EVERYTHING YOU WANTED TO KNOW ABOUT RETIREMENT DIVISION BUT WERE AFRAID TO ASK[1]

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I. STATUTES AND COURT RULES

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, as "all property" acquired after marriage, with certain exceptions, and they are divided under NRS 125.150, which directs a presumptively equal distribution of community property.

Chapter 286 of the Nevada Revised Statutes provides the framework for the State of Nevada Public Employees Retirement System (PERS) pension benefits. NRS 125.155, enacted in 1995, establishes a set of special rules applicable only to PERS retirement benefits in divorce. Section one of that statute requires any divorce order to be based on the "time rule" (discussed below) and prohibits basing a division "upon any estimated increase" based on post-marital service. Section two states that the divorce court may require that benefits for a spouse not be paid until the participant actually retires, and may safeguard the spousal share if it does so order, by way of a bond, life insurance, or other security, or (by agreement of the parties only) by increase in the spousal share to compensate for the delay in payments. Section three provides that a spousal share ordered under that statute terminates upon death of either party unless a retirement option providing for survivorship benefits is agreed or ordered.

Since 1987, PERS has required spousal consent to the form of retirement chosen. NRS 286.541. However, the absence of spousal consent only prevents the member from choosing any desired retirement option for 90 days, presumably considered to be enough time for an aggrieved spouse to get into court. *See* NRS 286.545.

Virtually every private employee-benefit plan in the United States today is qualified under, and governed by, the Employee Retirement Income Security Act of 1974, known as "ERISA," codified at 29 U.S.C. § 1001 *et seq*. ERISA provided that pension benefits may not be "assigned or

[1] Prepared as the Nevada presentation at the 15th Annual Symposium of the Family Law Council of Community Property States, Coeur d'Alene, Idaho, March 20 - 23, 2003.

alienated." 29 U.S.C. § 1056(d)(1). Many courts found a common law exception for domestic relations orders, but the legal landscape was confused until the passage of the Retirement Equity Act ("REA"), Pub. L. 98-397, 98 Stat. 1426 (1984), which provided that certain domestic relations orders, containing specific terms, must be accepted and honored by ERISA-qualified pension plans.

Under the federal ERISA/REA statutory scheme, ***any*** judgment, decree, or order dealing with alimony or support for a spouse, former spouse, child, or other dependent made according to local domestic relations law is considered a "domestic relations order" under federal law. *See* 29 U.S.C. § 414(p)(1)(B). It becomes a "qualified" order, or "QDRO," and must be recognized and enforced by an ERISA-qualified pension plan, when it creates or recognizes one of the listed classes of persons as an "Alternate Payee" with a right to receive all or any portion of the benefits normally payable to a participant in that plan.

An order is *not* "qualified" if it requires a plan to provide a type or form of benefit not otherwise available under the plan, or requires the plan to provide a greater (actuarially computed) sum of benefits, or requires payment of benefits to an Alternate Payee that are required to be paid to ***another*** Alternate Payee under a prior QDRO. *See* 29 U.S.C. § 1056(d)(3)(D).

For civilian employees of the federal government, there is an "old" system (Civil Service Retirement System, or CSRS, for those who began service before January 1, 1984) and the "new" system (Federal Employees' Retirement System, or FERS, for those who began service on or after January 1, 1984). *See* 5 U.S.C. §§ 8331, 8401. Both are operated by the Office of Personnel Management ("OPM"). The most obvious difference between them is that participants in CSRS do not participate in the social security program, while those in FERS do participate. Both systems provide a survivor annuity election, which is automatic for current spouses at retirement unless both spouses "opt out." *See* 5 U.S.C. § 8341(h)(1); 5 U.S.C. § 8445.

In 1992, sweeping changes were made to the regulations governing division of Civil Service retirement benefits, making virtually every prior reference on the subject out of date, and potentially dangerous to clients if relied upon. *See* Court Orders Affecting Retirement Benefits, 57 Fed. Reg. 33,570 (July 29, 1992) (codified at 5 C.F.R. Parts 831 *et seq*.). A court order dividing Civil Service benefits is called a "COAP" ("Court Order Acceptable for Processing"). Any COAP should provide orders dealing with each of the three types of benefits addressed in the regulations: the lifetime benefits ("employee annuity"), the potential refund of employee contributions, and death benefits ("former spouse survivor annuity").

A "Thrift Savings Plan" ("TSP") was also created by the FERS statute. The TSP is a defined contribution type of plan for federal employees; FERS employees get matching federal contributions up to a certain level. While the program is open to CSRS employees, there are no matching contributions for them. The TSP is expressly excluded by the regulations governing the CSRS and FERS retirement benefits. 5 C.F.R. § 838.101(d). It is administered by a Board entirely separate from the OPM (namely the Federal Retirement Thrift Investment Board), which has its own governing statutory sections and regulations. 5 U.S.C. § 8435(d)(1)-(2), 8467; 5 C.F.R. Part 1653,

Subpart A. There are no "survivorship" benefits, *per se*, for a TSP account, as it is a cash plan like a 401(k).

Members of the Armed Forces have retirement benefits under the Uniformed Services Former Spouses Protection Act ("USFSPA), 10 U.S.C. § 1408; Pub. L. No. 97-252, 96 Stat. 730 (Sept. 8, 1982). The USFSPA is both jurisdictional and procedural; it both permits the state courts to distribute military retirement to former spouses, and provides a method for enforcement of these orders through the military pay center. The USFSPA itself does not give former spouses an automatic ***entitlement*** to any portion of members' pay; those rights (for division of military retirement pay as property, or that alimony or child support are to be paid from military retired pay) come from state law, but rights granted by state law are limited by federal law. The federal regulations relating to the USFSPA are found at 32 C.F.R. § 63.6.

There is a survivorship benefits program under the military retirement system, known as the Survivor's Benefit Plan ("SBP"), and set out at 10 U.S.C. § 1447 *et seq*. Additionally, military members may after 2001 participate in the Thrift Savings Plan ("TSP") like Civil Service employees, and thus have both a defined contribution plan ***and*** a defined benefit kind of plan.

II. CASE LAW

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

The first Nevada case explicitly noting that retirement benefits earned during a marriage are divisible community property was apparently *Ellett v. Ellett*, 94 Nev. 34, 573 P.2d 1179 (1978).

In *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983), relying on the line of California opinions dividing the gross sum of all retirement benefits (*see In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981); *In re Marriage of Brown*, 544 P.2d 561 (Cal. 1976)), 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." 99 Nev. at 607, 668 P.2d at 279. In other words, the Court held that all forms of retirement, whether or not vested, and whether or not matured, are community property subject to division.

In *Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1987), 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 while single. The Court construed the decree as meaning half of the retirement benefits earned during marriage.

In *O'Hara v. State ex rel. Pub. Emp. Ret. Bd.*, 104 Nev. 642, 764 P.2d 489 (1988), the employee spouse was a Nevada State employee and PERS participant who had chosen the maximum

monthly annuity, which provided no survivor's benefits. 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. Finding that the "community property interests of a nonemployee spouse do not limit the employee's freedom to agree to terms of retirement benefits," the court ruled that the employee may choose any available options so long as "the community property interest of the nonemployee spouse is not defeated."

