

CHILD SUPPORT AND CUSTODY ISSUES - 60 minutes

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Preface

Very few issues evoke stronger emotions in litigation than custody and support. When litigants' children are the subject of a dispute, far too often the gloves come off and there is war.

Nevada has taken steps to minimize the ill-will created by custody and support disputes. The presumption, under Nevada law, is that parties should share equally in raising their children. (See NRS 125.465, NRS 125.480(3), and NRS 125.490) Most judges in Nevada (but not all) have concluded the Nevada Legislature directs them to look first at joint legal and joint physical custody, and move away from these custodial arrangements only where they cannot work. However, as a technical matter, none of the foregoing statutes expressly state the courts must first look at joint legal and joint physical custody.

In Nevada, legal custody has to do with "big" decisions in a child's life - schooling, religion, and elective medical procedures, for example. Physical custody has to do with the actual time share the children spend with each of their parents.

Regardless of the custodial arrangement, child support is purely statutory in Nevada. When one parent has primary physical custody, child support from the non-custodial parent to the custodial parent can be calculated by knowing the gross income of the non-custodial parent and applying the appropriate percentage and statutory "cap" as contained in NRS 125B.070. NRS 125B.080(9) provides deviation factors which can, but do not always, alter the statutory presumptions of support as detailed in NRS 125B.070 (but see *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 532 (1989), which states deviations from the presumptive amount of child support under NRS 125B.070 should be the exception, not the rule). Such deviations can be upward or downward.

In joint physical custody cases, there is a comparison of the parties' respective child support obligations to one another (as calculated for each of them using NRS 125B.070), subject to the aforementioned deviation factors and presumptive child support obligations (see *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998), but see also *Wesley v. Foster*, 119 Nev. 110, 65 P.3d 251 (2003), which states the imposition of the statutory "cap" under NRS 125B.070(2) occurs after comparing child support obligations one party to the other without consideration of the presumptive "cap").

This section of the seminar will detail with the nuts and bolts of custody and support in Nevada.

Determining and Calculating Child Support

Where one party has primary physical custody of the child or children of the parties, child support is paid from the non-custodial parent to the custodial parent. This is logical and intuitive, since the party with more time with the children will incur more of the expenses associated with caring for the children.

Where both parties share time with the children equally, there is still usually a child support obligation from one party to the other. For some, this is counterintuitive, since an equal time share with the children lends itself to the belief each will pay to support the children during their respective timeshares. However, the Nevada Supreme Court has stated that a “comparison of obligations” approach is appropriate in joint physical custody cases (see *Wright, supra*).

There is a presumption married people share joint physical custody of their children in the absence of a Court Order (see NRS 125.465). There is also a presumption that a single mother has primary physical custody of children in the absence of a Court Order (see NRS 126.031(2)(a)). This provision is more of an accommodation to single mothers who need to register children for school and take them to doctor appointments, as opposed to a statement as to the Nevada Legislature’s opinion on which parent should be awarded custody when there are children born out of wedlock.

In the absence of a confirmation of paternity, the father is a legal “stranger” to his own children, and cannot assert parental rights. As such, failing to litigate and/or confirm paternity by way of Court Order is detrimental to fathers. Furthermore, in the absence of a Court Order related to support, a custodial parent may seek child support going back four (4) years (see NRS 125B.030). As such, there is no good reason for a father to delay in confirming paternity by way of Court Order. In fact, it is quite the opposite - the sooner a father can define his rights and responsibilities, the better for both the father and the children.

In order to determine if child support will be paid one party to the other, and in what amount, you need four things:

- 1) The gross monthly income of each parent;
- 2) NRS 125B.070 and NRS 125B.080(9);
- 3) The holding in *Barbagallo v. Barbagallo, supra*; and

4) The holdings in *Wright v. Osburn* and *Wesley v. Foster, supra*.

The gross monthly income of each parent provides the basis for using the statutes and case law to set child support.

NRS 125B.070 provides both the percentage and the presumptive “cap” amounts for child support.

NRS 125B.070 *Amount of payment: Definitions; adjustment of presumptive maximum amount based on change in Consumer Price Index.*

1. As used in this section and NRS 125B.080, unless the context otherwise requires:

(a) “Gross monthly income” means the total amount of income received each month from any source of a person who is not self-employed or the gross income from any source of a self-employed person, after deduction of all legitimate business expenses, but without deduction for personal income taxes, contributions for retirement benefits, contributions to a pension or for any other personal expenses.

(b) “Obligation for support” means the sum certain dollar amount determined according to the following schedule:

(1) For one child, 18 percent;

(2) For two children, 25 percent;

(3) For three children, 29 percent;

(4) For four children, 31 percent; and

(5) For each additional child, an additional 2 percent,

of a parent’s gross monthly income, but not more than the presumptive maximum amount per month per child set forth for the parent in subsection 2 for an obligation for support determined pursuant to subparagraphs (1) to (4), inclusive, unless the court sets forth findings of fact as to the basis for a different amount pursuant to subsection 6 of NRS 125B.080.

2. For the purposes of paragraph (b) of subsection 1, the presumptive maximum amount per month per child for an obligation for support, as adjusted pursuant to subsection 3, is:

PRESUMPTIVE MAXIMUM AMOUNT

If the Parent's Gross Monthly Income is at Least	But Less Than	The Presumptive Maximum Amount the Parent May Be Required to Pay per Month per Child Pursuant to Paragraph (b) of Subsection 1 is	
\$0	-	\$4,168	\$500 (580) ¹
4,168	-	6,251	550 (638)
6,251	-	8,334	600 (697)
8,334	-	10,418	650 (754)
10,418	-	12,501	700 (812)
12,501	-	14,583	750 (870)

If a parent's gross monthly income is equal to or greater than \$14,583, the presumptive maximum amount the parent may be required to pay pursuant to paragraph (b) of subsection 1 is \$800 (930).

