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Back to Basics: Overview of Community Property

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TABLE OF CONTENTS

BIOGRAPHY

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In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other states, and in the drafting of various state and federal statutes in the areas of pensions, divorce, and property division. He has chaired several Committees of the American Bar Association Family Law Section, and has repeatedly represented the entire ABA in Congressional hearings on military pension matters. He has served on many committees, boards, and commissions of the ABA, AAML, and Nevada Bar, has served as an alternate judge in various courts, and is called upon to testify from time to time as an expert witness. He serves on the Board of Directors for Clark County Legal Services.

Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and his J.D. from Georgetown University Law Center in Washington, D.C., in 1982. Before entering private practice, he served on the Central Legal Staff of the Nevada Supreme Court for two years.

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I. PREHISTORY AND PREFACE; HOW WE GOT THIS PROPERTY SYSTEM

For most of the history of modern humans, we have been concerned with regulation of relationships between bonded pairs. Some anthropologists even consider pair bonding one of the defining characteristics marking the evolution of our species in differentiation from our hominid ancestors and cousins.[1]

The history of the evolution of "marriage" as an institution is beyond the scope of this work, but in broad strokes it may be said that even ancient societies needed a secure environment for the perpetuation of the species, a system of rules to handle the granting of property rights, and the protection of bloodlines.

After the fall of Rome, marital practices in the West devolved to the level of tribal or local custom. The practice of community ownership had existed among the Germanic tribes after the fall of Rome, and was brought by them in their migrations to and through the Iberian Peninsula to what is now Spain and France.[2]

The Spanish community property system, because of its adoption by other countries and the Spanish colonization of Latin America, has become perhaps the dominant form of community property in the western world. In what has been characterized as its "most salient characteristic," this conceptualization appropriates to the community the fruit of labors during marriage, which is why it defines as "marital" property earned during marriage by the labor of either or both parties, and as separate property that which is acquired before marriage, or during marriage by gift, bequest, or descent.[3]

There are other conceptualizations of marital property, of course. An alternate form called the "Roman-Dutch" system, adopted in the some Scandinavian countries (plus South Africa and Brazil), adopts the "hotch-pot" theory found in various common-law American States, in which all property is considered marital, whether acquired before or during the marriage.[4] It is this conceptualization that most nearly gives meaning to the oft-recited wedding vow of "With all my worldly goods I thee endow."

Another variant, found in Europe, considers property individual until divorce or death, at which time it is essentially treated as though it were community property.[5]

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[1] *See*, *e.g.*, Nicholas Wade, BEFORE THE DAWN: RECOVERING THE LOST HISTORY OF OUR ANCESTORS (Penguin Press, 2006).

[2] William Reppy, Jr. and William De Funiak, COMMUNITY PROPERTY IN THE UNITED STATES at 1 (Bobbs-Merrill Company 1975).

[3] *See* Grace Blumberg, COMMUNITY PROPERTY IN CALIFORNIA at 2 (4th ed., Aspen 2003).

[4] *See* Rheinstein and Glendon, Interspousal Relations (ch. 4) at 49-77, 139, in 4 Int. Encyclopedia of Compl. L. (A. Chloros ed. 1980).

[5] *See* Grace Blumberg, COMMUNITY PROPERTY IN CALIFORNIA at 2 (4th ed., Aspen 2003).

The common law received in this country from England was the common law as it existed upon the founding of the United States, and thus at a time when jurisdiction over matters of marriage and divorce still belonged to the ecclesiastical courts. The Nevada Supreme Court has held that the law of marriage and divorce, as administered by the ecclesiastical courts, is a part of the common law of this country, except as it has been altered by statute.[6]

In the U.S., common law marriage remained the norm in most of the country throughout its early history, presumably due to the size of the frontier and vast distances to government centers. The Spanish system of property ownership was, essentially, in place through much of the country prior in time to organized government.

Louisiana utilized the community theory as early as the 1700s under the "Custom of Paris," and later by the laws of Spain, retaining the system in its first legal code of 1808. Texas continued the system by Constitutional provision, even though the common law was adopted otherwise, in 1840. The California Constitution of 1849 continued the existing law of community property after much debate, modeling its laws on those of Texas. New Mexico operated solely under Spanish community property law until comprehensive statutes were enacted in 1901. Arizona – which included much of the area that is now Clark County, Nevada (including Las Vegas), and was part of New Mexico until 1863 – continued the community property system by statute as of 1865. Idaho recognized the community form of property in 1867, and Washington in 1869.[7]

Given these developments, and the time and place that they were being debated and implemented, it is unsurprising that Nevada followed suit. The original territorial laws were non-specific, stating only in Chapter 33, Section 25, that in granting a divorce, "the court shall also make such disposition of the property of the parties, as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it, for the benefit of the children."

The 1865 Nevada Constitution contained a Section 31 to Article Four, addressing the separate property of wives owned by her upon marriage or thereafter acquired by gift, devise, or descent, and providing for the passage of further laws "defining the rights of the wife in relation, as well to her separate property as to that held in common with her husband" and "providing for the registration of the wife's separate property." Nevada's formal community property scheme came into existence through the Statutes of 1873.

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[6] *Wuest v. Wuest*, 17 Nev. 217, 30 P. 886 (1882).

[7] William Reppy, Jr. and William De Funiak, COMMUNITY PROPERTY IN THE UNITED STATES at 2 (Bobbs-Merrill Company 1975).

The constitutional provision was altered in 1978 so as to re-phrase it in gender-neutral language[8]:

> 31. Property of married persons.
> All property, both real and personal, of a married person owned or claimed by such person before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of such person. The legislature shall more clearly define the rights of married persons in relation to their separate property and other property.

From the time it was a territory, Nevada followed the common law tradition perhaps most succinctly framed as: "Husband and wife are one, and that one is the husband."[9] The Nevada Supreme Court held that upon marriage, at common law, "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."[10]

While the evolution of women's rights in Western societies generally is beyond the scope of this paper, the snippets above suffice to convey the subordinate role for women perceived and institutionalized by the legal framework in place in the middle of the 19th century.

Seen from that perspective, the rights of husband and wife established in the community property statutes adopted March 10, 1873, can be perceived as moderate, or even as progressive. Even so, the husband remained the manager of the community estate until 1975, during the debate regarding the proposed Equal Rights Amendment, when Nevada altered its statutory scheme to a system in which the parties had equal powers of management of community property.

During the hundred-year run-up to joint management and control of community property, the concept of the spousal interest evolved, from being merely a right to make a claim upon dissolution, to actual ownership upon acquisition. It was in 1959 that the statutes were amended (by addition of NRS 123.225) to specifically provide that the "respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests, subject to the provisions of NRS 123.230." The statute applied to all community property, regardless of the date acquired.[11]

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[8] Proposed and passed in Statutes of Nevada 1975, p. 1917; agreed to and passed in Statutes of Nevada 1977, p. 1703; and ratified at the 1978 general election.

[9] Ascribed to a "Professor Loring" by Theron G. Strong, *Joseph H. Choate* (1917).

[10] *Darrenberger v. Haupt*, 10 Nev. 43, 45-46 (1875) (explaining why property acquired prior to adoption of community property law was not commonly owned by the prior husband and wife).

[11] NRS 123.225(2).

Before 1975, that "subject to" statute – NRS 123.230 – vested management and control in the husband. The sea change at that time altered the system to joint management and control, and set out a series of rules for what the spouses could do individually or jointly, with their property.

