NFLR
NEVADA FAMILY LAW REPORT
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BRIEF FOCUSED ASSESSMENTS

by Amber Robinson, Esq.

INTRODUCTION

In your practice, you have more than likely had clients who have been sent for Child Custody Evaluations (CCE), and you have probably had clients who need a CCE done, but simply cannot afford the high cost of one. There are increases in caseloads around the country and limited funds for full-blown assessments. For example, the Annual Report of the Nevada Judiciary Fiscal Year 2009 demonstrated that both litigants are pro se in 65 percent of family filings. More and more family courts are turning to the Brief Focused Assessments (BFA) models, which are issue specific assessments. BFAs are narrower in scope, timelier, and far less expensive than CCEs.

THE NORTH

As we learned at the Ely Family Law Conference 2010, the Reno Family Court has recently begun using BFAs. Prior to BFAs, where resources were limited and a child custody evaluation would be far too costly, the Reno Family Court relied on Court Appointed Special Advocates (CASA) for help in those particular cases. These advocates would

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Courts, "BFAs must not be substituted as an inexpensive alternative where a comprehensive CCE is necessary to address the concerns of the court and the family. Such practice could result in a two-tiered system in which low income clients routinely receive less comprehensive services than those who can afford to pay for more, building an injustice into the very legal system established to serve all families equally."

Amber Robinson, Esq. is an Associate at Lin & Associates, a firm in Las Vegas practicing primarily in the field of family law. She is a former law clerk to the Honorable Cheryl B. Moss, and Nicholas Del Vecchio. Ms. Robinson can be reached at 1801 South Rainbow, Suite 270, Las Vegas, Nevada 89146. Her phone number is (702) 243-0900, and her fax is (702) 243-0342. E-mail can be directed to arobinson@linassoc.com.

A "PANDORA'S BOX:"

Landreth v. Malik, 125 Nev. Adv. Op. No. 61 (December 24, 2009).

by Robert W. Lueck, Esq.

In Greek mythology, Pandora was the first woman created by the Greek gods. Prometheus gave the gift of fire to humans, and this made Zeus angry. Zeus decided to give mankind another gift to compensate for the boon they had been given in the form of fire. Zeus commanded Hephaestus to create the first woman. He does so with contributions from other gods who collectively made a beautiful but devilish woman he named Pandora.

When Pandora was gifted to the humans, she brought with her a jar containing burdensome toil, sickness, diseases and a myriad of other pains to inflict on others. Prometheus warned his brother Epimetheus not to accept this gift from Zeus, but Epimetheus did not listen and accepted Pandora. She promptly scattered the contents of her jar and brought much evil to mankind. These stories originated with two epic poems crafted by Hesiod, a writer in seventh century B.C., the first being *Theogony* and the second being *Works and Days* (www.neworldencyclopedia.org/entry/Pandora'sBox).

Today, the phrase "Pandora's box" is used as a literary device that suggests bringing up an issue that will likely make matters worse and compound problems rather than solving or alleviating them.

In short, it is an apt literary device for asserting that the *Landreth* opinion is far more likely to cause, and has caused, more problems than it will have purportedly fixed. This decision will have an impact far greater than the mere interim resolution of a dispute between two private parties. The "Pandora's box" opened up by the majority opinion entails the de facto creation of two separate and distinct family courts in both Clark and Washoe counties, two separate and unequal classes of district court judges and considerable

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uncertainty for the bench and bar as to where certain "gray area" cases should be filed, i.e. in the family or civil division.

The essential problem with the *Landreth* decision is that it limits the family court judges' jurisdiction to only the types of proceedings specifically enumerated in NRS 3.223. *Landreth* was an action between "unmarried, childless parties who used to live together and who dispute the division of property allegedly acquired during their relationship," a type of proceeding not specifically enumerated in NRS 3.223. The *Landreth* case was a matter of much debate in Ely, both in the classes and in the hallways between counsel and judges. Currently, the matter is on rehearing by the Nevada Supreme Court.

