

**APPELLATE DECISIONS;
WHAT CAN WE LEARN?**

(2024 VERSION)

JUDGE DIXIE GROSSMAN
JUDGE CHARLES HOSKIN

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ROLE OF A FAMILY DIVISION JUDGE?

Same as Civil Division?

- Take evidence and make decision?
- What if evidence not received?
- “Totality of the evidence”?

What is the purpose of an appeal?

- Correct legal error?
- Ends driven?
- Typically Judge is the one at fault?

Effect of reversal?

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ROLE OF APPELLATE COURT?

- Correct the error?
 - Sometimes there is not a legal error, but ends driven?
- Call out the District Court?
 - Judge's fault when evidence not received?
 - Judge's fault when law not previously applied to that situation?
- What are we to do?

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DRASKOVICH?

- What is the Judge to do when evidence is not provided?
 - Even when the lack of evidence is referenced at trial?
- When do attorney's failures apply to attorneys?
- Are we now to be an "activist judiciary?"
Draskovich v. Draskovich, 140 Nev. Adv. Op. 17 (Mar. 21, 2024)

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CONTEMPT/CUSTODY

"Citing *Cunningham* ... [party1] argues that a party may only be held in contempt of court if ... But the district court did not hold [party1] in contempt in this case; rather, the court considered [party 1's] violation of the three orders in connection with the court's custody determination. Therefore, *Cunningham* is inapposite here and the district court did not abuse its discretion."

Anaya-Alvarado, 84869-COA, Feb. 15, 2023.

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CONTEMPT/CUSTODY

"In this case, the district court provided a detailed analysis of the substantial change of circumstances requirement. When evaluating this requirement, the court rejected [party 2's] argument that the children's gender fluidity was a 'substantial change of circumstances' because it predated the controlling ... custody order. ... However, the court further determined that [party 1's] 'pattern of violating Court orders regarding medical issues and withholding visitation' from [party 2] ... constituted 'a substantial change of circumstances affecting the welfare of the children.'"

Id.

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CONTEMPT/CUSTODY

“Thus, although the court considered [party 1’s] violation of its prior orders, there were other persuasive factors supporting custody modification in favor of [party 2].”

Id.

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TAKE AWAYS?

CONTEMPT/CUSTODY

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AWARD OF CUSTODY TO PERSON OTHER THAN PARENT

NRS 125C.004 Award of custody to person other than parent.

1. Before the court makes an order awarding custody to any person other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be **detrimental to the child and the award to a nonparent is required to serve the best interest of the child.**

2. No allegation that parental custody would be detrimental to the child, other than a statement of that ultimate fact, may appear in the pleadings.

3. The court may exclude the public from any hearing on this issue.

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DEFINE DETRIMENTAL

There is no statutory definition of "detrimental." However, in one published Nevada Supreme Court case and four subsequent unpublished opinions from the Court of Appeals district judges are repeatedly reminded that NRS 125C.004 requires analysis of the parental preference doctrine by applying the factors in *Locklin v. Duka*, 112 Nev 1489, 929 P.2d 930 (1996).

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NRS 125C.004 DETRIMENTAL REQUIRES APPLICATION OF PARENTAL PREFERENCE

Hudson v. Jones, 122 Nev 708 (2006). Nevada Supreme Court concludes "that the parental preference applies only to initial custody orders, and not to modifications, between a parent and nonparent." Discusses and distinguishes *Litz v. Bennum and Locklin v. Duka*, involving voluntary relinquishment of custody to a nonparent under assumption that custody arrangement (guardianship) was temporary from cases involving an award of custody to a nonparent and subsequent modification of a final custody order.

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OTHER CUSTODY OPINIONS

English v. English, 135 Nev. 640 (Aug. 15, 2019). "[P]arental preference applies only to initial custody orders, and not to custody modifications."
Lawrimore v. Lawrimore, 136 Nev. 840 (2020). District court used definition of detrimental from dictionary.com rather than applying *Locklin* factors.
Reversible error. "...the determination of whether granting custody to a parent would be 'detrimental' requires a separate analysis applying *Locklin*."

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OTHER CUSTODY OPINIONS

Colt v. Plummer, No 82662-COA (January 24, 2022). Once again cites *Locklin v Duka* as the proper analysis for awarding custody of a child to a person other than a parent.
Frane v. Frane, 85498-COA (August 22, 2023). District court erroneously applied a dictionary definition of "detrimental" but "...error was harmless because the court adequately considered the *Locklin* factors."

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CHILD CUSTODY FINDINGS OF FACT

Are Findings of Fact for all factors required for all custody orders?
Can you simply incorporate factual assertions from an affidavit, declaration or complaint?

What about stipulations including stipulations between parties for sole physical custody?

