to review and consider search warrant applications after hours and on weekends could negatively impact law enforcement.

This court has expressed different legal principles for statutory construction: No part of a statute should be rendered nugatory nor any language turned to mere surplusage, *Paramount Insurance v. Frontier Fidelity Savings and Loan*, 86 Nev. 644,

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PANDORA'S BOX

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640 (1970); this court will interpret a statute in harmony with other rules or statutes, *Division of Ins. v. State Farm Mut. Auto Ins.*, 116 Nev 290, 295 (2000); the court will construe statutory provisions in such a manner as to render them compatible, should avoid construing one of its rules of procedure and a statute in a manner which creates conflict or inconsistency between them, and that a fundamental rule of interpretation is that the unreasonableness of the result produced by one of the possible interpretations is a reason to reject that interpretation in favor of one that produces a reasonable result, *Bowyer v. Taack*, 107 Nev. 625, 629 (1991); statutory provisions should be read in harmony provided that doing so will not violate the ascertained spirit and intent of the legislature, *Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 892 (1989); and statutes should be construed, if reasonably possible, to be in harmony with the Constitution, *State v. Glusman*, 98 Nev. 412, 419-20 (1982).

Family court judges, as district court judges, derive their fundamental legal existence from Article 6, Section 6 of the Nevada Constitution. They are constitutional officials of the State of Nevada. The majority opinion would make eminent legal sense if the family court judges were entirely creatures of statute with limited authority and subject to further review by a general jurisdictional judicial powers. In other words, like magistrate judges in the federal court system.

The majority opinion cannot be reconciled with the language and the powers granted by NRS 3.220 and to that extent the majority opinion nullifies a critical Nevada statute, albeit without explicitly saying so.

Thus, we now have two (2) classes of district court judges in Nevada. The family court judges have had their authority sharply limited in derogation of the Constitution and statutory law. Their colleagues in the civil/criminal division are not so limited.

CONCLUSION

The unintended consequence of *Landreth* is that we now have two family courts in Nevada: the traditional family court and the new mini-family court in the civil division which will now have to adjudicate unmarried couple property and debt issues, regardless of whether the parties hold themselves out as married or not, and all domestic partnership dissolution cases filed under the new chapter created by Senate Bill 283.

A fair and logical reading of the majority opinion also makes it clear that family court judges lack any judicial power to preside over any matters not within those chapters referred to in NRS 3.223. This has to include any specialty courts outside of the family division.

Since the majority decision was filed, this has caused considerable discussion and upheavals in the Eighth Judicial District Court and with family law practitioners. Mr. Lueck is requesting that the Nevada Supreme Court do what it did with the first *Rivero* decision issued in 2008 (since withdrawn and replaced on August 27, 2009), and that is withdraw the opinion and request amicus briefing from the Family Law Section. The undersigned can advise this court unofficially that the judges of the Eighth Judicial District Court may wish to file an independent amicus brief addressing the systemic effects on the district courts.

Robert Lueck is President of The Lueck Law Center, a Las Vegas firm devoted to Family Law. As a co-founder of the Collaborative Professionals of Nevada, much of Mr. Lueck's career has been devoted to developing the principles of Collaborative Settlements.

As a published author and recognized authority in the area of Family Law, Mr. Lueck's writings and decisions have been reviewed and taught at national seminars and in professional legal journals.

Mr. Lueck can be reached at 528 S. Casino Center Boulevard, Suite 311, Las Vegas, Nevada 89101. His telephone number is (702) 385-7385 and his facsimile number is (702) 385-3225. E-mail can be directed to: luecklawcenter@yahoo.com.

Where Have All the Values Gone?

(Not Yet Gone to Graveyards Every One)

By Richard M. Teichner, CPA, ABV, CVA, CFF, CDFA ™

I probably should apologize to Pete Seeger for the takeoff on the title of his song, "Where Have All the Flowers Gone," which contains a message about the regrettable results of war. I just couldn't resist using the title for this article because it conveys the message that most of this article is about. Many businesses and business interests appear to have virtually no value, and some may actually not have value, but they could still very well be viable.

