

FAMILY LAW OVERVIEW

Applicable Statutes – 125A, 125B, 125C

Main factor:

“Best Interest Standard” 125.480

NRS 125.480 Best interests of child; preferences; presumptions when court determines parent or person seeking custody is perpetrator of domestic violence or has committed act of abduction against child or any other child.

1. In determining custody of a minor child in an action brought under this chapter, the sole consideration of the court is the best interest of the child. If it appears to the court that joint custody would be in the best interest of the child, the court may grant custody to the parties jointly.

4. In determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things:

- (a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her custody.
- (b) Any nomination by a parent or a guardian for the child.
- (c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.
- (d) The level of conflict between the parents.
- (e) The ability of the parents to cooperate to meet the needs of the child.
- (f) The mental and physical health of the parents.
- (g) The physical, developmental and emotional needs of the child.
- (h) The nature of the relationship of the child with each parent.
- (i) The ability of the child to maintain a relationship with any sibling.
- (j) Any history of parental abuse or neglect of the child or a sibling of the child.
- (k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.
- (l) Whether either parent or any other person seeking custody has committed any act of abduction against the child or any other child.

5. Except as otherwise provided in subsection 6 or [NRS 125C.210](#), a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence

is not in the best interest of the child. Upon making such a determination, the court shall set forth:

- (a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and
- (b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

6. If after an evidentiary hearing held pursuant to subsection 5 the court determines that each party has engaged in acts of domestic violence, it shall, if possible, then determine which person was the primary physical aggressor. In determining which party was the primary physical aggressor for the purposes of this section, the court shall consider:

- (a) All prior acts of domestic violence involving either party;
- (b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence;
- (c) The likelihood of future injury;
- (d) Whether, during the prior acts, one of the parties acted in self-defense; and
- (e) Any other factors which the court deems relevant to the determination.

↳ In such a case, if it is not possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 5 applies to both parties. If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 5 applies only to the party determined by the court to be the primary physical aggressor.

7. A determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has committed any act of abduction against the child or any other child creates a rebuttable presumption that sole or joint custody or unsupervised visitation of the child by the perpetrator of the abduction is not in the best interest of the child. If the parent or other person seeking custody does not rebut the presumption, the court shall not enter an order for sole or joint custody or unsupervised visitation of the child by the perpetrator and the court shall set forth:

- (a) Findings of fact that support the determination that one or more acts of abduction occurred; and
- (b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other person from whom the child was abducted.

8. For purposes of subsection 7, any of the following acts constitute conclusive evidence that an act of abduction occurred:

- (a) A conviction of the defendant of any violation of [NRS 200.310](#) to [200.340](#), inclusive, or [200.359](#) or a law of any other jurisdiction that prohibits the same or similar conduct;
- (b) A plea of guilty or nolo contendere by the defendant to any violation of [NRS 200.310](#) to [200.340](#), inclusive, or [200.359](#) or a law of any other jurisdiction that prohibits the same or similar conduct; or
- (c) An admission by the defendant to the court of the facts contained in the charging document alleging a violation of [NRS 200.310](#) to [200.340](#), inclusive, or [200.359](#) or a law of any other jurisdiction that prohibits the same or similar conduct.

9. If, after a court enters a final order concerning custody of the child, a magistrate determines there is probable cause to believe that an act of abduction has been committed against the child or any other child and that a person who has been awarded sole or joint custody or unsupervised visitation of the child has committed the act, the court shall, upon a motion to modify the order concerning custody, reconsider the previous order concerning custody pursuant to subsections 7 and 8.

10. As used in this section:

- (a) “Abduction” means the commission of an act described in [NRS 200.310](#) to [200.340](#), inclusive, or [200.359](#) or a law of any other jurisdiction that prohibits the same or similar conduct.
- (b) “Domestic violence” means the commission of any act described in [NRS 33.018](#).

