POST-JUDGMENT MODIFICATIONS - 60 minutes

By John Marriner Eccles, Esq.

Preface

Generally speaking, final orders are exactly that - final orders. Under most circumstances, such final orders are not subject to revision or modification.

Family law cases are unique because they can include orders for familial support (both child support and alimony or spousal support), and also may contain custody provisions if there are children involved in the case. Orders for familial support and custody are modifiable if circumstances warrant it.

As to property and debt division, the Court is usually divested of jurisdiction to alter the terms of such division in the absence of fraud. However, omitted assets and debts may be considered by the Court if the Court is permitted to reserve jurisdiction in this regard. There is also case law in Nevada which permits the conversion of certain property and debt division orders into alimony to avoid discharge in Bankruptcy.

All of the foregoing will be discussed herein.

Revision and Modification of Support Orders and Judgments

Support Order usually come in one of two forms: Child support; and alimony or spousal support. Child support is modifiable during its existence upon a substantial change in the financial circumstances of the parties or every three years at the behest of either party, or the District Attorney. Authority for modification of child support is contained in NRS 125B.145, which states as follows -

For a three year review:

NRS 125B.145(1) An order for the support of a child must, upon the filing of a request for review by:

(a) The Division of Welfare and Supportive Services of the Department of Health and Human Services, its designated representative or the district attorney, if the Division of Welfare and Supportive Services or the district attorney has jurisdiction in the case; or

(b) A parent or legal guardian of the child,

be reviewed by the court at least every 3 years pursuant to this section to determine whether the order should be modified or adjusted. Each review conducted pursuant to this section must be in response to a separate request.

Interestingly, the Courts have determined the language "at least every 3 years" to mean "at any time after 3 years have elapsed since the most recent child support order issued."

Based on changed circumstances of the obligor:

NRS 125B.145(4) An order for the support of a child may be reviewed at any time on the basis of changed circumstances. For the purposes of this subsection, a change of 20 percent or more in the gross monthly income of a person who is subject to an order for the support of a child shall be deemed to constitute changed circumstances requiring a review for modification of the order for the support of a child.

It is important to note that the obligor's income must go up or down 20% in order to trigger the "changed circumstances" review, which can occur at any time, and which is not subject to the foregoing "three year review" language.

There are circumstances where both parties, to a certain extent, are viewed as "obligors", such as when there is a joint physical custody arrangement, and child support is calculated by subtracting the lesser income earning parent's child support obligation under NRS 125B.070 from the greater income earning parent's child support obligation under NRS 125B.070. It seems logical that the income of the parent who pays child support must increase or decrease 20% or more to trigger an early review of child support under the "changed circumstances" review process.

However, if the obligee's income goes up or down 20%, it would have an impact on child support using the comparison of child support obligations analysis under *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998). Depending on which side of the case you are on, you could argue both parties are obligors in a joint physical custody case, or argue only the parent with the child support obligation is an obligor, so the increase or decrease in income of the party receiving child support would therefore be irrelevant. This issue has not yet been addressed by either the Nevada Legislature or the Nevada Supreme court.

In reviewing a child support obligation, either under the "three year review" or "changed circumstances" analysis, the Court will look at whether or not there has been some bad act by the obligor which would change the obligor's child support obligation. The Courts are loathe to reduce the child support obligation of an obligor to the detriment of the recipient (and the children) if the reason for the drop in income is, for example, because the obligor was terminated for cause from his or her employment.

In some cases, the Court may also conclude the obligor is "wilfully unemployed" or wilfully underemployed" for the specific purpose of avoiding child support. Wilful unemployment and underemployment is covered in NRS 125B.080(4), which states that neither is a basis to deviate from the minimum monthly amount of child support under Nevada law (currently $100.00 per month per child). Wilful unemployment or underemployment is also covered under NRS 125B.080(8), which states that where an obligor is found to be wilfully underemployed or unemployed for the purposes of avoiding a child support obligation, the obligor's obligation for support must be calculated on the obligor's true earnings capacity. The burden of proof for wilful unemployment or underemployment is "a preponderance of the evidence" (or more probable than not), rather than a higher "clear and convincing" standard, but it will create a rebuttable presumption that the obligor can attempt to overcome. [*Minnear v. Minnear*, 107 Nev. 495, 814 P.2d 85 (1991)]

For spousal support or alimony modifications, there is no three year review. However, alimony or spousal support is modifiable as to amount and duration during its entire lifetime upon changed circumstances of the obligor. The relevant provision in this regard is NRS 125.150(11), which states as follows:

For the purposes of this section, a change of 20 percent or more in the gross monthly income of a spouse who is ordered to pay alimony shall be deemed to constitute changed circumstances requiring a review for modification of the payments of alimony. As used in this subsection, "gross monthly income" has the meaning ascribed to it in NRS 125B.070.