II. WHAT IS CONSIDERED COMMUNITY PROPERTY: DIFFERENT TYPES, EXAMPLES

Characterization of property as separate or community at the time of divorce can be an extremely important issue, since Nevada courts are without jurisdiction to award the separate property of one spouse to the other or to the children except for support purposes.[12]

In Nevada, married persons may own property either separately or as a community. Community property is defined in NRS 123.220:

> All property, other than that stated in NRS 123.130, acquired after marriage by either husband or wife, or both, is community property unless otherwise provided by:
> 1. An agreement in writing between the spouses, which is effective only as between them.
> 2. A decree of separate maintenance issued by a court of competent jurisdiction.
> 3. NRS 123.190.[13]
> 4. A decree issued or agreement in writing pursuant to NRS 123.259.[14]

NRS 123.220 allows spouses to agree to the characterization of property as community or separate by entering into a written agreement. Separate statutory provisions govern Premarital Agreements.[15] Agreements as to transmutation can be complex and are beyond the topic of this paper, and so generally are not discussed further here.

Nevada does not contemplate different "types" of community property; here, it either is, or it is not. Which is not to say that property cannot be of mixed character, as discussed in the sections below addressing questions of tracing.

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[12] *See* NRS 125.150(4) ("In granting a divorce, the court may also set apart such portion of the husband's property for the wife's support, the wife's separate property for the husband's support or the separate property of either spouse for the support of their children as is deemed just and equitable").

[13] "Earnings of either spouse appropriated to own use pursuant to written authorization of other spouse deemed gift."

[14] Division of income and resources of husband and wife when one spouse is institutionalized.

[15] *See* NRS ch. 123A.

Nevada also recognizes businesses and professional practices as "property" subject to valuation and equitable division upon divorce.[16] There, the Court also acknowledged the existence of goodwill in a professional practice (whether or not marketable), and approved the practice of allowing for the value of such goodwill in valuing the practice as part of the marital property.[17] To date, no Nevada authority distinguishes between "professional" and "personal" goodwill.

III. WHAT IS CONSIDERED SEPARATE PROPERTY, INCLUDING CHARACTERIZATION OF EARNINGS ON SEPARATE PROPERTY

Property specifically excepted from the definition of community property is "separate property," which is defined in NRS 123.130 as "[a]ll property of the wife owned by her before marriage, and that acquired by her afterwards by gift, devise, descent or by an award for personal injury damages, with the rents, issues and profits thereof" and "[a]ll property of the husband owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise, descent or by an award for personal injury damages, with the rents, issues and profits thereof . . . ."[18]

NRS 123.220 and NRS 123.130 together establish the presumptions that property acquired during marriage is community property, and that property owned prior to marriage is separate property.[19] When a spouse uses separate funds or separate credit to purchase property during the marriage, that property generally remains his or her separate property.[20] However, where no attempt is made by a spouse to keep separate and community property segregated, so that the properties have become so mixed and intermingled that it is no longer possible to determine their source, such intermingled properties are considered community property.[21]

NRS 123.190 allows either spouse to make the income earned by the other spouse his or her separate property:

> 1. When the husband has given written authority to the wife to appropriate to her own use her earnings, the same, with the issues and profits thereof, is deemed a gift from him to her, and is, with such issues and profits, her separate property.

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[16] *See Ford v. Ford*, 105 Nev. 672, 782 P.2d 1304 (1989).

[17] *Ford v. Ford*, 105 Nev. 672, 679, 782 P.2d 1304,1309 (1989).

[18] NRS 123.130(1)&(2).

[19] *See Peters v. Peters*, 92 Nev. 687, 557 P.2d 713 (1976); *Todkill v. Todkill*, 88 Nev. 231, 495 P.2d 629 (1972); *Carlson v. McCall*, 70 Nev. 437, 271 P.2d 1002 (1954); *Lake v. Bender*, 18 Nev. 361, 7 P. 74 (1885).

[20] *Todkill v. Todkill*, 88 Nev. 231, 495 P.2d 629 (1972).

[21] *Ormachea v. Ormachea*, 67 Nev. 273, 217 P.2d 355 (1950).

> 2. When the wife has given written authority to the husband to appropriate to his own use his earnings, the same, with the issues and profits thereof, is deemed a gift from her to him, and is, with such issues and profits, his separate property.

The statute provides an exception to the usual rule that all property acquired by either spouse during the marriage is community property.[22]

Additionally, spouses may enter into an agreement dividing the community income, assets, and obligations into separate income, assets, and obligations of the spouses if one spouse is admitted to a facility for skilled nursing or a facility for intermediate care or if a division of the income or property would allow one spouse to qualify for community-based services available to the elderly.[23]

Further, NRS 123.140 provides a method by which a spouse may record a written "full and complete inventory of the separate property of a married person, exclusive of money." Recording the inventory serves as notice of that spouse's separate property title to the property.[24]

Pursuant to NRS 123.160, the effect of the failure to record such an inventory, or the omission of an item of property from such a recorded inventory, "is prima facie evidence, as between such married person and purchasers in good faith and for a valuable consideration from the other spouse, that the property of which no inventory has been so filed . . . is not such person's separate property." However, failure of a spouse to prepare and record such a written inventory does not automatically result in forfeiture of the property's status as separate; rather, it may be used as evidence to be considered in determining whether the property is separate or community.[25]

IV. WHEN DOES THE COMMUNITY END

Fox v. Fox[26] was the second of three appeals between the same divorcing couple. In that round, the Court noted that the term of office of the judge who presided at the hearings below had expired before the judgment could be entered. The Court set it aside, and remanded for formal entry of the amended decree, but specified:

> this court, in ordering the limited new trial in the case of Fox v. Fox, supra, did not intend that any new evidence be taken on the trial court's findings, but intended only that the value

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[22] *Goldsworthy v. Johnson*, 45 Nev. 355, 204 P. 505 (1922).

[23] NRS 123.259.

[24] NRS 123.150.

[25] *Thomas v. Nevans*, 67 Nev. 122, 215 P.2d 244 (1950); *see also* NRS 123.160(3).

[26] *Fox v. Fox*, 84 Nev. 368, 441 P.2d 678 (1968).

> of Foxy's Restaurant be fixed to include the value of the goodwill as affected by the 1962 business receipts . . . .[27]

The Court made it clear that the hearings on remand were not to allow any new evidence or testimony, but only complete the judicial act of entry of a judgment.[28] After remand and entry of judgment, in a third appeal, the husband asked the Court to change its mind and order additional evidence be taken, but the Court held the parties to the evidence that they had presented as of the time of trial, stating that "equity does not require a remand to permit appellant to proffer explanatory matter he should have adduced at the first hearing of this cause."[29] 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 the context of the 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 is entered months later. In *Forrest v. Forrest*,[30] the Court held that community property accrues until parties are divorced, but in issuing instructions for the trial court, the Court treated the trial and the divorce as synonymous. Pointing out that property rights accrued "during marriage" and did not terminate upon separation, the Court in remanding referenced the financial facts as they existed at the moment of trial, and directed the trial court on remand to address those specific numbers.[31]

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. The Court's previous remands have always directed the parties to the valuations and distributions of property made at the close of evidence; the only date referenced in *Forrest* was the date of trial, although the procedural history reflects that in that case motions were filed which tolled the date of final judgment for some time.[32]

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 has been the

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[27] 84 Nev. at 371, 441 P.2d at 679.

[28] *Id*.

[29] *Fox v. Fox*, 87 Nev. 416, 418, 488 P.2d 548 (1971).

[30] *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

[31] 99 Nev. at 606-607, 668 P.2d at 278-79.

[32] 99 Nev. at 604.

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.[33]

So while none of the Nevada opinions are truly explicit on the point, it can be said with fair certainty that the community ends on divorce, and for purposes of property division, "divorce" means the date of the trial.

