NFLR
NEVADA FAMILY LAW REPORT

Volume 25, Issue 2 Summer 2012

Alimony in Nevada Part I

By Bruce I. Shapiro, Esq. and John D. Jones, Esq.

1. INTRODUCTION

In a typical divorce case, custody, visitation and child support are resolved first. Child support involves minimal conflict because of NRS 125B, which imposes a presumptive amount of child support based on the gross income of the payor parent. The calculation of child support is a simple formula and ever since the legislature adopted graduated presumptive maximums based upon the payor's income level, deviations from the statutory cap are far less common. Under NRS 125.150, the property must be divided equally absent a compelling reason. After discovery, an equitable division of the community property and community obligations are generally resolved through stipulation or occasionally trial. After child support and the property issues are resolved, alimony must be addressed. It makes sense to resolve custody issues and property issues before alimony because those issues will directly impact alimony. Child support being paid or received will affect the payor's ability to pay and the recipient's need. While the nature and amount of property or community debt may also affect the ability to pay and need, because each party presumably receives an equal amount of property, unless the amount of property received by the spouse making a claim for alimony is so massive as to make them independently wealthy, the division of property generally does not have a significant impact on the court's considerations regarding alimony.

There is not a generally accepted method or formula for calculating an alimony award. Every judge views alimony differently and each judge's award can be drastically different, even under identical facts. In fact, the same judge, with similar facts, on a different day, could award different alimony. Based upon this uncertainty, most practitioners, as well as litigants, seek insight on the issue of alimony more so than any other issue in family law.

There have been several recent articles in Nevada legal publications discussing alimony. Historically, every couple of years the Nevada

(cont'd. inside on page 3)

IN THIS ISSUE:

Nevada Family Law Report

Editor:
Shelly Booth Cooley

Family Law Section
Executive Council

Robert Cerceo, Chair
Las Vegas
Michael Kattelman, Vice–Chair
Reno
Katherine L. Provost, Secretary
Las Vegas
Jennifer V. Abrams, Treasurer
Las Vegas

Jessica Hanson Anderson, Reno
Kristine Brewer, Las Vegas
Shelly Booth Cooley, Las Vegas
Sarah Hardy-Cooper, Reno
Hon. Bryce C. Duckworth, Las Vegas
Dixie R. Grossman, Reno
John "Jack" Howard, Las Vegas
Josef M. Karacsonyi, Las Vegas
Eric A. Pulver, Reno
Hon. Chuck Weller, Reno

Design/Production
Christina Alberts, State Bar of Nevada

NEVADA FAMILY LAW REPORT is an electronic publication of the Family Law Section of the State Bar of Nevada. To subscribe, please send a request to: publications@nvbar.org.

The *NEVADA FAMILY LAW REPORT* is intended to provide family law–related material and information to the bench and bar with the understanding that neither the State Bar of Nevada, Family Law Section editorial staff nor the authors intend that its content constitutes legal advice. Services of a lawyer should be obtained if assistance is required. Opinions expressed are not necessarily those of the State Bar of Nevada or the editorial staff.

This publication may be cited as Nev. Fam. L. Rep., Vol. 25, No. 2, 2012 at ____.

The Nevada Family Law Report is supported by the State Bar of Nevada and its Family Law Section.

Editor's Notes

by Shelly Booth Cooley, Esq., Editor

In Memoriam: William M. Kapalka

It is with great sadness that we mark the passing of our friend and colleague William "Bill" M. Kapalka, who passed away on June 7, 2012. Bill was a great asset to our community and he was a generous volunteer with pro bono organizations. Bill will be greatly missed.

This issue:

In our first feature, by Bruce I. Shapiro and John D. Jones, Mr. Shapiro and Mr. Jones provide an outline of the types of alimony awards and suggest guidelines that the courts should adopt in making spousal support awards. Our second feature, by Robert W. Lueck, explains the Uniform Collaborative Law Act and the benefits for resolving cases using the collaborative law model.

Specialization Exam:

The Family Law Section is offering a test date on March 2, 2013 (the Saturday prior to the Family Law Conference). Those interested in sitting for the exam should apply no later than December 31, 2012.