3. The presumptive maximum amounts set forth in subsection 2 for the obligation for support must be adjusted on July 1 of each year for the fiscal year beginning that day and ending June 30 in a rounded dollar amount corresponding to the percentage of increase or decrease in the Consumer Price Index (All Items) published by the United States Department of Labor for the preceding calendar year. On April 1 of each year, the Office of Court Administrator shall determine the amount of the increase or decrease required by this subsection, establish the adjusted amounts to take effect on July 1 of that year and notify each district court of the adjusted amounts.

4. As used in this section, "Office of Court Administrator" means the Office of Court Administrator created pursuant to NRS 1.320.

In reviewing NRS 125B.070, you can see why knowing a parent's gross monthly income is important. It will determine the statutory "cap" under which he or she will fall. By way of example, if a parent earns \$4,000.00 in gross monthly income, and is obliged for the support of one (1) child, then his (or her) child support obligation to the other parent is calculated as follows:

$\$4,000.00 \times 0.18 = \720.00 (but see NRS 125B.070, which "caps" child support at \$530.00 per month if you earn less than \$4,168.00 in gross monthly income). Therefore, the obligor's child support obligation is presumptively capped at \$530.00 per month.

¹ The parenthetical amounts are the modified "cap" amounts for July 1, 2007 through June 30, 2008, pursuant to NRS 125B.070(3).

However, if a parent earns \$2,500.00 in gross monthly income, for example, then child support would not be subject to the “cap”: $\$2,500.00 \times 0.18 = \450.00 (an amount under the presumptive cap)

Interestingly, the “cap” essentially rewards higher income earning obligors (apparently to the detriment of the custodial parent and the child), and inversely, punishes lower income earning obligors (by making them pay the full 18% of their gross monthly income for the support of one child). However, this is what the Nevada Legislature has determined is fair and reasonable, and presumptively “meets the needs of the child”.

Matters become more cloudy when you deal with a self-employed individual. The reason this is so is because they are entitled to have their gross monthly income calculated after deducting “all legitimate business expenses” (see NRS 125B.070(1)(a)). If you have ever seen a self employed tax return, “legitimate business expenses” can be substantial. NRS 125B.070(1)(a) is not clear as to what constitutes a “legitimate business expense”, but a good rule of thumb is any business expense permitted by the IRS. The Court could theoretically review each business expense to determine whether or not it is legitimate, but denying a business expense which is permitted by the IRS could be viewed as a violation of the Supremacy Clause of the United States Constitution (which states that where Federal and State law come into direct conflict, Federal law controls).

Any parent who receives or pays child support is entitled to argue a deviation from the presumptive child support amount. The only authority for deviations from the presumptive child support calculated using NRS 125B.070 is found in NRS 125B.080(9).

NRS 125B.080. *Amount of payment: Determination.*

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9. 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.
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Nevada law does not permit any deviation factors other than those listed in NRS 125B.080(9). Furthermore, the holding in *Barbagallo v. Barbagallo*, *supra*, indicates such deviation factors should be the exception, and not the rule.

Nevertheless, there are three or four deviation factors regularly considered, and frequently granted by the Court. They are: The cost of healthcare (usually an offset for one half the cost of maintaining health insurance specifically on the child or children); The cost of child care (again, usually an offset for one half the costs of day care for children under school age); The legal responsibility of a parent (usually obligor) for the support of others (depending on the department, a deviation from \$0.00 to \$150.00 per other child may be granted); and The cost of transportation if the custodial parent relocates outside of Nevada with the minor children (most departments will again provide for an offset equal to one half the cost of such transportation, but some have provided a total offset because the custodial parent's relocation has precipitated the expense).

Most other deviation factors are generally ignored except in extraordinary situations. One such situation would be where the mother is bedridden during some point in her pregnancy and/or ends up with substantial expenses associated with birth. In such a case, it would be reasonable for the Court to Order reimbursement of some, if not all, of the expenses associated with the loss of work, prenatal care and birth expenses (see NRS 125B.020(3)). Such an Order

would almost always be deemed “arrear,” and a monthly payment on such arrears would be added to any monthly child support obligation. The Courts attempt to set payments on child support arrears in an amount at least equal to one percent of the arrears amount. Because arrears accrue post judgment interest, payments of less than one percent usually result in “interest only” payments, and therefore do not decline, or decline very slowly. NRS 31A.30(1)(a)(1) provides the Court with the authority to set payments on arrears at 10% of the current (prospective) child support obligation. Therefore, if an obligor’s ongoing monthly child support obligation is \$450.00, the Court could also Order payment of \$45.00 per month toward arrears on an ongoing monthly basis, for a total of \$495.00 per month.

If arrears, penalties and interest have not been satisfied before the minor child emancipates, NRS 125B.100 also provides for monthly child support (and scheduled arrears payments) to continue beyond the emancipation of a minor child at the same rate as previously Ordered by the Court until arrears, penalties and interest are extinguished.

Deviation factors are available regardless of whether there is a primary custodian, or if the parties share joint physical custody. Despite the dictates of *Barbagallo, supra*, the Court is vested with a substantial amount of discretion in awarding offsets or increases in child support under NRS 125B.080(9). It is helpful to know which judges would permit what offsets, and in what amounts in order to attempt resolution of child support issues, which should otherwise be simple mathematical equations.

An interesting exercise in the law may occur where two parents agree to a deviation of the statutory presumption of child support. Whereas the Nevada Legislature has stated, rather unequivocally, that only the deviation factors under NRS 125B.080(9) are available to deviate from the presumptive amount of child support under NRS 125B.070, what happens if two parents agree to a deviation, but claim the basis for the deviation is something other than one listed in NRS 125B.080(9) (such as “to ease the tensions between the parents relative to money issues”), or the basis for the deviation is not specified (i.e., just because)?

First, it is important to note the Courts are more than willing to ratify an agreement between the parties in most instances (as long as the Court finds it is in the best interests of the child or children to do so).

Second, the Court is acutely aware that parties who agree do not appeal their own agreements, so they don’t mind ratifying parties’ agreements.