V. DIVISION 50/50 OR OTHER

Chapter 125 of the Nevada Revised Statutes provides the statutory framework for the issues involved in the dissolution of a marriage. NRS 125.150 provides guidelines for the court regarding numerous issues, including the adjudication of property rights.

Nevada switched from being an "equitable distribution" to an "equal distribution" State in 1993. Prior to that year, NRS 125.150 required the court to make such disposition of:

> (1) The community property of the parties; and
> (2) Any property placed in joint tenancy by the parties on or after July 1, 1979, as appears just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by the divorce, and to the party through whom the property was acquired, and to the burdens, if any, imposed upon it, for the benefit of the children.

Under the pre-1993 case law, courts were provided a great range of discretion in the matter of property distribution, but the case law was still muddled by apparently conflicting directions.

The confusion stemmed from a series of Nevada Supreme Court opinions which seemingly advocated "equal distribution."[34] At the same time, however, the Court had issued decisions rebuffing appeals from orders dividing property ***un***equally.[35]

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[33] *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).

[34] *See Weeks v. Weeks*, 75 Nev. 411, 345 P.2d 228 (1959) (there is no basis for the argument that an equal division of the community property is not "just"); *Stojanovich v. Stojanovich*, 86 Nev. 789, 476 P.2d 950 (1970) (reversing award of house to the wife where the record did not show the lower court's reasons or purpose).

[35] *See Cunningham v. Cunningham*, 61 Nev. 93, 116 P.2d 188 (1941) (rejecting wife's claim that property division was "so out of proportion in favor of her husband" as to show absolute unfairness); *Lockett v. Lockett*, 75 Nev. 229 338 P.2d 77 (1959) (affirming award of 2/3 of the community property to the wife); *Freeman v. Freeman*, 79 Nev. 33, 378 P.2d 264 (1963) (on conflicting evidence, trial court is in best position to determine propriety of property division).

The confusion was eliminated in *McNabney v. McNabney*,[36] which clarified that as of that time, the applicable statutes should be so construed as to verify that Nevada was an "equitable distribution" jurisdiction, rather than an "equal distribution" jurisdiction, and that (the prior) NRS 125.150 did not mandate an "essentially equal" division of community property.[37]

Four years after the *McNabney* decision, the Legislature amended NRS 125.150, eliminating the "respective merits of the parties" language and inserting new directions. After 1993, NRS 125.150(1) provided, in pertinent part, that in granting a divorce, the court:

> (b) Shall, to the extent practicable, make an equal disposition of the community property of the parties, except that the court may make an unequal disposition of the community 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 disposition.

The treatment of property held in joint tenancy was moved to NRS 125.150(2).[38]

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[36] *McNabney v. McNabney*, 105 Nev. 652, 782 P.2d 1291 (1989).

[37] 105 Nev. at 660, 782 P.2d at 1296. In a footnote, the majority opinion pointed out that the phrase "respective merits of the parties" had never been defined. Without defining the phrase, the court noted that no claim had been made by either party that he or she was more deserving or more meritorious by reason of the fault of the other, and that in considering this factor, it was assumed that the trial court considered "only the respective *economic* merits of the parties." 105 Nev. at 656, n.4, 782 P.2d at 1294, n.4.

[38] Except as otherwise provided in this subsection, in granting a divorce, the court shall dispose of any property held in joint tenancy in the manner set forth in subsection 1 for the disposition of community property. If a party has made a contribution of separate property to the acquisition or improvement of property held in joint tenancy, the court may provide for the reimbursement of that party for his contribution. The amount of reimbursement must not exceed the amount of the contribution of separate property that can be traced to the acquisition or improvement of property held in joint tenancy, without interest or any adjustment because of an increase in the value of the property held in joint tenancy. The amount of reimbursement must not exceed the value, at the time of the disposition, of the property held in joint tenancy for which the contribution of separate property was made. In determining whether to provide for the reimbursement, in whole or in part, of a party who has contributed separate property, the court shall consider:

(a) The intention of the parties in placing the property in joint tenancy;
(b) The length of the marriage; and
(c) Any other factor which the court deems relevant in making a just and equitable disposition of that property.

As used in this subsection, "contribution" includes a down payment, a payment for the acquisition or improvement of property, and a payment reducing the principal of a loan used to finance the purchase or improvement of property. The term does not include a payment of interest on a loan used to finance the purchase or improvement of property, or a payment made for maintenance, insurance or taxes on property.

As indicated on the face of the statute, the default division of all property characterized as community (or joint tenancy) is equal.

The Nevada statute is, typically, vague and expansive, providing only that any division other than equal must be "deemed just" and based upon a "compelling reason," and supported by written reasons.

There is a question whether the "broad discretion" accorded to trial courts in making property distributions under the pre-1993 law has been changed in any meaningful way by the change from "equitable" to "presumptively equal" division. The matter could probably be argued either way. There is plenty of authority for the proposition that the legislative change reduced the scope of judicial discretion to make unequal distributions, since legislative enactments are to be construed so that "no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided."[39] On the other hand, the new statutory construction still appears to be leave plenty of wiggle room.

The legislature did not define what is meant by a "compelling reason" which would permit an unequal division of community property, and no existing body of statutory or case law provides a reliable precedent. In *Lofgren v. Lofgren*,[40] the Nevada Supreme Court identified one "compelling reason" which would justify an unequal division of community property as the financial misconduct of one of the parties, such as waste or secretion of community assets in violation of court order.[41]

The next year, in *Putterman v. Putterman*,[42] the Nevada Supreme Court held that both the husband's financial misconduct in the form of refusing to account to the court concerning earnings and other financial matters, and his lying to the court about his income, provided compelling reasons for an unequal disposition of community property.[43] The Court also noted, in dicta, that other possible "compelling reasons" for an unequal division of community property could include negligent loss or destruction of community property, unauthorized gifts of community property, and even, possibly, compensation for losses occasioned by marriage and its breakup.[44]

In *Lofgren*, the reviewing court did not expressly state a standard of review, except to couch its decision as a finding that the lower court had not erred, and that its findings of fact were not clearly erroneous. Similarly, *Putterman* did not state on its face a standard of review, but contained findings

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[39] *Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994).

[40] 112 Nev. 1282, 926 P.2d 296 (1996).

[41] *Id*., 112 Nev. at 1283-84.

[42] 113 Nev. 606, 939 P.2d 1047 (1997).

[43] *Id.* at 609.

[44] *Id.* at 608.

that the lower court's decision was detailed and did in fact support the conclusion that compelling reasons supported the modestly unequal division finally reached. While couched as finding no legal error, the analysis and conclusion in both cases were the sort that could be expected under an "abuse of discretion" review.

Under the existing case law, the scope of judicial discretion in "disproportionate division" cases would appear to be at least as broad as that exercised by trial courts in other contexts, such as awarding alimony or awarding attorney's fees. In disproportionate division cases, the court need only find (and identify in writing) some "compelling reason" (presumably, tied to one of the categories identified by the two opinions) without doing any of the things that have been found to be an "abuse of discretion" in other contexts, such as making a pronouncement in the absence of any substantial evidence in the record, or reaching a conclusion based on an identifiably erroneous legal rationale.

In sum, in the absence of anything indicating otherwise, property is to be divided equally. And that "anything," in Nevada, is required to rise to the level of a "compelling reason" for an unequal division. Still, it would appear that judges have significant latitude for finding such reasons, and need only make their findings in writing, and avoid obvious abuse of their discretion, to justify an unequal distribution of property.

The cases to date in Nevada indicate that disproportionate division is essentially a remedy for wrongful behavior on the part of the other spouse – waste, fraud, secreting or destroying community property, etc. Ultimately, the facts, and what can be proven, drive the availability of the remedy.

