

FROM EQUITABLE TO EQUAL, AND THEN MORE EQUAL: HOW NEVADA DIVORCE LAW CAN HELP DOMESTIC VIOLENCE SURVIVORS

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INTRODUCTION

In 2012 Nevada was described as the “embarrassment of the nation” when it comes to domestic violence.¹ This dishonorable distinction derives in part from Nevada consistently ranking at or near the top of the list of states where domestic violence is most prevalent.² Thanks to recent progressive strides in Nevada, however, domestic violence survivors are now able to terminate a lease to escape a violent relationship³ and are entitled to time off from work to address issues relating to a domestic violence incident.⁴ But there is more work to do.

Domestic violence is “a violent crime committed in the context of an intimate relationship.”⁵ A recent survey by the American Academy of Matrimonial Lawyers (AAML) suggests that domestic violence is becoming more prevalent between parties who have filed for divorce.⁶ And a majority of attorneys sur-

* Juris Doctor Candidate, May 2019, William S. Boyd School of Law, University of Nevada, Las Vegas. Big thanks to Khalon Richard, Anthony Defelice, and Africa Sanchez for lending me their ears and for their unwavering love and support. A mis padres: gracias por tu apoyo constante. Throughout this Note I aimed to write about domestic violence as responsibly as possible by, to the extent practicable, humanizing domestic violence survivors and using active voice to attribute violence to their aggressors. This Note is dedicated to those women who will never see a remedy for the wrongs that they received.

¹ Tovin Lapan, *Nevada Domestic Violence by the Numbers*, LAS VEGAS SUN (Feb. 7, 2012, 2:00 AM), <https://lasvegassun.com/news/2012/feb/07/nevada-domestic-violence-numbers/> [<https://perma.cc/2GPF-UJZC>].

² *Id.*

³ NEV. REV. STAT. § 118A.345 (2017).

⁴ NEV. REV. STAT. § 608.0198 (2017).

⁵ NEV. ATTORNEY GEN., DOMESTIC VIOLENCE RESOURCES IN NEVADA, http://ag.nv.gov/Hot_Topics/Victims/DV_Nevada [<https://perma.cc/PU9B-BDUU>] (last visited Aug. 22, 2018).

⁶ AM. ACAD. MATRIM. L., DOMESTIC VIOLENCE ON THE RISE SAY NATION’S TOP DIVORCE ATTORNEYS: MAJORITY FEEL COURTS NEED TO DO MORE, (Mar. 4, 2015), <http://aaml.org/about-the-academy/press/press-releases/domestic-violence/domestic-violence-rise-say-nation%E2%80%99s-top-div> [<https://perma.cc/6UAJ-D7K2>].

vewed by the AAML believe that the courts should do more to adequately address this violence.⁷

This Note advocates for a new Nevada bill that provides a more direct path to compensation for survivors of domestic violence that are seeking a divorce. The bill creates a rebuttable presumption that a domestic violence survivor in a divorce action is entitled to economic and noneconomic damages resulting from the domestic violence. Further, the proposed bill authorizes Nevada district courts to compensate survivors directly from a married couple's marital property.

Part I will begin by discussing domestic violence statistics nationally and in Nevada. Part II will detail the history of the relevance of evidence relating to domestic violence in Nevada divorce proceedings. Part II will then discuss how the rules of practice in Nevada's judicial districts and the Nevada Rules of Civil Procedure address the concerns that led the legislature to discourage the admission of evidence relating to domestic violence in divorce proceedings. The relationship between no-fault divorce and property division will be discussed in Part III. Part IV will detail the role that domestic violence plays in the divorce proceedings of other states. Part V will set forth my proposed bill and an accompanying explanation. And Part VI contains a short discussion about the potential overlap between criminal restitution and family law.

I. DOMESTIC VIOLENCE AT LARGE AND IN NEVADA

A. *The Difficulty in Collecting Data Related to Domestic Violence*

Domestic violence is a shadow crime. Many survivors of domestic violence do not come forward because of shame and embarrassment, and likely many more because of fear.⁸ Compounding the problem is the fact that there exists no national database recording incidents of domestic violence.⁹

The absence of a national database makes domestic violence difficult to track. Information about domestic violence is gleaned from several sources, each of which collect only enough information to meet their agency's specific objectives.¹⁰ For example, the CDC's 2003 report on domestic violence sourced its information from: (1) hospitals, whose primary purpose for collecting information is to treat and bill patients, which leaves little incentive for hospital to obtain crucial information regarding the relationship of the survivor to the aggressor; and (2) police departments, whose primary purpose for collecting

⁷ *Id.*

⁸ Jackie Valley, *A Culture of Abuse: Nevada Ranks Among Worst States for Domestic Violence*, LAS VEGAS SUN (Oct. 27, 2014, 2:00 AM), <https://lasvegassun.com/news/2014/oct/27/culture-domestic-abuse-nevada-ranks-among-worst/> [<https://perma.cc/VXK3-2Q65>].

⁹ *Id.*

¹⁰ DEP'T HEALTH & HUMAN SERVS.: CTR. FOR DISEASE CONTROL & PREVENTION, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 5 (Mar. 2003), <https://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>.

Fall 2018]

FROM EQUITABLE TO EQUAL

295

information is to apprehend the perpetrator, which leaves little incentive to collect information about the survivor.¹¹

B. What We Know for Sure

In 2014 the Las Vegas Sun reported that the Clark County District Attorney's Office receives approximately ten to twenty new cases of domestic violence each day.¹² Shockingly, the likelihood that a woman living in Nevada will be assaulted by her partner is greater than the likelihood that a police officer will be assaulted while working.¹³ And Nevada women are more likely to be killed in domestic violence altercations than women from other states.¹⁴

The Nevada Coalition to End Domestic and Sexual Violence (NCEDSV) releases statewide data collection reports of domestic violence.¹⁵ In 2017, there were a reported 47,368 adult and child victims of domestic violence in Nevada.¹⁶ Of those victims, 12,474 were employed full- or part-time, 4,025 were referred to a medical agency, and 6,584 were referred to housing services.¹⁷ Spousal abuse accounted for 1,145 of those domestic violence incidents.¹⁸ And in 2016, NCEDSV identified twenty-four instances in Nevada where someone's life was lost to domestic violence, including: "[sixteen] women and four men [] killed by partners or ex-partners," "[t]hree men killed by the partners of or former partners of domestic violence victims," and "[t]hree children [] killed in a family annihilation."¹⁹

Nationally, the picture is not much better. Half of all female homicide victims in the United States are killed by an intimate partner.²⁰ When Congress enacted the Violence Against Women Act (VAWA), it estimated that "[n]early [one-third] of American women report physical or sexual abuse by a husband

¹¹ *Id.*

¹² Valley, *supra* note 8.