Find the applications at:
https://www.nvbar.org/sites/default/files/Family_Law_Specialization_App_2011.pdf

Find the standards at:
https://www.nvbar.org/sites/default/files/FL%20Specialization_Standards.pdf

Family Law Conference:

The Family Law Conference has been scheduled for March 7 - 8, 2013, in Ely, Nevada.

Shelly Booth Cooley is the Principal of The Cooley Law Firm, where she practices exclusively in the area of family law. Shelly can be reached at 10161 Park Run Drive, Suite 150, Las Vegas, Nevada 89145; Telephone: (702) 265-4505; Facsimile: (702) 645-9924; E-mail: scooley@cooleylawlv.com.

Alimony in Nevada

cont'd. from page 1

Supreme Court issues a new case addressing alimony. The last case, however, that addressed alimony in any meaningful way was *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000).

So where are we? Has any progress been made? This author does not believe there has been any marked progress in predicting alimony awards. When negotiating alimony, counsel have no clear guidelines. When an attorney takes an alimony issue to trial, he or she is playing Russian roulette. Alimony continues to be inconsistent and unpredictable. Alimony has not adequately evolved in this state. Moreover, even when given the opportunity to clarify issues pertaining to alimony, the Nevada Supreme Court has declined to do so, thus leaving practitioners to come up with the most rational and creative approaches to advocate for their client's position at the district court level.

II. What is Alimony?

A. Temporary Support

Alimony, spousal support and sometimes separate maintenance may all be used interchangeably. Spousal support is often referred to as pre-divorce support while alimony may be used when referring to post-divorce support. Different states may use different labels. The labels, however, are not important. Alimony is the payment of money from one spouse to another. At its core, alimony is the allocation of available dollars between spouses. What makes this difficult in most cases is that the court has to allocate the same number of dollars to support two post-separation or post-divorce households which previously only had to support one.

For the purposes of this article, pre-divorce support will be called temporary spousal support. Although there is no specific legal standard for temporary support, temporary spousal support orders are sometimes more predictable and consistent than post-divorce orders because the standard is different. Courts usually just simply look to the parties' need and ability to pay and try to allocate the appropriate amount of community income to each spouse to allow them to meet their monthly obligations. Temporary support should most often be viewed as maintaining the pre-divorce financial status quo. Assuming there are adequate resources, neither spouse should be denied the financial resources to maintain the standard of living he or she enjoyed during marriage. At the same time, neither spouse should be permitted to suddenly enhance his or her standard of living, especially at the expense of the other spouse. Moreover, the proper allocation of community income during the pendency of the divorce action can avoid unnecessary exercises in accounting at the time of trial which can be caused by leaving one spouse in control of a larger portion of the community income during the pendency of the action.

It is common for Nevada lawyers to cite *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972) and argue that necessitous circumstances need not be shown to receive temporary support. Attorneys and often judges, however, ignore that in Nevada, all income acquired during marriage is community property. "The wages of either spouse during marriage are considered to be community funds regardless of which spouse earns the greater income or which spouse supports the community." *Norwest Financial v. Lawver*, 109 Nev. 242, 246, 849 P.2d 324 (1993). NRS 125.150(1)(b) mandates that the court "[s]hall, to the extent practicable, make an equal disposition of the property of the parties . . .." [earnings are community]. Considering this statute, why should the court, therefore, not have the legal obligation to equally divide the community income pending a divorce? Nevertheless, the courts often will not equally divide the income, but order one spouse to maintain the community obligations and give the other spouse an "allowance" pending trial. There is no basis in Nevada law for this concept.

B. Post-Divorce Alimony

Post-divorce support will be referred to as alimony. There are, however, several different types of alimony including transitional, rehabilitative, just and equitable and permanent alimony. What do they all mean and when are they ordered? The Nevada Supreme Court has recognized only two general forms of alimony. The first is a form of alimony a court may award in order to

(cont'd. on page 4)

