

NEVADA ALIMONY: AN IMPORTANT POLICY IN NEED OF A COHERENT POLICY PURPOSE

The Honorable David A. Hardy*

I. INTRODUCTION

In June 2006, my friend and colleague Judge Chuck Weller¹ was shot in the chest as he stood before the panoramic windows of his third-floor office. The shooter, who had killed his wife just hours before, was a disgruntled family law litigant in Judge Weller's department.² These violent crimes cannot be explained by custody or visitation distress, as Judge Weller had ordered the parents to share joint legal and joint physical custody of their minor child.³ Instead, it appears these crimes were animated by the shooter's misperceptions of Judge Weller's financial rulings. No rational explanation exists for such irrational crimes. I mention this series of events merely to illustrate the depth of emotions that exist within family law disputes. Family law attorneys and judges repeatedly observe these emotions as they strive to assist spouses redefine their post-marriage lives.

The divorce process is difficult, even for those who seek to end the marriage. Litigants often respond negatively when their relationships and resources are at risk. A divorce proceeding culminating in trial represents a failure of our legal system. The adversarial process requires parties to emphasize their virtues and their respective spouses' flaws. The divorce proceeding is both expensive and destructive. For this reason, Nevada family division district judges are directed to encourage nonadversarial and nontraditional methods of dispute resolution.⁴ In short, resolution designed and accepted by the parties is preferred over trial.

Alimony is a particularly troubling feature of Nevada matrimonial law. Nevada attorneys and judges are ill-equipped to facilitate pretrial resolution when alimony is at issue. No objective measures are available for judging fair-

* Judge David A. Hardy was appointed to the Second Judicial District Court, Family Division, Washoe County, Nevada in 2005. Prior to his appointment to the bench, Judge Hardy was an elder and disability law attorney with the Law Firm of Hardy & Woodman.

¹ Judge Chuck Weller was elected to the Second Judicial District Court, Family Division, Washoe County, Nevada in 2004.

² Martha Bellisle, *Opening Words Paint Contrasting Motives*, RENO GAZETTE-J., Oct. 25, 2007, at 1A.

³ Martha Bellisle & Jaclyn O'Malley, *Warrent Charges Sniper Suspect in Fatal Stabbing of Estranged Wife; Mack Left 'Angry' by Divorce Settlement, Friend Says*, RENO GAZETTE-J., June 14, 2006, at 5A.

⁴ NEV. REV. STAT. § 3.225(1) (2007).

ness or predicting results.⁵ The newly-enacted statutory guidelines,⁶ based upon Nevada decisional authority, provide no guidance as to their relative weight and little guidance regarding their purpose. Several of these statutory guidelines focus on antiquated notions of need and duty. As discussed later in this Article, no analytical reference point exists for settlement discussions. Alimony is therefore judge-specific, idiosyncratic, inconsistent, and unpredictable.⁷ As noted by one commentator, alimony is the “source of much inconsistency among trial courts, unhappiness among litigants, and conflict among critics.”⁸

The Nevada Supreme Court acknowledged problems with the Nevada alimony statute more than 120 years ago when it approved the following excerpt from counsel’s argument in a divorce case:

The popular ignorance, even in the legal profession, of the law of marriage and divorce, has, in times not long past, been so dense as almost to exclude from the legislation on this subject [alimony] its proper forms. Largely the statutes contain expressions and provisions of whose meanings, and especially of whose consequential effects, their makers pretty certainly had no clear idea whatever. Instead of consistency and verbal propriety, they abound in absurdities. They are often chaos.⁹

The issue remains in chaos for those at the front line of alimony litigation. Dating back to Nevada’s territorial status in 1861, Nevada judges awarded alimony when “just and equitable.”¹⁰ These conjunctive terms apply to both payor and recipient.¹¹ Nevada law provides little guidance for what the words “just and equitable” mean or how they should inform the alimony decision. While judges enjoy great discretion, they suffer from the absence of a coherent, sustainable policy rationale. Judicial discretion is best exercised when it is purpose driven. This Article synthesizes the constituent components of Nevada alimony law, which appear to have been developed haphazardly during the past century. This Article concludes with a request for more purpose-specific guidance from the Nevada Legislature and Supreme Court. Family-centered litigation emotions may then be diffused through better informed and better articulated pretrial alimony resolutions.

⁵ Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN’S L.J. 23, 23 (2001).

⁶ See NEV. REV. STAT. § 125.150(8) (2007).

⁷ Leslie Herndon Spillane, *Spousal Support: The Other Ohio Lottery*, 24 OHIO N.U. L. REV. 281, 282 (1998); Robert E. Gaston, *Alimony: You Are the Weakest Link!*, NEV. LAW., Oct. 2002, at 8, 9; Marshal Willick, *In Search of a Coherent Theoretical Model for Alimony*, NEV. LAW., Apr. 2007, at 40, 40.

⁸ Jennifer L. McCoy, *Spousal Support Disorder: An Overview of Problems in Current Alimony Law*, 33 FLA. ST. U. L. REV. 501, 502 (2005) (quoting Megan A. Drefchinski, Comment, *Out with the Old and In with the New: An Analysis of Illinois Maintenance Law Under the Uniform Marriage and Divorce Act and a Proposal for Its Replacement*, 23 N. ILL. U. L. REV., 581, 613 (2003)).

⁹ *Lake v. Bender*, 7 P. 74, 75 (Nev. 1885).

¹⁰ Act of Nov. 28, 1861, ch. 25, 1861 Nev. Stat. 70-71.

¹¹ NEV. REV. STAT. § 125.150(8)(a) (2007).

II. HISTORICAL & CONTEMPORARY PURPOSES OF ALIMONY

A. *Common Law*

Contemporary alimony has been described as an “accident of history” that has been extended through “inadvertence rather than deliberation.”¹² A comparison of historical alimony with contemporary alimony reveals this to be at least partially accurate. Nevada law is predicated upon the English common law.¹³ Section 1.030 of the Nevada Revised Statutes provides that “[t]he common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in all the courts of this State.”¹⁴

Alimony, which comes from the Latin word *alimonia*, was a rule of sustenance to ensure the wife’s food, clothing, habitation, and other necessities for support.¹⁵ In early England, alimony was grounded in antiquated notions of gender inequality. For example, under the doctrine of coverture, a wife’s legal identity merged with her husband, creating a single legal identity.¹⁶ The husband controlled the assets, including the wife’s pre-marriage assets.¹⁷ The wife transferred to her husband her ability to “hold real property, sign contracts, and keep any earnings.”¹⁸ In turn, the husband incurred the legal duty to support his wife.¹⁹ The Church did not recognize the indissolubility of marriage. Therefore, absolute divorce (*a vinculo matrimonii*) required an act of Parliament and was rarely granted.²⁰ Scholars report that Parliament granted only 317 absolute divorces in the 150 years preceding the Matrimonial Causes Act of 1857.²¹ The English ecclesiastical courts did permit divorce from bed and board (*a mensa et thoro*), which was a form of legal separation allowing the spouses to live apart.²² Because the marriage remained intact, the husband continued to control his wife’s assets and be responsible for his wife’s needs.²³ Alimony prevented the wife from becoming a public charge. Marital fault

¹² Collins, *supra* note 5, at 28.

¹³ The Nevada Supreme Court has also acknowledged the Spanish common law as a minor influence upon Nevada law. *See* Nixon v. Brown, 214 P. 524, 527 (Nev. 1923) (noting the Spanish civil law of community property was adopted by Nevada).

¹⁴ § 1.030; *see also* Darrenberger v. Haupt, 10 Nev. 43 (1875) (noting that marital property acquired before the Nevada Constitution and statutes were adopted must be governed by the rule of common law).

¹⁵ Connelly v. Connelly, 362 N.W.2d 91, 92 (S.D. 1985) (Henderson, J., dissenting); *see also* BLACK’S LAW DICTIONARY 80 (8th ed. 2004).

¹⁶ Lara Lenzotti Kapalla, *Some Assembly Required: Why States Should Not Adopt the ALI’s System of Presumptive Alimony Awards in Its Current Form*, 2004 MICH. ST. L. REV. 207, 211.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Collins, *supra* note 5, at 28-29.

²¹ *Id.*, at 29; *see also* Elizabeth A. Heaney, *Pennsylvania’s Doctrine of Necessities: An Anachronism Demanding Abolishment*, 101 DICK. L. REV. 233, 235 (1996) (discussing the doctrine of necessities).

²² Collins, *supra* note 5, at 28.

²³ McCoy, *supra* note 8, at 504.

determined the amount of alimony, but the general rule was that the wife received one-third of her husband's income.²⁴

B. Nevada's Recognition of Historical Origins of Alimony

The Nevada Supreme Court recognized the common law doctrine of coverture in several decisions. Its first published reference to alimony occurred in 1866, just two years after statehood.²⁵ The Court did not examine post-divorce alimony in this decision; it merely approved the concept of alimony *pendente lite* in the form of attorney's fees.²⁶ However, the Court did note a married woman's "property is generally entirely under the control of the husband."²⁷ Therefore, a "tyrannical husband might abuse his wife to any extent and protect himself from the consequences the law visits on such conduct, by denying her the means of asserting her rights in a court of justice."²⁸

Nine years later, in 1875, the Court again noted:

[a]t common law the existence of common property is not recognized in the marital relation. By the marriage, the legal existence of the wife is suspended or incorporated into that of the husband; she becomes *sub potestate viri*; is incapable of holding any personal property, or of having the use of any real estate; her earnings belong to her husband, and he is liable for her support.²⁹

The Court referred to the ecclesiastical courts of England in an 1882 decision.³⁰ And in a related case, also decided in 1882, the Court reiterated:

[i]n England the jurisdiction of divorce cases was committed to the ecclesiastical courts. Under the practice of these courts the parties were . . . 'in effect both plaintiff and defendant at the same time. So that, for example, one proceeded for divorce *a mensa et thoro*³¹

In 1884, the Court noted that before the Nevada Statute of 1865:

the property rights of husband and wife were governed by the common law . . . [I]t is conceded that property acquired during coverture presumably belongs to the community

. . . .

[A]fter divorce [is] granted to plaintiff the law imposes upon defendant the duty of supporting her according to his ability and condition in life.³²

²⁴ See Collins, *supra* note 5, at 61. For general discussions of English common law, see Mani v. Mani, 869 A.2d 904, 908-09 (N.J. 2005).

²⁵ Wilde v. Wilde, 2 Nev. 306, 306 (1866). The very first reference to alimony from the Nevada geographical area is found in *Kenyon v. Kenyon*, 24 P. 829 (Utah 1861). There, the Utah Territorial Supreme Court considered an appeal from the district court in Carson County. *Id.* at 829. The district court did not enter an absolute divorce—it granted a divorce from bed and board and awarded alimony of \$2,500.00. *Id.*

²⁶ Wilde, 2 Nev. at 306.

²⁷ *Id.* at 307.

²⁸ *Id.*

²⁹ Darrenberger v. Haupt, 10 Nev. 43, 45-46 (1875).

³⁰ Lake v. Lake, 16 Nev. 363, 369 (1882).

³¹ Wuest v. Wuest, 30 P. 886, 886 (Nev. 1882) (citation omitted).

³² Lake v. Lake, 4 P. 711, 722-23, 730 (Nev. 1884).

As late as 1920, the Nevada Supreme Court still referred to coverture as a basis for alimony.³³ A husband was jailed for contempt because he did not pay court-ordered alimony.³⁴ The Court noted that alimony is a

mere allowance for support and maintenance—a duty growing out of the marriage status; a duty which sound public policy sanctions to compel one who is able so to do, possibly as a result of the co-operation (during coverture) of his former wife, to prevent such former wife from becoming a public charge or dependent upon the charity of relatives or friends.³⁵

The Court then approved the following statement of law: “[T]he decree for alimony is an order of the court to the husband, compelling him to support his wife by paying certain sums, and thus perform a public as well as a marital duty.”³⁶ In 1970, the Court again noted at “common law, there was no final divorce, only a judicially decreed separation”³⁷

Absolute divorce has always been available in Nevada, and alimony has always been a feature of Nevada law. Thus, it appears the English tradition of continuing support when divorced from bed and board was transmuted in Nevada without explanation into necessitous support after an absolute divorce was granted.

C. *Post-Coverture Purposes for Alimony*

The analytical framework for alimony began to lose constancy with the end of coverture and advent of absolute divorce. If alimony was support during legal separation, awarded when the wife did not enjoy her own legal identity, “why does [it] continue to exist as an incident to divorce?”³⁸ The pragmatic answer is that divorce historically resulted in tremendous financial burdens for women. Even though women enjoyed their own legal identity, they did not enjoy economic parity or equality of economic opportunity. Women also subordinated their economic opportunities to the socially valuable, but noncompensatory care work of family and home. Marriage was viewed as a contract, the breach of which left many women unable to support themselves.³⁹

There should be little doubt that alimony provides an important mechanism for remedying economic injustice caused by divorce. But if alimony is important, it should be easily grounded in an articulated, sustainable policy rationale. Otherwise, alimony opponents will continue to decry the awards as social engineering, peonage, or perpetual involuntary servitude.⁴⁰

³³ *Ex parte* Phillips, 187 P. 311, 312 (Nev. 1920).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Bailey v. Bailey*, 471 P.2d 220, 221 (Nev. 1970).

³⁸ Collins, *supra* note 5, at 24.

³⁹ Alfred J. Sciarrino & Susan K. Duke, *Alimony: Peonage or Involuntary Servitude?*, 27 AM. J. TRIAL ADVOC. 67, 69 (2003); *see generally* *Wuest v. Wuest*, 30 P. 886 (Nev. 1882).

⁴⁰ Sciarrino & Duke, *supra* note 39, at 71 (noting the numerous arguments that alimony prevents the bonds of marriage from being dissolved; instead, it merely transmutes the bonds of marriage into bonds of servitude—a “judicially mandated system of lifetime serfdom”). *See also* Brad Reagan, *Getting the Better Half*, SMART MONEY, July 2007, at 82, 84 (noting that “[f]or as long as divorce has existed, men have griped about their divorce settlements—

Nevada does not provide a coherent policy rationale for why, when, and how alimony should be awarded. Many national scholars have offered contemporary rationales for alimony.⁴¹ While the rationales vary, they are susceptible to three different categories. The first category reflects the historic purpose of alimony: support calculated by the wife's needs and limited by the husband's ability to pay.⁴² The second category reflects contemporary rationales independent of alimony's coverture origins. These rationales suggest alimony is compensation to a former spouse by "rewarding efforts in homemaking, childrearing, interruption of a career, or contributions to the success of the other."⁴³ The second category of rationales are "based on theories of contract or partnership law, of economic or personal dislocation, and on general equitable principles of compensation" and are referred to collectively as "economic loss" rationales.⁴⁴ Finally, the third category of rationales is grounded in public policies such as fault deterrence and welfare avoidance.⁴⁵ I briefly introduce the economic loss rationales composing the second category in this Article.

