Volume 28, Issue 3 Fall 2015

NEVADA FAMILY LAW REPORT

Family Section of the State Bar of Nevada

In this Issue

N.R.C.P. 16.215: Providing Procedures for Child Testimony in Family Court

By Josef Karacsonyi, Esq., The Dickerson Law Group

On May 22, 2015, the Nevada Supreme Court adopted Nevada Rule of Civil Procedure 16.215. NRCP 16.215 was enacted in order to assist in the application of the Uniform Child Witness Testimony by Alternative Methods Act ("Child Testimony Act"), contained in Nevada Revised Statutes, Section 50.500, et. Seq, in domestic relations matters. NRCP 16.215 was proposed by the Child Witness Committee of the Family Law Section of the State Bar of Nevada ("Child Witness Committee"). Prior to the

enactment of NRCP 16.215, the Child Testimony Act was not being applied uniformly, and sometimes not at all. Child testimony was being obtained in different manners in almost every courtroom throughout this State. It was impossible for attorneys, and more importantly, litigants, to know what to expect with regard to the testimony of their child or children prior to appearing in court.

NRCP 16.215 was enacted to ensure that the Child Testimony Act is applied uniformly throughout the State, to establish procedures to apply the Child Testimony Act, and to ensure that the Child Testimony Act's purpose of protecting children while also guaranteeing the rights of due process to litigants is preserved. To that end, NRCP 16.215 provides procedural safeguards for children who serve as witnesses in custody hearings, whether the child's testimony is taken in court or during a child custody evaluation. The rule was written to balance the needs of the courts to obtain information while considering the short and long-term psychological impact on children participating in custodial proceedings.

The Child Witness Committee spent over two (2) years reviewing literature and studies regarding the psychological impact on children from testifying in domestic relations matters, and formulating and drafting NRCP 16.215. Children often report that they want to speak to the court in child custody proceedings. However, the key to whether a child's testimony will benefit the court without harming the child is based upon how the interview is conducted, including the location of the interview, the experience of the interviewer, and the interview protocol used in the process. Many who attended the 2013 Ely Family Law Conference remember the experiences shared by attorneys who were interviewed as children in their own parents' custody cases. While some attorneys found the experience traumatizing, others reported that it was cathartic and helped them to feel that their voice was heard in the decision making process. What was not explored in that informal audience survey was "how" the interview was conducted at the time that the child's testimony was taken.

Understandably, some children want to talk to the person who is making decisions about where they will live, where they will go to school, and, ultimately, with whom they will spend their days. While some children are eager to enter the courthouse and tell the judge what is on their mind, others are terrified by the thought of having to choose between their parents or saying something that is going to upset their parents. It is important for legal professionals to remember that children who are interviewed in child custody proceedings are undoubtedly being influenced by one or both parents in the process; children do not typically make independent decisions, rather, they make influenced decisions. NRCP 16.215 seeks to protect the value and integrity of child testimony (1) by providing specific alternative methods that will allow the finder of fact to obtain testimony from a child in a setting that protects the child; (2) by requiring the court to balance the needs of the litigants with the need to create an environment in which the child can be open and honest, and (3) by requiring the creation of a record of the child's testimony so that such testimony can be reviewed.

Josef Karacsonyi, ***Esq.*** is an associate attorney with The Dickerson Law Group. Mr. Karacsonyi is also a member of the Executive Council for the Family Law Section of the State Bar of Nevada, He can be reached at 1745 Village Center Circle Las Vegas, Nevada 89134. Mr. Karacsonyi's number is (702) 388-8600 and his fax is (702) 388-0210. He can be reached via email at josef@dickersonlawgroup.com.

AB 263 - The Parental Rights Protection Act of 2015: Legislative History

By Keith Pickard, Esq.

The Parental Rights Protection Act of 2015, known in Nevada legislative circles simply as AB 263, began as a response to *Druckman v. Ruscitti*[1] and transformed into legislation that leveled the playing field for parents seeking to protect their relationships with their children.