Alimony in Nevada

cont'd. from page 3

satisfy the demands of justice and equity. A second type of alimony (rehabilitative alimony) is provided by the legislature under NRS 125.150(8) which is designed to provide necessary training or education "relating to a job, career or profession." *Gardner v. Gardner*, 110 Nev. 1053, 1057, 881 P.2d 645 (1994). The individual circumstances of each case will determine the appropriate amount and length of any alimony award. *Gardner*, 100 Nev. at 1056-58, 881 P.2d 647-48; *Rutar v. Rutar*, 108 Nev. 203, 206-08, 827 P.2d 829, 831-33 (1992). Alimony is an equitable award serving to meet the post-divorce needs and rights of the former spouse. Cf. *Gardner v. Gardner*, 100 Nev. 1053, 881 P.2d 645, 647 (1994). It follows from the Nevada Supreme Court decisions in this area that two of the primary purposes of alimony, at least in marriages of significant length, are to narrow any large gaps between the post-divorce earning capacities of the parties and to allow the recipient spouse to live as nearly as fairly possible to the station in life they enjoyed before the divorce. *Sprenger v. Sprenger*, 110 Nev. 855, 860, 878 P.2d 284 (1994).

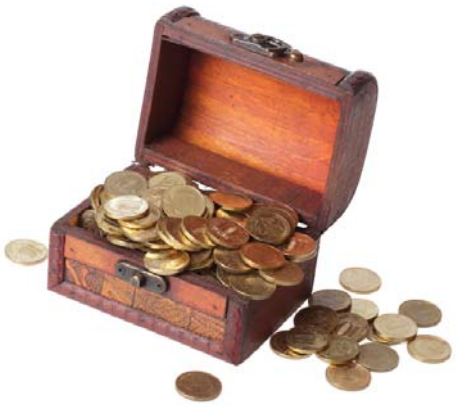
The court must award alimony as appears "'just and equitable,' having regard to the conditions in which the parties will be left in by the divorce." *Sprenger v. Sprenger*, 110 Nev. 855, 859, 878 P.2d 284 (1994), citing NRS 125.150(1)(a). In *Sprenger*, the court cited seven factors that should be used in determining an alimony award in a divorce case:

- the wife's career prior to marriage;
- the length of the marriage;
- the husband's education during the marriage;
- the wife's marketability;
- the wife's ability to support herself;
- whether the wife stayed home with the children; and
- the wife's award, besides child support and alimony.

Sprenger at 859, citing *Fondi v. Fondi*, 106 Nev. 856, 862-64, 802 P.2d 1264, 1267-69 (1990).

In *Sprenger*, the district court awarded the wife $1,500 per month alimony for two years. *Sprenger* at 858. The Supreme Court reversed the lower court's award, finding that based on the relevant factors, the district court's alimony award was an abuse of discretion. The court then remanded the case to the district court to "both increase and extend [the] alimony award such that [wife] is able to live 'as nearly as fairly possible to the station in life she enjoyed before the divorce,' for the rest of her life or her financial circumstances substantially improve." *Sprenger* at 860, citing *Heim v. Heim*, 104 Nev. 605, 612-13, 763 P.2d 678, 683 (1988).

Similarly, in *Gardner v. Gardner*, 110 Nev. 1053, 881 P.2d 645 (1994), rehabilitative alimony is not a realistic alternative. In *Gardner*, the parties had been married for 27 years and had no children. Mr. Gardner earned $75,000 per year and his wife earned $43,000 per year. *Gardner* at 1055. The district court awarded the wife $1,300 per month alimony for



the first year and $1,000 per month for the second year. *Gardner* at 1055. Considering all of the relevant factors, the Supreme Court attempted to achieve "income parity" between the parties by increasing the length of [the] alimony award by an additional 10 years, at the rate of $1,000 per month. *Gardner* at 1058-1059.

As it did in the above cases, in *Alba v. Alba*, 111 Nev. 426, 892 P.2d 574 (1995), the Nevada Supreme Court equalized the parties' income for a reasonable period. Alba involved a marriage of only seven years. *Alba* at 426. Husband earned $35,000 per year, less $6,000 paid in child support, and wife earned $20,400 per year, and $6,000 per year received in child support. Therefore, Mr. Alba had an adjusted income of approximately $29,000 per year and his wife had an adjusted income of $26,400 per year. The Nevada Supreme Court affirmed the lower court's award of $1,000 per month alimony to the wife for three years. *Alba* at 428. The alimony was affirmed because the earning potential of the husband was "higher" than that of the wife. *Alba* at 428.