In *Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988), 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. *See Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975) (Nevada follows the "pure borrowed law" approach, whereby our court determines the divisibility of assets according to the law of the state in which those assets accrued, rather than a "quasi-community property" approach whereby all assets divided are treated as if they were accrued in Nevada).

The next year, in *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989), the Court reviewed a case involving the retirement benefits of a Highway Patrol officer and PERS participant. The Court reiterated that Nevada law permits the division of unvested retirement benefits, and discussed the two possible methods of distributing a spouse's share of those benefits, by way of determining the present value of the pension and awarding half to each spouse, or by a "time rule"[2] 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 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." *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).

The Court further specified that a trial court can 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. *Gemma*, 105 Nev. at 462-63, 778 P.2d at 431-32.

In *Powers v. Powers*, 105 Nev. 514, 779 P.2d 91 (1989), a three-to-one majority of the Nevada Supreme Court sided with California authorities in acknowledging that a "disability pension" generally has two components, retirement and disability, and that while the latter is sole and separate,

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[2] The nearly universal formula in which a spousal share of a retirement benefit is calculated as one-half multiplied by a fraction, the numerator of which is the time of marriage during service, and the denominator of which is the total service time.

the retirement component of a disability pension is divisible community property. *Powers* is notable because the disabled worker had not yet qualified for payment of ***any*** regular retirement benefits when he was retired for disability, indicating that ***any*** disability award stemming from employment has ***some*** retirement component that can be traced out and counted as community property.

In *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990), the Court considered the divorce of a Judge from a legal secretary. 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 pension on date of divorce. Further, the Court clarified 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 any burden being on the non-employee spouse to show that no such efforts were made. The Court distinguished the 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*, 108 Nev. 358, 832 P.2d 380 (1992), the Nevada Supreme Court reversed the district court's refusal to set aside 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 was defective as a QDRO under ERISA to cause survivor's benefits to be paid to the spouse as a "surviving 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 spouse.

In *Carrell v. Carrell*, 108 Nev. 670, 836 P.2d 1243 (1992) the Nevada Supreme Court reversed a district court decree characterizing a portion of 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*, 110 Nev. 605, 877 P.2d 501 (1994), 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 $200.00 plus cost of living adjustments, as "permanent alimony." The facts showed that the military service overlapped the marriage by just less than ten years, precluding direct payment of a property award through the military pay center under the USFSPA. The Court noted that NRS 125.150(5) provides that specified periodic payments to a former spouse must cease unless "it was otherwise ordered by the court," and found that in the context of this case, the parties' use of the phrase "permanent alimony," in conjunction with the COLA clause, showed their intent to link it to the military retired pay. In conjunction with the testimony below as to intent, the Court was led to the conclusion that the divorce court had "otherwise ordered" within the meaning of the statute.

The Court reiterated that payments to a former spouse do not terminate upon her remarriage when the payments are clearly a property settlement, even if denominated "permanent alimony," as here.

In *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995), the district court ordered distribution of the wife's share of the Civil Service Retirement System (CSRS) pension at the time of trial. The Nevada Supreme Court found that a trial court would only not err in doing so doing, if certain conditions were met: (1) the present value could be determined with reasonable certainty; (2) there were sufficient existing funds to distribute the retiree's interest; and (3) both parties agreed that the distribution would be the final distribution regardless of what might occur in the future. The Court ruled that the district court had erred in determining the present value, and it could not be determined from the record whether the parties had agreed that the trial distribution would be final, so the case had to be reversed.

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, and for the first time clearly stated that normal distribution of a spousal share of a retirement is to be upon 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, 112 Nev. 1355, 929 P.2d 916 (1996), was another PERS case involving a Highway Patrol officer. The community had a 54% interest in the retirement, and the husband became eligible to retire three months after divorce, but elected to keep working. The district court ordered that the community share of the retirement was $1,155.12 per month, and that husband had to pay that sum from his salary until he actually retired. The lower court also apparently held that an "equivalency" must "reflect [the husband's] obligation to transfer his vested community property interest in [the wife's] social security benefits" and must "reflect" that the husband was paying taxes on his current salary. Still, the district court apparently held that the amount of the wife's community share of the husband's retirement, when he was entitled to receive it, would never be less than $578.00. The lower court awarded $450.00 per month in "Limited Temporary Spousal Support" until the husband retired, as a "reasonable equivalency," ordered that her payments would not terminate upon her remarriage, or her death, and that the support was taxable to her and deductible to him.

The Supreme Court, citing *Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1987) and *Carrell v. Carrell*, 108 Nev. 670, 836 P.2d 1243 (1992), held that pension payments cannot be classified as temporary spousal support, because such support is subject to possible future modification.

Next, the Court noted that the district court's valuation of the spousal share was correct, but that the lower court's explanation that the gap from $450.00 to $577.56 was reflective of "the taxable consequences" of the payments was inadequate. The Court found that reduction "arbitrary" and held that it violated the equal distribution presumption of NRS 125.150(1)(b).

The 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. The Court reaffirmed the holdings of *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. The Court held that the community interest was divided upon divorce to two sole and separate interests, citing 15A Am. Jur. 2d *Community Property* § 101 (1976), 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.

The Court rejected the husband's request for consideration of the wife's accrual of social security benefits, quoting language that the benefits are not "a form of deferred compensation, and therefore not . . . community property subject to division between the spouses." The Court held that "social security benefits, or the payments used to derive those benefits, cannot be divided in a property settlement agreement." The Court went on: "Further, they cannot be given any consideration in 'offsetting' one spouse's community property interest in the other spouse's retirement benefits," citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1978). The Court noted the lower court's statement that it was not awarding an offset of the social security benefits when he reduced the monthly payments to the wife, but that "Calling a duck a horse does not change the fact that it is still a duck. 'Considering' [the wife's] social security benefits does not change the fact that this is still an offset, and therefore, error." The Court cited several cases holding that social security benefits cannot be considered, distributed, or offset in marital property divisions. Reversing the reduction in the wife's monthly share as based in part on such a prohibited consideration, the Court affirmed the holding below that each party's social security benefit was separate property.

III. DISCUSSION

Generally, pension and retirement plans come in two varieties – defined benefit plans and defined contribution plans. A defined ***benefit*** plan (often called a pension plan) is usually funded by employer contributions (although in some plans employees can contribute) and is intended to provide certain specified benefits to the employee after retirement, usually for life. Often, the benefit is determined by a formula taking into account the highest salary received and the total number of years worked for the employer (such as a "high-three" or "high five" plan).

A defined ***contribution*** plan is one in which the employee has an individual account made up of contributions made by the employee (and, if any, by the employer), plus investment gains. These plans come in many varieties, including profit-sharing plans (employer contributions vary according to company performance), stock bonus plans (the plan invests in the securities of the company itself), "401k" plans (employee chooses either taxable salary or nontaxable contribution to plan), and money purchase plans (like profit-sharing, but with a fixed employer contribution). The

key concept for such plans is that they have a specific balance of funds belonging to each particular employee.

Nevada's cases stating that retirement benefits are divisible irrespective of whether or not the retirement benefits are vested (i.e., the employee has met the necessary conditions under which the employer may not refuse to provide the benefits) or matured (i.e., presently payable) places Nevada law in the clear majority of states, and in line with the modern trend of authority. *See Gemma*, 105 Nev. at 461, 778 P.2d at 430; *Forrest v. Forrest*, *supra*; *Ellett v. Ellett*, *supra*.