VI. DIVISION OF JUST COMMUNITY PROPERTY OR OTHER PROPERTY CONSIDERED

While the presence or absence of a significant separate property estate by one of two married persons might be of interest to a Nevada divorce court considering an award of alimony, it is technically irrelevant to Nevada community property law.

The law is not well developed, but it would appear that the separate property of one spouse is most readily "set apart" for the support of the other when the sort of facts set out in *Daniel v. Baker*[45] are present: there is a great disparity in the financial condition of the two parties; the spouse in need has no or little potential for meaningful employment with a sufficient salary for the spouse to reach a decent standard of living; and there is a great age distance between husband and wife. The case becomes even stronger where, as in *Sargeant*,[46] one spouse is likely to violate court orders of regular support, or even destroy assets just to injure the other spouse.

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[45] *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990).

[46] *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972).

The cases from over a century ago (*e.g.*, *Lake v. Bender*[47]) dealt with situations in which the then-new community property law did not affect the wealthier spouse's accumulation of all property in his name despite long years of work by the other spouse. Oddly, the more widespread modern use of prenuptial agreements and similar contracts may have brought society full circle, returning to a situation in which one of two spouses can accumulate a large separate property estate while the other does not accumulate even a small community property estate, even during a long-term marriage.

This sets up the facts under which a heavier reference to the divorce courts' power to "set apart" one spouse's separate property estate for the support of the other may, and perhaps should, be seen. Courts are generally loathe to produce a result where one divorced spouse lives a life of relative luxury while the other is relegated to merely surviving on a meager – or non-existent – community property distribution. The existence of a substantial separate property estate on one side of a marriage of significant length is sometimes seen as a justification for an award of separate property from one spouse to the other to prevent such a situation.

It is, however, a standard-less and therefore dangerous power. Under what circumstances is it "fair" – or "unfair" – that one spouse's separate property should be reduced to provide assets to the other, just because the marriage did not create "enough" community property? What about the situation where the parties marry at or after retirement, and necessarily are living off the pre-marital savings of one or both parties?

The availability of separate property set-aside creates a situation where, in the discretion of a judge, the act of marriage could create a hotch-pot effectively making even premarital separate property available for distribution upon divorce. Absent a situation where one party has subsidized the marriage, and essentially seeks compensation, the concepts of no-fault divorce and presumptive equal distribution would seem to militate against a gratuitous transfer of wealth from one party's separate property estate to that of the other. But the power remains available, and the existence of substantial separate property assets on one side always at least raises the question of whether "regular" or lump-sum alimony should be awarded.

VII. JOINT TITLING/GIFT OR SEPARATE CLAIMS STILL ALLOWED/TRACING

An issue frequently addressed by the courts in divorce cases involves the transfer of property owned by a spouse prior to marriage into joint tenancy during the marriage, or the purchase of property held in joint tenancy with separate property funds. A long line of Nevada cases establishes that separate

[47] *Lake v. Bender*, 18 Nev. 361, 7 P. 74 (1885).

property placed into joint tenancy is presumed to be a gift of a half interest to the other party, unless the presumption is overcome by clear and convincing evidence.[48]

Likewise, when separate funds of a spouse are used to acquire property in the names of the husband and wife as joint tenants, it is presumed that a gift of one-half of the value of the joint tenancy property was intended.[49] The existence of a valid deed in the form of joint tenancy raises a presumption that the parties intend to own the property as joint tenants.[50]

These presumptions can only be overcome by clear and convincing evidence.[51] The opinion of either spouse is of no weight; the party who wishes to overcome the presumption must do so by presenting "substantial evidence of conduct, expressions or intent at the time of taking or during the holding of the property."[52]

Case law from the time period where the husband was the manager of the community property held that the managing spouse must keep the community and separate property segregated.[53] If community and separate property becomes intermingled, it is the managing spouse's burden to prove the separate nature of the property so claimed.[54] Absent such proof, the entire property will be presumed to be community.[55]

This is one of those rules that has not proven problematic to make gender neutral, and in modern property trials, has evolved to the standard approach of placing the burden on the spouse asserting a separate property interest to prove that it exists, with the result being that the property is found to be community if the proof is insufficient, starting with NRS 123.220. Otherwise, Nevada case law appears unremarkable in that, generally, the burden is on the party going forward to make out a prima facie case for any legal proposition asserted.

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[48] *See Schmanski v. Schmanski*, 115 Nev. 247, 984 P.2d 752 (1999); *Graham v. Graham*, 104 Nev. 473, 760 P.2d 772 (1988); *Gorden v. Gorden*, 93 Nev. 494, 569 P.2d 397 (1977).

[49] *Campbell v. Campbell*, 101 Nev. 380, 705 P.2d 154 (1985).

[50] *Id.*; *Peters v. Peters*, 92 Nev. 687, 557 P.2d 713 (1976).

[51] *See Graham*, 104 Nev. at 690; *Todkill v. Todkill*, 88 Nev. 231, 495 P.2d 629 (1972).

[52] *Graham*, 104 Nev. at 474.

[53] *Todkill v. Todkill*, 88 Nev. 231, 495 P.2d 629 (1972); *Ormachea v. Ormachea*, 67 Nev. 273, 217 P.2d 355 (1950).

[54] *See*, *e.g.*, *Lucini v. Lucini*, 97 Nev. 214, 626 P.2d 270 (1981) (finding the tracing of funds adequate to overcome the presumption of community property where accounts were somewhat commingled).

[55] *Ormachea v. Ormachea*, 67 Nev. 273, 217 P.2d 355 (1950).

This is not to say that the burden of proof always rests with the party disputing a characterization of property as community; the burden shifts in different factual scenarios.

For example, when community funds are the source for the purchase of property, the naked form of title to the purchased property as the sole and separate property of one spouse, standing alone without supporting evidence, has been held to not be "the clear and certain proof required to overcome the presumption of community property."[56] By contrast, the fact that title to all the real property of a couple was put by them in joint tenancy ***was*** considered "the clear and certain proof needed to overcome the presumption that it was community property."[57]

The cases are not as incompatible as they appear. The *Peters* court explained that:

> Property held in the individual name of a spouse or in the name of both spouses as tenants in common can be compatible with the concept of community property, but property held in joint tenancy cannot because certain incidents of joint tenancy would be inconsistent with incidents of community property. . . . Whenever property nominally held in joint tenancy is determined to be community property the right of survivorship is destroyed and is brought within the laws of descent and distribution.[58]

In other words, the apparently-joint placement of property into the joint tenancy form of ownership reversed the burden of proof, so that the party attacking the form of title (in *Peters*, the estate of the deceased party) had the burden of proof as to why any of the property should not be considered the sole and separate property of the surviving spouse as an incident of joint tenancy title.

The point for counsel is that, while the rule may be "all property acquired by the husband and wife during marriage is presumed to be community property,"[59] there are apparently a number of situations where the presumption – and the consequent burden of proof – will be the opposite.

What seems like an adequate tracing may not always be so, and in Nevada at least two entirely different tracing mechanisms, and reasoning, exist. In *Malmquist v. Malmquist*,[60] addressing the primary residence, the Nevada Supreme Court used a combination of two approaches to allocate,

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[56] *Burdick v. Pope*, 90 Nev. 28, 518 P.2d 146 (1974).

[57] *Peters v. Peters*, 92 Nev. 687, 557 P.2d 713 (1976), *quoting Bowman v. Bowman*, 308 P.2d 906, 907 (Cal. App. 1957): "The deed to the property was taken in joint tenancy. This fact raises a rebuttal presumption that the property was, in fact, held in joint tenancy, and places on the party claiming it to be community property the burden of overcoming the presumption. . . . The fact that the property was purchased with community funds, standing alone, is insufficient to rebut the presumption created by the form of the deed" [internal cites omitted]).

