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CHILD SUPPORT IN WEALTHY FAMILIES

By Eric Pulver, Esq.

Some commentators complain that the Nevada child support guidelines favor the rich. They cite that the presumptive maximum amount of monthly child support per child is only $833 for a person earning from $14,816 to "no limit" per month. However, the Nevada Supreme Court repeatedly demonstrated its willingness to uphold the District Court's granting of upward deviations and denial of downward deviation of child support where the obligors were wealthy. This article will explore the cases and statutes utilized by the court in deviating from the child support formula where wealthy families are involved.

NRS 125B.020 and NRS 125B.070 set forth an objective standard regarding a parent's obligation to support his or her minor children. The two statutes, read together, require each parent to provide a minimum level of support for his or her children, which is specified by the legislature as a percentage of gross income, dependent on the number of children and absent special circumstances. *Wright v. Osburn*, 114 Nev. 1367, 1369, 970 P.2d 1071 (1998). Further, NRS 125B.080(5) creates a presumption that the basic needs of the children are met by the statutory formula set forth in NRS 125B.070(b). Application of the statutory child support formula must be the rule, and deviation from the statutory formula must be the exception. *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 532 (1989).

Despite the presumption set forth in NRS 125B.080(5), courts have limited discretion to deviate from the child support guidelines. The courts are not free to invent their own formula for determining if a deviation is warranted. *Lewis v. Hicks*, 108 Nev. 1107, 1112, 843 P.2d 828 (1992). Instead, any deviation from the child support formula must be based upon the factors enumerated in NRS 125B.080(9). *Westgate v. Westgate*, 110 Nev. 1377, 1379, 887 P.2d 737 (1994); *Anastassatos v. Anastassatos*, 112 Nev. 317, 320, 913 P.2d 652 (1996); *Love v. Love*, 114 Nev. 572, 579, 959 P.2d 523 (1998). Further, the basis for the deviation must be set forth in explicit findings of fact related to the relevant NRS 125B.080(9) factor. *Lewis* at 1111.

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Picture of Sara on page 4 courtesy of Wayne Blevins.

Pension QDRO Tax Information

By Marvin Snyder

This article provides information and clarification of the tax situation when there is a Qualified Domestic Relations Order (QDRO) on an individual account plan, such as profit sharing or 401(k), or on any plan that pays a lump sum cash distribution benefit. These notes do not apply to a regular defined benefit pension plan that pays a monthly annuity.

It is important to first note that there is no penalty for early withdrawal when payment is made to a former spouse under a QDRO regardless of the age of either party. The otherwise-imposed 10% excise tax (penalty) is not applicable [IRC 72(t)(2)(c)].

There are three distribution choices available. The Alternate Payee chooses one after being notified that the QDRO is fully and formally approved (but the individual should not wait too long to inform the plan of the selection):

(a) **All Cash.** A lump sum cash payment from the plan is considered to be personal and ordinary income of the Alternate Payee in the calendar year it is received, for federal income tax purposes. Twenty percent of the amount is withheld by the plan and sent directly to IRS in the name and Social Security Number of the Alternate Payee as a pre-payment or credit toward the income tax on the distribution.

This is required by federal tax law and cannot be waived. The 20% itself is not a penalty or the tax - it is withholding towards the tax.

(b) **Transfer to IRA.** No cash is paid. Instead, the entire distribution is transferred directly from the plan to an Individual Retirement Account of the Alternate Payee. The Alternate Payee does not even see the check.

The transferred funds in the IRA then become IRA assets, and are then subject to the standard rules for IRA taxation upon any eventual withdrawal of funds from the IRA at some future date. There is no tax event in the year of the transfer from the plan to the IRA, no withholding, no penalty.

(c) **Cash and Transfer.** The Alternate Payee may elect a combination of (a) and (b) in any amounts or percentages.

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NRS 125 B.080(9) states:

The court shall consider the following factors when adjusting the amount of support of a child upon specific findings of fact:

(a) The cost of health insurance;

(b) The cost of child care;

(c) Any special educational needs of the child;

(d) The age of the child;

(e) The legal responsibility of the parents for the support of others;

(f) The value of services contributed by either parent;

(g) Any public assistance paid to support the child;

(h) Any expenses reasonably related to the mother's pregnancy and confinement;

(I) The cost of transportation of the child to and from visitation if the custodial parent moved with the child from the jurisdiction of the court which ordered the support and the noncustodial parent remained;

(j) The amount of time the child spends with each parent;

(k) Any other necessary expenses for the benefit of the child; and

(l) The relative income of both parents.

