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Characterization, Valuation and Division of Employment-Related Benefits

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BIOGRAPHY

Mr. Willick is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American and International Academies of Matrimonial Lawyers, former Chair of the Nevada Bar Family Law Section and former President of the Nevada chapter of the AAML. He has authored many books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual.

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, AAML, and Nevada Bar, has served on many more committees, boards, and commissions of those organizations, and has been called on to sometimes represent the entire ABA in Congressional hearings on military pension matters. He has served as an alternate judge in various courts, and frequently testifies as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

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. THE BASICS OF NEVADA'S COMMUNITY PROPERTY SYSTEM

Nevada's formal community property scheme came into existence through the Statutes of 1873. In 1975, during the debate regarding the proposed Equal Rights Amendment, Nevada altered its statutory scheme. Before then, the husband was the manager of the community estate. After the amendment, both parties had equal powers of management of community property.

The concept of the spousal interest evolved over time, from being merely a right to make a claim upon dissolution, to actual ownership upon acquisition. In 1959, 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.[1]

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.[2]

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.
> 2. A decree of separate maintenance issued by a court of competent jurisdiction.
> 3. NRS 123.190.[3]
> 4. A decree issued or agreement in writing pursuant to NRS 123.259.[4]

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.[5] The rents, profits, and issues of community property are community property, and the rents, profits, and issues of separate property are separate property.[6] Also separate property is the premarital

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[1] NRS 123.225(2).

[2] *See* NRS 125.150(4) ("In granting a divorce, the court may also set apart such portion of the husband's separate 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").

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

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

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

[6] NRS 123.130; NRS 123.220.

property of either party, and all property acquired afterward by gift, devise, descent or by an award for personal injury damages.[7]

Nevada does not contemplate different "types" of community property – it either is, or it is not. Which is not to say that property cannot be of mixed character, requiring the tracing of interests.

Nevada also recognizes businesses and professional practices as "property" subject to valuation and equitable division upon divorce, and considers goodwill in a professional practice (whether or not marketable) part of that value.[8] To date, no Nevada authority distinguishes between "professional" and "personal" goodwill.

When separate and community property become so mixed and intermingled that it is no longer possible to determine their source, such intermingled properties are considered community property.[9]

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.
> 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.[10]

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.[11]

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

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

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

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

[11] NRS 123.259.

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.[12]

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).[13] This is the ***opposite*** of a quasi-community property approach, under which property, wherever acquired, would be treated as if it was acquired in this State.

Separation is irrelevant to continuity of the community,[14] which continues until the time of divorce. In those 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, so "until divorce" usually means until the divorce trial.[15]

Nevada switched from being an "equitable distribution" to an "equal distribution" State in 1993. Thereafter, 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). Such property is also to be equally divided, but tracing is allowed of separate property contributions to joint tenancy property and reimbursement can be ordered if found to be warranted.

The default division of all property characterized as community (or joint tenancy) is equal, and any division other than equal must be "deemed just" and based upon a "compelling reason," and supported by written reasons.

Such "compelling reasons" could be the financial misconduct of one of the parties, such as waste or secretion of community assets in violation of court order,[16] or refusing to account to the court

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[12] NRS 123.150.

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

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

[15] *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).

[16] *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996).

concerning earnings and other financial matters, and lying to the court about income.[17] Per dicta, 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."[18]

II. PENSION AND RETIREMENT PLANS

A. History and Case Law

Pensions have been recognized as community property by community property States for many decades,[19] and that recognition was extended to unvested[20] and unmatured[21] pension benefits long ago.[22] Statutory and case law throughout the country now recognizes pension benefits as marital property with near-uniformity.

Rationales for that recognition usually include that the benefits accrued during marriage, that income during marriage was effectively reduced in exchange for the deferred pension benefits, and that the choice was made to forego possible alternative employment which would have paid more in current wages, in order to have the pension.

There is little Nevada statutory law specifically directed to retirement benefits. Instead, they fall under the general definition of community property in NRS 123.220: "all property" acquired after marriage, with certain exceptions. All such property is divided under NRS 125.150 – the key statute governing division of property upon divorce – which mandates an equal distribution of community property, in the absence written reasons for finding a "compelling reason" to make an unequal disposition.[23]

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[17] *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997).

[18] *Id.*, 113 Nev. at 608, 939 P.2d at 1048.