D. *Alimony as Compensation for Economic Losses*

A recurring theme for economic loss proponents is the injustice that results upon dissolution of marriage when one spouse subordinates her economic utility to child-rearing and other domestic endeavors. In this Section, I briefly articulate the arguments set forth by contract theorists, partnership theorists, reliance theorists, and legal theorists in support of the "economic loss" rationale in favor of alimony.

For contract theorists, the timing of contractual promises is asymmetrical:

[T]he wife typically delivers her promise early in the marriage (by bearing and rearing children), whereas the husband delivers his promise later in the marriage (by providing adequate financial support to his family). Since the husband's income as the primary wage-earner usually increases as he approaches the peak of his career, at a time when the wife has already "performed" her part of the marriage contract, the husband has an incentive to exit the marriage at this later stage. Thus, divorce may have a detrimental impact on the economic well-being of wives, especially if they had been full-time homemakers during marriage.⁴⁶

perhaps most succinctly in Jerry Reed's 1982 hit single, 'She Got the Goldmine (I Got the Shaft)'").

⁴¹ Collins, *supra* note 5, at 40-48 (introducing 10 different rationales for contemporary alimony).

⁴² *Id.* at 39.

⁴³ *Id.* at 39-40.

⁴⁴ *Id.* at 40.

⁴⁵ *Id.* Alimony for fault deterrence is not applicable in Nevada. Alimony for welfare avoidance appears antiquated; nevertheless, as recently as 1989, the Nevada legislature recognized alimony in lieu of welfare as a consideration for rehabilitative alimony. *Fondi v. Fondi*, 802 P.2d 1264, 1268 n.5 (1990).

⁴⁶ Aspasia Tsaoussis, *Protecting Homemakers' Marriage-Specific Investments Under No-Fault Divorce: A Model for Restructuring Alimony in Civil Law Countries*, 6 AM. L. & ECON. REV. 217, 220-21 (2004).

A criticism of the contract theory is the measure of damages. Expectation is the standard measure for breach-of-contract damages, but expectancy damages are awarded only against a breaching party.⁴⁷

Partnership theorists focus on the spouses' investments into the marital partnership. Divorce deprives a partner of the return to which she is entitled.⁴⁸ Thus:

[s]pouses who interrupt careers to stay home to raise children, work to put their partners through graduate or professional school, or relocate to further their spouses' careers have made personal contributions whose dividends would be expected to accrue only in the future; in such cases, the return on the investment is obliterated by a divorce This compensatory aspect of maintenance reflects the reality that when one spouse stays home and raises the children, not only does that spouse lose future earning capacity by not being employed or by being underemployed subject to the needs of the family, but that spouse increases the future earning capacity of the working spouse who, while enjoying family life, is free to devote productive time to career enhancement.⁴⁹

Several commentators describe alimony as a division of the husband's "career asset," which an employed spouse generally builds through increased employment power during marriage.⁵⁰ For some divorcing couples, the economically superior spouse's career asset is one of the more valuable marital assets. However, a career asset cannot be divided upon divorce and allowing the husband to retain the career asset built upon the wife's contributions would result in the husband's unjust enrichment. Therefore, alimony is an adjunct to property division. Judge Posner explains:

[Alimony] is a method of repaying the wife (in the traditional marriage) her share of the marital partnership's assets. Often the principal asset to which the wife will have contributed by her labor in the household or in the market . . . [such as when a wife supports her husband while he is in graduate school] is the husband's earning capacity. This is an asset against which it is difficult to borrow. . . . So it might be infeasible for the husband to raise the money necessary to buy back from the wife, in a lump sum, as much of the asset as she can fairly claim is hers by virtue of her contributions; instead he must pay her over time out of the stream of earnings that the asset generates.⁵¹

Marriages of long duration are particularly susceptible to alimony because of lost economic opportunities. The "reliance theory" rationale is grounded in

⁴⁷ AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §5.04 cmt. b, at 807 (2002).

⁴⁸ Collins, *supra* note 5, at 43.

⁴⁹ Collins, *supra* note 5, at 43-44 (quoting *Delozier v. Delozier*, 640 A.2d 55, 57-58 (Vt. 1994)). Additionally, as in many states, Nevada alimony cannot be predicated upon marital fault or breach of the marital contract. *See generally Wheeler v. Upton-Wheeler*, 946 P.2d 200 (Nev. 1997). Alimony has been described as the receipt of "work in progress" profits similar to income payable to a former partner after a partnership has dissolved. *Id.* at 49.

⁵⁰ *See, e.g., Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* 61 (1985).

⁵¹ RICHARD A. POSNER, *Economic Analysis of Law* 151 (7th ed. 2007); *see also* Diana Green Smith, 'Til Success Do Us Part: How Illinois Promotes Inequities in Property Distribution Pursuant to Divorce by Excluding Professional Goodwill, 26 J. MARSHALL L. REV. 147, 163-65 (1992).

economic loss, but expanded by the passage of time.⁵² Spouses make certain investments and decisions in reliance upon the continuation of marriage. They make decisions they would not otherwise make if they were unmarried. The longer the marriage, the greater the spouses rely upon the continuation of marriage—with its attendant economic benefits. The longer a spouse relies upon marriage, the greater her risks of economic injustice upon divorce. As explained by two scholars:

First, the longer the marriage, the more likely the parties are to have foregone opportunities to enter into other favorable marriages. Second, in cases where career sacrifices are involved, the longer the marriage, the less likely the sacrificing spouse will be able to resume the interrupted career. Third, the longer the marriage and the greater the disparity in income, the more likely an increase in earning capacity occurred during the marriage, due (at least to some degree) to the contributions of the supporting spouse.⁵³

Legal economists view the family as a consuming and producing unit in society.⁵⁴ The family unit's economic properties can therefore be quantified and valued.⁵⁵ The family firm buys inputs of market commodities while producing outputs of "nourishment, warmth, affection, children, and the other tangible and intangible goods . . ."⁵⁶ Rational individuals make choices by reference to costs and benefits. If each spouse equally participates in care work and wage work, "the marriage will be less 'profitable.'"⁵⁷ "The theory of comparative advantage implies that the resources of members of a household . . . should be allocated to various activities according to their comparative or relative efficiencies."⁵⁸ Therefore, one spouse specializes in income production while the other spouse specializes in household production (even though the latter spouse may also work outside the home for financial compensation).⁵⁹ Spouses maximize the family profits by making these marital sharing choices.⁶⁰

The economic consequences of specialization under a traditional utility maximization theory become apparent upon divorce. "Human capital is the

⁵² Spillane, *supra* note 7, at 288.

⁵³ Collins, *supra* note 5 at 53 (quoting Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, n.151 (1988)); *see also* AM. LAW INST., *supra* note 47, §5.02 cmt. f, at 792.

⁵⁴ POSNER, *supra* note 51, at 143.

⁵⁵ This analysis may be problematic because market valuation "excludes . . . constraints of social roles and inequalities based upon gender, race, and class." Gaytri Kachroo, *Mapping Alimony: From Status to Contract and Beyond*, 5 PIERCE L. REV. 163, 164 (2007).

⁵⁶ POSNER, *supra* note 51, at 143.

⁵⁷ Kachroo, *supra* note 55, at 182; *see also* POSNER, *supra* note 51, at 144 ("By specializing in household production, the wife maximizes the value of her time as an input into the production of the household's overall output. This division of labor tends to maximize the total real income of the household by enabling husband and wife to specialize in complementary activities. It is the same principle that leads us to expect a person who works half-time as a doctor and half-time as a lawyer to produce less than one-half the total output of medical and legal services of two people of equal ability to his, one of whom is a full-time doctor and the other a full-time lawyer.").

⁵⁸ Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357, 366 (2007).

⁵⁹ Kachroo, *supra* note 55, at 219.

⁶⁰ *Id.* at 182.

ability to earn a stream of income over a lifetime.”⁶¹ Human capital is an asset. Individuals invest in their human capital through education and work experience.⁶² Specialization in household labor may cause decreased human capital through lack of ongoing training and employment opportunities. In traditional marriages, where specialization of labor occurs, the care worker’s human capital diminishes while the wage worker’s human capital increases. During marriage, the specialization is mutually advantageous to both parties. Upon divorce, however, the wage worker takes his increased human capital into his post-marriage future while the care worker leaves the marriage with diminished capital and a decreased earning ability.

Legal economists propose that the rational basis for alimony is compensation for the opportunity cost in the form of decreased earning capacity that results from one spouse’s care work during the marriage.⁶³ In other words, alimony is calculated by prices imposed and costs allocated to care work—as if the care work spouse were the employee of the wage work spouse. The value of the alimony claim is the value of the lost earning capacity realized through the loss of the mutual effort to maximize income.⁶⁴ Additionally, the value of love and companionship is measured by the doctrine of altruism, which is primarily advanced by Nobel Laureate Gary Becker.⁶⁵

Several scholars criticize the law and economics approach to alimony law.⁶⁶ These critics argue the distinction between positive and normative economic theories is difficult to sustain when describing intimate human relationships.⁶⁷ Legal economists have a “tendency to mix normative judgments liberally in . . . positive analysis.”⁶⁸ Positive economists fail to acknowledge that family behavior cannot be valued in money, and the “heavily mathematical” analysis may be “sterile, incomplete, and even inaccurate.”⁶⁹ According to one scholar, this social reality creates problems for all but the most theoretical legal economists.⁷⁰ Additionally, feminist theory critics argue gender-based divisions of labor are traceable not only to shared utility, but also to issues of power and socially-imposed inequality.⁷¹

Despite its criticisms, the language of law and economics has led to a significant proposal for alimony reform. A seminal reference point for the economic loss rationale is found with the efforts of the American Law Institute (ALI). The ALI devoted eleven years to developing an alimony formula

⁶¹ Spillane, *supra* note 7, at 288; *see also* STEPHEN J. SPURR, *ECONOMIC FOUNDATIONS OF LAW* 27 (2006).

⁶² Spillane, *supra* note 7, at 288.

⁶³ *Id.*

⁶⁴ Kachroo, *supra* note 55, at 182.

⁶⁵ Tsoukala, *supra* note 58, at 365 (noting Becker’s argument that altruism leads to coordinated, utilitarian behavior).

⁶⁶ *See generally id.*

⁶⁷ Kachroo, *supra* note 55.

⁶⁸ *Id.* at 201.

⁶⁹ Tsoukala, *supra* note 58, at 370 (quoting Ann Laquer Estin, *Can Families Be Efficient? A Feminist Appraisal*, 4 MICH. J. GENDER & L. 1, 3-5 (1996)); Kachroo, *supra* note 55, at 200.

⁷⁰ Kachroo, *supra* note 55, at 200.

⁷¹ *Id.* at 164, 201.

intended to increase predictability and decrease judicial discretion.⁷² The Principles of the Law of Family Dissolution (the “Principles”) transform alimony from need-based awards into entitlement-based compensation for specific economic losses caused by divorce.⁷³ Although the ALI approved the Principles in 1997, no state has yet to formally adopt the Principles.⁷⁴

Under the Principles, a presumption for post-marriage compensation arises if a spouse: 1) suffered a loss of the marital living standard in a marriage of significant duration; 2) suffered a loss in earning capacity incurred by primary care responsibilities for children; 3) suffered a loss in earning capacity resulting from the care of a sick, elderly or disabled third party to whom a moral obligation is owed; 4) required reimbursement for contributions to the other spouse’s education or training in short-term marriages; and 5) required money to restore her premarital living standard.⁷⁵ The amount of the award is measured by calculating the spouses’ income disparity and multiplying that figure by a durational factor.⁷⁶ Under the Principles, courts preserve judicial discretion to prevent “substantial injustice.”⁷⁷

A recurring point of contention among alimony scholars is the termination of alimony upon cohabitation or remarriage. The Principles provide that alimony may cease upon either of these two events.⁷⁸ Several scholars criticize this approach, arguing that alimony based upon economic entitlement should not be affected by post-marriage economic events.⁷⁹ As argued by one scholar,

[i]f alimony is an entitlement based on gender-neutral principles, it is difficult to explain why a wife must forfeit that entitlement simply because she has begun a new life relationship. Even if she wins the lottery, a dissociated partner need not return her buyout; a creditor need not cancel a debt; a tort victim need not give back her damage award.⁸⁰

The Principles have been both criticized and endorsed.⁸¹ However, the Principles also embody many of the contemporary rationales for alimony and articulate policies that are implicit in Nevada law. Within this contextual background, alimony based upon economic loss, or as an adjunct to property division, appears viable under Nevada law. Alimony based upon a reliance theory

⁷² AM. LAW INST., *supra* note 47, § 5.02, at 787; David Westfall, *Unprincipled Family Dissolution: The American Law Institute’s Recommendations for Spousal Support and Division of Property*, 27 HARV. J.L. & PUB. POL’Y 917, 918 (2004).

⁷³ AM. LAW INST., *supra* note 47, § 5.02 cmt. a, at 788; Tonya L. Brito, *Spousal Support Takes on the Mommy Track: Why the ALI Proposal is Good for Working Mothers*, 8 DUKE J. GENDER L. & POL’Y 151, 152 (2001).

⁷⁴ Elijah L. Milne, *Recharacterizing Separate Property at Divorce*, 84 U. DET. MERCY L. REV. 307, 317 (2007).

⁷⁵ See generally AM. LAW INST., *supra* note 47, §§ 5.02-.05, at 787-834, § 5.11, at 886, § 5.13, at 896.

⁷⁶ Brito, *supra* note 73, at 152; McCoy, *supra* note 8, at 509; Tsoussis, *supra* note 46, at 227.

⁷⁷ AM. LAW INST., *supra* note 47, § 1.02, at 88 (noting that judges must make written findings when departing from the presumption).

⁷⁸ *Id.* §§ 5.07-.09, at 859-75.

