

PARTITION ACTIONS AND “FRAUD UPON THE COURT”

by

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

Most “omitted pension” cases are brought under NRCP 60(b), which largely 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 injunction 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. The Evolving Concept of “Fraud Upon the Court”

Absent a reservation of jurisdiction over property rights, the property distribution in a decree is final after six months.¹ However, the six-month limitation will not bar a motion to set aside the property distribution where fraud was committed upon the court.² Fraud upon the court consists of “such conduct as prevents a real trial upon the issues involved.”³ What those terms mean, and what actions constitute satisfaction of them, has changed a great deal over the years.

¹ *Kramer v. Kramer*, 96 Nev. 759, 762, 616 P.2d 395, 397 (1980).

² *See Murphy v. Murphy*, 103 Nev. 185, 186, 734 P.2d 738, 739 (1987).

³ *Kramer*, 96 Nev. at 762, 616 P.2d at 397 (quoting *Savage v. Salzmann*, 88 Nev. 193, 195, 495 P.2d 367, 368 (1972)).

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.⁴

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.”⁵

In *Occhiuto v. Occhiuto*,⁶ 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)”.

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).

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:

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).

⁴ See *Calvert v. Calvert*, 61 Nev. 168, 122 P.2d 426 (1942); *Mazour v. Mazour*, 64 Nev. 245, 180 P.2d 103 (1947).

⁵ *Murphy v. Murphy*, 65 Nev. 264, 271, 193 P.2d 850, 854 (1948).

⁶ 97 Nev. 143, 625 P.2d 568 (1981).

“[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).

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 NRCF 60(b) motions appeared in a very short opinion entitled *Smith v. Smith*.⁷ 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*⁸ (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

⁷ 102 Nev. 110, 716 P.2d 229 (1986).

⁸ 103 Nev. 185, 734 P.2d 738 (1987).

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.⁹

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.”¹⁰

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.”¹¹

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.”¹²

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

⁹ 103 Nev. at 186, 734 P.2d at 739.

¹⁰ *Id.*

¹¹ *Id.*

¹² *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).

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.¹³

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*,¹⁴ 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.¹⁵

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.¹⁶ The Court rejected that distinction, noting the 1981 amendment

¹³ *Petersen v. Petersen*, 105 Nev. 133, 771 P.2d 159 (1989).

¹⁴ 108 Nev. 358, 832 P.2d 380 (1992).

¹⁵ 108 Nev. at 361-62, 832 P.2d at 382.

¹⁶ 108 Nev. at 362, 832 P.2d at 382-83.

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.¹⁷ The case was remanded for a redistribution of the property.

The same year, the Court decided *Blanchard v. Blanchard*,¹⁸ 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 NRC 60(b), much of the reasoning was similar to the cases explicitly decided under that rule.¹⁹ The valuations as to the assets had been fixed by the husband and relied on by the wife.²⁰ The wife filed suit on the basis of intentional misrepresentations. Reversing the lower court’s granting of the husband’s motion to dismiss pursuant to NRC 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.²¹

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.²² Justifiable reliance requires that the false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course.²³ The

¹⁷ 108 Nev. at 362 n.6, 832 P.2d at 383 n.6.

¹⁸ 108 Nev. 908, 839 P.2d 1320 (1992).

¹⁹ *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).

²⁰ 108 Nev. at 909, 839 P.2d at 1321.

²¹ 108 Nev. at 911-12, 839 P.2d at 1322-23.

²² 108 Nev. at 910-11, 839 P.2d at 1322.

²³ *Id.*

Court added that “misrepresentation” may consist of a representation that is misleading because it partially suppresses or conceals information.²⁴

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.”²⁵ The Court added that there is no duty to make a “reasonable investigation” unless the recipient has information which would serve as a danger 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.²⁶

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.²⁷ 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.²⁸

B. The Nevada Law Concerning Omitted Assets

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*,²⁹ 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.”

²⁴ *Id.*

²⁵ 108 Nev. at 912, 839 P.2d at 1323.

²⁶ *Id.*

²⁷ *Id.*

²⁸ 108 Nev. at 913, 839 P.2d at 1323.

²⁹ 233 F. 756 (D. Nev. 1916).

In *Bank v. Wolff*,³⁰ 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.³¹

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*³² 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.³³

³⁰ 66 Nev. 51, 202 P.2d 878 (1949).

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

³² 85 Nev. 50, 450 P.2d 156 (1969).

³³ See *Spilsbury v. Spilsbury*, 92 Nev. 464, 465-66, 553 P.2d 421, 422 (1976).

One hard-to-categorize case is *Applebaum v. Applebaum*.³⁴ 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*,³⁵ and that in either case, from that increase the amounts drawn to meet family expenses had to be subtracted, under *Schulman v. Schulman*.³⁶ 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."³⁷

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."³⁸

*Williams v. Waldman*³⁹ 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

³⁴ 93 Nev. 382, 566 P.2d 85 (1977).

³⁵ 89 Nev. 244, 510 P.2d 625 (1973).