Individual Retirement Accounts ("IRAs"), and "Keogh" plans are private retirement plans that do not really fit in with the other kinds of retirement benefits discussed above. Keoghs are essentially like other private retirement plans, but for sole proprietors, partnerships, or "S" corporations. Note that an IRA can be divided in a divorce action through a simple order in the decree, or other order; no QDRO or other special form of order is required. There are a variety of special tax rules, however, requiring direct roll-over without ever touching the recipients' hands in order to avoid incurring tax effects.

The Nevada Supreme Court's decision in *Wolff*, *supra*, in which it held that Social Security benefits could not be considered directly or indirectly in dividing other property, appears to call into question the Court's prior holding in *Anderson v. Anderson*, 107 Nev. 570, 816 P.2d 463 (1991), where it used the husband's receipt of twice as much per month in Social Security than the wife received as support for the unequal division of marital assets.

There are several unanswered questions awaiting resolution in the area of the treatment of retirement benefits under Nevada's community property law. For example, NRS 125.155, which became effective on July 5, 1995, carves out PERS retirements exclusively as permissively immune from division until actual retirement of the participant spouse, if the trial court so orders. Yet, six weeks later, the Nevada Supreme Court in *Sertic*, *supra*, specifically ordered that ***all*** spousal shares of retirement benefits are to be distributed to the spouses upon first eligibility for retirement. This would appear to present both an equal protection issue, and a question as to which mandate takes priority.

The decision in *Wolff* raised other issues. The Nevada Supreme Court has required what PERS prohibits. In *Wolff*, the Court explicitly affirmed the trial 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. The Court held that an Alternate Payee's portion of the retirement benefits is permanently transferred to the Alternate Payee, and is to be paid to the Alternate Payee's estate if the Alternate Payee should predecease the Member. PERS, however, rejects orders complying with the mandate in *Wolff*, making the issue one for future appellate resolution.

IV. OMITTED ASSETS, PARTITION ACTIONS, AND 60(b) CASES

Most "omitted pension" cases are brought under NRCP 60(b), which tracks FRCP 60(b). Nevada law has, unfortunately, had a tortuous, contradictory, and confused history regarding the right of an aggrieved party to set aside a judgment under the rule; some background as to statute and early case law, are necessary to understanding of the later cases. NRCP 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or misconduct of an adverse party which would have theretofore justified a court in sustaining a collateral attack upon the judgment; (3) the judgment is void; or (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an inunction should have prospective application. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order, or proceeding was entered or taken.

The rules of Civil Procedure were made effective in Nevada on January 1, 1953. The parenthetical eliminating the distinction between intrinsic and extrinsic fraud was inserted in 1981; prior to that time, the characterization of the ***kind*** of fraud often controlled the results of cases.

A. Background of Nevada Law

Absent a reservation of jurisdiction over property rights, the property distribution in a decree is final after six months. *Kramer v. Kramer*, 96 Nev. 759, 762, 616 P.2d 395, 397 (1980). However, the six-month limitation will not bar a motion to set aside the property distribution where fraud was committed upon the court. *See Murphy v. Murphy*, 103 Nev. 185, 186, 734 P.2d 738, 739 (1987). Fraud upon the court consists of "such conduct as prevents a real trial upon the issues involved." *Kramer*, 96 Nev. at 762, 616 P.2d at 397 (quoting *Savage v. Salzmann*, 88 Nev. 193, 195, 495 P.2d 367, 368 (1972)). What those terms mean, and what actions constitute satisfaction of them, has changed a great deal over the years.

Originally, the Nevada Supreme Court seemed to express the rule that if a party had an attorney, no sort of fraudulent conduct by the other party would permit post-divorce relief. *See Calvert v. Calvert*, 61 Nev. 168, 122 P.2d 426 (1942); *Mazour v. Mazour*, 64 Nev. 245, 180 P.2d 103 (1947).

The next year, however, the Court decided a case in which it expressed the rule that a judgment can be vacated, amended, modified, or corrected in the event it was procured by extrinsic fraud, which it defined as existing "when the unsuccessful party is kept away from the court by a false promise of compromise, or such conduct as prevents a real trial upon the issues involved, or any other act or omission which procures the absence of the unsuccessful party at the trial. Further,

it consists of fraud by the other party to the suit which prevents the losing party either from knowing about his rights or defenses, or from having a fair opportunity to present them upon the trial." *Murphy v. Murphy*, 65 Nev. 264, 271, 193 P.2d 850, 854 (1948).

In *Occhiuto v. Occhiuto*, 97 Nev. 143, 625 P.2d 568 (1981), the Nevada Supreme Court expounded at length on the meaning of "fraud on the court," as opposed to "fraud" as used in the remainder of NRCP 60(b):

> This court's interpretation of "fraud", as that term is used in NRCP 60(b)(2), and the term "fraud upon the court", also used in NRCP 60(b), is completely out of step with the treatment afforded those same terms by the federal courts in their interpretation of the Federal Rules of Civil Procedure 60(b). This difference can hardly be justified by the fact that the word "fraud" in FRCP 60(b)(3) is followed by the words "(whether heretofore denominated intrinsic or extrinsic)".
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> Federal cases construing FRCP 60(b) make it clear that "fraud upon the court" under the savings clause is distinguishable from "fraud . . . misrepresentation, or other misconduct" under FRCP 60(b)(3).
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> In United States v. International Telephone & Tel. Corp., 349 F. Supp. 22, 29 (D. Conn. 1972), aff'd without opinion, 410 U.S. 919, (1973), the trial court explained:
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> > Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944); Root Refin. Co. v. Universal Oil Products, 169 F.2d 514 (3d Cir. 1948); 7 J. W. Moore, Federal Practice, para. 60.33 at 510-11. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it will not ordinarily rise to the level of fraud on the court. See Kupferman v. Consolidated Research & Mfg. Co., 459 F.2d 1072 (2d Cir. 1972); see also England v. Doyle, 281 F.2d 304, 310 (9th Cir. 1960).
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> "[I]n order to set aside a judgment or order because of fraud upon the court under Rule 60(b) . . . it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision." England v. Doyle, *supra*, 281 F.2d at 309. *See also* United States v. Standard Oil Co. of California, 73 F.R.D. 612, 615 (N.D. Cal. 1977).
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> The motion to set aside on this ground is addressed to the sound discretion of the trial court. Title v. United States, 263 F.2d 28 (9th Cir. 1959); Siberell v. United States, 268 F.2d 61 (9th Cir. 1959). And the burden is on the moving party to establish fraud by clear and convincing evidence. Atchison, Topeka & Santa Fe Railway Co. v. Barrett, 246 F.2d 846 (9th Cir. 1957). England v. Doyle, 281 F.2d 304, 309-310 (9th Cir. 1960).

The opinion, however, did not explain in what way the Court perceived that Nevada practice had varied from that of the federal courts, or what, precisely, it was directing district courts to do differently.