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CHILD CUSTODY ORDERS IN THE EVENT OF DEFAULT / STIPULATION?

In *Blanco*, Nevada Supreme Court held that with regard to child custody and child support, case-concluding sanctions are not permissible and that child custody matters must be decided on the merits. *Blanco v. Blanco*, 129 Nev. 723, 730, 311 P.3d 1170, 1175 (2013).

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CHILD CUSTODY ORDERS IN THE EVENT OF DEFAULT / STIPULATION?

In *Barton v. Barton*, the COA cited *Blanco* before appearing to say **all** default judgments of child custody are impermissible and that child custody matters **must be decided on their merits**.

So where does this leave District Courts in the event of a true default situation presented under NRCP 55?

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NRCP 55

In *Barton* court held hearing and canvased Petitioner as to best interests but did not include findings of fact in the order.

A true default judgment however is entered without the action being tried upon the facts.

"As for the appellants' contention that the trial court failed to make separate findings of fact and conclusions of law in compliance with NRCP 52(a) before entry of judgment, it is obvious that they have overlooked the fact that these requirements apply only to those actions 'tried upon the facts.' A case submitted for judgment under NRCP 55(b)(2) is not 'tried upon the facts' within the meaning of NRCP 52(a)." See *Britz v. Consol. Casinos Corp.*, 87 Nev. 441, 447, 488 P.2d 911, 915-16 (1971)

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TAKE AWAYS?

OTHER CUSTODY ISSUES

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ADOPTING ATTORNEY PREPARED FINDINGS

"We take the opportunity to caution both practitioners and district courts of the dangers inherent in the practice of adoption wholesale a litigant's proposed findings of fact and conclusions of law.

... We conclude that utilizing a party's proposed order does not in and of itself constitute an abuse of discretion

... Nevertheless, we strongly urge both litigants and judges to exercise care when preparing and adopting such orders."

Eivazi, 84427-COA, Oct. 5, 2023

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TAKE AWAYS

ATTORNEY PREPARED FINDINGS

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REVIEW ON WASTE

"A district court must make an equal disposition of community property in a divorce unless there is a 'compelling reason' to make an unequal disposition.

...'Dissipation,' also known as 'waste,' can constitute a compelling reason for an unequal disposition of community property."

Eivazi, 84427-COA, Oct. 5, 2023.

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REVIEW ON WASTE

“Generally, the dissipation [or waste] which a court may consider refers to one spouse's use of marital property for a selfish purpose unrelated to the marriage in contemplation of divorce or at a time when the marriage is in serious jeopardy or is undergoing an irretrievable breakdown.’ *Kogod ...*”

Id.

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REVIEW ON WASTE

Kogod burden-shift

“the husband's inability to account for unknown expenses did not demonstrate a compelling reason for an unequal disposition of community assets.”

Id.

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REVIEW ON WASTE

“permissible to shift the burden of proving the absence of waste if one spouse could demonstrate that the ‘transactions furthered a purpose inimical to the marriage, that [the other spouse] made them to diminish [that spouse's] community share, or even that they were unusually large withdrawals from community accounts.’”

Id.

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TAKE AWAYS

WASTE

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ALIMONY

“Even though the district court superficially addressed the 11 factors ... it was not enough for the court to simply process this case through the list of statutory factors and announce its ruling. The court's factual findings had to be supported by substantial evidence, and the court needed to explain **why those findings supported its alimony award in both amount and duration.**”

Eivazi, 84427-COA, Oct. 5, 2023.

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ALIMONY

(PRESUME WHAT THE DISTRICT COURT IS THINKING)

The “court determined that the share of community assets distributed to [wife] would provide sufficient support through passive income.” “**Central** to the district court's determination to deny alimony in this case was its **finding** that [wife] would be able to earn a passive income of more than \$3,000 per month based on the liquid assets she received from community property.”

Draskovich v. Draskovich, 140 Nev. Adv. Op. 17 (2024)

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ALIMONY

(PRESUME WHAT THE DISTRICT COURT IS THINKING)

Actual FFCL:

"[Wife] will leave the parties' marriage with in excess of \$700,000 in liquid funds, including the equivalent of approximately \$605,000 in value associated with [husband's] law practice. As set forth above, the entire value has been treated as community property without any separate property apportionment for the years [husband] devoted to establishing his career and reputation. *Because there was in insufficient legal and factual basis for any separate property apportionment, [wife] is the beneficiary of the foundational years that established [husband's] career and reputation.* Notwithstanding the legal and factual deficiencies noted above with respect to such an apportionment, the Court nevertheless finds that [wife] is receiving a significant financial benefit that is the product of [husband's] fifteen years of practice that preceded the marriage. The total amount to be paid to [wife] as part of the division of assets will exceed \$1,000,000. Although not quantified factually, [wife] is the beneficiary of Robert's pre-marital professional foundation."