[58] *Peters v. Peters*, 92 Nev. 687, 690, 557 P.2d 713, 715 (1976). Statutory amendments thereafter eliminated much of the distinctions making these distinctions so important to inheritance questions.

[59] *Goldsworthy v. Johnson*, 45 Nev. 355, 204 P. 505 (1922).

[60] *Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990).

between separate and community property, the increase in value of separate property purchased on credit and subsequently brought into a marriage by one of the spouses: (1) the *Moore* approach[61]; and (2) the *Moldave* modification.[62]

The *Moore* approach grants the community a pro rata share in the increased value of a separate property residence according to the ratio that mortgage principal reduction attributable to community property bears to the original purchase price.[63] Thus, if the community paid 10% in principal of the original purchase price of the home, the community would be entitled to 10% of the increased value of the home. Under *Moore*, the entire unpaid mortgage balance at divorce is credited to separate property, in addition to the amount by which the separate property mortgage payments (pre-marriage) reduced the mortgage principal.[64] The total of the separate property mortgage principal is then divided by the original purchase price of the home to yield the fraction of appreciation that remains separate property.[65]

The *Malmquist* court modified the *Moore* approach because principal pay down in the earlier years of an amortization schedule requires more money (due to the higher percentage of interest in each payment) than in the later years.[66] Thus, the separate property owner would get a windfall under the *Moore* approach. The *Moldave* approach solved the inequity by allocating separate and community property based on the number of payments made while single or married, respectively, rather than the actual pay down of principal.[67] The actual formula is:

$$\text{Separate Property} = PDsp + [(PDsp + Olsp) \div PP \times A)],$$

where Separate Property (SP) is the total separate property interest in home equity; PDsp is principal pay down attributable to separate property before the marriage (including the down payment); OLsp is the portion of the outstanding loan to be credited to separate property, which is determined by dividing the number of monthly payments made while single by the total number of monthly

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[61] *See In re Marriage of Moore*, 618 P.2d 208 (Cal. 1980).

[62] *See* Peter M. Moldave, "The Division of the Family Residence Acquired with a Mixture of Separate and Community Funds," 70 CAL. L. REV. 1263 (1982).

[63] *Malmquist*, 106 Nev. at 238, 792 P.2d at 376 (citing *Moore*, 618 P.2d at 210-11).

[64] 106 Nev. at 238, 792 P.2d at 376 (citing *Moore*, 618 P.2d at 210-11).

[65] 106 Nev. at 238, 792 P.2d at 376 (citing *Moore*, 618 P.2d. at 210-11).

[66] 106 Nev. at 239, 792 P.2d at 377.

[67] 106 Nev. at 239, 792 P.2d at 377 (citing *Moldave*, 70 CAL. L. REV. at 1288-89).

payments made through the date of divorce, and multiplying that ratio by the outstanding loan balance at the time of trial; PP is the purchase price; and A is the appreciation of the home.[68]

So *Malmquist* contains a case-law-based algebraic tracing of separate property invested in a primary marital residence. Along the way, the Court discussed whether or not the initial down payment had been adequately traced, and held that whether the question was reimbursing a community property contribution to separate property, or a separate property contribution to community property, there were two ways to do so.

First, by way of "direct tracing." Second, to show that there was "exhaustion" of all potential funds of the opposite character in the source account at the time of the payment in question.

As to improvements to real estate, the Court found that "usually" simple reimbursement without interest is the proper measure, unless the party making the claim can establish that appreciation of the property was ***due*** to the improvements, not the market, in which case the trial court may apportion appreciation to the contribution of the party making the claim.

In 1993, the Nevada Legislature added an entirely different tracing methodology, applicable to ***any*** "contribution of separate property to the acquisition or improvement of property held in joint tenancy" as quoted above, in the amendment to NRS 125.150(2). The statute allows the court to provide reimbursement to a party for his or her separate property contribution to property which is held by the parties as joint tenants, up to the value of the sums contributed.

VIII. ANY REIMBURSEMENT TO SEPARATE PROPERTY FOR MONIES EXPENDED

As noted and discussed in the preceding two sections, NRS 125.150(2) allows the court to provide reimbursement to a party for his or her separate property contribution to property which is held by the parties as joint tenants, and case law permits the tracing out of community property contributions to separate property real estate, in at least some circumstances.

IX. MANDATORY DISCLOSURE ON DISCOVERY

Nevada is moving in the direction of California's mandatory disclosure rules. In the new State-wide rules provided by Nevada Rules of Civil Procedure 16.2, both sides are required to complete and file

[68] 106 Nev. at 240, 792 P.2d at 377.

a new State-wide uniform Financial Disclosure Form within 45 days of service of the summons and complaint.[69] The rule includes a duty to supplement.[70]

Also moving in the direction of the California law, intentional failure to disclose a material asset or liability could result in an order awarding that asset in its entirety to the innocent party, or making another form of unequal division of community property.[71]

The rule is specific to domestic relations cases, and new, and likely to be tweaked and revised as experience is developed. There seems little doubt, however, that Nevada has elected to reward disclosure and punish attempted concealment of assets as a matter of policy, a welcome evolution in family law practice to the hopeful advantage of all honorable litigants.[72]

X. AUTOMATIC TEMPORARY RESTRAINING ORDERS/TEMPORARY DOMESTIC ORDERS: WHAT IS ORDERED; CAN WILLS OR BENEFICIARY CARDS BE CHANGED

The local rules in the Eighth (Las Vegas) and the Second (Reno) Judicial Districts have specific court rules allowing for preliminary injunctions designed to prevent either spouse from transferring, encumbering, concealing, selling or otherwise disposing of any joint, common, or community property pending the completion of the case.

The Reno version[73] also allows the injunction to mutually restrain the parties from cashing, borrowing against, canceling, transferring, or changing the beneficiaries of insurance coverage, or taking any of those same actions with regard to retirement benefits or pension plans existing for the benefit of the parties or their minor children. So Reno prohibits beneficiary changes; Las Vegas does not.

Such injunctions serve as protection against transfers of community property that may or may not be permitted pursuant to NRS 123.230,[74] except transfers made in the ordinary course of business or pursuant to a court order. Violation of the joint preliminary injunction would subject the

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[69] NRCP 16.2(a)(1).

[70] NRCP 16.2(a)(1)(C).

[71] NRCP 16.2(a)(1)(B)(i).

[72] *Cf.* Marshal Willick, *Res Judicata in Nevada Divorce Law: An Invitation to Fraud*, 4 Nev. Fam. L. Rep. No. 2, Spr., 1989, at 1.

[73] WDCR 43.

[74] Governing management and control of community property.

offending spouse to a potential contempt citation by the court and, more relevant here, could trigger the granting of appropriate credits and offsets in the ultimate property division.[75]

As a matter of course, such an injunction is usually filed with each Complaint for Divorce and served upon the opposing party at the time of service of the Complaint.

XI. STATUS DIVORCE, PARTIAL DECREES OR BIFURCATED DIVORCES ALLOWED

Subject matter jurisdiction over the marriage itself – and therefore, jurisdiction to grant a divorce – is present as long as the court has personal jurisdiction over ***either*** of the parties to the marriage, and every State is required under the Full Faith and Credit clause of the United States Constitution to recognize decrees entered by other States if those other States had such personal jurisdiction over one party and afforded notice to the other in accordance with procedural due process.[76]

A court arguably could have jurisdiction to entertain a divorce case but nevertheless decline to do so when another divorce action is pending elsewhere, and the other court has jurisdiction over a greater number of the incidents of marriage. For example, where a party comes to Nevada and files for divorce, but the other party does not appear here, but initiates a divorce action in the State from which the party came, and that State has jurisdiction over issues of child custody, child and spousal support, and the bulk of the parties' property.

