NFLR
NEVADA FAMILY LAW REPORT
Volume 35 Issue 1 Summer 2022

THE RELATIONSHIP BETWEEN ALIMONY AND CHILD SUPPORT

By Jennifer V. Abrams, Esq.

INTRODUCTION AND DEFINITIONS

WHAT IS "CHILD SUPPORT?"

The Nevada Legislature has declared in NRS 125B.020 that "The parents of a child (in this chapter referred to as "the child") have a duty to provide the child necessary maintenance, health care, education and support." The current child support regulations set out in NAC Ch. 425 do not contain a statement of purpose, or definitions altering either prior statutes or case law. Thus, child support is a flow of funds from one parent of a child to the other for the purpose of meeting the child's needs.[i]

WHAT IS "ALIMONY?"

Alimony has not really been defined by either the Nevada Legislature or the Nevada Supreme Court. ***Most*** of the comments by the Nevada Supreme Court have been in "subtractive" saying what alimony is ***~~not~~***, rather than what it is. This fits with the American Law Institute's description of alimony as a "residual category … defined as those … awards … in connection with the dissolution of a marriage that are not child support or the division of property." [ii] This residual category of award is used "to provide remedies in a wide variety of cases that do not share and consistent pattern that can be captured in a sensible definition of [need]." [iii]

In 1989, the Legislature amended the alimony statute to require "consideration" of rehabilitative alimony, further requiring a court to consider a spouse's need for obtaining career-related training, whether the spouse who would pay such alimony obtained greater job skills during the marriage, and whether the spouses who would receive such alimony provided financial support while the other spouse obtained job skills or education. [iv]

In 2019, in Kogad,[v] the Court defined "permanent alimony" as financial support paid from one spouse to the other for a specified period of time, or in a lump sum, following a divorce, citing NRS 125.150(1)(a) and Rodriguez.[vi]

Of course, there are kinds of alimony other than "permanent." Nevada case law has also included characterizations of alimony in various contexts as "maintenance,"[i] temporary spousal support,[ii] rehabilitative alimony,[iii] or as lump-sum alimony, which presumably requires a set aside of one spouse's separate property to the other.[iv]

In short, the "definition" of alimony is elusive, such that one commentator has described trying to provide a concise definition of it as a "'blind men and the elephant' fallacy—trying to explain the whole of a complex concept consisting of several very different parts by focusing on only one of them."[v]

WHAT IS THE STATUTORY OR CASE LAW PURPOSE OF "CHILD SUPPORT" VS. "ALIMONY"?

Child support has at times been stated in the cases as intended to provide for a child's "basic needs,"[vi] but at other times has been stated as intended to allow a child to have a comparable standard of living in both parents' homes after they separate.[vii] The existing regulations are unclear as to purpose, containing both "basic needs" and "household income" language and factors.

It is noteworthy that there is no mechanism to evaluate how the child support recipient allocates the child support payments received to determine whether or not those dollars are actually benefitting the child(ren). For example, two physicians get divorced. They share joint physical custody four children. Husband earns $1M annually ($83,334 per month) and Wife earns $500,000 annually ($41,667 per month). Husband's guideline child support obligation calculates to $2,916.69 per month. With each parent providing housing, food, childcare, clothing, etc. for the children

The Relationship Between Alimony and Child Support

50% of the time, Husband paying the health insurance premiums for all four children, and the parents equally sharing out-of-pocket medical expenses, does the child support obligation of $2,916.69 per month provide for the children's "basic needs" or "allow the children to have a comparable standard of living in both parents' homes after they separate"? Or, does the child support in this scenario begin to resemble "alimony"?

"Alimony is wholly a creature of statute," entirely unknown to either the common law or ecclesiastical law.[viii] The statute, NRS 125.150, authorizes the court to award alimony to a spouse in granting a divorce.[ix] There is no other statutory authority for alimony.

The Court's explanations of the purpose of alimony have been several. In 1998 in *Shydler*,[x] the Court stated that alimony was "an equitable award serving to meet the post-divorce needs and rights of the former spouse."[xi] Most of its explanations have been in the negative, as in the 2000 explanation of alimony being "no fault" in *Rodriguez*, when it held that fault is not to be considered in the making of alimony awards at all, so alimony is not "a sword to level the wrongdoer" or "a prize to reward virtue."[xii]

Similarly, courts are ***not*** required to award alimony so as to equalize future income.[xiii] Property equalization payments "do ***not*** serve" as a substitute for alimony (or presumably vice versa).[xiv] And alimony is ***not*** an assignable property right.[xv]

The statute lists only "factors" to be "considered," from which various commentators have analyzed the never-stated "purpose" of alimony.[xvi] Judge Hardy came up with four possible, overlapping and perhaps contradictory purposes:[xvii]

1. Traditional need-based alimony and/or the payor's ability to pay.
2. Non-specific economic loss.
3. Adjunct to property division.
4. Reliance theory of marriage continuation.

Other commentators have grouped the decisions somewhat differently, as "transitional, rehabilitative, just and equitable, [or] permanent alimony,"[xviii] or as "bridge the gap alimony," "rehabilitative alimony," and "compensatory or contract alimony."[xix]

But a later commentator found the various categorizations attempted to be "vague, overlapping, and sometimes contradictory," and that ultimately the absence of a coherent theoretical basis for the cases rendered any attempt to line them up into categories of purpose would be "an intellectual dead-end" because "coherence cannot be divined from chaos."[xx] In sum, the district court has broad discretion to award alimony "as appears just and equitable,"[xxi] and that award will not be disturbed on appeal absent an abuse of discretion.

