Current Unanswered Questions in Nevada Family Law

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Agenda

- RELOCATION
- DEEDS/COMPETING PRESUMPTIONS
- PERS/JUDICIAL PERS

Speaker Introduction

- Attorney at Surratt Law Practice, P.C.
- Licensed in Nevada and California since 2003 (inactive CA)
- I have practiced family law since 2008
- Background in:
  - Collaborative Divorce
  - Mediation
  - Litigation

Family law is a result of changing thoughts of how things should be done over time. The caselaw and interplay with statute has not always developed in a thoughtful or logical way. This presentation will focus on oddities or problem areas that result due to lack of clear law and ways that can be addressed by the court.

Learning Objectives:

- We will explore a few circular or gray areas of Nevada statutory and case law.
- We will explore possible ways to avoid allowing parties to become trapped in litigation by being thoughtful in the analysis or approach to gray areas.

An Interesting Issue in Relocation Cases

The meandering path of legal analysis begins…

OVERVIEW OF NRS 125C.007

125C.007(1):

(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 (i.e. review the BEST INTEREST FACTORS under 125C.0035(4) A Through L (*Must Look At Those 12 Separate Items*); and

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

IF....

RELOCATING PARENT DEMONSTRATES THESE THINGS,

THEN...

COURT MUST WEIGH FACTORS IN "007" PART 2

125C.007(2):

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

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

(c) Whether the relocating parent will comply with any substitute visitation orders;

(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; and

(f) Any other factor necessary (IN BOLD BECAUSE I'M GOING TO REVISIT THIS FACTOR).

Relocation Oddities: WAS CUSTODY ESTABLISHED ALREADY?

NRS 125C.007 applies

- "[i]n every instance of a petition for permission to relocate with a child that is filed pursuant to NRS 125C.006 or 125C.0065" and these two statues apply where "physical custody **has been established** pursuant to an order, judgment or decree of a court."

Relocation Oddities (the unanswered questions part):
NO ORDER - NO “007”?

This begs the question:

- IF custody has NOT BEEN ESTABLISHED by order, and a parent wants to relocate, does NRS 125C.007 apply at all?
- If there must be an “order, judgment or decree,” WHAT ABOUT AN INTERIM ORDER DURING A DIVORCE addressing custody? Does NRS 125C.007 mandate analysis at that point?
- Will the Court’s analysis in a typical divorce case or initial custody case require a *custody decision only*, applying NRS 125C.0035, with a focus on the child’s best interest to decide who should have primary physical custody if a parent wants to move away?
- There is no mandate for a good faith reason to move or showing an actual advantage to the relocating parent and child (a more onerous standard to meet in many cases). None of NRS 125C.007(2)’s additional analysis will bear on the findings.

Consequently, there is no specificity on these issues required in the final ruling. But that seems wrong because…

You will have to decide if the best interest of the child catch all factor in NRS 125C.0035(4) which says “In determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things:” mandates looking at the relocation factors

Soooooooo… where does that leave us?

The plain language of NRS 125C.007 does not apply to relocation requests made in an initial custody determination where custody has not yet been established.

Druckman v. Ruscitti, 130 Nev. 468, 327 P.3d 511, 514 (2014) (analyzing the predecessor to NRS 125C.006 and NRS 125C.0065); *Shahrokhi v. Burrow*, 509 P.3d 602 (Nev. App. 2022).

BUT

You are still going to need to determine whether you must analyze the *Schwartz* and other common law factors.

NRS 125C.007 is modeled after the *Schwartz* factors, thus, you end up still applying this.

Further, under the catch all "007" part 2, (f), these are still likely relevant and "necessary" factors for the Court's consideration.

(Yes, we went in a circle)

What does Schwartz say again?

Determination of the best interests of a child in the removal context necessarily involves ***a fact-specific inquiry*** and cannot be reduced to a rigid "bright-line" test. *See In re Marriage of Eckert,* 119 Ill.2d 316, 116 Ill.Dec. 220, 224, 518 N.E.2d 1041, 1045 (1988) (citations omitted); *Cooper v. Cooper,* 99 N.J. 42, 491 A.2d 606, 614–15 (1984).