Third, and perhaps most importantly, fit parents are presumed to be acting in their children's best interests (see *Parham v. J. R.*, 442 U.S. 584, 99 S.Ct. 2493 (1979) and its progeny). Therefore, the Courts are effectively precluded from trumping the parenting decisions (in this instance, the amount of child support to be paid by one party to the other) unless there is a finding by the Court that one parent, the other, or both are "unfit". Furthermore, since the holding in *Pierce, supra*, is a United States Supreme Court decision, and NRS 125B.080(9) was drafted by the Nevada Legislature, NRS 125B.080(9) must bow to the holding in *Pierce, supra*, under the Supremacy Clause of the United States Constitution, since this is an example of where Federal and State law come into direct conflict with one another.

In cases of joint physical custody, child support still uses NRS 125B.070, NRS 125B.080(9), and the holding in *Barbagallo v. Barbagallo, supra*. However, two additional cases decided by the Nevada Supreme Court come into play as well: *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998) and *Wesley v. Foster*, 119 Nev. 110, 65 P.3d 251 (2003).

Wright v. Osburn, supra, states that in joint physical custody cases, the manner in which child support is calculated is as follows: Calculate the percentage of gross monthly income each parent would be obliged to pay the other if the other parent had primary custody. Subtract the lower child support obligation from the higher child support obligation. The difference is what is paid by the higher income earning parent to the lower earning parent.

As an example, mom earns \$2,500.00 per month, and dad earns \$4,000.00 per month. They have two (2) children, so the percentage to use is 25% (see NRS 125B.070(1)(b)(2)). Under a joint physical custody arrangement, child support would be set at \$375.00 per month from dad to mom ($\$4,000.00 \times 0.25 = \$1,000.00$; $\$2,500.00 \times 0.25 = \625.00 ; $\$1,000.00 - \$625.00 = \$375.00$). This would be the presumptive amount of child support from dad to mom.

However, scenarios come up from time to time which challenge the calculation as detailed in *Wright, supra*. What happens when we change dad's gross monthly income to \$15,000.00 per month? The answer, under *Wright, supra*, could be this: ($\$15,000.00 \times 0.25 = \$3,750.00$; $\$2,500.00 \times 0.25 = \625.00 ; $\$3,750.00 - \$625.00 = \$3,125.00$). The answer, under *Wright, supra*, could also be this: ($\$15,000.00 \times 0.25 = \$3,750.00$ [but capped at $2 \times \$930.00 = \$1,860.00$]; $\$2,500.00 \times 0.25 = \625.00 ; $\$1,860.00 - \$625.00 = \$1,245.00$)

It turns out **both** of these solutions, made using the calculation as defined in *Wright, supra*, are incorrect. The correct answer is \$1,860.00. The holding in *Wesley, supra*, is the reason why.

In *Wesley v. Foster, supra*, the Nevada Supreme Court concluded that in comparing incomes for the purposes of calculating a child support obligation in joint physical custody cases, the use of the statutory “cap” occurs *after* the comparison of incomes (referred to as a “cap last” approach).

Another interesting twist arises when there are legitimate “deviations” in joint physical custody cases where both *Wright* and *Wesley, supra*, apply. Do you cap last then apply the deviation factors, or do you apply the deviation factors and then “cap last”? Logic dictates that if *Wesley, supra*, states you “cap last”, the deviation factors are considered before capping child support. However, immediately after announcing the “cap last” approach, the Nevada Supreme Court included this sentence: “Of course, the district court also has the option to adjust the amount of the award where special circumstances exist.” (*Wesley*, at 113, citing *Wright, supra*, and NRS 125B.080(9))

In my humble opinion, by including this language immediately after directing a “cap last” approach, the Nevada Supreme Court intended to direct the Courts to apply any of the deviation factors available under NRS 125B.080(9) after capping child support in appropriate joint physical custody cases which invoke the “cap last” rule as contained in *Wesley, supra*. At least one District Court Judge has seen fit to disagree with my analysis. As such, the safest answer I can give relative to when to consider deviation factors in joint physical custody cases - and notably cases which invoke the “cap last” rule as enumerated in *Wesley, supra*, is it depends on the judge.

As an aside, the decision in *Wesley, supra*, was not even necessary, since at the time of the *Wright, supra*, decision, the presumptive cap for child support per child was set at a flat \$500.00 per month, and it is clear from the calculations in the decision in *Wright, supra*, that the Nevada Supreme Court had imposed a “cap last” approach. Therein, dad’s child support obligation, in the absence of a “cap”, would have been \$1,501.00 per month (29% of his gross monthly income for three children), and mom’s child support obligation was calculated at \$464.00 per month. Subtracting \$1,501.00 from \$464.00 resulted in a child support obligation from dad to mom of \$1,037.00 per month, **a number which is \$1.00 higher than if they had**

taken a “cap first” approach. Apparently, no one on the Nevada Supreme Court, or arguing the *Wesley* case, noticed that the Nevada Supreme Court had already answered the question of when to apply the statutory “cap” in the decision in *Wright, supra*.

An additional matter to consider is the minimum child support obligation a parent may have per child. Nevada has established that even if a parent is unemployed (through no fault of their own), child support would still be set at a minimum of \$100.00 per month. There are occasional hardship deviations granted, but ordinarily, if the parent cannot pay even the \$100.00 per month, such obligation would accrue as arrears.

Nevada also contemplates the possibility of being willfully unemployed (or underemployed) for the purpose of avoiding child support. NRS 125B.080(8) states: “If a parent who has an obligation for support is willfully underemployed or unemployed to avoid an obligation for support of a child, that obligation must be based upon the parent’s true potential earning capacity.” The standard to establish willful underemployment for the purposes of avoiding child support is “clear and convincing evidence”, and this evidentiary standard applies to the party claiming willful underemployment, but the Courts are generally lax in applying this standard, there being little sympathy for individuals who want to avoid or minimize their child support obligations.

Under NRS 125B.145, either parent is entitled to a review of child support “... at least every 3 years ...” (although this means exactly the opposite - at any time *after* three years have elapsed since the most recent child support order issued), or at any time when there is a “change in circumstances” (defined as modification in income of the person responsible for paying child support of at least 20%, either up or down).

