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The Relationship Between Spouses and with Third Parties in Management of Joint, Common and Community Assets During Marriage and During a Divorce Proceeding

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I. INTRODUCTION, HISTORICAL REVIEW, AND STATUTORY STRUCTURE

Nevada's marriage and divorce laws trace to the territorial laws of 1861, but laws providing for common ownership of property between husbands and wives were passed after Statehood, in 1865, and Nevada's formal community property scheme came into existence through the Statutes of 1873. For most of the period from Statehood to the present, the Nevada Supreme Court has complained about the incoherence of much of Nevada domestic relations law.[1]

From the time it was a territory, Nevada followed the common law tradition perhaps most succinctly framed as: "Husband and wife are one, and that one is the husband."[2] The Nevada Supreme Court held that upon marriage, at common law, "the legal existence of the wife is suspended or incorporated into that of the husband; she becomes *sub potestate viri*; is incapable of holding any personal property, or of having the use of any real estate; her earnings belong to her husband, and he is liable for her support."[3]

Even after passage of the community property statutes, the husband remained the manager of the community estate until 1975, during the debate regarding the proposed Equal Rights Amendment, when Nevada altered its statutory scheme to a system in which the parties had equal powers of management of community property. Until that time, transfers of property from a husband to a wife were presumed gifts, but the reverse was treated with suspicion, like a guardian profiting from a ward, or an attorney taking advantage of a client, because of the presumed unequal positions of the parties.[4]

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[1] Consider the following inexhaustive examples:

> A close examination of our statute touching the division of property in divorce cases enables us to realize the truth of Mr. Bishop's remarks when he says: "The popular ignorance, even in the legal profession, of the law of marriage and divorce, has, in times not long past, been so dense as almost to exclude from the legislation on this subject its proper forms. Largely the statutes contain expressions and provisions of whose meanings, and especially of whose consequential effects, their makers pretty certainly had no clear idea whatever. Instead of consistency and verbal propriety, they abound in absurdities. They are often a chaos."

Lake v. Bender, 18 Nev. 361, 403 (1884) *opn. on reh'g* (*citing* BISHOP ON MARRIAGE AND DIVORCE, vol. 1, sec. 89);

> [T]his section is hardly a model of clarity, ...

Rodgers v. Rodgers, 110 Nev. 1370, 887 P.2d 269 (1994) (addressing Nevada's main child support statute).

> Regarding the award of spousal support, the legislature has failed to set forth an objective standard for determining the appropriate amount. Absent such a standard, there appears to be a disparity in the awards for spousal support on similar facts even greater than for child support.

Wright v. Osburn, 114 Nev. 1367, 970 P.2d 1071 (1998).

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

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

[4] *See Peardon v. Peardon*, 65 Nev. 717, 201 P.2d 309 (1948). The Court held that in evaluating outright transfers of property from a wife to a husband, "equity requires that . . . in order to assure the free exercise of the wife's will and consent and the voluntary character of her act, she must be provided with independent legal counsel and advice in relation to the advisability and the fairness to her of the transaction." *Id*., 65 Nev. at 768, 201 P.2d at 334.

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

Before 1975, that "subject to" statute – NRS 123.230 – vested management and control in the husband. The sea change at that time altered the system to joint management and control, and set out a series of rules.

Oddly, the statute begins with an escape clause by which one spouse can leave all management and control to the other, and then sets out those few things that explicitly can ***not*** be given to the other spouse:

> A spouse may, by written power of attorney, give to the other the complete power to sell, convey or encumber any property held as community property or either spouse, acting alone, may manage and control community property, whether acquired before or after July 1, 1975, with the same power of disposition as the acting spouse has over his separate property, except that:
> 1. Neither spouse may devise or bequeath more than one-half of the community property.
> 2. Neither spouse may make a gift of community property without the express or implied consent of the other.
> 3. Neither spouse may sell, convey or encumber the community real property unless both join in the execution of the deed or other instrument by which the real property is sold, conveyed or encumbered, and the deed or other instrument must be acknowledged by both.
> 4. Neither spouse may purchase or contract to purchase community real property unless both join in the transaction of purchase or in the execution of the contract to purchase.
> 5. Neither spouse may create a security interest, other than a purchase money security interest as defined in NRS 104.9107, in, or sell, community household goods, furnishings or appliances unless both join in executing the security agreement or contract for sale, if any.
> 6. Neither spouse may acquire, purchase, sell, convey or encumber the assets, including real property and goodwill, of a business where both spouses participate in its management without the consent of the other. If only one spouse participates in management, he may, in the ordinary course of business, acquire, purchase, sell, convey or encumber the assets, including real property and goodwill, of the business without the consent of the nonparticipating spouse.

The language of the rules was tweaked slightly in 1977, and again in 1997 and 1999, but essentially the 1975 changes produced the community property management and control scheme still used in Nevada.

II. ASPECTS AND RAMIFICATIONS OF THE POST-1975 STATUTORY SCHEME OF JOINT MANAGEMENT AND CONTROL

A. Fiduciary Duties Between Spouses[5]

Most of the law in the field of management and control predates the 1975 amendments, and thus is essentially the concept of "what used to apply to just the husband now applies to both." This sometimes, but not always, provides rational guidelines.