The twelve factors that the courts may consider in deviating from the child support guidelines are not accorded equal weight. Greater weight is given to the standard of living and circumstances of each parent, their earning capacity and the relative financial means of the parents. *Love*, at 579 (citing *Barbagallo*, at 551). Greater weight will be given to these factors because, "what really matters in these cases, is whether the children are being taken care of as well as possible under the financial circumstances in which the two parents find themselves." *Barbagallo*, at 551.

Having identified the statutory framework that the courts look to in deviating from the child support guidelines, the questions then become: What explicit findings of fact related to the relevant NRS 125B.080(9) factors has the Nevada Supreme Court considered in approving or denying deviations from the child support guidelines? Further, how do these factors affect child support in wealthy families.

The first major case dealing with a deviation from the child support guidelines was *Barbagallo*, *supra.* In *Barbagallo*, the Supreme Court upheld the District Court's refusal to allow a secondary custodian father a downward deviation from the basic child support formula. The father spent 43% of the time with his children. The court was unpersuaded that the amount of time he spent with his children warranted a downward deviation. *Id.* at 552. The court reasoned that fixed expenses of a primary physical custodian are not usually appreciably diminished by the secondary custodian sharing the child care and child maintenance burdens. *Id.* 549-550. The court noted that a parent might spend a large amount of time with his or her child and yet contribute little or nothing to the child's material welfare. (However, see *Wright, supra,* and *Wesley v. Foster*, 119 Nev. Adv. Rep 11, 65 P.3d 251 (2003), holding that equal sharing of joint physical custody warranted a deviation from the child support formula, and creating a offset formula for determining child support in equal joint physical custody situations.)

Barbagallo held that all of the NRS. 125B.080(9) factors are not given equal weight in considering whether a deviation from the child support formula is warranted. The factors given the greatest weight are the standard of living and the circumstances of each parent, their earning capacity, and their relative financial means. *Id.* at 551. Further, in order to justify a downward deviation in child support, a secondary custodian has the burden to demonstrate that it would be unfair or unjust for him or her to pay the full child support amount, after he or she has already made substantial contributions of a financial or equivalent nature to the support of the child. *Id.* at 552. In the *Barbagallo* case there was no evidence of substantial financial contribution warranting a downward deviation from the basic child support formula. *Id.* at 553. Thus, the father's request for a downward deviation was denied.

Under *Barbagallo,* the wealthy obligor would find little relief from the child support formula based on the amount of time she spent with the children. Further, she would receive little relief if she could not prove that she made a substantial financial contribution to the support of the child. However, the more important legacy of *Barbagallo* for child support in wealthy families was to elevate the parties' standard of living, earning capacity, and financial means to the forefront of the consideration in deviating from the child support guidelines.

The next important decision was the *Herz v. Gabler-Herz* case, 107 Nev. 117, 808 P.2d 1 (1991). In just two pages, the Supreme Court set forth a dramatic holding in regards to deviation from the child support guidelines. The court found that child support awards in excess of the statutory formula could be based on factors other that increased need of the child. *Id.* at 118. The court found that an upward

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deviation was fair and equitable in light of the "vastly different incomes and financial resources of the plaintiff and defendant, and the amount of time each parent would spend with the children under the Decree of Divorce." *Id.* at 119. The court did not bother to tell the family law practitioner what was vastly different about the parties' incomes or financial resources, nor how much time the children were to spend with each parent. However, the *Herz* holding made it clear that greater wealth, without much more, could justify an upward deviation in child support. *Herz* struck fear in the hearts of wealthy obligors, and delighted the relatively financially disadvantaged obligee.

Lewis, *supra*, was the next important Nevada child support deviation case. A mother with primary physical custody of the parties' child sought to increase a father's child support obligation. The trial court adopted a referee's recommendation that the father's child support obligation should be increased, but the trial court only increased the father's child support obligation to one-half of what the child support formula mandated. *Lewis*, at 1109. The referee justified the low child support obligation by reviewing the father's expenses to determine what his "surplus" income was. *Id.* at 1111. The trial court then set the child support obligation according to the father's net income and not his gross income. The Supreme Court chastised the trial court for considering the father's expenses and net income in its determination of child support. *Id.* at 1112. The court noted the legislature's specific directive that an obligor's child support payments be set according to his gross income and not his net income. *Id.* at 1112.