¹³ PAMELA POWELL & MARILYN SMITH, UNIV. NEV. COOP. EXTENSION, DOMESTIC VIOLENCE: AN OVERVIEW (2011), <https://www.unce.unr.edu/publications/files/cy/2011/fs1176.pdf>.

¹⁴ Wesley Juhl, *Nevada Women More Likely Than Others to be Killed in Domestic Violence-Related Shooting, Study Says*, LAS VEGAS REV. J. (Apr. 12, 2016, 9:22 PM), <https://www.reviewjournal.com/crime/homicides/nevada-women-more-likely-than-others-to-be-killed-in-domestic-violence-related-shooting-study-says/> [<https://perma.cc/JD4F-D2HL>].

¹⁵ See generally NEV. COALITION TO END DOMESTIC AND SEXUAL VIOLENCE, STATISTICS AND REPORTS, <http://www.ncedsv.org/resources/statistics-and-reports/> [perma.cc/JBA4-YNHY] (last visited Aug. 13, 2018).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ NEV. COALITION TO END DOMESTIC AND SEXUAL VIOLENCE, DOMESTIC VIOLENCE HOMICIDES IN NEVADA 2016 3 https://drive.google.com/file/d/0B-wUwMfE_GhPZ2NjdENXUS1mOTQ/view [<https://perma.cc/52Q8-LGXQ>] (last visited Oct. 5, 2018).

²⁰ Camila Domonoske, *CDC: Half of All Female Homicide Victims are Killed by Intimate Partners*, NPR (July 21, 2017, 2:22 P.M.), <https://www.npr.org/sections/thetwo-way/2017/07/21/538518569/cdc-half-of-all-female-murder-victims-are-killed-by-intimate-partners> [<https://perma.cc/S75A-7W7W>].

or boyfriend at some point in their lives.”²¹ Congress, additionally, found that “as many as [10 million] children witness domestic violence every year,” and that “[fifty] percent of men who frequently assaulted their wives also frequently abused their children.”²²

Domestic violence often results in injury requiring treatment. The National Violence Against Women Survey (NVAWS) estimates that nearly 5.3 million intimate partner victimizations occur each year, which results in nearly 2 million injuries.²³ 550,000 of those injuries required medical attention and 145,000 warranted hospitalization for at least one night.²⁴ Apart from physical injury, however, the CDC estimates that intimate partner violence results in “18.5 million mental health care visits each year.”²⁵ Roughly \$4.1 billion is spent on medical and mental health care services for survivors of domestic violence.²⁶ And more broadly, the burdens linked to domestic violence include “adolescent pregnancy, unintended pregnancy in general, miscarriage, stillbirth, intrauterine hemorrhage, nutritional deficiency, abdominal pain . . . neurological disorders, chronic pain, disability, anxiety and post-traumatic stress disorder.”²⁷

It goes without saying that domestic violence has an impact on a survivor’s ability to work. According to the NVAWS, women lose almost 8 million days of paid work each year due to domestic violence.²⁸ For homemakers, an additional 5.6 million days are lost from household chores.²⁹ In total, the NVAWS estimates that intimate partner violence costs \$8.3 billion annually in medical care and lost productivity.³⁰

These distressing statistics make clear: those who survive domestic violence suffer tangible economic and noneconomic losses. And those survivors should be fully compensated.

²¹ Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 201, 199 Stat. 2993 (2006).

²² 34 U.S.C. § 12461 (2018).

²³ DEP’T HEALTH & HUMAN SERVS., *supra* note 10, at 19.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 30.

²⁷ WORLD HEALTH ORG., GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN: PREVALENCE AND HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE AND NON-PARTNER SEXUAL VIOLENCE, 21–22 (2013), http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf?ua=1.

²⁸ DEP’T HEALTH & HUMAN SERVS., *supra* note 10, at 1.

²⁹ *Id.*

³⁰ Robert Pearl, *Domestic Violence: The Secret Killer that Costs \$8.3 Billion Annually*, FORBES (Dec. 5, 2013, 1:00 PM), <https://www.forbes.com/sites/robertpearl/2013/12/05/domestic-violence-the-secret-killer-that-costs-8-3-billion-annually/#697319cf4681> [<https://perma.cc/UG3V-L8NU>].

II. DOMESTIC VIOLENCE AND NEVADA DIVORCE LAW

Currently, Nevada district courts “may” consider domestic violence in making an unequal disposition of marital property, but only “[i]f spousal abuse or marital misconduct . . . has had an adverse economic impact on the other party.”³¹ The reason for this exclusion is based in part on the 67th Nevada Legislature’s concern that testimony relating to the relative faults of the parties would have an adverse impact on children and could increase the cost of litigation.³²

A. From “Equitable” to “Equal”

Prior to 1993, Nevada law allowed district courts to make an “equitable” disposition of community property.³³ The Nevada Supreme Court, in fact, went as far as to write that there was not a judicially-created presumption favoring equal disposition of marital property, and neither was there a judicial mandate that property be divided in an “essentially equal manner.”³⁴

In 1993, however, the Nevada legislature amended Nevada’s property division statute to remove the court’s ability to make an “equitable” disposition of property and instead require it to “make an equal disposition.”³⁵ The amended statute contained an exception allowing the court to “make an unequal disposition of the community property . . . if the court finds a compelling reason to do so”³⁶ When confronting the newly amended statute for the first time, the Nevada Supreme Court reasoned that by replacing the term “equitable” with “equal,” the legislature “deleted the equitable factors that formerly had to be applied by the courts in making a ‘just and equitable’ disposition of community property”³⁷ Thus, the Nevada Supreme Court held that the trial court was no longer permitted to consider “equitable” factors, but could still make an unequal disposition of marital assets if it found a “compelling reason” to do so.³⁸

The legislature did not define the term “compelling reason.”³⁹ In the absence of a definition, the Nevada Supreme Court found that financial miscon-

³¹ Wheeler v. Upton-Wheeler, 946 P.2d 200, 203 (Nev. 1997) (emphasis added).