(cont'd. on page 5)

Alimony in Nevada

cont'd. from page 4

In *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998), the husband's income was $62,124 per year, and the wife's income was $19,200 per year at the time of the divorce. The Nevada Supreme Court reversed the lower court's award of $500 per month for five years and remanded the case for an award that is "fair and equitable," having regard to the conditions in which the parties will be left by the divorce, noting that "it appears very unlikely that in five years, [the wife] will be able to earn an income that will enable her to either maintain the lifestyle she enjoyed during the marriage or a lifestyle commensurate with, although not necessarily equal to, that of [the husband]."

C. Rehabilitative Alimony

For shorter-term marriages, rehabilitative alimony may be appropriate. Rehabilitative alimony theoretically allows a spouse to obtain the necessary training to become self-supporting. Rehabilitative alimony, however, is not necessarily intended to allow the spouse to enjoy the same standard of living the spouse had during the marriage. If a marriage is of a sufficient duration, the court may award equitable alimony in addition to rehabilitation. Equitable alimony is presumably based on contribution throughout the marriage such as raising children, etc.

Although the term "transitional" has not been used by the Nevada Supreme Court, a short-term marriage should be analyzed using this method. What does the disadvantaged spouse require to help with the transition from marriage to being single? The court should obviously consider the need and the ability to pay, but also focus on attempting to return the disadvantaged spouse to the same or better standard of living he or she enjoyed before marriage. With these transitional alimony awards, the court may properly look at what the disadvantaged spouse "gave up" with marriage and how the advantaged spouse may have benefitted. Awards of alimony in these cases, however, should be short term and relatively modest. Most likely, a disparity of income or earning capacity had nothing to do with what each spouse did or sacrificed during marriage and there is no basis for the disadvantaged spouse to receive a windfall. There is a significant difference between being married 10 years and raising children and continuing with the same employment or choosing not to work for a short period.

3. Do We Need Guidelines?

The simple answer is yes. The district court awards of alimony are inconsistent and often inadequate. It should be noted that there has never been a Nevada Supreme Court decision that reversed a trial court for awarding too much alimony. All the published decisions reverse the district court for failing to award sufficient alimony. The Child Support Enforcement Amendments of 1984 required all states to develop advisory mathematical guidelines to calculate child support awards. As a result, in 1987 the Nevada Legislature enacted NRS 125B.070 and NRS 125B.080, which created a rebuttable presumption that the guidelines represent the proper child support award and that a deviation from the guidelines will be allowed only upon a written finding that the application of the guidelines would result in an unjust or inappropriate mathematical award.

These child support guidelines were developed because the child support awards being made prior to enactment of the formulas were found to be severely deficient when compared to the actual economic costs of rearing children. Inconsistent orders caused inequitable treatment of parties in similarly situated cases and inefficient adjudication of child support awards in the absence of uniform standards. Advisory Panel On Child Support Guidelines, Development Of Guidelines For Child Support Enforcement, National Center For State Courts I-3, 4 (1987). Judicial discretion, unassisted by the presumptive guidelines, often resulted in severely deficient child support awards. The inconsistency makes it difficult for attorneys to advise their clients about what to accept in a settlement or what to expect from a judge at trial.

The child support formula scheme enacted by the Nevada legislature in 1987, and the case law that has followed, has alleviated many of the problems in inconsistent and inadequate child support awards. The same is needed for alimony. Although there does not seem to be much support for specific guidelines such as exist with child support,

(cont'd. on page 6)

Alimony in Nevada

cont'd. from page 5

some type of general guidelines are needed to alleviate some the vast inconsistencies amongst judicial departments.

It is not being opined that the court should equalize incomes. The superior earning capacity of one spouse may have nothing to do with the marital contributions of another spouse. In the end, most alimony cases deal with economic reality rather than legal theory. The important thing for the practitioner to remember and the client to be aware of is the fact that the courts are limited to the money available with which to pay alimony. In most cases there is a need for alimony, but the ability to pay is limited. The standard of living usually cannot be maintained after divorce because the same income will be supporting two homes instead of one. Further, it is not argued that marriage itself, without any other factors, entitles a spouse to any post-divorce alimony. There must, however, be more guidance.