WHO CAN GET "CHILD SUPPORT" AND WHO CAN GET "ALIMONY"?

Child support is a right of "all children" of "all parents," whether or not those children are "legitimated."[xxii] Under prior case law, biology was the sole focus,[xxiii] but the modern revisions to statutory law governing surrogacy and "intended parents"[xxiv] makes it highly likely that parentage, and child support, are going to be increasingly distinct from biological parentage.

For the time being, alimony generally requires a finding of a legitimate marriage, although existing case law would already permit an alimony award between parties not actually married if

there was a purported marriage and there were considerations of bad faith or fraud by the potential alimony obligor.[xxv]

Existing case law has not yet extended to unmarried cohabitants the same potential alimony rights that have already been established as to property by the theory of "community property by analogy."[xxvi] Some commentators have indicated, however, that the general trajectory of the law is to make ever-thinner the lines separating marital from non-marital cases, so that alimony, as well as property, could be a legitimate subject for court awards upon the dissolution of a non-marital relationship.[xxvii] In fact, the Uniform Law Commissioners[xxviii] have already promulgated a proposed "Uniform Cohabitants' Economic Remedies Act" which may well be a first step toward making alimony available in such cases.[xxix]

COMPARING AND CONTRASTING CHILD SUPPORT AND ALIMONY ELEMENTS AND RAMIFICATIONS

HOW IS EACH CALCULATED/FACTORS?

Child support was previously provided by formula under NRS 125B.070-.080, providing a guideline formula, presumptive maximums, and deviation factors. They were replaced as of February 1, 2020, by regulations found in NAC Ch. 425, in a revised formulation that eliminated both the presumptive maximums and the prior $100 statutory presumptive minimum and made the calculations a bit more complicated.[xxx]

Instead of the simple percentages-per-child with statutory presumptive maximums, the new regulations require a varying percentage of gross monthly income on the first $6,000 of income, depending on the number of children, a lower percentage on the next $4,000, and a still-lower percentage for income exceeding $10,000 per month. On the low end of incomes, instead of a presumptive $100 per month, the regulations adopt reference to the federal poverty tables, which change annually.

In the 1998 *Wright v. Osburn*[xxxi] case, the Nevada Supreme Court held that in 50/50 joint custody cases, child support would offset, so that the parent with the higher income would pay support to the parent with the lower income. In 2003, in *Wesley v. Foster*,[xxxii] the Court clarified that the offset should take place before, not after, application of the statutory presumptive maximums. And in the 2009 *Rivero v. Rivero*[xxxiii] case, the Court extended that offset calculation to all "joint custody" cases, which it defined as all cases in which the parents share custody 60/40 or closer.

Where there is joint custody of one or more children, the existing "offset" method is used in the new regulations. Where there is a mix of primary custody and joint custody, each parent's obligation to the other is separately calculated and then offset. The Child Support Commission is contemplating numerous changes, including as of this writing making the offset to be one half of the difference in offset cases, as opposed to the straight offset set out by the case law and in the current regulations.

Replacing the prior statutes' "total amount of income" language, the regulations try to define "gross monthly income" (GMI) with greater specificity. GMI expressly ***does*** include:

1. Salary and wages, including, without limitation, money earned from overtime pay if such overtime pay is substantial, consistent and can be accurately determined.
2. Interest and investment income not including the principal.
3. Social Security disability and old-age insurance benefits under Federal law.
4. Any periodic payment from a pension, retirement plan or annuity that is considered "remuneration for employment."
5. Net proceeds resulting from workers' compensation or other personal injury awards intended to replace income.
6. Unemployment insurance.
7. Income continuation benefits.
8. Voluntary contributions to a deferred compensation plan, employee contributions to an employee benefit or profit-sharing plan, and voluntary employee contributions to any pension or retirement account, regardless of whether the account provides for tax deferral or avoidance.
9. Military allowances and veterans' benefits.
10. Compensation for lost wages.
11. Undistributed income of a business entity in which a party has an ownership interest sufficient to individually exercise control over or access the earnings of the business, unless the income is included as an asset for the purposes of imputing income pursuant to a separate

section of the proposed guidelines. The regulations further define what is included:

a. "Undistributed income" means federal taxable income of a business entity plus depreciation claimed on the entity's federal income tax return less a reasonable allowance for economic depreciation.
b. A "reasonable allowance for economic depreciation" means the amount of depreciation on assets computed using the straight-line method and useful lives as determined under federal income tax laws and regulations.

12. Child care subsidy payments if a party is a child care provider.
13. Alimony.
14. All other income of a party, regardless of whether such income is taxable.

GMI under the new guidelines expressly does ***not*** include:

1. Child support received.
2. Foster care or kinship care payments.
3. Benefits received under the federal Supplemental Nutrition Assistance Program.
4. Cash benefits paid by a country.
5. Supplemental security income benefits and state supplemental payments.
6. Except as otherwise provided in the guidelines, payments made for social services or any other public assistance benefits.
7. Compensation for losses, including, without limitation, both general and special damages, from personal injury awards not intended to replace income.

