I. SEPARATE MAINTENANCE

A proceeding for separate maintenance, commonly referred to in Nevada as a "legal separation," is an action used to determine the temporary possession of real and personal property between spouses, along with their financial responsibilities to one another, and either temporary or permanent custody, visitation, and support of any minor children, without dissolving the marriage. Generally, any subject that may be addressed in a decree of divorce may be addressed in a decree of separate maintenance, except that the marital status continues to exist.

The original enactment dates to 1913 and was intended to allow courts to order support of deserted spouses without requiring divorce. In modern practice, the most common reasons for seeking separate maintenance is to avoid a religious prohibition of divorce, a loss of military or other spousal benefits, or a loss of medical insurance. In 1987, an entirely different statute was enacted permitting divisions of "income and resources" where one spouse is institutionalized.

A. SUBJECT MATTER AND PERSONAL JURISDICTION

1. Statutes and Court Rules

Pursuant to NRS 125.190, a person may maintain an action for separate maintenance – without applying for a divorce – for any of the three grounds for divorce, or one additional unique ground, listed last below:

1. Insanity existing for two years prior to commencement of the action;

2. Separation for one year or longer without cohabitation;

3. Incompatibility; or

4. Desertion by a spouse for a period of at least 90 days.

Pursuant to NRS 125.250, the action may be brought:

1. In the county in which either party resides; or

2. In the county in which the spouse may be found.

2. Cases

The purpose of the special filing direction was to permit a wife to sue her husband for support either in the county where she remained, or the county to which he moved after deserting her. *Hilton v. Second Judicial Dist. Court*, 43 Nev. 128, 135, 183 P. 317, 319-20 (1919).

3. Discussion

At the time of the *Hilton* decision, the requisite residency time for filing for divorce was six months. The statute was specifically designed to permit filing a separate maintenance action after desertion of 90 days to shorten the time when such an deserted spouse could get relief in court. 43 Nev. at 136, 183 P. at 320. In the years since then, of course, the period of residency has been shortened to six weeks (42 days).

The purpose of enactment of the separate maintenance statutes was remedial, so that deserted wives could "enforce the performance of a duty" [for men to support their families] relatively quickly, and without requiring them to "resort" to actions for divorce, upon proof of "the marriage relation, her needs, and the ability of her husband." 43 Nev. at 134-35, 183 P. at 318-19.

4. Local Rules

There are no local rules specifically applicable to subject matter or personal jurisdiction in a separate maintenance action.

B. AVAILABLE RELIEF AND PROCEDURE

1. Statutes and Court Rules

NRS 125.190 describes a separate maintenance action as one for "permanent support and maintenance of himself and their children." NRS 125.200(1) permits a court to order either spouse to pay "any money necessary for the prosecution of the action and for the support and maintenance of the other spouse and their children." NRS 125.200(2) appears to bar orders for payment of maintenance and support of the other spouse, but not of the children or money for prosecution of the action, if barred by an enforceable premarital agreement.

NRS 125.210(1) enumerates the specific authority of the court to:

(a) Assign and decree to either spouse the possession of any real or personal property of the other spouse;
(b) Order or decree the payment of a fixed sum of money for the support of the other spouse and their children;
(c) Provide that the payment of that money be secured upon real estate or other security, or make any other suitable provision; and
(d) Determine the time and manner in which the payments must be made.

NRS 125.210(2) appears to bar orders assigning and decreeing to either spouse the possession of any real or personal property of the other, or ordering a spouse to pay a fixed sum of money for the support of the other, if barred by an enforceable premarital agreement. Again, the children are not mentioned in the exceptions listed in NRS 125.210(2).

NRS 125.220 permits the recordation of notices of *lis pendens* and the issuance of injunctions prohibiting the "disposing of any property during the pendency of the action." NRS 125.230 permits entry of "preliminary and final orders" relating to child custody and support.