The second provision (change in circumstances) is very important because child support is only modifiable prospectively (looking forward). Therefore, if an obligor loses his job, it is incumbent on the obligor to immediately file a Motion to Review Child Support, or child support will continue to be due at the most recent Court Ordered rate. The Court has the authority to modify child support commencing the date of the filing of the Motion (see NRS 125B.140(1)(b)) but child support, once accrued, is not modifiable (see NRS 125B.140(1)(a)).

Lastly, you should note that the graduated “caps” as contained in NRS 125B.070 are presumptive, but not absolute. The presumption is rebuttable. However, most rebuttable presumptions require “clear and convincing evidence” to be overcome. For the purpose of

calculating child support, you should not anticipate being able to overcome the presumptive child support graduated cap unless the obligor's income is at least twice the top cap amount. Twice the top cap amount translated into annual income is \$350,000.00 per year. As such, overcoming the top presumptive cap will only apply to the very top income earners with which you will ever come into contact. The highest child support award I ever had Ordered in one of my cases was \$3,000.00 per month for one child (obviously in excess of the top presumptive "cap"), but in that case, the obligor earned over \$3 million per year as a professional athlete.

With the foregoing statutes, case law and analysis, you are now well equipped to calculate child support in a vast majority of your cases, assuming the custodial arrangement has already been resolved.

Arrearage Calculations and Wage Assignments

Calculating Arrears

The calculation of arrears requires knowledge of the child support obligation, payment history, NRS 125B.095, NRS 125B.140, and NRS 99.040.

NRS 125B.095 *Penalty for delinquent payment of installment of obligation of support.*

1. Except as otherwise provided in this section and NRS 125B.012 (which references the UIFSA statutes as contained in NRS 130), if an installment of an obligation to pay support for a child which arises from the judgment of a court becomes delinquent in the amount owed for 1 month's support, a penalty must be added by operation of this section to the amount of the installment. This penalty must be included in a computation of arrearages by a court of this State and may be so included in a judicial or administrative proceeding of another state. A penalty must not be added to the amount of the installment pursuant to this subsection if the court finds that the employer of the responsible parent or the district attorney or other public agency in this State that enforces an obligation to pay support for a child caused the payment to be delinquent.
2. The amount of the penalty is 10 percent per annum, or portion thereof, that the installment remains unpaid. Each district attorney or other public agency in this State undertaking to enforce an obligation to pay support for a child shall enforce the provisions of this section. (Parenthetical information provided by author)

What NRS 125B.095 indicates is that a 10% per annum penalty *must* be added to arrears calculations. The penalty is assessed in each month where it remains unpaid. Therefore, each

month in which an arrears amount remains unpaid, a 0.833% monthly penalty is added (10% divided by 12).

NRS 125B.140(2)(c)(1) also provides a basis to award interest on arrears. Therein, NRS 99.040 is referenced. NRS 99.040 sets “statutory interest” at the prime rate charged by the largest bank in Nevada on the most recent previous January or July plus 2%. Rather than trying to figure this out yourself, go to <http://www.fid.state.nv.us/Prime/PrimeInterestRate.pdf>. This web site will provide you with the “statutory interest” for each six (6) month period in the last 30 years or so.

As with the calculation of penalties, interest is compounded monthly on the total arrears amount. To determine how to compound the interest monthly, take the current “statutory interest” rate and divide by 12. This gives you the monthly rate of interest. Unlike the previously referenced penalty, interest is permissive, and not mandatory. However, the Court will usually award statutory interest on accumulated and unpaid arrears in the absence of a “hardship” to the obligor.

Officially, the Court obtains jurisdiction over the issue of child support arrears with the filing of a Motion to Reduce Child Support Arrears to Judgment. In order to properly vest the Court with jurisdiction to consider arrears, the moving party is required to submit a “Schedule of Arrears” (go to http://www.accessclarkcounty.com/District_court/SHC%20Packets%20and%20Documents/Schedule_Arrears.pdf for a template of a Schedule of Arrears). This Schedule must be filled out completely, including calculations, and a copy of the Order setting child support must also be referenced in the Schedule and provided as an attachment.

Frankly, the process of computing penalties and interest can be so time consuming that, in some instances, you would end up charging your client more for computation than he or she would recover. For a fairly nominal cost, an arrears, penalties and interest calculation program called Marshal Law can be purchased from the Willick Law Group. If you are interested, contact Seth Willick at (702) 438-4100. I heartily endorse this program, and receive no compensation of any form as a result of my endorsement. There is a certain period of orientation to the program which is initially slower than making the calculations “freehand” but ultimately, is much faster and so accurate that the Courts rarely challenge the results.

Wage Assignments

NRS 125.450(2) (referencing NRS 31A) permits the issuance of a wage assignment (or garnishment) at any time after an installment of child support becomes more than 30 days delinquent. Specifically, with a child support obligation, there is no Order required for the issuance of a wage assignment. However, the obligor can request a hearing to suspend the wage assignment, and if your client obtains a wage withholding without just cause, the judge will be very upset and most likely sanction the client severely.

The actual process of obtaining a wage assignment in general, and in this instance, a wage assignment for child support, is quite laborious. It requires the preparation of numerous documents, including the wage assignment itself, a writ of execution, instructions to the constable, and a notice of execution after judgment. The employer receives a fee for processing the wage assignment, and the constable receives a fee for serving the wage assignment. Unlike most wage garnishments, child support garnishments are ongoing, and do not need to be renewed every six months. Some attorneys skip the constable entirely and just mail a wage assignment to the employer. Even though this process is defective, employers will almost always comply because their failure to comply (with a properly processed wage assignment) can make them liable for the amount due each pay period, as well as a stiff fine each pay period they fail to comply. The employer can also be hauled into Court to defend against Contempt proceedings.

A less laborious alternative is for the client to submit the child support portion of their case to the District Attorney, Child Support Enforcement Division, in the county in which they reside. There is no charge for the District Attorney to open a child support case, but they are often backlogged to such a degree that no activity may occur on the case for as long as ten months. However, once the case is opened and goes before the Child Support Commissioner, the District Attorney and the Court do a good job of holding obligors to their obligation, and issuing a wage assignment when necessary.