The rationales are the doctrines of comity and abstention,[77] and the Nevada Supreme Court's repeated admonitions against bifurcating divorce actions.[78]

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[75] *See Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997); *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996).

[76] *Williams v. North Carolina*, 317 U.S. 287 (1942); *see also Sherrer v. Sherrer*, 334 U.S. 343 (1947); *Coe v. Coe*, 334 U.S. 378 (1947).

[77] "Comity," strictly speaking, is a "rule of courtesy by which one court defers to the concomitant jurisdiction of another." Gifis Law Dictionary (Barron's 1984 ed.) at 79. As the dictionary definition further explains, "judicial comity is not a rule of law, but one of practical convenience and expediency based on the theory that a court which first asserts jurisdiction will not be interfered with in the continuance of its assertion by another court . . . unless it is desirable that one give way to the other."

[78] *See*, *e.g.*, *Gojack v. District Court*, 95 Nev. 443, 596 P.2d 237 (1979); *Smith v. Smith*, 100 Nev. 610, 691 P.2d 428 (1984).

In *Gojack*,[79] the Court spoke of the potential complications arising in a case with certain kinds of facts. The *Opinion* warned of the dangers risked in granting a divorce without settling property and support issues at the same time. As summarized in the Nevada Family Practice Manual:

> The Court recited the "numerous problems inevitably flowing" from an interim divorce decree, such as the effect of such a Decree on the character of the property of the parties, the status of community property after the entry of the Decree (whether it was thereafter held as tenants in common), the allocation of rents, profits, and taxes, the effect of a subsequent death or remarriage of one or both of the parties prior to the final adjudication and disposition of community assets, and the "adverse effect" on "property settlement or reconciliation possibilities."[80]

The Court termed the "statutory mandate" to be "rather clear"[81]and held that a status-only divorce was "beyond the court's power to enter." In later cases, the Court used the term "disfavored," and held that such decrees could only be entered upon stipulation of the parties to the marriage.[82]

Some members of the Court have stated that they simply will not affirm ***any*** bifurcated divorces on appeal, whether stipulated to or not.[83] However, since *Gojack*, the Court has unanimously insisted that, at ***minimum***, entry of a partial, or "status-only," or bifurcated divorce be stipulated to by both parties.

Where actions are pending in courts of different states, whether to stay or dismiss one action or the other should be raised by motion.[84] A ruling on whether to stay or dismiss must take into consideration matters outside the pleadings, such as the seriousness of the threat of multiple and vexatious litigation, the convenience of the parties, the status of the foreign action, and the competing interests of the two forums.[85] Considerations of comity and prevention of multiple and

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[79] *Gojack v. District Court*, 95 Nev. 443, 596 P.2d 237 (1979).

[80] Nevada Family Law Practice Manual, 2003 Edition § 1.316-1.317, quoting *Gojack*, 95 Nev. at 445-46, 596 P.2d at 239.

[81] *Id*.

[82] In *Smith v. Smith*, 100 Nev. 610, 691 P.2d 428, 431 (1984), the Court reviewed a case in which it concluded that the parties' convoluted procedural conduct had effectively stipulated to a bifurcated trial, in which the status of the marriage was terminated but jurisdiction over property issues had been reserved. The Court added, however, that "despite our acceptance of the separate trials in this case, we wish to emphasize that bifurcated divorce proceedings and the problems they are likely to engender are disfavored and should generally be avoided."

[83] Ten years after *Smith*, in *Milender v. Marcum*, 110 Nev. 972, 980, 879 P.2d 748, 754 (1994), two justices dissented from the decision affirming an order modifying property and alimony terms without vacating the divorce itself, complaining that it amounted to a prohibited *sua sponte* bifurcation of the divorce decree by the trial court.

[84] *See*, *e.g.*, *Marriage of Hanley*, 199 Cal. App. 3d 1109 (Ct. App. 1998).

[85] *Engle v. Superior Court*, 140 Cal. App. 2d 71, 82-83 (Ct. App. 1956).

vexatious litigation will most often militate in favor of dismissal of the later-filed action, unless there is some clear superiority of that action being the one that should proceed.[86]

The analysis to determine which State has jurisdiction over which issues is usually pretty straight-forward, since the various uniform acts (UIFSA, UCCJEA) determine whether or not a State has jurisdiction over child support and custody, and the State of last matrimonial domicile retains long-arm jurisdiction to resolve all regular incidents of a marriage not specifically overridden by such an enactment, such as property and alimony issues.[87]

Whether or not another action has been filed elsewhere makes a difference. In a strictly default divorce situation when ***no*** other action is pending elsewhere, a Nevada court with jurisdiction over only one party can dissolve the marriage, but not adjudicate any rights as to alimony, child support, or child custody without obtaining personal jurisdiction over both parties.[88] Technically, since the trial court lacks jurisdiction to adjudicate any issues other than status, those issues are thus "bifurcated," but no known case has denied a plaintiff a divorce on that basis.

Where there ***is*** another action pending, however, granting a "status-only" divorce effectively bifurcates the action, since those issues remain pending before a court. Since this is forbidden under *Gojack*, one State must defer to the other under principles of comity and abstention.

The doctrine of *forum non conveniens* is recognized by Nevada law,[89] and is typically the rubric under which an action may be dismissed in Nevada when this State has arguable jurisdiction over some incidents of the marriage, but the doctrines noted above indicate that the litigation really should proceed elsewhere.

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[86] *Id*. at 83.

[87] In 1993, the Nevada Legislature expanded the reach of our long-arm statute to "any basis not inconsistent with the constitution of this state or the Constitution of the United States" to make it as expansive as possible. NRS 14.065(1). The previous formulation was more selective and specific, but still allowed – as all States do – the exercise of long-arm jurisdiction over a person who was "living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for alimony, child support or property settlement, if the other party to the marital relationship continues to reside in this state." NRS 14.065(2)(e) (prior statute).

[88] *Simpson v. O'Donnell*, 98 Nev. 516, 645 P.2d 1020 (1982). In the years since this case was decided the various uniform acts governing matters of child support and custody may have altered its holding on those points; if permitted under the uniform acts, the court would gain jurisdiction over those issues irrespective of jurisdiction over the other party.

[89] *See Cariaga v. District Court*, 104 Nev. 544, 762 P.2d 886 (1988); *Martin v. DeMauro Constr. Corp.*, 104 Nev. 506, 761 P.2d 848 (1988).

XII. LEGAL SEPARATIONS ALLOWED

Nevada has only one form of divorce – an absolute divorce, with no interlocutory or partial forms, unlike certain other States. In addition to absolute divorce, however, Nevada has a separate statutory allowance for separate maintenance, commonly (if inaccurately) referred to in Nevada as a "legal separation."

Such an action is used to determine the temporary possession of real and personal property between spouses, along with their financial responsibilities to one another, and either temporary or permanent custody, visitation, and support of any minor children, without dissolving the marriage. Generally, any subject that may be addressed in a decree of divorce may be addressed in a decree of separate maintenance, except that the marital status continues to exist.

Specifically, NRS 125.210(1) enumerates the specific authority of the court to:

(a) Assign and decree to either spouse the possession of any real or personal property of the other spouse;
(b) Order or decree the payment of a fixed sum of money for the support of the other spouse and their children;
(c) Provide that the payment of that money be secured upon real estate or other security, or make any other suitable provision; and
(d) Determine the time and manner in which the payments must be made.