Pursuant to NRS 125.250, the "proceedings and practice" in an action for separate maintenance must be the same "as nearly as may be" to those in divorce actions.

Under NRS 125A.330, visitation of a child with grandparents can be granted, if in the child's best interest, in an order of separate maintenance.

2. Cases

A cause of action for separate maintenance exists independently of a cause of action for divorce; accordingly, an action for separate maintenance may be brought by one spouse against the other without applying for a divorce. *See Carroll v. Carroll*, 51 Nev. 62, 66, 268 P. 771 (1928); *Vickers v. Vickers*, 45 Nev. 274, 279, 199 P. 76, 77 (1921); *Hilton v. Second Judicial Dist. Court*, 43 Nev. 128, 134, 183 P. 317, 318 (1919).

A cause of action for separate maintenance may also be pled as a cross-complaint, by a spouse who is served with a divorce complaint. *See Metcalf v. Second Judicial Dist. Court*, 51 Nev. 253, 263, 274 P. 5, 7 (1929); *Hilton*, 43 Nev. at 134, 183 P. at 317; *Carroll*, 51 Nev. at 62, 268 P. at 772. A cross-complaint for monies due under a separate maintenance decree is not, however, proper in a divorce action. *Lemp v. Lemp*, 62 Nev. 91, 100, 141 P.2d 212, 216 (1943).

In *Summers v. District Court*, 68 Nev. 99, 227 P.2d 201 (1951), the Nevada Supreme Court held that statutes relative to divorce may be applied to separate maintenance actions; included in the range of possible orders is an injunction preventing a spouse who is trying to avoid support payments from leaving the state. 68 Nev. at 104, 227 P.2d at 204.

In *Pearson v. Pearson*, 77 Nev. 76, 82, 359 P.2d 386, 389 (1961), the Nevada Supreme Court held that a wife, in her cross-claim for separate maintenance against her husband, could not seek recovery of sums expended by her for past support of either herself or of the minor children of the parties, whether or not she would be entitled to entertain an independent action therefor.

Bopp v. Lino, 110 Nev. 1246, 885 P.2d 559 (1994) noted the availability of a grandparental visitation order in a decree of separate maintenance, among the other places it might be ordered.

An order granting or denying preliminary relief to a party during the pendency of proceedings for separate maintenance is not appealable, just as such a preliminary order would not be appealable in a divorce action. *See Engebretson v. Engebretson*, 73 Nev. 19, 21, 311 P.2d 412, 412 (1957); *see also Allis v. Allis*, 81 Nev. 653, 657, 408 P.2d 916, 918 (1965); *Levinson v. Levinson*, 74 Nev. 160, 162, 325 P.2d 771, 772 (1958); *Katleman v. Katleman*, 74 Nev. 141, 142, 325 P.2d 420, 420 (1958).

3. Discussion

The discussion in *Hilton* suggests that the place-of-filing rule is not a jurisdictional prerequisite, but only a venue provision. This could lead to the conclusion that there is no residency requirement to a separate maintenance action at all, but the opinion also addresses use of the word "residence" as that term would be used to allow access to courts in regular "civil actions." The

statutory direction to make "proceedings and practice . . . the same, as nearly may be, as those provided in actions for divorce" appears intended to make the rules governing divorce apply unless some specific alteration is suggested by the separate maintenance statutes. Especially now that the residency term for divorce action is as short as it is, the safer course would be to have six weeks residency before suing for either divorce or for separate maintenance.

It is possible to read the separate maintenance statutes to restrict venue in such actions more so than in divorce cases, since a divorce action may also be brought in the county in which the cause accrued, in the county in which the parties last cohabited, or in any county if plaintiff resided six weeks in the state before suit was brought. *See* NRS 125.250; NRS 125.020. Again, however, the statutory direction to conform to divorce practice, and the direction in *Hilton* that the statute, being remedial, is to be liberally construed, 43 Nev. at 135, 183 P. at 319, would appear to belie any such intended restriction.