Before going any further, I must say that, undoubtedly, there are going to be some business valuators (and maybe some attorneys) that will not agree with the theses set forth in this article. Although I am quite resolute about the positions I am advocating here, there could be situations where the particular set of facts warrant departures.

We can all agree that the economy has had a negative impact on many, if not most, businesses. For those businesses whose profitability has suffered, this has translated into at least some, if not a substantial, decrease in their values. Those business enterprises fortunate enough to not have been materially affected by the downturn in the economy or that have even thrived despite the downturn, are still probably not worth as much as they would otherwise be in a favorable economy. Investors are merely not willing to pay as much for those profitable businesses, i.e. the multiples are smaller, because the potential risks in a down economy are greater, money is tighter and a wait-and-see mentality exists.

When performing a business valuation, the valuator needs to determine which of three approaches to apply under the circumstances: the income approach, whereby a capitalization rate is applied to those historical earnings that are most representative of what the future earnings will be. (Alternatively, under certain circumstances, a discount rate is applied to each year's forecasted future earnings for a finite period, and a capitalization rate is applied to an ongoing future earnings figure, with the results then being discounted to present value.) Under the market approach, multiples of earnings (and/or sales and/or some other yardstick) are compiled from businesses that are similar or have similar characteristics to the business being valued, and the average (usually not the mean) of the multiples is applied to the business's earnings. Under the asset-based approach, the value of the business's assets and liabilities are individually arrived at, and then the total of the individual asset values less the total of the individual liability values determines the value of the business.

Let's now see why a business that seems to be making a profit can have no value. I will illustrate first by using the income approach. We will assume that the business is formed as a single-member limited liability company (or it could very well be a sole proprietorship). It has earned an average of $100,000 per year before any depreciation expense (which can vary greatly among businesses), and after giving effect to adjustments for any one-time revenue and expense items and any other expenses that an outside investor would not want the business to bear, e.g. expenses of a personal nature. The LLC pays no salary to the sole member, as this person withdraws money from the LLC bank account as needed. Now let's assume that this member's efforts in running the business warrants a salary of $100,000 per year based on the compensation that others in similar businesses and performing similar functions earn. (Such

(cont'd. on page 12)

WHERE HAVE ALL THE VALUES GONE?

cont'd. from page 11

compensation data, based on various criteria, are available from numerous resources.) After deducting the "fair compensation" of $100,000 from the $100,000 earned by the business before such compensation, the profit of the LLC is zero. If this is the case, then there is no earnings amount to capitalize, and thus there is no apparent value.

The same situation could apply to a corporation or other form of entity. Say that a corporation earns $50,000 after paying the stockholder-operator $75,000 per year, but the fair compensation amount is $125,000. Again, in this example, the corporation's earnings for valuation purposes is zero.

Under the market approach, using the scenarios set forth above, the value, theoretically, also should be zero. If there is a large discrepancy in the results between the market approach and the income approach, then either there is a flaw in the application of one (or both) of the approaches or the likelihood exists that there are not sufficient relevant data available for using the market approach, which often occurs when valuing certain types of professional practices, or businesses that are relatively small or have unique characteristics. Also, market data may not be relevant when it is derived mostly from transactions that occurred when the economic conditions were much more favorable than what has existed within the last couple of years.

So if the value of a business appears to be zero, should that be the end of the discussion? Probably not. The operative word here is "appears."

First of all, the value of a business is not based solely on its current profitability, or lack thereof. How has the business fared in the past? What are the prospects for the future when the economy starts to recover? Does the company have the wherewithal to sustain some period, or maybe an extended period, of depressed revenues? Are there funds available from outside sources, and/or are the owners able and willing to infuse needed capital in the hope that the business can ride out the storm? These are factors that need to be considered when determining value.

As for the past performance of a business, if it has been profitable in prior years and has the potential to be similarly profitable when conditions improve, then, even if the business has nominal or no profit, or is even operating at a loss, it could very well have value when looking at other factors, such as some of those mentioned above.