³² See *Requires Equal Disposition of Community Property of Parties in Proceeding for Divorce Under Certain Circumstances: Hearing on A.B. 347 Before the Assemb. Comm. on the Judiciary*, 1993 Leg., 67th Sess. (Nev. 1993) (statement by Sen. James).

³³ NEV. REV. STAT. § 125.150(b)(2) (1989) (amended 1993) (requiring that the court make a division of property “as appears just and equitable, having regard to the respective merits of the parties”).

³⁴ McNabney v. McNabney, 782 P.2d 1291, 1295 (Nev. 1989) (alteration in original).

³⁵ NEV. REV. STAT. § 125.150(b)(1) (1989) (amending NRS 125.150(b)(1) (1989)) (amended by NRS 125.150(b)(1) (2017)) (requiring that the court, “to the extent practicable, make an equal disposition of the community property of the parties”).

³⁶ *Id.*

³⁷ Lofgren v. Lofgren, 926 P.2d 296, 297 (Nev. 1996).

³⁸ *Id.*

³⁹ *Id.*

duct was one such “compelling reason” to divide marital property unequally.⁴⁰ In *Lofgren v. Lofgren*, Mr. Lofgren committed financial misconduct when he used marital funds for his own personal use and transferred other marital funds to his father.⁴¹ The trial court found that Mr. Lofgren’s actions were an attempt to avoid sharing money with his spouse.⁴² The trial court also found that, in total, Mr. Lofgren misappropriated \$96,000.00 in community funds.⁴³ In light of this financial misconduct, the trial court divided the marital property such that Ms. Lofgren was awarded \$44,106.50 more than her one-half share of the remaining marital property.⁴⁴ That additional monetary sum represented her one-half interest in the money that Mr. Lofgren misappropriated.⁴⁵ On appeal, the Nevada Supreme Court affirmed the trial court’s award and held that Mr. Lofgren’s financial misconduct was a “compelling reason” to divide property unequally.⁴⁶

In another post-amendment case, the Nevada Supreme Court in *Wheeler v. Upton-Wheeler* reversed a trial court’s determination that spousal abuse or marital misconduct—standing alone—was a compelling reason to make an unequal division of marital assets.⁴⁷ At the trial court level, Ms. Upton-Wheeler introduced photographs into evidence showing that Mr. Wheeler’s violent behavior caused her “numerous” bruises.⁴⁸ In light of the abuse, the trial court awarded Ms. Upton-Wheeler more than her one-half share in the marital property.⁴⁹

The Nevada Supreme Court, on appeal, emphasized that the 67th Nevada Legislature amended the language in the property division statute to require the court to make an “equal”—rather than an “equitable”—division of marital property.⁵⁰ The Court noted that the reason for this change was the legislature’s belief that “testimony regarding the relative faults of the parties could have an adverse effect on the children and could increase the expense of litigation.”⁵¹ Additionally, the Court also determined that the legislature hoped the amended statute would preserve Nevada’s status as a no-fault divorce state.⁵²

Based on this legislative history, the Nevada Supreme Court held that the substitution of the term “equitable” for “equal” meant that the Nevada legislature intended to omit evidence of marital misconduct from divorce proceed-

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 298.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 297.

⁴⁷ *Wheeler v. Upton-Wheeler*, 946 P.2d 200, 203 (Nev. 1997).

⁴⁸ *Id.* at 201.

⁴⁹ *Id.*

⁵⁰ *Id.* at 203.

⁵¹ *Id.* (citation omitted).

⁵² *Id.*

Fall 2018]

FROM EQUITABLE TO EQUAL

299

ings.⁵³ The Court further held that “except for a consideration of the economic consequences of spousal abuse or marital misconduct, evidence of spousal abuse or marital misconduct does not provide a compelling reason” to make “an unequal disposition of community property.”⁵⁴ Under the new statute, then, the trial court could divide property unequally only “if” spousal abuse has an economic impact.⁵⁵

In sum, the 67th Nevada Legislature reasoned that exposure to evidence of domestic violence and marital misconduct has an adverse effect on children.⁵⁶ To ensure the safety of those children, the legislature sought to discourage spouses from introducing evidence of domestic violence by requiring that the court make a totally “equal” division of marital property.⁵⁷ There was an exception to this rule “if” the domestic violence had an economic impact on the survivor.⁵⁸ If the violence had an economic impact on the survivor, then this impact constitutes a “compelling reason” to award the survivor more than his or her one-half share in the marital property.⁵⁹

B. The 67th Nevada Legislature’s Concerns Were Quickly Rendered Moot by the 68th Nevada Legislature

Two years following the 67th Nevada Legislature’s decision to preclude the trial court from considering evidence of domestic violence when dividing property, the 68th Nevada Legislature determined that “domestic violence [was] on the rise.”⁶⁰ It further determined that domestic violence was “the leading cause of serious injury to women—more than automobile accidents and assaults by strangers combined.”⁶¹ At a hearing on a bill to amend the custody statutes, Judge Charles McGee of the Second Judicial District Court testified that “family courts in Nevada speak out unanimously in favor of legislation which strips the presumptive right of joint custody of a perpetrator of domestic violence.”⁶²

Based on these determinations, the 68th Nevada Legislature amended the custody statutes to create a rebuttable presumption that it is not in a child’s

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Makes Various Changes to Provisions Relating to Domestic Violence: Hearing on A.B. 378 Before the Assemb. Comm. on Judiciary*, 1995 Leg., 68th Sess. 12 (Nev. 1995) (statement of Assemb. Chris Giunchigliani).