Two Types of Custody

State Policy – NRS 125.460

NRS 125.460 State policy. The Legislature declares that it is the policy of this State:

1. To ensure that minor children have frequent associations and a continuing relationship with both parents after the parents have become separated or have dissolved their marriage; and
2. To encourage such parents to share the rights and responsibilities of child rearing.

Legal Custody – Statute and Definition:

NRS 125.465

NRS 125.465 Married parents have joint custody until otherwise ordered by court. If a court has not made a determination regarding the custody of a child and the parents of the child are married to each other, each parent has joint legal custody of the child until otherwise ordered by a court of competent jurisdiction.

- a. Each parent will consult and cooperate with the other in substantial questions relating to religious upbringing, education programs, significant changes in social environment, and health care of the child.
- b. Each parent will have access to medical and school records pertaining to their child and be permitted to independently consult with any and all professionals involved with them.
- c. All schools, health care providers, day care providers, and counselors will be selected by the parents jointly. In the event the Parties cannot agree to the selection of a school, the child will be maintained in the present school pending mediation and/or further order of the court.
- d. Each parent will be empowered to obtain emergency health care for the child without the consent of the other parent. Each parent will notify the other parent as soon as reasonably possible as to any illness requiring medical attention, or any emergency involving the child.
5. Each parent will provide the other parent, upon receipt, with any information concerning the well-being of the child, including, but not limited to, copies of report cards; school meeting notices; vacation schedules; class notices of activities involving the child; samples of school work; order forms for school pictures; all communications from health care providers and the names, addresses, and telephone numbers of all schools, health care providers, regular day care providers, and counselors.
6. Each parent will advise the other parent of school, athletic, religious, and social events in which the child participate, and each agree to so notify the other parent within a reasonable time after first learning of the future occurrence of any such event as to allow the other parent to make arrangements to attend the event if he or she chooses to do so. Both parents may participate in all such activities with the child, including, but not limited to, such activities as open house, ceremonies, school carnivals, and any other events involving the child.

7. Each parent will provide the other parent with the address and telephone number at which the minor child reside, and to notify the other parent within ten (10) days prior to any change of address and provide the telephone number of such address change as soon as it is assigned.
8. Each parent will provide the other parent with a travel itinerary and, whenever reasonably possible, telephone numbers at which the child can be reached whenever the child will be away from the parent's home for a period of one (1) night or more.
9. Each parent will encourage liberal communication between the child and the other parent. Each parent will be entitled to reasonable telephone communication with the child; and each parent agrees he or she will not unreasonably interfere with the child's right to privacy during such telephone conversation.
10. Neither parent will interfere with the right of the child to transport their clothing and personal belongings freely between the parents respective homes.
11. The parents agree to communicate directly with each other regarding the needs and well being of the child, and each parent further agrees not to use the child to communicate with the other parent regarding parental issues. The parents agree to use self control and to not verbally or physically abuse each other in the presence of the minor child.
12. Neither parent will disparage the other in the presence of the child, nor will either parent make any comment of any kind that would demean the other parent in the eyes of the child. Additionally, each parent agrees to instruct their respective family and friends to make no disparaging remarks regarding the other parent in the presence of the child. The parents will take all action necessary to prevent such disparaging remarks from being made in the presence of the child, and will report to each other in the event such disparaging remarks are made.

Physical Custody

Joint – Rivero vs. Rivero, Nev.

The implications of Rivero on custody is probably the most significant to understand.

40/60 split. What is 40/60? How to determine?

Primary – Time share is disproportionate.

Primary vs. Joint – Effect of Legal Custody.

Modification of Custody

Rivero

Under Rivero – The actual defacto arrangement of the Parties is adopted. **Scary premise under modification.** Look back over one year. **What is one year?**

Holding in Rivero - According to Rivero vs. Rivero, the Court is to look at the actual timeshare to which the Parties have utilized without taking into consideration the terms or agreement contained in the Decree of Divorce. Pursuant to Rivero, without counting hours the Court is to look at and determine if there is a minimum of a 40/60 timeshare split over the past year. Court's have varied with regards to what they determine to be a 40/60 split and the Supreme Court has yet to clarify the issue. If the Court does not determine there is an actual 40/60 split, the Court is to modify the custodial terminology to the de facto arrangement.