Once guideline support has been determined, the regulations provide for "adjustments" (replacing the prior "deviations") for a list of potential reasons, which may be refined and altered by the Child Support Commission as it reviews the regulations, but now include:[xxxiv]

a) Any special educational needs of the child;
b) The legal responsibility of the parties for the support of others;
c) The value of services contributed by either party;
d) Any public assistance paid to support the child;
e) The cost of transportation of the child to and from visitation;
f) The relative income of both households, so long as the adjustment does not exceed the total obligation of the other party;
g) Any other necessary expenses for the benefit of the child; and
h) The obligor's ability to pay.

Additionally, federal disability or old age insurance might be added to a parent's gross income and the amount of the child's benefit subtracted.

By comparison, there is no formula for calculating alimony in Nevada. In 2007, the Nevada Legislature codified 11 "guideline factors" lifted directly from Nevada Supreme Court decisions,[xxxv] which a district court is required to "consider" in making an alimony award:

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.

The legislative history adopting those factors is devoid of any discussion or consideration of whether the factors listed make any sense individually or in combination or how they were to be prioritized, weighted, or applied in making awards.

The case law provides no calculation matrix, continuing to review individual decisions for "an abuse of discretion." As noted by the

The Relationship Between Alimony and Child Support

Nevada Supreme Court in *Kogod*, alimony is "the last great crapshoot in family law" because "it is a category of remedy without any substantive underlying theoretical rationale."[xxxvi]

The Court in *Kogod* provided at least two approaches ("need" and "loss") for alimony, and set out a version of the "alimony bell curve" by which alimony would normally not be considered at the upper end if a property award was sufficient to fully satisfy the recipient's standard of living, but at least one commentator has found its "need" and "loss" tests to be conflicting, and has urged use by lawyers and adoption by courts of a more structured analysis to determining whether, and how much, alimony is appropriate in a given case.[xxxvii]

PRESUMPTIVE/MINIMUM AMOUNTS?

The regulations replacing the prior child support statutes explicitly did away with the prior $100 per month presumptive minimum child support award. The regulations set out a formula, incorporating the federal poverty table, which produces a presumptive award in every child support case, subject to adjustments based on specific findings relating to the specific needs of a child.

There is no presumption of any kind as to alimony, as to its existence or as to any amount if it is found to be appropriate at all.

IN WHAT FORMS CAN IT BE PAID?

Since 1983, NRS 125B.090 has stated that "A judgment or order of a court of this State for the support of a child ordinarily must be for periodic payments which may vary in amount. In the best interest of the child, a lump-sum payment or the purchase of an annuity may be ordered in lieu of periodic payments of support."

So, child support is normally paid as a monthly obligation, and the regulations are set up to do calculations of a guideline schedule sum payable in accordance with the "monthly gross income of an obligor." However, the regulations specifically permit parties to stipulate to a child support obligation that does not comply with the guidelines. This presumably means that parties could create alternative child support payments, including lump sum or alternative payments as to time or even substance (for example, stock or other assets in lieu of cash).

Any arrangements seeking a lump sum payment in exchange for a waiver of future monthly child support payments would have to be carefully structured with an eye toward the case law indicating that parties are unable to remove a child support modification from the jurisdiction of the trial court.[xxxviii]

In *Fernandez*, the district court held the parties to their bargain of non-modifiability, but the Supreme Court reversed, holding that "so long as the statutory criteria for modification are met, a 'trial court always has the power to modify an existing child support order, either upward or downward, notwithstanding the parties' agreement to the contrary.'"[xxxix]

The Court reasoned that "[h]ad the Legislature wanted to give parents the option of agreeing to a decree providing for nonmodifiable child support, it could have easily provided an exception to NRS 125B.145." The lack of any such exception in the statute led the Court to conclude that the jurisdiction of the court never ends in a child support matter, as long as the child is eligible to receive support.

There is no presumption or directive of any kind as to the form of alimony, although cash payments, usually monthly, appear to be the norm.

NRS 125.150(1)(a) permits an award of post-divorce alimony "in a specified principal sum," as distinguished from "specified periodic payments." This money could come from the obligor's separate property existing during the marriage or to be acquired later, or even from that spouse's share of community property divided upon divorce.

Nevada cases have a lengthy familiarity with "lump-sum" alimony awards, but the overall law governing such awards is as confusing as all the other categories. A lump-sum award is sometimes designated as providing for temporary or permanent alimony.[xl] And the case law indicates that lump-sum alimony need not even actually be paid in a "lump sum."[xli]

NRS 125.150(4) allows the set aside of separate property from a spouse for the support of the other spouse or their children as is deemed "just and equitable." Applying this statute would apparently require a finding that some separate property of the obligor spouse existed upon divorce.

The Court's discussions of lump sum alimony over the years[xlii] do not clearly explain whether it is applied as a remedy or some separate species of available award. In either case, the Court has expressed the sentiment that there is a need for lump sum alimony to be available to avoid a party being left without the ability of

self-support or to prevent efforts by the payor spouse to frustrate a divorce court's order.[xliii]

DURATION, MODIFICATION, AND TERMINATION—WHEN/HOW DOES IT END?

