

LAW RELATING TO MHPs

I. Law Relating to MHPs, and Interactions with the Court system

A. *Purpose* of appointment

1. The “encouragement” of dispute resolution through nonadversarial means (NRS 3.225).

B. “Special Masters”

- a. NRS 3.405 (paternity and child support)
- b. EDCR 1.40 (child support masters); EDCR 1.42 (UPA masters); EDCR 144 (civil commitments); EDCR 1.46 (Juvenile masters)
- c. NRCP 53 – pretty much everyone else
 - (1) Quasi-judicial immunity
 - (a) *Duff v. Lewis*, 114 Nev. 564, 958 P.2d 82 (1998): psychologist was "entitled to absolute quasi-judicial immunity from Duff's suit because `(1) at least to some extent, his evaluations and recommendations aided the trial court in determining child custody, and (2) his services were performed pursuant to a court order."
 - (2) Quasi-judicial responsibility; “order of reference”
 - (3) Grounds for objection
 - (4) Powers; witnesses by party subpoena; other
 - (5) Reports
 - (a) Can’t withhold for non-payment
 - (b) Findings of fact vs. other conclusions
 - (c) Must be served on all parties unless otherwise specified in order of reference
- d. Proposed Forms

(1) Stipulation and Order

(2) PC Report, Recommendations and Order

- C. Absolute requirement of adherence to court orders; enforcement vs. second-guessing; subordination of authority to judge; the ability to *recommend* is *not* the authority to require.
- D. Limits of delegation per federal and State law; *Van Schaik* illustration
- E. Priority of safety overrides; see *Mack-Manley* (“notwithstanding *Huneycutt*, the district court always has jurisdiction “to make short-term, temporary adjustments to the parties’ custody arrangement, on an emergency basis to protect and safeguard a child’s welfare and security”).
- F. Masters, Parenting Coordinators, and Related MHPs Limits
 - 1. EDCR 5.12 – no examination of child for purposes of report absent stipulation or order
 - 2. EDCR 5.13 – Child interview/outsourced evaluation reports
 - a. Who can read them
 - b. Who can keep them
 - c. Who can copy them
 - d. File them?
 - e. Exhibits to reports
 - 3. Limits on role – APA, ABA, AAML, and other guidelines
 - a. Advising
 - b. Providing therapy
 - c. Exceeding scope of appointment (financial and other issues)
 - d. Potential liability; limits of quasi-judicial immunity
 - e. Mandatory reporting and its limits

(1) NRS 432B.220 (amended 1/1/12)

4. Details of form appointment order; alternatives
 - a. Prior model order
 - b. Problems identified with prior model
 - c. Revised proposed model
5. Potential personal financial responsibility for failure to warn of/prevent danger to vulnerable persons

G. Outsourced evaluators

1. Incompatibility of evaluative and therapeutic functions
2. Recommendations – Yes? No? Maybe?
3. Documentation and maintenance of notes, source documents, etc.
4. Admissibility and use of evaluation and reports
 - a. Nationally: FRE 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) & *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).
 - (1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
 - (2) *Daubert* is even more restrictive: minimum standards for scientific legitimacy of a practice or procedure: (1) “whether a theory or technique . . . can be (and has been) tested”; (2) “whether the theory or technique has been subjected to peer review and publication”; (3) “the known or potential rate of error”; and (4) general acceptance in the scientific

community. *Daubert*, 509 U.S. at 593-594.

- b. Nevada: NRS 50.275, *Hallmark v. Eldridge*, 124 Nev. 492, ___, 189 P.3d 646 (2008) & *Higgs v. State*, 126 Nev. ___, 222 P.3d 648 (Nev. Adv. Opn. No. 1, Jan. 14, 2010) (adopting *Frye*, and referencing *Daubert*)
 - (1) NRS 50.275: If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.
 - (2) *Hallmark*: five factors to judge reliability of a methodology, instructing the district court to consider whether the proffered opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization.
 - (3) *Higgs*: “to the extent that *Daubert* espouses a flexible approach to the admissibility of expert witness testimony, this court has held it is persuasive. . . . But, to the extent that courts have construed *Daubert* as a standard that requires mechanical application of its factors, we decline to adopt it. We see no reason to limit the factors that trial judges in Nevada may consider when determining expert witness testimony admissibility.
 - (4) three overarching requirements for admissibility of expert witness testimony pursuant to NRS 50.275: (1) qualification, (2) assistance, and (3) limited scope requirements.
- c. Lots of attention, CLEs, articles, and suggestions for rigorous cross-examination of any expert purporting to make a custodial evaluation without solid foundation in established scientific methods.

H. Miscellaneous Issues relating to MHP interactions with the Court system

- 1. Process and procedure of recommendations
- 2. Objections; how, how long, and possible outcomes

I. Communications

1. With the Court

a. Meaning of *ex parte* communications

b. From *In re Fine*, 116 Nev. 1001, 13 P.3d 400 (Nev. 2000):

(1) Canon 3B(7) expressly provides that "[a] judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding."

(2) Any *ex parte* communications with court-appointed experts should be limited to procedural or administrative matters. Matters involving the merits or substance of a case must not be discussed outside the presence of the parties. Moreover, the content of procedural or administrative communications should be promptly documented and forwarded to the parties so as to afford them an opportunity to respond to the court's actions.

(3) The fact that an actor may have acted with the best of intentions does not relieve the actor of liability.

2. With represented parties

3. With unrepresented parties

4. With counsel

5. With third parties

J. Testimony and formal reports

K. Is "reunification therapy" or other such tasks *Daubert*-allowed (reliability/validity/peer consensus)?

1. Qualifications/certification?

2. Availability of materials for counsel vetting and approval.

L. **All** base documentation, work product, work notes, etc., to be preserved for discovery

and cross-examination; the concept of spoliation.

List of Exhibits:

1. NRS 3.225
2. NRS 3.405
3. NRCP 53
4. Stipulation and Order
5. PC Report, Recommendations and Order
6. Brett Turner: Referring Disputed Custody Issues to Guardians or other third parties
7. *Mack-Manley*
8. EDCR 5.12
9. EDCR 5.13
10. Prior model order
11. Problems identified with prior model
12. Revised proposed model
13. “Shrinks Gone Wild IP” (legal note No. 51)
14. *Higgs*
15. Titles and contents of CLEs on MPH custody evaluator cross-examination
16. NRS 432B.220