⁷⁹ Cynthia Lee Starnes, *One More Time: Alimony, Intuition, and the Remarriage-Termination Rule*, 81 IND. L.J. 971, 992 (2006).

⁸⁰ *Id.*; see also POSNER, *supra* note 51, at 151.

⁸¹ See McCoy, *supra* note 8; Westfall, *supra* note 72; Kapalla, *supra* note 16.

of marriage continuation for long-term marriages also appears to be a viable Nevada rationale.

III. NEVADA STATUTORY ALIMONY

A. *History of Nevada Statutory Alimony*

The Territorial Legislature promulgated the Act Relating to Marriage and Divorce in 1861.⁸² It provided that, if a marriage was dissolved for adultery, the wife should receive the husband's lands and property as if he were deceased.⁸³ If the marriage was dissolved for other causes, the Court could set apart such portion for the wife's support as deemed "just and equitable."⁸⁴ The Nevada Legislature adopted this same language during its first session in 1865.⁸⁵ Reminiscent of coverture, the legislature also directed that "[t]he husband shall have the management and control of the separate property of the wife during the continuation of the marriage"⁸⁶

In 1913, the Nevada Legislature authorized "permanent support and maintenance" if the wife had cause for divorce or was abandoned by her husband for more than ninety days.⁸⁷ In 1915, the Legislature authorized the courts, upon a wife's remarriage, to direct the payment of alimony "for the benefit of the minor children."⁸⁸ In 1939, the Legislature amended the "just and equitable" standard to include an analysis of "the respective merits of the parties and to the condition in which they will be left by such divorce"⁸⁹ The Legislature also made alimony terminable by death or remarriage unless "otherwise ordered by the court."⁹⁰

In 1993, the Nevada Legislature eliminated the "respective merits of the parties" and the "condition in which they will be left by the divorce" considerations.⁹¹ The alimony statute now provides that courts may award alimony in a specified principal sum or as specified periodic payments as appears "just and equitable."⁹² Periodic alimony payments cease upon death or remarriage, unless otherwise ordered by the court.⁹³ Courts may modify alimony payments not yet accrued upon a showing of changed circumstances.⁹⁴

⁸² Act of Nov. 28, 1861, ch. 24, 1861 Nev. Stat. 70-71.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Act of Mar. 7, 1865, ch. 76, 1864-5 Nev. Stat. 239.

⁸⁶ *Id.*

⁸⁷ Act of Mar. 13, 1913, ch. 97, 1912 Nev. Stat. 120.

⁸⁸ Act of Mar. 24, 1915, ch. 211, 1915 Nev. Stat. 324.

⁸⁹ Act of Feb. 23, 1939, ch. 25, 1939 Nev. Stat. 18.

⁹⁰ *Id.* at 18-19.

⁹¹ *Rodriguez v. Rodriguez*, 13 P.3d 415, 417 n.4 (Nev. 2000).

⁹² NEV. REV. STAT. § 125.150(1)(a) (2007).

⁹³ *Id.* § 125.150(5). The Supreme Court has adopted a bright-line rule for remarriage. *See Shank v. Shank*, 691 P.2d 872, 873 (Nev. 1984) (holding that the re-marriage ceremony is enough to terminate alimony—even if the re-marriage is void and subsequently annulled).

⁹⁴ § 125.150(7).

B. Nevada Statutory Guidelines

Until 2007, Nevada was one of only ten states in the country without some form of statutory guidelines to inform the alimony decision.⁹⁵ No state ranks the statutory guidelines' significance or weight.⁹⁶ The result is that "[b]oth the trial and appellate courts look to a hodgepodge of factors, weighing them in an unspecified and unsystematic fashion," rendering it impossible for couples or their counsel to predict with any degree of certainty what the actual alimony award might or should be."⁹⁷

Statutory guidelines generally follow two approaches. The first is an attempt to determine the recipient spouse's financial needs regardless of what contributions she may have made during the marriage.⁹⁸ The second is an attempt to reward the recipient spouse's economic and personal contributions to the marriage, such as "the investments of time, money or effort in the relationship itself, or in its financial health."⁹⁹

The 2007 Nevada Legislature codified eleven guidelines, which were taken directly from decisional authority published by the Nevada Supreme Court.¹⁰⁰ No legislative history examines the substance of the guidelines or provides insight into how courts should measure, balance or otherwise apply the guidelines.¹⁰¹ The newly-enacted guidelines follow the approaches described in the preceding paragraph. Nevada courts must now consider, among any other relevant considerations, the following guidelines when determining alimony:

1. The financial condition of each spouse. This guideline focuses on the recipient's need and the payor's ability to pay.¹⁰²
2. The nature and value of the respective property of each spouse. This guideline focuses on the recipient's need and the payor's ability to pay.¹⁰³
3. The contribution of each spouse to any property held by the spouses pursuant to section 123.030 of the Nevada Revised Statutes.¹⁰⁴ This guideline focuses on the

⁹⁵ Collins, *supra* note 5, at 32; McCoy, *supra* note 8, at 514 n.112.

⁹⁶ Collins, *supra* note 5, at 32.

⁹⁷ *Id.* at 32-33 (alteration in original) (quoting Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; Or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 276 (1987)).

⁹⁸ *Id.* at 36.

⁹⁹ *Id.*

¹⁰⁰ NEV. REV. STAT. § 125.150(8) (2007).

¹⁰¹ The explanatory language provided by the Nevada Legislative Council Bureau merely indicates that

Under existing case law in Nevada, a court determining whether alimony should be awarded and the appropriate amount of alimony is required to consider several relevant factors including: (1) the financial condition of the parties; (2) the nature and value of their respective property; (3) the contribution of each party to any property held by both parties as tenants by the entirety; (4) the duration of the marriage; and (5) the income, earning capacity, age and health of each party. Section 1 of this bill codifies those factors as well as factors from subsequent case law so that a court must consider those factors when determining alimony.

Act of June 13, 2007, ch. 465, 2007 Nev. Stat. 2479 (citations omitted).

¹⁰² NEV. REV. STAT. § 125.150(8)(a) (2007).

¹⁰³ *Id.* § 125.150(8)(b).

¹⁰⁴ *Id.* § 123.030 ("A husband and wife may hold real or personal property as joint tenants, tenants in common, or as community property.").

spouses' respective financial conditions and is therefore an extension of the need and ability to pay considerations.¹⁰⁵

4. The duration of marriage. This guideline focuses on the reliance theory of marriage continuation.¹⁰⁶

5. The income, earning capacity, age and health of each spouse. This guideline focuses on the recipient's need, the payor's ability to pay, the payor's career asset, and the reliance theory of marriage continuation.¹⁰⁷

6. The standard of living during the marriage. This guideline focuses on the reliance theory of marriage continuation.¹⁰⁸

7. The career before the marriage of the spouse who would receive the alimony. This guideline focuses on the recipient's economic loss resulting from career subordination.¹⁰⁹

8. The existence of specialized education or training or the level of marketable skills attained by each spouse during the marriage. This guideline focuses on the career asset as an adjunct to property division and economic loss resulting from career subordination.¹¹⁰

9. The contribution of either spouse as homemaker. This guideline focuses on economic loss resulting from career subordination.¹¹¹

10. The award of property granted by the court in the divorce, other than child support and alimony, to the spouse who would receive the alimony. This guideline focuses on the recipient's need.¹¹²

11. The physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse. This guideline focuses on the recipient's need and the payor's ability to pay.¹¹³

C. Nevada Rehabilitative Alimony

In addition to other alimony, Nevada courts must consider whether rehabilitative alimony is appropriate. Rehabilitative alimony is intended to assist the recipient spouse obtain training or education relating to a job, career, or profession.¹¹⁴ In addition to other relevant factors, courts shall consider:

1. Whether the spouse who would pay alimony has obtained greater job skills or education during the marriage; and

¹⁰⁵ *Id.* § 125.150(8)(c).

¹⁰⁶ *Id.* § 125.150(8)(d).

¹⁰⁷ *Id.* § 125.150(8)(e).

¹⁰⁸ *Id.* § 125.150(8)(f).

¹⁰⁹ *Id.* § 125.150(8)(g).

¹¹⁰ *Id.* § 125.150(8)(h).

¹¹¹ *Id.* § 125.150(8)(i).

¹¹² *Id.* § 125.150(8)(j).

¹¹³ *Id.* § 125.150(8)(k).

¹¹⁴ *Johnson v. Steel, Inc.*, 581 P.2d 860, 862 (Nev. 1978) ("It is clear that the two year award was in the nature of 'rehabilitative alimony', awarded wives for the purpose of facilitating their entry into the labor market.")

2. Whether the spouse who would receive such alimony provided financial support while the other spouse obtained job skills or education.¹¹⁵

The Nevada Legislature created rehabilitative alimony, among other reasons, to increase the workforce and keep the recipient spouses off the welfare rolls.¹¹⁶ The factors indicate that rehabilitative alimony is also intended to compensate for losses incurred by career subordination to the predomination of the other spouse's career asset.

D. Statutory Division of Marital Estate

Alimony as an adjunct to property division compels a brief examination of Nevada's marital property distribution scheme. In 1993, the Nevada Legislature changed Nevada's property division law from equitable division to equal division.¹¹⁷ Nevada courts must now, to the extent practicable, divide the marital estate equally without regard to the respective merits of the parties.¹¹⁸ Marital fault is not legally relevant.¹¹⁹ A court may divide the marital estate unequally if there are compelling reasons to do so.¹²⁰ In 1996 and 1997, the Nevada Supreme Court published two decisions analyzing what may constitute compelling reasons for unequal division.¹²¹ The focus of these decisions is financial misconduct, primarily after separation. The Court did note in dicta that another compelling reason could be to compensate one spouse for losses occasioned by marriage and its dissolution, such as reimbursement for supporting a spouse while he or she obtained a graduate degree.¹²² Thus, courts may use property division to remedy the economic losses normally associated with alimony.

IV. NEVADA DECISIONAL AUTHORITY

There are more than 300 Nevada Supreme Court published decisions containing the word "alimony" in the text or editorial annotation.¹²³ Upon careful review, however, only a few decisions examine post-marriage alimony. Of those, there are even fewer that provide any overarching policy guidance

¹¹⁵ § 125.150(9).

¹¹⁶ *Fondi v. Fondi*, 802 P.2d 1264, 1268 n.5 (Nev. 1990).

¹¹⁷ *Rodriguez v. Rodriguez*, 13 P.3d 415, 417 & n.4 (Nev. 2000).

¹¹⁸ § 125.150(1)(b); *Wheeler v. Upton-Wheeler*, 946 P.2d 200, 203 (Nev. 1997).

¹¹⁹ *Wheeler*, 946 P.2d at 203.

¹²⁰ § 125.150(1)(b).

¹²¹ *Putterman v. Putterman*, 939 P.2d 1047, 1048 (Nev. 1997); *Lofgren v. Lofgren*, 926 P.2d 296, 297-98 (Nev. 1996).

¹²² *Putterman*, 939 P.2d at 1048. The issue of graduate educations has spawned its own literature. See generally *In re Marriage of Weinstein*, 470 N.E.2d 551 (Ill. App. Ct. 1984); *In re Marriage of Francis*, 442 N.W.2d 59 (Iowa 1989); *Postema v. Postema*, 471 N.W.2d 912 (Mich. Ct. App. 1991); *O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y. 1985); *In re Marriage of Denton*, 951 P.2d 693 (Or. 1998); *Haugan v. Haugan*, 343 N.W.2d 796 (Wis. 1984); Katherine Wells Meighan, *For Better or For Worse: A Corporate Finance Approach to Valuing Educational Degrees at Divorce*, 5 GEO. MASON L. REV. 193 (1997); Daniel D. Polsby & Martin Zelder, *Risk-Adjusted Valuation of Professional Degrees in Divorce*, 23 J. LEGAL STUD. 273 (1994).

¹²³ As of December 29, 2008, a Westlaw search with the key terms "alimony" or "spousal support" returned 340 results.

regarding alimony. The decisions are difficult to categorize for several reasons. First, they represent more than 120 years of jurisprudence—with evolving social circumstances and rotating judicial personalities. Second, the decisions lack analytical consistency and are each informed by a trial judge’s individual discretion. On a few occasions, the Court has acted as a trier of fact, choosing to impose its own judgment instead of remanding for further proceedings.¹²⁴ Third, only seven decisions were published after the enactment of the 1993 equal division statute.¹²⁵ The Court last published a substantive alimony decision in 2000.¹²⁶ Fourth, the Court has historically entered a substantial number of unpublished dispositive orders. These orders are neither available for organized academic review nor may they be referred to for any precedential purpose.¹²⁷ Fifth, many of the decisions contain overlapping analyses and could be placed within multiple categories.

For the purposes of this Article, the relevant Nevada Supreme Court decisions are placed within one of the following policy categories:

1. Traditional need-based alimony and/or the payor’s ability to pay¹²⁸
2. Non-specific economic loss
3. Adjunct to property division
4. Reliance theory of marriage continuation

In this Section, I discuss each of these policy categories, in turn.

A. *Traditional Need-Based Alimony and/or the Payor’s Ability to Pay*

There are twenty-eight decisions examining alimony based upon the recipient spouse’s need and/or the payor spouse’s ability to pay.¹²⁹ These decisions span 114 years, dating from 1884 through 1998. Many of these decisions are interesting, but of little contemporary value because none explain *why* one spouse must support a former spouse after the marriage has ended. A summary of the need-based decisions is included in Appendix A at the conclusion of this Article.

The Nevada Supreme Court announced in its first substantive alimony decision that after a divorce is finalized, the law shall impose “the duty of supporting [the wife] according to [the husband’s] ability and condition in life.”¹³⁰ The Court published its last need-based decision in 1998.¹³¹ That

¹²⁴ See *Gardner v. Gardner*, 881 P.2d 645, 648 (Nev. 1994); *Rutar v. Rutar*, 827 P.2d 829, 833 (Nev. 1992).

¹²⁵ *Rodriguez v. Rodriguez*, 13 P.3d 415 (Nev. 2000); *Wright v. Osburn*, 970 P.2d 1071 (Nev. 1998); *Gilman v. Gilman*, 956 P.2d 761 (Nev. 1998); *Shydler v. Shydler*, 954 P.2d 37 (Nev. 1998); *Alba v. Alba*, 892 P.2d 574 (Nev. 1995); *Gardner*, 881 P.2d 645; *Sprenger v. Sprenger*, 878 P.2d 284 (Nev. 1994).