The duty of child support continues until 18 (or 19 if the child is still in high school). The obligation could extend indefinitely for a handicapped child.[xliv] Once ordered, child support continues until the death or emancipation of the child, or the adoption of the child.[xlv]

A child support obligation may transcend the death of the obligor. NRS 125B.130 provides that "The obligation of a parent is enforceable against his or her estate in such an amount as the court may determine, having regard to the age of the child, the ability of the custodial parent to support the child, the amount of property left by the deceased parent, the number, age, and financial condition of the lawful issue, if any, and the rights of the surviving spouse, if any, of the deceased parent." The court apparently has some discretion, as the statute further provides that "The court may direct the discharge of the obligation by periodical payments or by the payment of a lump sum."

Child support may be modified "at any time" upon a finding of "changed circumstances"[xlvi] and every three years in any event.[xlvii] No such changes may be retroactive as to accrued sums due under an order.[xlviii] 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 is deemed to constitute changed circumstances requiring a review for modification of the order.[xlix]

While neither the statutes nor the regulations provide a list of all things that could be considered "changed circumstances," they would include an alteration in the needs of the child, the custodial schedule, and the income of the obligor, as well as the receipt of public assistance by a child or an obligee.[l]

As with most topics, matters relating to duration, modification, and termination are less certain for alimony. Trying to find some meaningful distinction between facts supporting "permanent," as opposed to "temporary," awards yield no firm criteria. The Court has used the same factor lists for both, sometimes throwing in "rehabilitative" language as well, without ever giving any kind of guidance or test for distinguishing "long term" from "short term" marriages, or otherwise indicating when temporary alimony might be more appropriate than permanent alimony, or vice versa.

Unlike child support, it appears that alimony payments—at least monthly periodic payments—terminate on the death of the obligor, since NRS 125.150(5) states that "In the event of the death of either party or the subsequent remarriage of the spouse to whom specified periodic payments were to be made, all the payments required by the decree must cease, unless it was otherwise ordered by the court."

There is some fuzziness in what awards terminate upon remarriage. Traditionally, in the absence of the district court "otherwise ordering," all future payments cease upon remarriage, but it would appear that a periodic payment of lump sum alimony or even (after *Waltz*[li]) a designation of "permanent alimony" is sufficient to prevent remarriage from constituting a terminating event. Since lump-sum alimony need not even be paid in "lump sum" under *Kishner*,[lii] it seems possible that this entire category is just a euphemism for "unmodifiable." Left unclear is whether there are ***any*** contingencies that could affect the recipient's entitlement to full collection of such an ordered "lump sum award."

The same confusion exists between "rehabilitative" and "temporary" awards. The Court has at times confused "rehabilitation" as a goal with general temporary support, using the terms interchangeably, making it unclear which should be the focus of a trial court, or under what circumstances one or the other is more appropriate.

The Relationship Between Alimony and Child Support

In 1989, what is now NRS 125.150(10)-(11) both codified and modified the earlier case law which recognized the need for rehabilitative alimony, adding targeted classes of intended beneficiaries, and restrictions and conditions necessary for such awards. The statute recognized the need to sustain a spouse during a period of readjustment and training for employment, and the Court has added in the goals of avoiding welfare dependence and not forcing unskilled spouses into poverty upon divorce.

When it focused on the rehabilitative alimony statute itself, the Court was highly concerned with its statutory purpose[liii] and even its technical requirements.[liv] At other times however, the Court simply threw the word "rehabilitative" out in some general sense[lv] seeming to make it synonymous with temporary alimony, and at least once directing entry of a temporary alimony award "at least for a period of rehabilitation" where no specific job or career training was at issue.[lvi]

Once ordered, only a court can modify alimony and only prospectively—there is no jurisdiction to modify alimony payments already ordered and accrued.[lvii]

"Changed circumstances" for alimony modifications have a couple of statutory specifics. Courts are directed that "In addition to any other factors the court considers relevant in determining whether to modify the order, the court shall consider whether the income of the spouse who is ordered to pay alimony, as indicated on the spouse's federal income tax return for the preceding calendar year, has been reduced to such a level that the spouse is financially unable to pay the amount of alimony the spouse has been ordered to pay."[lviii] And "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."[lix]

It is possible that counsel may be able to choose whether to make alimony modifiable. In 1953, NRS 123.080(4) was enacted to provide a mechanism for the parties to make their agreements effective beyond the date of divorce by introducing their agreement into evidence as an exhibit in any divorce action and requiring the court to, "by decree or judgment ratify or adopt or approve the contract by reference thereto."

In 1962, the Nevada Supreme Court held in *Ballin v. Ballin*[lx] that a decree could direct the survival as an independent contract of an agreement containing alimony provisions:

> In our view, the support clause in an agreement should, in accordance with ordinary contract principles, survive a subsequent decree if the parties so intended and if the court directs such survival.
>
> * * *
>
> We therefore conclude that NRS 123.080(4) does not apply to a decree directing survival of an approved agreement.[lxi]

In the years since NRS 123.080(4) was enacted by the Nevada Legislature, the Nevada Supreme Court has reinforced the principle of merger in numerous opinions.