Joint to Primary – Truax – Best Interest Standard

Truax vs. Truax, 110 Nev.437, 874 P.2d 10 (1994) – The modification is in the best interest of the minor child. 125.480

Primary to Joint/Primary – Ellis vs. Carucci

Moving Party is requesting a change in custody under the holding in Ellis v. Carucci, 123 Nev. Adv. Op. No. 18 (2007), which requires Moving Party to establish a substantial change in circumstances affecting the welfare of the child and the modification serves the best interest of the minor child pursuant to NRS 125.480 (4) which states as follows:

- (a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his custody.
- (b) Any nomination by a parent or a guardian for the child.
- (c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.
- (d) The level of conflict between the parents.
- (e) The ability of the parents to cooperate to meet the needs of the child.
- (f) The mental and physical health of the parents.
- (g) The physical, developmental and emotional needs of the child.
- (h) The nature of the relationship of the child with each parent.
- (i) The ability of the child to maintain a relationship with any sibling.

- (j) Any history of parental abuse or neglect of the child or a sibling of the child.
- (k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.

In addition, the moving Party must still establish a material change in circumstances. The basis for the revised standard for change is custody is based upon changes in the statute which occurred after the holding in Murphy.

Importance of McMonigle

In *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P. 2d 742 (1994), the Nevada Supreme Court held a moving Party in a change of custody action must show circumstances have been substantially altered **since the last custodial order**. Reality: only look at events since the last custodial order.

Ten (10) years after the holding in *McMonigle*, the Nevada Supreme Court again ruled on pre-divorce evidence, specifically evidence of domestic violence. In ***Castle v. Simmons***, 120 Nev. 98, 86 P. 2d 1042 (2004), the Nevada Supreme Court held when seeking to modify custody, the District Court may consider evidence of domestic violence which was not known to a Party or the Court, or the extent of which was not known, prior to the last custodial order. As such, the holding in *Castle* overrules, in part, the holding in *McMonigle* by specifically allowing the District Court to consider acts of domestic violence regardless of when the domestic violence occurred.

Make-up Visitation

Effects if no make up visitation.

Domestic Violence

With respect to Temporary Protective Orders, the Courts are guided and obtain jurisdiction to act in these matters pursuant to EDCR 5.22, NRS 33.020 and NRS 33.018.

EDCR 5.22, states in relevant part as follows:

- (a) This rule governs all requests for temporary and extended protection orders against domestic violence under NRS 33.017 et seq.
- (b) The standard of proof for the issuance of a temporary (TPO) or extended protection order pursuant to NRS 33.020(1) is “to the satisfaction of the court.” This contemplates the lesser standards than a preponderance of the evidence and is equivalent to a reasonable cause or probable causes standard.
- (g) The Court may appoint one or more full-time or part-time family diversion masters to alternate domestic violence commissioners. Interim orders signed by the domestic violence commissioner are effective upon issuance subject to approvals by the assigned

district court judge. A duly appointed domestic violence commissioner has the authority to:

- (1) Review applications for temporary and extended protective orders against domestic violence.
- (2) Schedule and hold contempt hearings for alleged violations of temporary and extended protection orders; recommend a finding or contempt; and recommend and recommend the appropriate sanction subject to approval by the assigned district court judge.
- (3) Recommend a sanction upon a finding of contempt in the presence of the court subject to approval of the assigned district court judge.
- (4) Issue, extend or dissolve protection orders against domestic violence under NRS 33.030.
- (5) Perform other duties as directed by the assigned district court judge.

NRS 33.018 Acts which constitute domestic violence.