The legislation achieves three principal goals:

1. It establishes a tiered preference for joint physical custodial awards, consistent with NRS 125.460 and NRS 125.480(1)-(3);

2. It establishes uniform rules for all relocation cases, including both intra- and interstate relocation cases, based upon the rule the Nevada Supreme Court intended in *Druckman*; and

3. It brings the disparate rules scattered across the five sections of the statutory scheme into one place, NRS 125C, which allowed for harmonization of the various standards, removing the threshold tests based upon the parties' gender and prior marital status.

[1] 130 Nev. Adv. Op. 50, 327 P.3d 511 (June 26, 2014).

A Tiered Preference for Joint Physical Custody.

NRS 125.460 describes the policy of the state as one ensuring "that minor children have frequent associations and a continuing relationship with both parents."[2] Similarly, NRS 125.480 opens with a declaration that the "***sole consideration*** of the court" in custody cases must be that of the "best interest of the child." It also provided that joint custody was preferred.[3] NRS 125.490 further provided that joint custody would be presumed to be in the child's best interest.[4] The expected result was, however, illusive to the extent that the statutes did not adequately define "joint custody," and NRS 126.031 provided that, when parents of a child were not married, the mother had primary physical custody of the child by operation of law unless there was a court order stating otherwise. This conflict in standards meant that the initial custody determination was largely based upon gender and the prior marital status of the parents, rather than the best interests of the child.

Instead, though the "presumption" for joint *legal* custody was retained, rather than establish a similar presumption for joint physical custody, a tiered preference was instituted so that joint physical custody would be the norm when all things were otherwise equal. This gave guidance to, but left discretion in, the trial court to make a determination based upon the various "best interest factors" of NRS 125.480(4). If the Court feels that primary physical custody in one parent is preferable to joint, then the Court must merely explain what facts support that determination. The default assumption for joint legal and physical custody was established only for those cases where a court had made no determination at all, barring domestic violence. But once the case went to court, the trial judge still held the mandate to do justice, based solely upon the best interests of the child.

---

[2] NRS 125.460(1); *see also* NRS 128.005(1)("The Legislature declares that the preservation and strengthening of family life is a part of the public policy of this State.")

[3] NRS 125.480(1-3)(emphasis supplied).

[4] NRS 125.490(1-2).

Historical Rules for Relocation Cases.

At the time *Druckman* was decided, there were two glaring problems with relocation cases. The first had to do with the inequality of treatment between instances where parents had a custodial order and when there were none. The second had to do with the disparity between interstate relocation cases, no matter how close the parties remained, versus intrastate relocations where the parties were now separated by hundreds of miles.

NRS 125C.200 provided that a "custodial parent" could not relocate from the state without the consent of the non-custodial parent, or, if the non-custodial parent refused, permission from the court. The term "custodial parent" referred only to a parent who received primary physical custody by court order. Parents who had not obtained a court order, and those who obtained joint physical custody by court order, were unaffected by this rule. For those custodial parents who wished to relocate with their children out of state, the prior custodial award made a huge difference. The two primary cases that dealt with relocation, *Schwartz v. Schwartz*[5] and *Potter v. Potter*[6], created an unbalanced set of rules that the trial court was to follow in relocation cases.

Schwartz provided the trial court with a set of six factors to consider when determining whether relocation with children was in the children's best interest that began with a simple "good-faith" or "best-interest" test as established in another case, *Truax v. Truax*[7]. It also held that the provisions of NRS 125C.200 did not apply to joint custodial situations.

Potter, attempting to fill the gap for joint custodial arrangements, also raised the bar as to what was required to obtain permission to relocate for those particular brand of cases. Rather than simply applying NRS 125C.200 to joint physical custodial arrangements, it added a balancing equation wherein the relocating parent would have to prove that it was better to move with the relocating parent than to remain in Nevada with the remaining parent.

The overriding concern was supposed to be the best interests of the child per the policy statements of 125.460 and NRS 125.480(1)-(3), not which parent had the child first. And no rule applied at all where parents wanted to relocate within Nevada, no matter what that would do to the relationship with the remaining parent.

Standardized Rules for Relocation Cases.

The legislation resolved all of these issues. Though the decision in *Druckman* attempted to address the disparity between cases where a prior custodial order existed and when one did not, it ultimately did not rely upon the rule it created when it upheld the trial court's decision. *Druckman* purported to create a rule, but the trial court failed to make any findings of fact

---

[5] 107 Nev. 378, 381-82, 812 P.2d 1268, 1270 (1991).