A TALE OF TWO FAMILY COURTS

The core holding of the majority opinion is that any family law case which does not squarely fit within any of the NRS chapters enumerated in NRS 3.223 must be adjudicated in the civil division. Although a case may look, feel and smell like a "family law" case, it cannot be adjudicated in Family Court unless clearly within one of those chapters. The practical result is that a number of cases that were customarily adjudicated in Family Court must now be filed in the civil division.

"The law of unintended consequences" is a rhetorical phrase to illustrate that the results of a legal decision or a statute have consequences that were neither intended nor comprehended when the decision was made or the law passed.

This "law of unintended consequences" applies here because the net practical effect of the majority decision is the de facto creation of two family courts in Clark and Washoe counties. There is the *de jure* Family Court created by the Nevada Constitution and the subsequent enabling legislation, and the *de facto* "mini-family court" in the civil division of the Second and Eighth Judicial Districts. This mini-court will presumably hear and adjudicate family law type cases that don't fall neatly into any of the statutory categories created in NRS 3.223 and newer family law matters that the legislature has neglected to assign to the family courts.

The civil divisions in both courts are already overburdened with cases and the *Landreth* majority ruling will now detour an untold number of "gray area" family law cases into the civil divisions.

The majority opinion misapprehends the concept of "subject matter jurisdiction" as it was used in NRS 3.223 and that misapprehension lead to the court's ruling. Article 6, Section 6 of the Nevada Constitution provides that the district courts are the courts of general original jurisdiction in this state and have jurisdiction over all cases not specifically granted to other courts.

In the domestic relations context, all cases referred to in NRS 3.223 were and are district court cases. In Clark and Washoe Counties, the judges decided how the caseloads and speciality assignments were done.

In the late 1980s, the Nevada Legislature approved the creation of dedicated family courts in Clark and Washoe Counties and the constitutional amendment to do this was approved by the voters in 1990. The Legislature was authorized to craft the list of the cases that would be heard in Family Court. That was done in NRS 3.223.

What the Nevada Legislature did not do was create any new statutory causes of action. At its central core, NRS 3.223 is not truly a jurisdictional statute; it is an ASSIGNMENT AND CLASSIFICATION statute that designated which class of cases were to be filed and heard in the family courts. The goal was to provide a fairly bright line of demarcation for those cases which should belong in family courts and no longer be filed in the civil/criminal division. Because it was an assignment of case categories, nothing in NRS 3.223 or the other enabling statutes for the creation of family court or in the legislative history of these statutes indicated any legislative intention that NRS 3.223 was a LIMITATION on the judicial authority of the district court judges in the family division.

Family Court is not a statutorily created court of limited jurisdiction. It was and still is constitutionally and statutorily described as a division of the District Court. See NRS 3.006 and 3.0105 and Nevada Const. Art. VI, § 6(2). The ostensible goal of

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NRS 3.223 was to ensure that lawyers, pro se litigants, judges and the district court clerical staff know that domestic cases belong in family court and not elsewhere.

As the dissent correctly points out, family court judges are district court judges for all legal intents and purposes. They have the same pay and benefits, same titles, are elected in the same fashion and any final decisions are appealable to the Nevada Supreme Court. There is no distinction between those who serve in the family division and those who serve in the civil/criminal division.

For the overwhelming bulk of cases, there is no question of where to file the lawsuit. But due to the changing nature of society, there are gray areas that don't admit of any clean, neat answers. The majority opinion notes that the district courts have long adjudicated unmarried couple cases such as *Hay v. Hay*, 100 Nev. 196 (1984) and *Western States Construction v. Michoff*, 108 Nev. 931 (1992). Those cases and a few others preceded the creation of family courts in Nevada and no doubt they were district court cases. Family courts did not exist then so jurisdictional claims could not have been an issue. In those cases the parties did hold themselves out as husband and wife although not legally married. After acknowledging these two cases and that the parties therein held property "as co-owners or as though they were a marital community," the court distinguishes the instant case by stating:

"Although the parties dispute whether they hold property as co-owners, neither party claims to have held themselves out as a married couple *or otherwise qualify as a familial unit*, therefore, *Hay* and *Michoff* are not applicable." *Emphasis supplied.* (Page 9 of opinion.)

