A legal note from Marshal Willick about when a divorce actually occurs.

To laymen, it seems obvious that when a judge says "I declare you divorced," and the proverbial gavel bangs, parties are divorced. But, as in many areas of law, it is not that simple; the law has the ability to move such an event backward – or forward – in time, and sometimes it is a matter of choice.

I. THE BASIC RULE: A DIVORCE OCCURS WHEN THE DECREE IS FILED

NRCP 58(c) provides that "[t]he filing with the clerk of a judgment, signed by the judge, or by the clerk, as the case may be, constitutes the entry of such judgment, and no judgment shall be effective for any purpose until the entry of the same . . . ."

Subsection (e) of that rule provides that the designated party must serve written notice of the order on the other and file the notice with the clerk, and that while execution on a judgment is delayed until that service, failure to serve notice of entry does not affect the validity of the judgment.

Of course, that does not mean that what is ***said*** by a judge in open court never has any effect. In *Division of Child and Family Services v. Eighth Judicial District Court*, 120 Nev. 445, 92 P.3d 1239 (2004), the court held that:

> dispositional court orders that are not administrative in nature, but deal with the procedural posture or merits of the underlying controversy, must be written, signed, and filed before they become effective. However, nothing in this opinion precludes a court from summarily punishing a party who commits contempt in the court's immediate presence, pursuant to NRS 22.030. Additionally, oral court orders pertaining to case management issues, scheduling, administrative matters or emergencies that do not allow a party to gain an advantage are valid and enforceable.

Houston v. Eighth Judicial District Court, 122 Nev. 544, 135 P.3d 1269 (2006), contains a longer and more detailed discussion of when a verbal order for contempt is enforceable.

The take-away from these rules and cases is that, as a general principle, while judges may manage their courtrooms as necessary to maintain order, it takes a written order, signed by a judge and entered by a clerk, to alter the legal landscape in any way. But, as with many things in law, the reality is a bit more nuanced.

II. DOES THE "DIVORCE" HAPPEN ON THE DATE OF THE DIVORCE ***TRIAL***?

The fact that the order is not ***effective*** until signed and filed does not necessarily mean that the date of filing is the "date of divorce." Many legal documents memorialize facts as of certain prior dates, and this should be so for divorces much more often than it is apparently being accomplished.

A trial may start on one day and end on another, which could be many months separated in time.

For reasons both practical and of public policy, it is suggested that the "date of divorce" should generally be noted by counsel in drafting decrees as being the date of the conclusion of the divorce ***trial*** – no matter how much longer it takes to actually get a Decree written, approved by the other side, signed by a judge, and filed.

Case law has long held that separation is irrelevant to continuity of the community, which continues until the time of divorce. *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983). The Nevada Supreme Court, issuing instructions for the trial court on remand, treated the trial and the divorce as synonymous. Pointing out that property rights accrued "during marriage" and did not terminate upon separation, the Court's remand referenced the financial facts as they existed at the moment of trial, and directed the trial court to address those specific numbers.

This was so even though the procedural history reflected that, in that case, motions were filed which tolled the date of final judgment for some time, and despite the existence of other cases indicating that a case is not actually "final" until all appeals are concluded.

In other cases holding that community property accrues "until the parties are divorced," the Court has always treated the trial and the divorce as synonymous, even when the decree was entered months later, so "until divorce" usually means until the divorce trial. *See Fox v. Fox*, 84 Nev. 368, 441 P.2d 678 (1968); *Fox v. Fox*, 87 Nev. 416, 488 P.2d 548 (1971) (collectively determining the outcome on the basis of the information presented at the divorce trial).

In the *Fox* appeals, the Court made it clear that the hearings on remand were not to allow any new evidence or testimony, but only to complete the judicial act of entry of a judgment. Thus, the critical time period as to evidence of the property belonging to the parties was the time of the ***divorce trial***, not that of the (much-delayed) filing of the judgment.

In ***every*** contested case, there is some period of delay between the close of evidence and the formal entry of a decree, since the paperwork has to be drafted. There is no published Nevada case squarely addressing the question of whether one party can take advantage of the delay between trial and entry of judgment to assert that the other party (presumably working for a living) is accruing "unadjudicated assets" (or paying down debt) during that pendency which are then subject to further proceedings or division.