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TAKE AWAYS

ALIMONY

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SEPARATE PROPERTY TRACING

"Properties acquired during marriage are presumed to be community property, and this presumption can be overcome only by clear and convincing evidence."

"even a deed that places title in one spouse as that spouse's separate property is insufficient to overcome the community presumption if the party cannot also show that the home was purchased with separate funds."

Lopez v. Lopez, 84950-COA, Nov 30, 2023

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SEPARATE PROPERTY TRACING

"When reviewing a district court's determination of the character of property, this court will uphold the district court's decision if it was based on substantial evidence, However, we will review a purely legal question, such as the application of a presumption, de novo."

Draskovich v. Draskovich, 140 Nev. Adv. Op. 17 (2024)

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SEPARATE PROPERTY TRACING

"district court relied **exclusively** on the fact that DLG was incorporated during the marriage" and "deemed this single fact dispositive and characterized DLG as entirely community property by applying the community property presumption."

Id.

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SEPARATE PROPERTY TRACING

Actually, the FFCL states:

"The factual findings set forth herein are based on the credible evidence admitted into the record and the stipulations of the parties. In this regard, the Court makes findings based on the evidence admitted into the record. It is not the Court's prerogative to advise either party as to what evidence should be offered. The Court adjudicates the issues based on the law and the facts presented by the parties (as deficient as they might be)."

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SEPARATE PROPERTY TRACING

FFCL goes on to state:

“While the Court concludes that [husband's] request that the Court find a separate property component to DLG's value is reasonable, the legal presumption has not been overcome and [husband] offered no legal authority in support of the Court relying on a “time rule” apportionment method (or some other formulaic calculation) between community and separate property interests.”

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SEPARATE PROPERTY TRACING

- “When reviewing tracing evidence to support a finding of separate property, function takes precedence over form, and nominal representations of separate property are not, without additional evidence, enough to overcome the community presumption. “

• *Hacham v. Sebai*, 86819-COA, March 22, 2024

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SEPARATE PROPERTY TRACING

“the date of incorporation is not the decisive factor in determining a property's character. Rather, the court must look to the *totality of the circumstances* to determine whether a business is an asset acquired during the marriage and thus presumptively community property, or merely a continuation of a pre-marriage enterprise and thus separate property.”

Id.

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SEPARATE PROPERTY TRACING

Burden?

"Therefore, when a spouse claims that the increase in value of separate property is partially attributable to the community, *that spouse* must show clear and convincing evidence of the community share."

"Here, [husband] brought the business into the marriage, so it is his separate property, and any increase in its value over time is also *presumed to be separate*."

Id.

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TAKE AWAYS

SEPARATE PROPERTY

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FALCONI

140 NEV. ADV. OP. 8 (FEB. 15, 2024)

Not here to debate the decision or discuss the case in terms of whether it is good or bad.

Petition for Rehearing pending.

This is the law, at least currently, so what are we dealing with right now?

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PRESUMPTIVELY OPEN PROCEEDINGS

- Supreme Court found NRS 125.080, EDCR 5.207 and EDCR 5.212 violate the constitutional right to access court proceedings.
 - Held family law proceedings **presumptively open**.
- Before a district court can close these proceedings
 - “(1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;
 - (2) the closure must be no broader than necessary to protect the overriding interest;
 - (3) the trial court must consider reasonable alternatives to closing the proceeding; and
 - (4) the trial court must make findings adequate to support the closure.”

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WHAT IS A PROCEEDING?

Case does not define proceeding.

From the case it appears clear that a trial or hearing constitutes a proceeding.

What about the court record?

Does the court record fall within the definition of a proceeding?

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MIGHT TITLE 5 BE INSTRUCTIVE?

In Juvenile Delinquency, statute makes clear distinction between a proceeding and the record.

NRS 62D.010 Manner for conducting proceedings; proceeding open to public; exception.

1. Each **proceeding** conducted pursuant to the provisions of this title:
 - (a) Is not criminal in nature.
 - (b) **Must be heard separately from the trial of cases against adults.**
 - (c) **Must be heard without a jury.**
 - (d) **May be conducted in an informal manner.**
 - (e) May be held at a facility for the detention of children or elsewhere at the discretion of the juvenile court.
 - (f) Does not require stenographic notes or any other transcript of the proceeding unless ordered by the juvenile court.
2. Except as otherwise provided in this subsection, **each proceeding conducted pursuant to the provisions of this title must be open to the public. If the juvenile court determines that all or part of the proceeding must be closed to the public because the closure is in the best interests of the child or the public:**
 - (a) **The public must be excluded; and**
 - (b) **The juvenile court may order that only those persons who have a direct interest in the case may be admitted. The juvenile court may determine that a victim or any member of the victim's family is a person who has a direct interest in the case and may be admitted.**

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MIGHT TITLE 5 BE INSTRUCTIVE?