[6] 121 Nev. 613, 119 P.3d 1246 (2005).

[7] 110 Nev. 437, 874 P.2d 10 (1994).

consistent with the rule. As a result, the rule set forth in the decision was arguably dicta, meaning no one had to follow it.

The Act addressed this flaw. First, it standardized the rule across all relocation cases, creating for the first time a rule that required intrastate relocations to follow the same rules. It established that a parent who wished to relocate "within the state at such a distance that would substantially impair the ability of the other parent to maintain a meaningful relationship with the child" must also seek consent of the other parent or, if the other parent objects, permission from the court. The undefined term "meaningful relationship" was chosen over a hard rule (either by defining "meaningful" or by setting a bright-line rule based upon an arbitrary distance) in order to allow the trial court the ability to make particularized determinations on a case by case basis. What might be "meaningful" in one context could be insufficient in another, and the preference was to allow the trial court the ability to craft an order based solely upon the best interests of the child. This put children subject to being separated from a parent, whether by interstate or intrastate relocation, on an even playing field.

Second, the Act codified the *Schwartz* factors that the *Druckman* decision attempted to apply, including a three-pronged threshold test. The party wishing to relocate with the child must first demonstrate to the court that:

(a) There exists a sensible, good-faith reason for the move, and the move is not intended to deprive the non-relocating parent of his or her parenting time;

(b) The best interests of the child are served by allowing the relocating parent to relocate with the child; and

(c) The child and relocating parent will benefit from an actual advantage as a result of the relocation.

Once the relocating parent sufficiently demonstrated that these factors had been sufficiently met, the Court must consider the Schwartz factors:

(a) The extent to which the relocation is likely to improve the quality of life for the child and the relocating parent;

(b) Whether the motives of the relocating parent are honorable and not designed to frustrate or defeat any visitation rights accorded to the non-relocating parent;

(c) Whether the relocating parent will comply with any substitute visitation orders issued by the court if permission to relocate is granted;

(d) Whether the motives of the non-relocating parent are honorable in resisting the petition for permission to relocate or to what extent any opposition to the petition for permission to relocate is intended to secure a financial advantage in the form of ongoing support obligations or otherwise;

(e) Whether there will be a realistic opportunity for the non-relocating parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship between the child and the non-relocating parent if permission to relocate is granted; and

(f) Any other factor necessary to assist the court in determining whether to grant permission to relocate.

These sets of factors offer a relatively predictable way of addressing first the interests of the child when approaching relocation. If the parties do not agree, then the court will take evidence and make specific findings relative to the child's interests and craft an appropriate order.

Protecting those subject to domestic violence.

Another of the principal frustrations with the existing rules was that parents would often still relocate with impunity, even if they couldn't fully justify it, because the rules regarding parental abduction were so easy to circumvent or disregarded by the courts. Arguably, one of the principal difficulties in resolving relocation cases in the past was that there was little the remaining parent could do when the relocating parent moved unilaterally other than to file a motion with the court after the fact. There were simply no teeth to the rule making such a move illegal, even in cases where NRS 125C.200 applied. The legislation tied cases where there was a court order existed and those where no order was in place to the parental abduction statute in NRS 200.359.

NRS 200.359 was also modified to address when parents both willfully removed the child and where they acted to frustrate the other parent of a meaningful relationship with the child. Parents are not to resort to self-help in such a way that denies the other parent of their constitutional rights to their children, at least not without permission of the court. But specific attention was paid to protect those that were fleeing domestic violence. A parent must seek permission of the court first, or demonstrate to the satisfaction of the court that they were fleeing domestic violence. This was of particular concern to those in rural areas where they had no choice but to flee a significant distance.

During the editing process of the Act, it was also determined that there were various possible scenarios, other than domestic violence, that might provide the relocating parent justification for a preemptive move. In an effort to give the court the flexibility needed in such cases, the decision was made to insert a new term – "compelling excuse" – for the court to consider. As with the term "meaningful relationship," the court is given the ability to determine on a case by case basis whether a party has a compelling excuse for intentionally disregarding the rule requiring permission first. Not to be interpreted as "any" excuse, a party must show a "compelling" reason for doing so. If the court is satisfied that the party was justified in the unilateral relocation, the court has the ability to avoid implementation of punishment.