1. Domestic violence occurs when a person commits one of the following acts against or upon the person's spouse or former spouse, any other person to whom the person is related by blood or marriage, any other person with whom the person is or was actually residing, any other person with whom the person has had or is having a dating relationship, any other person with whom the person has a child in common, the minor child of any of those persons, the person's minor child or any other person who has been appointed the custodian or legal guardian for the person's minor child:

- (a) A battery.
- (b) An assault.
- (c) Compelling the other person by force or threat of force to perform an act from which the other person has the right to refrain or to refrain from an act which the other person has the right to perform.
- (d) A sexual assault.
- (e) A knowing, purposeful or reckless course of conduct intended to harass the other person. Such conduct may include, but is not limited to:
 - (1) Stalking.
 - (2) Arson.
 - (3) Trespassing.
 - (4) Larceny.
 - (5) Destruction of private property.
 - (6) Carrying a concealed weapon without a permit.
 - (7) Injuring or killing an animal.
- (f) A false imprisonment.
- (g) Unlawful entry of the other person's residence, or forcible entry against the other person's will if there is a reasonably foreseeable risk of harm to the other person from the entry.

2. As used in this section, “dating relationship” means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement. The term does not include a casual relationship or an ordinary association between persons in a business or social context.

(Added to NRS by 1985, 2283; A 1995, 902; [1997, 1808](#); [2007, 82, 1275](#))

NRS 33.020 Requirements for issuance of temporary and extended orders; availability of court; court clerk to inform protected party upon transfer of information to Central Repository.

1. If it appears to the satisfaction of the court from specific facts shown by a verified application that an act of domestic violence has occurred or there exists a threat of domestic violence, the court may grant a temporary or extended order. A temporary or extended order must not be granted to the applicant or the adverse party unless the applicant or the adverse party has requested the order and has filed a verified application that an act of domestic violence has occurred or there exists a threat of domestic violence.
2. The court may require the applicant or the adverse party, or both, to appear before the court before determining whether to grant the temporary or extended order.
3. A temporary order may be granted with or without notice to the adverse party. An extended order may only be granted after notice to the adverse party and a hearing on the application. A hearing on an application for an extended order must be held within 45 days after the date on which the application for the extended order is filed.
4. The court shall rule upon an application for a temporary order within 1 judicial day after it is filed.
5. If it appears to the satisfaction of the court from specific facts communicated by telephone to the court by an alleged victim that an act of domestic violence has occurred and the alleged perpetrator of the domestic violence has been arrested and is presently in custody pursuant to [NRS 171.137](#), the court may grant a temporary order. Before approving an order under such circumstances, the court shall confirm with the appropriate law enforcement agency that the applicant is an alleged victim and that the alleged perpetrator is in custody. Upon approval by the court, the signed order may be transmitted to the facility where the alleged perpetrator is in custody by electronic or telephonic transmission to a facsimile machine. If such an order is received by the facility holding the alleged perpetrator while the alleged perpetrator is still in custody, the order must be personally served by an authorized employee of the facility before the alleged perpetrator is released. The court shall mail a copy of each order issued pursuant to this subsection to the alleged victim named in the order and cause the original order to be filed with the court clerk on the first judicial day after it is issued.

6. In a county whose population is 52,000 or more, the court shall be available 24 hours a day, 7 days a week, including nonjudicial days and holidays, to receive communications by telephone and for the issuance of a temporary order pursuant to subsection 5.

7. In a county whose population is less than 52,000, the court may be available 24 hours a day, 7 days a week, including nonjudicial days and holidays, to receive communications by telephone and for the issuance of a temporary order pursuant to subsection 5.

8. The clerk of the court shall inform the protected party upon the successful transfer of information concerning the registration to the Central Repository for Nevada Records of Criminal History as required pursuant to [NRS 33.095](#).

Impact of a TPO in reality –

TPO must be read carefully as restrictions may vary.

No contact with applicant, even if applicant has the children

Not allowed at children's school

Exchanges of the children

Change in custody ramifications

Inability to carry a firearm.

Difference between TPO and Behavioral Order

TPO – Criminal in nature – violations = arrest

Behavioral Order – Family Court Order – Civil in nature not criminal. Violations = civil contempt.

Ramifications related to custody