¹²⁶ See *Rodriguez v. Rodriguez*, 13 P.3d 415 (Nev. 2000), *but see Williams v. Williams*, 97 P.3d 1124 (Nev. 2004) (Although in the author’s view, not a “substantive” decision, held that the putative spouse doctrine does not permit an alimony award if the marriage ends in annulment).

¹²⁷ NEV. SUP. CT. R. 123.

¹²⁸ The ability to pay decisions are combined with the traditional need-based decisions because they are incongruent with alimony as an entitlement resulting from economic loss.

¹²⁹ See *infra* app. A.

¹³⁰ *Lake v. Lake*, 4 P. 711, 730 (1884).

decision does little to advance the concept of alimony as a form of economic entitlement. The Court noted the majority rule that cohabitation can lead to modification or termination if the “recipient spouse’s need for the support decreases as a result of the cohabitation.”¹³² The Court then adopted the following “economic needs” test:

[T]he amount of spousal support reduction, if any, depends upon a factual examination of the financial effects of the cohabitation on the recipient spouse. Shared living arrangements, unaccompanied by evidence of a decrease in the actual financial needs of the recipient spouse, are generally insufficient to call for alimony modification.

The economic needs test properly considers the rights and needs, both fiscal and personal, of payor and recipient spouses

. . . [T]he test also recognizes the fact that the recipient spouse may be left largely unprotected, from an economic standpoint, if he or she breaks off a relationship with the cohabitant.¹³³

B. *Non-Specific Economic Loss*

There are four published decisions in which nonspecific economic loss can be inferred as an analytical influence in the alimony decision.¹³⁴ These decisions are only marginally instructive, however, and only so by inference. Two decisions confirmed alimony and two decisions affirmed the denial of alimony. A summary of the non-specific economic loss decisions is included in Appendix B at the conclusion of this Article.

In *Thorne v. Thorne*,¹³⁵ the Nevada Supreme Court noted, in dicta, that a wife suffers economic loss if she does not receive a return on her investment into the marriage endeavor by way of an alimony award.¹³⁶ In *Winn v. Winn*,¹³⁷ the Court recognized that alimony can be used to compensate one spouse for economic losses incurred in a short-term marriage.¹³⁸ The decision implies alimony can be used to return a spouse to her pre-marriage economic condition. In *York v. York*,¹³⁹ the Court rejected the proposition that care work is separately compensable through alimony.¹⁴⁰ The Court noted:

It is generally recognized that the marital community is a partnership to which both parties contribute. Each spouse contributes his or her industry in order to further the goals of the marriage. There was evidence to show [the wife] labored for the benefit of her marital relationship by performing household duties. She fails, however, to cite any authority for the proposition that such services are compensable upon divorce.¹⁴¹

¹³¹ *Gilman v. Gilman*, 956 P.2d 761 (Nev. 1998).

¹³² *Id.* at 764.

¹³³ *Id.* at 765 (citations omitted). As noted by many scholars, alimony terminable by remarriage is incongruent with the concept of economic entitlement. See Starnes, *supra* note 79, at 992; see also POSNER, *supra* note 51, at 151.

¹³⁴ See *infra* app. B.

¹³⁵ *Thorne v. Thorne*, 326 P.2d 729 (Nev. 1958).

¹³⁶ *Id.* at 730.

¹³⁷ *Winn v. Winn*, 467 P.2d 601 (Nev. 1970).

¹³⁸ *Id.* at 602.

¹³⁹ *York v. York*, 718 P.2d 670 (Nev. 1986).

¹⁴⁰ *Id.* at 671.

¹⁴¹ *Id.*

Finally, in *Fondi v. Fondi*,¹⁴² the Court examined a mid-length marriage of sixteen years and concluded that alimony was not appropriate because: 1) the claimant did not contribute to her husband's career asset; 2) the claimant remained employed throughout the marriage; 3) the parties had no children together; and 4) the claimant did not need post-marriage support.¹⁴³

C. Adjunct to Property Division

Beginning in 1988, the Nevada Supreme Court published four decisions in which it focused on the payor spouse's career asset built upon the contributions of both spouses.¹⁴⁴ A common analytical thread running through each decision is the recipient spouse's post-marriage economic need. No decision contains a clear analysis of entitlement independent of economic need. These decisions are instructive and are summarized in Appendix C at the conclusion of this Article.

In *Heim v. Heim*,¹⁴⁵ the husband obtained a Ph.D. degree and lucrative university position during marriage.¹⁴⁶ In contrast, the wife was a care worker for six children throughout the marriage.¹⁴⁷ The Court was

struck by the enormous disparity in the status and quality of life of the two marital partners that is brought about largely by the 'paltry' amount of alimony awarded to her by the trial court. It is quite obvious that [he] leaves the divorce with almost everything and [she] with almost nothing. By 'everything' we mean principally [his] present capacity (a capacity gained by him through the long-term efforts of both parties) to hold a prestigious position and command a large salary. Rather clearly, the single most valuable product of the [parties'] enterprise in the marital partnership is the Ph.D. degree and the high level of professional employability which were gained by [him] during the marriage."¹⁴⁸

Under these circumstances, the Court held the wife was entitled to "somefair return" based upon her contributions to the marital partnership.¹⁴⁹

The case of *Gardner v. Gardner*¹⁵⁰ involved spouses who were both educated and employed during marriage.¹⁵¹ The wife relocated several times with the husband through several iterations of his pilot training and career.¹⁵² Each time the spouses moved, the wife was forced to leave her employment and lose seniority and retirement benefits.¹⁵³ The Court reversed the trial court's limited award of rehabilitative alimony, noting "[t]he magnitude of [her] contribution to the community over many years is not fairly recognized by the two-year alimony award"¹⁵⁴

¹⁴² *Fondi v. Fondi*, 802 P.2d 1264 (Nev. 1990).

¹⁴³ *Id.* at 1269-70.

¹⁴⁴ *See infra* app. C.

¹⁴⁵ *Heim v. Heim*, 763 P.2d 678 (Nev. 1988).

¹⁴⁶ *Id.* at 678.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 681-82 (citations omitted).

¹⁴⁹ *Id.* at 683.

¹⁵⁰ *Gardner v. Gardner*, 881 P.2d 645 (Nev. 1994).

¹⁵¹ *Id.* at 646.

¹⁵² *Id.*

¹⁵³ *Id.* at 646-47.

¹⁵⁴ *Id.* at 648.

In *Wright v. Osburn*,¹⁵⁵ the parties both obtained college educations during marriage.¹⁵⁶ The wife was not employed as a wage worker after the birth of the couple's first child.¹⁵⁷ The Court reversed an award of rehabilitative alimony because the wife enabled the husband "to obtain an advanced degree and establish a career."¹⁵⁸ As a result, the husband's post-marriage economic opportunities were greater than the wife's post-marriage economic opportunities.¹⁵⁹ The Court concluded it was unlikely the wife would be able to earn an income that would enable her to either "maintain the lifestyle she enjoyed during marriage or a lifestyle commensurate with, although not necessarily equal, to that of [the husband's]."¹⁶⁰

Finally, in *Rodriguez v. Rodriguez*,¹⁶¹ the Court noted the husband had "risen steadily to a management position" and enjoyed a "far superior earning power."¹⁶² In contrast, the wife would be "impoverished as a result of divorce."¹⁶³ *Rodriguez* was the Court's last alimony decision, and is best known for its holding that "[a]limony is not a sword to level the wrongdoer"¹⁶⁴ and it "is not a prize to reward virtue. Alimony is financial support paid from one spouse to the other whenever justice and equity require it."¹⁶⁵

D. Reliance Theory for Lengthy Marriages

Beginning in 1978, the Nevada Supreme Court published five decisions in which it concluded the length of marriage was the engine of alimony.¹⁶⁶ The marriages ranged from seventeen to twenty-one years. A summary of the Court's decisions is available in Appendix D. Three of the decisions reject rehabilitative alimony as the remedy to economic injustice resulting from long-term marriages, whereas one decision suggests that rehabilitative alimony could be an adequate remedy. As with other economic loss decisions, these decisions are phrased within the context of the recipient spouse's economic need.

In *Johnson v. Steel, Incorporated*,¹⁶⁷ the Court provided its most thorough analysis of the reliance theory. The parties were married twenty years and their two children were still minors at the time of divorce.¹⁶⁸ The lower court awarded rehabilitative alimony for two years and nominal monthly alimony until the wife's death or remarriage.¹⁶⁹ The Court acknowledged the "legitimate and healthy trend toward consideration of the wife's ability to become

¹⁵⁵ *Wright v. Osburn*, 970 P.2d 1071 (Nev. 1998).

¹⁵⁶ *Id.* at 1071.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1072.

¹⁵⁹ *Id.* at 1071-72.

¹⁶⁰ *Id.* at 1072.

¹⁶¹ *Rodriguez v. Rodriguez*, 13 P.3d 415 (Nev. 2000).

¹⁶² *Id.* at 420.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 419.

¹⁶⁵ *Id.*

¹⁶⁶ See *infra* app. D.

¹⁶⁷ *Johnson v. Steel, Inc.*, 581 P.2d 860 (Nev. 1978).

¹⁶⁸ *Id.* at 861.

¹⁶⁹ *Id.* at 862.

Winter 2009]

NEVADA ALIMONY

343

self-supporting in the determination of alimony,” but then cited to a New York decision as follows:

[I]n our zeal to correct what may have been inequitably burdensome alimony arrangements and to recognize the selfhood of women as functioning, independent persons, we would do injustice to the men and women we seek to treat more equally if we ignored the facts of life. A woman who, for historical and personal reasons, and especially with the long concurrence of her husband, chooses to make her contribution to a marriage by remaining at home to raise the children of the union and who finds herself, after 23 years, alone with still-growing children to rear, might be victimized rather than liberated by being required to enter the working world.

. . . .

. . . “[W]here (a husband) has acquiesced in and benefited from her role as wife and mother for 23 years, he may not now, for his own economic reasons, force her into a different role without demonstrating that it has economic viability and that the children will not suffer any detriment from it.”¹⁷⁰

In *Shydler v. Shydler*,¹⁷¹ the Court referred to the husband’s career asset as “business acumen” that enhanced his post-marriage economic condition.¹⁷² The Court held:

Alimony is an equitable award serving to meet the post-divorce needs and rights of the former spouse [T]wo of the primary purposes of alimony, at least in marriages of significant length, are to narrow any large gaps between the post-divorce earning capacities of the parties, and to allow the recipient spouse to live “as nearly as fairly possible to the station in life [] enjoyed before the divorce.” The individual circumstances of each case will determine the appropriate amount and length of any alimony award.¹⁷³

The *Shydler* Court does not explain the legal principle on which it based its decision. Interestingly, the Court remanded the issue and noted that alimony, “at least for a period of rehabilitation,”¹⁷⁴ was appropriate. The Court also held that Nevada law does not require alimony to equalize post-marriage salaries.¹⁷⁵

V. OBSERVATIONS ABOUT NEVADA ALIMONY

Nevada law provides no consistently or coherently stated rationale for alimony awards. Nevada decisional and statutory law provide support for almost any conceivable alimony decision. As noted by a judge from another jurisdiction, support for alimony “can be found in the cases for absolutely any argu-

¹⁷⁰ *Id.* at 863 (citing *Kay v. Kay*, 339 N.E.2d 143, 147 (N.Y. 1975) (citations omitted)).

¹⁷¹ *Shydler v. Shydler*, 954 P.2d 37 (Nev. 1998).

¹⁷² *Id.* at 39 (noting a court may consider the alimony award as an adjunct to property division).

¹⁷³ *Id.* at 40 (citing *Sprenger v. Sprenger*, 878 P.2d 284, 287-88 (Nev. 1994) (citations omitted)).

¹⁷⁴ *Id.* at 41.

¹⁷⁵ *Id.*

ment or position one wants to pursue.”¹⁷⁶ The same assertion could be made in Nevada. Nonetheless, as set forth below, some alimony trends are discernable.

A. *Statutory Guidance*

The 2007 statutory guidelines were derived from legal principles announced by the Nevada Supreme Court during the last several decades. The guidelines reflect historical alimony considerations because the Court historically focused on need and ability to pay.¹⁷⁷ The guidelines also suggest compensation for economic losses resulting from career subordination, the indivisibility of the career asset, and the dissolution of a long-term marriage.¹⁷⁸ There is no known legislative history examining the guidelines, nor is there any evidence the guidelines were filtered through any deliberative legislative process. Neither the legislation itself, nor its history, provides any insight for implementation. Thus, the guidelines may be more palliative than purpose driven. Although the guidelines are encouraging, particularly those that focus on economic loss, they should be re-examined and re-stated to better assist pretrial resolutions and adjudicatory decisions.

B. *Need-based alimony is pervasive but trending downward*

Nevada statutory and decisional authority contemplate alimony that is somewhat related to the recipient spouse's need, even if the need is broadly defined to include the wife's luxurious marital standard of living. The Nevada Supreme Court continues to refer to the recipient spouse's need in its ostensible economic loss decisions, but it has not confirmed need as the sole basis for alimony since 1990.¹⁷⁹ The Nevada authorities provide no explanation for why a person should be compelled to support a former spouse after the marriage has ended. As stated by one leading alimony scholar: “[J]ust because many divorced women meet financial difficulties upon divorce is no reason to assume that in some way the other former spouse should be liable for this financial need rather than parents, other family, or society generally.”¹⁸⁰ Resolving the contemporary relevance of need-based awards becomes ever more urgent because Nevada is an equal division community property state, without regard to marital fault.¹⁸¹ Also, because need-based awards lack a compelling rationale, there are no criteria for the amount and duration of the award.¹⁸² Income

¹⁷⁶ Sciarrino & Duke, *supra* note 39, at 70 (quoting *Stansberry v. Stansberry*, 1977 Okla. Civ. App. LEXIS 154, at *7 (Okla. Civ. App. Sept. 20, 1977)).

¹⁷⁷ See *supra* notes 95-113 and accompanying text.

¹⁷⁸ See *supra* notes 95-113 and accompanying text.

¹⁷⁹ *Daniel v. Baker*, 794 P.2d 345 (Nev. 1990). The *Gilman* decision was placed within the traditional need-based category but it does not examine need as the basis for alimony; it merely examines the role of need when considering changed circumstances. See *Gilman v. Gilman*, 956 P.2d 761 (Nev. 1998).