4. Possible Framework for Guidelines

The first step should be to divide marriages by duration: short-term (two – six years), moderate-term (six – 20 years), and long-term (more than 20 years). Because alimony is seldom awarded (nor should it be) for marriages of one to two years in duration, those durations should be addressed only in the context of "transitional" alimony as discussed above. For a marriage less than six years, an award of alimony, absent compelling circumstances, generally should not exceed two years. In a short term marriage, the recipient spouse would have the burden of showing that alimony is needed. The purpose of the alimony award would be to assist the disadvantaged spouse for a more substantial period than transitional alimony. Children, if any, would be young and child support would also be paid.

Alimony for moderate-term marriage would be rehabilitative in nature and absent a compelling reason, would not exceed one-half of the term of the marriage. Again, the recipient spouse would have the burden of showing need. Currently, most inconsistency is with these moderate term marriages. These recommendations would curtail this inconsistency.

The purpose of alimony in a long-term marriage would be either rehabilitative or equitable. If rehabilitation is not possible, the court would be directed to make an equitable determination of alimony, similar to the subjectivity that exists now.

In any case, the recipient spouse seeking alimony in a term more than the presumptive amount would have the burden of proof and could use the "*Sprenger* factors." Further, to avoid a recipient spouse from attempting to prolong the proceedings and the period of receiving temporary alimony, which does not count toward post judgment alimony. Anything after six months should be considered part of the post-judgment alimony award. Additionally, child support and alimony awards should not be permitted to exceed one-half of the payor's gross monthly income.

5. Advising Your Client

On the issue of duration, it is generally safe to advise your clients and to argue to the court that the duration of alimony is often a sliding scale between one-third to one-half of the duration of the marriage up to a marriage of 20 years in duration, and that it is a sliding scale between one-half of the duration of the marriage and lifetime for marriages in excess of 20 years in duration. More specifically, in the short-term marriage duration discussed above, a two-year award but certainly no more than a three-year award is proper. In a moderate-term marriage, whereas a six-year marriage could result in a two-year award, a 10-year marriage would likely receive an award of between three and five years. A marriage of 10 to 15 years would likely result in an award of alimony between four and seven years. Once a moderate-term marriage reaches the 15-year to 20-year term, the likelihood of an award which equals one half of the duration of the marriage is much greater. Certainly the discretion of the court regarding all aspects

(cont'd. on page 7)

Alimony in Nevada

cont'd. from page 6

of alimony causes uncertainty, but the foregoing calculation regarding duration not only provides a legitimate range with which to advise a client, but a credible duration range to argue to the court.

The larger issue for which additional insight is generally sought by practitioners, clients and judges alike is regarding the amount of alimony to be awarded. Probably the single most important factor in any alimony amount analysis deals with the fact that once the parties are divorced, the payment of support from one spouse to the other becomes a tax deduction for the payor and a taxable event for the recipient. The failure of a judge to take into consideration the net tax impact of the payment of alimony is, in this author's opinion, either an abuse of discretion, an error of law, or both. It is also important to remember that while child support is based upon gross monthly income, alimony necessarily must be based upon net available dollars after payment of taxes and child support.

There is no formula for alimony in the state of Nevada. Regardless, there is no prohibition against attorneys, parties and district court judges applying basic concepts of accounting and common sense to any set of facts. While there are certainly cases in which there are extraordinary considerations, like the disability of the spouse, in general the issue of how much alimony a court should award comes down to an issue of math and accounting. If we assume that the payor will always want to pay as little as possible and the recipient will always want to receive as much is possible, then we are left with math as the basis of the amount awarded by the court.

As an example, assume that the payor earns $14,000 per month and the recipient earns or has the ability to earn $2,000 per month. Also assume that the payor also pays $1,000 per month in child support to the recipient. Under this scenario, the payor would earn a net income of approximately $10,000 per month based upon the 2011 effective tax bracket for individuals with a gross annual income of $168,000. The recipient would have a net income from employment of approximately $1,750 (assuming an approximate effective bracket of 14 percent). As such, the payor, after taxes and after paying child support, would have a net net income of $9,000 per month. The recipient would have a net net income of $2,750, after receiving child support. Under this scenario, the net difference in the parties' incomes after taxes, the payment of child support and the receipt of child support is $6,250. Based upon this disparity in the net net income of parties' income, it is safe to say the amount of alimony awarded by the court could not exceed $3,125 per month. This is an appropriate assumption regardless of the duration of the marriage.