This creates multiple serious conceptual and practical problems for lawyers and judges alike. First, is this court saying that Family Court will continue to have jurisdiction over unmarried couples who co-own property together and hold themselves out as husband and wife but who have no children? That seems to be the distinguishing jurisdictional feature and one which allows the family court to handle such cases.

"For the overwhelming bulk of cases, there is no question of where to file the lawsuit. But due to the changing nature of society, there are gray areas that don't admit of any clean, neat answers."

Yet even this is highly problematic because there is nothing in the language of NRS 3.223 that even remotely refers to unmarried couples living and owning property together. That statute was a collection and recitation of a list of family law chapters in the Nevada Revised Statutes. *Hay* and *Michoff* are judicially crafted remedies for meretricious relationship cases and was part of the major trend in legal developments following the famous *Marvin* case in California in the mid-1970s.

If meretricious relationship cases are not mentioned in the statute, then why should family court continue to hear such cases except for child custody and support issues? The majority opinion does not explain this distinction at all and it does not make sense in light of this language from *Michoff* [108 Nev. at 935]:

"After a trial, the district court found that there existed an express and an implied agreement between the parties to acquire and hold the properties as if they were married. The court ruled that the community property laws should apply by analogy and thus entered judgment in favor of Lois and against Max and Western States for one-half of the net assets less the value of the property already taken."

The concepts of "as if they were married" and "community property by analogy" are purely judicial creations. Nothing remotely resembling these concepts appears in NRS 3.223 and yet this court seems to imply, very confusingly so, that unmarried couples who hold themselves out as married couples can bring their actions in family court despite the lack of enabling language in NRS 3.223 that allows such actions.

Now consider another possible scenario. An unmarried couple has lived together and acquired property together. One says they have held themselves out as a married couple and therefore files the dissolution/division action in family court. The

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other party disputes that they held themselves out as a married couple. The case goes to trial and the judge rules that they did NOT hold themselves out as a married couple. That means an instant loss of jurisdiction.

Yet another scenario. An unmarried couple has children and has acquired some assets but neither has held themselves out as a married couple. They were content simply to remain in an unmarried status. Under the *Landreth* case, the custody, support and visitation issues are heard in family court but the property and debt issues have to be resolved in a separate suit filed in the civil division. That would be the strict, literal interpretation and application of *Landreth*. Or would the family court have some form of ancillary jurisdiction to hear their property and debt issues in conjunction with the custody and support matters?

Now consider this problem for the civil division. The legal rights regarding property for an unmarried couple acquiring assets together while they were in their own familial relationship is considerably different from the law applicable to partners, joint venturers, etc. who own property together but are not in anything other than a business relationship. Dissolution of a non-marital relationship is far more similar to a divorce than to a straight civil dispute. The property accrual agreements between co-habitants is substantially different than from traditional contract principles. *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

The other major conceptual problem with the above paragraph rests in the phrase, "or otherwise qualify as a familial unit." That phrase, left undefined further by the court's opinion, is highly problematic. The meaning of "family" has greatly changed over the past forty years and the traditional nuclear family of a married mother, father and child(ren) is very much a minority in recent years. There is nothing written that only those people with children can constitute a "family" but an unmarried couple living together cannot constitute a "family."

The majority opinion did not cite any authority for that phrase. It is contrary to accepted social norms today. Unmarried couple cases have far more in common with their married brethren in family court than with civil cases in the civil division. The legal recognition of these dramatic changes in "family" has been observed in published opinions even by the United States Supreme Court in *Troxel v. Granville*:

"The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, 1997 Population Profile of the United States 27 (1998). Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children – or 5.6 percent of all children under age 18 – lived in the household of their grandparents. U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, Marital Status and Living Arrangements: March 1998 (update), p. *1* (1998)." [530 U.S. 57, 63 (2000)]

Similar observations were made by the Supreme Judicial Court of Massachusetts in *Turner v. Lewis*:

"Our conclusion is supported by sound public policy. We take judicial notice of the social reality that the concept of 'family' is varied and evolving and that, as a result, different types of 'family' members will be forced into potentially unwanted contact with one another. The recent increases in both single parent and grandparent headed households are two examples of this trend. With respect to the increase in single parent headed households, children under age [eighteen] are considerably more likely to be living with only one parent today than two decades ago." [749 N.E.2d 122, 125 (MA 2001)] Marital Status and Living Arrangements: March 1994, Bureau of the Census, United States Department of Commerce (Feb. 1996). See Marital Status and Living Arrangements: March 1998 (update) Bureau of the Census (Dec. 1998) (between 1970 and 1998, proportion of chil-