For example, the prior case law provided that the spouse actively managing the community assets is deemed to be in a position of a trustee for the other spouse's share of the community property in a manner that is analogous to the trustee relationship of a partner to his partnership or an agent to his principal.[6] This is a principle that seems easily carried into the neutral, so that it can logically be applied to any financial transaction undertaken by either spouse.

In practice, such has proven true, as the inquiry made concerning expenditures made or investment losses suffered during marriage is essentially that of the "reasonably prudent investor," and reimbursement liability for foolish or malicious expenditures of community property is usually considered to arise only upon a finding of "waste."

In two cases that issued following the change of Nevada community property law from "fair and equitable" to "presumptively equal" in 1993, the Court addressed the kind of circumstances that would permit a trial court to find a "compelling reason" to divide property other than equally.

In *Lofgren v. Lofgren*,[7] the Nevada Supreme Court identified one "compelling reason" which would justify an unequal division of community property as the financial misconduct of one of the parties, such as waste or secretion of community assets in violation of court order.[8]

The next year, in *Putterman v. Putterman*,[9] the Court held that both the husband's financial misconduct in the form of his having refused to account to the court concerning earnings and other financial matters, and his lying to the court about his income, provided compelling reasons for an unequal disposition of community property.[10] The Court also noted, in dicta, that other possible "compelling reasons" for an unequal division of community property could include negligent loss

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[5] In the original outline from the seminar host, this was proposed topic (1).

[6] *Fox v. Fox*, 81 Nev. 186, 195, 401 P.2d 53 (1965).

[7] 112 Nev. 1282, 926 P.2d 296 (1996).

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

[9] 113 Nev. 606, 939 P.2d 1047 (1997).

[10] *Id.* at 609.

or destruction of community property, unauthorized gifts of community property, and even, possibly, compensation for losses occasioned by marriage and its breakup.[11]

Neither case expressly stated a standard of review beyond the conclusory finding of the absence of an "abuse of discretion." The cases indicate that there is a fairly wide scope of judicial discretion, which in turn signals that the essential inquiry is now "reasonableness."

It is difficult to be precise with the degree to which long-standing legal standards shifted once the review was made applicable to both spouses. For example, under the prior statutes, the case law declared that a husband could make voluntary dispositions of "some" of the community property without the consent of the wife, except that he could not "make excessive gifts with the intent to injure or defraud" the wife, who would have a right to sue both him and the recipient of the property if he did so.[12] The current statute appears to be harsher, stating that "neither spouse may make a gift of community property without the express or implied consent of the other,"[13] which would appear to apply to ***any*** sum of community property, no matter how small.

In practice, the pre-1975 level of discretion appears undisturbed. While *Lofgren* and *Putterman* speak to "unauthorized gifts," as a practical matter trial courts are extremely reluctant to find gifts of community property to third parties "unauthorized" in any circumstances short of outright theft or fraud, finding implied spousal consent from acquiescence or silence following virtually any degree of notice to or knowledge of the spouse that the transfers occurred. This is probably wise, since any harsher requirement of proving "consent" could create an impossible burden of proof of agreement to long-past gifts.

Notably, the fiduciary duty between spouses may survive death. Since both spouses have a "present, existing, and equal interest in community property," an issue arises when a spouse designates a third party – instead of his or her spouse – as the beneficiary of a life insurance policy paid for with community funds.

Two cases from the era when the husband had the exclusive right to control and dispose of community property, *Nixon v. Brown*,[14] and *Christensen v. Christensen*,[15] stood for the proposition that a husband had the power to insure his life in favor of his parents or other family members, and to pay premiums with community funds, so long as the community funds expended were not

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[11] *Id.* at 608.

[12] *See Nixon v. Brown*, 46 Nev. 439, 214 P. 524 (1923). These are obvious subjective calls – "some," "intent to injure," and "excessive" are all inherently subjective terms that virtually beg the questions involved in their usage, giving the trial courts considerable discretion to make findings sufficient to satisfy their individual views of equity.

[13] NRS 123.230(2).

[14] 46 Nev. 439, 214 P. 524 (1923).

[15] 91 Nev. 4, 530 P.2d 754 (1975).

"unreasonably out of proportion" to the other community assets remaining and there was no fraud committed upon the wife. In that case, the wife had no claim to either reimbursement of the premiums, or any of the policy proceeds.

Now that the statute expressly provides that "neither spouse may devise or bequeath more than one-half of the community property," the "proportionality" analysis of those earlier cases may have given way to a direct mathematical claim relating to the benefits themselves. At least where the surviving spouse claims a lack of consent to or knowledge of the beneficiary designation of others, at least one court has held that the spouse is entitled to half of life insurance policy proceeds where the policy was paid for with community funds.[16]

The contours of the resulting rights and obligations are still unclear, however, since the Nevada Supreme Court has held that a spouse ***may*** create a "tentative trust" by making a third party the recipient of the funds in a bank account upon the death of the account holder, notwithstanding a pre-existing will naming the spouse as the beneficiary of the decedent's "entire estate."[17] This would imply that, notwithstanding claims of non-consent by the surviving spouse, at least some of the community property (presumably, up to half) can still be left upon death to third parties.