For the purpose of the topic of this seminar, only a limited discussion of the Nevada separate maintenance laws seems warranted. As to property, the particulars of what might be ordered are apparently different in separate maintenance actions than in divorce actions.

Nevada's formal community property scheme came into existence through the Statutes of 1873, and had been in effect for some 40 years when the separate maintenance statutes were passed in 1913. It is therefore unclear why no mention is made in the separate maintenance statutes of community property or any joint tenancy property. The statutes state only that a court has the power to "assign and decree to either spouse the possession of any real or personal property of the other spouse,"[90] which on its face would appear to reference only each spouse's ***separate*** property.

No explanation for the omission of community property from the separate maintenance statutes appears on their face, in the case law, or in any surviving legislative history. Still, each spouse owns an undivided one-half interest in all community property pursuant to NRS 123.225 (although that statute dates to only 1959), so interpreting the statute as including authority for the district court to make orders concerning community or joint tenancy property, as well as separate property, seems reasonable.

[90] NRS 125.210(1)(a).

NRS 125.210(1)(a) permits a court to "Assign and decree to either spouse the possession of any real or personal property of the other spouse." The statute is framed not in terms of ***ownership*** of property, but in terms of "possession." In combination with the provisions making such separate maintenance orders and decrees modifiable at any time, and automatically terminable at death, the scope of authority granted to district courts in separate maintenance actions seems to contemplate only temporary, changeable orders as to property.

Notably, the Nevada laws appear to be a bit contradictory. Providing only for possession, rather than ownership of property by way of a separate maintenance decree seems contradictory to the portion of NRS 123.220(2)[91] stating that property could be defined as ***not*** community property by way of a decree of separate maintenance. While the statute itself dates to 1873, the "separate maintenance" notation was only added in 1975, during the make-over of Nevada's community property laws in the wake of the Equal Rights Amendment proposal, to make husbands and wives joint managers of community property, and eliminate gender-specific language. Apparently, there was no action to conform the separate maintenance provisions themselves at the time NRS 123.220 was changed, and there is no legislative history showing the reason for the change.

It seems likely that no one checked the separate maintenance statutes, and it was simply assumed that they included the power to declare parties to be owners, rather than mere "possessors," of property. Irrespective of intent, as of 1975, NRS 123.220(2) has given courts the apparent ability to declare, by way of decree of separate maintenance, that property acquired (presumably after the date of the decree) is the separate property of the party acquiring it. This is the construction given to the provision by the Nevada Supreme Court, without significant history or analysis, in *Forrest*,[92] where the Court deemed earnings acquired after the parties separated, but before divorce, to be community property because:

> despite the fact that since the time of separation both parties were represented by counsel, no written agreement or authorization between the parties was entered into, nor was a decree of separate maintenance obtained. In such a case, the statutes clearly mandate that all property acquired by the parties until the formal dissolution of the marriage is community property.[93]

It is beyond the scope of this paper, but there is some doubt as to the effect of a separate maintenance decree if one of the parties dies before divorce. During the parties' mutual lives, however, a decree of separate maintenance apparently may (but is not required to) permit the earning spouse to treat all such earnings as separate property. In combination with the provision permitting a court to

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[91] Community property defined. All property, other than that stated in NRS 123.130 [defining separate property], acquired after marriage by either husband or wife, or both, is community property unless otherwise provided by: . . . A decree of separate maintenance issued by a court of competent jurisdiction."

[92] *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

[93] *Forrest v. Forrest*, 99 Nev. 602, 607, 668 P.2d 275, 279 (1983).

change its separate maintenance orders and decrees at any time,[94] NRS 123.220(2) creates the peculiar state of affairs in which a court can decree income to be separate or community property, alternately, during a continuing marriage.

The Nevada statutes governing separate maintenance go beyond the classic definition of "separate maintenance," framed as "Money paid by one married person to another for support if they are no longer living as husband and wife."[95] The statutes encompass much of the possible scope of the typical definition of "legal separation": "An arrangement whereby a husband and wife live apart from each other while remaining married, either by mutual consent or by judicial decree."[96]

The distinction of the two concepts is much more pronounced in some other jurisdictions. In Washington State, for example, "separate maintenance" is an equitable remedy intended to provide maintenance to a needy spouse, providing limited jurisdiction to the court over the property of the parties, and a court decree anticipates the parties' reconciliation.[97] By contrast, "legal separation" in that jurisdiction is a statutory procedure providing a "permanent" remedy similar to the common law divorce from bed and board,[98] in which the court has the same jurisdiction to enter permanent orders as to property and other matters as in a divorce action, except as to marital status.[99]

By contrast, Nevada's separate maintenance provisions contain elements of both "separate maintenance" and "legal separation" concepts as used elsewhere. The court's jurisdiction is statutory-based, and its first section[100] speaks of the provision of "permanent support and maintenance," but the remaining provisions clearly provide that all separate maintenance orders and decrees are temporary, in that they may be altered at any time, and never survive the death of a party.[101]

These apparent contradictions on the face of the statutes render all separate maintenance proceedings and orders susceptible to uncertainty as to their permissible scope and effectiveness.

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[94] NRS 125.210(3).

[95] BLACK'S LAW DICTIONARY 965 (7th ed. 1999).

[96] BLACK'S LAW DICTIONARY 1369 (7th ed. 1999).

[97] 21 Kenneth W. Weber, Washington Practice, Family and Community Property Law With Forms §47.4 (West 1997).

[98] "Divorce a mensa et thoro." *See* BLACK'S LAW DICTIONARY 494 (7th ed. 1999).

[99] 21 Kenneth W. Weber, Washington Practice, Family and Community Property Law With Forms §47.4 (West 1997).

[100] NRS 125.190.

[101] NRS 125.210(3); NRS 125.210(4).

XIII. HOW IS PROPERTY ACQUIRED IN DIFFERENT STATES TREATED

Nevada follows the "pure borrowed law" approach, whereby our courts determine the divisibility of assets according to the law of the state in which those assets accrued).[102] The rule of *Braddock* which (actually slightly mis-quoting the case it claims to be following) states that:

> The nature and rights of married persons in personal property acquired during marriage is determined by the laws of that state which is the matrimonial domicile of the parties at the time the property is acquired.[103]

The quote is inaccurate – the actual language from the earlier case is:

> The nature ***of the*** rights of married persons in personal property acquired during marriage is determined by the laws of that state which is the matrimonial domicile of the parties at the time the property is acquired.[104]

The latter court did not indicate that it was intending to alter the earlier holding, so it would appear to be an inadvertent misquote. The difference between the two would seem to make the actual legal doctrine one strictly of ***characterization***, not of distribution or any other aspect of marital property.

This is confirmed by the earlier *Choate* opinion itself – what the Court was trying to do was figure out if proceeds from an accident suit would be community property or separate property under Idaho community property law. Similarly, in *Braddock*, the question was whether the various kinds of property acquired in Ohio were marital property, or solely owed by the husband; it is only ***that*** question, and not how property might be divided, to which the Court turned in "again applying the law of Ohio."[105]

The *Braddock* rule is best perceived as akin to an affirmative defense, in that if the matter is not raised by the party seeking an advantage under the law of some other State where the asset accrued, Nevada's community property law will apply by default.[106]

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[102] *See Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975).

[103] 91 Nev. at 740-41, quoting from *Choate v. Ransom*, 74 Nev. 100, 104, 323 P.2d 700, 702 (1958).

[104] *Choate v. Ransom*, 74 Nev. 100, 104, 323 P.2d 700, 702 (1958) (emphasis added).