It is not unusual for an individual who is charged with the responsibility to pay alimony to have a change in circumstances, and thus, trigger a review of the obligation for support. However, the basis for the change in circumstances is sometimes subject to scrutiny by the Court.

For example, if an individual is charged with a monthly alimony obligation of $1,000.00 per month based on an income of $60,000.00, and the obligor is terminated for cause from his or her employment, the Court may be reluctant to effectively punish the alimony recipient for the obligor's bad act which resulted in termination for cause. In fact, typically, the Court will not modify alimony (or child support, for that matter) if the resulting decrease in income of the obligor is as a result of his or her bad act.

More problematic is when a person changes careers. For example, what if a teacher, making $55,000.00 per year leaves that position to be a law clerk, earning $40,000.00 per year while attending law school? The Court may view this as an appropriate measure taken by the obligor to ultimately increase his or her income, though it may reduce earning capacity in the short term.

Because the initial award of alimony is essentially a two part analysis of need versus ability to pay [*Morris v. Morris*, 83 Nev. 412, 432 P.2d 1022 (1967)], and only one portion of the analysis (ability to pay) has changed, the Court may still be reluctant to grant a modification of an alimony award even if the underlying purpose for shifting employment is ultimately "noble".

What about the obligor who receives a sudden windfall - either an inheritance, large gambling winning, or gift? Technically, none of these activities increase the obligor's income. However, the Court can consider the parties' respective property holdings in determining whether or not a recalculation is warranted. The Court will not usually consider such changes as changes in income, so any windfall of this sort would normally need to piggy back onto a change in income. This can be done, for example, when there are investments associated with a windfall, since interest on investments is considered income for the purposes of calculating alimony.

Ultimately, alimony is reviewed on a case-by-case basis, and there is no calculation used in Nevada for the purposes of determining how much alimony should be paid by one party to another. However, the authority of the Court relative to an award of alimony cannot be arbitrary or uncontrolled [*Buchanan v. Buchanan*, 90 Nev. 209, 523 P.2d 1 (1974)]. The Nevada Supreme Court has enumerated the factors for the Court to consider, and they include the following: the financial condition of the parties; the nature and value of their respective property; the contribution of each to any property held by them as tenants by the entirety; the duration of the marriage; the husband's income, his earning capacity, his age, health and ability to labor; and the wife's age, health, station and ability to earn a living. (Id.) Some of these factors would not be the subject of any review of an alimony award, but others certainly could.

Similarly, the Nevada Legislature has enumerated factors to be considered by the Court in any award of alimony. NRS 125.150(8) provides the Court with the statutory authority and factors in considering an award of alimony:

. . . .

8. In addition to any other factors the court considers relevant in determining whether to award alimony and the amount of such an award, the court shall consider:

(a) The financial condition of each spouse;

(b) The nature and value of the respective property of each spouse;

(c) The contribution of each spouse to any property held by the spouses pursuant to NRS 123.030;

(d) The duration of the marriage;

(e) The income, earning capacity, age and health of each spouse;

(f) The standard of living during the marriage;

(g) The career before the marriage of the spouse who would receive the alimony;

(h) The existence of specialized education or training or the level of marketable skills attained by each spouse during the marriage;

(i) The contribution of either spouse as homemaker;

(j) The award of property granted by the court in the divorce, other than child support and alimony, to the spouse who would receive the alimony; and

(k) The physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse.

. . . .

As with the *Buchanan* factors [some of which are duplicated in NRS 125.150(8)], not all factors would be useful in an alimony modification hearing, but some would.

Ultimately, the process of modifying an alimony obligation requires "changed circumstances" in the obligor's income, and upon a finding by the Court of the requisite changed circumstances, the Court will review all applicable *Buchanan* and NRS 125.150(8) factors in making its decision relative to any change in alimony obligation.