B. Rights to Transfer and Limitations on Transferability of Joint, Common or Community Property; When There Is an Obligation to Obtain Consent of Both Spouses and When Each Spouse Can Act Alone; and Differences in Rights and Obligations Depending upon Status of Property as Joint, Common or Community[18]

Under the Nevada categorization, much depends on what the property is, and how it is held. For most personal property, the general rule apparently applies that "either spouse, acting alone, may manage and control community property . . . with the same power of disposition as the acting spouse has over his separate property."[19]

This is apparently not true for the creation of any kind of "security interest" against such property (with the single named exception of a "purchase-money security interest as defined in NRS

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[16] *Ennis v. United of Omaha Life Ins. Co.*, 825 F. Supp. 962 (D. Kan. 1993) (applying Nevada law, and claiming that the earlier Nevada authority is no longer valid in an era of joint management and control, and would be found so per the community property law of New Mexico, Texas, Washington, and California).

[17] *Byrd v. Lanahan*, 105 Nev. 707, 783 P.2d 426 (1989).

[18] In the original outline from the seminar host, these were proposed topics (2), (4), and (5).

[19] NRS 123.230.

104.9103"[20]). Other than that exception, creating a "security interest" requires that "both join in executing the security agreement or contract of sale, if any."[21]

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[20] 104.9103. **Purchase-money security interest: Circumstances of existence; applicability of payments; burden of establishing.**

1. In this section:

(a) "Purchase-money collateral" means goods or software that secures a purchase-money obligation incurred with respect to that collateral; and

(b) "Purchase-money obligation" means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.

2. A security interest in goods is a purchase-money security interest:

(a) To the extent that the goods are purchase-money collateral with respect to that security interest;

(b) If the security interest is in inventory that is or was purchase-money collateral, also to the extent that the security interest secures a purchase-money obligation incurred with respect to other inventory in which the secured party holds or held a purchase-money security interest; and

(c) Also to the extent that the security interest secures a purchase-money obligation incurred with respect to software in which the secured party holds or held a purchase-money security interest.

3. A security interest in software is a purchase-money security interest to the extent that the security interest also secures a purchase-money obligation incurred with respect to goods in which the secured party holds or held a purchase-money security interest if:

(a) The debtor acquired its interest in the software in an integrated transaction in which it acquired an interest in the goods; and

(b) The debtor acquired its interest in the software for the principal purpose of using the software in the goods.

4. The security interest of a consignor in goods that are the subject of a consignment is a purchase-money security interest in inventory.

5. In a transaction other than a consumer-goods transaction, if the extent to which a security interest is a purchase-money security interest depends on the application of a payment to a particular obligation, the payment must be applied:

(a) In accordance with any reasonable method of application to which the parties agree;

(b) In the absence of the parties' agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

(c) In the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, in the following order:

(1) To obligations that are not secured; and

(2) If more than one obligation is secured, to obligations secured by purchase-money security interests in the order in which those obligations were incurred.

6. In a transaction other than a consumer-goods transaction, a purchase-money security interest does not lose its status as such, even if:

(a) The purchase-money collateral also secures an obligation that is not a purchase-money obligation;

(b) Collateral that is not purchase-money collateral also secures the purchase-money obligation; or

(c) The purchase-money obligation has been renewed, refinanced, consolidated, or restructured.

7. In a transaction other than a consumer-goods transaction, a secured party claiming a purchase-money security interest has the burden of establishing the extent to which the security interest is a purchase-money security interest.

8. The limitation of the rules in subsections 5, 6 and 7 to transactions other than consumer-goods transactions leaves to the court the determination of the proper rules in consumer-goods transactions. The court may not infer from that limitation the nature of the proper rule in consumer-goods transactions and may continue to apply established approaches. [1999, ch. 104, § 4, p. 291.]

[21] NRS 123.230(5).

If the property – apparently real or personal – is owned through a business in which either spouse "participates in the management," who can do what depends on the status of the spouse with respect to the business. If only one spouse is involved in the management of the business, that spouse can buy or sell any asset of the business without the consent of the nonparticipating spouse "in the ordinary course of business." If ***both*** spouses "participate in management" of the business, however, neither can buy or sell any assets of the business "without the consent of the other."[22]

As to ***non***-business real property, the manner in which title is held is of particular importance. Spouses are prohibited from selling, conveying, or encumbering the ***community*** real property "unless both join in the execution of the deed or other instrument by which the real property is sold, conveyed or encumbered and the deed or other instrument must be acknowledged by both."[23]

However, those restrictions do not apply to real property held in ***joint tenancy***, which may be transferred or encumbered by one spouse without the knowledge or consent of the other joint tenant spouse. If the property is held in ***joint tenancy***, therefore, NRS 123.230 is usually inapplicable,[24] with the critical exception of ***homesteaded*** joint tenancy property, which is effectively transmuted into community property, at least insofar as neither party may alienate his or her interest in the property without the consent of the other.[25]

When real property is owned by a husband and wife as joint tenants, the deed raises a rebuttable presumption that the property was held in joint tenancy and that the parties ***intended*** to own the property as joint tenants.[26] The courts have been pretty variable in deciding when the presumption created by title is overcome, however.