¹⁸⁰ Kachroo, *supra* note 55, at 170 (quoting Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 5 (1989)). See also AM. LAW INST., *supra* note 47, § 5.02 cmt. a, at 789; Collins, *supra* note 5, at 37-38 (“[I]f marriage is terminable at will, and marital support obligations end upon divorce, what is the justification for imposing a continued financial relationship upon the parties?”).

¹⁸¹ *Wheeler v. Upton-Wheeler*, 946 P.2d 200, 203 (Nev. 1997).

¹⁸² Collins, *supra* note 5, at 24-25.

and expenses are unpredictable, as are need and ability to pay. Need-based awards perpetuate the antiquated support for services construct, which many feminist scholars have criticized.¹⁸³ Alimony based upon need may also contribute to post-marriage economic injustice because it is frequently denied to claimants who are otherwise entitled to post-marriage compensation.¹⁸⁴ Alimony grounded solely upon economic need does not appear analytically sustainable, nor does it help resolve the chaotic nature of alimony adjudications. For these reasons, it is suggested that Nevada continue trending away from need-based awards in lieu of economic-based compensation.

C. Economic loss alimony is trending upward

Under Nevada law, economic loss resulting from career subordination may be cured by a disproportionate property division, rehabilitative alimony, or permanent alimony. Economic loss resulting from the indivisibility of the payor spouse's career asset may be cured by rehabilitative or permanent alimony, but the published decisions suggest the return on career investment is influenced by the recipient spouse's economic needs. Economic loss resulting from reliance upon the continuation of marriage may be cured by permanent alimony, but virtually every Nevada decision in this regard contains a component of economic need. The tools for better alimony awards nominally exist, but they come without an all-encompassing instruction manual. The concept of alimony as an entitlement based upon economic loss should dominate in future legislation and decisional authorities.¹⁸⁵

D. Methodology of Proof

The method for proving economic loss is an important component of the recipient spouse's case-in-chief. There are no Nevada published decisions examining how such losses may or should be proven. A brief examination of loss caused by career subordination illustrates the need for methodological proof. Income parity is an elusive ideal because income is driven by profession, ambition, sacrifice, and fortuity. Different careers obviously result in different compensation schemes. Therefore, career subordination is best understood within a career-specific context. The recipient spouse's career could be viewed longitudinally. The recipient spouse should be prepared to prove, by expert witness evidence if necessary, what she would earn if she had been employed during marriage, without any employment costs associated with care work or other marital distractions. The recipient spouse should also be prepared to demonstrate how the proven loss may be remedied (i.e., amount and duration of alimony, together with inflation and present value considerations).

Similarly, expert economic evidence can be used to prove the value of the payor spouse's career asset. Many spouses will bring a career asset into the

¹⁸³ Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1 (2003).

¹⁸⁴ Kachroo, *supra* note 55, at 165-69.

¹⁸⁵ Additionally, if alimony is viewed as an economic entitlement, care workers will be secure in their post-marriage affairs and spouses will continue making efficient marital sharing choices.

marriage through pre-marriage education, employment, or experience. The recipient spouse should present evidence regarding the value of the career asset before marriage, the career asset grown during marriage, and the career asset to be further developed with post-marriage efforts.¹⁸⁶ One scholar has argued that alimony predicated upon the career asset must reflect the elasticity of the post-divorce career.¹⁸⁷ The career asset generates ever-diminishing residuals as the employed spouse's post-divorce efforts supplant the marital efforts of both spouses.¹⁸⁸ The absence of such expert economic evidence compromises the courts' ability to render consistent and accurate decisions.

E. Other Considerations

The demographics of age are shifting as elderly Americans are living longer.¹⁸⁹ Nevada authorities provide no guidance regarding alimony for elderly divorce litigants whose marriages cannot be considered long term. Most careers are terminable by age and careers are not readily transferable upon retirement.¹⁹⁰ Thus, each career asset should be considered within its appropriate length expectancy. Must a payor spouse be compelled to keep his career asset active to sustain an alimony award? Must an economically-superior retired spouse pay alimony from the fruits of pre-marriage labor when the marriage was not long term? Nevada provides no answers to these questions.

Another unexamined issue is the propriety of alimony for high-wealth litigants. The equal division of marital property in these circumstances may ameliorate alimony.¹⁹¹ Again, Nevada provides no answer. Nevada policymakers should consider this issue when they revisit the nature and scope of alimony.

¹⁸⁶ See *O'Brien v. O'Brien*, 489 N.E.2d 712, 718 (N.Y. 1985).

¹⁸⁷ *Collins*, *supra* note 5, at 63.

¹⁸⁸ *Id.*

¹⁸⁹ Individual Americans are living longer, and a greater proportion of Americans within the aggregate population are growing elderly. ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2005, at 1 (2005), available at http://assets.aarp.org/rgcenter/general/profile_2005.pdf. Seventy-eight million "baby boomers" were born between 1946 and 1964. Approximately 8000 Americans reach their sixtieth birthday every day. Lenita Powers, *Baby Boomers Changing the Way We Look at Growing Old*, RENO GAZETTE-J., Apr. 4, 2006, at 1. The United States Department of Health and Human Services, Administration on Aging, reports there were 3.1 million Americans over the age of sixty-five in 1900, 33.2 million in 1994, and 36.3 million in 2004. The number of Americans over the age of sixty-five will almost double to 71.5 million by 2030. ERICA F. WOOD, NAT'L CTR. ON ELDER ABUSE, STATE-LEVEL ADULT GUARDIANSHIP DATA: AN EXPLORATORY SURVEY 10 (2006). The average life expectancy for older Americans is also increasing. While there were 4.2 million Americans over the age of eighty-five in 2000, there will be 9.6 million Americans over the age of eighty-five in 2030.

¹⁹⁰ The Social Security Administration has determined eligibility ages for retirement benefits. ADMIN. ON AGING, *supra* note 189, at 1.

¹⁹¹ Judge Posner suggests equal division is arbitrary for "superrich" parties who acquired their wealth during marriage. The value of services contributed by the economically-inferior spouse, when compared to what the economically-superior spouse would pay at arm's length for such services, is not close to market equilibrium. The market benchmark in these cases would be a retrospective analysis of what the parties would have agreed to in a prenuptial agreement regarding unexpected financial success. POSNER, *supra* note 51, at 150-51. The issues of income generation and imputation, along with the sanctity of capital preservation also become relevant for high-wealth litigants. See William H. Stolberg & Jane Hawkins,

Winter 2009]

NEVADA ALIMONY

347

F. Continuation of Judicial Discretion

As an alimony decision-maker, it is difficult to contemplate a forum without judicial discretion. The alimony decision is predicated upon an infinite variety of facts and familial dynamics. Unlike child support, which as a policy is unequivocal and somewhat limited, alimony is more resistant to quantitative or qualitative, result-driven formulae. The fact of marriage does not establish the alimony obligation, whereas the fact of parenthood does establish a child support obligation. While discretion should continue to inform the alimony decision, Nevada trial courts would benefit from a more thorough analysis of the purpose and scope of Nevada alimony.

VI. CONCLUSION

Although economic loss is identified in Nevada law as a sustainable rationale, this Article does not join the surfeit of national scholarship examining the intellectual and philosophical underpinnings of alimony. Rather, this Article synthesizes existing Nevada law and urges a re-examination of why and how courts should award alimony. Without policymaker assistance, trial courts will continue entering disparate alimony awards and litigants will continue to benefit or suffer from the vagaries of judicial personality.

APPENDIX A

Traditional Need-Based Alimony and/or the Payor's Ability to Pay

1. *Lake v. Bender*, 7 P. 74 (Nev. 1885).¹⁹² The Nevada Supreme Court announced in its first substantive alimony decision that “[a]fter divorce is granted to plaintiff the law imposes upon defendant the duty of supporting her according to his ability and condition in life.”¹⁹³ Although the holding is phrased within a traditional needs context, the decision demonstrates the Court’s progressive understanding of a wife’s compensable contributions to the marriage.

Myron and Jane Lake were married in 1864 when Ms. Lake was a twenty-six year old widow and mother of three children.¹⁹⁴ Ms. Lake did not own any property before the marriage, whereas Mr. Lake was already wealthy by the time of the marriage.¹⁹⁵ In 1862, before marriage, Mr. Lake obtained a charter from the Nevada Territorial Legislature to build a toll road and bridge in what is now the City of Reno.¹⁹⁶ At the time, Reno was known as “Lake’s Crossing.”¹⁹⁷ Mr. Lake also owned and operated a hotel.¹⁹⁸ Mr. Lake made substantial money from those enterprises and later sold a large tract of land to the Central Pacific Railroad.¹⁹⁹

Mr. and Ms. Lake had one child together.²⁰⁰ At the time of divorce, the district court confirmed that all of Mr. Lake’s property was his pre-marriage, separate property.²⁰¹ Ms. Lake was forty-seven years of age at the time of their divorce.²⁰² The district court awarded \$150.00 per month to Ms. Lake for as long as she remained unmarried.²⁰³ Ms. Lake

had no property, but for more than 15 years she worked hard and performed faithfully the duties of a wife. When she married Lake she was strong and healthy, but at the time of the trial she testified that the hard work she had done had prematurely enfeebled and aged her.²⁰⁴

Ms. Lake had “contributed her services and co-operated with him in the manifold enterprises undertaken by him. Early and late she toiled for him, year in and year out.”²⁰⁵ The Court concluded that “she [was] entitled, at least, to

¹⁹² The Supreme Court reviewed the case four times. The first appeal was procedurally deficient because a final judgment had not been entered. *Lake v. King*, 16 Nev. 215 (1881). The second appeal confirmed the award of alimony *pendent lite*. *Lake v. Lake*, 16 Nev. 363 (1882). The third appeal challenged the district court’s characterization of all martial property as the husband’s separate property. *Lake v. Lake*, 30 P. 878, 878-79 (Nev. 1882).

¹⁹³ *Lake v. Lake* 4 P. 711, 730 (Nev. 1884).

¹⁹⁴ *Lake v. Bender*, 7 P. 74, 79 (Nev. 1885).

¹⁹⁵ *Id.*

¹⁹⁶ Patty Cafferata, *Reno History: Three Men Can Be Credited as City’s Founding Fathers*, RENO GAZETTE-J., Nov. 26, 2007, at 3E.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Lake v. Bender*, 7 P. 74, 79 (Nev. 1885).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 74.

²⁰⁴ *Id.* at 79.

²⁰⁵ *Id.*

be as well supported during the remainder of her life, as she ought to have been, and was, prior to her application for divorce.”²⁰⁶ The Court defined support as a “word of broad signification; it includes everything—necessities and luxuries—which a person in appellant’s positions is entitled to have and enjoy.”²⁰⁷ The Court concluded,

[i]t is impossible to lay down a rule that should govern courts in cases like this, except that they should consider all the circumstances surrounding the parties, including, besides those mentioned in the statute, the financial condition of the husband and the requirements of the wife; and, to the extent of her support, she should not be left to suffer pecuniarily for having been compelled, by his ill conduct, to seek divorce.²⁰⁸

2. *Greinstein v. Greinstein*, 191 P. 1082 (Nev. 1920). The Nevada Supreme Court concluded that alimony was properly awarded when the wife “was without sufficient means, and unable physically to maintain and support herself, and the husband was financially able to pay[.]”²⁰⁹

3. *Foy v. Smith’s Estate*, 81 P.2d 1065 (Nev. 1938). The parties were married twenty-five years.²¹⁰ The district court awarded alimony to the wife in the amount of \$600.00 per month.²¹¹ The wife contended that her husband could afford to pay more because he had understated his income during the divorce proceeding.²¹² The Supreme Court focused on the wife’s needs: “If it be true that the defendant misrepresented his wealth to the plaintiff, as contended, it would in no way affect this case. If he had been worth a billion dollars, all that the plaintiff would have been entitled to would have been support during her life.”²¹³ The Court held that support should not be ordered with “the idea of enabling her to accumulate great wealth from such allowance.”²¹⁴ The Court also approved language from other jurisdictions, concluding that alimony is “solely for the support and maintenance of the wife.”²¹⁵

4. *Murphy v. Murphy*, 183 P.2d 632 (Nev. 1947). The Nevada Supreme Court noted that “one of the principal factors, if not the principal one, entering into the problem of a reasonable determination of the amount of alimony a husband should pay, is the extent or measure of his financial ability.”²¹⁶

5. *Wilson v. Wilson*, 212 P.2d 1066 (Nev. 1949). The Nevada Supreme Court affirmed a combined alimony and child support award. Although the

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 78.

²⁰⁸ *Id.* at 80.

²⁰⁹ *Greinstein v. Greinstein*, 191 P. 1082, 1082 (Nev. 1920).

²¹⁰ *Foy v. Smith’s Estate*, 81 P.2d 1065, 1066 (Nev. 1938).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 1067.

²¹⁴ *Id.*

²¹⁵ *Id.* at 1068 (quoting *Faversham v. Faversham*, 161 A.D. 521, 523 (N.Y. App. Div. 1914)).

²¹⁶ *Murphy v. Murphy*, 183 P.2d 632, 638 (Nev. 1947).

wife was accustomed to receiving more money during marriage, the amount awarded was consistent with the husband's ability to pay.²¹⁷

6. *Lewis v. Lewis*, 289 P.2d 414 (Nev. 1955). The Supreme Court did not analyze the wife's need; rather, it focused entirely upon the husband's ability to pay.²¹⁸

7. *Fausone v. Fausone*, 338 P.2d 68 (Nev. 1959). The parties were married for nineteen years.²¹⁹ The wife was fifty-six and the husband was forty-eight years of age at trial.²²⁰ The wife was in poor health and suffered from severe degenerative arthritis.²²¹ She had an eighth grade education and no employment prospects.²²² She had not worked during the marriage.²²³ She was in debt and had no sources of income other than the "charity of friends and relatives."²²⁴ The husband earned \$4,500.00 per year.²²⁵ The district court denied alimony as follows:

There is no reason in the world why a man should support a woman, unless she has something obligating her such as with the care and support of children, why he should have to support her any more than I should support him because he needs it. If he has imposed obligations on her as a result of her marriage, she has suffered an illness, or become disabled during her life with him, then she is entitled to alimony. I can see no other reason. A woman is not entitled to alimony just because she has been his wife.²²⁶

The Nevada Supreme Court reversed the decision.²²⁷ The Court held that, "[u]nder such a situation the necessities of the wife for her support and the ability of the husband to contribute a reasonable sum definitely appear."²²⁸ The Court went on to state that, "[w]hile we agree with the court's conclusion that 'a woman is not entitled to alimony just because she has been his wife,' we cannot agree with the court's other conclusion that she is not entitled to support."²²⁹

8. *Baker v. Baker*, 350 P.2d 140 (Nev. 1960). The parties were married thirteen years.²³⁰ The district court did not award alimony, although it ordered the husband to give his one-half interest in the joint tenancy home to his wife.²³¹ The Nevada Supreme Court provided no other factual information. The Court

²¹⁷ *Wilson v. Wilson*, 212 P.2d 1066, 1074 (Nev. 1949).