There is no authority in place to modify the duration of alimony under current Nevada law. However, a typical alimony provision - in the absence of language to the contrary - would terminate upon the death of the obligor or recipient, or the remarriage of the recipient. Inherently, however, the Court may adjust the duration of alimony under a similar evaluation of "changed circumstances".

For example, what if the recipient has started collecting a pension and Social Security benefits which grossly exceed the income the recipient had at the time the alimony amount and

duration was set? Further, what if the obligor has now retired, and is making substantially less income than at the time the alimony amount and duration was set? Can the Court compel someone to work past the age at which retirement benefits are first available to the obligor? There has been at least one case in Clark County where the Court directed one of my clients to continue working so as to meet his alimony obligation into his 70's (and well past when he could commence taking pension benefits). My client elected not to appeal the Court's decision, so the questions remain largely unanswered.

There is also a question as to whether or not "bulletproofing" an alimony award would withstand Court review. In certain circumstances, the parties may agree that the certainty as to amount and duration of alimony is more valuable than the right to have alimony reviewed based on changed circumstances. In such a case, lots of language would be included in the Order essentially waiving the parties' right to review, confirming the value of certainty in uncertain times, and the like.

But what happens if the obligor becomes totally disabled? What if the obligor hits Megabucks? What if the recipient hits Megabucks? This is also an unanswered question in Nevada. However, parties are within their rights to contract away their rights otherwise granted to them. People have the right against unreasonable search and seizure, but may agree to waive such a right if asked by the authorities.

The general consensus is that an agreement, crafted between two parties, with counsel, in which they waive rights they would otherwise have under Nevada law, would be upheld by the Courts. Those who disagree argue that to the extent such waivers contradict the public policy of the State of Nevada, such waivers would not be upheld.

An excellent example would be if the recipient of alimony ended up on state aid. In that instance, the state would want to be able to have the alimony obligation reviewed so the state would not have to support the recipient. However, in *State of Mont. Dept. of Social and Rehabilitation Services ex rel. Riley v. Lopez*, 112 Nev. 1213, 925 P.2d 880 (1996), the Nevada Supreme Court concluded (in a child support case) that the state could only subrogate (stand in the shoes of the recipient) to the extent of the recipient's rights to receive money, so if the recipient had waived the right to support, the state was not entitled to pursue support from the individual who would otherwise be an obligor. However, even this is not a perfect case, since a recipient who qualifies for state aid notwithstanding the receipt of alimony would not have to

relinquish his or her right to alimony. In the event the recipient did, in fact, have to relinquish such alimony, the case would be almost perfectly on point. Therefore, despite the strong public policy argument which could be made relative to “bulletproofing” an alimony obligation, it is likely the Nevada Supreme Court would honor the waiver of modification in exchange for a certain result by both parties to an alimony award who were represented by counsel.

The issue becomes more cloudy where one or both of the parties were not represented by counsel (and therefore, not made fully aware of the ramifications of such waivers). In *Peardon v. Peardon*, 65 Nev. 717, 201 P.2d 309(1948), the Nevada Supreme Court noted that in any transaction between husband and wife, the person in the better position is duty bound to inform the person in the worse position of the potential deleterious effect of entering into such a contract, and to advise the person to seek legal counsel, or the transaction will be *presumed* fraudulent (and therefore set aside by the Court).

This case is good law today, and could be argued in support of setting aside the waiver portion of an alimony Order if it was originally based on a stipulation between husband and wife where the recipient of alimony was not represented or given an opportunity to consult with an attorney on the specific issue of the effect a waiver of the right to review alimony would have on their case.

In summary, the issue of modifying alimony hinges first on whether or not there are “changed circumstances”, whether the changed circumstances are created as a result of a bad act by the obligor, and whether, given a totality of the circumstances, the Court believes equity requires a modification.

Modifying Existing Custody and Visitation Terms

The requirements for modifying a custody order are the easiest, and at the same time, most difficult, things to understand.

If a parent has primary physical custody of the minor children, in order to change the custodial arrangement, the non-custodial parent will need to establish (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the modification serves the best interest of the child. [*Ellis v. Carucci*, 123 Nev. Adv. Op. No. 18 (2007)] The two pronged analysis must be detailed fairly comprehensively in any motion to change custody in order to obtain an evidentiary hearing on the issue of changing custody. [*Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123 (1993)] The analysis to change custody from primary physical custody

to joint physical custody is no different than the analysis to change custody from primary physical custody to the other parent having primary physical custody.

