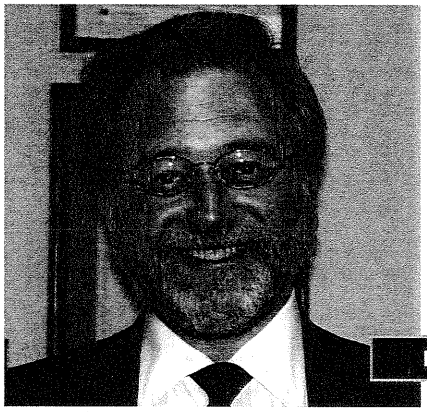

IN SEARCH OF A COHERENT THEORETICAL MODEL FOR ALIMONY

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Alimony has been described as "the last great crapshoot in family law." More specifically, both legislative and judicial guidance on the topic are so vague as to be largely useless in predicting, or negotiating, actual cases. This, in turn, increases both the costs and uncertainties of all litigation touching on the subject. This article discusses a bit about where we have been on this topic, what has been tried, and suggests the apparent root of the problem, and where we might go from here.

I. UNDERLYING STATUTES

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. 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.

In 1989, the Nevada Legislature added NRS 125.150(8), 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." This provision did add some language indicating what such an award would encompass, and at least two factors to consider in making such an award (whether the obligor obtained job skills or education during the marriage, and whether the recipient provided financial support while the obligor did so).

In 1993, the Legislature resolved the potential conflict between the concept of a no-fault divorce on the one hand, and the consideration of marital misconduct on the other, when determining an award of alimony, by deleting the phrase "having regard to the respective merits of the parties" from NRS 125.150(1).

II. BASIC CASE LAW

The Nevada Supreme Court has struggled with alimony cases since such cases have been decided; even the case lines developed since the "no fault" era began half a century ago have been inconsistent and unpredictable, in both approach and results.

For example, in a single year the court issued back-to-back decisions; in one, it remanded to the District Court, stating that it was the function of the trial court to weigh the particular equities and make a specific award – and in the other, the court issued a specific dollar sum award for a specific length of time. See *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994) (remanding for entry of a"just and equitable" award); *Gardner v. Gardner*, 110 Nev. 1053, 881 P.2d 645 (1994) (extending alimony by 10 years at $1,000 per month).

Even the court's list of general "factors to be considered" has varied wildly and without explanation. For many years, the court referenced a list of factors it posited in *Buchanan v. Buchanan*, 90 Nev. 209, 523 P.2d 1 (1974), periodically reversing decisions when it perceived a failure of a district court to "adequately consider" those factors. See *Forrest v. Forrest*, 99 Nev. 602, 606, 668 P.2d 275, 278 (1983).

By 1992, however, the court referenced that list as "useful but inexhaustive," *Rutar v. Rutar*, 108 Nev. 203, 827 P.2d 829 (1992), and two years later supplanted it entirely with a different list of partially coextensive factors laid out in *Sprenger*. After six years of repeated references to that latter list, the court reasserted and expanded the 1974 *Buchanan* factors list without even mentioning the factors or analysis of *Sprenger*, in *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000). The court gave no hint as to whether or not the Sprenger factors should be considered outdated, or allowed to continue to stand as an alternative analysis.

And the "factors" – as set out in either *Sprenger* or *Buchanan/Rodriguez* – are of decidedly little assistance in quantifying an alimony award appropriate in any particular case, stating only that courts should "consider" such things as "the financial condition of the parties," "the nature and value of the parties' respective property," "the duration of the marriage," and the parties' "income and earning capacity."

III. WHY LACK OF PREDICTABILITY IS A PROBLEM

In *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998), the Nevada Supreme Court decried the Legislature's failure to set forth an "objective standard" for determining the appropriate amount of alimony, stating that "absent such a standard, there appears to be a disparity in the awards for spousal support on similar facts even greater than for child support." The Legislature has ignored the invitation to provide such a standard for a decade, and the Court itself has done little to solve the problems with consistency and predictability that it noted.

The Family Law Section of the State Bar of Nevada appointed a working group to try to create such an "objective standard," to be used as a starting point and "reality check" for divorce courts by means of a formula giving weight to each of the factors set out in the court's prior cases.

Proponents asserted that there was a value to establishing some level of consistency between cases and departments, and predictability in any given case, because litigation of the "What the heck, give it a try" variety could be reduced – on both sides – if there was some kind of objective methodology for establishing a presumptive spousal support award that could then be varied (up or down) in accordance with the particular facts of the case. Critics protested that any such approach "eliminates judicial independence" or "hinders good lawyering" – the same sort of complaints that were heard when the concept of child support guidelines were first proposed.

The proposed weighted formula known as the "Tonopah Formula" dates to 1997; the Family Law Section voted to ask district courts throughout the state to try actually running calculations under the formula, in parallel with their subjective determinations of alimony in real cases, so that the data could be reviewed a few years later to determine the utility of that formulaic approach. Apparently, the follow-up was never done, and partisans on both sides of the debate have remained staunchly for or against a formulaic alimony analysis focused on the Tonopah formula model.

IV. A PROPOSED ANALYTIC FRAMEWORK

This article is not designed, however, to re-start or even weigh in on that debate, but to question the validity of trying to mathematically model case law that is inconsistent and incomplete. The reason alimony is "the last great crapshoot in family law" appears to be because it is a category of remedy without any substantive underlying theoretical rationale.

A review of alimony statutes and cases from around the country show that most states have statutory or case authority setting up either a list of economic or behavioral factors (including or excluding questions of "fault"), or an attempt to give trial courts general guidance on how to balance an obligee's "need" with an obligor's "ability to pay." The factor lists in *Sprenger* and *Rodriguez* and the Tonopah formula, intended to model the existing case law, all fit into that category.