These changes act to provide real consequences to those who intentionally and willfully disregard the requirement for consent of the other parent, or permission from the court, while

ensuring that those that had a legitimate and compelling need are not punished for doing what was truly in the child's best interest.

The Resulting Law is Good.

Ultimately, the result that came out of the 2015 Legislative Session is a good one. AB 263 took a first step toward legislative changes that make sense. It codified the *Druckman* rule making relocation cases more predictable. It also leveled the playing field for those seeking to retain a relationship with their children. And it removed much of the disparity and inequity in the law resulting from the preconditions of prior marital status and gender. That there is more work to be done is both apparent and to be expected. AB 263 was never going to be a major overhaul of Nevada's custody and visitation statutes. But the law that came out of this legislative session will act to assure that decisions in the trial courts are increasingly based only on the best interests of the children, rather than first on the desires of one of the parents. If that is the only thing it accomplishes, it was worth the effort.

Keith Pickard, ***Esq.*** is a partner of Pickard Parry & Pfau. He can be reached at 10120 S Eastern Ave #140, Henderson, NV 89052. Mr. Pickard's number is (702) 910-4300 and his fax is (702) 910-4303. He can be reached via email at keith@pickardparry.com.

The New/Old Nevada Law of Partition of Omitted Assets

Marshal S. Willick, Esq., Willick Law Group

This summary article provides a pencil sketch of the new statute governing partition of omitted assets; a full explanation of the history, relevant public policy concerns, and forms will be set out in the materials for the December, 2015, "Advanced Family Law" seminar in Las Vegas.

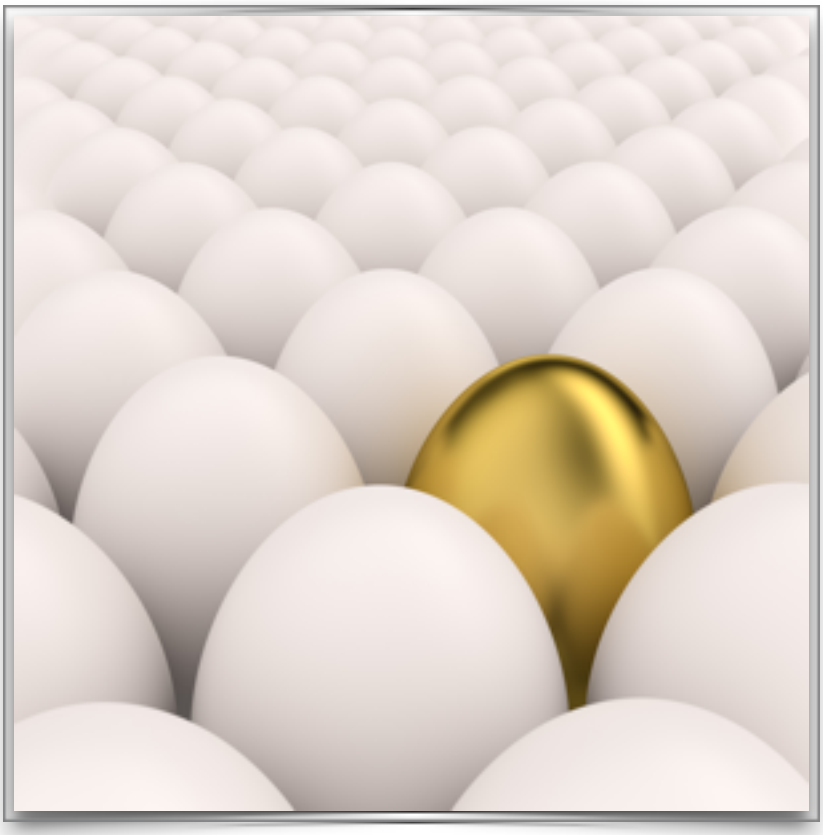
As of October 1, 2015, when the 2015 Legislature's adoption of AB 362 went into effect, Nevada practice returned to how it had evolved in the time between *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990), and *Doan v. Wilkerson*, 130 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 48, June 26, 2014). The legislation also returned Nevada to compliance with its own case law dating back to a century ago, and to (near) uniformity with the other 8 community property states.