Where the parties upon divorce both referenced real estate titled as joint tenancy property as "community property," and it was subsequently discovered that the husband had created an encumbrance upon the real estate for members of his family, the Court considered the presumption overcome and quieted title in the wife, finding that the property had actually been held as community property, and that she had therefore received it free and clear of the lien recorded by husband's relatives.[27] In other circumstances, however, the Court has ruled that the opinion of either spouse

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[22] NRS 123.230(6).

[23] NRS 123.230(3).

[24] *Mullikin v. Jones*, 71 Nev. 14, 278 P.2d 876 (1955); *Allen v. Hernon*, 74 Nev. 238, 328 P.2d 301 (1958).

[25] *Besnilian v. Wilkinson*, 117 Nev. 519, 25 P.3d 187 (2001). The Court reached this conclusion by looking at Article Four, Section 30 of the Nevada Constitution, which provides that a homestead "shall not be alienated without the joint consent of husband and wife when that relation exists."

[26] *Peters v. Peters*, 92 Nev. 687, 557 P.2d 713 (1976); *Neumann v. McMillan*, 97 Nev. 340, 629 P.2d 1214 (1981).

[27] *Neumann v. McMillan*, *supra*.

is "of no weight" in determining whether property is community or separate.[28] In yet other circumstances, the Court has "recognized" the transmutation of community property into separate property without a writing, under the doctrine of estoppel.[29]

It seems pretty clear that these various lines of authority are somewhat contradictory, and that the Nevada law governing the rights of spouses to transfer joint, common, or community property to or from third parties must seen as somewhat uncertain.

C. Rights to Incur and Limitations on Incurrence of Debts for Which the Other Spouse Is Liable; Whom must a Creditor Sue, When and How, in Order to Obtain a Valid Judgment Against Both Spouses or Enforceable Against Joint, Common and Community Assets; and Against Which Spouse and Against What Property Will a Judgment Be Collectible, Before Divorce, and after Divorce[30]

As a theoretical matter, the debts brought into a marriage by a spouse are the responsibility of that spouse, to be paid with premarital funds, and with that spouse's share of any post-marital income. NRS 123.050 provides:

> Neither the separate property of a spouse nor his share of the community property is liable for the debts of the other spouse contracted before the marriage.

Nevada law does not, however, have an explicit "definition" of either separate debt or community debt, although both are created by implication under the above provision. The Nevada Supreme Court stated in dicta that it considered the statute to be in accord with federal tax law and California Family Code Section 910, in that half of a spouse's post-marital earnings are liable for that spouse's premarital debts.[31] The other half belongs to the other spouse and is not available for those debts.

Some courts have not honored this protection of the spousal share of a worker's wages. In 1962, a federal court held that the statute was no bar to a collection action by the husband's prior spouse against the community property the husband shared with his new wife, at least to the extent of his

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[28] *Verheyden v. Verheyden*, 104 Nev. 342, 757 P.2d 1328 (1988) (transmutation of community property to separate property requires an agreement in writing between the spouses, and that "the mere oral expression by a spouse that [property] purchased during the marriage is a 'gift' to the other spouse" did not overcome the community property presumption); *Bank v. Milisich*, 52 Nev. 178, 283 P. 913 (1930).

[29] *Anderson v. Anderson*, 107 Nev. 570, 816 P.2d 463 (1991).

[30] In the original outline from the seminar host, these were proposed topics (3), (10), and (11).

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

earnings.[32] In 1992, however, the Nevada Supreme Court refused to impute half of a second spouse's income to a payor of child support in setting the amount of current child support due.[33] It is uncertain how far this consideration for the rights of a second spouse will go, however, since the Court has also expressed at least some willingness to invade legal protections for second spouses when necessary to provide support to children of a first marriage.

Certain kinds of creditors are given an effective "super-priority" that permits collection against both spouses, during marriage or even after divorce, despite legal defenses that would stop other creditors. While a homestead is generally a solid defense against execution against a home – even blocking the parties to a current marriage from selling their respective interests in it[34] – it may provide no defense at all against a former spouse seeking to enforce a child or spousal support order that has remained unsatisfied.

In *Breedlove v. Breedlove*,[35] the Nevada Supreme Court held that homestead laws were designed for the purpose of protecting families, a purpose not served by allowing it to be used to block collection of a support judgment. Adopting a "balancing test" between the earlier and later families, the Court noted that the father owed his first family a duty of support long before the second marriage arose, and he entered into the second marriage aware of the earlier duty, and allowed the earlier former spouse to execute against the house.