When earnings are capitalized (or to which a multiple is applied), almost always, assuming there is some history to the business, the earnings of the current year are weighted along with the earnings of a number of prior years. (Under the market approach, sales or some other yardstick could be used in addition to, or instead of, earnings.) This is because, as alluded to above, a business's value is not based on only one year's performance. The earnings to which a capitalization rate (or multiple) is applied is to be representative of the ongoing earnings (and/or sales, etc.) of the businesses. Thus, the weighting of current and prior earnings is to be done in a manner that, based on the valuator's best judgment from current information he or she has obtained from external and internal sources, will result in the amount of earnings the business should expect to have in the future. Key words here have been italicized, because there are many variables that affect value, and a change in any one of them can impact the result. In reality, of course the business will not have the same amount of earnings (and/or sales, etc.) every year in the future, nor does the likelihood exist that the average of some future period of earnings will be equal to the

(cont'd. on page 13)

WHERE HAVE ALL THE VALUES GONE?

cont'd. from page 12

weighted average of earnings that have been capitalized (or to which a multiple has been applied). All that a valuator can do is use the information that is currently available and then apply it in the best way that he or she sees fit.

What if a business has not been profitable in the few recent preceding years and/or there is little likelihood that it will be profitable in the foreseeable future? Could the business possibly have any value? In the context of the business having any return to the owner or to some investor, the answer is probably "no." However, there could be reasons that the business has value to a particular owner-operator that are intrinsic in nature. For example, if the business has earnings that result in cash flow to the owner-operator before imposing a fair compensation to the owner-operator, then if such cash flow is adequate for that person's needs, the business is thus allowing him or her to "make a living." Then there are the qualitative elements of that person having what could be a relatively secure job and being his/her own boss. However, for purposes of property division, a business with no post-fair compensation earnings would not have a quantitative value under any circumstances that I know of. But I'm not a lawyer!

An alternative that might be considered in ascribing value to a business having no earnings is to determine the value of the business's assets and liabilities. The asset-based approach is mentioned on the first page of this article, but this approach is not used very often, or at least not usually as the only approach, unless a business is hard-asset intensive and/or determining its individual values of the assets, including the intangibles, is not problematic. If a business has net worth, i.e. the total of the values of its assets exceed the total of the values of its liabilities, but it has no earnings and no prospects of earnings in the foreseeable future, does the business as a whole have value or, more specifically does the equity of the business, have value? From an ongoing concern perspective, the answer is most likely "no," but from a liquidation perspective the answer is "yes." So the question now is: What value, if any, should be ascribed to the business for property division purposes? If it appears that the business is better off dead than alive, should the business be killed? That, of course, all depends on 1) whether there is any reason to keep the business intact, e.g. it has some earnings before the imposition of a fair compensation; 2) whether cutbacks in certain expenses, product lines, etc. can be made to allow the business to be salvageable (if so, maybe then the business will have some value); and 3) if to liquidate is decided, whether assets are to be sold off methodically (and maybe the business still operates during this process), or to be sold off in short order. If liquidation of the business is agreed upon by the parties, then the value of the business is based on liquidation value for property division purposes. Of course, if the proceeds of the sale of assets are to be split equally between the spouses, establishing a value becomes unnecessary.

So far, the discussion has focused on a business being owned entirely by one or both spouses. If ownership is not 100 percent, but is controlled by one spouse or the community, then the same principles would apply as those discussed above. When a third party controls a business entity, then, generally, the cash flow to the spouse(s) is the primary determinant of value, using the income or market approach. (There are certain situations where the asset approach could be used as well.) This means, in part, that a "fair compensation" to the owner-operator(s) is not an issue in arriving at a value of the spouse's(s') interest, since he or she does not have control and must accept, or is deemed to have accepted, whatever compensation the owner-operators(s) receive, by virtue of the spouse(s) making and retaining the investment in the entity. I should note that, almost certainly, in determining the value of the spouse's(s') investment, a discount for lack of control (or minority discount) would be applied. Any further discussion about lack of control or minority discounts is beyond the scope of this article.

What about the marketability of an interest in a business entity? In the context of economic conditions, what affect, if any, should there be on marketability? Although a discussion on how a discount for lack of marketability is arrived at and what factors influence the determination of this discount is beyond the scope of this

(cont'd. on page 14)

WHERE HAVE ALL THE VALUES GONE?

cont'd. from page 13

article, I am going to mention two points about marketability discounts that are somewhat controversial.