The court noted that such an expense based approach would require the district courts to investigate the reasonableness of a parent's expenses, and encouraged a parent to increase his expenses prior to a support hearing. *Id.* at 1113. Such a result was exactly what the legislature had tried to avoid when it determined that child support would be set according to a parent's gross income and not their net income. *Id.* Barring special circumstances, the court held that child support is not calculated as a supplement to the presumably inadequate means of the custodial parent, or even the child's welfare, but is calculated according to the obligor's means. *Id.* The court concluded that even in considering the relative income of the parents under NRS 125B.080(l), the trial court was precluded from considering a parent's general expenses. *Id.* at 1115. Therefore, the court held that the trial court improperly departed from the statutory framework in setting father's child support below the statutory mandated amount. *Id.*

In a rare and helpful display, the court went on to demonstrate how the facts of the *Lewis* case should be considered in reviewing the deviation factors set forth in NRS 125B.080(9). First, the court looked at the parties' financial means and earning capacity. The court noted that while the mother had more financial assets, the father's income was three times greater than the mother's. *Id.* at 1114. The court noted that these facts favored raising the father's child support obligation, rather than reducing it. *Id.* Next, the court looked at the parent's standard of living. The court stated that there was no great disparity between the parties' standard of living. Since the parties' lifestyles were similar, a downward deviation of the father's child support was not warranted under NRS 125B.080 (9).

Finally, the court noted that it was not an abuse of discretion for the trial court to consider reducing the father's child support based on the fact that he remarried and had new children to support under NRS 125.080(9)(e), "the legal responsibility of the parents for support of others." *Id.* at 1116. However, the court tempered its statement by noting that the father had the offsetting benefit of his new spouse's income. The court warned that allowing downward deviations under NRS 125.080(9)(e) should be the exception rather than the rule, as 75% of divorcees remarried, and divorced men in particular often went on to become responsible for additional children. *Id.* The *Lewis* case demonstrated that an obligor's general expenses were not relevant to deviate from the child support guidelines. Instead, child support would initially be set by the obligor's gross monthly income. Further, greater earning capacity of the obligor, even when the parties' financial means and lifestyles were similar, would justify an increase in child support. *Lewis* helped to clarify that greater income alone could be considered as grounds for an upward deviation of child support.

Four years later, the *Anastassatos* case, *supra*, demonstrated that long visitation periods with the children by the secondary custodian did not justify an abatement of child support during the visitation periods absent specific findings of fact justifying the deviation from the child support formula. *Id.* at 321. The court reasoned that it does not necessarily follow that the fixed expenses of a primary caretaker should correspondingly decrease during prolonged visitation of the children by the secondary custodian. Thus, abatement of child support during summer break and other holidays is not favored. *Id.*

The *Love* case, *supra*, revisited the greater financial wealth of an obligor as a factor warranting an upward deviation in child support. In *Love*, the District Court based its upward deviation of Beach Boy Mike Love's child support obligation upon the vast difference in his financial resources compared to that of the child's mother. In addition, the trial court justified its upward deviation in the child support based upon the increased expenses of raising a teenager. On appeal, Mr. Love argued that the mother was not paying her fair share of the child's expenses. *Love*, at 580. The court dispensed of this argument by noting that child support is not a supplement to the presumably inadequate means of the custodial parent, but instead, child support is set according to the obligor's means. *Id.* (Citing *Barbagallo*). Thus, the court concluded that the trial court properly considered Mike's greater wealth in departing from the statutory child support formula. *Id.* The court was silent on the issue of whether the trial court properly considered the increased expenses of raising a teenager as a factor for an upward deviation of child support. However, the court's silence seems to be tacit approval of considering this factor, and logically would fall under NRS 125B.080 (d), "the age of the child." The *Love* court also upheld the District Court's requirement that Mike pay private school tuition for the child. The court reasoned that the parties' Marital Settlement Agreement provided that Mike pay the "educational expenses" of the child. The court found that private school tuition fell squarely within the meaning of the language educational expenses. *Id.* Thus, the *Love* case reinforced the notion that evidence of greater wealth, with little more, was a proper ground for an upward deviation in child support. Also, the case provided precedent for requiring wealthy parents to provide tuition for private education.

In *Wright* and *Wesley*, *supra*, the court considered how to calculate child support in equal joint custody situations. The court invented a child support formula for that unique situation. The trial court must calculate the amount of child support each parent would owe based on the number of children, and the appropriate percentage of the parent's gross income. Then, the court must subtract the difference between the two amounts, and the parent with the higher income will pay the difference. *Wesley* then requires that the *Wright* offset occur before the presumptive maximum amount is applied. The *Wesley* court noted, as it did in *Barbagallo*, that joint custody situations have the inevitable result of increasing total child-related expenses for both parents. *Id.* At 253. Yet, the *Wesley* court stated that the courts must still attempt to maintain comparable lifestyles of the children between the parent's households. *Id.* Further, the court noted that trial courts could use the factors set forth in NRS 125B.080(9) to deviate from the amount of child support calculated under the *Wright* analysis if special circumstances warranted. *Wesley* at 253. Thus, even in joint physical custody situations, a party's increased wealth or lifestyle can be used to justify an upward deviation in child support. Despite the court's repeated caution that child support should be set based on the obligor's means rather than as a supplement to the obligee's inadequate means, the *Wesley* decision sets a dangerous precedent that child support can be used as a means to bring the parents' lifestyles into parity. This result is exactly what worried Justice Springer

in the *Wright* dissent. He wrote:

> [W]hat is of most concern to me now is the unfairness that will be suffered by virtually every joint custodian. Once the word gets out that an excessive, judicially-imposed formula is going to be unexceptionably applied to the joint custodian with the greater income, I fear that it will deter parents from entering into joint custody arrangements. Most joint custodial parents would not object to paying child support to the parent earning less income, but after a certain point the child support becomes more of a subsidy to the payee parent than it is a benefit to the children. As things stand, unless the legislature acts to create a reasonable formula to be applied in joint custody cases, I am afraid that today's ruling will give great pause to the parent who earns more money that the other before agreeing to accept joint custody. I think that this is detrimental to the best interest of Nevada's children.

Wright, at 1371 (Springer, C.J. dissenting).

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An obligor's own wealth may not be limited to his or her income or property. Since second marriages are now the norm in our society, some courts have considered the wealth of a new spouse as a factor in setting child support. The statutory scheme regarding child support does not expressly authorize consideration of an obligor's spouse's income. However, if the obligor's spouse's income has significant impact on a NRS 125.080 (9) factor, the court may consider it in its determination of child support. *Lewis supra;* see also, *Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994). Similarly, financial contributions of a live-in co-habitant may be considered for the child support analysis. *Jackson v. Jackson*, 111 Nev. 1551, 907 P.2d 990 (1995).

It is clear that child support in wealthy families is not as simple as just applying the statutory formula. Elevated income or financial means alone are enough to justify an upward deviation in child support. This appears to be true regardless of the custody arrangement of the obligor has with his or her children.

While a child undoubtedly deserves to share in the wealth and income of each parent, evidence of wealth alone is increasingly being used to set and/or modify child support obligations above the statutory guidelines. Child support is ever increasingly being used to redistribute wealth as an alimony substitute, or as a means to equalize the parents' income and lifestyle.

The family law practitioner must be keenly aware that in wealthy families the analysis does not end after the child support formula is completed. There is great latitude to adjust child support based on the wealth and lifestyle of the parents. The family law practitioner must counsel their clients that there are significant amounts of money to be gained or lost in the setting or modification of child support for wealthy families.

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BETTER YOUR ODDS:
Knowing the Factors that Affect the Recovery of Marital Assets Wasted Through Gambling

By Vincent Mayo, Esq.

Perhaps in no other state is the litigation of marital assets wasted through gambling as prevalent as in Nevada. Although not directly addressed, it is generally understood in Nevada that gambling can constitute a waste of marital property. In fact, NRS 125.150(1)(b) provides:

> In granting a divorce, the court shall, to the extent practicable, make an equal disposition of the community property of the parties, except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

There are two Nevada cases that elaborate on the definition of the compelling reason requirement. In the first, *Lofgren v. Lofgren*, 112 Nev. 1282, 926P.2d 296 (1996), the Nevada Supreme Court identified one "compelling reason" for unequal disposition of community property as financial misconduct in the form of one party's wasting or secreting of marital assets. In the second case, *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997), the Nevada Supreme Court stated that there existed other possible compelling reasons, such as negligent loss or destruction of community property and unauthorized gifts of community property. Although these cases do not specifically hold that gambling can constitute waste or address pre-separation misconduct, it is nevertheless implicit that "compelling reasons" can include gambling as an activity that typically involves a substantial loss of a spouse's property.

Further, this position has been sub-

stantiated by rulings in other states. The Court of Appeals of Arizona held in *Gutierrez v. Gutierrez*, 193 Ariz. 343, 972 P.2d 676 (Ct. App. 1999), that a wife who was unaware of the fact her husband gambled and lost a portion of the parties' retirement was entitled to reimbursement for half of the account. The Court of Appeals of Iowa also held in the case of *In re Marriage of Bell*, 576 N.W.2d 618 (Iowa Ct. App. 1998), *cited by In re Marriage of Olson*, 705 N.W. 312 (Iowa Sup. 2005), that when a spouse gambles with community property, without the knowledge of the other party, such an act constitutes waste. This principle has, to varying degrees, even been codified in some states:

[*See* Minn. Stat. Ann. §518.58 (1996); 750 Ill. Comp. Stat. 5/503(d) (West 2000); N.M. Stat. Ann. §40-3-9.1. (Michie 2005). *See also Stremski v. Stremski*, 1994 Minn. App. LEXIS 1042 (Minn. Ct. App. 1994) (Under Minn. Stat. §518.58, the trial court properly determined that funds that the husband used in gambling during the pendency of the proceedings were to be treated as if they still existed); *Lehrer v. Lehrer*, 2000 Minn. App. LEXIS 507 (Minn. Ct. App. 2000) (the trial court did not have to make equal division of marital property, but rather a "just and equitable" division, and in light of the facts that the wife incurred the debt by writing bad checks on a gambling spree and a separate credit card debt was assigned solely to the husband, the division was just and equitable); *In re Marriage of Carter*, 317 Ill. App.3d 546, 740 N.E.2d 82 (Ill. Ct. App. 2000) (in accordance with Illinois statute, in part defining gambling as a dissipation of marital assets for one spouse's benefit or for a purpose unrelated to the marriage.]

Unfortunately, not all cases involving waste are as straightforward as the fact patterns in *Gutierrez* and *Bell* in their outcome. For instance, what does one do when a client has some knowledge of an offending spouse's gambling history or when the client was complicit in their "wrongful" actions? As the saying goes, the devil is in the details and special attention must be paid to whether or not an offending spouse's gambling truly was "unauthorized" and "secretive" in nature. *Lofgren* and *Putterman*, *supra.* Therefore, anticipating the factors that an opposing party or the court will look at in evaluating the merits of the case is essential to advising one's client.

The most obvious objection to a request for an unequal distribution of marital assets based on waste via gambling is a general consent to an offending spouse's gambling lifestyle. Along these lines, being complicit by gambling with the offending spouse can also create a presumption that gambling was authorized. This was the position of the Court of Civil Appeals of Alabama in *Pate v. Guy*, 2005 Ala. Civ. App. LEXIS 784, when the court took into consideration the evidence divulged at trial that the parties "lived a very extravagant lifestyle during their marriage, regularly taking expensive vacations and gambling trips . . ." Therefore, a client's direct involvement in the offending spouse's gambling is of importance. It is hard to imagine a judge feeling sympathetic for a party who regularly went gambling with their spouse but is now crying foul over the monies lost.

The Court of Appeals of Washington took a similar position in the case of *In the Marriage of Williams*, 84 Wn. App. 263, 927 P.2d 679 (Wash. App. 1996), when it considered whether gambling on the part of the wife constituted waste. In that case, the Court of Appeals held the wife's gambling lifestyle did not amount to waste, but was rather more in the nature of entertainment costs, when it took into consideration that gambling is legal and encouraged in Washington. 84 Wn. App. at 270. The court in essence reasoned that gambling, when consistent with the overall marital standard of living, is not materially different from any other expenditure for entertainment. The case also appears to stand for the proposition that in states where gambling is legal, the more minimal the amount spent on gambling is, the less reason for a disproportionate property award. At a certain point, however, the losses may be so great as to cause a court to find it to be more a waste of marital assets than a legitimate entertainment expense. This point is usually crossed when the losses cause significant debts to the parties as a result of addictive gambling. The court looked to the wife having three jobs as a mitigating factor in that the monies lost through gambling were apparently offset by her additional income from her numerous jobs. Id. Similarly, and by the same reasoning, in the event a party won more than they lost gambling, or at least won in proportion to their losses, they could argue "no harm, no foul," since the community was not detrimentally affected.

Also brought up by the court was the three-year length of time the wife had gambled. Id. The court seems to imply that if an offending spouse has gambled seriously for an extended period of time, the mere fact the non-offending spouse had not filed for a divorce sooner, with the goal of protecting herself financially, would reasonably be held against her. Id. A counter-argument to this reasoning based on equity, however, seems to

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have been suggested by the Court of Civil Appeals of Alabama in the case of *Wheeler v. Wheeler*,831 So. 2d 629; 2002 Ala. Civ. App. LEXIS 262.

In that case, the court found it fair and equitable to award the wife a majority of their assets when the husband's gambling caused the wife to invade her separate inheritance funds. Id. at 634. The court also determined the disparity in earning potential and education between husband and wife had an impact on her ability to support herself from her half of the remainder of the marital estate. Id. at 634. The lower court's rulings were upheld despite the fact the husband had gambled for over five years.