The first solid sign of a change in sentiment on questions relating to willingness to entertain NRCP 60(b) motions appeared in a very short opinion entitled *Smith v. Smith*, 102 Nev. 110, 716

P.2d 229 (1986). The wife signed a proper person answer in the husband's attorney's office the day after the husband filed for divorce. Three days before the six-month limit of the rule would have run, the wife filed a motion seeking to set aside the property distribution in the decree, claiming that the day before she signed the proper person answer, the husband had beaten her until she agreed to sign the papers he had his attorney prepare, and that she received only some 15% of the total community property estate. The district court denied her motion, apparently based on the husband's claim that her list of community property was "inaccurate and outdated," and that he did not threaten the wife with bodily harm at the time she signed the proper person answer.

On appeal, the Nevada Supreme Court noted that the husband had not even denied beating the wife and that, while he claimed that the wife's numbers as to community property were inaccurate, he did not supply any figures that he claimed were more correct. The Court therefore found the denial of the wife's motion to have been without sufficient evidence, reversed, and remanded "so that the extent of the parties' community property may be ascertained and divided justly and equitably pursuant to NRS 125.150."

A major change in the Nevada Supreme Court's approach and results occurred in 1987, when the Court considered another fraud upon divorce case captioned *Murphy v. Murphy*, 103 Nev. 185, 734 P.2d 738 (1987) (no relation to the 1948 parties). The former wife filed a motion to set aside the property division in her divorce decree about a year after it was entered, on the ground that the husband had received everything they owned by threatening to kill her if she sought a property award.

Finding that "fraud upon the court" included "such conduct as prevents a real trial upon the issues involved," the Court distinguished "certain older decisions holding that threats of this nature were not a proper basis for relief" on the ground that the wife here did ***not*** have counsel at the time of divorce. 103 Nev. at 186, 734 P.2d at 739.

Further, the Court ruled that the wife could proceed by motion rather than independent action. The Court found that the six month limitation was inapplicable because the court's jurisdiction to remedy fraud is inherent and because a court can proceed to remedy fraud even in the absence of further action by a party. Noting that the wife's motion had been "styled as exposing a fraud on the court," the Court held that it was "cognizable on that basis." *Id*.

The Court found that NRCP 60(b) was ambiguous as to whether the wife could proceed by motion or was required to file an independent action, and concluded that "the better reading" permitted a motion, irrespective of how much time had passed since entry of the decree, finding that any other reading would make the provision dealing with fraud upon the court "unnecessary." Additionally, the Court held that since a court can proceed *sua sponte* to rectify fraud, there was no reason to limit the "avenues by which the court's attention may be directed to the fraud." *Id*.

A few months after the 1987 *Murphy* holding, the Court considered a non-family law case involving the sale of land, in which it held that relief under NRCP 60(b) was available on the ground

of unjust enrichment, that an independent action to set aside a judgment can be filed outside the six-month time period of the rule on the basis of "mutual mistake," and such an equitable action is not barred by the doctrine of *res judicata*. The Court held that the "salutary purpose of Rule 60(b) is to redress any injustices that may have resulted because of excusable neglect or the wrongs of an opposing party. Rule 60 should be liberally construed to effectuate that purpose." *Nevada Industrial Dev. v. Benedetti*, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987) (citations omitted); *see also Sherman v. Southern Pac. Co.*, 31 Nev. 285, 102 P. 257 (1909); *Brockman v. Ullom*, 52 Nev. 267 at 269, 286 P. 417 (1930).

That language was repeated by the Court two years later in a family law case involving a wife who filed a motion within the six month period of the rule against her former husband (a lawyer "experienced in handling divorce cases"), alleging that he had defrauded her by having her sign a property settlement agreement heavily weighted in his favor. *Petersen v. Petersen*, 105 Nev. 133, 771 P.2d 159 (1989).

In *Petersen*, the wife figured out about 90 days after the divorce that she had received about 10% of the parties' property, but her motion to set it aside was not filed until the day before the six months would have elapsed. The Court rejected the trial court's conclusion that the motion was untimely, and held that when such a motion is filed at ***any*** time within the six months allowed by NRCP 60(b), alleging fraud or mutual mistake, and seeks for the first time to address the fairness of the decree of divorce, the motion should be considered on its merits (i.e., the fairness of the distribution of property should be explicitly examined by the reviewing court).

In *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992), the Nevada Supreme Court reversed the district court's refusal to set aside a property distribution under NRCP 60(b), where a private pension had been greatly undervalued in the original divorce proceedings. Both parties were represented by counsel, but the wife found out (just days before the six month period of NRCP 60(b) expired) that the representation by the husband and his counsel that the property division was "essentially equal" was false, because the pension was worth much more than had been thought.

The wife, who had received about 29% of the total value of the community property, moved to set aside the property distribution under NRCP 60(b). A Domestic Relations Referee recommended setting aside the decree, but the husband objected, and the district court sustained his objection.

On appeal, the Nevada Supreme Court reversed the district court's order as an abuse of discretion, since the misrepresentation of the value of the pension could only be attributed to mutual mistake or to fraud; if both parties were mistaken, the property settlement was based upon the mistake that the property was being evenly divided, entitling wife to redress under NRCP 60(b)(1); if the husband or his attorney knew the true value, they fraudulently misrepresented the value, permitting the wife to set aside the decree under NRCP 60(b)(2). The Court reiterated the *Petersen* statement of the purpose of NRCP 60(b), and its direction that the rule be liberally construed to redress injustices. 108 Nev. at 361-62, 832 P.2d at 382.

The husband asserted that the wife was not entitled to relief under NRCP 60(b) on the basis that any misrepresentation as to the value of the pension was intrinsic, citing *Mazour*, *supra*, and other cases. 108 Nev. at 362, 832 P.2d at 382-83. The Court rejected that distinction, noting the 1981 amendment eliminating the distinction between intrinsic and extrinsic fraud, and concluding that on that basis the earlier cases denying relief to a wife were "not applicable" to the wife's request for relief. 108 Nev. at 362 n.6, 832 P.2d at 383 n.6. The case was remanded for a redistribution of the property.

The same year, the Court decided *Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d 1320 (1992), in which the wife filed an independent contract action alleging fraud against the husband about 90 days after their divorce, seeking rescission based on her assertion that certain assets listed in the parties' property settlement agreement as going to her did not exist at all, certain others were worthless, and others going to the husband were undervalued; the Husband had claimed that certain assets he received were worthless, but later sold them at a profit.

While the case did not cite NRCP 60(b), much of the reasoning was similar to the cases explicitly decided under that rule.[3] The valuations as to the assets had been fixed by the husband and relied on by the wife. 108 Nev. at 909, 839 P.2d at 1321. The wife filed suit on the basis of intentional misrepresentations. *Id.* Reversing the lower court's granting of the husband's motion to dismiss pursuant to NRCP 12(b)(5), the Court found that even though the agreement contained a provision that the parties had not relied upon the values provided in the financial statement, neither that provision nor the agreement's "integration" or "waiver" clauses could bar a claim for intentional misrepresentation. 108 Nev. at 911-12, 839 P.2d at 1322-23.