The first point deals with whether a marketability discount is applicable to a business entity if it is owned by one person, e.g. spouse, or the community. If a business is profitable and thus has value, then to realize such value vis-à-vis a potential sale would take some time, and the time value of money would mean that the value of the business should be discounted. Right? Probably not, because, since the entity will continue to have earnings (that's what the value is based on), there is an ongoing return on that value of the entity until the time it is disposed. (If a business is not profitable and has no value, then there is no value to which a marketability discount can be applied.) Then there is the question of what the expense of disposing of the business would be. So now, the question is whether the ongoing earnings up to the anticipated time of sale will cover the time value of money plus the expenses of sale. If not, then some discount may be warranted, but this is not seen very often, because it is so speculative. But should a marketability discount be applied in a divorce situation in any event? This brings me to my next point.

When a spouse is active in a business (or in some cases, not active) in which the community has a less than a 100 percent interest, then the question arises as to whether or not a marketability discount should be applied. If the in-spouse would receive his or her percentage of the total value of the business upon an eventual sale of the business, or retirement or other disposition of his or her interest, while reaping the benefits of being an owner until such event (and if active in the business, probably having at least some job security and a regular salary), then why should that in-spouse have the advantage of paying the out-spouse a discounted amount, which is at the out-spouse's expense? I believe that, although there may be situations when a marketability discount is applicable, generally, it should only be applied in certain circumstances. Examples of such circumstances may be when the ownership interest in an entity is passive, particularly if there is no or little control regarding the sale of the entity or disposition of the owner's interest; a disposition of an interest has certain restrictions; proceeds from the sale of the entity are to be shared in a percentage other than that which is owned (which can occur when proceeds are above or below established thresholds); and/or other conditions exist that warrant a marketability discount.

Summary:

1. **Do economic conditions affect the value of a business?** Most likely, yes.
2. **Can a business that appears to be profitable have no value?** Yes, especially if the earnings are reduced to zero or to a loss after making certain valuation-related adjustments, such as an adjustment for fair compensation.
3. **Can a business worth keeping have no value?** Yes, even if after adjusted earnings are zero, by the owner-operator having command over running the business, having a sense of job security and having the ability to draw an adequate compensation for his or her needs, makes keeping the business worthwhile.
4. **Can a business with no earnings have a quantitative value?** Yes, if it is going to be liquidated and there will be proceeds to the owners.
5. **Are marketability discounts appropriate for business valuations in divorces?** Not normally when one spouse will continue to reap the benefits of ownership and eventually receive full value for his or her interest in the business.

Richard M. Teichner is the manager and sole member of Teichner Accounting Forensics & Valuations, PLLC in Reno. He is a CPA, Accredited in Business Valuation, a Certified Valuation Analyst, a Certified Financial Forensic and a Certified Divorce Financial Analyst™. He provides litigation consulting and expert witness testimony relative to forensic accounting and business valuations in family law matters and commercial litigation matters. Richard can be contacted at (775) 828-7474 or at accountingforensics@gmail.com. Website: www.accounting-forensics.com.

Are PERS Options Optional?

A Q&A Article on options in the Nevada Public Employees Retirement System

by Marvin Snyder

Q. What is an option in PERS?
A. The PERS option deals with death benefits after retirement (also known as survivor benefits).

Q. Is there an option with no death benefit?
A. Yes. Option number one, known as the "unmodified option" provides the full pension benefit to the retiree, ending at death, with no survivorship benefits.

Q. How many options are there that provide for death benefits?
A. Six, numbered from two to seven (because number one has no death benefit).

Q. What are the options?
A. Option one: No death benefits.
Option two: 100 percent of the retiree's monthly pension goes to the beneficiary.
Option three: 50 percent of the retiree's monthly pension goes to the beneficiary.
Option four: Same as option two but starts at age 60.
Option five: Same as option three but starts at age 60.
Option six: A specified dollar amount or percentage is selected in advance.
Option seven: Same as option six but starts at age 60.