Another question that can potentially be raised by a trial court is that if a client did not have direct knowledge of the offending spouse's gambling, should they have been diligent when there was reason to be suspicious? The Court of Appeals in *Williams* did not find a dissipation of assets related to gambling based on the fact that the husband, even though he did not know the extent of the wife's gambling, nevertheless had reason to conclude she had gambled substantial assets. 84 Wn. App. at 271. In the case, husband admitted that he knew his wife regularly made withdrawals from several credit cards and that he had access to the cards. Therefore, as the court stated, the husband knew or should have known "approximately what was going on." Id.

There could potentially exist other scenarios similar to the one in *Williams* in which a spouse would have a difficult time playing dumb. A court might reasonably conclude that a client who alleges they did not know their spouse gambled on-line but knew of multiple unexplained billing charges on credit cards would have a difficult case. The fact an offending spouse never deposited their checks into their checking account but rather cashed them at a casino, pay day loan center or another undisclosed location, would be highly suspicious. Even a failure by a client to inquire into the grounds of a spouse's bankruptcy prior to marriage could be interpreted as a clear warning sign based on the significant financial impact a bankruptcy can have on a marriage.

Contrast these fact patterns to the case of *Keathley v. Keathley*, 76 Ark. App. 150; 61 S.W.3d 219 (Ark. App. 2001). In that case, the Court of Appeals of Arkansas disagreed with a husband's argument that his wife should have known he was gambling and therefore a disproportionate division of marital assets was not justified. Id. at 160. Specifically, the court upheld the lower court's finding that the parties had little debt when they married, the wife thought their only debts were a car and house payment, her income was sufficient to cover these expenses and the husband handled the parties' finances. Id. at 160. Even though the husband alleged otherwise, the evidence further showed the wife did not have access to the parties' checkbook and therefore did not know of her husband's ATM withdrawals. Id. at 160.

Even though there does not appear to be any specific case law on the topic, another factor that should be taken into consideration is whether the non-offending party took it upon themself to address and try to remedy the other spouse's gambling problem. Acts that could constitute remedial measures would be participation in such organizations as Gamblers Anonymous or Al-Anon; attending marital and credit counseling; discussions directly with the offending spouse, friends and family; attempts by the client to separate the client's marital funds from the offending spouse's or restricting the offending spouse's access to bank accounts or canceling credit cards. Although this list is not all inclusive, it is a starting point in evaluating a client's case and could be argued when appropriate as mitigating circumstances even though they had knowledge of gambling.

Potentially, an offending party could assert that since gambling is recognized as an addiction and disease, it was beyond their control. Therefore, there was no intentional misconduct on their part that could be held against them. Such an argument seems plausible. As suggested in *Wheeler*, however, a court might be unwilling to leave the non-gambling, financially limited spouse out in the cold based on the conduct of the offending party, regardless of a lack of control on their part. Further, a gambling spouse's ability to prevail on this argument would only seem likely in extreme cases and where an expert can testify convincingly to the court. *See Williams*, 84 Wn. App. at 270.

As demonstrated, numerous factors can limit a court's finding of waste by an offending spouse and care must be taken before sounding the proverbial bell regarding a dissipation of marital property through gambling. Only by identifying and evaluating these components will an attorney be in the best position to not only properly advise the client but successfully argue waste before a court.

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PARENTING COORDINATION IN DOMESTIC VIOLENCE CASES

by Hon. Dale R. Koch and Amy Pincolini-Ford, J.D.

Parenting coordination is an emerging alternative dispute resolution technique being used to address the problems of highly litigious "high-conflict families" (Zollo, N. & Thompson, R., 2006) and overburdened, overworked, and under-resourced family court systems. This article examines parenting coordination in high-conflict cases, the difference between high-conflict and domestic violence cases, the safety implications of parenting coordination for abused parents and their children, and the different approaches being used to enhance the safety of abused parents and their children.

What is Parenting Coordination?

Parenting coordination seeks to assist high-conflict parents to implement their parenting plan, monitor compliance with the details of the plan, resolve conflicts regarding their children and the parenting plan in a timely manner, and protect and sustain safe, healthy, and meaningful parent-child relationships (AFCC Task Force, 2006). Parenting coordination is child focused (AFCC Task Force, 2006) and is designed to resolve disputes between high-conflict parents arising out of an agreed-upon parenting plan, or, in cases where the parties cannot agree, a child custody and visitation order entered by the court. Rather than go back to court to resolve problems arising out of the parenting plan or court order, such as changes to or clarification of parenting time, exchanges of the children, or alterations to the children's appearance (AFCC Task Force, 2006), the parties may elect to use parenting coordination to resolve these issues or may be court ordered to do so.