The Court held that the party alleging intentional misrepresentation is required to prove that the other party made a false representation, with knowledge or belief of falseness, and intended to induce the plaintiff to act or refrain, that the plaintiff justifiably relied, and was damaged. 108 Nev. at 910-11, 839 P.2d at 1322. Justifiable reliance requires that the false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course. *Id*. The Court added that "misrepresentation" may consist of a representation that is misleading because it partially suppresses or conceals information. *Id*.

Responding to the husband's allegations that the wife had made "an independent investigation" of the values as recited in the agreement, the Court held that the issue of whether there had been such an investigation was a factual question which "may not be dispensed [with] as a matter of law." 108 Nev. at 912, 839 P.2d at 1323. The Court added that there is no duty to make a "reasonable investigation" unless the recipient has information which would serve as a danger

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[3] *Blanchard* was decided in accordance with contract law principles. The Nevada Supreme Court has issued a series of cases in which it enforced, or overturned, the terms of property settlement terms under contract law principles. *See Wallaker v. Wallaker*, 98 Nev. 26, 639 P.2d 550 (1982) (permitting independent action to reform a property settlement agreement as to alimony payments based on fraud and mutual mistake, where the property settlement was not incorporated or merged in the decree); *Renshaw v. Renshaw*, 96 Nev. 541, 611 P.2d 1070 (1980) (enforcing unmerged agreement that attorney father pay mother child support even as to child who left mother's house to go live with father).

signal and a red light to any normal person of his intelligence and experience, and that in this case there was no record of such information being given to the wife. *Id*.

The Court found that there was no evidence in the record that the wife made an independent investigation (which would charge her with what reasonable diligence would have disclosed), but even such an investigation would not have prevented a finding of detrimental reliance where falsity of the defendant's statement was not apparent from that inspection, where the plaintiff is not competent to judge the facts without expert assistance, or where the defendant has superior knowledge. *Id.* Since the wife had accepted a parcel of property previously forfeited to the state for non-payment of taxes as a part of the settlement, she had clearly relied on the husband's representation that it was a part of the marital estate, and she was damaged because the property had no value. 108 Nev. at 913, 839 P.2d at 1323.

There is a separate line of Nevada case authority dealing with ***omitted*** assets.

The earliest authority in Nevada regarding the ownership of assets not specifically disposed of in a decree of divorce is a federal decision. In *Johnson v. Garner*, 233 F. 756 (D. Nev. 1916), the court held that "(t)he divorce terminated the community, as well as the marriage, and put an end to any right which either spouse may have had in or to the property of the other. . . . Thereafter the interest of the former husband and wife in the property was that of tenants in common."

In *Bank v. Wolff*, 66 Nev. 51, 202 P.2d 878 (1949), a divorce decree was granted, the wife filed a motion for a new trial; that motion was denied, and the newly ex-husband died the next day. The Nevada Supreme Court held that:

> it is fundamental that where property rights are not in issue in a divorce action, a decree which is limited to granting a divorce in no way prejudices such rights. Upon the entry of such a decree the former separate property of the husband and wife is his or her individual property, and the property formerly held by the community is held by the parties at tenants in common.
>
> From the necessities of the case the right of either party after a divorce has been granted, to enforce his or her rights to such property in a separate action brought for that purpose cannot be doubted.
>
> . . . .
>
> In the absence of any reference thereto in the decree, the parties to the suit became tenants in common of the community property, and the death of the plaintiff after the entry of judgment did not impair the [wife's] right thereto; but this right must be enforced in an independent action, in which all who may have any interest therein should be made parties.

66 Nev. at 55-56, 202 P.2d at 880-81 (citations deleted).

Wolff has never been overruled or criticized in any subsequent opinion. For several years, however, it was cited only in cases involving the situation where one party died at some point. *Adams v. Adams*, 85 Nev. 50, 450 P.2d 156 (1969), involved a case in which the parties divorced, and their decree indicated that the proceeds of the former marital home would be divided when it sold, but the former husband died before the house was sold, and the former wife claimed that she owned the entirety of the house as a matter of community property survivorship principles. Citing *Wolff* and *Johnson v. Garner*, *supra*, the Court held that the divorce had transmuted the house from community property to ownership by the parties as tenants in common.

In 1976, the Nevada Supreme Court ruled that if issues of fraud, misrepresentation and mistake as to value are raised at trial, a later independent action to reform the agreement is subject to dismissal on the basis of *res judicata*, since the claim in question would have already been directly considered. *See Spilsbury v. Spilsbury*, 92 Nev. 464, 465-66, 553 P.2d 421, 422 (1976).

One hard-to-categorize case is *Applebaum v. Applebaum*, 93 Nev. 382, 566 P.2d 85 (1977). There, the parties had married in 1968, divorced in 1972, remarried in 1973, and in 1975, the wife moved to invalidate the property settlement in the ***first*** divorce, and for separate maintenance. The husband counterclaimed for divorce, and when the divorce court refused to throw out the property settlement in the first divorce based on the wife's claim of extrinsic fraud, the case went up on an appeal of the second divorce decree. This case was, therefore, a "double-divorce" case, and its holdings might be considered limited to its facts, although the opinion does not say so on its face.

On appeal, the Court noted the wife's allegation that she received only $15,000 for her half of the husband's (never-specified) business, which she claimed was worth over a million dollars. The Court backed into the extrinsic fraud analysis, stating that only the increase in the value of the business developed during marriage was community property under either the *Pereira* or *Van Camp* approaches approved in *Johnson v. Johnson*, 89 Nev. 244, 510 P.2d 625 (1973), and that in either case, from that increase the amounts drawn to meet family expenses had to be subtracted, under *Schulman v. Schulman*, 92 Nev. 707, 558 P.2d 525 (1976). *Applebaum*, 93 Nev. at 385-86, 566 P.2d at 88. Noting the testimony as to the "high standard of living" enjoyed during the marriage, the Court found substantial evidence to support the conclusion below that "any community interest in the increased value of the business had already been withdrawn for this purpose." 93 Nev. at 386, 566 P.2d at 88.

It was apparently based on those conclusions that the Court found unpersuasive the facts that the worldly-wise husband had stayed in the residence during the first divorce, drafted the agreement he had the wife sign, and that the wife claimed that she had only consulted with, and not retained, an attorney during the first divorce. The Court so much as said that it was not the husband's fault if the wife failed to ask the attorney about the substance of the agreement, but only its enforceability, and (in the statement for which the case is usually cited), that once the husband "announced his

intention to seek a divorce," the wife "was on notice that their interests were adverse." 93 Nev. at 384-85, 566 P.2d at 87.

Williams v. Waldman, 108 Nev. 466, 836 P.2d 614 (1992), involved a lawyer-husband who had obtained partial ownership of his law firm during the marriage. When the parties had divorced seven years earlier, he had stopped the wife from getting her own lawyer with promises that "I will take care of you" and "I will be fair to you and the children," and he prepared all papers in the divorce. The wife, without benefit of independent counsel, signed the agreement prepared by the husband and filed an answer in proper person, which said the agreement was merged into the decree of divorce. The agreement did not provide that the law practice was community property divisible upon divorce, nor was the wife so advised. 108 Nev. at 469, 836 P.2d at 617.

Seven years later, in consulting with a lawyer, the wife first learned that the law practice was considered to be community property and a divisible asset. She filed an independent action for partition. It was rejected by the district court.