Although you file your child support action with the District Attorney in the county in which you reside, the Child Support Court in the county (and state) where the obligor resides will be the enforcing court. This court also has the authority (under the Uniform Child Custody Jurisdiction and Enforcement Act and Uniform Interstate Family Support Act - UCCJEA and UIFSA, respectively) to modify the amount of child support using that state's child support guidelines and calculations (see NRS 130.206).

Working With Child Custody Experts

The Clark County District Court, Family Division, has provided specific authority for outsourcing a custody evaluation to a Child Custody Expert - usually a Psychiatrist or Psychologist. The Court may also send the children out for an interview with a specialist in FMC (the Mediation arm of the Family Court) who holds at least a Masters Degree in Social Work (MSW), and may also be a Marriage and Family Therapist (MFT) (see EDCR 5.16).

An outsourced evaluation to a Psychiatrist or Psychologist can run \$5,000.00 or more, usually split between the parties. A child interview through FMC is technically free. The Court may also utilize alternative options, such as the appointment of a Court Appointed Special Advocate (CASA) (usually free) or Guardian ad Litem (GAL) (usually an attorney, and typically less expensive and quicker than an outsourced evaluation), depending on the circumstances of the case presented to the Court.

If the parties are reluctant to participate in the costly process of an outsourced evaluation, they may elect or be Ordered by the Court to participate in mediation of custody issues through FMC. The cost for mediation through FMC is a sliding scale between \$0.00 and \$200.00 per party, depending on the respective parties' incomes.

Outsourced Evaluation

If the parties agree to a custody evaluation, or the Court Orders it, a referral from the Court will be delivered to an agreed upon or Court Ordered evaluator. It is incumbent on the parties to provide the evaluator with copies of all pleadings filed in the case. Some evaluators also permit the parties to provide any other documentation they believe may be relevant to the evaluation.

Unlike the Court, which is bound by the rules of evidence, an evaluator may elect to use any and all "evidence" necessary to reach a conclusion - including items which would not be admissible in Court, such as sending the parties out for polygraph examinations and drug tests. The individuals chosen to perform custody evaluations usually have numerous evaluations under their belt, and are able to separate the wheat from the chaff in coming to a decision in their evaluation.

As with all experts, any request from the evaluator for additional information and/or documentation should be immediately addressed. Cooperation with the evaluator ensures the

best possible result for your client. If your client has the requested information, it is imperative you relay to the client how important prompt compliance with the evaluator's request is.

The evaluator may also coordinate with your office to schedule appointments to meet with the client and/or the children the subject of the evaluation.

Many evaluators are familiar with the evidentiary standards and factors used by the Court to make a custody determination. Through experience, you will be able to determine which evaluators are knowledgeable in this regard, and which are not. This is important in the selection of an evaluator if the option to select one is offered by the Court.

Although the Court is not in any way bound by the recommendations of an evaluator, the Court will typically rely on the recommendations of the evaluator, as well as testimony and evidence provided by each party at the time of trial, in crafting its decision on the issue of custody.

Once the Court Orders an outsourced evaluation, it is typical for the evaluation to come into evidence. However, either party may challenge the evaluator as to the conclusions reached or the methodology used to reach a conclusion. With limited exceptions, the Court will not outsource an evaluation to an individual who has not qualified as an expert in their area. Either party may elect to challenge the qualifications of an evaluator (though it is unusual in circumstances where the evaluator is chosen by agreement of the parties).

You should note that attacking the evaluator's credentials is the equivalent to telling the evaluator he or she is not competent to render a professional opinion on the specific issue they have been asked to address. Often, such tactics would backfire with the Court, which relies heavily on evaluators.

Child Interview

On occasions, the Court will Order the child or children interviewed by FMC. This is permitted under EDCR 5.13, but runs contrary to EDCR 5.03, which states children shall not be involved in the litigation between their parents. Nevertheless, the Court will Order an interview more frequently for children over the age of 13 or so, and children younger than that less frequently in extraordinary cases. The FMC interviewer will not ask the children where they desire to live unless the Court expressly requests that question be asked.

The purpose of the interview is usually twofold: first, does the child have the capacity to render a reasoned and well informed opinion as to their preferences (are they smart enough to know why they want whatever they want); and second, what is their custodial preference.

Although the interviewer will not usually ask direct questions about what custodial time the child desires, the interviewer will ask questions around the issue of the custodial time share. For example, the interviewer will attempt to determine if the child, through its responses, indicates a preference for spending more time with one parent or the other. The interviewer may also determine which parent is more active in the child's life. Finally, the interviewer may also be able to determine the strengths and weaknesses each parent has in parenting their children.

Of significant concern with child interviews, children tend to try to stay neutral in disputes between their parents, sometimes bending their memory in order to be as neutral as possible. Furthermore, the interviewers at FMC are not well trained to identify coaching by one parent, the other, or both. Lastly, but equally importantly, the child interview does not permit either party to cross examine the child if there is a dispute about the efficacy of the representations made by the child or children to the interviewer. A child interview by FMC, and the report which issues as a result of the interview, are regularly admitted into evidence, even though it is clearly hearsay, and even though it is incredibly unlikely the Court will permit either parent to cross examine their children on the representations made to the interviewer.

It is incumbent on your office to inform your client not to involve their children in the litigation, and not to coach their children on what they will tell the interviewer. The judicial process, especially in cases involving custody, only works effectively when the information used is obtained in as neutral a manner as possible.

If FMC determines coaching has occurred, and can identify which parent is coaching the children, it will be reported to the Court. This, in turn, can have a significant and negative impact on the outcome of the custody dispute. A parent who coaches the children on what to tell the evaluator cannot be considered by the Court as the parent "... more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent." (NRS 125.480(4)(c)), a factor the Court will use in deciding custody.

Appointment Of A CASA / GAL

The middle of the road alternative to either an outsourced evaluation or a child interview is the appointment of a CASA or an attorney Guardian ad Litem (GAL).