[105] 91 Nev. 741.

[106] *See*, *e.g.*, *Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988), in which the Nevada Supreme Court simply noted without comment the equal division of a Michigan state retirement fund in a Nevada divorce court. *Id*. at n.1. This was legally significant only because it constituted a quasi-community property approach to division of that retirement, without acknowledgment of doing so.

The Nevada Supreme Court has not closely analyzed the effects of *Braddock* on the relative rights of residents of Nevada who, by happenstance of their ***prior*** places of residence, could have considerably different rights from other residents vis-a-vis the distribution of identical property interests. A case could be made that any injustice created by selective importation of other States' laws creates a "compelling reason" basis for a disproportionate property division[107] – at least to the extent of restoring to the Nevada resident the effect of a distribution under local law – to prevent forum shopping.

XIV. ANALYSIS OF HYPOTHETICAL FACT PATTERN

The supplied fact pattern is:

> **Before marriage**: Parties lived together for 5 years. Parties kept separate checking accounts. House they lived in was purchased by both of them, joint title; joint mortgage. Wife contributed 20% of purchase price as the only down payment funds. Her funds came from an inheritance, from a separately named account, with no commingled funds. Wife paid utilities and bought groceries from her checking account; husband paid mortgage from his checking account.
>
> **After marriage**: Parties have joint account and commingle earnings and expenses. Parties are married for 16 years. Wife is an accountant; husband is a lawyer – each has their own successful practices, wife's is worth $1 million, husband's is worth $2 million. No kids. Discuss what would be community property, how valued, how divided, process of divorce.

A. The House

The essential question for the period of premarital cohabitation is the intent of the parties; Nevada law permits two different interpretations of her clearly separate property-sourced down payment.

The facts do not say whether, during the cohabitation period, future husband or future wife in fact made the larger contribution. If the house, even if jointly titled, was unequally contributed to during the period of cohabitation, it is possible for the trial court to award the parties their respective shares of the interest in the residence, in accordance with their unequal contributions of funds, under the line of authority including *Sack v. Tomlin*[108] and *Langevin v. York*.[109]

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[107] *See* NRS 125.150(2).

[108] *Sack v. Tomlin*, 110 Nev. 204, 871 P.2d 298 (1994).

[109] *Langevin v. York*, 111 Nev. 1481, 907 P.2d 981 (1995).

If the facts indicated an agreement, express or implied, to equally co-own the property, that partnership or joint venture could be given effect under the doctrine expressed in *Michoff*.[110] That decision stated that the remedies in *Marvin v. Marvin*[111] (i.e., "palimony," or the setting aside of property acquired by one unmarried cohabitant to the other) were expressly available to unmarried co-habitants.[112]

The same analysis would inform the future husband making the mortgage payments while the future wife bought groceries – it is a matter of divining what "deal" the parties actually had about their expenditures.

At bottom, if the parties intended to own the property in accordance with their contributions toward it, the court should parse out whether the parties contributed equally or otherwise (with a secondary question of whether there was a quid pro quo in the mortgage-for-groceries allocation). On the other hand, if the parties intended to and did live in a stable, marriage-like relationship while knowing that they were not, in fact, married, the court could and presumably would find that the property acquired by ***either*** of them during that relationship is to be divided exactly as community property would be, because any other division would be less fair than an equal division.[113]

The marriage itself is a defining moment. Even though the deed preceded the marriage ceremony, it is hard to believe that any court would use the various tracing tools discussed above to look past the fact of jointly-titled real estate owned by two married parties,[114] and the reasonable expectation would be an equal division of the house value upon divorce.

B. The Professional Practices

Insufficient information is provided to see if either professional practice had any substantial value at the start of the marriage. Presuming not, in Nevada, it is irrelevant whether or not the parties commingled their earnings and expenses during marriage – they are community earnings, and community expenses. Also irrelevant is whether value of the practices is made up of goodwill, hard assets, or some combination; presumably, both would be community property, and the expected

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[110] *Western States Construction v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992).

[111] *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

[112] 108 Nev. at 938.

[113] *See Connell v. Francisco*, 898 P.2d 831 (Wash. 1995); *In re Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984).

[114] *See*, *e.g.*, *Kerley v. Kerley*, 112 Nev. 36, 910 P.2d 279 (1996) (on rehearing, the Court stated that it has "consistently held that a spouse to spouse conveyance of title to real property creates a presumption of gift that can only be overcome by clear and convincing evidence").

division would be for each to keep his or her own practice, and for husband to give wife $500,000 in order to equalize their distributions.

If the professional practices were ongoing at the start of the marriage, the analysis is longer and more complicated, because there is a separate property component to any end-of-marriage valuation of the professional practices, which alters the math.

It is a well-established principle of community property law that the labor and skills of a spouse are considered to be a community asset, and that income generated during the marriage from such labor and skills is also community property.[115]

When a spouse owns a business or an asset at the time of marriage and thereafter devotes his labor and skills to that business, that principle conflicts with the statutory mandate that the rents, issues, and profits of separate property remain separate property. Courts have consistently held that in such a situation, the community should receive a fair share of the profits which derive from the owner-spouse's devotion of more than minimal time and effort to the handling of the separate property business.[116]

In general, if the increase in the value of the separate property during the marriage is the result of the normal, or expected, appreciation in the asset (such as interest earned in a savings account), the increased value belongs to the owner-spouse as his separate property.[117] On the other hand, if the asset has increased in value during the marriage as the result of the spouse's labor and skills, the increase in value belongs to the community.[118] However, in the latter situation, an allowance is made for the natural increase in the value of the asset which would be expected from a reasonable return on the separate property investment.[119] Furthermore, because of the statutory presumption that rents, issues and profits from separate property are also separate property, the burden is on the spouse claiming that an increase is due to the labor and skills of the other spouse to rebut this presumption.[120]

The Nevada Supreme Court explained the underlying rationale in *Johnson*:

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[115] *See Johnson v. Johnson*, 89 Nev. 244, 510 P.2d 625 (1973).

[116] *See Johnson v. Johnson*, 89 Nev. 244, 510 P.2d 625 (1973); *Beam v. Bank of America,* 490 P.2d 257 (Cal. 1971); *Pereira v. Pereira*, 103 P. 488, 490-91 (Cal. 1909).

[117] *Johnson*, 89 Nev. at 246.

[118] *Id.*

[119] *Id.*

[120] *Smith v. Smith*, 94 Nev. 249, 578 P.2d 319 (1978).

> Profit or increase in value of property may result either from the capital investment itself, or from the labor, skill and industry of one or both spouses or from both the investment of separate property and the labor and skill of the parties. Where both factors contribute to the increase in value of a business, that increase should be apportioned between separate and community property. The rule we announce today is necessary in order to prevent the inherent injustice of denying the owner of separate property a reasonable return on the investment merely because the increase in value results "mainly" from the labor, skill or industry of one or both spouses.[121]

In *Johnson*, the Nevada Supreme Court held that where an increase in the value of separate property occurs during marriage as a result, either in part or in whole, of the owner-spouse's labor and skills, the increased value should be apportioned between the separate property of the owner and the community property of the spouses.[122] In so allocating the increased value, the court may choose between two approaches, the first commonly referred to as the *"Pereira"* approach, which is based upon *Pereira v. Pereira*,[123] and the second commonly referred to as the *"Van Camp"* approach, which is based upon *Van Camp v. Van Camp*.[124]

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[121] 89 Nev. at 246-47.

[122] *Id.*

[123] *Pereira v. Pereira*, 103 P. 488 (Cal. 1909).

[124] *Van Camp v. Van Camp*, 199 P. 885 (Cal. 1921).