Records distinct from proceeding. Records defined by NRS 62H.100 and includes the court record of a child who appears before the juvenile court in accordance with Title 5. Records are maintained in a confidential manner and may be open to inspection only by court order to persons who have a legitimate interest in the records. NRS 62H.030.

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ISSUES

NRS 125.110?

Do we have any other options?

Nevada Rules for Sealing and Redacting Court Records (SRCR) apply to all civil actions *except* "[t]hese rules **do not apply to the sealing or redacting of court records under specific statutes**, such as NRS Chapter 33, NRS Chapter 179, juvenile cases pursuant to NRS Chapters 62 and 63, or domestic relations matters pursuant to NRS Chapters 122 (Marriage), 123 (Rights of Husband and Wife), 125 (Dissolution), 126 (Parentage), 127 (Adoption), 128 (Termination of Parental Rights), 129 (Minors' Disabilities), 130 (Child Support), 453 (Treatment and Rehabilitation of Addicts), 433, 433A (Admission to Mental Health Facilities/Sealing of Records), 433B (Provisions Relating to Children), 435 (Retarded Persons), and 436 (Community Programs for Mental Health) or to NRS Title 13 (Guardianships; Conservatorships; Trusts). These rules do not provide for the retention or destruction of court records or files."

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NRS 126.211

- NRS 126.211 Hearings and records: Confidentiality.
 - Any hearing or trial held under this chapter must be held in closed court without admittance of any person other than those necessary to the action or proceeding. All papers and records, other than the final judgment, pertaining to the action or proceeding, whether part of the permanent record of the court or of a file in the Division of Welfare and Supportive Services of the Department of Health and Human Services or elsewhere, are subject to inspection only upon consent of the court and all interested persons, or in exceptional cases only upon an order of the court for good cause shown.

Now seeing claims for paternity joined with custody, divorce.

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TAKE AWAYS

FALCONI

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SOLE PHYSICAL CUSTODY

"Sole physical custody is a custodial arrangement where the child resides with only one parent and the noncustodial parent's parenting time is restricted to no significant in-person parenting time. Sole physical custody is different than primary or joint physical custody because sole physical custody conflicts with this state's general policy for courts to support 'frequent associations and a continuing relationship' between parent and child."

Roe v. Roe, 139 Nev. Adv. Op. 21, 535 P.3d 274 (2023)

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SOLE PHYSICAL CUSTODY

"We direct district courts when entering an order for sole physical custody to first find either that the noncustodial parent is *unfit* for the child to reside with, or to make specific findings and provide an adequate explanation as to the reason primary physical custody is *not in the best interest of the child*.

Following either of these findings, the district court must consider the least restrictive parenting time arrangement possible to avoid constraining the parent-child relationship any more than is necessary to prevent potential harm caused by an unfit parent and meet the best interest of the child."

Id.

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SOLE PHYSICAL CUSTODY

"Therefore, a district court risks abusing its discretion when it orders sole physical custody without sufficient cause or otherwise unnecessarily restricts and threatens the parent-child relationship. ...

a district court must only enter an order for sole physical custody if it first finds either that the noncustodial parent is unfit for the child to reside with, or if it makes specific findings and provides an adequate explanation as to the reasons why primary physical custody is not in the best interest of the child."

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SOLE PHYSICAL CUSTODY

"However, the district court abused its discretion by improperly characterizing its custodial award as primary physical custody when it was in actuality sole physical custody, thereby overly restricting appellant [Mom's] parenting time without adequate findings, failing to consider any less restrictive arrangement, and delegating its substantive decision-making authority to a therapist.

Id.

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SOLE PHYSICAL CUSTODY

"In sum, the district court erred by:

- (1) failing to consider a less restrictive parenting time arrangement;
- (2) failing to adequately explain why the greater restriction was necessary;
- (3) failing to make findings how true primary physical custody was not in H.R.'s best interest; and
- (4) implementing an almost unachievable plan with no ending, review, or even status check date, and accordingly has undermined Nevada's public policy, issued an order inconsistent with Nevada jurisprudence, and violated [Mom's] parental rights."

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SOLE PHYSICAL CUSTODY
(COMPARE TO WARD)

"the district court entered an order denying Ward's request to reestablish supervised parenting time, and found ... that if he provided 'a psychological evaluation and shows he is not a danger to the minor children' the court may reconsider his request to reinstate his time with his children."

Ward v. Villaflor, 84674-COA, May 2023

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TAKE AWAYS

SOLE PHYSICAL CUSTODY

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QUESTIONS?

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