Schwartz v. Schwartz, 107 Nev. 378, 382, 812 P.2d 1268, 1271 (1991)

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"…[I]n determining the issue of removal, the court must first find whether the custodial parent has demonstrated that an **actual advantage** will be realized by both the children and the custodial parent in moving…"

"If the custodial parent satisfies the threshold requirement set forth above, then the court must weigh the following additional factors and their impact on all members of the family, including the extent to which the compelling interests of each member of the family are accommodated:

(1)the extent to which the move is likely to **improve the quality of life for both the children and the custodial parent**;

(2) whether the custodial parent's **motives are honorable**, and not designed to frustrate or defeat visitation rights accorded to the noncustodial parent;

Schwartz, 107 Nev. 378, 382, 812 P.2d 1268, 1271 (1991)

(3) whether, if permission to remove is granted, the custodial parent will comply with any substitute visitation orders issued by the court;

(4) whether the noncustodian's motives are honorable in resisting the motion for permission to remove, or to what extent, if any, the opposition is intended to secure a financial advantage in the form of ongoing support obligations or otherwise;

(5) whether, if removal is allowed, there will be a realistic opportunity for the noncustodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship with the noncustodial parent."

What about a Voluntary Acknowledgment of Parentage?
-One more oddity in this statute

It is deemed to have the *same effect* as a judgment or order of a court determining that a parent-child relationship exists. NRS 126.053(1).

A voluntary acknowledgment is not required to be ratified by a court. *Id*. But, something that has the *same effect* as a judgment or order may, or may not (we do not yet have NV Sup. Court insight on this from caselaw), be treated as if custody has been established *pursuant to* a judgment or order.

What rulings have been made on this before?

Unpublished Court of Appeals decisions specifically analyze NRS 125C.007's relocation factors in cases where the parties have not had a prior established custody order or decree – implicating NRS 125C.007's factors must be examined. In *Eorio v. Eorio*, 507 P.3d 1238 (Nev. App. 2022), where the parties did not have a prior order, the Court of Appeals stated:

> **Therefore, the burden is on the relocating parent and the district court is required to issue specific findings for each provision under NRS 125C.007(1) and then tie those findings to the decision made. *Citing Pelkola v. Pelkola*, 137 Nev., Adv. Op. 24, 487 P.3d 807, 810 (2021); *Davis v. Ewalefo*, 131 Nev. 446, 452, 352 P.3d 1139, 1143 (2015)**
>
> **("Crucially, the decree or order must tie the child's best interest, as informed by specific, relevant findings ... to the ... determination made.").**

THE LEGAL STANDARD

Again, when the Court is making specific findings under NRS 125C.007(1)(b), it should look to the NRS 125C.0035(4) custody **best interest factors** and any other factors that may bear on the issue, with a **preponderance of the evidence standard**. *Monahan v. Hogan*, 138 Nev. 7, ___ (Adv. Opn. No. 7, Feb. 24, 2022).

Next...
The Spousal Deed Off

ANOTHER ISSUE IN FAMILY LAW
IMPACT OF A SPOUSAL "DEED OFF" ON REAL PROPERTY

Q: How can the community own property if it is titled in one spouse's name only?

Community property should be divided equally in divorce. *See* NRS 125.150(1)(b).

Thus, in divorce, it is imperative to determine if there a community property interest. Community property includes, primarily, all property acquired after marriage by either spouse or both spouses. *See* NRS 123.220.

Property acquired during marriage raises a presumption that it is community property. *See Forrest v. Forrest*, 99 Nev. 602, 604, 668 P.2d 275, 277 (1983); *Pryor v. Pryor*,103 Nev. 148, 150, 734 P.2d 718, 719 (1987).

On the other hand, separate property is property owned 1) by a party before marriage, or, 2) property acquired by the party after marriage by gift, bequest, devise, descent or by an award for personal injury damages. *See* NRS 123.130.

THE ABOVE IS A BASIC RECAP BUT PROVIDED FOR CONTEXT

- The separate property proponent may rebut the community property presumption with clear and convincing evidence. *See Forrest*, 99 Nev. at 604-05, 668 P.2d at 277.
- Without proper tracing, the district court is left with only the parties' testimony regarding the characterization of the property, which carries no weight. *See Peters v. Peters*, 92 Nev. 687, 692, 557 P.2d 713, 716 (1976).

Triggering a Malmquist analysis:

HYPO:
With that backdrop, here is a hypothetical

A party owed a home before marriage;

Retained title in their own name after getting married.

The community gains an interest if the married couple used their income to pay down the loan or otherwise contributed with community proceeds (this is a basic analysis, we are skipping impact of a premarital agreement, etc.).

Here, we simply engage our math brain to figure out the community versus separate property interests. It can get quite complicated, but by plugging some numbers into a formula, we spit out what was pre-marital/separate and what was post-marital/community.

The pre-marital period would be set over to the party as separate property.