The advocate for the payor could argue that based upon the sliding scale of the duration of the marriage, the amount of alimony should be between 30 and 50 percent of the net difference in the parties' incomes. On a shorter-term marriage, a smaller percentage of the net difference of the incomes would be an appropriate argument and an appropriate order for any District Court judge. In a marriage of moderate duration or longer, it is certainly appropriate pursuant to the case law set forth above to argue for an equalization of income. This would mean an award of alimony of $3,125 per month. What is important to recognize about such an extreme request in the eyes of many is that $3,125 per month paid by an individual in the 25 percent tax bracket has a net impact to him of paying $2,343.75 in alimony due to the fact that alimony is tax-deductible by the payor. Similarly the receipt of $3,125 per month in alimony by the recipient has the net impact of her receiving $2,656.25 in alimony based upon the fact that alimony is taxable to the recipient.

So under this scenario, at the end of each month, the payor ends up with net dollars of $6,656.25, while the recipient of alimony ends up with $5,406.25. As such, a true equalization of post-divorce earnings due to the fact that alimony is taxable to the recipient and deductible by the payor results in the payor ending up with $1,250 more each month than the recipient under this example. The end result of this equalization of post-divorce incomes in this scenario is that the payor ends up with 55 percent of the post-divorce earnings and the recipient ends up with 45 percent of the post-divorce earnings.

(cont'd. on page 8)

Alimony in Nevada

cont'd. from page 7

While the foregoing example establishes that an "equalization" of income alimony award is not really an equalization of income, it also establishes that absent a true net net tax impact analysis, the actual impact on the recipient (need) and on the payor (ability to pay) cannot be recognized by the court. While the advocate for the payor can certainly argue that the percentage of the net difference in the parties' respective incomes that constitute alimony should be less, it is imperative to recognize what the final net impact to each party is of any award.

It is also important for the advocate for the recipient to consider when, if at all, during the duration of alimony, a minor child or multiple children might emancipate. When the foregoing calculation includes consideration to the payor for his payment of child support, determination of child support pursuant to statute should have an impact on the alimony analysis. If under the above example, within the first year of a five year term of alimony, the minor child for which $1,000 per month was paid in child support emancipates, the failure to take that into consideration could result in the payor having $7,656.25 in income at the end of each month and the recipient having only $4,406.25. This range is far more extreme than the 55 to 45 percent difference discussed above. One of the ways to bridge this gap, would be to either negotiate, or argue that the court must order that alimony increase at the time child support terminates. In the end, the payor under such an increase in alimony would have a larger tax deduction and the recipient would have a larger tax burden. Regardless, when child support is an integral factor in any alimony analysis, the advocate for the recipient, and the District Court, must consider when that child support might terminate during the duration of the alimony award.

While there is no true formula in Nevada for alimony, the foregoing gives both practitioners and judges a true analysis of what it means to order even a single dollar of alimony based upon the effective tax brackets of the payor and recipient. The foregoing example and tax impact analysis also avoids the practitioner who argues one position when representing the payor and another position while representing the recipient. If the practitioner and the judge began at a position that recognizes the duality of the tax impact of alimony, then one true answer to the great alimony question can be obtained through the simple application of math and accounting principles.

6. Conclusion

In sum, the basic economic and accounting principles set forth herein if adopted or accepted by the District Court judges, the Supreme Court Nevada or the Nevada Legislature could eliminate a vast amount of unneeded litigation at the District Court level and at the Supreme Court level due to the uncertainty and randomness of the current rulings at the district court level.

Bruce I. Shapiro attended the University of Nevada, Las Vegas, and received his bachelor's degree in 1984 and his master's degree in 1986. He graduated from Whittier College School of Law in 1990, magna cum laude. He has practiced in family law since 1990 and has served as a Domestic Violence Commissioner, pro tempore, URESA/ Paternity Hearing Master, Alternate, Municipal Court Judge, Alternate, Judicial Referee, Las Vegas Justice Court, Small Claims. Shapiro has written several articles in the area of family law and has served on the Nevada Children's Justice Task Force, Clark County Family Court Bench-Bar Committee, State Bar of Nevada, Child Support Review Committee, the State Bar of Nevada Southern Nevada Disciplinary Board, State Bar of Nevada Standing Committee on Judicial Ethics and Election Practices and the Continuing Legal Education Committee. Shapiro also served on the Board of Governors for the State Bar of Nevada from 2003-2005 and 2008 -2010.