[19] *See LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *In re Marriage of Fithian*, 517 P.2d 449 (Cal. 1974) (recognizing the importance of retirement benefits as a marital asset).

[20] A "vested" pension is one that, having been earned and accrued, is beyond the power of the issuing authority to withdraw. *See LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969) (exploring definitions of "vestedness" and "maturity" of retired pay).

[21] *Id*. A "matured" pension is one in which a particular employee is eligible for present payments from a plan.

[22] *See In re Marriage of Brown*, 544 P.2d 561 (Cal. 1976); *Copeland v. Copeland*, 575 P.2d 99 (N.M. 1978); *In re Marriage of Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (Cal. Ct. App. 1980); *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

[23] NRS 125.150(1)(b). As discussed below, the statute also contains an exception to the statutory mandate of equal division where "otherwise provided" by either a premarital agreement or NRS 125.155.

Nevada case law has long held that property acquired during marriage is presumed to be community property, and that the presumption can only be overcome by clear and convincing evidence.[24] The first Nevada case explicitly noting that retirement benefits earned during a marriage are divisible community property was apparently *Ellett v. Ellett*.[25]

In *Forrest v. Forrest*,[26] relying on the line of California opinions dividing the gross sum of all retirement benefits,[27] the Nevada Supreme Court held that "retirement benefits are divisible as community property to the extent that they are based on services performed during the marriage, whether or not the benefits are presently payable."[28] In other words, the Court held that all forms of retirement benefits, whether or not vested, and whether or not matured, are community property subject to division.

In *Walsh v. Walsh*,[29] the divorce decree had stated only that the wife was awarded "half of the retirement benefits," even though the husband clearly had accrued a portion of the retirement benefits before marriage. The Court construed the decree as meaning half of the retirement benefits earned ***during*** marriage.

O'Hara v. State ex rel. Pub. Emp. Retirement. Bd.[30] was not a divorce case. It involved a married Nevada PERS participant who chose the maximum monthly annuity, providing no survivor's benefits, upon retirement. She died shortly after retirement, and her widower sued the retirement board, seeking to alter the benefit option selection to include a survivorship benefit for himself. In the context of an ongoing marriage, the Nevada Supreme Court found that the "community property interests of a nonemployee spouse do not limit the employee's freedom to agree to terms of retirement benefits," and ruled that the employee may choose any available options so long as "the community property interest of the nonemployee spouse is not defeated."

The next year, in *Gemma v. Gemma*,[31] the Nevada Supreme Court turned to the issues of PERS retirement benefits in the context of divorce. The Court reiterated that Nevada law permits the division of unvested retirement benefits, and discussed the two possible methods of distributing a

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[24] *See*, *e.g.*, *Todkill v. Todkill*, 88 Nev. 231, 495 P.2d 629 (1972).

[25] *Ellett v. Ellett*, 94 Nev. 34, 573 P.2d 1179 (1978).

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

[27] *See In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981); *In re Marriage of Brown*, 544 P.2d 561 (Cal. 1976).

[28] *Forrest*, 99 Nev. at 607, 668 P.2d at 279.

[29] *Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1987).

[30] *O'Hara v. State ex rel. Pub. Emp. Ret. Bd.*, 104 Nev. 642, 764 P.2d 489 (1988).

[31] *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989).

spouse's share of those benefits, by way of determining the present value of the pension and awarding half to each spouse (requiring a cash out of the nonemployee spouse's share), or by a "time rule" division of the benefits themselves, stating that the latter is preferred.

Addressing the possibility that the employee spouse might continue employment past the date on which he could retire, thereby delaying payment to the former spouse of the spousal share of the benefits, the Court adopted the holdings and reasoning of two widely-cited California cases: "The employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition solely within the employee spouse's control."[32] The Court further specified that a trial court could reserve jurisdiction to adjust such an award in the event that the employee by "extraordinary efforts" (as opposed to normal promotions and cost of living increases) greatly increases the value of the retirement benefits after divorce.[33]

Almost exactly a year after *Gemma*, the Court considered the divorce of a Judge from a legal secretary in *Fondi v. Fondi*.[34] The trial court had calculated the marital percentage of the amount the Judge ***would have*** received from PERS if he retired on the date of divorce. On appeal, that holding was reversed, and the Court clarified its holding in *Gemma* to specify not only application of the time rule, but also use of the "wait and see" approach, under which the community has an interest in the pension benefits ***ultimately received***, not just the pension accrued as of the date of divorce.