⁶¹ *Id.*

⁶² *Creates Rebuttable Presumption of Custody: Hearing on A.B. 395 Before the Assemb. Comm. on Judiciary*, 1995 Leg., 68th Sess. 1886–87 (Nev. 1995) (statement of Judge Charles McGee, Second Judicial District Court).

“best interest” for the court to award sole or joint physical custody to a parent who is found by clear and convincing evidence to have committed “one or more acts of domestic violence” against a child or the parent of a child.⁶³ Bearing in mind that in resolving custody disputes “the sole consideration of the court” was—and today remains—“the best interest of the child,”⁶⁴ the presumption against custody by the abusive parent created a powerful incentive for parents to introduce evidence of spousal abuse. In fact, the creation of the presumption can be interpreted to mean that the State *encouraged* parents to bring forth evidence of domestic violence.

The court’s holding in *Wheeler* was premised upon the 67th Nevada Legislature’s concern that “testimony regarding the relative faults of the parties could have an adverse effect on the children and could increase the expense of litigation.”⁶⁵ But the 68th Nevada Legislature—by creating the rebuttable presumption in the custody statutes—rendered the 67th Nevada Legislature’s concerns moot by incentivizing parents to come forth with evidence of domestic violence. Despite this shift in policy considerations, *Wheeler* and its reasoning remain precedent today: evidence of domestic violence may not be considered when dividing marital property, unless the violence has an economic impact on the survivor.⁶⁶

C. *The 67th Nevada Legislature’s Concerns are Now Served by Local Rules of Practice and the Nevada Rules of Civil Procedure*

The local rules of practice adopted by Nevada’s judicial districts, and the Nevada Rules of Civil Procedure minimize the risk that children will be exposed to evidence of domestic violence.

1. *The Local Court Rules*

a. *The Eighth Judicial District Court Rules*

The Eighth Judicial District Court, which covers Clark County—where the majority of Nevadans reside—has several rules protecting children from exposure to evidence of domestic violence.⁶⁷ Even before reaching the courtroom,

⁶³ See A.B. 395, 1995 Leg., 68th Sess. (Nev. 1995) (amending NRS 125.480, Nevada’s then-custody statute). NRS 125.480 is now repealed, but the relevant language lives on in NRS 125C.0035 (2017).

⁶⁴ See A.B. 395, 1995 Leg., 68th Sess. (Nev. 1995); see, e.g., NEV. REV. STAT. § 125C.003(1) (2017).

⁶⁵ *Wheeler v. Upton-Wheeler*, 946 P.2d 200, 203 (Nev. 1997).

⁶⁶ *Id.*

⁶⁷ The U.S. Census Bureau estimates that Clark County has a population of over 2,200,000 residents. U.S. CENSUS BUREAU, QUICK FACTS: CLARK COUNTY, NEVADA, <https://www.census.gov/quickfacts/fact/table/clarkcountynevada/PST045217> [https://perma.cc/H9K4-T68X] (last visited Aug. 13, 2018). Washoe County is the next populous county, with an estimated

the Eighth Judicial District Court requires that all parents involved in a contested custody matter attend mediation through the Family Mediation Center.⁶⁸ If the parties do not resolve their custody disputes during mediation and the case proceeds through litigation, then the divorcing spouses are required to take a seminar for separating parents.⁶⁹ However, if the parents successfully resolve their custody disputes in mediation, the court may waive the seminar requirement; but it reserves jurisdiction to order the seminar post-judgment.⁷⁰

Once a complaint for divorce is filed, “all lawyers and litigants possessing knowledge of matters” heard by the family court—including divorce proceedings—are prohibited from:

- (a) Discussing issues, proceedings, pleadings, or papers on file with the court with any minor child;
- (b) Allowing any minor child to review any such proceedings, pleadings, or papers or the record of the proceedings before the court, whether in the form of transcripts, audio or video recordings, or otherwise;
- (c) Leaving such materials in a place where it is likely or foreseeable that any minor child will access those materials; or
- (d) Knowingly permitting any other person to do any of the things enumerated in this rule, without the written consent of the parties or the permissions of the court.⁷¹

Further, the court is authorized to appoint a Court Appointed Special Advocate (CASA).⁷² The CASA assists the court by providing information relating to “the children’s concerns, desires, and needs.”⁷³ In theory, then, this assistance mostly obviates the need for children to testify in open court.⁷⁴ To that end, any reports prepared by a CASA can be read only by the parties, their attorneys and staff, and experts that the attorneys deem necessary.⁷⁵ And except by court order, the CASA report cannot be made an exhibit to, or part of, the open court file.⁷⁶ In fact, the report cannot be released even to the parties in the case.⁷⁷ Finally, each CASA report is required to contain a “prominent notice” stating:

population of over 460,000. U.S. CENSUS BUREAU, QUICK FACTS: WASHOE COUNTY, NEVADA, <https://www.census.gov/quickfacts/fact/table/washoecountynevada/PST045217> [https://perma.cc/W4LM-EDEX] (last visited Aug. 13, 2018).

⁶⁸ NEV. EIGHTH JUD. DIST. CT. R. 5.303.

⁶⁹ *Id.* 5.302.

⁷⁰ *Id.* 5.302(d)–(e).

⁷¹ *Id.* 5.301.

⁷² *Id.* 5.107(a).

⁷³ *Id.* 5.107(c)(2).

⁷⁴ Relatedly, a parent may not cause a child to be examined by a therapist or other professional for the purpose of obtaining an expert opinion for trial, except upon court order or agreement between the parties. *Id.* 5.305(a).

⁷⁵ *Id.* 5.304(a).

⁷⁶ *Id.* 5.304(b).

⁷⁷ *Id.* 5.304(c).