The new statutory language was based on the California codification of the line of authority following *Henn v. Henn*, 605 P.2d 10 (Cal. 1980). A post-judgment motion may be filed in the underlying divorce action to remedy the omission of an asset from disposition in a divorce.

Essentially, upon an assertion that a community property asset was not divided, the court that heard the underlying divorce shall divide it ***unless*** the Court finds that:

> The property ***was*** included in a prior equal division of the community estate, or in an unequal division of the community estate supported by written findings in the decree;

OR



There is a compelling reason to make an unequal disposition of the community estate and the court makes written findings to that effect.

The final enactment was not perfect. It strays from consistency with community property theory and prior practice through two limitations periods.

First, the three-year limitation period from discovery of the "fraud or mistake" to file a motion to remedy it was (unfortunately) copied from NRS 11.190 by one of the committees through which the legislation passed, and while there was an intention to remove that language from the final bill, political happenstance prevented it, at least this year.

The second limitations period codifies case law from New Mexico in saying that where partition is sought of a defined benefit pension plan already in pay status, partition may only be prospective plus reach back to payments made within the past 6 years.

It is anticipated that the statute, like the case law before it, will most often be invoked where a decree of divorce failed to distribute pension benefits. Even though they are almost always the most valuable asset of a marriage, few people understand retirement benefits; even family law attorneys get pension matters wrong all the time. And pro se (proper person) litigants are usually clueless, having no idea what benefits exist or how they work. When a pension that accrued during marriage is omitted from the divorce, one party is wrongfully enriched, and the other is often consigned to a life of destitution.

There is not space in this article for the complete history of how the Nevada law regarding omitted assets and finality of judgments became the mess that it did; further detail will be provided in the December CLE materials. For purposes of this brief recitation, it should suffice to say that as early as 1916, Nevada case law held that a former husband and wife would remain tenants in common of all property accrued during marriage but not actually disposed of in their divorce. *See Johnson v. Garner*, 233 F. 756 (D. Nev. 1916); *Bank v. Wolff*, 66 Nev. 51, 202 P.2d 878 (1949).

The legislation was required by a series of cases over the past few decades in which the Nevada Supreme Court has made a series of contradictory pronouncements regarding whether and how partition would be allowed of valuable assets omitted from distribution upon divorce.

McCarroll v. McCarroll, 96 Nev. 455, 611 P.2d 205 (1980), was a short *per curiam* opinion affirming a summary judgment in favor of a former husband and against his former wife. The parties had divorced three years earlier, and the divorce decree apparently approved "an oral agreement for the division of community property." The former wife sued to divide the husband's Forest Service Pension, since "no mention was made of it during the divorce action"; the wife asserted that it had been fraudulently concealed.

The district court had "found that the fraud, if any, was intrinsic since the former wife had a fair opportunity to present the claim she is now making to the divorce court," and concluded that NRCP 60(b) "barred relief." The Nevada Supreme Court affirmed, stating only: "We perceive no error."

Tomlinson v. Tomlinson, 102 Nev. 652, 729 P.2d 1363 (1986), involved a common law action for partition of a military pension omitted from a 1971 Michigan decree of divorce. The district court dismissed the wife's complaint for partition, and the Nevada Supreme Court affirmed. The Court noted that the Uniformed Services Former Spouses Protection Act had nullified *McCarty v. McCarty*, 453 U.S. 210 (1981), and so made "Rosemary's right to a portion of Robert's military retirement benefits . . . the same now as it was before McCarty or the enactment of the USFSPA."

The court stated that Nevada would apply Michigan law in determining Rosemary's rights, and that the first Michigan appellate decision dividing a military pension as property was issued six years after the Tomlinsons' divorce.

The Nevada court then held that Rosemary's failure to raise the issue of her right to division of the pension at the time of divorce (six years before she knew of that right) precluded her from requesting partition once she ***did*** know that the asset was marital property. The court claimed it was applying the principle of *res judicata*, but announced a rule ***actually*** originating from collateral estoppel, and arrived at a ruling by which the rights of the parties to property accrued during the marriage were deemed adjudicated by a divorce decree silent as to those assets, in favor of the party who obtained physical possession or apparent title.