Further, the Court clarified in *Fondi* that the burden is on the employee spouse to prove that post-divorce extraordinary efforts were made in order to change the mathematical analysis, instead of the burden being on the non-employee spouse to show that no such efforts were made. The Court distinguished the legal division of the benefits, which occurs at divorce, from actual ***collection*** of benefits by the spouse, which is to take place at the employee's eligibility for retirement.

In *Carlson v. Carlson*,[35] the Nevada Supreme Court ordered the set aside of a property distribution under NRCP 60(b), where a private pension had been greatly undervalued in the original divorce proceedings. During marriage, the parties had chosen a form of retirement benefit with a survivorship option, but the divorce decree did not qualify under ERISA to cause survivor's benefits to be paid to the spouse. On remand, the court therefore directed that the trial court amend the decree to constitute a QDRO to provide those survivorship benefits to the former spouse.

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[32] *Gemma v. Gemma*, 105 Nev. 458, 463-64, 778 P.2d 429 (1989), *quoting from In re Marriage of Luciano*, 164 Cal. Rptr. 93, 95 (Ct. App. 1980) *and In re Marriage of Gillmore*, 629 P.2d 1, 5 (Cal. 1981). As noted above, *Gillmore* has been approvingly cited and relied upon by the Nevada Supreme Court since the 1983 *Forrest* decision.

[33] 105 Nev. at 462-63, 778 P.2d at 431-32.

[34] *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[35] *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992).

The same year, in *Carrell v. Carrell*,[36] the Nevada Supreme Court reversed a district court decree characterizing a portion of the husband's share of pensions as "spousal support" instead of property. Citing *Walsh*, *supra*, and NRS 125.150(5)&(7), the Court explained that retirement benefits earned during marriage are community property, and so are not subject to future modifications, whereas spousal support can be modified upon a showing of changed circumstances, remarriage, or death.

In *Waltz v. Waltz*,[37] the divorce decree had awarded the entire military retirement to the husband, but ordered him to pay to the former spouse, by military allotment, the sum of $200 plus cost of living adjustments, as "permanent alimony." This had been done because the military pay system did not allow direct payments to a spouse with an overlap of military service and marriage of less than ten years. The decree had been formulated to make sure the spouse actually received her property award, under the rubric of "permanent alimony" as allowed by NRS 125.150(5). The Court approved the arrangement.

In *Sertic v. Sertic*,[38] the trial court had ordered immediate distribution of the value of the wife's share of the Civil Service Retirement System (CSRS) pension. The Nevada Supreme Court reversed, stating that providing the spouse with anything other than a time-rule distribution could only be done upon certain special findings not present in that case.

The Court further clarified that "actual division" under the "wait and see" approach (which may be done at trial) is ***not*** the same as present ***distribution*** of the pension asset itself. Further, the Court more clearly stated that the normal distribution of a spousal share of a retirement is to be upon the employee spouse's first eligibility for retirement, and that if a worker does not retire at first eligibility, the worker must pay the spouse whatever the spouse would have received if the worker ***did*** retire at that time.

Wolff v. Wolff[39] was another PERS case involving a Highway Patrol officer. The employee spouse became eligible to retire three months after divorce, but elected to keep working. The district court had calculated the spousal share of the retirement and ordered the husband to pay that sum to the wife from his salary until he actually retired. The lower court also tried to "reflect" that the husband was paying taxes on his current salary, and so awarded a couple hundred dollars less per month in "Limited Temporary Spousal Support" until the husband retired, as a "reasonable equivalency."

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[36] *Carrell v. Carrell*, 108 Nev. 670, 836 P.2d 1243 (1992).

[37] *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994).

[38] *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

[39] 112 Nev. 1355, 929 P.2d 916 (1996).

Citing *Walsh*[40] and *Carrell*,[41] the Nevada Supreme Court held that pension payments cannot be classified as temporary spousal support, because such support is subject to possible future modification. The Court found the lower court's lowering of payments to reflect "the taxable consequences" of the payments was "arbitrary" and held that it violated the equal distribution presumption of NRS 125.150(1)(b).