In *Day v. Day*,[lxii] the fundamental consideration for the court in determining whether a separation agreement containing an alimony provision survived a validly entered decree of divorce was whether the ***decree*** specifically directed survival (as opposed to anything stated in the settlement agreement itself)[lxiii]:

> We now take a further step and hold that the survival provision of an agreement is ineffective unless the court decree specifically directs survival. We recognize that our view is an arbitrary one; it has to be. However, we think that questions relating to enforcement rights and choice of forum are of such significance as to require a clear and direct expression from the trial court as to whether the agreement shall survive. Absent such a clear and direct expression in the decree we shall presume that the court rejected the contract provision for survival by using words of merger in its decree ("adopt," "incorporate," etc. and, since the 1953 statute, "approve," "adopt," "ratify."). Accordingly, in the instant matter, we hold that the agreement was merged into the decree of divorce, and that the provisions of such decree for the future support of Mrs. Day are susceptible to a proceeding under NRS 125.180.[lxiv]

The holding in *Day* is consistent with the holdings in *Rush v. Rush*,[lxv] *Watson v. Watson*,[lxvi] *Wallaker v. Wallaker*,[lxvii] and *Vaile v. Porsboll*,[lxviii] all of which looked to the decree for language regarding merger or survival.

The Relationship Between Alimony and Child Support

When considering whether or not to merge a settlement agreement containing an alimony provision into a decree of divorce, at least one commentator has opined that the decision might determine whether the divorce court might elect to modify alimony terms, whether or not the agreement states that they are "non-modifiable":

> In drafting marital settlement agreements where the parties intend alimony to be non-modifiable, it is important that the drafter contemplate the effect of merging the agreement into the decree – including the possibility that merger may nullify the parties' intent. Similarly, for practitioners wishing to modify "non-modifiable" alimony, merger of the agreement may provide the opportunity for making such a claim so long as a change in circumstances warrants such relief.[lxix]

C.

Care must be taken if there is any intention to have ***any*** spousal support provision in a separation agreement remain valid past the date of the decree of divorce.

The decree could expressly order that alimony is to be paid—in which case the alimony is presumably modifiable.[lxx] Or, a decree could expressly order the survival of a separation agreement providing for such support—in which case the court would presumably not have jurisdiction to modify that alimony award.[lxxi]

Any support provisions in a separation agreement that are ***not*** merged into a decree and are ***not*** expressly ordered to survive the decree are apparently extinguished as a matter of law upon entry of the decree.[lxxii] And if such a separation agreement lacks a severability clause, the ***entirety*** of the separation agreement becomes void and unenforceable upon entry of the decree—including the property provisions.[lxxiii]

TAX IMPLICATIONS?

Whole books were written regarding the tax planning opportunities, and internal revenue code restrictions, surrounding the deductibility of alimony and non-deductibility of child support under the prior law, but all of that changed when alimony was made non-deductible in 2019, when as a part of a federal tax reform bill, alimony was made non-deductible by payors, and non-includable by recipients. This eliminated the ability for attorneys to increase the net value of the award by taking advantage of differences in tax brackets between parties.

BANKRUPTCY IMPLICATIONS?

The law has evolved considerably over the years, and federal bankruptcy judges still render decisions surprising to many family law practitioners on a variety of subjects. However, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[lxxiv] eliminated the balancing of hardships under the prior law between the debtor and creditor spouse and "domestic support obligations"[lxxv] were made non-dischargeable in Chapter 7 bankruptcies, but apparently not under Chapter 13 plans that are successfully concluded. Such obligations were given a priority before all but administrative expenses,[lxxvi] requiring their payment before satisfaction of virtually any other obligations of the debtor.

HOW TO COLLECT? PENALTIES FOR NON-PAYMENT?

The 10% penalty provision previously applicable to child support obligations was prospectively eliminated as of February 2020. Interest at the legal rate continues to accrue on all child support that is due but unpaid.[lxxvii] Statutory interest also runs as to any accrued, unpaid alimony, as it would as to any other money judgment.[lxxviii]

The full array of collection methodologies is beyond the scope of these materials, but a case may be opened through the District Attorney for any unpaid child support, and current policy appears to be that the D.A. will also collect alimony arrears so long as there is a child support arrearage.

CASES IN WHICH BOTH ALIMONY AND CHILD SUPPORT ARE PRESENT

WHAT IS COUNTED, AND IN WHICH ORDER?

The definition of "income" in the child support regulations is more specific than under the prior statutes and may be further refined. The definition of "income" for purposes of alimony is fmore expansive.

As to the order of steps in considering alimony and child support, there is currently little guidance in the law. The existing child support regulations do state that alimony is included as a part of the "gross income" for an obligor, implying that child support should be calculated *after* other transfers of funds, such as alimony, between the same parties in a given case.

The Relationship Between Alimony and Child Support

Without much explanation of how it got there, the AAML Commission that attempted to create a model alimony formula directed those calculations be based on gross income, including actual and imputed income, calculated ***before*** child support is determined.

Not really discussed in the statutes, regulations, or case law are the myriad ways that payments could flow in the real world. Multiple family and serial marriage cases are extremely common; a child support obligor, or obligee, or both, could be paying or receiving either child support or alimony payments from third parties. Outlining the possibilities produces a minimum of nine possible scenarios.

The child support regulations appear to need some clarification on the point, but as a matter of logic, calculations appear to work best when calculations are done in the order: property, alimony, child support.