Saying "no" to that question, however, has been the uniform result in all known Nevada cases, and appears to be the consensus in published cases from other jurisdictions, reflecting a policy choice of encouraging promptness rather than delay. *See*, *e.g.*, *Markham v. Markham*, 909 P.2d 602 (Hawaii Ct. App.), *cert. denied*, 910 P.2d 128 (Hawaii 1996); *MacDonald v. MacDonald*, 698 So. 2d 1079 (Miss. 1997); *In re Graff*, 902 P.2d 402 (Colo. Ct. App. 1994); *Heine v. Heine*, 580 N.Y.S.2d 231 (1992); *Grinaker v. Grinaker*, 553 N.W.2d 204 (N.D. 1996); *Zuger v. Zuger*, 563 N.W.2d 804 (N.D. 1997); *Bell v. Bell*, 643 A.2d 846 (1994).

While none of the Nevada opinions are truly explicit on the point, it can therefore be said with fair certainty that the community ends on divorce, and for purposes of property division, "divorce " should usually mean the date of the conclusion of the trial.

III. DOES THE PRECISE DATE MATTER?

In a word, "yes." In the area of pensions, for example, such dating alterations could mean a lot of money. Take the example of a retirement involving a couple that live together in marriage for ten years before they separate, while the husband continues working. The parties discuss reconciliation and possible divorce terms, but after six months, it becomes clear that the split is permanent, and one of them files for divorce. The divorce turns out to be a messy, acrimonious matter which proceeds through motions, custody evaluations, returns, etc., for another year and a half, when the parties finally get to trial and are declared divorced. Also presume that the worker spouse is accruing pension benefits providing exactly $1,000 in monthly benefits after 20 years.

If such a divorce occurred in California, the spousal share would cease to accumulate upon "final separation." So the math would be 10 (years of marriage) ÷ 20 (years of service) x .5 (spousal share) x $1,000 (pension payment) = $250.

We know from *Forrest* that the parties ***could*** stipulate to use their separation date as the termination of the community by "written agreement or authorization." If such was done on these hypothetical facts, the calculation would be the same as it is in California.

Or they could agree to terminate the community upon the start of divorce proceedings, in which case the analysis would be as it is in Arizona, which terminates community property accruals, for the most part, on the date of filing and service of a petition for divorce. There, on the same facts, the math would be 10.5 (years of marriage) ÷ 20 (years of service) x .5 (spousal share) x $1,000 (pension payment) = $262.50.

But if none of these things was done, in Nevada, community property ceases to accrue on the "date of divorce." On these facts, if "divorce" meant the date of the divorce ***trial***, the math would be 12 (years of marriage) ÷ 20 (years of service) x .5 (spousal share) x $1,000 (pension payment) = $300.

And, if pension-earning employment service continued during further months that the parties dickered over the form of the decree and counsel did not specifically recite the trial date as the divorce date, the spousal share would be increased by .104167% ***more*** every month – which does not seem like a lot, but accrues during ***each*** such month, and results in increased future payments every month for life.

There are a host of things that can (and do) delay entry of a decree, including parties switching lawyers, administrative re-assignment of cases between departments, or disputes as to an issue to be reflected in the decree. Such disputes could result in negotiations, motion practice, or even lengthy intervening proceedings in some other forum – think bankruptcy court, or an appellate court. Months can easily go by; sometimes, years.

So, yes, the dates are important, and the incentives thus created have led some of us concerned with divorce theory to recommend legislative adoption of an Arizona-like termination of community interests upon filing and service. The concept is to remove incentives for delay on the part of a

potential spouse-recipient, and basically to align the entire process so as to give all parties incentives pointed at resolution of cases, on their merits, as promptly as is consistent with doing justice to their cases. But – as briefly commented on below – the suggested reforms have languished for a very long time.

IV. WHAT HAPPENS IF THE DIVORCE TRIAL DATE IS NOT USED?

Counsel who do ***not*** provide for a date of divorce being the date of the trial will leave a later reviewing court with no guidance as to intent, and the file stamp at the top of the page will present an awfully tempting – in fact, the only – easy reference. Indeed, in our QDRO-drafting practice (see http://qdromasters.com/), we do the same thing: rely on the file-stamp date if the Decree text indicates no different "date of divorce."

