

## Civil Cases in the Aftermath of Spousal Killings

by Anne L. Perry, Esq.

### Nebraska: After Father Murdered Mother and Committed Suicide, Best Interests of Children Supported Awarding Guardianship to Maternal Grandparents

In February 2008, Chris McDowell murdered his wife, Erika Ambriz McDowell, and then committed suicide. As a result, their children, Isaac, then age seven, and Marianna, then age three, were orphaned. By a last will and testament executed four days before the murder and suicide, Chris named his mother, Carolyn McDowell Rosenquist, as guardian of his children. This will made no mention of his wife, Erika. Erika's parents, Raul Ambriz-Padilla and Maria Ambriz-Trujillo, were appointed as temporary guardians of the children, and their son, Erika's brother, Jorge Ambriz, was appointed as temporary conservator. Thereafter, Carolyn sought appointment as guardian and conservator, and Raul, Maria, and Jorge sought permanent appointment as guardians and conservator, respectively.

After an evidentiary hearing, the court appointed Raul and Maria as guardians of the children and appointed Jorge as conservator to manage their property. The court found that the provisions of Chris's will did not apply as it was prepared four days prior to death and was specifically nullified by statute. Carolyn argued that the court incorrectly construed the statute, which applied only in circumstances in which there were children over the age of 14. Therefore, she argued, as the guardian appointed by will, she had priority over any guardian appointed by the court. Notwithstanding any statutory analysis, the court also found that it was in the best interests of both children that the maternal grandparents be appointed as guardians. Carolyn appealed, claiming that the court abused its discretion in failing to appoint her as guardian/conservator.

The Court of Appeals of Nebraska, as an initial matter, agreed with Carolyn, concluding that the court's reliance on the statute was misplaced since there were no children age 14 or over. Nor did the court need to decide whether

the State's homicide probate statute voided a killer's nomination of a guardian for his children. Rather, the court held that "irrespective of the circumstances of the parents' death, under Nebraska law, the determination of who shall be guardian and conservator is ultimately dependent upon the best interests of the children." While a testamentary nomination of a guardian may have statutory priority, the best interests of the children is the paramount concern and determining factor.

In the instant case, the court found it clear from a complete reading of the trial court order that the rationale for its appointment of Raul and Maria was premised upon the best interests of the children. Therefore, the court reviewed for error based on the facts in the record. Both the maternal grandparents and the paternal grandmother were "qualified" and able to provide adequate and appropriate care for the children. However, Carolyn had relocated from Nebraska to Arizona three years prior and had seen the children only once a year since that time.

In contrast, Raul and Maria, as well as their son Jorge, two other sons, and two of their daughters, all resided in the Lexington, Nebraska area. The extended family was extremely close knit and included a number of young cousins who were all bilingual, as were Isaac and Marianna. Immediately following the murder-suicide, Jorge arranged for Isaac and Marianna to be seen by a mental health therapist who met with them weekly up to the time of trial and recommended they stay in their present placement with Raul and Maria because they were doing well and needed continued stability. Given the "structure, support, love, and nurture provided by Raul and Maria and their family—aunts, uncles, and cousins," the court found it "abundantly clear" that the children's best interests were served by the appointment of Raul and Maria as their guardians. The court also found that Jorge was an appropriate conservator for the children. Thus the decision of the county court was neither arbitrary, capricious nor unreasonable, and the judgment was affirmed.

**In re McDowell**, 762 N.W.2d 615 (Neb. Ct. App. 2009).

### Nevada: Slayer Statute Prohibited Husband Who Shot and Killed Wife From Blocking Distribution of His Pension Plan to Wife's Estate

Darren Roy Mack and Charla Mack were married for ten years and had one child. Upon their divorce, the distribution of property was a main area of contention. At a hearing on the issue of property settlement, the district court recited several oral orders, including the agreement that Darren pay Charla \$480,000 for the purchase of a home, vehicle, and other needs. There was also an agreement that Darren, Charla, Darren's mother, and several Mack business entities would all waive their respective rights to sue. At the conclusion of the hearing, the judge affirmed Darren and Charla's understanding of, and agreement to, the court's order.

Thereafter, the parties' written orders were inconsistent, so a second hearing was held regarding the issues hindering settlement. The court reaffirmed the earlier order and read the settlement on the record. Two weeks later, Charla was killed and the trial judge was shot. Darren was later convicted of both Charla's murder and the attempted murder of the judge. Charla's estate was substituted for her in the divorce proceedings, and the estate moved to memorialize the oral orders from the two previous hearings into a written order through entry of an order *nunc pro tunc* (which corrects a clerical error and makes the order retroactively effective).

Darren filed a motion in opposition and to dismiss. He argued that the district court did not have jurisdiction to force a settlement on terms to which Darren never agreed, that the issue of the waiver of rights to sue was unresolved and included settlement with third parties, and that the court had no authority to issue an order affecting Darren's pension plan which was qualified under ERISA (the Employee Retirement Income Security Act).

*See SPOUSAL KILLINGS, next page*

The Supreme Court of Nevada addressed four issues on appeal. First, because of its applicability to the other issues on appeal, the court examined whether it could take judicial notice of the fact that Darren was adjudged Charla's killer. Generally, courts can only consider matters contained in the record, but the court held that "judicial notice may be taken of the outcome of a murder trial in which the deceased stood to gain financially from the killer because of the close relationship between the murder trial and the benefits to which the deceased's estate is entitled." This conclusion was supported by the state's slayer statute which prohibited a person's financial gain from their own wrongdoing in taking the life of another. ■

Second, the court discussed whether it could correct the record (*nunc pro tunc*) by memorializing the oral order entered by the former presiding judge who was also shot and injured by Darren. The court found that a *nunc pro tunc* order was proper in this case because it did not correct judicial errors or omissions, but was simply used to memorialize the oral orders made on the record. Given that both parties clearly assented to the terms of the settlement agreement, and Darren acquiesced to the waiver of the right to sue, the terms of the settlement were understood and the merits of the order were valid.

Third, the court addressed whether a Qualified Domestic Relations Order (QDRO) was issued during Charla's lifetime as was required under ERISA for an "alternate payee" to collect from another's pension plan. The

court found that the district court did issue a valid QDRO as part of the oral order which recognized Charla's right to receive a \$500,000 payment from Darren's ERISA pension plan.

Fourth, the court considered, as a matter of first impression, whether Nevada's slayer statute was preempted by the federal ERISA statute, which would otherwise govern any employee benefit or pension plan. The court concluded that the slayer statute did not fall within the category of laws preempted by ERISA, and thus "Darren cannot benefit from his wrongdoing and stop Charla's estate from obtaining payments from his ERISA-qualified pension plan."

The order of the district court with respect to the settlement agreement was affirmed. **Mack v. Estate of Mack**, \_\_ P.3d \_\_, 2009 WL 790379 (Nev. 2009). ■



## **Authorized Electronic Copy**

This electronic copy was prepared for and is authorized solely for the use of the purchaser/subscriber. This material may not be photocopied, e-mailed, or otherwise reproduced or distributed without permission, and any such reproduction or redistribution is a violation of copyright law.

For permissions, contact the **Copyright Clearance Center** at  
<http://www.copyright.com/>

You may also fax your request to 1-978-646-8700 or contact CCC with your permission request via email at [info@copyright.com](mailto:info@copyright.com). If you have any questions or concerns about this process you can reach a customer relations representative at 1-978-646-2600 from the hours of 8:00 - 5:30 eastern time.