OVERLAP BETWEEN CHILD SUPPORT AND ALIMONY

Child support is not necessarily spent on direct expenditures of a child. It includes "basic needs" of a child including contribution towards shelter, utilities, food, and transportation. As the Nevada Supreme Court noted in *Barbagallo*, there are "fixed expenses relating to child rearing, costs such as rent, mortgage payments, utilities, car maintenance and medical expenses. These expenses go on and are not appreciably diminished as a result of the secondary custodian's sharing of the burdens of child care and maintenance. . . . It is ironic that joint custody arrangements, which are premised on the theory that an equal sharing of physical and emotional resources is best for the child, would result in added burdens on both custodians." These "basic needs," however, overlap with the basic needs served by an award of alimony. When alimony is calculated first to meet the needs of the alimony recipient, there is a risk of overlap resulting from the guideline child support formula to that same recipient. In other words, independently applying the factor lists for alimony and for child support can generate two income streams intended to meet several of the same basic expenses.

Consider also the "double dip" dilemma when the payor is a business owner. The concept of "double dipping" concerns the double counting of a marital asset, once in the context of property for equitable division purposes, and once in the context of alimony and/or child support. The concept of "double dipping" is premised on the fact that the same cash flows capitalized to determine the present overall value of a spouse's business for purposes of property division is also considered as a component of that spouse's income for purposes of alimony and child support calculations.[lxxix] There is significant potential for overlap in these circumstances.

For example, Husband earns $250,000 annually. Wife earns $50,000 annually. The parents share joint physical custody of two children. The parties have been married for 18 years. Alimony is $3,500 per month based on the disparity of income ($20,833 per month vs. $4,167 per month).

	Husband	Wife
GMI	$20,833	$4,167
Taxes	- $5,071	- $476
Alimony	- $3,500	+ $3,500
	$12,262	$7,191

For purposes of the child support calculation, Husband's GMI is $20,833—there is no deduction for taxes or alimony paid. For purposes of the child support calculation, Wife's GMI is $7,667. Child support calculates to $907 per month.

	Husband	Wife
	$12,262	$7,191
Child support	- $907	+ $907
	$11,355	$8,098

Also consider the equalization payment to Wife if Husband is a business owner.

OTHER CONSIDERATIONS RELATING TO AWARDS OF CHILD SUPPORT AND ALIMONY

Neither child support nor alimony are tax deductible by the payor or taxable to the payee. Thus, the actual obligation is greater than the amounts awarded due to the inherent tax liability associated with that income. Furthermore, when calculating child support, alimony is included in the income of the payee but is not deducted from the income of the payor. Thus, the payor's income for purposes of the guideline support calculation is artificially increased by the amount of the alimony being paid plus the tax obligation on the total support being paid.

In any case in which both alimony and child support are being paid by the same obligor to the same recipient, the net effect of what is and is not counted, and all tax effects, should be considered.

JENNIFER V. ABRAMS is the founder and managing partner of The Abrams & Mayo Law Firm in Las Vegas, Nevada. The firm focuses exclusively on divorce and related matters within the practice of Family Law. Abrams is a State Bar of Nevada Board Certified Family Law Specialist, and a Fellow of the American Academy of Matrimonial Lawyers. Previously she was elected to and served as Treasurer of the Executive Council of the State Bar of Nevada, Family Law Section. She has also served on the State of Nevada Family Law Rules of Civil Procedure Committee, State of Nevada Committee to Re-write NRS Chapters 123 – 126, and State Bar of Nevada EDCR Rule 5 Committee. Abrams drafted the State of Nevada Detailed Financial Disclosure Form which is currently used in complex divorce and high-asset cases. Recently, Abrams re-wrote NRCP 16.2 and 16.205. Abrams has spoken at and published materials for a variety of CLE presentations for the Annual Nevada Family Law Conference Advanced Family Law Program, the American Bar Association, the Nevada Family Law Judges' Conference, and the Annual Nevada Family Law Conference. Abrams is a member in good standing of the State Bar of Nevada, Clark County Bar Association, American Bar Association, American Association for Justice (formerly the Association of Trial Lawyers of America), and the State Bar Associations of California and Louisiana (both inactive). She received her Juris Doctorate degree, *Magna Cum Laude*, from the Pepperdine University School of Law in California, where she graduated ninth in a class of 255 and was a staff member of the Pepperdine Law Review for two years. Abrams received her undergraduate degree in Business Administration, Accounting Theory and Practice, from California State University, Northridge, and has passed the California Certified Public Accountants (CPA) examination. The Abrams and Mayo Law Firm's offices are located at 6252 South Rainbow Boulevard, Suite 100, Las Vegas, NV 89118. The phone number is (702) 222-4021. E-mails may be sent to jabrams@TAMLF.com. Comprehensive information about the firm's specialty practice can be found by visiting www.TAMLF.com.

ENDNOTES

i. Recent case law, and possible legislative changes, may create scenarios where child support may involve three or more parties in the position of "parents." These materials do not address those possibilities directly, but the observations made here should apply to those situations, as well.

ii. A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) ("*Principles*") at 875 (§ 5.01).

iii. *Id*., Introduction at 29.

iv. NRS 125.150(10).

v. *Kogod v. Cioffi-Kogod*, 135 Nev. ___, 439 P.3d 397 (Adv. Opn. No. 9, Apr. 25, 2019).

vi. *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000).

vii. NRS 125.040 authorizes Nevada courts to make orders for "temporary maintenance for the other party" during the pendency of an action. No standards are provided, and such temporary orders are often made on law and motion hearings addressing "need and ability" as disclosed by preliminary financial disclosure forms.

viii. NRS 125.150(1) authorizes the court to award alimony at the conclusion of a divorce case "as appears just and equitable." No standards are provided there, either.