Note: In most divorce cases, options two and three would provide a considerably increased benefit for the beneficiary.

Q. How does the employee know what option to elect?
A. If married at retirement, the employee would decide whether to take a full pension with no survivorship rights for spouse, or one of the options that would protect the spouse.

Q. Do the options cost anything?
A. Option one with no death benefits has no cost. All of the others bear an actuarial reduction in the pension based on the ages of the retiree and spouse, and on the specific benefit in the option.

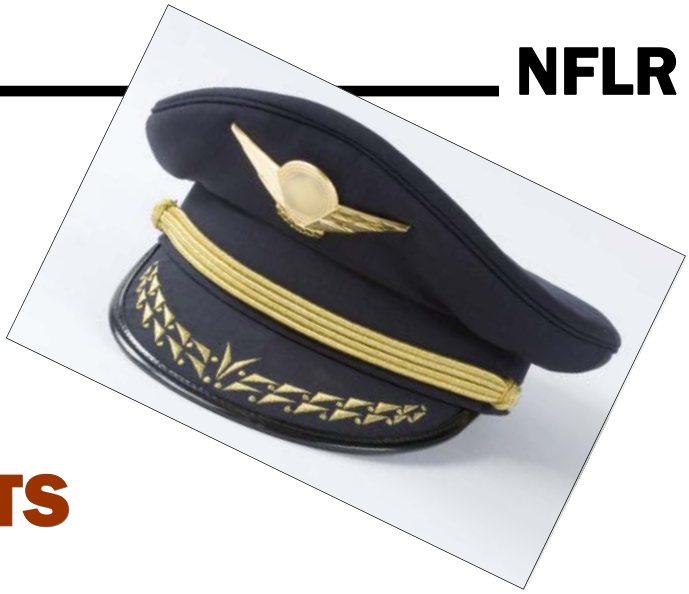
Marvin Snyder is president of Marvin Snyder Associates, Inc., Las Vegas, Nevada. He is a professional qualified pension actuary with more than thirty years of experience.

Mr. Snyder has served as a pension consultant for pension plans, annuity plans and profit sharing plans of all types and sizes, for a variety of employers, covering all kinds of employees.

Mr. Snyder has prepared more than ten thousand marital pension valuations, drafted hundreds of "QDRO's" for counsel, and has served as an expert witness on the value and equitable distribution of pension benefits more than one hundred times.

He has served as a court appointed expert and as a Special Master.

He can be reached at (702) 869-0303 or at MSnyder335@aol.com.



"Sham Divorces," Civil Rights, and Family Law Experts

by Marshal S. Willick, Esq.

I recently participated as the expert witness for a number of airline pilots in a series of arbitrations. The pilots had been fired by their employers for entering into supposedly "sham divorces" with their spouses for the purposes of accessing the pilots' pension benefits by QDRO.

Simultaneously, a federal district court in Texas ruled in favor of other pilots in parallel cases in *Brown v. Continental Airlines*.[i]

In both groups of cases, the employers came to believe that the pilots had obtained divorces for the specific purpose of withdrawing their pensions "early." As the federal court recited, "the pilots and their former spouses did not behave in a manner consistent with the breakup of a marriage. Many of the pilots continued to cohabitate, remarried soon after obtaining the lump sum payout, and all essentially conducted themselves as if the divorce had never happened."

Under the Employment Retirement Income Security Act (ERISA), plan administrators may review Domestic Relations Orders (DROs) to determine if they "qualify" as Qualified Domestic Relations Orders QDROs), defined by ERISA as orders which assign an alternate payee the right to receive "all or a portion of the benefits payable with respect to a participant under a plan," and comport with special terms defining the specificity of information regarding the alternate payee, and whether the DRO would allow benefits not available under the plan or in conflict with another alternate payee respectively.[ii]

ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.[iii] Normally, this means that pension rights are "inalienable" – non-transferable to third parties, so as to safeguard a stream of income for pensioners...and their dependants.[iv]

But in 1984, Congress enacted the Retirement Equity Act (REA) amending ERISA and adding, among other things, an exception to the anti-alienation provision for a domestic relations order resulting from a divorce between an employee and a non-participating spouse.[v]

In the airline cases, however, the plans wanted to go beyond the technical requirements of ERISA, and deem the underlying divorce decrees obtained by the pilots and their spouses "shams," thus permitting them to ignore the DROs and refuse to qualify them as QDROs (and thus not paying out the pension benefits).