On appeal, the Nevada Supreme Court held that a general "each to keep the property in his possession" release clause in the property settlement was non-binding where the asset in question, the law practice, was not specifically mentioned in the document. The Court reversed the dismissal below, concluding that the district court had failed to recognize the parties' agreement as the product of an attorney/client relationship giving rise to a fiduciary relationship, and that all transactions growing out of that relationship are subject to the "closest scrutiny." 108 Nev. at 471-74, 836 P.2d at 617-19. Explaining, the Court held that when an attorney deals with a client for the former's benefit "the attorney must demonstrate by a higher standard of clear and satisfactory evidence that the transaction was fundamentally fair and free of professional overreaching." 108 Nev. at 472, 836 P.2d at 618. The Court held that there was detrimental reliance by the wife on the husband's representations.

Addressing its earlier holding in *Applebaum*, *supra*, the Court modified the oft-cited holding of that case, stating that "the issue of whether a confidential relationship survives an announcement of an intention to seek a divorce necessarily depends on the circumstances of each case." 108 Nev. at 472 n.4, 836 P.2d at 618 n.4. The Court found adequate grounds for distinction in the fact that while *Applebaum* involved a short-term divorce without children, where the husband had told the wife to hire a lawyer and that he would pay for it, the parties in *Waldman* "had a longstanding marital partnership with three young children at the time of the divorce," the husband was a lawyer and drafted the agreement personally, and the husband had convinced the wife ***not*** to hire independent counsel. *Id*.

The Court found that the husband failed to prove that the wife "completely understood her property rights when she executed the agreement," and found the wife's alleged disclaimer of an interest in the law practice "unavailing" where it was "made in an informational vacuum, without a full understanding of the rights she was relinquishing." 108 Nev. at 473 n.5, 836 P.2d at 619 n.5. Citing *Amie*, *supra*, and *Wolff*, *supra*, the Court held the unadjudicated property was subject to

partition in an independent action in equity, because property not disposed of in a divorce action is held by the parties as tenants in common. 108 Nev. at 474, 836 P.2d at 619.

The Court distinguished *McCarroll*, *infra*, upon the Court's conclusion that "after a careful review of the record . . . under the circumstances of this case, where [wife] did not have independent representation, she did not have a fair opportunity to present this issue to the original divorce court." For the first time, the Court specified the burden of proof in a partition suit, stating that upon remand, the wife was not required to prove fraudulent omission, "but simply that the community property at issue was left unadjudicated and was not disposed of in the divorce."

In light of these holdings, it is perhaps understandable how the Nevada Supreme Court made the errors it did when it first considered the question of omitted pension benefits.

B. Nevada Law as to Omitted Pension Benefits

McCarroll v. McCarroll, 96 Nev. 455, 611 P.2d 205 (1980), was a short *per curiam* opinion affirming a summary judgment in favor of a former husband and against his former wife. The parties had divorced three years earlier, and the divorce decree apparently approved "an oral agreement for the division of community property." The former wife sued to divide the husband's Forest Service Pension, since "no mention was made of it during the divorce action"; the wife asserted that it had been fraudulently concealed. 96 Nev. at 456, 611 P.2d at 205.

The district court had "found that the fraud, if any, was intrinsic since the former wife had a fair opportunity to present the claim she is now making to the divorce court," and concluded that NRCP 60(b) "barred relief." *Id*. The Nevada Supreme Court affirmed, stating only: "We perceive no error." *Id*. The only citation of authority provided for upholding the lower court's opinion was *Colby v. Colby,* 78 Nev. 150, 369 P.2d 1019 (1962). *Colby*, however, was not an omitted property case, and did not cite any omitted property cases, but was concerned with jurisdictional and "full faith and credit" issues, and quoted at length from the 1948 case of *Murphy v. Murphy*, *supra*, 65 Nev. 264, 193 P.2d 850 (1948), which was concerned with distinguishing intrinsic and extrinsic fraud.

Tomlinson v. Tomlinson, 102 Nev. 652, 729 P.2d 1363 (1986), involved a common law action for partition of a military pension omitted from a 1971 Michigan decree of divorce. The district court dismissed the wife's complaint for partition, and the Nevada Supreme Court affirmed. The Court noted that the Uniformed Services Former Spouses Protection Act [10 U.S.C. § 1408 (1982), discussed *supra* in section F(5) of Chapter I] had nullified *McCarty v. McCarty*, 453 U.S. 210 (1981) and so made "Rosemary's right to a portion of Robert's military retirement benefits . . . the same now as it was before McCarty or the enactment of the USFSPA." 102 Nev. at 653, 729 P.2d at 1364.

The court stated that Nevada would apply Michigan law in determining Rosemary's rights, and that the first Michigan appellate decision dividing a military pension as property was issued six years after the Tomlinsons' divorce.

The Nevada court then held that Rosemary's failure to raise the issue of her right to division of the pension at the time of divorce (six years before she knew of that right) precluded her from requesting partition once she ***did*** know that the asset was marital property. 102 Nev. at 654, 729 P.2d 1364. The court claimed it was applying the principle of *res judicata*, but announced a rule actually originating from collateral estoppel, and arrived at a ruling by which the rights of the parties to property accrued during the marriage were deemed adjudicated by a divorce decree silent as to those assets, in favor of the party who obtained physical possession or apparent title.

The Court returned to the same subject matter three years later in *Taylor v. Taylor*, 105 Nev. 384, 775 P.2d 703 (1989). In the intervening time, *Tomlinson* had been legislatively overruled by NRS 125.161, passed in 1987, but repealed in 1989. *Taylor* was a consolidated case involving two sets of former spouses whose divorce decrees omitted military retirement benefits.[4]

The *Taylor* court did not apply *Benedetti*, *supra*, or *Wolff*, *supra*, and the decision made no mention of the legal principles of either "unjust enrichment" or the status of the parties as tenants in common of the omitted assets. The court held that it did "not recognize a common law cause of action to partition retirement benefits not distributed as part of the property agreement at the time of divorce." 105 Nev. at 387, 775 P.2d at 704-705. In a footnote, the court stated that "there is no evidence of fraud in these cases," and responded to the argument by the former wives' counsel that the ruling would allow a party to "hide" the retirement benefits from the other party and the court by stating that:

> On the contrary, such conduct would most likely constitute a fraud on the court and NRCP 60(b) specifically provides that it "does not limit the power of a court to entertain an independent action to relieve a party from a judgment . . . for fraud on the court."

105 Nev. at 387, n.4, 775 P.2d at 704, n.4.

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[4] The published decision did not detail the full factual background of the cases. The parties to the earlier of the two cases (the Taylors) were divorced in 1970. At trial in the partition case in 1987, both parties testified that they had no idea that the pension benefits were a divisible asset at the time of divorce.

In the second case, however (Campbell), the parties had been divorced in 1980, two years ***after*** Nevada case law established that pensions were community property divisible upon divorce. *See Ellett v. Ellett*, *supra*, 94 Nev. 34, 573 P.2d 1179 (1978). The wife had been unrepresented at the time of divorce. The divorce decree granted the husband the house, its furnishings, and the bulk of the parties' tangible assets. He also kept all assets ***omitted*** from the decree, including all joint bank accounts and the military pension with a present value upon divorce of about $200,000.00. He paid no alimony, no property equalization, and minimal child support. The wife received custody of three children, a used car, and some raw land in another state that had earlier been given to her by her mother. In the 1987 partition case, the husband conceded that he knew all along that the pension was divisible community property, and that he discussed the matter with his attorney before the divorce. The divorce attorney had deliberately omitted the pension from the Complaint for Divorce and from the Decree.