ix. In 1989, the Nevada Legislature added NRS 125.150(8) (now 125.150(10)), requiring a court granting a divorce to "consider the need to grant alimony to a spouse for the purpose of obtaining training or education relating to a job, career or profession."

x. NRS 125.150(1) considers on its face that alimony might be payable "in a specific principal sum" rather than in installments, and NRS 125.150(4) provides: "In granting a divorce, the court may also set apart such portion of the husband's separate property for the wife's support, the wife's separate property for the husband's support or the separate property of either spouse for the support of their children as is deemed just and equitable."

xi. *See* Marshal Willick, *A Universal Approach to Alimony: How Alimony Should Be Calculated and Why*, 27 J. Am. Acad. Matrim. Law. 153 (2015) ("Willick").

xii. *See*, *e.g.*, *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 532 (1989).

xiii. *Anastassatos v. Anastassatos*, 112 Nev. 317, 320, 913 P.2d 652 (1996), citing to *Barbagallo*.

xiv. *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000); *Freeman v. Freeman*, 79 Nev. 33, 378 P.2d 264 (1963).

xv. NRS 125.150(1).

xvi. *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998).

xvii. *Id.*, *citing Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996).

xviii. *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000). The Court closely examined the legislative history of the 1993 amendment to NRS 125.150, and concluded that the Legislature deleted the language about the "respective merits of the parties" in direct response to the Court's decisions in previous cases suggesting that marital fault could be considered in determining both alimony and property distribution.

xix. *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998); *Kogod*, *supra*.

xx. *Id*.

xxi. *Foy v. Estate of Smith*, 58 Nev. 371, 81 P.2d 1065 (1938).

xxii. *See*, *e.g.*, David Hardy, *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 NEV. L. J. 325 (2009) ("Hardy"); Laura W. Morgan, *Current Trends in Alimony Law: Where Are We Now?*, 34 FAM. ADVOC. 8, 10 (Winter 2012); Brett R. Turner, *Spousal Support in Chaos*, 25 FAM. ADVOC. 14, 18 (Spring 2003).

xxiii. Hardy, *supra* note 17, at 339-343.

xxiv. *See* Bruce I. Shapiro & John D. Jones, *Alimony in Nevada, Part I*, 25 NEV. FAM. L. REP. 1 (Summer 2012), available at http://www.nvbar.org/sections/FamilyLaw/NFLR/sept2002.pdf (last visited Sept. 29, 2013).