If parents share joint physical custody, the analysis used to change custody is a simple "best interests of the child" analysis. [*Truax v. Truax*, 110 Nev. 437, 874 P.2d 10 (1994)] The requirement to include in the moving papers all that information upon which the movant will rely in making a case for a change of custody, as required under *Rooney*, *supra*, also apply to change of custody motions in joint physical custody cases.

Ultimately, unless the moving party provides the Court with sufficient information which, if true, could result in a change of custody at the conclusion of an evidentiary hearing, the moving party will not get an evidentiary hearing on the issue of changing custody.

There is a movement afoot to permit the wishes of a teenage child to serve as a basis to change custody. It is almost impossible for the Court to be sure of a child's preferences unless that child is interviewed, so it is fairly common, after a hearing on a motion to change custody, to have the Court Order a Child Interview. Most judges are reluctant to interview any child who is not at least a teenager, but there are exceptions. When there is more than one child the subject of the dispute, and only the eldest child is a teenager, the Court may Order that all of the children be interviewed. The preference of a teenager is a factor for custody determinations under NRS 125.480(4)(a), part of a non-exhaustive list of factors for the Court to consider.

There are inherent problems with the child interview process. For one, the child may tell the interviewer what he or she thinks the parents want to hear, or try very hard not to appear to be choosing sides. Another problem is that children are smarter than their parents give them credit for, and learn they can pit one parent against the other in a custody dispute where their input is sought. Perhaps most problematic is that the parties will be able to review the report, but will not usually be afforded an opportunity to challenge the child's responses to the interviewer's questions, or the methodology used by the interviewer to solicit responses. Given the high degree of probability a child will try not to seem to be choosing sides, or may pit one parent against the other in their custody dispute, it is frustrating to have no recourse as to the contents of the Child Interview Report.

Ultimately, the child interview process is supposed to provide the Court with two sets of information: Is the child of a sufficient age and intellect to render a reasoned and well-informed opinion as to the timeshare the child will spend with its parents? If so, what is the child's

timeshare preference? The first portion of the analysis is often overlooked, as some judges presume a child of 13 or more is old enough and smart enough to provide input into the custodial timeshare. The second portion is usually focused upon, and can often be determinative.

However, there are ways to attack the logic used by a child. A child with poor grades in school may be considered incapable of rendering a sound decision on the timeshare issue. Similarly, a child who has gotten into trouble with some frequency may be deemed incapable of rendering a reasoned and well-informed opinion on the timeshare issue. It is also possible to challenge the reasoning ability of a child based on responses. If a son says he wants to live with his father because "it is time for the guys to hang out", this could be argued as not meeting the level of reasoning required under NRS 125.480(4)(a) (although a former Judge felt this was a perfectly acceptable and well-reasoned response in one of my cases).

The threshold to change custody from one parent to the other is very high in Nevada, and is a difficult standard to meet, in the absence of child abuse, domestic violence or drug abuse. The *Ellis* case, *supra*, noted that even short term failures in schooling by a child may warrant a change in custody.

While the Nevada Supreme Court has indicated that child custody is modifiable during the entire minority of a child, there is still a need for stability in children's lives, and in this regard, the principles of *res judicata* are valuable. [*McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994)] Therefore, only matters which have occurred since the most recent Custody Order will be considered. There is a limited exception for domestic violence issues the scope and breadth of which were not fully disclosed to the Court at the time of the issuance of the most recent Custody Order, and to demonstrate a course of conduct over a period of time (which can reach behind the most recent Court Order to show such a pattern).

The probability of prevailing on a change of custody motion where the custodial parent has primary physical custody is fairly low, in the absence of child or drug abuse, or domestic violence (usually requiring the custodial parent to be the perpetrator of domestic violence, not the victim).

Changing custody in a joint physical custody arrangement is at least conceptually easier. The Court will simply use a "best interests of the child" standard in reviewing a change of custody request in joint physical custody cases. However, as in change of custody actions involving a primary physical custodian, the information upon which a change of custody motion

is based in joint physical custody cases must be “fresh”, and not a reargument of factors the Court used in coming to its decision in its most recent joint physical custody Order.

Even though the Courts will use the “best interests of the child” standard in their review, and the burden of proof is “more probable than not”, the Courts will scrutinize any request to change custody even in a joint physical custody arrangement because the Court is acutely aware of the inherent value of stability in children’s lives. In other words, the Court will need to be fully convinced that changing custody is better for the child or children than the stability of the current timeshare.