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b. The First Judicial District Court Rules

Subject to certain exceptions, the First Judicial District Court requires that divorcing parents attend mediation to attempt to reach amicable divorce terms.⁷⁹ The mediator is entitled to interview the child.⁸⁰ Thus, the child's wishes can be obtained before the parents even enter a courtroom. Further, the First Judicial District Court has a rule authorizing the appointment of a CASA in high-conflict divorce cases.⁸¹

c. The Second Judicial District Court Rules

The Second Judicial District Court “encourages [the] resolution” of divorce matters “through the family mediation program.”⁸² All new actions in the Second Judicial District Court that “involve a dispute regarding child custody” must be “referred to mediation.”⁸³ Also, the mediator is entitled to interview the parents’ children.⁸⁴

d. The Fourth Judicial District Court Rules

In the Fourth Judicial District, no contested child custody matters may be set for trial without the parents having attended “Mediation and/or Child Advocacy.”⁸⁵ Child Custody Mediation requires the parties to actively participate in one or more meetings with a neutral mediator to try reaching an amicable custody resolution.⁸⁶

Further, “Child Advocacy” is “an investigation for the purposes of making a recommendation to the Court concerning a custody/visitation schedule”⁸⁷ Child advocates interview persons with knowledge helpful for making a custody recommendation, including the children.⁸⁸ The Child Advocacy recommendations must describe in detail the facts relied upon in making the recommendation.⁸⁹ And the Fourth Judicial District Court requires that child ad-

⁷⁸ *Id.*

⁷⁹ NEV. FIRST JUD. DIST. CT. R. 25(1)(a).

⁸⁰ *Id.* 25(7)(c).

⁸¹ *Id.* 26(6).

⁸² NEV. SECOND JUD. DIST. CT. R. 52.

⁸³ *Id.* 53(a).

⁸⁴ *Id.* 53(7)(c).

⁸⁵ NEV. FOURTH JUD. DIST. CT. R. 5(4).

⁸⁶ *See id.* 5(5)(a)(1).

⁸⁷ *Id.* 5(5)(b)(1).

⁸⁸ *See id.* 5(5)(b)(2).

⁸⁹ *See id.* 5(5)(b)(3).

Fall 2018]

FROM EQUITABLE TO EQUAL

303

vocates be professionally qualified in the field of psychiatric mental health.⁹⁰ This district further requires litigants in divorce matters to take a course “to assist parents in methods of protecting their children from the harmful effects following the separation of their parents.”⁹¹

e. The Ninth Judicial District Court Rules

The Ninth Judicial District Court generally requires that custody matters be referred to mediation.⁹² Like most other districts, the mediator is entitled to interview the child.⁹³ Further, the Ninth Judicial District Court authorizes the use of a CASA to represent the child’s interests.⁹⁴ Finally, the Ninth Judicial District Court generally prohibits the presence of children at the courthouse for trials, but a judge may interview a child in camera.⁹⁵

f. The Tenth Judicial District Court Rules

The Tenth Judicial District Court forbids the presence of children at the courthouse for hearings or trials and authorizes the judge to interview the child in camera, if necessary.⁹⁶

2. The Nevada Rules of Civil Procedure

NRCP 16.215(a) provides protections for children testifying in a divorce proceeding. The Rule instructs that the court “should find a balance between protecting the child, the statutory duty to consider the wishes of the child, and the probative value of the child’s input while ensuring to all parties their due process rights to challenge evidence”⁹⁷ In determining whether a child witness may testify by alternative method—meaning that the child does not testify in person in an open forum, in the presence of the fact finder, or in the presence of the parties to the matter—NRCP 16.215(d)(1) incorporates the standards set forth in NRS 50.580, which governs the testimony of children in non-domestic cases.⁹⁸ This rule states:

In a noncriminal proceeding, the presiding officer may allow a child witness to testify by an alternative method if the presiding officer finds by a preponderance of the evidence that allowing the child to testify by an alternative method is nec-

⁹⁰ NEV. FOURTH JUD. DIST. CT. R. 5(5)(b)(5).

⁹¹ *Id.* 5(9).

⁹² NEV. NINTH JUD. DIST. CT. R. 26(a)(1).

⁹³ *Id.* 26(g)(3).

⁹⁴ *Id.* 30(a).

⁹⁵ *See id.* 30(e)(4); *Id.* 30(g).

⁹⁶ NEV. TENTH JUD. DIST. CT. R. 24(5).

⁹⁷ NEV. R. CIV. P. 16.215(a).

⁹⁸ *See* NEV. REV. STAT. § 50.520 (2017); NEV. R. CIV. P. 16.215(b)(1); *Id.* 16.215(d)(1).

essary to serve the best interests of the child or enable the child to communicate with the finder of fact.⁹⁹

* * * *

In summary, through robust mediation requirements the rules of practice promulgated by Nevada's judicial districts minimize the risk that parents will engage in prolonged and contentious divorce proceedings that harm children. The rules also forbid parents from discussing divorce proceedings with the children or from exposing the children to evidence used in those divorce proceedings. Further, CASA advocates, by obtaining the wishes of the child and providing that information to the court, obviate the need for children to testify in court proceedings. And if it becomes necessary to gather the testimony of a child, the Nevada Rules of Civil Procedure provide an avenue for the court to ascertain the child's testimony outside the presence of the child's parents. Thus, the local rules and the Nevada Rules of Civil Procedure adequately address the 67th Nevada Legislature's concern about exposing children to evidence of marital misconduct.

D. *Maldonado v. Robles*

In an unpublished opinion interpreting Nevada's post-amendment property division statute, the Nevada Supreme Court affirmed a trial court's order awarding Ms. Robles more than one-half of the marital property after the State convicted her husband of sexually molesting Ms. Robles's daughters.¹⁰⁰ The court found that Mr. Maldonado's actions had a "continuing economic impact" on Ms. Robles because she: (1) required counseling to address the trauma of having her daughters sexually molested; (2) incurred expenses and lost wages from appearing at Mr. Maldonado's numerous criminal proceedings; (3) incurred costs for medical bills, hospitalizations, and medications; and (4) was forced to move residences because the sexual abuse of her daughters occurred in her apartment.¹⁰¹ The court explicitly cited *Wheeler* in its holding and stated that Nevada trial courts can make an unequal disposition of property if it finds "a compelling reason" to do so.¹⁰²

This Note advocates that *Maldonado*'s holding—although involving marital misconduct in the form of abuse against children, rather than against a spouse—must be the rule, rather than the exception. Further, Nevada district courts must be enabled to divide property unevenly in response to domestic violence that is less egregious than the unfortunate violence that occurred in

⁹⁹ NEV. REV. STAT. § 50.580(2) (2017).