A CASA is a volunteer GAL specifically trained to evaluate issues in custody matters. Typically, the training is focused on identifying problems with parenting skills, which may include abuse or neglect. After investigating the problems and skills each parent has, the CASA will render a Report and Recommendation to the Court. Like a custody evaluation (and unlike a child interview), either party may call the CASA to testify and question them as to their ultimate conclusions and how they reached their conclusions.

The difference between a CASA and an attorney GAL is that the attorney GAL need not have any specialized training in evaluating parenting skills or indicia of neglect or abuse. However, the attorney GAL is usually selected from a pool of attorneys who have significant experience in custody cases, and by virtue of their experience, are good candidates to evaluate parents' parenting skills. I have acted as an attorney GAL on a number of occasions, and have the added benefit of having trained specifically as a CASA while in law school.

Do not shy away from the option of an attorney GAL. There are a limited number of CASAs, and their availability must first be to delinquency, neglect and abuse cases, so a CASA may not be available in a "simple" custody action. Some attorneys will volunteer their time, at the behest of the Court, to act as an attorney GAL. Ordinarily, however, the attorney GAL will receive compensation commensurate with his or her hourly rate, or a modest discount.

Mediation Through FMC; Private Mediation

By far, the most common method used by the Court to resolve custody disputes between parents is to send them to FMC to engage in mediation to attempt to resolve the custody issues. The parties will meet with a neutral third party (the mediator) who is trained in dispute resolution. There is an initial meeting (a "meet and greet"), followed by a subsequent meeting (or meetings) to negotiate or mediate in earnest.

The mediators are aware of the presumption towards joint physical custody. As such, if your client is adamant in pursuing primary physical custody, it is important for the client to express to the mediator the basis for deviating from joint physical custody. A good plan of action is to have the client come up with a list of 5-7 positive attributes which he or she has as a parent (which, at the same time, the other parent lacks), and 3-5 negative attributes the other parent has (which, at the same time, your client does not suffer from).

The nature of the negative attributes should be constructive, and not inflammatory. For example, your client should not say the other parent can't help the children with homework.

Rather, your client should say that because of his or her experience and education, he or she is better equipped to help with homework. A negative, in the sense contemplated in these discussions, could be something as simple as a work schedule which makes scheduling equal time with each parent difficult or impossible.

Along with positive and negative elements of parenting skills, the mediator needs to come up with solutions, so the client should be prepared to provide solutions to help “steer” the mediator toward the desired custodial arrangement.

Although the mediation process is “confidential” (in other words, it is treated like settlement negotiations, and therefore cannot be brought to the Court’s attention), there is an exception to the confidentiality: The mediator will inform the Court if one party, the other, or both declare an impasse. Basically, if someone declares an impasse, they have indicated that the mediation process has failed, and the judge should decide the custodial arrangement.

Mediators do not like to snitch on the parties, so if one party says mediation is a waste of time, the mediator will ask the other side if they agree. Since it takes two to tango (or mediate), it is quite common for the other side to agree. However, the mediator will then inform the Judge *both* sides declared an impasse. As such, I recommend telling your client to memorize and use this mantra: “I believe two caring parents working in the best interests of their children can come up with an agreement in mediation” any time the mediator asks the client if mediation is a waste of time.

In the event the parties agree on some or all of the custody and visitation issues, a Parenting Plan, or Partial Parenting Plan will be drafted by the mediator. The draft will be provided to the parties for review. Their attorneys also get a chance to look it over and advise their client on the impact the purported “agreement” will have on their lives, both as to their time with the children, and on child support.

The Courts are not permitted to ratify a Parenting Agreement unless both parties and their attorneys approve it. However, if there is an objection to the Parenting Agreement, the Court will be disappointed, and will view such a change of heart as “buyer’s remorse” (even if the objection is one legitimately raised by the client’s attorney). This does not usually, but could, affect the Court’s ultimate decision on custody.

Mediation through FMC has a surprisingly good track record - resolution of some or all of the issues occurs in about 85% of the cases submitted to FMC for mediation. As such, the

Court relies on the mediation process extensively. Obviously, mediation is also much cheaper for the client if it is successful, and the costs associated with mediation are fairly low if there is no success.

Private mediation is also available to the litigants. The purpose is the same as mediation through FMC, and although it is more costly (sometimes as much as \$400 per hour), the qualifications of a private mediator may be substantially greater than the qualifications of a mediator through FMC. Furthermore, private mediators are not constrained to resolve only custody, visitation, and holiday schedules. All aspects of litigation may be resolved through the use of a private mediator. It is a good idea to meet and confer with the other side to define precisely what issues will be addressed in private mediation.

The very best private mediators have been involved in custody dispute resolution for a significant period of time, and can predict with frightening accuracy the ultimate outcome of a custody battle if the matter is submitted to the Court for a decision. Some private mediators are even former Family Court Judges. Although more expensive, private mediation may be a better alternative to litigants with the resources to pay for it. It is also often beneficial to have a mediator who can resolve more than just custody, visitation, and holiday scheduling issues.

Drafting of Parenting Plans, Agreements and Schedules

If mediation through FMC or a private mediator is successful, there will most likely be no need to draft a Parenting Plan. However, if the parties reach resolution between themselves (independent of mediation), or the Court issues an Order for custody, you may be called upon to prepare a Parenting Plan, or include the language as part of a Custody Order or Decree.

In order to effectively represent your client, there are certain aspects of any Parenting Plan (or custody, visitation and holiday schedule in a Custody Order or Decree of Divorce) which you should include in all instances. An effective Parenting Plan, Custody Order, or Decree of Divorce will define each party's rights and responsibilities with as much specificity as possible.

This, in turn, places everyone on notice of what they can expect, and what is expected of them. It also makes the rights and responsibilities of the parties Orders of the Court, and therefore enforceable by way of Contempt proceedings. The more vague the language used, the more likely it is that the parties will argue about provisions, and the less enforceable the provisions will be.