Both the public policy objectives being pursued and the legal framework designed to realize them remain difficult to discern and explain. Nevada is hardly unique – the American Law Institute's Principles of the Law of Family Dissolution has noted that the current law of alimony, nationally, has "no coherent rationale," and that alimony continues to be a "residual category," defined as a negative – i.e., a financial award that is neither child support nor a division of property.

In an effort to move the alimony analysis toward predictability and consistency, the ALI has suggested recasting the question of alimony as one of "loss occasioned by dissolution" rather than one of the "need" of the former spouse. Changing focus from "need" to "loss" makes the question one of entitlement rather than a subjective plea for assistance; this seems positive, but inadequate.

Whether approached from a "loss" or "need and ability" basis, most alimony frameworks try to take into consideration the concept of the "career asset." The term is shorthand for the common scenario in which only one career or other primary source of income has been developed by the efforts of both spouses during the marriage.

Most alimony analyses give no significant weight to the natural talent or primary education of the working spouse (definitionally "separate property" components to any career success), focusing instead on the education, training, and even business experience achieved during marriage to determine whether there is a legitimate spousal interest in the career asset of the employed spouse. This leads to the conclusion that there is a marital component to the "career asset" of the working spouse in any marriage of significant length.

The tangible products of that career asset over time are spun off as "hard" assets – cash that can be saved, invested, or used for the purchase of tangible goods, or income deferred as divisible retirement benefits. But the remaining intangible potential for further production is not usually quantified in any overt way, other than by determining if the worker's business is a "going concern," or whether or not a professional remains in practice.

It might make sense to try to analyze the career asset more formally. The components combining

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to create income – from natural ability to education to experience – could be weighted and attributed as separate or marital contributions to the future income stream. Then the reasonable expectation of length of future receipt could be projected, based on standards in the field, and any factors individual to the case.

For example, a 59-year-old airline pilot has an effective work life of just one year, as a matter of federal regulation. While such a person is not foreclosed from other work, even in the same industry (say, as a flight instructor), it would not be appropriate, no matter the length of the marriage, to create a permanent or long-term alimony award based on a career asset which has been almost completely converted at the time of divorce from potential income to realized income.

It seems reasonable that an order establishing alimony could be couched as terminating or reducing at the date predicted for work to cease (and alimony payable to be adjusted accordingly), with the burden being explicitly placed on one side or the other to file a motion if the expectation was for some reason not fulfilled.

A divorce decree calling for future reduction or termination of alimony may seem harsh to the obligee, whose needs presumably will not decrease. But property division schemes everywhere increasingly resemble the community property scheme of dividing, usually equally, that which was created during the marriage, and most states (including Nevada) have eliminated "fault" analyses in favor of straight economic criteria for if and how much alimony should be awarded.

By treating the "career asset" as just one more thing to divide, alimony can be analyzed almost as readily as property. Looked at this way, any alimony award outliving the income stream thrown off by the career would not be compensatory to the former spouse, but a transfer of wealth from one party's separate property to that of the other. Where the property accrued during the marriage is divided, presumably equally, alimony awards reaching beyond the exhaustion of the career asset can be seen as unfair.

For example, in a post-retirement case, the parties would have already completed the transformation of the career asset into assets and investments – large or small. If those assets and investments are equally divided, no alimony award would appear proper, since the parties would have precisely equal resources for self-support.

A "career asset" focus of alimony analysis creates a dynamic, not static, factor, which dissipates over time as ability, effort, and education/training are converted into assets, and potential income is transformed into realized income. The career asset declines in value with age and reaches zero upon bona fide retirement. There are ramifications of such an analysis on modification motions, but they are beyond the scope of this article.

In altogether too many decisions – in Nevada and elsewhere – courts appear to simply decide what is "fair," and then set about constructing rationalizations in support of the conclusion already reached. This may be an artifact of the lack of a coherent theoretical model for either the original award of alimony or its modification once awarded.

In the modern world, pensions are typically divided between spouses to the degree accrued during the marriage. Alimony might be seen, in part, truly as "maintenance" – stopgap payments by the employee spouse to the non-employee spouse to provide the ability to live long enough for the deferred compensation portion of the career asset to enter pay status.

Conceptualized this way, alimony becomes merely a means of preventing too gross a disparity in the available incomes of the parties until the career asset is completely converted from potential to realized income, and the parties are returned to parity as they each begin to receive their half of the marital portion of that asset.

Anecdotal accounts suggest that this basic approach has been stumbled upon, if not clearly enunciated; in long-term marriages, the trial court sometimes effectively pools the current income of a working spouse and the retirement income of a spouse who has retired, until both achieve retirement age, at which time each receives his or her time-share rule of all retirement benefits earned during marriage. This achieves, by design, the result of the cases where the payor spouse moves for alimony termination upon retirement – without the additional litigation of the modification motion.

V. CONCLUSION

The lack of a theoretical framework plagues all efforts to achieve predictability and consistency in alimony cases, since it is hard to formalize a process when it is uncertain exactly where it is intended to go. A multitude of "factors" of varying degrees of objective and subjective verifiability are not really helpful to counsel seeking to predict the outcome of litigation. This, of course, increases the chances of such litigation going forward instead of being settled or avoided.

The analytical messiness and lack of predictability and consistency among cases indicates a lack of definitional agreement about what alimony is, and should be, and what role retirement plays in divorce. Perhaps a focus on the realization of a career asset over time would allow for creation of the "objective standard" the Nevada Supreme Court called for in Wright, to the advantage of litigants on both sides of possible alimony cases. NL