¹⁰⁰ *Maldonado v. Robles*, No. 63732, 2015 WL 7356364, at *3 (Nev. Nov. 17, 2015) (stating that the Nevada Supreme Court upheld the trial court ruling for uneven distribution of assets in a divorce case).

¹⁰¹ *Id.*

¹⁰² *Id.* Notably, the opinion does not discuss whether there was evidence that Mr. Maldonado committed domestic violence against Ms. Robles. *See id.*

Maldonado. Although the injuries might differ in egregiousness, each injury is concrete and requires a remedy.

III. NO-FAULT DIVORCE AND PROPERTY DIVISION

Prior to the 1970's, every jurisdiction in the United States required that divorcing spouses proffer a fault-based reason for their split.¹⁰³ The grounds for divorce included “adultery, extreme cruelty, wilful [sic] desertion, wilful [sic] neglect, habitual intemperance, conviction of a felony, or incurable insanity.”¹⁰⁴ In the wake of the Equal Rights Amendment, however, a movement began to change the existing statutory infrastructure in the hopes that a no-fault system would promote personal autonomy and minimize animosity between couples seeking divorce.¹⁰⁵

In 1970, California became the first American jurisdiction to adopt a no-fault divorce law.¹⁰⁶ And in 2010, New York became the final state to allow no-fault divorce.¹⁰⁷ Now, divorcing spouses in any American jurisdiction can proffer a no-fault based reason for the divorce, usually something like “incompatibility”¹⁰⁸ or an irretrievable breakdown of the marital relationship.¹⁰⁹ But the question of what—if any—role fault should play in the division of marital property is far different.

Prior to 1970, nearly all American jurisdictions permitted courts to consider misconduct when dividing marital assets.¹¹⁰ However, 1970 saw the approval of the Uniform Marriage and Divorce Act (“UMDA”), a model law that unequivocally barred the consideration of fault in dividing property.¹¹¹ The UMDA achieved its goal: a 1996 survey of the fifty states shows that around half of the states do not permit the consideration of fault in property division; fifteen other states do allow fault consideration; and the remainder of the states fall somewhere in between.¹¹²

¹⁰³ Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 79 (1991).

¹⁰⁴ *Id.* at 83 n.10.

¹⁰⁵ Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 62 (1991).

¹⁰⁶ Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 291 (1987).

¹⁰⁷ N.Y. DOM. REL. LAW § 170(7) (McKinney 2018); Nicholas Confessore & Anemona Hartocollis, *Albany Approves No-Fault Divorce and Domestic Workers' Rights*, N.Y. TIMES (July 1, 2010), <https://www.nytimes.com/2010/07/02/nyregion/02albany.html> [https://perma.cc/BYR2-JNCE].

¹⁰⁸ *E.g.*, NEV. REV. STAT. § 125.010(3) (2017).

¹⁰⁹ *E.g.*, N.Y. DOM. REL. LAW § 170(7) (McKinney 2018).

¹¹⁰ Katharine T. Bartlett, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y 1, 39 (2001).

¹¹¹ *Id.*

¹¹² *Id.* at 60–61.

The reasoning behind the exclusion of marital misconduct is difficult to pin down. After all, the concept of bodily integrity is held in such high regard that the United States Supreme Court has found a right to that integrity within the Due Process Clause of the Constitution.¹¹³ But to be clear: the bill I propose would not bring fault-based divorce back to Nevada. The bill would leave intact Nevada's current grounds for divorce: (1) insanity; (2) lack of cohabitation for one year; or (3) incompatibility.¹¹⁴ Neither would the proposed bill require the court to look at the relative faults of the parties in dividing property. Instead, the bill merely allows survivors of domestic violence who have suffered economic and noneconomic injuries to be compensated directly from the marital property that the survivor shares with his or her spouse.

IV. MARITAL MISCONDUCT AND PROPERTY: THE APPROACHES OF OTHER STATES

A. *New York*

New York domestic relations law provides that the trial court must “equitably” distribute property amongst the parties.¹¹⁵ The statute requires the consideration of several factors, among them being “the wasteful dissipation of assets by either spouse,” and “any other factor which the court shall expressly find to be just and proper.”¹¹⁶ The party seeking the unequal disposition of marital property must satisfy a two-pronged test: (1) there must be a finding of “fault” and (2) a finding of “such adverse physical and/or psychological effect upon the innocent spouse so as to interfere with [his or] her ability to be, or to become self-supporting.”¹¹⁷

In *Wenzel*, the trial court found that Mr. Wenzel struck, choked, and stabbed Ms. Wenzel, and engaged in behavior that caused her “severe emotional anguish.”¹¹⁸ The most egregious incident of violence involved multiple stabblings and resulted in Mr. Wenzel leaving Ms. Wenzel for dead.¹¹⁹ Ms. Wenzel required hospitalization, surgery, and therapy.¹²⁰ Further, Ms. Wenzel's injuries left her with severe nerve damage, unable to support herself or her children, and on public assistance.¹²¹

¹¹³ See *Ingraham v. Wright*, 430 U.S. 651, 673–74 (1977) (explaining that the right to be free from unjustified intrusions on personal security has always “been thought to encompass freedom from bodily restraint and punishment.”) (citation omitted).

¹¹⁴ NEV. REV. STAT. § 125.010 (2017).

¹¹⁵ N.Y. DOM. REL. LAW § 236(B)(5)(c) (McKinney 2018).

¹¹⁶ N.Y. DOM. REL. LAW § 236(B)(5)(d)(12) (McKinney 2018); *id.* § 236(B)(5)(d)(14).

¹¹⁷ *Wenzel v. Wenzel*, 472 N.Y.S.2d 830, 833 (1984).

¹¹⁸ *Id.* at 834.

¹¹⁹ *Id.* at 833.

¹²⁰ *Id.*

¹²¹ *Id.* at 834–35.