The Nevada Supreme Court rejected the husband's attack on *Gemma*, which he had argued was "fatally flawed" for non-recognition of the "passive appreciation of the sole and separate portion" of the retirement during the marriage, and explicitly reaffirmed its holdings in *Gemma*, *Sertic*, and *Fondi*. The Court specifically affirmed the lower court's order that the wife's share would ***not*** revert to the husband if she predeceased him, but would instead continue being paid to her estate, explaining that the community interest was divided upon divorce to two sole and separate interests,[42] so that even if her estate was not listed as an alternate payee as defined in NRS 286.6703(4), the estate was entitled to the payments that she would have received if alive.[43]

B. Open Issues and Unanswered Questions: Defined Contribution Plans

Most States that have brought themselves to issuing any guidelines at all for the distribution of pension plans have espoused rules for the division of the case at issue, without limiting language concerning whether different rules might be better applied if the retirement plan was some other ***kind*** of retirement plan. To date, all Nevada cases involving retirement benefits have involved defined ***benefit*** plans.

Traditionally, most retirement plans have been "defined benefit" plans, but this is changing rapidly in the post-Enron world, as many companies are terminating such plans, in or out of bankruptcy, and converting to "cash plans" or defined contribution plans, at least for all new workers. This is setting up a situation in which the controlling decisional law in many States was developed to distribute an entirely different kind of benefits (defined benefit plans) than will actually be presented in many divorce cases (defined contribution plans).

The valuation problem for defined contribution plans has not received nearly enough attention in the case law. If the marriage was not completely coextensive with the period of contributions, and there was ***any*** variation in the relative rate of contribution over time, a standard time-rule analysis to value the spousal share might not be appropriate at all. It would appear to be more precise – i.e., "fairer"

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[40] 103 Nev. 287, 738 P.2d 117 (1987).

[41] 108 Nev. 670, 836 P.2d 1243 (1992).

[42] *Citing* 15A Am. Jur. 2d *Community Property* § 101 (1976).

[43] PERS, however, refuses to enforce this holding. Whether and how this dichotomy will ever play out is unknown.

– to trace the ***actual contributions*** to such an account from community and separate sources, and attribute interest and dividends over time accordingly.[44] The scant case authority from other States squarely addressing this issue has agreed with that proposition.[45]

Another common error of courts and counsel dividing defined contribution plans is the failure to take into account the time that will pass between the agreement or court proceeding and the physical division of the account. This can be done, easily, by a few words either providing for sharing of the investment gains and losses until actual distribution, or by freezing the spousal share at a specific sum for transfer.

Obviously, either approach could be better – or worse – for either party, depending on how much time passes, and whether the account balance increases or decreases during that time, which could be due to market forces having nothing to do with the parties. But in ***either*** case, it should be dealt with one way or the other in the decree (preferably) and in any QDRO or other ancillary order dividing the plan benefits (definitely) to avoid what could be considerable litigation as to which possible way to divide benefits was impliedly intended to be done.

The lesson relating to defined contribution plans is thus to consider whether the "usual way" of dividing benefits in a given jurisdiction is the ***right*** way to divide those particular benefits, and in any event, to be sure to specify with precision what is being divided as of when.

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[44] *See* Brett R. Turner, EQUITABLE DISTRIBUTION OF PROPERTY § 6.10, at 523 (2d ed. Supp. 2004); Amado, *The Ubiquitous Time Rule – A Responsa: An Argument for the Applicability of Tracing, Not the Time Rule, to Defined Contribution Plans*, 13 Family Law News, Sum. 1990, at 2 (California State Bar, Family Law Section Publication) (arguing that a ***tracing*** analysis would be superior for defined contribution plans – as opposed to the "time rule" – because it is possible to discover the source of all funds in the account).

[45] *See Tanghe v. Tanghe*, 115 P.3d 567 (Alaska 2005) (*citing In re Marriage of Hester*, 856 P.2d 1048, 1049 (Or. App. 1993) ("When the value of a particular plan is determined by the amount of employee contributions, application of [a coverture fraction] could result in a division of property that is demonstrably inequitable"); *Paulone v. Paulone*, 649 A.2d 691, 693-94 (Pa. Super. 1994) (rejecting the use of the coverture fraction and adopting an accrued benefits test, deemed the "subtraction method," for the distribution of a defined contribution plan); *Smith v. Smith,* 22 S.W.3d 140, 148-49 (Tex. App. 2000) (finding that it was incorrect to apply a coverture fraction to a defined contribution account); *Mann v. Mann*, 470 S.E.2d 605, 607 n.6 (Va. App. 1996) ("Applying [a coverture] fraction to a defined contribution plan could lead to incongruous results, and such an approach is not generally used"); *Bettinger v. Bettinger*, 396 S.E.2d 709, 718 (W. Va. 1990) (rejecting the use of a discounted present value calculation for division of a defined contribution plan "because no consideration was given to the fact that the fund was earning interest" (quotation marks omitted)).