The probability of prevailing on a change of custody motion where there is joint physical custody is inherently higher than where one party is the primary physical custodian. However, the gap between the two standards is not as great as it appears to be on its face.

There is a secondary problem where there is joint physical custody by agreement of the parties. Although technically the “best interests of the child” is still the standard, some Courts have chosen to increase the burden of proof where the parents have agreed to joint physical custody. The Courts usually rely on NRS 125.490(1), which states as follows: “There is a presumption, affecting the burden of proof, that joint custody would be in the best interest of a minor child if the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.”

Clearly, the foregoing indicates the burden of proof is altered where the parties have agreed to joint physical custody, especially since NRS 125.490(1) specifically references an agreement between the parties to joint physical custody as meeting the “best interests of the child”. As such, there are pitfalls associated with advising a client to agree to joint physical custody, since NRS 125.490(1) seems to raise the standard of proof required to change joint physical custody.

In either joint physical custody or primary physical custody cases, changing custody is quite complex. The Court cannot (except under extraordinary circumstances) change custody at a motion hearing, and will instead set the matter for an evidentiary hearing on the issue of changing custody, and then only if the moving party provides enough information in moving papers to permit a change of custody if all such allegations in the moving papers were true. At the time of the evidentiary hearing, the moving party would then have to establish each of those

allegations originally lodged with the Court in the moving papers, or the Court will not usually change custody.

One final aspect of changing custody involves a claim by one parent that the parents have modified their custodial arrangement by agreement without actually changing the language of the most recent Court Order (also known as a *de facto* change in custody). Under such circumstances, the moving party will assert in moving papers that the parents had a long term, informal agreement to change the timeshare based upon the parties' conduct.

There is no statute or caselaw supporting a request to confirm a *de facto* change in custody. However, the Courts will consider a *de facto* change in custody argument because, if true, the alleged modification could be construed as "a substantial change in circumstances affecting the welfare of the child, and the modification serves the best interest of the child", as contemplated in *Ellis*, *supra*. Given the foregoing, it is often beneficial for parents to maintain a custodial calendar, physically noting on a calendar which days the children are with one parent or the other. If the calendar is maintained in real time, and not filled in at a later time, it can be a compelling piece of evidence as to the actual timeshare the parents have been sharing.

Interestingly, with a little foresight and good documentation by the client, a change of custody based on a *de facto* argument can be the easiest method to change custody. However, there is no set amount of time to establish a *de facto* change of custody. I have seen Judges change custody on proof of as little as six months of a *de facto* change, and seen other Judges deny a change without an evidentiary with as much as 18 months of a *de facto* change alleged. I have also had a Judge confirm a *de facto* change in custody which occurred years before, but deny a *de facto* change in custody which occurred thereafter but before the filing of a motion.

The bottom line in custody changes is that there is very little certainty, and any request to change custody poses significant challenges to the moving party. Guaranteeing the best possible results comes from being completely familiar with the applicable law, the preferences and propensities of different judges, and making sure your client provides you with sufficient information and documentation to make a legitimate and substantial claim for a change of custody.

Physical Placement and Removal of Children

Most relevant in the area of physical placement and removal of the children is a request by a custodial parent to relocate outside Nevada with the minor children. Because the Las Vegas

Valley is a fairly transient community, with people moving in and out of the valley with some frequency, this issue comes up quite often in post-divorce litigation.

The first thing to consider is whether the parent requesting relocation is even entitled to do so. In order to seek permission to relocate with the minor children outside Nevada, the parent must either share joint physical custody or have primary physical custody. This seems logical, but for a while, there was a substantial question of whether a joint physical custodian was entitled to seek to relocate outside Nevada with the minor children, and if so, what the procedure was in order to seek permission of the Court to relocate.

This was ultimately resolved when the Nevada Supreme Court rendered its decision in *Potter v. Potter*, 121 Nev. 613, 119 P.3d 1246 (2005), and therein indicated a joint physical custodian seeking permission to relocate outside Nevada with minor children must file (concurrently with the request to relocate) a motion to change custody, citing NRS 125.510(2), which deals with changes in custody where the current arrangement is joint physical custody.

Ultimately, the relocation statute upon which the Court will rely for a review of a relocation request is NRS 125C.200, which states as follows:

"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."