John D. Jones is a senior attorney in the family law section of Black & LoBello. Jones has extensive experience in trials involving all areas of family law, and complex financial issues associated with divorce proceedings, with particular expertise in business valuation and stock options. Jones graduated from Dickinson College in 1990 with a bachelor's degree in English and a minor in Latin. Jones was awarded his Juris Doctor in 1993 from the University of Pittsburgh. In 2002, Jones became a graduate of the American Bar Association Family Law Section, Trial Advocacy Institute. Jones was admitted to practice law in Pennsylvania in 1994 and in Nevada in 1998. Jones is one of a small group of Nevada Board Certified Family Law Specialists.

THE UNIFORM COLLABORATIVE LAW ACT IS HERE

by Robert W. Lueck, Esq.

The 2011 Nevada Legislature passed Assembly Bill 91, the Uniform Collaborative Law Act (UCLA), with unanimous votes in both houses. The governor signed the bill into law on May 13, 2011, and held a public bill signing ceremony later on June 1, 2011.

Nevada became the second state to pass the Uniform Act. Four other states had previously passed collaborative law practice legislation before the Uniform Law Commission created the Uniform Act. Utah passed an earlier version of the UCLA in 2009, and then was the first state in the country to pass the revised version in 2010.

While Nevada was a leader in passing this Uniform Act, it lags far behind other states and localities in promoting and practicing the collaborative model. Our legal culture is often years behind practice developments elsewhere and our citizens, bench and bar pay the price for lack of modernization.

The traditional adversary system is too expensive, too slow, too unsatisfactory and too stressful. The adversary legal system today probably does more financial and emotional damage than good to Nevada's families and children. The social science literature is replete with studies about the negative effects of divorce on children and litigants. Yet too many judges and lawyers remain so enmeshed in this flawed system that they lack any vision or motivation to fundamentally alter it for the benefit of the public.

We can do better. Whether we admit it or not, the legal system exists for the benefit of the public and not primarily for the benefit of the bench and bar. We do not serve the public well by excluding or limiting better methods of dispute resolution. So why is Nevada not moving forward with the collaborative movement?

The culprits are misinformation and lack of knowledge. In talking to other lawyers, one response is that the collaborative model is more expensive than any other process and is really more appropriate for wealthier clients. Lawyers are wrong on both points. Even with multiple professionals, the collaborative model is generally cheaper.

Let me explain. As one of the few attorneys in Nevada who has resolved divorce cases by all methods except early neutral evaluation, I can safely say that the collaborative model is superior to all the other methods. It is the only model that formally utilizes licensed legal, financial and mental health professionals in a coherent method and a coherent philosophy of practice.

In the collaborative model, each party is represented by an attorney and is assisted by a divorce coach (mental health professional) and a financial neutral, typically a certified divorce financial analyst or CPA. Other experts/consultants such as a child custody specialist, appraisers, pension consultants, etc. can be used.

The collaborative model is a voluntary process and all participants sign an agreement that they will not use, or threaten to use, the court process to settle their divorce case. If they do, the process fails. An exception exists for domestic violence protection orders if needed in the case.

(cont'd. on page 11)

Uniform Collaborative Law Act

cont'd. from page 9

The key component of the collaborative model is the disqualification provision. If either party resorts to the court system or quits, the collaborative process fails. The collaborative attorneys and other professionals can no longer work with the clients and each party must hire other attorneys to go to court. This provision compels the parties to work harder to settle their cases instead of litigating them.

The disqualification provision is the most important and most controversial aspect of the collaborative model. It is so easy in negotiations to get mad or frustrated and thus threaten to go to court as a means to coerce the other party into agreement.

The collaborative model removes that threat. In practice, it works well to push the parties and counsel to work harder to settle the case. The settlement rates for collaborative divorce cases ranges from 84 to 92 percent, the costs are lower and overall client satisfaction is higher.

How is it cheaper in practice? First, no one is going to court. Lawyers are not drafting complaints, motions, affidavits, briefs, subpoenas, etc. Half or more of a lawyer's time is spent in writing court motions, affidavits, briefs, etc. and going to court.