Fall 2018]

FROM EQUITABLE TO EQUAL

307

In light of those injuries, the trial court in *Wenzel* awarded Ms. Wenzel 100 percent of Mr. Wenzel's pension, 100 percent of the marital home, and the entirety of the marital bank accounts and vehicles.¹²² In making the award, the trial court stated that it was "not the repugnance or violence of the act itself that is the basis for fault to be considered as a factor" in dividing marital property.¹²³ Instead, it was the fact that the violence had a "detrimental effect upon the innocent spouse," adversely impacting her ability to become self-supporting.¹²⁴

B. Missouri

Missouri law requires that the trial court, when dividing marital property, consider the economic position of each spouse, the contribution of each spouse to the acquisition of marital property, each spouse's contribution as a homemaker, the value of nonmarital property, each spouse's conduct during the marriage, and the custodial arrangements for the minor children.¹²⁵

In the Missouri case of *Dodson v. Dodson*, Mr. Dodson was involved in no less than seven extramarital affairs, resulting in the financial waste of the marital assets.¹²⁶ Mr. Dodson's extramarital partners would call the family's home and harass Ms. Dodson.¹²⁷ One affair forced the family to go into hiding to evade a woman who became upset when Mr. Dodson ended the affair.¹²⁸

Additionally, Ms. Dodson introduced evidence of numerous instances of physical and emotional abuse.¹²⁹ For example, Mr. Dodson once picked up Ms. Dodson and threw her into the air, causing her to land in the "back of the truck."¹³⁰ In another instance, Mr. Dodson dragged Ms. Dodson by her hair across the carpet, leaving carpet burns all over her body.¹³¹ Additionally, Mr. Dodson sometimes locked Ms. Dodson in the family's doghouse.¹³² In the most egregious instance, Mr. Dodson put a loaded pistol into Ms. Dodson's mouth and threatened to kill her.¹³³

The Missouri trial court found that Mr. Dodson's abuse placed "burdens on [Ms.] Dodson beyond the norms to be expected in the marital relationship."¹³⁴ Based on this finding, the trial court awarded Ms. Dodson the entirety of the

¹²² *Id.* at 835–36, 838.

¹²³ *Id.* at 833.

¹²⁴ *Id.*

¹²⁵ MO. REV. STAT. § 452.330(1) (2018).

¹²⁶ *Dodson v. Dodson*, 904 S.W.2d 3, 4–5 (Mo. Ct. App. 1995).

¹²⁷ *Id.* at 5.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 8.

family home, a mobile home, a lot valued at \$12,000, and a one-fourth interest in Mr. Dodson's retirement fund.¹³⁵ The award was affirmed on appeal.¹³⁶

C. *Alabama*

Alabama's divorce statute provides that—subject to the court ensuring it does not abuse its discretion—the trial court is not required “to award each party an equal portion of commonly-used assets.”¹³⁷ Rather, the division of assets must be done “according to the particular circumstances of the case.”¹³⁸

The trial court in *Crowe v. Crowe* awarded the majority of the marital real and personal property to Ms. Crowe.¹³⁹ Ms. Crowe worked for thirty-four of the parties' thirty-eight-year marriage, and the court found that the couple avoided financial ruin because of Ms. Crowe's deft financial management.¹⁴⁰ Conversely, Mr. Crowe worked only sporadically and was treated for alcoholism several times throughout the marriage.¹⁴¹

Further, the court noted that under Alabama law, the proffering of a no-fault basis for divorce does not preclude the court from considering “the fault of the parties.”¹⁴² Accordingly, the court considered the fact that over the parties' marriage, Mr. Crowe physically abused Ms. Crowe through most of the children's childhood.¹⁴³ Based on these circumstances, the trial court awarded Ms. Crowe “substantially all of the marital assets,” including antique furniture, the entirety of her retirement pension, and one-half of the marital residence.¹⁴⁴

V. PROPOSED BILL AND EXPLANATION

The aim of this bill is to help address Nevada's woefully high rate of domestic violence by deterring perpetrators of domestic violence, while also aiding survivors of domestic violence in their rehabilitation. However, the bill also aims to ensure that the division of marital property goes only as far as necessary to compensate the survivor.

A. *The Bill*

An act relating to domestic relations that authorizes the trial court to award an unequal disposition of marital property to compensate a survivor of domestic violence who suffered such violence at the hands of his or her spouse.

¹³⁵ *Id.* at 5.

¹³⁶ *Id.* at 10.

¹³⁷ *Crowe v. Crowe*, 602 So. 2d 441, 443 (Ala. Civ. App. 1992).

¹³⁸ *Id.*

¹³⁹ *Id.* at 442.

¹⁴⁰ *Id.* at 443.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 442.

Fall 2018]

FROM EQUITABLE TO EQUAL

309

Section 1. NRS 125.150 is hereby amended to read as follows:

1. In granting a divorce, the court:

- (a) May award such alimony to the wife or to the husband, in a specified principal sum or as specified periodic payments, as appears just and equitable; and
- (b) Shall, to the extent practicable, make an equal disposition of the marital property of the parties, except that the court may make an unequal disposition of the marital property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition¹⁴⁵;

(c) There is a presumption that a spouse who proves by clear and convincing evidence that he or she has suffered an act or acts of domestic violence by his or her spouse within two years before the filing of the complaint for divorce has shown a “compelling reason” to make an unequal disposition of the marital property, but only to the extent necessary to make the abused spouse whole for economic and non-economic damages resulting from the abuse, including:

(1) medical costs for the diagnosis, care, or treatment of health conditions related to the act(s) of domestic violence that occurred within two years prior to the filing of the complaint for divorce and are proven by clear and convincing evidence;

(2) wages not paid by the employer for days missed from work for those reasons set forth in NRS 608.0198(2)(a);

(3) pain and suffering resulting from the act(s) of domestic violence that occurred within two years prior to the filing of the complaint for divorce and that are proven by clear and convincing evidence.

(d) The district court shall, to the extent practicable, distinguish between actions taken by a spouse to defend themselves from an act of domestic violence, and acts of domestic violence promulgated by the primary aggressor.

(e) A court making an award to a domestic violence survivor under this section must set forth the specific findings that formed the basis for the award.