III. STOCK OPTIONS

Nevada has no statutory or published case law on the distribution of stock options upon divorce. The couple of unpublished decisions shed no appreciable light on the sentiments of the Nevada Supreme Court as to stock options, and may not be cited as authority in any event.[46]

As a practical matter, Nevada trial courts tend to value and distribute the value of options granted during the marriage in a rather practical way. If they are simple grants, they are usually treated as property and figure a way (usually by requiring the employee-spouse to exercise and split) to obtain that value, either upon divorce, or at a later date.

Things are a lot less certain where the vesting period either partially predates or follows the dates of marriage. If the options are contingent upon future services, as is common, lawyers tend to try to negotiate, or litigate, the percentage of the option attributable to marital and non-marital efforts, and derive a spousal interest accordingly. There is little science, and much variation, in current Nevada practice.

IV. EMPLOYEE SAVINGS PLANS

There is no specific authority on these assets, so they would presumably analyze under the general authorities discussed above. There is no reason to believe that any distinction could or would be raised between employee and employer contributions.

As a practical matter, some tips from the trenches might be useful. Some such plans have long-period contributions. Specifically, employer contributions could be semi-annual, or annual, although earned ratably. This could require some creative phrasing as to how and when to separate the spousal portion of the accounts.

In the military, for example, annual retention and specialist bonuses are payable to various members, from doctors to pilots. These bonuses are typically paid in lump sum, but are applicable to an annual period of future service.

The same consideration applies in reverse, and in non-military plans. If a divorce is occurring in, say, November, it might be just days before a sizable lump-sum contribution to a retirement plan is made. And an employee in some plans might have the ability to machinate the timing of contributions or payments.

The non-employee spouse is always at a disadvantage as to such matters, and counsel for that spouse must be careful to find out as much as possible about the inner workings of each plan in which the employee spouse might be participating.

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[46] SCR 123.

V. 401(k) & 403(b) PLANS

The lack of specific case law, and suggested approach to these assets, is discussed in Section II(B) above, discussing defined contribution plans.

VI. ACCRUED LEAVE/VACATION PAY/SICK LEAVE

There is no statutory or published Nevada case law. Nationally, the decisions are conflicting. States vary on whether or not unused vacation or sick pay (and thus, by analogy, accrued but unused military leave) constitutes "property" for equitable or community property division. Various citations are extremely supportive of the idea[47]; others are just as vehement that vacation or sick pay is not any kind of marital property.[48]

If there is any coherence to the lines of authority, it is the pretty reasonable thinking that the more certain it is that such leave can be converted into cash, the more likely it is that a court will treat it

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[47] *See*, *e.g.*, Mark Sullivan, "Hidden money in Military Divorce Cases," 20 Nev. Fam. L. Rep. 4 (Fall, 2007) at 4; *Arnold v. Arnold*, 77 P.3d 285 (N.M. Ct. App. 2003) (husband's accumulated vacation leave and sick leave hours were community property because they were fruits of labor during marriage, had value, and were not separate property as that is defined; "the essence of leave is that it is a benefit of employment and, whether considered a benefit in addition to salary, or somehow an aspect of salary, it has independent value"); *Grund v. Grund*, 151 Misc. 2d 852, 573 N.Y.S. 2d 840 (N.Y. Sup. Ct. 1991); *Schober v. Schober*, 692 P.2d 267 (Alaska 1984) (unused cashable leave valued and distributed at the number of hours multiplied by the employee's hourly rate at the time of divorce); 2 Gary N. Skoloff, et al., *Valuation and Distribution of Marital Property* § 23.04A (2002); *MEA/AFSCME Local 519 v. City of Sioux Falls*, 423 N.W.2d 164 (S.D. 1988); *In the Matter of the Marriage of Susan M. Hurd*, 848 P.2d 185 (Wash App. 1993) (while no specific rationale provided for finding that vacation leave was ruled a divisible asset, record included finding that the husband was already eligible for retirement, so an additional payment was likely to be made to him); *Lesko v. Lesko*, 457 N.W. 2d 695 (Mich. App. 1993) (over vigorous dissent, majority concluded in an equitable division state, accrued vacation and sick time could be divided); *Saustez v. Plastic Dress-Up Co.*, 647 P.2d 122 (Cal. 1982); *see also In re Marriage of Fithian*, 517 P.2d 449 (Cal. 1974) ("vacation pay is similar to pension or retirement benefits, another form of deferred compensation. Those benefits, too, 'do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee'").