The elimination of fault grounds and other limitations now make it likely that when cross-actions for separate maintenance and divorce are filed, it is the latter that will be ordered. In modern practice, an action for separate maintenance is often met with a countercomplaint for divorce, so it would appear prudent to counsel a client to anticipate such a result.

The 1961 prohibition in *Pearson* against seeking retroactive support in a separate maintenance action included the caveat that the holding was not concerned with whether or not the wife was entitled to file an independent action for such support. The Court did not discuss the statute, first passed in 1923, and now codified at NRS 125B.030, permitting recovery of up to four years back child support if the parents are separated and one party has provided for the children. *See, e.g.*, *Cuisenaire v. Mason*, 122 Nev. ___, 128 P.3d 446 (Adv. Opn. No. 6, Feb. 9, 2006).

In light of the explicit discussion in the statute of "separation" as a ground for recovery of pre-application child support, that aspect of the *Pearson* holding seems to be of questionable continuing vitality, since it would seem to serve no valid public policy to require the spouse supporting the children to file for divorce, rather than separate maintenance, to recover a contribution for support of the parties' children.

Substantively, while the terminology is different from that contained in the divorce statutes, the separate maintenance statutes appear to authorize district courts to grant to a party relief in the same subject areas that are addressed upon divorce, including child custody, child support, spousal support, alimony, property division, and attorney's fees and costs.

The separate maintenance statutes are both more vague and more redundant than those governing divorce. For example, orders may clearly be temporary in nature, but the phrase "permanent support" is used in NRS 125.190. And there does not seem to be any real reason for providing authority to make child support orders in four separate sections (NRS 125.190, 125.200(1), 125.210(1)(b), and 125.230(1)). Additionally, the particulars of what might be ordered are apparently different in separate maintenance actions than in divorce actions, at least as to property.

Nevada's formal community property scheme came into existence through the Statutes of 1873, and had been in effect for some 40 years when the separate maintenance statutes were passed in 1913. It is therefore unclear why no mention is made of community property or any joint tenancy property, but only (in NRS 125.210(1)(a)) of the power of the court to "assign and decree to either spouse the possession of any real or personal property of the other spouse," which on its face would appear to reference each spouse's separate property. Still, each spouse owns an undivided one-half interest in all community property pursuant to NRS 123.225 (although that statute dates to only 1959), so interpreting the statute as including authority for the district court to make orders concerning community or joint tenancy property, as well as separate property, seems reasonable.

Additionally, the separate maintenance statutes are framed, not in terms of ***ownership*** of property, but in terms of its "possession." In combination with the provisions (discussed below) making such separate maintenance orders and decrees modifiable at any time, and automatically terminable at death, the scope of authority granted to district courts in such actions seems to contemplate only temporary, changeable orders as to property.

Providing only for possession, rather than ownership of property by way of a separate maintenance decree seems contradictory to the allowance in NRS 123.220(2) that property could be defined as ***not*** community property by way of a decree of separate maintenance. While the statute dates to 1873, the "separate maintenance" notation was only added in 1975, during the make-over of Nevada's community property laws in the wake of the Equal Rights Amendment proposal, to make husbands and wives joint managers of community property, and eliminate gender-specific language. Apparently, there was no action to conform the separate maintenance provisions at the time NRS 123.220 was changed, and there is no legislative history showing the reason for the change.

It seems likely that no one checked the separate maintenance statutes, and it was simply assumed that they included the power to declare parties to be owners, rather than mere "possessors," of property. Irrespective of intent, as of 1975, NRS 123.220(2) has given courts the ability to declare, by way of decree of separate maintenance, that property acquired (presumably after the date of the decree) is the separate property of the party acquiring it. This is the construction given to the provision by the Nevada Supreme Court, without significant history or analysis, in *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983), where the Nevada Supreme Court deemed earnings acquired after the parties separated, but before divorce, to be community property because:

> despite the fact that since the time of separation both parties were represented by counsel, no written agreement or authorization between the parties was entered into, nor was a decree of separate maintenance obtained. In such a case, the statutes clearly mandate that all property acquired by the parties until the formal dissolution of the marriage is community property.