B. Explanation

1. Animating Wheeler v. Upton-Wheeler

The proposed bill compensates a survivor of domestic violence by allowing the district court to compensate the survivor for the adverse consequences that routinely follow such violence. The bill, then, animates *Wheeler*'s central premise of allowing for a division of assets when violence “has had an adverse economic impact.”¹⁴⁶

Further, the presumption in the bill codifies the simple fact that domestic violence almost always has adverse financial consequences for the survivor. Rather than *Upton-Wheeler*'s permissive approach allowing the court to con-

¹⁴⁵ NEV. REV. STAT. § 125.150(1) (2017) (citations omitted).

¹⁴⁶ *Wheeler v. Upton-Wheeler*, 946 P.2d 200, 203 (Nev. 1997).

sider whether domestic violence has had an economic impact on a spouse, the bill would presume a survivor's right to be made whole for domestic violence he or she has suffered.

The bill also works in tandem with another statute to fill a gap in the protection of domestic violence survivors. Ratified in 2017, NRS 608.0198 allows domestic violence survivors to take time off from work to resolve issues relating to an act of domestic violence.¹⁴⁷ The statute allows survivors to take time off from work for "the diagnosis, care or treatment of a health condition," to "obtain counseling," and to "participate in any court proceedings" related to the violent incident.¹⁴⁸ An employer is not permitted to retaliate against an employee for taking time off from work for the reasons enumerated in the statute.¹⁴⁹ However, the statute allows for the time off to be "paid *or unpaid* by the employer."¹⁵⁰ Accordingly, a survivor of domestic violence who lacks financial means might not invoke NRS 608.0198 if she cannot spare the wages that will go unpaid. Section 2(c)(2) of the proposed bill aims fill this gap in protection by imposing the financial burden of unpaid work on the domestic violence aggressor, so long as the survivor is missing work for those reasons set forth in NRS 608.0198(2)(a).

2. *Clear and convincing evidence*

The clear and convincing evidentiary standard is one that family law litigators will be very familiar with. It is the same evidentiary standard that Nevada currently requires to prove that a parent committed an act of domestic violence against the child or a parent of the child, which triggers a rebuttable presumption joint or sole custody by that parent is not in the child's best interest.¹⁵¹ A survivor's claim under the bill can be litigated in tandem with a claim for primary physical custody deriving from abuse against a spouse or child.

3. *Requirement for written findings*

The underlying goal of the proposed bill is to seek compensation for the domestic violence survivor, but not at the cost of accuracy. The requirement for written findings aims to ensure that the judgment and discretion of the trial court is well reasoned and capable of review. This requirement is analogous to the current requirement that the trial court set forth written findings if it finds sufficient evidence to give rise to a presumption that it is not in a child's best interest for one parent to have sole or joint physical custody.¹⁵²

¹⁴⁷ NEV. REV. STAT. § 608.0198(1) (2017).

¹⁴⁸ *Id.* §§ 608.0198(2)(a)(1)–(3).

¹⁴⁹ *Id.* § 608.0198(3)(c).

¹⁵⁰ *Id.* § 608.0198(1)(a) (emphasis added).

¹⁵¹ NEV. REV. STAT. § 125C.003(1)(c) (2017).

¹⁵² *See id.* § 125C.230(1).

VI. OVERLAP BETWEEN CRIMINAL RESTITUTION AND FAMILY LAW

The proposed bill compensates a survivor for harm resulting from an act that is potentially criminal under state and federal law.¹⁵³ And under federal law, certain domestic violence survivors are automatically entitled to “the full amount” of their losses.¹⁵⁴ Thus, the possibility of double recovery cannot be ignored. However, the Nevada Supreme Court addressed a similar issue in *Major v. State*.¹⁵⁵

In *Major*, the defendant was accused of child abuse, resulting in his arrest.¹⁵⁶ The family court ordered the defendant to pay \$100 of child support each month to Social Services, which cared for the defendant’s daughter following his arrest.¹⁵⁷ In the criminal proceedings—before a court different from the one that ordered the child support award to Social Services—the defendant pleaded guilty to felony child abuse.¹⁵⁸ Subsequently, Social Services sought \$20,362.07 in restitution, which represented the cost of caring for the defendant’s daughter for seven months.¹⁵⁹ The court hearing the criminal matter granted the request for restitution, but deducted the amount by \$700, which represented the seven months of child support that the family court ordered the defendant to pay Social Services.¹⁶⁰ The defendant opposed the award and argued that because the family court had already entered an order for child support, the criminal court lacked jurisdiction to enter another cost-of-care order.¹⁶¹

The Nevada Supreme Court disagreed and affirmed the restitution award.¹⁶² The Court noted the overlap between the family court’s authority to impose a support obligation and the criminal court’s authority to impose restitution, each for “the same occurrence.”¹⁶³ But the Court held that “[s]uch an overlap need not undermine the jurisdiction” of either court, so long as the courts take care to avoid double compensation.¹⁶⁴

Under my proposed bill, then, a court presiding over a criminal domestic violence matter may, in theory, still award restitution, so long as it takes care to ensure that the survivor is not doubly compensated. The principles of res judicata would still apply, however, and a domestic violence survivor would not be permitted to collaterally attack a family court’s judgment.

¹⁵³ 18 U.S.C. § 2261 (2018); NEV. REV. STAT. § 200.485 (2017).

¹⁵⁴ 18 U.S.C. § 2264(b)(1) (2018).

¹⁵⁵ *Major v. State*, 333 P.3d 235, 237 (Nev. 2014).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 238–39.

¹⁶³ *Id.* at 238.

¹⁶⁴ *Id.*

CONCLUSION

The 67th Nevada Legislature's efforts were noble, but misguided. The inclusion of evidence relating to domestic violence is now commonplace in family law litigation, and that evidence is crucial to ensure that district courts are apprised of all the facts relevant to a child's safety. But apart from its relevance to the safety of children, evidence of domestic violence in divorce proceedings can help the court address a pressing human rights issue. The proposed bill would be a meaningful step towards ensuring that domestic violence survivors are fitted with the tools necessary for their rehabilitation and ability to move on with their lives. Until every abuser is forced to compensate the victim that they harmed, there will be no true parity. Changing Nevada's property division standard in accordance with the proposed bill would mean that property division in Nevada will have gone from equitable, to equal, and then more equal.