²¹⁸ *Lewis v. Lewis*, 289 P.2d 414, 417 (Nev. 1955).

²¹⁹ *Fausone v. Fausone*, 338 P.2d 68, 71 (Nev. 1959).

²²⁰ *Id.* at 70.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 71.

²²⁶ *Id.* at 69 (quoting the district court opinion).

²²⁷ *Id.* at 71.

²²⁸ *Id.*

²²⁹ *Id.* This decision could also be placed within one of the economic compensatory categories.

²³⁰ *Baker v. Baker*, 350 P.2d 140, 140, 142 (Nev. 1960).

²³¹ *Id.* at 140.

merely affirmed the trial court's discretionary decision.²³² Although not a true alimony decision, this case is included because it reflects the Court's post-marriage support considerations.

9. *Freeman v. Freeman*, 378 P.2d 264 (Nev. 1963). The parties were married for one year.²³³ They had a newborn child at the time of divorce.²³⁴ The wife worked before marriage and had intended to work when the child reached two years of age.²³⁵ The Nevada Supreme Court determined there was no alimony as a matter of right.²³⁶ The Court discussed as follows:

Permanent alimony in conjunction with an absolute divorce was entirely unknown to either the common law or the ecclesiastical law. There is no such thing as a common-law power to grant permanent alimony in connection with a divorce. The power to award permanent alimony is wholly the creature of statute.²³⁷

The Court further noted a district court is not compelled to make any award of alimony.²³⁸ The Court did not include information about the wife's needs or the husband's ability to pay. However, the Court did note in affirming the lower court's decision, the wife had worked and would continue to work, which suggests that her absence of any need justified the denial of alimony.²³⁹

10. *Adler v. Adler*, 394 P.2d 350 (Nev. 1964). The parties were married six years.²⁴⁰ They did not have children.²⁴¹ The wife was thirty-two years of age at the time of the divorce.²⁴² The husband was ordered to pay alimony in the amount of \$130.00 per week.²⁴³ At the time, he was earning \$22,500.00 per year and owned investments worth \$400,000.00.²⁴⁴ Ten years later, the husband moved to modify the alimony award based upon change in his employment circumstances.²⁴⁵ The Nevada Supreme Court noted the husband continued to enjoy a high standard of living.²⁴⁶ The Court also noted the wife had never remarried and was living in a meager apartment.²⁴⁷ She was a college graduate with a master's degree, but she suffered from physical limitations that compromised her ability to work.²⁴⁸ The husband's wealth at the time of the post-divorce hearing was similar to his wealth at trial.²⁴⁹ The Court affirmed the district court's decision to deny modification.²⁵⁰

²³² *Id.* at 142.

²³³ *Freeman v. Freeman*, 378 P.2d 264, 265 (Nev. 1963).

²³⁴ *Id.*

²³⁵ *Id.* at 266.

²³⁶ *Id.* at 265.

²³⁷ *Id.*

²³⁸ *Id.* at 266.

²³⁹ *Id.* at 265.

²⁴⁰ *Adler v. Adler*, 394 P.2d 350, 350 (Nev. 1964).

²⁴¹ *Id.*

²⁴² *Id.* at 351.

²⁴³ *Id.* at 350.

²⁴⁴ *Id.* at 350-51.

²⁴⁵ *Id.* at 350.

²⁴⁶ *Id.* at 351.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 352.

11. *Fox v. Fox*, 401 P.2d 53 (Nev. 1965). The parties were married twenty-nine years.²⁵¹ The wife received almost \$100,000.00 of their community business.²⁵² The district court ordered the husband pay \$1,000.00 per month to satisfy the wife's property interest.²⁵³ It also ordered the husband to pay \$100.00 per year in alimony.²⁵⁴ The district court analyzed the wife's living expenses and determined she could live on her own community property distributions.²⁵⁵ The Nevada Supreme Court stated it would have ordered a higher allowance for alimony, but yielded to the district court as the trier of fact.²⁵⁶ The Court affirmed the "meager"²⁵⁷ alimony award because of the wife's incremental receipt of her property share.²⁵⁸

12. *Edwards v. Edwards*, 419 P.2d 637 (Nev. 1966). The district court ordered the husband to pay alimony in the amount of \$150.00 per month.²⁵⁹ Three years later, he moved to terminate alimony because his income had decreased.²⁶⁰ Although the husband's income had decreased, he had also increased his consumer expenses by buying two cars on installment contracts.²⁶¹ The district court therefore denied the modification.²⁶² The Nevada Supreme Court affirmed, noting that although the wife was not working it was unimpressed by the husband's "evident lack of desire to cut his own family expenses."²⁶³

13. *Jacobs v. Jacobs*, 422 P.2d 1005 (Nev. 1967). There are no details available about the length of the marriage or the parties' ages, other than the wife was "advancing in years and declining in health."²⁶⁴ The district court ordered the husband to convey his interest in the joint tenancy home to the wife for her "future support, maintenance and security."²⁶⁵ No alimony was ordered.²⁶⁶ The Nevada Supreme Court affirmed, noting that, "[f]rom 'time immemorial,' [it had] affirmed the trial courts in their efforts to provide and protect the needs of the wife or children who are the victims of divorce."²⁶⁷

14. *Morris v. Morris*, 432 P.2d 1022 (Nev. 1967). The parties were married twenty-eight years.²⁶⁸ The wife did not plead any facts showing her need for alimony or the husband's ability to pay.²⁶⁹ The Nevada Supreme Court

²⁵¹ *Fox v. Fox*, 401 P.2d 53, 54 (Nev. 1965).

²⁵² *Id.* at 58.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 59.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Edwards v. Edwards*, 419 P.2d 637, 637 (Nev. 1966).

²⁶⁰ *Id.* at 637-38.

²⁶¹ *Id.* at 638.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Jacobs v. Jacobs*, 422 P.2d 1005, 1006 (Nev. 1967).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Morris v. Morris*, 432 P.2d 1022, 1022 (Nev. 1967).

²⁶⁹ *Id.* at 1022-23.

affirmed the denial of alimony because the wife's failure to make "necessary allegations" was fatal.²⁷⁰

15. *Wicker v. Wicker*, 451 P.2d 715 (Nev. 1969). The parties were divorced in Wisconsin and the husband was ordered to pay alimony.²⁷¹ The length of marriage is not discussed. The husband moved to modify the award five years later.²⁷² Although his income had doubled, he had also remarried.²⁷³ The Nevada Supreme Court noted the wife was impoverished and unable to labor.²⁷⁴ By contrast, the husband could afford to continue paying alimony.²⁷⁵ The Court thereby held the husband's remarriage was not a basis for modification.²⁷⁶

16. *Rosenbaum v. Rosenbaum*, 471 P.2d 254 (Nev. 1970). The parties were married for twenty-four years.²⁷⁷ The district court ordered the husband to pay \$10.00 per month in alimony, based upon his unemployment at the time of the divorce.²⁷⁸ The Nevada Supreme Court concluded alimony should be consistent with the husband's ability to pay, and district courts can impute such earning power if the husband is not fully employed.²⁷⁹

17. *Thurston v. Thurston*, 487 P.2d 342 (Nev. 1971). The parties were married for thirty-four years.²⁸⁰ The wife received \$300,000.00 in the property division, which was a disproportionate share of the community property.²⁸¹ However, she did not receive alimony.²⁸² The Nevada Supreme Court concluded the district court's decision was just and equitable because the award was "capable of producing a substantial yearly income."²⁸³ Implicit in the Court's decision is that the investment income was sufficient for the wife's needs.

18. *Sargeant v. Sargeant*, 495 P.2d 618 (Nev. 1972). The parties were married for twenty-eight years.²⁸⁴ The husband was twenty years older than the wife.²⁸⁵ The husband was wealthy, whereas the wife had little wealth.²⁸⁶ The Nevada Supreme Court affirmed a lump sum alimony award based upon the

²⁷⁰ *Id.* at 1023.

²⁷¹ *Wicker v. Wicker*, 451 P.2d 715, 716 (Nev. 1969).

²⁷² *Id.* at 717.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Rosenbaum v. Rosenbaum*, 471 P.2d 254, 255 (Nev. 1970).

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 256.

²⁸⁰ *Thurston v. Thurston*, 487 P.2d 342, 343 (Nev. 1971).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Sargeant v. Sargeant*, 495 P.2d 618, 620 (Nev. 1972).

²⁸⁵ *Id.* at 622.

²⁸⁶ *Id.* at 620.

wife's life remaining expectancy of 23.1 years.²⁸⁷ The Court noted the purpose of the award was to provide support for the wife.²⁸⁸

19. *Buchanan v. Buchanan*, 523 P.2d 1 (Nev. 1974). This was the Nevada Supreme Court's first attempt to inform the alimony discretion with specific considerations. The parties were married five years at the time of trial and were the parents of two minor children.²⁸⁹ The district court awarded monthly property settlement payments, but denied alimony.²⁹⁰ The wife appealed, noting that although the circumstances did not warrant long-term alimony some alimony would allow her "to adjust to the situation."²⁹¹ The Nevada Supreme Court acknowledged its earlier statement in *Freeman* that there is no entitlement to alimony as a matter of right.²⁹² It then held that the alimony discretion is

neither arbitrary nor uncontrolled. [Rather, m]uch depends upon the particular facts of the individual case. Among the matters to be considered are: the financial condition of the parties; the nature and value of their respective property; the contribution of each to any property held by them as tenants by the entirety;²⁹³ the duration of the marriage; the husband's income, his earning capacity, his age, health and ability to labor; and the wife's age, health, station and ability to earn a living.²⁹⁴

Turning to the facts, the Court noted the marriage cohabitation was only three years. The wife was thirty-one years of age at trial.²⁹⁵ The wife was in good health, even though she chose to work only one day per week.²⁹⁶ The Court affirmed the denial of alimony, primarily because the wife was able to provide for her own needs.²⁹⁷ The Court did note it would have affirmed an award of alimony, if so ordered by the district court.²⁹⁸

20. *Schulman v. Schulman*, 558 P.2d 525 (Nev. 1976). The parties were married for five years.²⁹⁹ The husband was twenty-two years older than the wife.³⁰⁰ The husband was wealthy, but the wife received little in the property division.³⁰¹ The district court awarded alimony of \$1,000.00 per month for six months.³⁰² The opinion includes little discussion, but it does appear the Court awarded nominal alimony to transition the wife back to her premarital standard of living.

²⁸⁷ *Id.* at 621-22.

²⁸⁸ This decision could also be placed within the reliance theory category.

²⁸⁹ *Buchanan v. Buchanan*, 523 P.2d 1, 2 (Nev. 1974).

²⁹⁰ *Id.*

²⁹¹ *Id.* at 4 (quoting Appellant's Brief).

²⁹² *Id.* (citing *Freeman v. Freeman*, 378 P.2d 264, 265 (Nev. 1963)).

²⁹³ This is curious inasmuch as tenants by the entirety is a form of tenancy unknown to Nevada jurisprudence. See *Heim v. Heim*, 763 P.2d 678, 680 (Nev. 1988).

²⁹⁴ *Buchanan*, 523 P.2d at 5.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Schulman v. Schulman*, 558 P.2d 525, 526 (Nev. 1976).

³⁰⁰ *Id.* at 531.

³⁰¹ *Id.* at 527-28.

³⁰² *Id.* at 529

21. *Applebaum v. Applebaum*, 566 P.2d 85 (Nev. 1977). There were no factual details set forth in the decision, other than a reference to factual similarities with *Buchanan*. The Nevada Supreme Court affirmed a denial of alimony.³⁰³ The Court simply noted the wife “had adequate resources with which to support herself.”³⁰⁴

22. *Jones v. Jones*, 571 P.2d 103 (Nev. 1977). The district court ordered the husband to pay alimony for ten years, or until the wife’s death or remarriage.³⁰⁵ The parties had agreed alimony would cease upon cohabitation.³⁰⁶ The wife subsequently cohabitated, and the district court terminated alimony.³⁰⁷ The Nevada Supreme Court affirmed.³⁰⁸ This decision is included because cohabitation affects the cohabitant’s need to be supported by a former spouse, whereas cohabitation would not impair an economic recovery to which the spouse is otherwise entitled.

23. *Ellett v. Ellett*, 573 P.2d 1179 (Nev. 1978). The parties were married twenty-eight years, but they had lived together for only eighteen years at the time of their divorce.³⁰⁹ The husband was forty-eight years of age and the wife was forty-seven years of age when divorce proceedings were commenced.³¹⁰ The district court ordered the husband to pay alimony in the amount of \$750.00 per month.³¹¹ The husband argued on appeal that the wife’s employability disqualified her from alimony.³¹² The Nevada Supreme Court did not “address that narrow issue”³¹³ because evidence demonstrated the wife could not work because of her physical infirmities.³¹⁴ The wife had not worked since the parties’ first child was born in 1953.³¹⁵ The Court focused on certain *Buchanan* factors such as “age, health, station and ability to earn a living” and affirmed the alimony award.³¹⁶ The Court also expressed concern the wife would need alimony to pay her health care expenses.³¹⁷

24. *Robison v. Robison*, 691 P.2d 451 (Nev. 1984). There are few reported facts in this opinion. Each party had been previously married and each had children from prior marriages.³¹⁸ The marriage lasted for approximately twelve years.³¹⁹ The wife did own some pre-marriage property.³²⁰ The district

³⁰³ *Applebaum v. Applebaum*, 566 P.2d 85, 89 (Nev. 1977).

³⁰⁴ *Id.* at 88.

³⁰⁵ *Jones v. Jones*, 571 P.2d 103, 103 (Nev. 1977).