In a situation where there are payments made pre and post-marriage, whether by down-payment or monthly payments, a calculation can be done to determine what portion of the home's value should be community versus separate, despite the fact that title is in one spouse's name only at the time the parties are seeking a divorce. As most divorce practitioners have experienced, Malmquist v. Malmquist, 106 Nev. 231, 792 P.2d 372 (1990) has given us law regarding these issues.

An analysis of Malmquist in-and-of-itself would require more discussion, but having an understanding about the overall holding acts as a springboard to further understanding regarding other property issues discussed below.

BEWARE THE SPOUSAL "DEED OFF"

Another far more interesting issue crops up often and can rear its ugly head when you least expect it! We will simply refer to this as the spousal "deed-off" issue – let me explain.

HYPO #2: Two parties get married, and buy a home together, using their earnings from marriage.

Later, for whatever reason, the couple decides it makes sense to REFINANCE AND ONE SPOUSE'S NAME ALONE is placed on title. Perhaps one spouse had better credit, so it made sense to refinance in one spouse's name, or, perhaps one spouse was at risk of being sued, so they felt like it was less risky for them to just place it is the name of one person only. In any event, one spouse is asked to sign a spousal deed to get his or her name off title in order to allow the other spouse to get the loan process finalized.

BEWARE THE SPOUSAL “DEED OFF”

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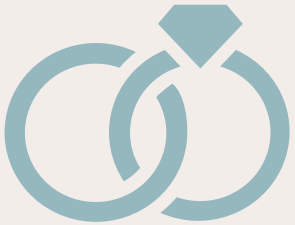
The title company and loan folks merely indicate the spouse that is not on the loan (we will call this the “Unlucky Spouse”) must sign a deed releasing **any and all interest in the home to the other spouse** (the “Lucky Spouse”).

No one talks to a lawyer, there is no discussion about the long-term plan for the pay-down of the home.

The parties continue for years paying this home down with their community property income THEN formerly happy couple find themselves in the midst of divorce. What now?

GIFTS TO THE LUCKY SPOUSE

The deed is clear and the property title is only in the name of Lucky Spouse.



Unlucky Spouse must be ready to address the argument the property should be presumed to be Lucky Spouse's separate property. Lucky Spouse may assert Unlucky Spouse should bear the burden of overcoming the presumption of gift by clear and convincing evidence.

SHOULD LUCK DETERMINE HOW THIS IS DONE?

We have consistently held that a spouse-to-spouse conveyance of title to real property creates a presumption of gift that can only be overcome by clear and convincing evidence. *(Citations Omitted*). Moreover, property acquired by gift during marriage is separate property pursuant to NRS 123.130 and therefore is not community property pursuant to NRS 123.220."

See Kerley v. Kerley, 112 Nev. 36, 37,910 P.2d 279,280 (1996).

Spousal “deed-off” mixed with Malmquist – or, “Plan C”

If there was a gift by Unlucky Spouse signing the deed, what was gifted? Does the gift include only the equity and ownership interest that existed on that day? Certainly, is does not go forward and count as a gift of every payment made thereafter – right?

In situations like this hypothetical, the Court will look at who is on the current deed, which presumption should apply (community property versus the presumption of a gift), and possibly need to engage in a *Malmquist* analysis to parse out the community property interest based on the community’s contribution toward paying for the home *after* the deed-off. Going backwards to get values might be difficult, but often, if there was a refinance, there will be an appraisal or value assigned at that time.

TIPS AND FINAL NOTES ON DEED OFF ISSUES

So, here are some tips: look at the above noted issues with your thinking-cap on, get all the documents related to the property, such as deeds, title and loan records, and create a clear chronology of events, and show the court who was on title, at what point, and what was the source of funds at any given time. After a spousal deed-off, there could nevertheless be a community property interest because the "[c]ourt has recognized that the community is entitled to a *pro rata* ownership share in property which community funds have helped to acquire." *See Robison v. Robison*, 100 Nev. 668, 670 691 P.2d 451, 454 (1984); *Malmquist v. Malmquist*, 106 Nev. 231, 238, 792 P.2d 372, 376 (1990).

TIPS AND FINAL NOTES ON DEED OFF ISSUES

What *Malmquist* makes clear is when the community contributes to principal reduction or has property appreciation during the marriage (or after the "deed-off"), the Court must take these facts into consideration to fairly attribute what belongs to the community.

And I would end with this: If you are ever approached with a request to sign a deed releasing your interest in real property – be aware – even if you don't mean it, even if a gift was never discussed, you could be found to have given away your interest in that property.

Next…
IS IT TIME TO RETIRE YET?

Does it matter when you do this after a divorce?
If so, why?