Some years later, this rationale was applied to permit a first ex-wife to execute against a homesteaded house owned solely by a second ex-wife.[36] The second ex-wife had divorced the husband as well, but she was to pay him money for his share of equity in the home, and the first ex-wife had recorded a child support arrears judgment. Instead of paying the ex-husband, the second ex-wife gave him free rent in the home, and paid certain of his bills, so that he ultimately quit-claimed his interest in the house to her without being paid for his share of the equity. Finding that the second ex-wife had acted in such a way as to prevent the first ex-wife from collecting on her

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[32] *Greear v. Greear*, 303 F.2d 893 (9th Cir. 1962). While not entirely clear, the holding seemed to go to the ***entirety*** of the husband's community property income, and not just to half.

[33] *Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992); *see also Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994).

[34] *See* discussion above of legal effects of a married couple filing a homestead exemption in *Besnilian v. Wilkinson*, 117 Nev. 519, 25 P.3d 187 (2001).

[35] 100 Nev. 606, 691 P.2d 426 (1984).

[36] *Phillips v. Morrow*, 104 Nev. 384, 760 P.2d 115 (1988). Notably, this is the same result, and essential reasoning, followed by the Ninth Circuit a quarter century earlier in *Greear v. Greear*, 303 F.2d 893 (9th Cir. 1962) ("such an obligation [alimony to a former spouse], founded in the marital relationship and not terminated by divorce, must remain a charge upon the earnings of the obligor until its termination, irrespective of whether a new community is formed").

support judgment, the Court applied the *Breedlove* balancing test and determined that the second wife's homestead would not bar the first wife's execution against the house.

These cases illustrate that the supposed freedom of a spouse from liability for "any" premarital debts of the other under NRS 123.050 is not absolute, and under certain circumstances, both the spouse's community property interest, and even that spouse's separate property, could be found at risk for the premarital debts of the debt-incurring spouse.

Few restrictions on the ability of a spouse to incur debt during marriage are enforceable. The portions of NRS 123.230 explicitly addressing limitations on one party incurring debt alone are:

> . . . .
> 3. Neither spouse may . . . encumber the community real property unless both join in the execution of the deed or other instrument by which the real property is . . . encumbered, and the deed or other instrument must be acknowledged by both.
> 4. Neither spouse may purchase or contract to purchase community real property unless both join in the transaction of purchase or in the execution of the contract to purchase.
> . . . .
> 6. Neither spouse may acquire, purchase, sell, convey or encumber the assets, including real property and goodwill, of a business where both spouses participate in its management without the consent of the other. In only one spouse participates in management, he may, in the ordinary course of business, acquire, purchase, sell, convey or encumber the assets, including real property and goodwill, of the business without the consent of the nonparticipating spouse.

Purchases on credit present specific problems. There is, of course, the general presumption that ***all*** property acquired during marriage is community property;[37] the conflict is created by the fact that in Nevada, the rents, profits, and issues of separate property remain separate, just as the fruits of community property are community.[38]

The burden is generally on the spouse suggesting that property is separate to show that it was acquired by use of separate funds or separate credit.[39] Case law has expressed the burden of proof as one of clear and certain evidence that a lender or vendor ***primarily*** relied on that spouse's separate personal property to secure the credit – rather than on that spouse's earning capacity – to establish that loan proceeds are separate property.[40] This is known as the "intent of the lender" test.

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[37] NRS 123.220; *Peters v. Peters*, 92 Nev. 687, 557 P.2d 713 (1976).

[38] NRS 123.130.

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

[40] *See Schulman v. Schulman*, 92 Nev. 707, 716-17, 558 P.2d 525, 530-31 (1976).

Property purchased with such a separate loan remains separate property thereafter, absent transmutation.[41] Furthermore, the fact that both spouses sign a mortgage or note does not transform the separate property into community property.[42]

Creditors thus need to have the signature of both parties on an application for credit in order pursue collection of the credit debt from both parties. There do not appear to be any published cases dealing with limitations on garnishment against commingled assets (such as joint bank accounts). As a theoretical matter, creditors would appear to be restricted to collection against the person (or property of the person) incurring the obligation, either during the marriage, or after the divorce.[43] As a practical matter, this restriction appears to provide no barrier; banks do not typically care about the source of money in accounts being garnished, but only the name on the account.

One notable exception – by which one spouse can create a debt that becomes an obligation of the other spouse as a matter of law – is through "the doctrine of necessaries," although the stated statutory grounds for when husbands' property is liable for the support of wives is different from that in which wives' property is liable for the support of husbands. NRS 123.090 provides:

> If the husband neglects to make adequate provision for the support of his wife, any other person may in good faith supply her with articles necessary for her support, and recover the reasonable value thereof from the husband. The separate property of the husband is liable for the cost of such necessities if the community property of the spouses is not sufficient to satisfy such debt.

The only appellate case discussing the 1873 statute for a husband's payment of "necessaries" for a wife indicates that the terms "necessary for her support" and "necessities" will be construed somewhat closely. In *Ferreira v. P.C.H. Inc.*,[44] a husband was found ***not*** liable for his wife's car rental for "failure to provide adequately for her support" where there was no conversion of the automobile and no proof of community purpose in its rental.

NRS 123.110 states a different standard for when husbands must be supported by wives:

> The wife must support the husband out of her separate property when he has no separate property and they have no community property and he, from infirmity, is not able or competent to support himself.

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[41] *Id*., 92 Nev. at 716 n.9, 558 P.2d at 531 n.9.