In the meantime, in ***non***-family law cases, the Court expressed greater concern with substantive justice than with "finality." In 1987, in *Nevada Industrial Dev. v. Benedetti*, 103 Nev. 360, 741 P.2d 802 (1987), the Court permitted a second suit where the parties to an earlier action had, by "mutual mistake," settled the earlier case for $30,000 too much, constituting "unjust enrichment" of the receiving party. The Court held that the interest in finality did not bar a later independent action under NRCP 60(b) where "the policies furthered by granting relief from the judgment outweigh the purposes of *res judicata*."

But not in divorce cases. In 1989, the Court returned to the subject in *Taylor v. Taylor*, 105 Nev. 384, 775 P.2d 703 (1989). In the intervening time, *Tomlinson* had been legislatively overruled

by NRS 125.161, passed in 1987, but that statute was repealed in 1989. *Taylor* was a consolidated case involving two sets of former spouses whose divorce decrees omitted military retirement benefits.

The published decision did not detail the full factual background of the cases, which included admissions by one husband that he knew the pension was divisible community property, and that he discussed the matter with his attorney before the divorce, but hid any mention from his unrepresented spouse. The divorce attorney deliberately omitted the pension from the Complaint for Divorce and from the Decree.

The *Taylor* court did not apply *Benedetti*, or *Wolff*, and the decision made no mention of the legal principles of either "unjust enrichment" or the status of the parties as tenants in common of the omitted assets. Instead, and in apparent contradiction of both of those holdings, the court held that it did "not recognize a common law cause of action to partition retirement benefits not distributed as part of the property agreement at the time of divorce," and that partition of omitted assets would only be permitted where fraud on the court was proven.

The next year, however, the Court took up *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990), which concerned a post-divorce action by a former wife to partition her community property share of the proceeds of a lawsuit for lost wages brought by her former husband during the marriage, but not collected until after divorce. The opinion recited that the parties had "simply omitted" the property from their property settlement agreement and divorce decree "[f]or reasons that are not entirely clear from the record."

Embracing the 1949 holding from *Wolff*, the Court in *Amie* found that the right to bring an independent action for equitable relief from a judgment is "not necessarily barred by res judicata." The court noted that the proceeds of the husband's lost wages claim were apparently omitted from the parties' divorce settlement only because of their "mutual mistake" in leaving it out of the property settlement agreement.

The Court then reaffirmed its adherence to *Benedetti*. After quoting the earlier holding, the *Amie* court found that the wife's equitable action for partition of a portion of the suit for back wages did not violate any of the "policies and purposes of the doctrine of res judicata," so there was "no reason in fairness and justice that she should not be allowed to proceed to have this property partitioned in accordance with *Wolff*." The court summed up by holding that since the proceeds of the husband's suit were left unadjudicated and were not disposed of in the divorce, they were held by the parties as tenants in common, and the property was "subject to partition by either party in a separate independent action in equity."

In *Amie*, ***no mention*** was made of the requirement, mandated in *Taylor* just a few months earlier, of finding "fraud on the court" before allowing partition of assets omitted from a decree. Several other cases also held that courts should correct the omission of marital assets, once discovered. *See Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992).

Based on *Amie*, partition actions (and motions) were brought in family court for the next 25 years, but in *Doan v. Wilkerson*, 130 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 48, June 26, 2014), the

Court snapped back to its focus on "finality," finding that property distributions – including the ***omission*** from distribution of the most valuable asset of the marriage, were final 6 months after entry of a decree.

The *Doan* court reversed the 1986 decision in *Tomlinson*, but again held, as in *Taylor*, that partition of omitted assets would only be permitted if the party who did not know about those assets could prove, after the fact, fraud on the court by the omission. So while it ruled that "nonadjudication of marital assets is an exceptional circumstance justifying equitable relief," it further held that an arguable mention of an asset during pre-trial proceedings would constitute such an "adjudication," preventing partition of the omitted asset.

The Court stated that if the desired rule was that assets "merely left out of the divorce decree" and omitted from actual distribution could be partitioned, the Legislature would have to amend the law to say so. AB 362 was drafted, and passed, to do exactly that.