LINGERING QUESTIONS IN THE WAKE OF *HENSON* AND *KILGORE*

We need to acknowledge that retirement is often the largest asset or class of assets in a divorce. A PERS pension can be one of the single largest assets in a divorce.

Often, a PERS division is simply addressed by a “time rule” and “wait and see” division of the overall asset when the PERS member spouse actually retires.

HOWEVER, THE NON-PERS SPOUSE is entitled to their share of the asset when the PERS SPOUSE IS ELIGIBLE TO RETIRE, unless the Decree or settlement terms say otherwise. *See Sertic*, 111 Nev. 1192, 901 P.2d 148.

Gemma, Fondi and Sertic

With a reservation of jurisdiction, the district court can adjust such an award in the event that the employee by "extraordinary efforts" increases the value of the retirement benefits after divorce. Meaning, the employee can argue post-divorce efforts should be taken into consideration to deviate from a strictly 50/50 time-rule division. *See Gemma*, 105 Nev. at 462-63, 778 P.2d at 431-32. FYI - THIS COULD BE MODIFIED or CODIFIED INTO THE NRS THIS LEGISLATIVE SESSION.

Meaning, the employee can argue post-divorce efforts should be taken into consideration to deviate from a strictly 50/50 time-rule division.

THE COURT CAN DO THIS IN PRO-PER CASES… FYI. LAWYERS SHOULD BE DOING THIS IN THEIR CASES ALREADY.

The order should clearly provide either that the employee or plan member spouse shall begin paying at ***actual*** retirement OR state whether and when to make direct payments to the former spouse upon ***eligibility for*** retirement (with terms on tax impact of dollars earned and identifying when that is expected to be based on information available at that time) until the plan begins taking this on after actual retirement.

NRS 125.155

Aside from filing a motion, there is little guidance in Nevada law that addresses a fair mechanism for how the PERS member spouse should begin paying, the tax-effect of the payments, how the tax issue is documented, and alterations to the payments over time. With a PERS (or judicial retirement) pension division, there is the added overlay of NRS 125.155, which states, in part:

> The court **may**, in making a disposition of a pension or retirement benefit provided by the Public Employees' Retirement System or the Judicial Retirement Plan, order that the benefit **not be paid before the date on which the participating party retires**.

So, while *Gemma* urges the district court to make a "time rule" division regarding a defined benefit plan, NRS 125.155 permits a district court to order pension payments when the participating party retires. The "may" language is specific to PERS and Judicial Retirement – and we have **no similar statutory guidance or discretionary language as to other defined benefit pension plans**.

MORE PROBLEMS…

With PERS, the district court has discretion when determining, "how, and to what extent, to accommodate a non-employee spouse's request for pension payments" before the first- eligibility to retire. In *Kilgore v. Kilgore, 135 Nev. ___, 449 P.3d 843,847 (Adv. Opn. No. 47, October 3, 2019)*, the non-employee spouse filed a motion and sought immediate direct payments of her share of the PERS pension (i.e. complied with *Henson*). *See Kilgore v. Kilgore*, 135 Nev. 357, 449 P.3d 843, 847 (2019).

The district court took evidence and had multiple hearings, ultimately deciding on the amount owed to the non-member spouse from the time the motion was made until its ruling nearly 2 years later, reducing the amount owed to judgment, and ordering a monthly payment amount on the judgment. The Nevada Supreme Court cautioned that "NRS 125.155(2)'s broad grant of discretion is not unlimited. Overriding principles of equity and fairness govern a district court's exercise of discretion." *Id.*

FLAWS – ‘figure it out later’ and ‘use discretion’ creates other unanswered questions

- THERE IS A BUILT IN INCENTIVE TO LITIGATE
- THE “USE DISCRETION” ONLY APPLIES TO PERS/JUD. PERS.
- IN KILGORE, THE NON-PERS SPOUSE GOT A JUDGMENT, AND THE PERS MEMBER HAD TO PAY, BUT THE COURT LOWERED THE AMOUNT: (i.e. $350 a month on the judgment instead of the $2,455 per month calculated as owed each month on the pension at first eligibility
- AS EACH YEAR GOES BY, AND THE PERS MEMBER IS STILL WORKING EARNING MORE CREDIT, THE “PIE” THAT IS DIVIDED IS EXPANDING, as the total size of the pension pie grows, the non-member spouse’s interest similarly grows.
- CASELAW DOES NOT ADDRESS WHO PAYS THE TAXES OR HOW
- THERE IS A NEED TO CONSTANTLY TRUE-UP THE NUMBERS – HOW OFTEN IS THAT DONE? DOES IT NEED A MOTION EVERY TIME?

Thank you!

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