The next year, however, the Court took up *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990). The case did not address retirement benefits, but a post-divorce independent action by a former wife to partition her community property share of the proceeds of a lawsuit for lost wages brought by her former husband during the marriage, but not collected until after divorce. The opinion recited that the parties had "simply omitted" the property from their property settlement agreement and divorce decree "[f]or reasons that are not entirely clear from the record." 106 Nev. at 542, 796 P.2d at 234.

Embracing the 1949 holding from *Wolff*, *supra*, the Court in *Amie* found that the right to bring an independent action for equitable relief from a judgment is "not necessarily barred by res judicata." 106 Nev. at 542-43, 796 P.2d at 234. The court noted that the proceeds of the husband's lost wages claim were apparently omitted from the parties' divorce settlement only because of their "mutual mistake" in leaving it out of the property settlement agreement. 106 Nev. at 542, 796 P.2d at 234.

The Court then reaffirmed its adherence to *Nevada Industrial Dev. v. Benedetti*, 103 Nev. 360, 741 P.2d 802 (1987), in which the Court had permitted a second suit where the parties to an earlier action had, by "mutual mistake," settled the earlier case for $30,000.00 too much, constituting "unjust enrichment" of the receiving party, and in which the Court had held that the interest in finality did not bar a later independent action where "the policies furthered by granting relief from the judgment outweigh the purposes of res judicata." *Amie*, 106 Nev. at 543, 796 P.2d at 234-35, *quoting from Benedetti*, 103 Nev. 360,741 P.2d 802 (1987) (citations omitted in quoted text).

After quoting the earlier holding, the *Amie* court found that the wife's equitable action for partition of a portion of the suit for back wages did not violate any of the "policies and purposes of the doctrine of res judicata," so there was "no reason in fairness and justice that she should not be allowed to proceed to have this property partitioned in accordance with *Wolff*." 106 Nev. at 543, 796 P.2d at 235. The court summed up by holding that since the proceeds of the husband's suit were left unadjudicated and were not disposed of in the divorce, they were held by the parties as tenants in common, and the property was "subject to partition by either party in a separate independent action in equity." *Id*.

The Court distinguished *McCarroll v. McCarroll*, *supra*, stating that in that case, "the trial court found, and we agreed, that the wife had a fair opportunity during the divorce litigation to litigate the fraud allegations. Under such circumstances, the fraud issue could not be later litigated in another civil action. Unlike McCarroll, this case involves property omitted from the divorce controversy. There was no dispute as to the nature of the property, and neither party claimed exclusive entitlement to this property." 106 Nev. at 542, 796 P.2d at 234.

In *Amie*, no mention was made of the requirement, mandated in *Taylor* a few months earlier, of finding "fraud on the court" before allowing partition of assets omitted from a decree.

C. Discussion

While property awards are still considered generally final six months after the decree is filed, several different kinds of exceptions to the general rule have been developed.

There is no neat or concise way to reconcile the cases that have been issued over the years under NRCP 60(b), even as to the definition of terms or the meaning of standards. The NRCP 60(b) cases fall into two general groups, those filed within six months, and those filed after six months have passed since the original judgment.

At least where an error, fraud, or mistake, has caused a distribution of other than half of the community property to each party, and that error is discovered within the six month limitation of NRCP 60(b), case law evolving from *Smith* and *Petersen* to *Carlson* has made it clear that the district courts are obligated to evaluate the substance of the distribution, and either redistribute property so as to make the distribution equal, or find compelling reasons for the unequal distribution of property.

Blanchard, *supra*, exemplifies the class of cases in which "mutual mistake" as to ***value*** constitutes a basis for rescission of property settlement terms; there would seem to be no logical basis under which ***mistake*** would provide a viable basis for attack on such an agreement or decree, but intentional understatement or overstatement of value by one party, or "fraud" (intrinsic, extrinsic, or otherwise), would ***not*** provide a basis.

Counsel should file the motion to set aside the property distribution within six months of the original ruling if possible, since motions or independent actions filed outside that time frame may be held to the standard of establishing a fraud upon the court, in which the moving party is required to allege "such conduct as prevents a real trial upon the issues involved."

While the 1987 *Murphy* case has increased the uncertainty of when an independent action (rather than a motion in the underlying case) is required, it seems clear that at least when an arguable fraud on the court can be alleged, and perhaps when a "mutual mistake" can be mathematically demonstrated, an "independent action" under NRCP 60(b) will lie.

The same reasoning process can be expressed, in such an action or a different one, alleging intentional misrepresentations in property settlement agreements or divorce decrees, although a party alleging intentional misrepresentation is still held to a considerable burden of proof as to the elements of that claim.

In perhaps no other area is the case law so internally contradictory as that considering actions for partition of property omitted from decrees of divorce. Without question, it is the most confused, and confusing, of the lines of cases dealing with finality of judgments in Nevada.

The precise contours of the law as it exists today are open to some question, although the modern trend is clearly to allow divisions of omitted assets, by motion or independent action. The case law, however, is irreconcilable, as the Court's treatment of analytically identical issues has been directly contradictory from case to case, and later cases have not overruled earlier ones with which they are inconsistent.

It appears that today Nevada has returned to alignment with the uniform law of the other community property states permitting former spouses to return to court for partition of assets not disposed of in the original divorce proceeding, typically as "tenants in common" of the omitted assets. *See*, *e.g.*, *Henn v. Henn*, 605 P.2d 10 (Cal. 1980); *Amie v. Amie*, *supra*. But anachronisms and unexplained contradictions remain in cases that have not been adequately harmonized or overruled, and some opinions contain outright errors that have not been explained or corrected.

McCarroll appears to impose upon the spouse without knowledge of assets the responsibility for knowing about all community property concealed by the spouse who does have such knowledge. No consideration was given to the wife's actual knowledge of the existence and nature of the asset, or her opportunity to acquire such knowledge. *McCarroll* radically departed from the law of every other community property state by providing a mechanism for divestment of community property without agreement of the parties or express judicial determination.

The grounds asserted in *Amie* for distinguishing *McCarroll* do not appear to be analytically valid. The claim in *Amie* that the wife in *McCarroll* "had a fair opportunity during the divorce litigation to litigate the fraud allegations" is not supportable; the face of the *McCarroll* opinion shows that the parties in that case had orally agreed to divide their property, but that their agreement "did not include the pension and no mention was made of it during the divorce action." 96 Nev. at 456, 611 P.2d 205. In other words, as of the time of divorce, the facts of *McCarroll* were ***indistinguishable*** from those of *Amie.*

In *McCarroll*, the wife alleged that her husband's silent retention of the pension[5] was due to his "fraudulent concealment" of the asset, whereas the wife in *Amie* alleged only the parties' "mutual mistake" in leaving the asset out of the divorce. The fraud alleged by Mrs. McCarroll in her later partition case had not yet ***occurred*** at the time of divorce – as a matter of temporal logic, it had not yet been "omitted" or "concealed" from the divorce decree until the divorce was concluded. The *Amie* court therefore incorrectly stated that the wife could have litigated "that claim" (fraudulent omission) in her divorce action; what Mrs. McCarroll ***could*** have done in her divorce case was litigate her right to the property ***itself*** – if she had realized that she had such an interest – just as Mrs. Amie could have done in ***her*** divorce action.