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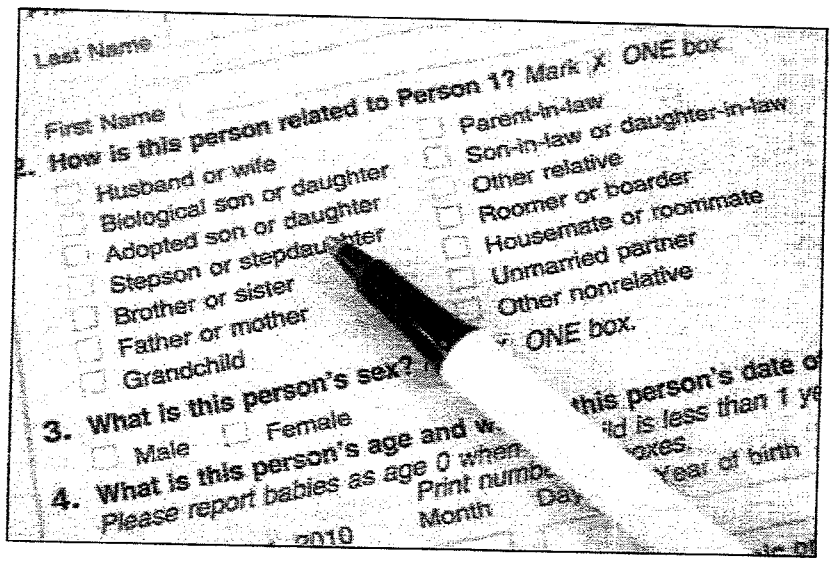
dren under age of 18 years living with single parent grew from 12 percent to 27.7 percent). "High levels of divorce and postponement of first marriage are among the changes that have reshaped the living arrangements of children and adults since the 1970's." *Id.* In the majority of these cases, women are the head of the household. *Id.* (84 percent of children who lived with single parent in 1998 lived with mother). The often contentious nature of custody arrangements necessitates the protection of these single parents through legislation like G. L. c. 209A."



The Census Bureau is soon to start the decennial census of the United States. It will take months to gather and assess the data. The results will start being released in the spring of 2011. In between the decennial census events, the Census Bureau and demographers still work to trace evolutions in American living and economic patterns. Demographic expert Peter Francese, founder of the American Demographics Magazine, has recently written "2010 America," a 32-page white paper for Ad Age, an industry trade association. He concludes that the concept of the "average American" is gone and predicts that the forthcoming census will find that no household type describes even one third of the households. The traditional American family, married parents with children, will account for a mere 22 percent of the households. The new census form will give Americans 14 choices to define their household relationships. This will allow the Census Bureau to better define blended families, single parent families, multi-generational families, etc. *Advertising Age* magazine published Oct. 12, 2009 viewed online at http://adage.com/article?article_id=139592 (website visited 1/19/10).

The website for the Alternatives to Marriage Project also lists numerous statistics including those showing that unmarried Americans head more than 51 million households (citing 2007 Census Bureau data), www.unmarried.org/statistics.html, (website last visited January 19, 2010).

Suffice it to say that what constitutes a "family" has changed greatly since family courts were created in Nevada some two decades ago. As times have changed, there is nothing wrong with the courts and the laws changing along with social changes. Indeed, in *Galloway v. Truesdell*, this court said that "The constitution is a living thing and is to be interpreted in light of changing conditions" [83 Nev. 13, 21 (1967)].

Since the nature of "family" has rapidly changed in recent years, there is no reason why that can't be reflected in this decision. Family court judges presumably have more expertise in family dynamics and the family division should continue to hear all cases that are family centered, regardless of how that family unit is defined or constituted. The last thing the civil division needs is more cases that are outside its normal area of expertise.