While the federal judge in *Brown* fell back on not looking beyond the technical requirements of ERISA, the airline pilots in the arbitrations took the fight to the airlines on domestic relations public policy grounds.

Folks arrange their marital status for maximum financial advantage, on the advice of lawyers, all the time – for tax status, loan and mortgage qualification, and a host of other reasons that are affected by marital status.

In the modern "no-fault" world, the sole determination of marriage is

(cont'd. on page 17)

SHAM DIVORCES

cont'd. from page 16

a present intent at a given moment to ***be*** married. One is not required to hate one's ex, or not to associate, live with, date, or re-marry one's ex. I see all of those actions all the time – and usually for non-economic reasons. But the motivation for marriage – or divorce – is irrelevant; it's perfectly lawful, and if a divorce maximizes the size of the marital estate, it sounds like responsible financial planning.

The 1999 Department of Labor guidance stated "the administrator may not independently determine that the order is not valid under State law and therefore is not a 'domestic relations order' under section 206(d)(3)(C), but should rather proceed with the determination of whether the order is a QDRO." That was a good call, and the only appropriate response.

A couple who wish to adopt the legal relationship of "married" are free to do so at will, and to dissolve their union at will for their individual or joint advantage as they see it, including any financial advantages they see or think they see. It is just not an airline's business to inquire behind the decision to marry, or to divorce – and even less so is it the business of their Pension Plan Administrators.

In fact, in many states, both parties to a marriage have been found to have a fiduciary duty to look out for the maximum financial welfare of the community. The core holding of *Luciano*,[vii] a California case adopted by the Nevada Supreme Court in *Gemma*,[viii] was that "The employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition within the employee spouse's control." It's not much of a stretch from there to a duty – or at minimum, legal protection – to arrange marital status in such a way as to maximize the community income and assets.

So long as marital union, and marital dissolution, are legally available, the motivations of the parties are irrelevant to anyone else. The Plan, and Plan Administrator, and attorneys for both, just have no business interjecting themselves into private lives or making *any* kind of moral judgment about plan participants, dependents, or beneficiaries, or the "correctness" of legal proceedings in domestic relations courts. They are to obey conforming documents – period.

This was the essence of my testimony in the arbitrations. The defense corporate attorney-types representing the airlines were – quite literally – speechless.

But all of this is pretty basic civil rights stuff, and the employer who chooses to render judgment that an employee has entered into a "sham" divorce "just to get more pension money" may reasonably expect to pay – a lot – at the end of the appellate road.

These cases illustrate the value that a family law specialist expert witness might bring to litigation involving matters that appear far afield from the divorce courts. As the pilots' lead attorney wrote me when the cases ended: "It has been a pleasure working with you on these cases. I have gained an appreciation for domestic relations and pension law and DR lawyers . . . which I did not have before these cases began. The way issues in this area of law scratch their way into the very basic fabric of our freedoms is fascinating."

Gave me a warm feeling – it's nice to be able to do a good turn for the little guy facing a big corporation that wants to take his livelihood, or assets – and make the case a winner. And these cases provide a nice reminder that family law touches every conceivable field, often as the determiner of how things do – and should – come out for everyone involved.

Marshal S. Willick, Esq. is the principal of the Willick Law Group, a Las Vegas firm practicing exclusively in the field of family law. One of the original AAML members in Nevada and nationally published on family law topics, Mr. Willick can be reached at 3591 East Bonanza Rd., Ste. 200, Las Vegas, NV 89110-2198. His phone number is (702) 438-4100, and his fax is (702) 438-5311. E-mail can be directed to: Marshal@WillickLawGroup.com.