[42] *Id*.; *see also Dimick v. Dimick*, 112 Nev. 402, 915 P.2d 254 (1996) (husband's signature of both spouses' names on a trade-out purchase agreement, and both parties' signatures on "vesting instructions" that would have made them joint tenants of the property at the close of escrow, did not actually transfer any property interest to the wife).

[43] At least when the creditor is someone other than a former spouse of one of the parties to the marriage, as in *Greear v. Greear*, *supra*, 303 F.2d 893 (9th Cir. 1962).

[44] 105 Nev. 305, 774 P.2d 1041 (1989).

The statute regarding a wife's payment of "necessaries" for a husband has been interpreted to create a duty of support that ran to the benefit of creditors who supplied necessaries of life to an infirm, impecunious husband. A hospital was therefore able to reach the separate property of a woman whose spouse had died at the hospital leaving no community or separate property.[45]

In other words, men, but not women, have an implied duty of self-support when they are physically capable of doing so. While the phrasing of both statutes seems to contemplate exhaustion of ***both*** halves of any community property before the separate property of either spouse can be attached, going after the separate property of a wife apparently involves additional necessary proofs regarding the condition of the husband.

Why the spouse requiring assistance is in need may be relevant. NRS 123.100, which was enacted originally in 1873, provides:

> A husband or wife abandoned by his spouse is not liable for the support of the abandoning spouse until such spouse offers to return unless the misconduct of the husband or wife justified the abandonment.

The enactment regarding non-support for abandoning spouses was construed only once, in 1929, when the Nevada Supreme Court held that a wife should not have been granted a divorce on the ground of the failure of her husband to support her, when she had ordered him from the home and refused to permit him to live with her, since she had "waived her right to support" by doing so.[46] Thus, her debts accrued in the interim were apparently not his responsibility.

If a debt is incurred during marriage and owed by both spouses, nothing in the divorce decree prevents the creditor from chasing whichever spouse it chooses for payment.[47] Of course, where such a creditor chases one spouse for a debt allocated to the other upon divorce, the spouse saddled with the other's adjudicated debt has recourse to the divorce courts to obtain reimbursement.[48] Thus, where one spouse is ordered to pay a marital debt, but instead discharges it in bankruptcy, the other spouse still has a viable claim in Family Court.[49]

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[45] *Swogger v. Sunrise Hosp., Inc.*, 88 Nev. 300, 496 P.2d 751 (1972).

[46] *Smith v. Smith*, 51 Nev. 271, 274 P. 9 (1929).

[47] *Marine Midland Bank v. Monroe*, 104 Nev. 307, 756 P.2d 1193 (1988).

[48] *See*, *e.g.*, *Putterman v. Putterman*, *supra*, 113 Nev. 606, 939 P.2d 1047 (1997) (upholding the trial court's unequal division of community property for, among other things, the husband's violation of a joint preliminary injunction by charging several thousands of dollars in credit card debt after the separation, which the wife paid).

[49] *Martin v. Martin*, 108 Nev. 384, 832 P.2d 390 (1992) (where no alimony was awarded at trial in August, 1988, but the husband was ordered to pay child support and two Visa accounts, the property, debt, and alimony terms were inter-related, so that husband's discharge of the debts in bankruptcy permitted the former wife to file a motion for reimbursement by way of spousal support, because the debt the husband was supposed to pay was "characterized as being

Just the statement in a divorce decree that a given obligation is to be paid "from the proceeds of the sale" of a community property asset "implies" that the debt was community debt, and where one spouse ends up paying the entirety of the obligation, gives rise to a post-divorce claim for reimbursement.[50] Thus, the characterization of property may be determinative of the obligation of two divorcing parties to pay any debt connected to the property. The reverse is also sometimes true – courts can look to who owes debt connected to property to determine whether it has a separate or community property character.[51]

D. Bankruptcy Issues[52]

Nevada has a significant number and variety of cases dealing with management and control of community property, between spouses (and ex-spouses) and in their interactions with third party creditors, where bankruptcy is thrown into the mix.

When one spouse files for a chapter seven bankruptcy during marriage, the filing protects the other. In *Norwest Financial v. Lawver*,[53] a husband and wife had jointly signed a promissory note to Norwest Financial, secured by household goods, and providing for liability of both. Only the husband filed for bankruptcy, and turned over to bankruptcy trustee all his separate property and all of the couple's non-exempt community property per 11 U.S.C. § 541(a)(2). In addition to filing a creditor's claim, Norwest sought relief against the wife for the unpaid balance on the note.

Summary judgment was granted to the wife, and the Nevada Supreme Court upheld the ruling, holding that 11 U.S.C. § 524(a)(3) creates an injunction against the commencement of an action against a debtor's spouse to collect community property acquired after the commencement of the debtor's bankruptcy. Since community property passes into the bankruptcy estate of the filing spouse, in community property states there is no need for both spouses to file unless the nondebtor spouse has substantial separate debt. The only question is whether the debt is "separate" or "community" as to the non-debtor spouse, which depends upon the intent of the lender in granting the loan. Here, the loan was found to be clearly to the community, so the wife's wages, after husband's bankruptcy filing, were immune from attachment by the lender.