The law has been returned to a focus on the ***actual distribution*** of marital assets. If valuable marital property is not equally divided upon divorce – or unequally divided by way of a decree setting forth findings supporting that unequal division – the shortchanged spouse can return to the divorce court for distribution of the omitted asset, so long as the request is made within three years of discovery of the fraud or mistake causing the omission. In pension cases, such "discovery" is typically when the possessing party retires.

Marshal S. Willick, Esq. is the Principal of the Willick Law Group, an A/V-rated Las Vegas family law firm. Mr. Willick can be reached at 3591 East Bonanza Rd., Ste. 200, Las Vegas, NV 89110-2198. Phone: (702) 438-4100; fax: (702) 438-5311; e-mail: Marshal@WillickLawGroup.com.

Keep Your Hands Off My Disability Pay! Service-Connected Disability and Alimony

Melissa L. Exline, Esq.

There is no doubt, military veterans and their spouses each sacrifice to allow the family to function while the service member is deployed or otherwise serving our country. A divorcing couple with military retirement, disability benefits and child support in issue, may square-off when arguing over the "proper" community property division and support.

Effective October 1, 2015, AB 140 became law as part of

Nevada Revised Statute Chapter 125 (Dissolution of Marriage) which was amended to clarify and confirm Chapter 11 of Title 38 of the United States Code, the existing federal law which states federal disability benefits awarded to veterans for service-connected disabilities pursuant to shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process. It has been well established that a Nevada family court could not directly divide a veteran's disability benefits, as this is preempted by federal law.[8] Arizona, by contrast, went much further and precluded their family courts from considering or acknowledging disability benefits awarded to veterans through the Department of Veterans Affairs ("VA") under title 38, chapter 11 of the U.S. Code. [9]

From the service-members' perspective, he or she provided the service and was awarded disability for a reason, which may include significant physical and/or emotional impairments. The service member views this as wholly separate from anything that should be given to the other spouse, as they suffered to obtain the benefit. From the spouses' perspective, he or she may have had to travel, take on a larger "in home" responsibility, or given up a career to support the veteran. Thus, alimony may be important to get that spouse on his or her feet after the divorce. Now, Nevada law is an attempting to make its law mirror the pre-existing protections in place that prohibit a veteran's service-related disability benefits from "attached, levied or seized."

The Nevada language now states:

> Unless the action is contrary to a premarital agreement between the parties which is enforceable pursuant to chapter 123A of NRS, in making a disposition of the community property of the parties and any property held in joint tenancy by the parties, and in making an award of alimony, the court shall not:
>
> 1. Attach, levy or seize by or under any legal or equitable process either before or after receipt by a veteran, any federal disability benefits awarded to a veteran for a service-connected disability pursuant to chapter 11 of Title 38 of the United States Code.
>
> 2. Make an assignment or otherwise divide any federal disability benefits awarded to a veteran for a service-connected disability pursuant to chapter 11 of Title 38 of the United States Code.[10]

---

[8] See *Mansell v. Mansell*, 490 U.S. 581, 588–89, 594–95, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989) (holding that federal law prevents states from treating military disability pay as divisible community property).

[9] ARIZ. REV. STAT. ANN. §§ 25-318.01(1), -530.

[10] In addition, NRS 125.210 was modified to add the language to subsection 3, which states, "Unless the action is contrary to a premarital agreement between the parties which is enforceable pursuant to chapter 123A of NRS, in determining whether to award money for the support of a spouse or the amount of any award of money for the support of a spouse, the court shall not attach, levy or seize by or under any legal or equitable process, either before or after receipt by a veteran, any federal disability benefits awarded to a veteran for a service-connected disability pursuant to chapter 11 of Title 38 of the United States Code.