There are various subparts of this section which are important, the first of which is that the parent intending to relocate with the minor children must first attempt to obtain the written consent of the other (non-custodial) parent prior to any planned relocation. Only then is the parent entitled to file a Motion to Relocate.

The second issue is whether or not, once a Motion has been filed, the parent seeking relocation can, in fact, relocate, pending the Court's decision. The statutory language of NRS 125C.200 does not seem to preclude this. NRS 125C.200 does not say that the parent intending to relocate must await a Court Order permitting the relocation, only that before the parent leaves the state, he or she must petition the Court for permission to relocate. However, the Courts have

historically taken a dim view of such heavy handed tactics, and may use such a relocation before it is granted by the Court as a factor in changing custody. Therefore, it is inadvisable to suggest to a client they can move once the Motion is filed.

Ultimately, as with any change of custody motion, the moving party is obliged to present a prima facie case for relocation in the moving papers, under the holding in *Rooney*, *supra*, or the Court may deny the request without proceeding to an evidentiary hearing. This will require a substantial amount of research, as well as a lot of information from the client.

The cases related to relocation requests are ample in Nevada. In the family law arena, it is perhaps the most analyzed matter the Nevada Supreme Court has reviewed. The lodestar case related to relocations is *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991). Since the decision in Schwartz, supra, was issued, the Nevada Supreme Court has issued an additional ten or twelve cases "tweaking" their decision, thereby providing litigants with a comprehensive set of factors for the Court to consider in any relocation request.

All relocations ultimately start by analyzing the factors enumerated in the *Schwartz* decision, *supra*. The factors are broken down into two sets. First, the parent seeking relocation must show that an actual advantage will be realized by both the children and the custodial parent in moving to a location so far removed from the current residence that weekly visitation by the noncustodial parent will be virtually precluded.

If the parent meets that criteria, then the Court will review the following non-exhaustive list of factors: The extent to which the compelling interests of each member of the family are accommodated; the extent to which the move is likely to improve the quality of life for the children and the custodial parent; whether the custodial parent's motives are honorable in seeking relocation; whether the custodial parent will comply with any substitute visitation orders issued by thecourt; whether the noncustodian's motives are honorable in resisting the motion for permission to remove the children from Nevada, and; whether if removal is allowed there will be a realistic opportunity for the noncustodial parent to maintain a visitation schedule that will foster and preserve the parental relationship. (Id.)

There is no requirement that the timeshare of the noncustodial parent be maintained. In fact, the noncustodial parent is often accommodated by receiving less frequent, but larger, blocks of time. For example, it is quite common for the non-custodial parent to receive Spring Break, most of the Summer Break, Thanksgiving at least every other year, and either half the Christmas

Break, or all the Christmas Break every other year. The noncustodial parent would still be entitled to vacation time, and usually any three day weekend. It is fairly common for the Court to expect about three quarters of the noncustodial parent's timeshare to be preserved, if at all possible.

The relocation process is laborious. In the absence of an agreement, an evidentiary hearing must be held. The moving party will be required to satisfy the Court that all relevant elements of the relocation are fully developed. Because there are numerous elements, and proving the elements requires a substantial amount of evidence to be presented, it may very well take a whole day or more to put on a relocation case.

Ultimately, the Court will balance the right of the custodial parent to travel freely among the states against the noncustodial parents' right to a substantive relationship with a child. Relocations are frequently granted, but must be supported by the weight of the evidence.

Although one party creates the transportation expense by relocating, the Courts will usually divide the responsibility between both parents. The noncustodial parent usually gets an offset for one half the cost of transportation [under NRS 125B.080(9)(I)] against his or her child support obligation.

This is really a "tip-of-the-iceberg" basic overview. Cases dealing with relocation are numerous and varied: *Flynn v. Flynn*, 120 Nev. 436, 92 P.3d 1224 (2004); *Reel v. Harrison*, 60 P.3d 480, 118 Nev. 881 (2002); *Gepford v. Gepford*, 13 P.3d 47, 116 Nev. 1033 (2000); *Blaich v. Blaich*, 971 P.2d 822, 114 Nev. 1446 (1998); *McGuinness v. McGuinness*, 970 P.2d 1074, 114 Nev. 1431 (1998); *Gandee v. Gandee*, 895 P.2d 1285, 111 Nev. 754 (1995); *Trent v. Trent*, 890 P.2d 1309, 111 Nev. 309 (1995); *Jones v. Jones*, 885 P.2d 563, 110 Nev. 1253 (1994); *Primm v. Lopes*, 853 P.2d 103, 109 Nev. 502 (1993); *Hayes v. Gallacher*, 972 P.2d 1138, 115 Nev. 1 (1999); *Halbrook v. Halbrook*, 971 P.2d 1262, 114 Nev. 1455 (1998); *Davis v. Davis*, 970 P.2d 1084, 114 Nev. 1461 (1998), *rehearing denied*, *certiorari denied* 120 S.Ct. 246, 528 U.S. 905, 145 L.Ed.2d 206, and; *Cook v. Cook*, 898 P.2d 702, 111 Nev. 822 (1995).