The 2009 Nevada Legislature passed the domestic partnership act in Senate Bill 283. It creates a new chapter in Title 11 of NRS, but nowhere in that bill is there a section that says dissolution disputes are to be filed in family court. Section 9 of the bill states that such actions should follow the general procedures of NRS Chapter 125 for divorce.

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However, since this is not expressly mentioned in NRS 3.223, logically all such actions will now have to be heard by the civil division and not in family court.

We have now preliminarily seen that a number of "family" law scenarios fall into that gray zone of cases not fitting neatly into one of the NRS chapters allocated to the family courts. Future case law will flesh out those borderline cases and possibly result in more appeals to this court.

THE MAJORITY OPINION HAS CREATED TWO CLASSES OF DISTRICT JUDGES: SEPARATE AND UNEQUAL

The existence of NRS 3.220 was referred to in the supplemental points and authorities filed by respondent on October 24, 2008. That statute reads as follows:

"Equal coextensive and concurrent jurisdiction. The district judges shall possess equal coextensive and concurrent jurisdiction and power. They each shall have power to hold court in any county of this State. They each shall exercise and perform the powers, duties and functions of the court and of judges thereof and of judges at chambers. The decision in an action or proceeding may be written or signed at any place in the State by the judge who acted on the trial and may be forwarded to and filed by the clerk, who shall thereupon enter judgment as directed in the decision, or judgment may be rendered in open court, and, if so rendered, shall be entered by the clerk accordingly. If the public business requires, each judge may try causes and transact judicial business in the same county at the same time. Each judge shall have power to transact business which may be done in chambers at any point within the State, and court shall be held in each county at least once in every 6 months and as often and as long as the business of the county requires. All of this section is subject to the provision that each judge may direct and control the business in his own district and shall see that it is properly performed."

The majority decision impliedly repeals that section insofar as family court judges are "co-equal and co-extensive" with their civil/criminal division colleagues. By voiding this decision under the theory that the family court had no jurisdiction, the majority opinion is also saying that no family court judge, even with the status of being lawfully recognized as a district court judge, can act on any case or legal matter outside the scope of NRS 3.223.

The court's decision creates two classes of separate and unequal district court judges. This is untenable and is already having a ripple effect on the judicial administration of the Eighth Judicial District Court. The current chief judge is Family Court Judge Art Ritchie. He relocated his chambers down to the RJC while he serves as chief judge. Because of the *Landreth* opinion, Judge Ritchie has relinquished his judicial responsibilities for the bond forfeiture calendar and for hearing objections to the probate commissioner's decisions.

Judge Jennifer Elliott still presides over adult drug court and those defendants come out of the criminal division and are still considered criminal cases even though it is a specialty court. Drug courts are not part of the family court jurisdiction outlined in NRS 3.223. Footnote 2 on page 10 in the opinion relates that the *Landreth* decision does not apply to specialty court assignments, yet that statement cannot be consistent with the majority opinion, i.e. family court judges cannot hear and decide matters outside of NRS 3.223. Either they can hear all district court matters or they can't. Jurisprudential waffling does not lend itself to promoting clarity and consistency.

Family Court judges have long held the same authority to review search warrant applications and sign search warrants when sought by law enforcement. It is conceivable that a criminal defendant could successfully challenge any search warrant signed by a family court judge. Some criminal prosecutions could be in jeopardy. Furthermore, eliminating family court judges from the available pool of judges to review and consider search warrant applications after hours and on weekends could negatively impact law enforcement.

This court has expressed different legal principles for statutory construction: No part of a statute should be rendered nugatory nor any language turned to mere surplusage, *Paramount Insurance v. Frontier Fidelity Savings and Loan*, 86 Nev. 644,

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640 (1970); this court will interpret a statute in harmony with other rules or statutes, *Division of Ins. v. State Farm Mut. Auto Ins.*, 116 Nev 290, 295 (2000); the court will construe statutory provisions in such a manner as to render them compatible, should avoid construing one of its rules of procedure and a statute in a manner which creates conflict or inconsistency between them, and that a fundamental rule of interpretation is that the unreasonableness of the result produced by one of the possible interpretations is a reason to reject that interpretation in favor of one that produces a reasonable result, *Bowyer v. Taack*, 107 Nev. 625, 629 (1991); statutory provisions should be read in harmony provided that doing so will not violate the ascertained spirit and intent of the legislature, *Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 892 (1989); and statutes should be construed, if reasonably possible, to be in harmony with the Constitution, *State v. Glusman*, 98 Nev. 412, 419-20 (1982).