We do away with all that work and paper. No more wasted time going to court and waiting for a hearing or trial. A lawyer's time is spent meeting with the client, communicating by e-mails or letters regarding the case, and attending the settlement conferences. Other than short e-mails or letters, the only legal writing done by lawyers involves the drafting of agreements and the final paperwork to obtain an uncontested divorce.

Second, the entire process focuses on problem solving and settlement. The focus is on cooperation in information gathering and discussions about difficult issues. The team of professionals work to reduce conflict and help the clients through this difficult transition in their personal lives. A divorce is a problem to be solved, not a battle to be fought.

Third, mental health professionals work with the clients to help them with adjusting emotionally to the divorce and to reduce conflict. If children are involved, mental health professionals talk to the children and both parents and start crafting the child custody agreements. Their hourly rates are lower than the lawyers. The collaborative lawyers may have limited involvement in the discussions, but will do the formal drafting of the custody agreement.

Fourth, the parties meet with the neutral financial professional who prepares a list of the assets, debts and finances and also will do a lifestyle analysis and future projections. Working with the financial neutral, the parties will look at a variety of financial alternatives and the tax consequences of those alternatives. Again, the lawyers are not involved in those meetings, but the lawyers still gather the essential financial information from the clients and bring that to the meetings.

As information is gathered and alternatives are developed, the communications among the team members is done by e-mails, faxes or letters, etc. Then the clients and the collaborative team members meet in full sessions to review the information and work on settlement.

Fifth, the collaborative team members are all trained in the collaborative practice model. We share a common philosophy to reduce the conflict, take the "war words" out of the dialogues, dispel the attitudes of "winning" or "losing," and focus on practical solutions for the divorcing couple. It is all about helping the couple and their children move on with their lives.

There are serious practical advantages to the collaborative model. Since the divorce agreements are studied and reviewed by multiple licensed professionals, the chance of legal or factual error is greatly reduced. The chances of malpractice are almost non-existent. If there is malpractice, the risk is spread among multiple professionals and not just placed on the lawyer.

The risk of complaints to the state bar is much lower. Clients make the final decisions for their divorce and decisions are made after all of the viable options are

(cont'd. on page 11)

Uniform Collaborative Law Act

cont'd. from page 10

developed. Client satisfaction is much higher and satisfied clients don't complain to the bar.

The attorney fees in a collaborative case tend to be a small fraction of the litigated case for the reasons set forth above. Every lawyer who does domestic relations litigation has a drawer full of unpaid client bills. Few of my litigation clients have ever paid 100 percent of their bills.

In stark contrast to the litigation bills, I have been paid 100 percent of my fees in all of my collaborative cases. The fees are generally much lower and the clients are more satisfied.

Finally, the stress level for lawyers in the traditional adversary model is high. Lawyers suffer from alcoholism and depression rates at twice the averages of the general population. Litigation work is very stressful and too often the client comes out with bad results in Family Court.

Practicing in the collaborative model is so much more pleasant and so much less stressful. If I had my choice, I would do only mediation cases and collaborative divorce work.

The collaborative model is not just different. In practice, it is definitely superior in many ways to other resolution methods. No other model uses financial, legal and mental health professionals in a coherent practice structure.

Robert Lueck is President of The Lueck Law Center, a Las Vegas firm devoted to family law. As a co-founder of the Collaborative Professionals of Nevada, much of Lueck's career has been devoted to developing the principles of collaborative settlements. As a published author and recognized authority in the area of family law, Lueck's writings and decisions have been reviewed and taught at national seminars and in professional legal journals. Lueck can be reached at 528 S. Casino Center Boulevard, Suite 311, Las Vegas, Nevada 89101. His telephone number is 702-385-7385 and his fax number is 702-385-3225. E-mail can be directed to: luecklawcenter@yahoo.com.

Article Submissions

Articles are Invited! The Family Law Section is accepting articles for the Nevada Family Law Report. The next release of the NFLR is expected in August, 2012, with a submission deadline of July 15, 2012.

Please contact Shelly Cooley at scooley@cooleylawlv.com with your proposed articles anytime before the next submission date. We're targeting articles that are between 350 words and 1,500 words, but we're always flexible if the information requires more space.