As indicated by the example discussed above, it is not unusual for several months (and sometimes a year or more) to go by between trial and entry of a decree, and the cost to a client from omission of that small detail could be significant. Whenever a significant loss to a client can result from a minor inadvertent omission, the specter of malpractice looms over counsel. I have been called on to testify as an expert witness relating to oversights that are certainly less critical than that one.

V. OTHER SPECIAL CASES

It is possible to obtain an enforceable order at the moment a deal is made, in open court, prior to the drafting of the formal written order. In Clark County, under EDCR 7.50:

> Stipulations to be in writing or to be entered in court minutes. No agreement or stipulation between the parties or their attorneys will be effective unless the same shall, by consent, be entered in the minutes in the form of an order, or unless the same is in writing subscribed by the party against whom the same shall be alleged, or by the party's attorney.

The same rule, phrased differently, is set out in the State-wide District Court Rules. *See* DCR 16.

Where the dispositional order is placed on the record in open court, no immediately-apparent reason exists for doing anything ***other*** than reflecting the date of the entry on the court minutes as the date of the subsequent written order, however long it takes to get it prepared, approved, and filed.

VI. MOVING "DIVORCE" FORWARD AND BACKWARD IN TIME

Courts ***can*** – at least sometimes – use the magic of the law to change the fact of when something occurred. In *Koester v. Estate of Koester*, 101 Nev. 68, 693 P.2d 569 (1985), one of the parties died between the date of the divorce declaration by the judge and the date that the decree was submitted and filed. The Nevada Supreme Court affirmed the district court's decision to declare the judgment entered *nunc pro tunc* (literally, "now for then") as of the trial date. In fact, the Court declared the power to relate a divorce decree backward in time "[i]f the facts justifying the entry of a decree were

adjudicated during the lifetime of the parties to a divorce action, so that a decree was rendered or could or should have been rendered thereon immediately, but for some reason was not . . . ."

But that power is not always exercised, or found proper ***to*** exercise. In *McClintock v. McClintock*, 122 Nev. 842, 138 P.3d 513 (2006), the issue was whether a judge properly moved a date of divorce backward in time to the date the entirely uncontested paperwork had been submitted, rather than the date three weeks later that it was actually file-stamped. The three week difference determined whether the wife's ten-year marriage to her second husband – which was performed during that three-week period – was valid, or void.

The Court reversed, even though the first-divorce paperwork had languished in the courthouse only because the prior judge did not get around to signing the decree for most of a month. Since the first judge ***might have*** (but did not) question or refuse to sign the decree submitted, the Court found that the later judge could not move the date of the decree, *nunc pro tunc*, to a date before the first judge had "adjudicated" the matter by signing the uncontested paperwork.

Of such points are legal distinctions made.

VII. PROSPECTS FOR IMPROVING STATUTORY FAMILY LAW; CONCLUSIONS

There was a proposal to recommend the Arizona (termination of community at filing) rule to the Nevada Legislature, but out of forgetfulness, misplaced concerns about "lobbying," or simple sloth, no one in the past two decades has put forth the effort required to get that proposal (or a sizeable number of other improvements in substantive and procedural family law) in front of and through the Legislature.

This is a shame. Nevada family law is chock-full of anachronisms, outdated provisions, outright contradictions, and logical weaknesses. Heck – it was noted 20 years ago that the entire structure of family law from chapter 122 to 130 was in need of recodification and updating.

The law would be a ***whole*** lot more likely to be meaningfully improved if consciously guided by the suggestions of knowledgeable neutrals than if left to the blowing winds of chance, individual legislators' pet peeves, and the corrosive distortion of fixated special interest groups. But actually doing something to improve the law takes time, will, and effort, and those with the means to engage in that process have apparently lacked either the ability or the desire to commit one or all of those elements to the task.

In the meantime, counsel can best serve their clients by being conscious of time as a component of valuation, and ensuring that the paperwork following a divorce correctly reflects the fact of resolution as of the proper moment.

VIII. QUOTES OF THE ISSUE

"Lawful, adj. Compatible with the will of a judge having jurisdiction."
– Ambrose Bierce, *The Unabridged Devil's Dictionary*, 1911.

"Not unless you can alter time, speed up the harvest, or teleport me off this rock."
– Luke Skywalker (Mark Hamill) to C-3PO (in answer to the question "Is there anything I might do to help?"), *Star Wars* (Fox, 1977).

"The probability that we may fail in the struggle ought not deter us from the support of a cause that we believe to be just."
– Abraham Lincoln

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This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.