Id., 99 Nev. at 607, 668 P.2d at 279.

As discussed in the next section, there is some doubt as to the effect of such a decree if one of the parties dies before divorce, but it seems that during life, anyway, a decree of separate maintenance permits the earning spouse to treat all such earnings as separate property.

Since the statutes applicable to divorce may be applied, practitioners should consult NRS 125.010 through NRS 125.185 regarding divorce; NRS 125.450 through NRS 125.520 and NRS 125A and NRS 125C regarding custody of children; and NRS 125B and NRS 130 regarding child support.

4. Local Rules

Any local rule applicable in a divorce action would apparently also be applicable in a separate maintenance action.

C. ENFORCEMENT, MODIFICATION, LIMITATIONS, AND TERMINATION

1. Statutes and Court Rules

If one spouse is ordered to pay support to the other, or for the children, accrued support installments may not be retroactively modified, except by stipulation, under NRS 125.270. Arrearages of any sum of money owed in a separate maintenance action "may be enforced by the court by such order as it deems necessary," pursuant to NRS 125.240. That statute further provides that the court may appoint a receiver, require security, issue execution, sell real or personal property, and punish disobedience of any order as a contempt. NRS 125.280 also provides for execution against any money judgment, and states that the court may enter a judgment for arrears together with costs ("not to exceed $10") and attorney's fees.

Pursuant to NRS 125.210(3), the court has continuing jurisdiction to "change, modify or revoke its orders and decrees from time to time." This power is apparently unrestricted, no matter the degree to which the order being changed, modified, or revoked purported to be a "permanent" order under NRS 125.190.

NRS 123.220(2), however (in the Chapter of the NRS governing "rights of husband and wife"), states that all property acquired after marriage by husband or wife, or both, is community property unless otherwise provided by "a decree of separate maintenance issued by a court of competent jurisdiction."

Pursuant to NRS 125.210(4), "no order or decree" in a separate maintenance action is "effective beyond the joint lives" of the parties.

2. Cases

In *Lemp*, *supra*, 62 Nev. at 95, 141 P.2d at 214, the Nevada Supreme Court upheld a district court determination that the Nevada courts lack jurisdiction to make any order which would affect, supersede, or set aside any rights under a decree of separate maintenance obtained in another state. In *Summers v. District Court*, *supra*, 68 Nev. at 107, 227 P.2d at 205, the Court held that, notwithstanding the inability of a Nevada court to modify a separate maintenance order of another state, it has jurisdiction to enforce, including by use of execution and even contempt powers, the separate maintenance decree of a foreign jurisdiction that has been domesticated.

In *Summers v. Summers*, 69 Nev. 83, 241 P.2d 1097 (1952) (involving the same parties and dispute in the 1951 case of *Summers v. District Court*, *supra*), the Nevada Supreme Court carefully explained that in Nevada, the issuance of a divorce decree would extinguish all orders from an earlier separate maintenance decree between the same parties. 69 Nev. at 92, 241 P.2d at 1101; *see also Herrick v. Herrick*, 55 Nev. 59, 68, 25 P.2d 378, 380 (1933); *Carroll v. Carroll*, 51 Nev. 62, 66-67, 268 P. 771, 771-72 (1928).

Reviewing cases from around the country, the 1952 *Summers* court found that the rule as followed here was pretty widely recognized. Under the full faith and credit doctrine, however, and the rule of divisible divorce as recognized by the United States Supreme Court in *Estin v. Estin*, 334 U.S. 541, 545-46 (1948), the Court held that if the state issuing a separate maintenance decree would not terminate the orders contained in it if informed of a Nevada divorce, then Nevada was obliged to continue recognizing and enforcing the terms of the earlier separate maintenance decree as well.