[48] *See In re Marriage of Abrell*, 923 N.E.2d 791 (Ill. 2010), *affirming* 898 N.E.2d 1163 (2008) (accrued vacation and sick days are not marital property subject to distribution, but if a party has actually received payment for vacation and/or sick days accrued during marriage prior to a judgment for dissolution, the payment is marital property); *Bratcher v. Bratcher*, 26 S.W.3d 797 (Ky. App. 2000) (where wife had accumulated vacation and sick leave, would lose any sick leave if she terminated but would be paid for any accrued vacation, court concluded that neither constituted "property" divisible upon divorce); *Akers v. Akers*, 729 N.E.2d 1029 (Ind. Ct. App. 2000); *Thomasian v. Thomasian*, 556 A.2d 675 (Md. App. 1989) (husband's accrued holiday and vacation leave were not marital property, because they were not entitlements like pension or retirement benefits, only replaced wages on days the employee did not work, and did not need to be, and often were not, liquidated by a payment of cash, but instead frequently dissipated, and therefore too speculative to constitute property); *Smith v. Smith*, 733 S.W.2d 915 (Tex. Ct. App. 1987) (accrued vacation and sick pay are not marital assets, as the husband owned no physical control or power of immediate enjoyment over them).

as divisible property. It is presumed that until there is some definitive authority, Nevada district courts are likely to some out differently in different cases.

VII. SABBATICALS

As above, there is no statutory or case law in Nevada. As far as can be determined, no district court has ever placed a property value on the opportunity for future time off – paid or unpaid – as an asset in a divorce case.

VIII. DEFERRED RETIREMENT OPTION PLANS

This is not a term of art known to Nevada case law. To the extent it addresses the option of an employee to continue working beyond retirement eligibility, the subject is addressed in Section II(A), addressing payment of a spousal share upon the employee spouse's eligibility for retirement.

IX. BONUSES

While there is no particularly on-point guiding authority, there is no reason to expect this analysis to be any different than for retirement and stock option cases – to the extent the right to eventual payment is attributable to efforts undertaken during marriage, each spouse has a presumptive half interest in the benefits eventually paid, whether the actual pay-out is during marriage or after divorce.

X. MISCELLANEOUS

A. Educational Benefits

The ability to earn the right to obtain future education at a lower cost or no cost has obvious value. In those few systems (such as the post-9/11 G.I. Bill)[49] where the right is made expressly allocable to either spouse, courts tend to treat the education credits like any other property right. It stands to reason that non-transferable educational benefits could and would be valued, and the value placed on the employee's side of the ledger.

[49] For the first time in history, servicemembers enrolled in the Post-9/11 G.I. Bill program were able to transfer unused educational benefits to their spouses or children starting August 1, 2009, if various criteria for eligibility and transfer of those education benefits were satisfied.

B. Employer Expense Reimbursements

Potential issues relating to employer expense reimbursements are similar to those related above as to employee savings plans – mainly, the ability of the employee to defer the reimbursements so as to make his or her expenses seem higher than they actually are, receiving reimbursement after the valuation/distribution period is over.

Since most courts tend to do "balance sheets" taking into account both assets and debts when dividing property, the ability to defer employer reimbursement of expenses is, essentially, an opportunity to skew the balance sheet by creating artificial debt.

XI. CONCLUSIONS

Nevada's community property system is a fairly basic, presumptive-equal-division statutory scheme. There is little statutory or case law addressing division of employment-related benefits beyond that addressing cash and retirement benefits – and the latter has not yet distinguished between defined benefit and defined contribution retirement plans.

The definition of "property" in Nevada is expansive, however. To the degree that courts can grasp that there is some tangible value to a benefit of employment accrued during marriage, it should be presumed that the courts will be predisposed to find some way to divide that value between the parties.

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