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Ellett v. Ellett*, 573 P.2d 1179, 1180 (Nev. 1978).

³¹⁰ *Id.*

³¹¹ *Id.* at 1181.

³¹² *Id.* at 1182.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.* (quoting *Buchanan v. Buchanan*, 523 P.2d 1, 5 (Nev. 1974)).

³¹⁷ *Id.*

³¹⁸ *Robison v. Robison*, 691 P.2d 451, 453 (Nev. 1984).

³¹⁹ *Id.*

³²⁰ *Id.*

court ordered the husband to pay alimony in the amount of \$600.00 per month for two years.³²¹ The husband argued that alimony was not necessary because his wife earned approximately \$40,000.00 per year.³²² The Nevada Supreme Court noted that, although the wife had earned a lucrative income during the marriage, she had been injured before the divorce and was unable to continue working.³²³ Because of this sudden decrease in income, and because the husband retained his profitable businesses, the Court held there was not an abuse of discretion.³²⁴

25. *Shank v. Shank*, 691 P.2d 872 (Nev. 1984). The district court ordered the husband to pay alimony for twenty years, unless his wife remarried.³²⁵ The wife did remarry, and the husband quit paying alimony.³²⁶ The wife then annulled her marriage because, at the time, her new husband was still married to another woman.³²⁷ The district court reinstated alimony but the Nevada Supreme Court reversed.³²⁸ In so doing, the Court adopted a policy statement set forth by the Missouri Supreme Court:

A former husband is entitled to rely on the remarriage ceremony of the former wife to recommit assets previously used for alimony obligations to her.

[]Unless the remarriage ceremony is taken as conclusive, any latent grounds for annulment between the remarried spouse and her new husband may remain suspended until the offended spouse seeks annulment, so that the former husband's alimony obligations may never be certainly determined.

[]Even though both former spouses may be innocent, the more active of the two [the one whose remarriage is later annulled] should bear the loss from the misconduct of a stranger.³²⁹

The Nevada Supreme Court held that remarriage "means the solemnization or ceremony of remarriage, without regard to whether the remarriage is later determined to be void or voidable."³³⁰ The termination of alimony at remarriage illustrates a need-based component of the award. If alimony were economic compensation for losses caused by divorce, it should not terminate upon remarriage.

26. *Daniel v. Baker*, 794 P.2d 345 (Nev. 1990). The husband was already retired when the parties first met.³³¹ The husband enjoyed substantial wealth.³³² By contrast, the wife, who had an eighth grade education, worked at a bowling alley.³³³ The wife became the husband's live-in housekeeper before marriage.³³⁴ The parties were subsequently married for fifteen years.³³⁵ The

³²¹ *Id.* at 455.

³²² *Id.*

³²³ *Id.* at 456.

³²⁴ *Id.*

³²⁵ *Shank v. Shank*, 691 P.2d 872, 872 (Nev. 1984).

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.* at 872-73.

³²⁹ *Id.* at 873 (quoting *Glass v. Glass*, 546 S.W.2d 738, 741 (Mo. Ct. App. 1977)).

³³⁰ *Id.*

³³¹ *Daniel v. Baker*, 794 P.2d 345, 345 (Nev. 1990).

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

district court awarded alimony of \$1,250.00 per month.³³⁶ The husband died while the appeal was pending.³³⁷ The Nevada Supreme Court noted the husband was much older than the wife, was ill, and had enjoyed a much shorter life expectancy.³³⁸ The Court also noted a higher alimony award would not have substantially depleted the husband's assets.³³⁹ The wife had few assets or hopes of employment.³⁴⁰ She was left with essentially no means of support, yet she had many more years to live.³⁴¹ The Court concluded an award extending beyond the husband's death would have been just and equitable.³⁴² It therefore remanded the issue for re-determination of a greater alimony award.³⁴³

27. *Alba v. Alba*, 892 P.2d 574 (Nev. 1995). This brief opinion is referenced merely because the Nevada Supreme Court focused on the husband's ability to pay when analyzing the district court's alimony decision.

28. *Gilman v. Gilman*, 956 P.2d 761 (Nev. 1998). This decision examines cohabitation as an event to modify or terminate alimony. The Nevada Supreme Court noted the majority rule that cohabitation can lead to modification or termination if the "recipient spouse's need for the support decreases as a result of the cohabitation."³⁴⁴ It then adopted the "economic needs" test:

The amount of spousal support reduction, if any, depends upon a factual examination of the financial effects of the cohabitation on the recipient spouse. Shared living arrangements, unaccompanied by evidence of a decrease in the actual financial needs of the recipient spouse, are generally insufficient to call for alimony modification . . .

The economic needs test properly considers the rights and needs, both fiscal and personal, of payor and recipient spouses . . .

The test also recognizes the fact that recipient spouse may be left largely unprotected, from an economic standpoint, if he or she breaks off a relationship with a cohabitant.³⁴⁵

The Court also noted that one reason for awarding alimony is to keep the recipient spouse off the welfare rolls.³⁴⁶ Finally, the Court held the test fairly balances the rights of the payor and payee spouses by permitting modification or termination of alimony solely when financial circumstances so merit.³⁴⁷

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.* at 346.

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Gilman v. Gilman*, 956 P.2d 761, 764 (Nev. 1998).

³⁴⁵ *Id.* at 765.

³⁴⁶ *Id.*

³⁴⁷ *See also Spector v. Spector*, 929 P.2d 964 (Nev. 1996); *Watson v. Watson*, 596 P.2d 507 (Nev. 1979).

APPENDIX B

Non-Specific Economic Loss

1. *Thorne v. Thorne*, 326 P.2d 729 (Nev. 1958). The Nevada Supreme Court noted, in dicta, that a wife's labor contributions to the parties' income may be relevant when considering the husband's continuing obligation to provide for the wife's support.³⁴⁸ Presumably, the contributing spouse suffers economic loss if she does not receive a return on her investment by way of an alimony award.

2. *Winn v. Winn*, 467 P.2d 601 (Nev. 1970). The parties married when the husband was forty-seven years of age and the wife was thirty-nine years of age.³⁴⁹ Neither party had been married before.³⁵⁰ The wife had worked for seventeen years in public employment before marriage.³⁵¹ She quit her job at marriage and withdrew \$3,400.00 from her retirement fund.³⁵² The wife later returned to work after one year of marriage because the husband was overly penurious.³⁵³ The marriage only lasted for two and one-half years.³⁵⁴ As set forth by the Nevada Supreme Court, "[t]he differences that arose between them, starting with the honeymoon, can largely be attributed to their respective long-term bachelorhood and spinsterhood. Mutual obstinacy imbedded by the years undoubtedly made them irreconcilable."³⁵⁵ The district court had awarded the wife \$4,000.00 of property and \$100.00 per month in alimony.³⁵⁶ The Supreme Court noted a trial court "should not be held to a mathematical certainty in all cases. The trial court's objective is that of fairness which it achieves by the judge's personal observation of the parties and the evaluation of the circumstances as they come before him in the arena of the trial court."³⁵⁷ The decision is seemingly grounded in the Court's desire to compensate the wife for losses occasioned by marriage.

3. *York v. York*, 718 P.2d 670 (Nev. 1986). The parties were married for six years.³⁵⁸ The district court did not award alimony to the wife.³⁵⁹ However, she was awarded \$2,900.00 for providing "other services" relating to household duties and care for the husband's children.³⁶⁰ The Nevada Supreme Court reversed, stating:

[i]t is generally recognized that the marital community is a partnership to which both parties contribute. Each spouse contributes his or her industry in order to further the goals of the marriage. There was evidence to show [the wife] labored for the benefit

³⁴⁸ *Thorne v. Thorne*, 326 P.2d 729, 730 (Nev. 1958).

³⁴⁹ *Winn v. Winn*, 467 P.2d 601, 601 (Nev. 1970).

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.* at 601-02.

³⁵³ *Id.* at 602.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.* (citations omitted).

³⁵⁸ *York v. York*, 718 P.2d 670, 670 (Nev. 1986).

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 671.

of her marital relationship by performing household duties. She fails, however, to cite any authority for the proposition that such services are compensable upon divorce.³⁶¹

Thus, the opinion suggests that equal division contemplates a return on any investments into the marriage partnership.

4. *Fondi v. Fondi*, 802 P.2d 1264 (Nev. 1990). This is a decision in which the district court did not find any economic loss and the Nevada Supreme Court affirmed the denial of alimony. The parties were married for almost sixteen years.³⁶² The parties did not have common children, but the husband's child from a prior marriage had occasionally lived with them.³⁶³ The wife worked periodically throughout the marriage.³⁶⁴ The husband was a district court judge.³⁶⁵ The district court awarded rehabilitative alimony of \$3,000.00, but denied any other alimony.³⁶⁶ The Nevada Supreme Court noted the husband had obtained his education and standing in the legal community before marriage.³⁶⁷ The wife left the marriage with marketable skills, giving her a "viable means of supporting" herself.³⁶⁸ The wife also left the marriage with cash from the property division and an interest in the husband's judicial retirement plan.³⁶⁹ The Court did acknowledge the district court's decision was close and could have been decided another way.³⁷⁰

³⁶¹ *Id.*

³⁶² *Fondi v. Fondi*, 802 P.2d 1264, 1264-65 (Nev. 1990).

³⁶³ *Id.* at 1269.

³⁶⁴ *Id.* at 1269 n.6.

³⁶⁵ *Id.* at 1265.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 1269.

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

APPENDIX C

Adjunct to Property Division

1. Heim v. Heim, 763 P.2d 678 (Nev. 1988). The parties were married for thirty-five years.³⁷¹ The wife did not pursue employment or a career during the marriage.³⁷² Rather, she stayed home and raised the parties' six children.³⁷³ In contrast, the husband earned a Ph.D. and obtained a lucrative university position.³⁷⁴ By the time of trial, the husband's monthly salary exceeded his monthly expenses by several thousand dollars.³⁷⁵ The wife was fifty-seven years of age at trial.³⁷⁶ She had no professional skills, was unemployed, and had never earned more than \$600.00 per month.³⁷⁷ There were no appreciable marital assets to divide. The district court awarded alimony of \$500.00 per month.³⁷⁸ The Nevada Supreme Court concluded the award was neither just nor equitable.³⁷⁹ The parties were married for thirty-five years, but the husband was only ordered to pay nine percent of his monthly income to the wife.³⁸⁰ The husband's post-divorce economic condition was healthy, whereas the wife's economic condition would "result in deprivation, poverty and social degradation."³⁸¹

The Court noted further that the "just and equitable"³⁸² standard includes what the wife deserves under the circumstances of the case.³⁸³ The parties must be treated fairly. The Court was

struck by the enormous disparity in the status and quality of life of the two marital partners that is brought about largely by the "paltry" amount of alimony awarded to her by the trial court. It is quite obvious [he] leaves the divorce with almost everything and [she] with almost nothing. By "everything" we mean principally [his] present capacity (a capacity gained by him through the long-term efforts of both parties) to hold a prestigious position and command a large salary. Rather clearly, the single most valuable product of the [parties'] enterprise in the marital partnership is the Ph.D. degree and high level of professional employability which were gained by [him] during the marriage.³⁸⁴

The Court went on to describe the "species of property sometimes referred to as a career asset,"³⁸⁵ which is not easily divisible. It then repeated the following oft-quoted language: "Divorces should not become a handy vehicle for the summary disposal of old and used wives. A woman is not a breeding cow

³⁷¹ Heim v. Heim, 763 P.2d 678, 678 (Nev. 1988).

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 679.

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 678.

³⁷⁹ *Id.* at 679.

³⁸⁰ The Court also noted the husband's tax benefits derived from paying alimony. *Id.* at 680-81.

³⁸¹ *Id.* at 681.

³⁸² *Id.*

³⁸³ *Id.* at 679.

³⁸⁴ *Id.* at 681-82 (citations omitted).

³⁸⁵ *Id.* at 682.

to be nurtured during her years of fecundity, then conveniently and economically converted to cheap steaks when past her prime.”³⁸⁶ The Court then referred to a California appellate court decision examining the concept of distributive justice issue as follows:

In those cases in which it is the decision of the parties that the woman becomes the homemaker, the marriage is of substantial duration and at separation the wife is to all intents and purposes unemployable, the husband simply has to face up to the fact that his support responsibilities are going to be of extended duration—perhaps for life. This has nothing to do with feminism, sexism, male chauvinism or any other trendy social ideology. It is ordinary common sense, basic decency and simple justice.³⁸⁷

Moreover, the Nevada Supreme Court:

manifested [its] concern for women like [the wife], an example of a ‘woman who, for historical and personal reasons, and especially with the long concurrence by her husband, chooses to make her contribution to a marriage by remaining at home to raise the children of the union. . . .’ [S]uch a woman might well ‘be victimized rather than liberated by being required to enter the working world.’³⁸⁸

The Court concluded as follows:

[D]ivorce has []taken [this wife] from relative prosperity to misfortune, if not destitution, and that her treatment by the court below was not just and equitable. She is entitled to some fair return based on her thirty-five year contribution to the marital partnership. She is entitled after this long marriage to live as nearly as fairly possible to the station in life that she enjoyed before the divorce.³⁸⁹

2. *Gardner v. Gardner*, 881 P.2d 645 (Nev. 1994). The parties married while attending college.³⁹⁰ Both parties graduated, and the wife subsequently obtained a master’s degree.³⁹¹ The parties moved several times while the husband pursued his training and career as a pilot.³⁹² The parties remained married for twenty-seven years.³⁹³ At the time of their divorce, the husband was earning \$75,000.00 per year and the wife was earning \$43,000.00 per year.³⁹⁴ The husband was forty-eight years of age and the wife was forty-seven years of age at the time of their divorce.³⁹⁵ The district court awarded alimony in the amount of \$1,300.00 per month for one year and \$1,000.00 per month for a second year so the wife could achieve income parity through further education and training.³⁹⁶ The husband appealed because the wife had no interest in more education.³⁹⁷ She was a tenured teacher who was content with her existing career.³⁹⁸ The wife also appealed, arguing that she should receive ali-

³⁸⁶ *Id.*

³⁸⁷ *Id.* (citing *In re Marriage of Brantner*, 67 Cal. Rptr. 635, 637 (Cal. Ct. App. 1977)).

³⁸⁸ *Id.* (citations omitted).