So, there may be a general rule that a separate maintenance decree terminates once there is a divorce action, based on the reasoning that once a decree of divorce is obtained, the dissolution of the marriage relation extinguishes the subject matter which forms the basis of the claim for separate maintenance. *See Summers v. Summers*, 69 Nev. 83, 92, 241 P.2d 1097, 1101 (1952); *Herrick v. Herrick*, 55 Nev. 59, 68, 25 P.2d 378, 380 (1933); *Carroll v. Carroll*, 51 Nev. 62, 66-67, 268 P. 771, 771-72 (1928).

Nevertheless, under choice of law rules, a foreign separate maintenance decree may survive a subsequent Nevada divorce decree if the foreign jurisdiction holds that separate maintenance survives divorce, and the foreign jurisdiction has made its judgment with personal jurisdiction of the parties. Nevada must give full faith and credit to the foreign separate maintenance decree while the foreign jurisdiction must give full faith and credit to the subsequent Nevada divorce which terminates the marital relationship. *See Estin v. Estin*, *supra*; *Farnham v. Farnham*, 80 Nev. 180, 181, 391 P.2d 26, 26 (1964); *Summers v. Summers*, 69 Nev. at 88-89, 241 P.2d at 1099-1100; *see also Lagemann v. Lagemann*, 65 Nev. 373, 383-84, 196 P.2d 1018, 1023 (1948); *George v. George*, 56 Nev. 12, 18, 41 P.2d 1059, 1060 (1935).

Likewise, Nevada must give full faith and credit to ***findings*** made by a foreign court in a separate maintenance action where there was personal jurisdiction over the parties. *Clark v. Clark*, 80 Nev. 52, 58, 389 P.2d 69,72 (1964); *Koch v. Koch*, 62 Nev. 399, 401-02, 152 P.2d 430, 430-31 (1944); *Silverman v. Silverman*, 52 Nev. 152, 167, 283 P. 593, 597 (1930); *Vickers*, *supra*, 45 Nev. at 279, 199 P. at 77.

If the state issuing the separate maintenance award ***did*** have jurisdiction over both parties, and the Nevada court issuing a divorce did ***not*** have jurisdiction over both parties, the Nevada court could not terminate a support order granted by that other state, and an order or decree purporting to do so is void. *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

3. Discussion

Presumably, if there ***was*** personal jurisdiction over both parties in a later Nevada divorce action, an earlier separate maintenance order from some other jurisdiction could be terminated, either directly or by domesticating the resulting Nevada divorce decree in the state issuing the earlier separate maintenance decree. *See Lagemann, supra* (where Illinois resident wife appeared in Nevada action and fully defended, terms of Illinois separate maintenance decree were irrelevant to issued orders, and *Estin* doctrine was irrelevant).

The phrasing of NRS 125.210(3) would appear to make it impossible to make any order entered in a separate maintenance action unmodifiable. The structure of the statutory provisions appears to contemplate essentially temporary, changeable orders.

Accordingly, it is unclear whether parties who intend to terminate all potential future litigation, by making a final disposition of all assets, debts, and obligations to one another, can do so through a separate maintenance action. Since procedures are to be "as nearly as may be" to divorce procedures, it is an open question whether a property settlement agreement could be entered, unmerged, and thus "permanent" and unmodifiable as to its contents as a matter of contract to be recognized in a later divorce action.

The NRS 125.210(4) limitation by which no order in a separate maintenance action is effective beyond the joint lives of the parties is difficult to reconcile with NRS 125B.130, which allows the court to hold a parent's estate liable for child support. Both statutes are derived from much older statutes and court rules, and both have been amended in the past several years, at which time the legislature could have resolved the conflict if it had been noticed. Public policy would probably lean toward resolving the question in favor of finding jurisdiction to hold a parent's estate liable for child support, but the matter has never been addressed in a published opinion.