It is difficult to come up with any real distinction between the cases, except as to the form of pleading. The *Amie* court apparently relied substantially on form in reaching its result, finding:

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[5] The *Amie* opinion erroneously refers to this asset as "prison benefits." 106 Nev. at 542.

> Since the parties omitted to include this property in their written agreement and hence in the divorce suit itself, the property never came within the field of the prior divorce litigation. . . . There was no dispute as to the nature of the property, and neither party claimed exclusive entitlement to this property.

106 Nev. at 542, 796 P.2d at 234. The court thus implied that its holding was based on the existence of mistake but ***not*** fraud, and the failure of the party holding the omitted asset to "claim exclusive entitlement" to it. Such an implication, however, would lead to the absurd result that partition in *Amie* was granted only because the omission of the property from the decree was innocent, but that partition would have been denied if the husband asserted in the later case that he ***intended*** to defraud the wife, or that he wanted to baselessly claim that the property was all his.

It is likewise impossible to reconcile *Amie* with *Tomlinson* and *Taylor*. Factually, *Tomlinson* was nearly identical to *Henn*, *supra*, which was relied upon as authority in *Amie*, but not even acknowledged to exist in *Taylor*. The California Supreme Court had followed and explained *Henn* in *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *cert., denied*, 479 U.S. 1012 (1987), just months before the Nevada court decided *Tomlinson*.

The holding in *Tomlinson* amplified *McCarroll* and effectively condoned the practice of concealing, disguising, and mischaracterizing assets prior to and at the time of divorce. The case created a rule that a spouse who can acquire physical control of an asset, or apparent right to a future asset, is automatically awarded that asset by a divorce decree that fails to state otherwise, a practice of "divestment by silence."[6]

The consolidated cases addressed in *Taylor* included one set of spouses mutually mistaken as to the community property nature of the retirement benefits, and one set in which the husband consciously chose to omit the asset from the decree for the purpose of preventing the unrepresented wife from making a claim to them.

If there was truly a distinction between property omitted from a decree because of "mistake" and property omitted because of deliberate fraud, the Court would presumably have said so given the facts of those two cases. Instead, the Court merely recited that it had consolidated the cases for disposition on appeal "because they involve identical issues of law," and then affirmed, refusing to apply – or even acknowledge – *Benedetti* and *Wolff*. The opinion made no mention of either "unjust enrichment" or the status of the parties as tenants in common of the omitted assets, in favor of a holding that it did "not recognize a common law cause of action to partition retirement benefits not distributed as part of the property agreement at the time of divorce."

No legal distinction as to the character of the asset to be partitioned can be drawn, since both the omitted wages in *Amie* and the omitted pensions in *Taylor* are clearly community property. The

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[6] *See* M. Willick, *Res judicata in Nevada Divorce Law: An Invitation to Fraud*, 4 Nev. Fam. L. Rep. No. 2, Spr., 1989, at 1.

Taylor court's requirement of finding "extrinsic fraud" before allowing partition was nowhere to be seen in the *Amie* decision a few months later, which did not cite *Taylor* at all.

Amie aligned its result and holding with both the earlier Nevada decision in *Wolff* and the seminal California case of *Henn v. Henn*, *supra*. The *Henn* decision expressly held that military retirement benefits omitted from a decree of divorce are subject to partition in a later independent action by the nonmilitary spouse – precisely the holding rejected by the Nevada Supreme Court only a few months before *Amie*, in *Taylor*. It seems possible, therefore, that *Amie* directly undercuts *Taylor* and foreshadows *Taylor's* eventual reversal.[7]

In its more recent cases, the Nevada Supreme Court has indicated that it is more willing to affirm a district court ruling attempting to achieve equity than it is to approve an order which would have the result of preserving an inequitable result. *See*, *e.g.*, *Lesley v. Lesley*, 113 Nev. 727, 941 P.2d 451 (1997). Given the lack of any meaningful factual distinction among *McCarroll*, *Taylor*, and *Amie*, however, the law of Nevada concerning partition of omitted assets is quite uncertain. There appear to be no coherent guidelines for analysis according to the character of the assets omitted, the reason or means by which they were omitted, or the form of the pleadings involved during attempted partition.

It is clear that *Wolff*, *Henn*, and *Amie*, on the one hand, and *McCarroll*, *Tomlinson*, and *Taylor*, on the other, are directly contradictory, and that both lines of authority cannot be indefinitely maintained as valid authority.

In the meantime, counsel attempting to guide a reviewing court toward a preferred treatment of assets not specifically recited on the face of a decree have inserted either an "*Amie*" clause[8] or an

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[7] *See* M. Willick, *Partition of Omitted Assets After Amie: Nevada Comes (Almost) Full Circle*, 7 Nev. Fam. L. Rep. No. 1, Spr.1992, at 8.

[8] IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all community property which is not listed herein shall be owned by the parties as equal co-tenants, subject to future partition upon discovery; in the event that any property has been omitted from this decree that would have been community property or otherwise jointly-held property under the law applicable as of the date of this decree, the concealing or possessory party will transfer or convey to the other party, at the other party's election:

(a) The full market value of the other party's interest on the date of this agreement, plus statutory interest through and including the date of transfer or conveyance; or

(b) The full market value of the other party's interest at the time that party discovers that he or she has an interest in such property, plus statutory interest through and including the date of transfer or conveyance; or

(c) An amount of the omitted property equal to the other party's interest therein, if it is reasonably susceptible to division.

Nothing contained herein shall alter the sole and absolute ownership of pre-marital property to which there has been no community contribution.

"anti-*Amie*" clause[9] for the purpose of guiding a reviewing court to achieve a specific result in any later litigation.

V. CONCLUSION

Pension plans are so central to any divorce including them that practitioners cannot afford to ***not*** know a great deal of the detail required to provide for their adequate disposition. It has become increasingly important for domestic relations practitioners to learn all aspects of relevant retirement plans, and to develop appropriate valuations for those assets, with thoughtful written contingencies for tax, survivorship, and related issues. Only then can counsel intelligently negotiate – or litigate – their clients' interests in such retirement benefits.

It is highly desirable for counsel to deal with pension benefits correctly during the divorce proceedings itself. The chances of uncertain, and inequitable, results, are greatly magnified when the assets are omitted from the original disposition by the court and left to the law of partition of omitted assets.

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[9] IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that except as may be otherwise expressly provided herein, each of the parties is and shall continue to be the sole and absolute owner of: (a) all real and personal property, whether tangible or intangible, and all interests in such property whether legal, beneficial, or equitable, titled separately in his or her name; (b) all rights and privileges in any such property, including, without limitation, those in any individual retirement account, trust, pension or profit-sharing plan or other employee benefit plan; and (c) all tangible or intangible personal property which he or she now or in the immediate past has in fact, used, controlled, or enjoyed as an owner would.