Divorce changes both the parties' positions, and the equities. It seems pretty well established in Nevada that bankruptcy filings give rise to jurisdiction in Family Court to reconsider support orders.

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in the nature of alimony, maintenance and support").

[50] *Fuller v. Fuller*, 106 Nev. 404, 793 P.2d 1334 (1990).

[51] *See Schmanski v. Schmanski*, 115 Nev. 247, 984 P.2d 752 (1999) (the Court attempted to derive the community or separate character of property, in part, based on a characterization of the debt attached to that property).

[52] In the original outline from the seminar host, this was proposed topic (9).

[53] 109 Nev. 242, 849 P.2d 324 (1993).

As discussed above, where one ex-spouse files for bankruptcy after divorce, and discharges debts allocated to him in the divorce decree, the burdened spouse has recourse to the Family Court to seek reimbursement by way of spousal support.[54]

In *Siragusa v. Siragusa*,[55] the doctor husband filed bankruptcy, wiping out $1,300,000 in property payment arrears owed to the wife. The district court ordered increased alimony on a new schedule to pay off original judgment, which was affirmed on appeal. The Court joined the majority of other courts elsewhere in holding that discharge of a property settlement obligation in bankruptcy may be taken into account in determining whether the parties' circumstances have changed sufficiently to justify a modification of alimony, although it described the question as "a close one, and two strong competing interests must be weighed." The Court looked to the supremacy clause but found no preemption of state law permitting alimony modification "to compensate the wife for the discharged obligation," and found that consideration of post-bankruptcy circumstances was not antagonistic to the federal "fresh start" policy of bankruptcy relief.

It appears that an intervening bankruptcy has no effect on the liability of the non-custodian for child support arrears, or the ability of the custodian to collect them. In *In Re Anders*,[56] the court held that a former wife who declared chapter seven bankruptcy could retain a child support arrears judgment (granted after she filed bankruptcy) despite the bankruptcy. The court held that child support "is a property interest belonging to the child" and the custodian "merely has a right to enforce the child's property interest." The 11 U.S.C. § 541(b) exception from the property of the bankruptcy estate for "powers which are exercisable solely for the benefit of another" apply to child support by analogy.

A bankruptcy can cause alterations in Family Court orders pertaining to property and debt allocations, as well as support. In *Allen v. Allen*,[57] the husband and wife had entered into an oral property settlement; the wife waived child support, and the husband agreed to pay certain debts and also pay $16,250 to the wife "to equalize the division of community property." The agreement was made during a "settlement conference" held by the district court judge, but was not reduced to writing for a year, when the court entered a divorce decree "nunc pro tunc" adopting the agreement.

In the interim, the husband had filed bankruptcy, and was "released" from most of the financial obligations. The wife claimed that the husband used the bankruptcy to defraud her out of her share of the community property and that because of the bankruptcy there was a failure to equalize the division of community property as intended. The wife moved to set aside the decree, which was denied by the district court as "barred by federal law."

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[54] *See* discussion above of *Martin v. Martin*, *supra*, 108 Nev. 384, 832 P.2d 390 (1992).

[55] 108 Nev. 987, 843 P.2d 807 (1992).

[56] No. BK-S-91-24783-LBR (Bk. Ct., D. Nev., Mar. 10, 1993).

[57] 112 Nev. 1230, 925 P.2d 503 (1996).

The Supreme Court, noting that the district court knew all these facts, expressed no understanding of why the district court entered the decree in the first place, but held that in any event, it was error to refuse to set it aside. Noting its holding in *Siragusa*, the Court again held that the lower court could consider the effect of the husband's bankruptcy upon the community and the rights of the parties, "but this is not to say the state court would be interfering in any way with the bankruptcy court's decree." The Court expressly rejected the husband's assertion that the wife's fraud claim was waived under 11 U.S.C. § 524 because she failed to file a complaint in the bankruptcy action.

Finally, the Court concluded that even aside from the question of fraud, the decree entered was inherently unfair and should be set aside: "Under no circumstances, bankruptcy or no bankruptcy, should one party to a divorce be allowed to take all of the benefits of the divorce settlement and leave the other party at the disadvantage suffered by the wife in the present case."

Although some of these comments appear to be *dicta*, *Allen* provides authority for the proposition that whenever a bankruptcy has "an effect upon the community and the rights of the parties," a motion may be entertained to rectify that effect. The respective rights and obligations between and among spouses and third party creditors may be altered significantly by a bankruptcy filing at any time during the marriage or after divorce.

E. Impact of Investments in Partnerships, Corporations or LLCs[58]

There does not appear to be any Nevada authority directly bearing on the interaction between community property management and control issues and forms of corporate ownership, beyond the statutory distinctions discussed above altering required consents by spouses depending upon whether one or both is involved in the management of the business.

F. Fraudulent Conveyances Between Spouses or Between One or Both Spouses and a Third-Party Creditor[59]

As discussed above, the Nevada courts will go to some efforts to prevent inter-spousal fraud, even if that requires recharacterizing the form of ownership of property,[60] expansively interpreting the

[58] In the original outline from the seminar host, this was proposed topic (6).