As to spousal support obligations, the limitation seems clearer, and any such orders presumably end upon death. Greater latitude is permitted a court entering an order in a divorce action, where alimony payments must cease upon the death of either party "unless otherwise ordered" by the court. *See* NRS 125.150(5). Accordingly, it appears that the district court has jurisdiction to enter orders effective beyond the death of a party in a divorce action, but not in a separate maintenance action.

It is unclear whether property divisions made in a separate maintenance decree disappear upon the death of a party, since the statute speaks of "possession" and not ownership, and since subsection four expressly terminates the effectiveness of all such orders at death. It is unclear precisely what happens to such property; presumably, it reverts to "normal" community property, irrespective of which spouse had possession of it or why, and is subject to whatever law provides for disposition of community property upon the death of a spouse.

Presuming that a separate maintenance decree ordered all post-decree income of one or both parties to be separate property after the date of the decree under NRS 123.220, yet another statutory conflict is created if one of the parties dies before divorce. Under NRS 125.210(4), the order declaring that income separate property ceases to be "effective" at the moment of death, but both separate property, and the "rents, issue and profits" of such separate property, are the separate

property of the owing party under NRS 123.130. No Nevada authority reconciles the conflict between these two provisions, one of which would apparently characterize all such income as the earning spouse's separate property, and the other of which would make it community property.

The provisions of a separate maintenance order or decree may be terminable not only by the issuing court, or by a divorce court, or at death, but even by the lifetime, post-decree, out-of-court actions of the parties. While there does not appear to be any Nevada authority, a number of jurisdictions have held that a reconciliation or resumed cohabitation of the parties to a decree of separate maintenance abrogates the decree automatically and entirely. *See* 24 Am. Jur. 2d DIVORCE & SEPARATION § 409 at 572 (1998); Annotation, *Reconciliation as Affecting Decree for Limited Divorce, Separation, Alimony, Separate Maintenance, or Spousal Support*, 36 ALR 4th 512 (1985 & Supp. 2002); *People v. Howard*, 686 P.2d 644 (Cal. 1984); *In re Marriage of Modnick*, 33 Cal.3d 897, 911 (1983) ("reconciliation restores each spouse to his or her full marital rights"); *Glasen v. Glasen*, 13 P.3d 719 (Alaska 2000) (decree of separation is interlocutory order, and "it is well recognized that a legal separation decree ordinarily terminates if the parties become reconciled and resume cohabitation").

4. Local Rules

Any local rule applicable in a divorce action would also be applicable in a separate maintenance action, including the requirement to file financial information when seeking monetary relief. *See* FJDCR 15(12), WDCR 40, 4JDCR 6(3), SJDCR 9, EDCR 5.32, and NJDCR 25.

D. EFFECT OF SEPARATE MAINTENANCE ON SUBSEQUENT DIVORCE ACTION

1. Statutes and Court Rules

Nevada does not have a specific statute concerning the effect of a separate maintenance decree on a subsequent divorce action.

2. Cases

A separate maintenance decree does not bar a party from bringing a subsequent action for divorce. *See Clark v. Clark*, 80 Nev. 52, 59, 389 P.2d 69,73 (1964); *Lagemann v. Lagemann*, 65 Nev. 373, 380, 196 P.2d 1018, 1021 (1948).

Back in the days of fault-based divorce, a decree of separate maintenance from elsewhere containing findings relating to fault could operate as a bar to a Nevada divorce action premised on the ground of abandonment. *Pease v. Pease*, 47 Nev. 124, 128-29, 217 P. 239, 240 (1923). Such a foreign separate maintenance decree, however, does not bar a collection action for nonsupport where the party may be in default of the payment provisions of the separate maintenance decree. *Ex parte Filtzer*, 60 Nev. 109, 111-12, 100 P.2d 942, 943 (1940).