Since nearly every case will involve joint legal custody (the big ticket decisions parents make in their children's lives), it is important to specify what joint legal custody entails. I usually include about a dozen paragraphs so the parents can clearly see what they can expect and what they are expected to do in issues which fall under the category of joint legal custody. I use very specific joint legal custody language as follows:

IT IS FURTHER ORDERED and ADJUDGED the parties are bound by the following Joint Legal Custody Provisions:

A. Each parent will consult and cooperate with the other in substantial questions relating to religious upbringing, educational programs, significant changes in social environment, and health care of the child.

B. Each parent will have access to medical and school records pertaining to their child, and be permitted to independently consult with any and all professionals involved with him/her.

C. All schools, health care providers, day care providers, and counselors will be selected by the parents jointly. In the event the parties cannot agree to the selection of a school, the child will be maintained in the present school pending mediation and/or further order of the court.

D. Each parent will be empowered to obtain emergency health care for the child without the consent of the other parent. Each parent will notify the other parent as soon as reasonably possible as to any illness requiring medical attention, or any emergency involving the child.

E. Each parent will provide the other parent, upon receipt, with any information concerning the well-being of the child, including, but not limited to, copies of report cards; school meeting notices; vacation schedules; class notices of activities involving the child; samples of school work; order forms for school pictures; all communications from health care providers and the names, addresses, and telephone numbers of all schools, health care providers, regular day care providers, and counselors.

F. Each parent will advise the other parent of school, athletic, religious, and social events in which the child participates, and each agrees to so notify the other parent within a reasonable time after first learning of the future occurrence of any such event so as to allow the other parent to make arrangements to attend the event if he or she chooses to do so. Both parents may participate in all such activities with the child, including, but not limited to, such activities as open house, attendance at all school and religious activities and events, athletic events, school plays, graduation ceremonies, school carnivals, and any other events involving the child.

G. Each parent will provide the other parent with the address and telephone number at which the child resides, and to notify the other parent within ten (10) days prior to any change of address and provide the telephone number of such address change as soon as it is assigned.

H. Each parent will provide the other parent with a travel itinerary and, whenever reasonably possible, telephone numbers at which the child can be reached whenever the child will be away from that parent's home for a period of one (1) night or more.

I. The parents will encourage liberal communication between the child and the other parent. Each parent will be entitled to reasonable telephone communication with the child, and each parent will not unreasonably interfere with the child's right to privacy during such telephone conversations.

J. Neither parent will interfere with the right of the child to transport his/her clothing and personal belongings freely between the parents' respective homes.

K. The parents will communicate directly with each other regarding the needs and well being of their child, and the parents will not use the child to communicate with the other parent regarding parental issues. The parents will use self-control and to not verbally or physically abuse each other in the presence of the minor child.

L. Neither parent will disparage the other parent in the presence of the child, nor will either parent make any comment of any kind that would demean the other parent in the eyes of the child. Additionally, each parent will instruct their respective family and friends to make no disparaging remarks regarding the other parent in the presence of the child. The parents will take all action necessary to prevent such disparaging remarks being made in the presence of the child, and will report to each other in the event such disparaging remarks are made.

Although somewhat off topic, I also clarify parental rights and responsibilities by using specific language as to who will be responsible for unreimbursed medical expenses, as follows:

IT IS FURTHER ORDERED and ADJUDGED with regard to the payment of future unreimbursed medical expenses incurred on behalf of the minor child, the parties will adhere to the following provisions related to Medical and Health Expense Sharing:

1. Equal Responsibility for Health Expenses Exception: Parents are required to equally share medical, dental and health expenses hereinafter referred to as "health expenses" of their child pursuant to NRS 125B.080(7) unless the court specifically makes an exception to that rule for extraordinary circumstances.

2. Documentation of Out-Of-Pocket Expenses Required: A parent who incurs an

out-of-pocket health expense for their child is required to document that expense and proof of payment of that expense. A receipt from the health care provider is sufficient to prove the expense so long as it has the name of the child on it and shows an actual payment by the parent.

3. Proof of Payment Required: A parent who has paid a health expense for a child of the parties must provide a copy of the proof of payment to the other parent and the insurance company within thirty (30) days of the payment being made and in no event later than the expense should have been submitted to insurance for reimbursement. The failure of a parent to comply with this provision in a timely manner which causes the claim for insurance reimbursement to be denied by the insurance company as untimely may result in that parent being required to pay the entire amount which would have been paid by the insurance company as well as one-half of the expense which would not have been paid by insurance if the claim had been timely filed.

4. Mitigation of Health Expenses Required; Use of Covered Insurance Providers: Parents have a duty to mitigate medical expenses for their child. Absent compelling circumstances, a parent should take their child to a health care provider covered by the insurance in effect and use preferred providers if available in order to minimize the cost of health care as much as possible. The burden is on the parent using a non-covered health care provider to demonstrate that the choice not to use a covered provider or the lowest cost option was reasonably necessary in the particular circumstances of that case. If the court finds the choice of a non-covered or more expensive covered provider was not reasonably necessary then the court may impose a greater portion of financial responsibility for the cost of that health care to whichever parent incurred that expense up to the full amount which would have been provided by the lowest cost insurance choice.

5. Sharing of Insurance Information Required: The parent providing insurance coverage for a child of the parties has a continuing obligation to provide insurance information including, but not limited to, copies of policies and changes thereto as they are received, claim forms, preferred provider lists initially and as the change from time to time and identification cards. The failure of the insuring parent to timely support any of the above items to the other parent which results in a claim for treatment being denied by the insurance company in whole or in part may result in the amount which would have been paid by the insurance policy being paid by the issuing parent.