³⁸⁹ *Id.* at 683. This decision could also be placed within the reliance theory category.

³⁹⁰ *Gardner v. Gardner*, 881 P.2d 645, 646 (Nev. 1994).

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.* The decision provided no information regarding the marital estate.

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 647.

³⁹⁸ *Id.*

mony for twelve years in “equitable recognition”³⁹⁹ of the parties’ future earning capacities and retirement benefits.⁴⁰⁰

The Nevada Supreme Court observed the lack of evidence that the wife could earn an additional sum of money within two years.⁴⁰¹ The Court noted the husband had achieved his current success and financial status because the wife had supported him at the expense of her own career.⁴⁰² Each time the parties moved to pursue the husband’s career, the wife was forced to leave her employment and lose her seniority and retirement benefits.⁴⁰³ Because of the wife’s contributions to the husband’s career, the husband was able to earn greater income and retirement benefits.⁴⁰⁴

The Court relied upon its decision in *Heim* and concluded that rehabilitative alimony was illusory.⁴⁰⁵ The wife continually sacrificed in order to promote the husband’s career desires and opportunities.⁴⁰⁶ Even though she worked during the marriage, her employment benefits were substantially diluted when the marriage ended.⁴⁰⁷ As explained by the Court, “[t]he magnitude of [her] contribution to the community over many years is not fairly recognized by the two-year alimony award”⁴⁰⁸ Rather than remand the issue, the Court simply enlarged alimony to a period of ten years.⁴⁰⁹

3. *Wright v. Osburn*, 970 P.2d 1071 (Nev. 1998). The parties married while attending college.⁴¹⁰ Although both parties graduated, the wife stayed home after the birth of their first child.⁴¹¹ By contrast, the husband continued in his schooling and obtained a master’s degree in business administration.⁴¹² The parties were married for fourteen years.⁴¹³ At the divorce, the district court granted the parties joint physical custody of their three children.⁴¹⁴ The court further ordered the husband to pay rehabilitative alimony of \$500.00 per month for five years.⁴¹⁵ The Nevada Supreme Court acknowledged that the Nevada Legislature had failed to set forth an objective standard for determining the appropriate amount of alimony.⁴¹⁶ The Court further noted the disparity of alimony awards in Nevada.⁴¹⁷ The Court also acknowledged the alimony fac-

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 647-48.

⁴⁰⁶ *Id.* at 648.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Wright v. Osburn*, 970 P.2d 1071, 1071 (Nev. 1998).

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* at 1072.

⁴¹⁷ *Id.*

tors are not weighted.⁴¹⁸ However, the Court emphasized the importance of the district courts' discretion in these matters.⁴¹⁹

The Court noted the wife enabled her husband to obtain an advanced degree and establish a career.⁴²⁰ As a result, the husband's post-marriage economic opportunities were greater than the wife's opportunities.⁴²¹ The Court held it was unlikely that in five years the wife would be able to earn an income that would enable her to either "maintain the lifestyle she enjoyed during the marriage or a lifestyle commensurate with, although not necessarily equal to, that of [the husband's]."⁴²² The Court remanded the issue with instructions for the district court to re-visit and enlarge the alimony award.⁴²³

4. *Rodriguez v. Rodriguez*, 13 P.3d 415 (Nev. 2000). The parties were married for twenty-three years.⁴²⁴ The husband was forty-two years of age and the wife was forty-three years of age at their divorce.⁴²⁵ The husband enjoyed good health, while the wife was in poor health which affected her ability to retain employment.⁴²⁶ The husband earned \$75,000.00 per year and the wife earned \$14,000.00 per year.⁴²⁷ Nonetheless, the district court denied alimony because of the wife's marital and economic faults.⁴²⁸ The Nevada Supreme Court noted the alimony statute no longer allowed trial courts to consider the "respective merits of the parties."⁴²⁹ The Court explained that "[a]limony is not a sword to level the wrongdoer. Alimony is not a prize to reward virtue. Alimony is financial support paid from one spouse to the other whenever justice and equity require it."⁴³⁰

Given the disparity in the parties' incomes, the Court concluded the wife should not be required to survive on her meager income after enjoying a comfortable lifestyle within a long-term marriage.⁴³¹ The Court noted the wife would unlikely earn more money in the future, whereas the husband could live comfortably on his existing salary.⁴³² The Court explained the husband had "risen steadily to a management position"⁴³³ and enjoyed a "far superior earning power."⁴³⁴ By contrast, the wife would be "impoverished as a result of the divorce."⁴³⁵ The Court remanded the issue with instructions for the district court to re-visit and enlarge the alimony award.⁴³⁶

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.* at 1073.

⁴²⁴ *Rodriguez v. Rodriguez*, 13 P.3d 415, 415-16 (Nev. 2000).

⁴²⁵ *Id.* at 420.

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 416.

⁴²⁹ *Id.* at 417.

⁴³⁰ *Id.* at 419.

⁴³¹ *Id.* at 420.

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.*

APPENDIX D

Reliance Theory for Lengthy Marriages

1. *Johnson v. Steel, Inc.*, 581 P.2d 860 (Nev. 1978). The parties were married for twenty years.⁴³⁷ The wife was thirty-nine years of age and the husband was forty years of age at their divorce.⁴³⁸ The parties had two minor children, who were aged seven and fourteen at the time of the divorce.⁴³⁹ One child had required extra care because of a physical condition.⁴⁴⁰ The wife never worked outside the home during the marriage, nor did she acquire marketable skills that would help her earn a living after the divorce.⁴⁴¹ By contrast, the husband had acquired significant skills during the marriage and built a thriving business.⁴⁴² He enjoyed a substantial annual income.⁴⁴³ The wife received one-half of the marital estate, but most of her property was closely held stock with no guarantee of income.⁴⁴⁴

The district court awarded rehabilitative alimony of \$1,250.00 per month for two years and \$250.00 per month until the wife's death or remarriage.⁴⁴⁵ The Nevada Supreme Court noted that other jurisdictions had begun questioning the wisdom of awarding rehabilitative alimony at the end of long marriages when there was no evidence the wife was capable of earnings "commensurate with her former standard of living."⁴⁴⁶ The Court further noted the "legitimate and healthy trend toward consideration of the wife's ability to become self-supporting in the determination of alimony,"⁴⁴⁷ but then set forth the following pertinent language from another jurisdiction:

[I]n our zeal to correct what may have been inequitably burdensome alimony arrangements and to recognize the selfhood of women as functioning, independent persons, we would do injustice to the men and women we seek to treat more equally if we ignored the facts of life. A woman who, for historical and personal reasons, and especially with the long concurrence of her husband, chooses to make her contribution to a marriage by remaining at home to raise the children of the union and who finds herself, after 23 years, alone with still-growing children to rear, might be victimized rather than liberated by being required to enter the working world.⁴⁴⁸

. . . [W]here (a husband) has acquiesced in and benefited from her role as wife and mother for 23 years, he may not now, for his own economic reasons, force her into a different role without demonstrating that it has economic viability and that the children will not suffer any detriment from it.⁴⁴⁹

⁴³⁷ *Johnson v. Steel, Inc.*, 581 P.2d 860, 861 (Nev. 1978).

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.* at 863.

⁴⁴⁴ *Id.* at 862.

⁴⁴⁵ *Id.* at 861.

⁴⁴⁶ *Id.* at 863.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.* (quoting *Kay v. Kay*, 339 N.E.2d 143, 147 (N.Y. 1975)).

⁴⁴⁹ *Id.*

The Nevada Supreme Court concluded it was appropriate to “question awards based on the assumption that wives who have not worked during marriages of long duration will develop the capacity to earn enough to meet expenses engendered by their lifestyle during marriage.”⁴⁵⁰ It then cited California Supreme Court Justice Rose Bird as follows:

Limiting the duration of support so that both parties can develop their own lives, free from obligations to each other, is a commendable goal. However, if courts were to award support with a set termination date simply for this reason and without any evidence as to the ability of the supported spouse to support himself or herself, great injustices could result. Although increasing numbers of married women today are employed, many others have devoted their time, with their spouse’s approval, to maintaining the home and raising the children, leaving them no time for employment outside the home. This willingness of the wife to remain at home limits her ability to develop a career of her own. If the marriage is later dissolved, the wife may be unable, despite her greatest efforts, to enter the job market.⁴⁵¹

2. *Wilford v. Wilford*, 699 P.2d 105 (Nev. 1985). The parties were married in 1963.⁴⁵² They had two children.⁴⁵³ The wife worked various unskilled jobs during the marriage, such as food service and housekeeping.⁴⁵⁴ The wife had also worked for the parties’ construction company.⁴⁵⁵ She had received her high school diploma twelve years after the marriage, but she was unemployed at trial.⁴⁵⁶ The district court awarded alimony of \$1,000.00 per month for two years and \$500.00 per month for two additional years.⁴⁵⁷ The Nevada Supreme Court affirmed.⁴⁵⁸

3. *Rutar v. Rutar*, 827 P.2d 829 (Nev. 1992). The parties were married for eighteen years.⁴⁵⁹ The wife was unemployed for twelve years because she had cared for the parties’ two common children and the husband’s two other children.⁴⁶⁰ The wife helped build the parties’ business, which generated substantial profits for the husband.⁴⁶¹ The wife was forty-five years of age at the time of the divorce.⁴⁶² The district court awarded alimony of \$1,000.00 per month for three and one-half years.⁴⁶³ The wife did not receive any income-producing property in the property division. The Nevada Supreme Court noted that “both parties [had] contributed substantially to the marriage but are left with vastly disparate earning capacities after the divorce.”⁴⁶⁴ As a result, the wife would

⁴⁵⁰ *Id.* at 864.

⁴⁵¹ *Id.* at 865 (quoting *In re Marriage of Morrison*, 573 P.2d 41, 51 (Cal. 1978)).

⁴⁵² *Wilford v. Wilford*, 699 P.2d 105, 106 (Nev. 1985).

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* at 107.

⁴⁵⁸ *Id.* This decision is irreconcilable with *Johnson*. See *Johnson v. Steel, Inc.*, 581 P.2d 860, 860 (Nev. 1978).

⁴⁵⁹ *Rutar v. Rutar*, 827 P.2d 829, 830 (Nev. 1992).

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.* at 831.

suffer a standard of living far below that to which she had been accustomed.⁴⁶⁵ The Court simply increased the award amount to \$1,700.00 per month and extended its duration to eight years.⁴⁶⁶

4. *Sprenger v. Sprenger*, 878 P.2d 284 (Nev. 1994). The wife was a licensed practical nurse, although she quit her employment shortly after marriage.⁴⁶⁷ The parties had two children.⁴⁶⁸ The parties were married for twenty-one years.⁴⁶⁹ The wife was forty-four years of age at the time of the divorce.⁴⁷⁰ The district court awarded alimony of \$1,500.00 per month for two years.⁴⁷¹ The wife's property division was primarily a minority, non-controlling interest in the family business.⁴⁷² Although the value of the wife's property was \$837,408.00, the wife had no guarantee of income because the husband and his parents controlled corporate dividends and other distributions.⁴⁷³ The wife was therefore at the mercy of her former husband and his family regarding her future income.⁴⁷⁴ The Nevada Supreme Court noted the wife's marketability was not promising and she could not earn a salary allowing her to live in the manner to which she had become accustomed.⁴⁷⁵ By contrast, the husband had developed business acumen allowing him to earn approximately \$100,000.00 per year.⁴⁷⁶ The Court remanded with instructions to both increase and extend alimony so the wife could live "as nearly as fairly possible to the station in life she enjoyed before the divorce."⁴⁷⁷

5. *Shydler v. Shydler*, 954 P.2d 37 (Nev. 1998). The parties married in 1976 and separated in 1992.⁴⁷⁸ The divorce proceeding was tried in 1993.⁴⁷⁹ Although both spouses worked during their marriage, the wife's business was unsuccessful while the husband enjoyed business success.⁴⁸⁰ The wife contributed to the husband's success.⁴⁸¹ The district court awarded real property to the wife and a share of the husband's business, which was to be paid in thirty-eight monthly increments of \$5,000.00.⁴⁸² The district court denied alimony

⁴⁶⁵ *Id.* at 832.

⁴⁶⁶ *Id.* at 833.

⁴⁶⁷ *Sprenger v. Sprenger*, 878 P.2d 284, 286 (Nev. 1994).

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 287.

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ Without reference to the *Buchanan* factors, the *Sprenger* Court identified the following factors to consider when awarding alimony: "[]the wife's career prior to marriage; []the length of the marriage; []the husband's education during marriage; []the wife's marketability; []the wife's ability to support herself; []whether the wife stayed home with the children [in lieu of work]; and []the wife's award" in addition to child support and alimony. *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ *Shydler v. Shydler*, 954 P.2d 37, 38 (Nev. 1998).

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² *Id.* at 39.

Winter 2009]

NEVADA ALIMONY

367

because the wife would receive her portion of community property in monthly increments and “have sufficient funds with which to support herself.”⁴⁸³

The Nevada Supreme Court referred to the husband’s career asset as “business acumen” that enhanced his post-marriage economic condition.⁴⁸⁴ The wife’s post-divorce earning potential was “well below” the husband’s.⁴⁸⁵ The Court thereby held it was unfair for the husband to receive income-producing property while the wife was forced to dissipate her property share to provide for her living expenses.⁴⁸⁶

The Court further held that

[a]limony is an equitable award serving to meet the post-divorce needs and rights of the former spouse . . . [T]wo of the primary purposes of alimony, at least in marriages of significant length, are to narrow any large gaps between the post-divorce earning capacities of the parties, and to allow the recipient spouse to live as nearly as fairly possible to the station in life enjoyed before the divorce. The individual circumstances of each case will determine the appropriate amount and length of any alimony award.⁴⁸⁷

Interestingly, the Court remanded the issue and noted that alimony, “at least for a period of rehabilitation,”⁴⁸⁸ was appropriate.⁴⁸⁹ The Court also held that Nevada law does not require alimony to effectively equalize post-marriage salaries.⁴⁹⁰

⁴⁸³ *Id.* at 40.

⁴⁸⁴ *Id.* at 39.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.* at 39-40.

⁴⁸⁷ *Id.* at 40 (citations omitted).

⁴⁸⁸ *Id.* at 41.

⁴⁸⁹ Reconciling a rehabilitative alimony award with the facts of this case is difficult.

⁴⁹⁰ *Shydler*, 954 P.2d at 41.