Family court judges, as district court judges, derive their fundamental legal existence from Article 6, Section 6 of the Nevada Constitution. They are constitutional officials of the State of Nevada. The majority opinion would make eminent legal sense if the family court judges were entirely creatures of statute with limited authority and subject to further review by a general jurisdictional judicial powers. In other words, like magistrate judges in the federal court system.

The majority opinion cannot be reconciled with the language and the powers granted by NRS 3.220 and to that extent the majority opinion nullifies a critical Nevada statute, albeit without explicitly saying so.

Thus, we now have two (2) classes of district court judges in Nevada. The family court judges have had their authority sharply limited in derogation of the Constitution and statutory law. Their colleagues in the civil/criminal division are not so limited.

CONCLUSION

The unintended consequence of *Landreth* is that we now have two family courts in Nevada: the traditional family court and the new mini-family court in the civil division which will now have to adjudicate unmarried couple property and debt issues, regardless of whether the parties hold themselves out as married or not, and all domestic partnership dissolution cases filed under the new chapter created by Senate Bill 283.

A fair and logical reading of the majority opinion also makes it clear that family court judges lack any judicial power to preside over any matters not within those chapters referred to in NRS 3.223. This has to include any specialty courts outside of the family division.

Since the majority decision was filed, this has caused considerable discussion and upheavals in the Eighth Judicial District Court and with family law practitioners. Mr. Lueck is requesting that the Nevada Supreme Court do what it did with the first *Rivero* decision issued in 2008 (since withdrawn and replaced on August 27, 2009), and that is withdraw the opinion and request amicus briefing from the Family Law Section. The undersigned can advise this court unofficially that the judges of the Eighth Judicial District Court may wish to file an independent amicus brief addressing the systemic effects on the district courts.

Robert Lueck is President of The Lueck Law Center, a Las Vegas firm devoted to Family Law. As a co-founder of the Collaborative Professionals of Nevada, much of Mr. Lueck's career has been devoted to developing the principles of Collaborative Settlements.

As a published author and recognized authority in the area of Family Law, Mr. Lueck's writings and decisions have been reviewed and taught at national seminars and in professional legal journals.

Mr. Lueck can be reached at 528 S. Casino Center Boulevard, Suite 311, Las Vegas, Nevada 89101. His telephone number is (702) 385-7385 and his facsimile number is (702) 385-3225. E-mail can be directed to: luecklawcenter@yahoo.com.

Seminars

Good lawyers and good judges are permanent students of the law. There is always more to learn in the legal profession. Over the past three plus decades, I have participated in several seminars for the State Bar of Nevada, Clark County Bar Association, the Nevada District Judges Association, and, most recently, with the National Business Institute (NBI).

My presentation topics have included collaborative divorce, parental alienation, alternative dispute resolution, and other aspects of family law. The materials attached here were written for various NBI seminars. Here is a partial list of my seminar teaching moments.

1. Settlement Techniques in Divorce Cases, December, 1999 for Clark County Bar Association

2. Ethics for Family Law Attorneys, December, 2000, for Clark County Bar Association

3. Joint Physical Custody, April, 2000, District Judges Association.

4. Domestic Violence and Child Custody Presumption, March, 2003, CLE for Judges at Family Law Conference.

5. Parental Alienation, May, 2003, for Clark County Bar Association.

6. Bankruptcy Court & Family Court Interface Problems, September, 2003 for Southern Nevada Bankruptcy Attorneys luncheon meeting.

7. Uniform Child Custody Jurisdiction Act, February, 2004 - Advanced Family Law Seminar.

8. Parental Alienation, March 2004, CLE for Judges at Family Law Conference.

9. Collaborative Divorce, March, 2004, Family Law Conference, State Bar of Nevada.

More recently, I have been working with NBI on a variety of Family Law seminars. Attached are materials I authored for three recent seminars.

Collaborative Divorce Segment

Divorce Law Guide

Family Court Judicial Forum