3. Discussion

Presuming that a separate maintenance decree purports to dispose of any issues of child custody, visitation, support, spousal support, or division of property or debts, it would appear that all such orders may be revisited in a subsequent divorce action.

Presumably, the standards of review for altering existing child custody orders will be precisely the same as if custody had been established in a divorce action, and matters relating to spousal support and child support will likewise follow the usual rules for such matters. Property will presumably have to be looked at as if no earlier action had been filed, since a separate maintenance decree cannot alter ownership, but only possession, of property; presumably, what the parties did and why they did it could be reviewed by the divorce court for indications that some "compelling reason" was presented for an unequal division of community property under *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996) and *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997).

However, it does not necessarily follow that every separate maintenance decree addresses every subject that it might have addressed. Rather, it seems that the statutory scheme is permissive, and any matter not specifically dealt with remains in abeyance, reserved entirely for any later divorce action filed by one of the parties.

Since a new action must be commenced to obtain a divorce, a party should consider whether a decree of separate maintenance action is worth pursuing at all if a future divorce is anticipated.

4. Local Rules

There should not be any special local treatment.

E. DIVISION OF INCOME, ASSETS, AND OBLIGATIONS WHEN ONE SPOUSE IS INSTITUTIONALIZED

1. Statutes and Court Rules

NRS 123.259(1) permits a court, upon a petition to be filed by a spouse or the guardian of a spouse, to enter a decree dividing the "income and resources" of a husband and wife, if one spouse is an "institutionalized spouse" and the other is a "community spouse."

NRS 123.259(2) prohibits such a decree if it would be contrary to the terms of an enforceable premarital agreement.

NRS 123.259(3) permits such a decree to divide income and resources equally, or by "protecting the income for the community spouse through application of the maximum federal minimum monthly maintenance needs allowance set forth in 42 U.S.C. § 1396r-5(d)(3)(c).

NRS 123.259(4) provides that upon a finding of "exceptional circumstances resulting in significant financial duress" set out in written findings, a court may enter an order for support against

the institutionalized spouse in favor of the community spouse in "an amount adequate to provide such additional income as is necessary."

NRS 123.259(5) permits the court to direct community "resources" sufficiently to reach a sum sufficient to support the community spouse under subsections (3) or (4).

NRS 123.259(6) provides that if an "application for medical assistance" is made on behalf of the institutionalized spouse, any petition for relief under subsections (4) or (5) must be sent to Department of Health and Human Services, which then has 45 days to "intervene" to seek a modification of such an order.

NRS 123.259(7) provides for a written agreement between an institutionalized spouse and a community spouse to divide the community income, assets, and obligations into equal shares of separate income, assets, and obligations, and provides that such an agreement is only "effective only if one of the spouses is institutionalized, or such a division would allow one spouse to qualify for services under NRS 427A.250-280" ("Program to provide community-based services to frail elderly persons").

NRS 123.259(8) states that such an agreement is not binding on the Division of Welfare and Supportive Services of the Department of Health and Human Services in making determinations under the state plan for Medicaid.

NRS 123.259(9) refers the definitions of "community spouse" and "institutionalized spouse" to the federal definitions set out at 42 U.S.C. § 1396r-5(h).

2. Cases

None.

3. Discussion

The purpose of the statutory provisions is to provide some alternative to a divorce intended only to allow the healthier of two spouses to not be dragged into penury upon the incapacity of the other. Such an agreement is effective only if one spouse is admitted to a facility for skilled nursing or a facility for intermediate care or if a division of the income or property would allow one spouse to qualify for community-based services available to the elderly pursuant to NRS 427A.250-280. Once such an agreement is entered into, the separate income or property of each spouse is not liable for the costs of supporting the other spouse, including the costs of medical care and other necessities.

4. Local Rules

There should not be any special local treatment.