Child support was not addressed in the modifications – only alimony. Child support was left out of the discussions at the legislative hearings for AB 140. On the other hand, while military retirement is not mentioned in the new language, per se, a veteran has the ability to increase his or her disability rating and decrease retired pay. As such, a community property asset could, at first blush, be impacted despite the fact that it was not mentioned in the law. The Nevada Supreme Court, in *Shelton v. Shelton*, 119 Nev. 492 (2003), held that a settlement agreement between spouses wherein one spouse was obligated to pay an agreed upon portion of retired pay would still be obligated, even after decreasing the retirement post-divorce. The analysis was grounded in contract law and required enforcement of the existing agreement. As noted in *Shelton*, at footnote 13, "Virtually any military retiree eligible for disability will elect to receive disability pay rather than retirement pay since disability pay is not subject to federal, state and local taxation, and thus increases the recipient's after-tax income. 38 U.S.C. § 5301(a) (2000) (previously codified at 38 U.S.C. § 3101(a) (1988))." The Uniformed Services Former Spouses Protection Act ("USFSPA"), contrary to the protections over VA disability, allows the Defense Finance and Accounting Services ("DFAS") to honor family court orders that direct a division of veteran's "disposable retired pay" (with some limitations not fully discussed here). [11]Given the interwoven nature of VA disability and military retirement, and the preclusions that bars a state court from issuing orders over VA disability only, it can be complicated to say the least.

The first draft of AB 140 would have barred a Nevada family court from even considering the VA benefits. Importantly, AB 140, as enacted, was changed so that Nevada does not bar the court from acknowledging the existence of such an important federal benefit. Nevada's family courts would not be forced to pretend the federal disability did not exist. While it is not permissible to seize the federal disability, Nevada's approach maintains the ability of a family court judge to look at all revenue streams, consider all applicable legal factors, and determine what remedy applies given the assets available and resources for each side. It is extremely important to be aware that the Shelton analysis, under contract law, remains intact with the changes from AB 140.

Beware the Trap – Practice Pointer Given the Codification of Federal Law

Should a post-divorce Shelton-like fact pattern arise, the non-veteran spouse may enforce their settlement agreement or the Court's order. A spouse that promises to pay $X could, improperly, attempt to use the new language added to NRS Chapter 125 in order to argue that the Court should treats the VA disability as untouchable. It is, in fact, "un-attachable." Importantly, the family court is not barred from considering all revenue (or ability to work, and all of the other alimony factors found in NRS 125.150(8) and the progeny case law interpreting the same, which goes beyond this summary article). Practitioners must be cognizant of the law change because the intent is to bar a family court from squarely looking at the disability pay and mandating that specific source of revenue be effectively assigned to satisfy an alimony obligation. But, a Nevada Court is not required to engage in a fiction and pretend the income does not exist.

[11] 10 U.S.C. § 1408(a)(2).

A Decree or marital settlement agreement must be properly crafted to avoid unintended language which a Court might find antithetical to the language that states, "...the court shall not: (1) Attach, levy or seize by or under any legal or equitable process either before or after receipt by a veteran... or (2) Make an assignment or otherwise divide any federal disability benefits..."

In summary, a properly drafted agreement, or careful language put on the record (as applicable), can protect the spouse getting an appropriate alimony award when VA disability is a source of income for the paying party. It is best to acknowledge the VA disability income, but note that it is not set over to the alimony recipient at all. Rather, how the paying party satisfies the settlement or court ordered alimony obligation is up to the payor, based on the resources at the payor's disposal. This is not unlike what takes place in child support cases when a court sets the amount based on imputed income. The family court has discretion to find the payor has the ability to pay without ever explicitly directing the payor to use VA disability to satisfy the obligation. If a payor chooses to pocket the VA disability, and leave an alimony obligation unsatisfied, clearly, or Order to Show Cause for Contempt is on the table.

Melissa L. Exline, Esq. is an associate attorney with Surratt Law Practice. She may be reached at 3705 Lakeside Drive, Reno, NV 89509. Ms. Exline's number is (775) 636-8200 and his fax is (775) 636-8202. She can be reached via email at melissa@surrattlaw.com.

Article Submissions

Articles are invited! The Family Law Section is accepting articles for the Nevada Family Law Report. The next release of the NFLR is expected in **January, 2016**, with a submission deadline of **December 15, 2015**.

When submitting an article to the NFLR, please note that automatically embedded footnotes/endnotes do not carry over into the State Bar of Nevada's publishing program. As such, if at all possible, we would ask that you utilize endnotes that are not automatically embedded (Please do not use the Footnote/Endnote function of your word processing program.).

Please contact Margaret E. Pickard at nevadamediator@gmail.com or Jason Naimi at jason@standishnaimi.com with your proposed articles anytime before the next submission date. We're targeting articles that are between 350 words and 1,500 words, but we're always flexible if the information requires more space.