Concerns have been raised about the courts' use of parenting coordination as an inappropriate delegation of judicial decision-making. While those concerns are legitimate, they can be largely alleviated by ensuring that judicial oversight continues in those cases and that the parties have expedited access to the court in the event that there is disagreement with a decision made by the coordinator, as well as if the need arises either to replace or terminate the use of a parent coordinator. Thus, while enjoying the benefit of quick, regular, and more economical access to a parent coordinator to help parties resolve day-to-day questions and disputes, parties should not be prohibited from access to the judge handling their case.

The Role of the Parenting Coordinator

The role of the parenting coordinator is not to make major decisions that would change legal or physical custody from one parent to the other or that would substantially change a parenting plan or court order (AFCC Task Force, 2006). This type of decision-making is the court's function.

However, a parenting coordinator, if given authority by the court, may resolve or make recommendations about issues such as: health care management; child-rearing; education or day-care; enrichment and extracurricular activities; religious observances and education; children's travel and passport arrangements; communication between parties regarding the children; role of and contact with significant others and extended family; substance abuse assessment or testing for either or both parents; and parenting classes for either or both parents (AFCC Task Force, 2006). Whether parenting coordination is agreed upon by the parties or court ordered, it is incumbent upon the court to clarify with specificity the role of the parenting coordinator. This is especially true for domestic violence cases because parenting coordination was designed primarily for high-conflict cases.

High-Conflict vs. Domestic Violence Cases

Although the goals of parenting coordination may serve high-conflict cases well, parenting coordination presents safety concerns in domestic violence cases. The terms high-conflict and domestic violence are often used interchangeably within the courts and are often confused, even though these two terms have vastly different meanings (Jaffe, P.G., Crooks, C.V. & Wong, F.Q.F., 2005). "High-conflict" has been used to describe more intense and protracted disputes that require considerable court and community resources, and that are marked by a lack of trust between parents, a high level of anger, and a willingness to engage in repetitive litigation (Jaffe, P.G., Crooks, C.V. & Wong, F.Q.F., 2005). Because domestic violence cases are marked by many of these same traits, they are often lumped into definitions of high-conflict. However, the term domestic violence refers to an intentional pattern of coercive behavior, including physical violence, sexual violence, threats of harm, economic control, isolation, insults, and emotional control, within an intimate relationship in which one partner engages with the purpose of achieving power and control over the other partner (Jaffe, P.G., Crooks, C.V. & Wong, F.Q.F., 2005; Dunford-Jackson, B.L. & Jordan, S., 2006).

As a result of the confusion in and interchangeable use of these terms, domestic violence cases are many times labeled as high-conflict cases. However, the risks and responsive

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strategies to each type of case are different, although they may overlap. The crucial differences between high-conflict cases and domestic violence cases include, among other things:

1. In high-conflict cases, there is a relatively equal balance of power between the two parties, and the parties are not making safety-based decisions. However, in domestic violence cases this equality of power is not present, and the abused parent's decisions often hinge on whether such decisions will compromise their safety or that of their children.
2. The safety of the abused parent and children should be prioritized after separation in domestic violence cases; this is not necessarily a concern in high-conflict cases.
3. In high-conflict cases, generally the conflict does not provide the sole basis for choosing one parent as the sole physical or legal custodian of the children; however, in domestic violence cases, many states mandate by law that the violence alone does provide a basis for awarding physical or legal custody of the children to the non-abusive parent (see, e.g., Alaska Stat. § 25.24.150; S.D. Codified Laws § 25-4-45.5; and Wis. Code § 767.24).
4. In domestic violence cases, the abuser is likely to minimize and deny the violence and the abused parent may be unwilling or afraid to disclose the abuse or parenting concerns about the abuser; however, in high-conflict cases, both parents tend to be equally vocal about parenting issues (Dalton, C., Carbon, S. & Olesen, N., 2003).

Other Safety Concerns for Abused Parents and Children

In addition to the mislabeling of domestic violence cases as high-conflict cases, current parenting coordination laws also present safety concerns for abused parents and their children. For example:

1. Many states with parenting coordination laws or court rules call for parenting coordination specifically in high-conflict cases, which these laws and court rules tend to define as domestic violence cases; or they call for its use in domestic violence cases, without providing specific safety-focused practices and procedures (e.g., Arizona, Idaho, Kentucky, North Carolina, Ohio, and Oklahoma).
2. The parenting coordination process is not confidential, so abused parents and their children may be unwilling to disclose ongoing threats or acts of violence or parenting concerns about the abuser and may be at increased risk of harm if information is shared with the abusive parent (e.g., North Carolina and Oklahoma). When information that puts a party at risk must be disclosed, the parenting coordinator should alert the party of the disclosure in advance so that the party can take any necessary safety precautions (Dalton, C., Drozd, L. & Wong, F.Q.F., 2004).
3. At least two states using parenting coordination also specifically allow parenting coordinators to exclude attorneys from parenting coordination conferences or interviews (e.g., Idaho and Kentucky). This raises the question as to whether this type of practice may interfere with both parties' due process rights.
4. Most states that allow parenting coordination in domestic violence cases do not address domestic violence training in the statute, court rule, or local rule authorizing parenting coordination; require that the parenting coordinator receive a minimal amount of training, such as one-time only training; or require training on topics such as anger management, which is an inappropriate intervention in domestic violence cases that could heighten the danger for abused parents and their children (Dalton, C., Drozd, L. & Wong, F.Q.F., 2004). This practice is especially problematic because domestic violence is a multifaceted issue and needs a parenting coordinator who understands its complexity. Training alone does not ensure that the parenting coordinator will be able to assess the presence of domestic violence, its impact on those directly and indirectly affected by it, and its implications for the parenting of each party (Dalton, C., Drozd, L. & Wong, F.Q.F, 2004), or to assess whether the abuser is using parenting coordination for continued access to the abused parent and children.
5. Several states do not require parenting coordinators to conduct separate interviews and sessions with parties in domestic violence cases (e.g., Idaho, Kentucky, and Oklahoma). This practice does not prioritize the safety of abused parents and their children or protect abused parents from potential intimidation or coercion by the abuser during parenting coordination.
6. Typically, both parties are required to share the costs of parenting coordination, which may be virtually impossible for an abused parent who has had to flee the abuse and may be starting over. While some states give the parenting coordinator authority to require one party to bear the costs of parenting coordination because of that party's behavior (e.g., North Carolina), it is unclear whether domestic violence can be the basis upon which to require an abuser to pay the entire cost of parenting coordination.

These concerns raise the question whether the use of parent coordinators is ever appropriate in cases involving domestic violence, which mirror the same concerns that were initially raised about the use of mediation in domestic violence cases in Multnomah County, Oregon. However, the Multnomah County experience showed that with appropriate training, procedures, safeguards, and opt-out provisions in place, mediation can improve the outcomes for victims of domestic violence over those which they might otherwise experience in contested court proceedings. Thus, although clearly not appropriate in many cases involving a history of domestic vio-

lence, mediation may be a useful tool if thoughtfully used by the courts in custody and parenting time disputes.

Although the parent coordinator movement is a much more recent concept and its use not widespread, with the proper use of the same tools developed in the mediation context, it should not be rejected out of hand in all domestic violence cases. However, its appropriateness is predicated upon ensuring that the primary focus is the safety of abused parents and their children.

Safety-Driven Approaches

In an attempt to provide safety for abused parents and their children and to acknowledge the differences between high-conflict and domestic violence cases, the Association of Family and Conciliation Courts' (AFCC) *Guidelines for Parenting Coordination* (*Guidelines*), set forth specific practices and procedures for parenting coordination in cases with domestic violence that are separate and different from the parenting coordination practices and procedures in high-conflict cases. Such practices and procedures include requiring parenting coordinators to:

1. screen prospective cases routinely for domestic violence;
2. decline domestic violence cases if they do not have the expertise and procedures in place to manage coercive tactics and the imbalance of power and control in such cases;
3. be trained on domestic violence and child maltreatment on a continual basis;
4. tailor techniques used in order to avoid giving the abuser the opportunity to continue the pattern of power, control, and coercion;
5. conduct interviews and sessions with parties separately;
6. adhere to all protection orders; and
7. take whatever measures are necessary to ensure the safety of the parties, their children, and the parenting coordinator (AFCC Task Force, 2006).

Another approach to increasing the safety of abused parents and their children who may elect or be required to use parenting coordination is to provide an opt-out provision. For example, in Texas parties are allowed to opt out of parenting coordination on the basis of domestic violence. When a party opts out for this reason, parenting coordination can go forward only if the court finds that the objection is not supported by the evidence. When parenting coordination goes forward, the court must require safety measures be taken, such as ensuring that the parties not be required to have face-to-face contact and that parties be placed in separate rooms during parenting coordination.

Conclusion

A key component to making these safety-driven approaches work is to provide implementation guidance for states and parenting coordinators. For example, more guidance is needed about screening effectively for domestic violence and conducting interviews and sessions with parties separately. Without implementation guidance, the safety of abused parents and their children may be compromised.

Although parenting coordination was designed for high-conflict cases, the prevalence of domestic violence cases mislabeled as high-conflict cases means that parenting coordinators are often working with domestic violence cases even if not identified as such. Making parenting coordination safe for abused parents and their children requires that states and parenting coordinators prioritize the safety of abused parents and their children.

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