Adjustments in Child Support Payments

There are really three fundamental issues related to any adjustment of child support:

1) Has there been a material change in the financial circumstances of the obligor? If yes, then;
2) What is the obligor's new income off of which to compute child support? And

3) Are there any deviation factors (either up or down) under NRS 125B.080(9).

These are comprehensively covered in the "revision and modification of support orders" above.

Wage Assignments

There are two types of wage assignments used in Family Court - one for child support, and one for everything else. Child support is treated specially. Once a wage assignment for child support is put into effect, it stays in effect until it is extinguished by Court Order. Other wage assignments last a maximum of six months.

It is important to note that wage garnishments for anything other than child support must be based on a Judgment. For example, it is not sufficient to have an ongoing monthly alimony obligation as your basis to obtain a wage garnishment. Alimony arrears must be reduced to Judgment, and then that Judgment can be collected through the use of a wage garnishment. So too can you collect Judgments pursuant to a Decree (for example, dollar denominated Judgments as part of a property settlement).

The reason you must have a Judgment, even on alimony, is that alimony is modifiable as to amount and duration for its entire existence, and would terminate on the death of either party or (usually) the remarriage of the recipient of alimony. If a wage garnishment were permitted for on ongoing alimony obligation (rather than a Judgment for alimony arrears), then it is possible the wage withholding would continue beyond the death of either party or the remarriage of the recipient spouse, which in turn would be inequitable.

Although child support is also modifiable as to its amount during its entire existence, child support is treated differently than any other wage garnishment. First, a wage garnishment is required under NRS 125.450(2), unless the obligor can show good cause to delay such a garnishment, or the parties agree in writing. However, the Courts have been relaxed on this requirement, and usually state a wage withholding can issue without further Order or notice when the obligor becomes more than thirty days delinquent in a child support obligation, consistent with NRS 31A (relative to garnishments).

The process of obtaining a wage withholding is fairly complex. It requires a copy of the original Order or Judgment, Instructions to the Constable, a Wage Garnishment, a Notice of Execution, a Notice of Exempt Property, and usually a fee for the Constable to serve the wage

garnishment. The Constable's office has an excellent resource for wage garnishments: http://www.co.clark.nv.us/constable/Writ.htm

Termination of Spousal Support

While it is conceivable that an individual with an alimony obligation could have changed circumstances sufficient to warrant a termination of spousal support (see modification of alimony, above), ordinarily, there are only three reasons to terminate alimony: the death of the obligor; the death of the recipient, and; the remarriage of the recipient.

There are some interesting issues which may come up from time to time, however. What if the recipient marries, but then is successful in having the marriage annulled? Under Nevada law, obtaining an annulment means that the marriage never happened. However, the Nevada Supreme Court has determined that an obligor's alimony obligation is terminated on the remarriage of the recipient, even if the marriage is subsequently annulled. [*Shank v. Shank* 100 Nev. 695, 691 P.2d 872 (1984)]

Aside from this peculiar situation, only the death of either the obligor or the recipient, or the lapse of the alimony obligation, will terminate an alimony obligation. The Nevada Supreme Court has noted, however, that an accelerated payment of alimony does not extinguish the obligation before its end date (so there is no advantage to "prepaying" alimony). As such, even if all alimony obligations are paid in full prior to the extinguishment of the alimony obligation, the recipient can still go in to Court and ask that alimony be modified as to duration before the actual expiration of the alimony obligation.

In essence, the obligor is not officially off the hook until the alimony obligation period actually expires, since alimony is modifiable as to amount and duration during its entire existence. On the other hand, once the alimony obligation does expire, the Court is completely and utterly divested of jurisdiction on the issue of alimony.

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