xxv. *See* Radford Smith, *Advanced Child and Spousal Support Issues*, in ADVANCED FAMILY LAW (NBI, Nov. 2012).
xxvi. *Willick*, *supra*.
xxvii. NRS 125.150(1)(a).
xxviii. NRS 125B.010.
xxix. *See*, *e.g.*, *Hermanson v. Hermanson*, 110 Nev. 1400, 887 P.2d 1241 (1994).
xxx. *See* NRS ch. 126.
xxxi. *Williams v. Williams*, 120 Nev. 559, 97 P.3d 1124 (2004).
xxxii. *See Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992); *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984).
xxxiii. *See*, *e.g.*, Marshal Willick, *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-Marital Property and Support Law* (Nevada Lawyer, May 2011).
xxxiv. The National Conference of Commissioners on Uniform State Laws ("NCCUSL"), also known a the "Uniform Law Commissioners." Now 116 years old, NCCUSL provides States with non-partisan draft legislation intended to bring "clarity and stability" – and most especially, consistency – to various areas of the law.
xxxv. *See* https://www.uniformlaws.org/committees/community-home?CommunityKey=c5b72926-53d2-49f4-907c-a1cba9cc56f5.
xxxvi. https://www.leg.state.nv.us/NAC/NAC-425.html.
xxxvii. *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998).
xxxviii. *Wesley v. Foster*, 119 Nev. 110, 65 P.3d 251 (2003).
xxxix. *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).
xl. NAC 425.150.
xli. The underlying decisional authority is discussed in Appendix 1.
xlii. *Kogod*, quoting from Marshal Willick, *In Search of a Coherent Theoretical Model for Alimony*, Nev. Law., Apr. 2007, at 41.
xliii. *See* Marshal Willick, *Kogod Contradictions, Practical Problems, and Required Statutory Fixes: Part 1*, 33 Nev. Fam. L. Rep., Fall 2019/Winter 2020, at 1.
xliv. *See Fernandez v. Fernandez*, 126 Nev. 28, 222 P.3d 1031 (2010).
xlv. *Id*., citing *In re Marriage of Alter*, 171 Cal. App. 4th 718, 89 Cal. Rptr.3d 849, 852 (Ct. App. 2009).
xlvi. *See Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972) (explaining that the reason for the payment of alimony in lump sum was to ensure that the spouse would actually receive payments that might otherwise be made by way of periodic payments).
xlvii. *Kishner v. Kishner*, 93 Nev. 220, 562 P.2d 493 (1977) (installment payments of "lump sum" alimony approved).
xlviii. *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972); *Kishner v. Kishner*, 93 Nev. 220, 562 P.2d 493 (1977); *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990); *Schwartz v. Schwartz*, 126 Nev. 87, 225 P.3d 1273 (2010).
xlix. *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990); *Schwartz v. Schwartz*, 126 Nev. 87, 225 P.3d 1273 (2010).
l. NRS 125B.110.
li. NRS 125B.120(2).
lii. NAC 425.170; see *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).
liii. NRS 125B.145((1)(b).
liv. NRS 125B.140(1)(a).
lv. NRS 125B.145(4).
lvi. NAC 425.170(2).
lvii. *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994).
lviii. *Kishner v. Kishner*, 93 Nev. 220, 562 P.2d 493 (1977).
lix. *See Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).
lx. *Fick v. Fick*, 109 Nev. 458, 851 P.2d 445 (1993).
lxi. *See Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998); *Kerley v. Kerley*, 111 Nev. 462, 893 P.2d 358 (1995).
lxii. *See Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998).
lxiii. NRS 125.150(8).
lxiv. NRS 125.150(8).
lxv. NRS 125.150(12).
lxvi. 78 Nev. 224, 371 P.2d 32, at 36 (1962).
lxvii. 78 Nev. 224, 371 P.2d 32, at 36 (1962).
lxviii. 395 P.2d 321 (1964).
lxix. *Day* at 389; *Rush v. Rush*, 85 Nev. 623, 460 P.2d 844 (1969).
lxx. *Id*.
lxxi. 82 Nev. 59, 410 P.2d 757 (1966) (Where the agreement and decree each direct survival, later controversy regarding support must rest upon the agreement, for the rights of the parties flow from the agreement rather than from the decree approving it).
lxxii. 95 Nev. 495, 596 P.2d 507 (1979) (Where the agreement and decree each direct survival, courts are bound by language in the agreement which is clear and free from ambiguity and cannot, using the guise of interpretation, distort the plain meaning of an agreement).
lxxiii. 98 Nev. 26, 639 P.2d 550 (1982) (Where the decree of divorce confirmed a Property Settlement Agreement and stated that the agreement was "not incorporated into this decree but shall survive the decree herein granted," the action should have been decided on principles of general contract law and although the district court could not modify the divorce decree, respondent has cited no authority that the district court was precluded from granting reformation of the property settlement agreement).
lxxiv. 128 Nev. 27, 268 P.3d 1272 (2012) (Because the parties' agreement was merged into the divorce decree, to the extent that the district court purported to apply contract principles, specifically rescission, reformation, and partial performance based on Vaile's initial payments of $1,300 and Porsboll's acceptance of these payments to support its decision to set the payments at $1,300, any application of contract principles to resolve the issue of Vaile's support payments was improper, citing *Day* at 389-90.
lxxv. See Dixie Grossman, *Alimony: When Nonmodifiable Terms Fail*, 22 Nev. Fam. L. Rep., Summer, 2009, at 4.
lxxvi. Some states have held that a court's ability to modify a temporary or permanent alimony award cannot be waived by agreement or court order. *Sill v. Sill*, 164 P.3d 415 (Utah 2007); *Ellis v. Ellis*, 962 A.2d 328 (Me. 2008); *Braun v. Greenblatt*, 927 A.2d 782 (Vt. 2007); *Norberg v. Norberg*, 609 A.2d 1194 (N.H. 1992); *Eidlin v. Eidlin*, 916 P.2d 338 (Or. App. 1996); *Vorfeld v. Vorfeld*, 804 P.2d 891 (Hawaii App. 1991).
lxxvii. Some states allow parties to waive a court's ability to modify a temporary or permanent alimony award. *Burns v. Burns*, 677 A.2d 971 (Conn. App. 1966); *Bair v. Bair*, 750 P.2d 994 (Kan. 1988); *Toni v. Toni*, 636 N.W.2d 396 (N.D. 2001); *Beasley v. Beasley*, 707 So. 2d 1107 (Ala. Civ. App. 1997); *Rockwell v. Rockwell*, 681 A.2d 1017 (Del. Supr. 1996); *Kilpatrick v. McLouth*, 392 So. 2d 985 (Fla. 5th DCA 1981); *Ashworth v. Busby*, 526 S.E.2d 570 (Ga. 2000); *Voigt v. Voigt*, 670 N.E.2d 1271 (Ind. 1996); *Staple v. Staple*, 616 N.W.2d 219 (Mich. App. 2000); *Moseley v. Mosier*, 279 S.C. 348, 306 S.E.2d 624 (S.C. 1983); *Nichols v. Nichols*, 469 N.W.2d 619 (Wis. 1991); *In re Marriage of Ousterman*, 46 Cal. App. 4th 1090, 54 Cal. Rptr.2d 403 (Ct. App. 1996).
lxxviii. *Day* at 389.
lxxix. *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978) (The alimony provision of a postnuptial agreement violates NRS 123.080 and is void. Because the postnuptial agreement is "integrated" and not subject to severability, the entire agreement "must be annulled since a material part of it is illegal.").

lxxx. ("BAPCPA") (Pub. L. 109–8, 119 Stat 23).

lxxxi. The term domestic support obligation is defined very broadly to include all debts to a spouse, former spouse or child incurred during a divorce or separation regardless of whether or not the debt is designated as a "support" obligation.

lxxxii. *See* 11 U.S.C. § 507(a)(1).

lxxxiii. NRS 125B.140(2)(c)(1).

lxxxiv. NRS 99.040.

lxxxv. *See, e.g.*, Brian M. Boone, Valuation of Goodwill in Professional Practices and "Double Dipping" With Spousal Support, 22 Nev. Fam. L.R. at 6 (Summer 2009).