Endnotes:

i. Docket H-9-1148, H-9-1529, 47 EBC 2704, 2009 WL 3365911 (S.D. Tex., Oct. 19, 2009).

ii. 29 U.S.C. § 1056(d)(3)(B)(i).

iii. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S. Ct. 2890 (1983).

iv. *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376, 110 S. Ct. 680 (1990).

v. *See* Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426.

vi. My personal record is divorcing the same fellow from the same woman four times, bringing to mind the old joke about the lawyer saying goodbye to his client at the courthouse, and saying: "Goodbye, John, and I sure hope this divorce last longer than your last one."

vii. *In re Marriage of Luciano*, 164 Cal. Rptr. 93 (Ct. App. 1980).

viii. *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989).

Bench/Bar Meeting Report: "The South"

by Andrew L. Kynaston, Esq.

The Clark County Family Court Bench/Bar meeting was held April 29, 2010, at noon at the Family Courts and Services Center in Las Vegas. The meeting was attended by dozens of family law practitioners, members of the judiciary, other interested professionals, and representatives from the clerk's office, along with other court administrators and personnel.

Presiding Judge Gloria Sanchez announced that the Court had saved in excess of $29,000 through a program allowing staff attorneys to sit as pro tem judges. She extended the invitation to other members of the bar to serve as pro tem judges and hearing masters on a voluntary basis. Members interested in volunteering should send a letter to Judge Sanchez's chambers.

Mike Carman, who acted as master of ceremonies for the meeting, also made several announcements. He advised the attendees that it had come to the attention of the Court that there are several entities in the valley offering "COPE-type" parenting classes. He reminded members of the bar that only COPE certificates obtained from authorized providers will be accepted by the court, and to be cognizant of the same when referring clients for these services.

It was also announced that due to the Nevada Supreme Court's holding in *Landreth v. Malik*, 125 Nev. Adv. Op. No. 61 (December 24, 2009), that adult name changes must now be filed with the regular civil division of the District Court.

Mr. Carman further announced that the email list for the Bench/Bar will be scrapped due to becoming outdated. A new email list will be prepared and any members who wish to receive Bench/Bar related email should send an email to Corinne Price, Esq., at Corinne @thefinelawgroup.com.

Judge Jennifer Elliott then spoke briefly regarding the work of the Outsource Mediation Committee. She introduced several members of the committee and discussed her desire to expand the court's ability to refer litigants for outsourced mediation services not only to address child custody matters, but also property, debt and other financial issues. She indicated that there is a dramatic increase in the need for alternative dispute resolution (ADR) due to the present status of the economy. Judge Elliott further discussed proposals to change court rules to require attorneys to execute a certification in every case attesting that they have discussed ADR options with their clients. Judge Elliott indicated that the committee meetings are open to the public and invited participants to attend the next meeting on July 12, 2010, to share their ideas, comments and concerns regarding the proposed expansion of outsourced mediation services.

Following Judge Elliot's presentation, Marshal Willick briefly discussed that an amicus brief had been filed on behalf of the Family Law Section of the Nevada State Bar in relation to the rehearing by the Nevada Supreme Court of the *Landreth v. Malik* decision. Mr. Willick indicated that the amicus brief is available for review on his website: www.willicklawgroup.com. Mr. Willick further indicated that the NRCP 16.2 committee was presently working on improving the standard Financial Disclosure form with the goal of making the form more user friendly for both practitioners and the court. Further information regarding these efforts is also available on Mr. Willick's website.

The remainder of the meeting was devoted to follow-up discussions regarding questions and concerns related to the court's new e-filing system. Representatives from the court, Clerk's Office, and Wiznet (now Taylor) were present to address

(cont'd. on page 19)

BENCH/BAR REPORT

cont'd. from page 18

questions. It was reported that since mandatory e-filing became effective on February 1, 2010, that over 145,000 documents had been e-filed, saving enough paper to fill 572 bankers' boxes. The average daily filings are about 3,000, and the largest number of filings in one day was 3,500.

The next Bench/Bar meeting is scheduled for June 10, 2010, at noon at the Family Courts and Services Center located at 601 North Pecos Road, Las Vegas, Nevada 89101. Please mark your calendars to attend.

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

The firm's website is www.eckerkainen.com.