6. Reimbursement for Out-Of-Pocket Expenses: A parent who receives a written request for contribution for an out-of-pocket health care expense incurred by the other parent must pay his or her share of that out-of-pocket expense to the paying parent within thirty (30) days of receipt of the written request for contribution. The court encourages as much informal written documentation as possible such as handwritten notes with copies of the bills and proof of payment attached. The requesting parent should make a copy of all papers submitted to the other parent in order to prove communication of this information to the other and substantiation for the request. The parent receiving the request for contribution must raise any questions about the correctness of the request for contribution within the thirty (30) day period after the request for contribution within the thirty (30) day period after the request for contribution is received. Any objection to the request for contribution must be made in writing with a copy made for later

reference by the court. If the parent receiving a request for contribution does not respond to the request within the thirty (30) day period that parent may be assessed attorney's fees if a contempt proceeding or court action is required as a result of the parent doing nothing. If the parent who owes a contribution for a health care expense of a child of the parties does not pay the amount within thirty (30) day period and fails to respond to the request within the thirty (30) days and if that parent is the recipient of periodic payments for child support or spousal support, the requesting parent is authorized to deduct the amount due from the other parent from any periodic payments due and payable thirty (30) days after the request for contribution was made in writing subject to the limitation that the maximum recovery by deduction from monthly periodic payments will be no more than \$50.00 per month.

7. Sharing Insurance Reimbursement: If either parent receives a payment from an insurance company or medical provider which reimburses payments previously made out-of-pocket by both parents or the other parent only, the parent receiving the payment must give the other parent's share of the payment to the other parent within seven (7) days of receipt of the payment.

8. Timely Submission of Claims to Insurance Company: If either party may submit a claim for payment to the insurance company directly they must do so in a timely manner. If the claim must be submitted by only one party that party must submit the claim in a timely manner. Failure of a party to comply with this requirement may result in that party being required to pay the entire amount of the claim which would have been paid by insurance if timely submitted and one-half of that amount which would have been paid by insurance.

9. Effect of Not Obtaining or Maintaining Required Health Insurance Coverage: If a party is required to provide health insurance for a child of the parties and that party fails to obtain or maintain such coverage or if that party loses the ability to continue coverage for the child, the court may require that party to pay all of the medical expense which would have been paid by insurance as well as one-half of what would not have been covered by insurance if it had been in effect.

The failure to include the foregoing language will create reimbursement "loopholes" the parties will argue about until resolved by the Court. While judges appreciate closing these loopholes, it is possible any department may have its own reimbursement language.

Lastly, all Custody and Support Orders require the inclusion of certain statutory notices. There are statutory notices as to custody and visitation, and other statutory notices as to support, as follow:

As to custody –

IT IS FURTHER ORDERED and ADJUDGED the following statutory notices relating to the custody and/or visitation of the minor child are applicable to the parties herein:

A. Pursuant to NRS 125C.200, the parties, and each of them, are hereby placed on notice of the following:

If custody has been established and the custodial parent intends to move his residence to a place outside of this state and to take the child with him, he must, as soon as possible and before the planned move, attempt to obtain the written consent of the noncustodial parent to move the child from this state. If the noncustodial parent refuses to give that consent, the custodial parent shall, before he leaves this state with the child, petition the court for permission to move the child. The failure of a parent to comply with the provisions of this section may be considered as a factor if a change of custody is requested by the noncustodial parent. This provision does not apply to vacations outside the State of Nevada planned by either party.

B. Pursuant to NRS 125.510(6), the parties, and each of them, are hereby placed on notice of the following:

THE ABDUCTION, CONCEALMENT OR DETENTION OF A CHILD IN VIOLATION OF THIS ORDER IS PUNISHABLE AS A CATEGORY "D" FELONY AS PROVIDED IN NRS 193.130. NRS 200.359 provides that every person having a limited right to custody of a child or any parent having no right of custody to a child who willfully detain, conceals or removes the child from a parent, guardian or other person having lawful custody or a right of visitation of the child in violation of an order of this court, or removes the child from the jurisdiction of the court without the consent of either the court or all persons who have the right to custody or visitation is subject to being punished for a category "D" felony as provided in NRS 193.130.

C. Pursuant to NRS 125.510(7) and (8), the parties, and each of them, are hereby placed on notice that the terms of Hague Convention of October 25, 1980, adopted by the 14th Session of the Hague Conference on Private Internal Law, apply if a parent abducts or wrongfully retains a child in a foreign country. This Court has taken jurisdiction over issues related to the custody and support of the parties' child, and as such, Nevada is hereby declared the state, and the United States of America is hereby declared the country of habitual residence of the child for the purposes of applying the aforesaid terms of the Hague Convention.

As to support -

IT IS FURTHER ORDERED and ADJUDGED the following statutory notices relating to the support of a child are applicable to the parties herein:

A. Pursuant to NRS 125B.095, if an installment of an obligation to pay support for a child becomes delinquent in the amount owed for one (1) month's support, a 10 % per annum penalty must be added to the delinquent amount.

B. Pursuant to NRS 125B.140, if an installment of an obligation to pay support for a child becomes delinquent, the court shall determine interest upon the arrearages at a rate established pursuant to NRS 99.040, from the time each amount became due. Interest shall continue to accrue on the amount ordered until it is paid, and additional attorney's fees must be allowed if required for collection.

C. Pursuant to NRS 125B.145, the parties, and each of them, are hereby placed on notice that the foregoing order for support shall be reviewed by the court at least every three (3) years to determine whether the order should be modified. The review will be conducted upon the filing of a request by a (1) parent or legal guardian of the child; or (2) the Nevada State Welfare Division or the District Attorney's Office, if the Division of the District Attorney has jurisdiction over the case.

D. Pursuant to NRS 125.450(2), the parties, and each of them, are hereby placed on notice that the wages and commissions of the parent responsible for paying support shall be subject to assignment or withholding for the purpose of payment of the foregoing obligation of support as provided in NRS 31A.025 through 31A.240, inclusive.

The failure to include the foregoing language will result in the proposed Order being rejected.

Ultimately, the most important task you have is to ensure the parties have little, if anything, to argue about once their case is over. It is not beneficial to you or your firm to leave loopholes for the parties to argue over, since this will only build client resentment. If you protect your client and close as many loopholes as possible, the client is much more likely to recommend you and your firm to others. Repeat business from the same client on the same case usually means someone did not include specific language defining each parties' rights and responsibilities, and it reflects poorly on your organization if the client has to return to you to fix a problem with the original Order.

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