[59] In the original outline from the seminar host, this was proposed topic (7).

[60] *Neumann v. McMillan*, *supra*.

homestead laws[61] – or holding them inapplicable,[62] or generously interpreting Nevada's support statutes.[63]

The bankruptcy opinions indicate a somewhat less protective attitude toward businesses that find themselves frustrated by the community property form of ownership and control of marital assets. There are some protections for third parties and business entities unsure of who owns what. NRS 123.140 provides a method by which a spouse may record a written inventory of his or her separate property. The recordation of such an inventory serves as notice to the world of the spouse's title.[64]

Pursuant to NRS 123.160, the ***absence*** of such an inventory "is prima facie evidence, as between such married person and purchasers in good faith and for a valuable consideration from the other spouse, that the property of which no inventory has been so filed . . . is not such person's separate property." However, failure of a spouse to prepare and record such a written inventory does not automatically result in forfeiture of the property's status as separate; rather, it may be used as evidence to be considered in determining whether the property is separate or community.[65]

Overall, while Nevada has no separately-identifiable body of "community property management and control law regarding fraudulent conveyances," it is probably fair to conclude that on a case by case basis, the courts go to substantial lengths to prevent, or correct, fraud when it is identified.

G. Use of Prenuptial and Post-nuptial Agreements to Limit Creditor Rights[66]

Nevada is a Uniform Premarital Agreements Act State, and the general rules and requirements concerning such agreements are well-enough known to not require repetition here.[67] A few Nevada specifics are worth noting.

First, the dual management and control statute, on its face, explicitly gives either spouse the ability "by written power of attorney," to have complete power to sell, convey or encumber any community

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[61] *Besnilian v. Wilkinson*, *supra*.

[62] *Breedlove v. Breedlove*, *supra*.

[63] *See Martin v. Martin*, *supra*; *Siragusa v. Siragusa*, *supra*.

[64] NRS 123.150.

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

[66] In the original outline from the seminar host, this was proposed topic (8).

[67] *See*, *e.g.*, *Matrimonial Agreements: Requirements for Validity*, Nevada submission, 14th Annual Symposium of the Family Law Council of Community Property States, New Orleans, LA, March 14 - 17, 2002.

property.[68] Such an agreement, however, would expand, rather than limit, the rights of a creditor to do business with one of two spouses.

Nevada does have a couple of peculiar statutes, tracing to original 1873 enactments. One, modified in 1973, allows either spouse to give the other "written authority to . . . appropriate to [his or her] own use [his or her] earnings," upon which those earnings are the separate property of the earning spouse."[69]

The Nevada Supreme Court has held that the statute creates an "exception" to the rule that earnings during marriage are community property,[70] but the statute comes from the day when all of the wife's earnings automatically reverted to the husband's control absent such an agreement, and it has not been the subject of any mention in the case law since well before it was amended to become gender neutral. Whether and under what circumstances it can be used to circumvent the results otherwise seen in actions between creditors and one or both spouses remains to be seen.

The other statute worth mentioning here is NRS 123.140, under which "a full and complete inventory of the separate property of a married person" can be recorded, which provides notice to all potential purchasers of such property as to its character.[71]

H. Which Spouse or Third Party Bears the Burden of Proof[72]

In a case from the time period where the husband was the manager of the community property, the Nevada Supreme Court held that the managing spouse must keep the community and separate property segregated. If community and separate property becomes intermingled, it is the managing spouse's burden to prove the separate nature of the property so claimed. Absent such proof, the entire property will be presumed to be community.[73]

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[68] NRS 123.230.

[69] NRS 123.190.

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

[71] *See Bowler v. Leonard*, 75 Nev. 32, 333 P.2d 989 (1959) (failure to file such an inventory was not proof of the entitlement of the husband to sell the property, but was "*prima facie* evidence as between the wife and a *bona fide* purchaser from the husband" that the property was not the wife's separate property).

[72] In the original outline from the seminar host, this was proposed topic (12).

[73] *Fox v. Fox*, 81 Nev. 186, 195, 401 P.2d 53 (1965).

This is one of those rules that has not proven problematic to make gender neutral, and in property trials, the burden is on the spouse asserting a separate property interest to prove that it exists, with the result being that the property is found to be community if the proof is insufficient.[74]

Otherwise, Nevada case law appears unremarkable in that, generally, the burden is on the party going forward to make out a *prima facie* case for any legal proposition asserted.

III. CONCLUSION

Nevada was perhaps a bit tardy in adopting joint management and control of community property, not getting to that conclusion until 1975. Adoption of the modified management scheme has proceeded pretty smoothly since then, however, requiring little in the way of statutory fine-tuning or case law adaptation to recognition of essential gender neutrality (the few historical artifacts and oddities discussed above notwithstanding).

While the entirety of the Nevada legal code pertaining to Family Law could use a restatement and recodification (for all the reasons commented on by the Nevada Supreme Court for more than the past hundred years), in the area of management and control of community property, the law appears to be mostly stable, and adequate to the modern world.

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[74] *See*, *e.g.*, *Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990).