³⁶ 92 Nev. 707, 558 P.2d 525 (1976), citing *Applebaum*, 93 Nev. at 385-86, 566 P.2d at 88.

³⁷ 93 Nev. at 386, 566 P.2d at 88.

³⁸ 93 Nev. at 384-85, 566 P.2d at 87.

³⁹ 108 Nev. 466, 836 P.2d 614 (1992).

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.⁴⁰

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.”⁴¹

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.”⁴² 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.”⁴³ 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.⁴⁴

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

⁴⁰ 108 Nev. at 469, 836 P.2d at 617.

⁴¹ 108 Nev. at 471-74, 836 P.2d at 617-19.

⁴² 108 Nev. at 472, 836 P.2d at 618.

⁴³ 108 Nev. at 472 n.4, 836 P.2d at 618 n.4.

⁴⁴ *Id.*

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.”⁴⁵ Citing *Amie, infra*, 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.⁴⁶

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.

C. Nevada Law as to Omitted Pension Benefits

*McCarroll v. McCarroll*⁴⁷ 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.⁴⁸

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.”⁴⁹ The Nevada Supreme Court affirmed, stating only: “We perceive no error.”⁵⁰ The only citation of authority provided for upholding the

⁴⁵ 108 Nev. at 473 n.5, 836 P.2d at 619 n.5.

⁴⁶ 108 Nev. at 474, 836 P.2d at 619.

⁴⁷ 96 Nev. 455, 611 P.2d 205 (1980).

⁴⁸ 96 Nev. at 456, 611 P.2d at 205.

⁴⁹ *Id.*

⁵⁰ *Id.*

lower court's opinion was *Colby v. Colby*.⁵¹ *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*,⁵² which was concerned with distinguishing intrinsic and extrinsic fraud.

*Tomlinson v. Tomlinson*⁵³ 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 Act⁵⁴ had nullified *McCarty v. McCarty*,⁵⁵ 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."⁵⁶

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.⁵⁷ 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*.⁵⁸ In the intervening time, *Tomlinson* had been legislatively overruled by NRS 125.161, passed in

⁵¹ 78 Nev. 150, 369 P.2d 1019 (1962).

⁵² 65 Nev. 264, 193 P.2d 850 (1948).

⁵³ 102 Nev. 652, 729 P.2d 1363 (1986).

⁵⁴ 10 U.S.C. § 1408 (1982), discussed in the military section of these materials.

⁵⁵ 453 U.S. 210 (1981).

⁵⁶ 102 Nev. at 653, 729 P.2d at 1364.

⁵⁷ 102 Nev. at 654, 729 P.2d 1364.

⁵⁸ 105 Nev. 384, 775 P.2d 703 (1989).

1987, but repealed in 1989. *Taylor* was a consolidated case involving two sets of former spouses whose divorce decrees omitted military retirement benefits.⁵⁹

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. Instead, and in apparent contradiction of both of those holdings, 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.”⁶⁰ 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.”⁶¹

The next year, however, the Court took up *Amie v. Amie*.⁶² 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.”⁶³

⁵⁹ 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.

⁶⁰ 105 Nev. at 387, 775 P.2d at 704-705.

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

⁶² 106 Nev. 541, 796 P.2d 233 (1990).

⁶³ 106 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.”⁶⁴ 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.⁶⁵

The Court then reaffirmed its adherence to *Nevada Industrial Dev. v. Benedetti*,⁶⁶ 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.”⁶⁷

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*.”⁶⁸ 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.”⁶⁹

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.⁷⁰

⁶⁴ 106 Nev. at 542-43, 796 P.2d at 234.

⁶⁵ 106 Nev. at 542, 796 P.2d at 234.

⁶⁶ 103 Nev. 360, 741 P.2d 802 (1987).

⁶⁷ *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).

⁶⁸ 106 Nev. at 543, 796 P.2d at 235.

⁶⁹ *Id.*

⁷⁰ 106 Nev. at 542, 796 P.2d at 234.

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

D. 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.⁷¹ 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 the *Amie* opinion 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."⁷² 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 pension⁷³ 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

⁷¹ See, e.g., *Henn v. Henn*, 605 P.2d 10 (Cal. 1980); *Amie v. Amie*, *supra*.

⁷² 96 Nev. at 456, 611 P.2d 205.

⁷³ The *Amie* opinion erroneously refers to this asset as "prison benefits." 106 Nev. at 542.

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:

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.⁷⁴

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*,⁷⁵ 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.”⁷⁶

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.

⁷⁴ 106 Nev. at 542, 796 P.2d at 234.

⁷⁵ 720 P.2d 921 (Cal. 1986), *cert., denied*, 479 U.S. 1012 (1987).

⁷⁶ See M. Willick, *Res judicata in Nevada Divorce Law: An Invitation to Fraud*, 4 Nev. Fam. L. Rep. No. 2, Spr., 1989, at 1.

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* – the Court’s own holdings in *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* were clearly community property. The *Taylor* court’s requirement of finding “extrinsic fraud” before allowing partition was nowhere to be seen in the *Amie* decision – issued just a few months later, but 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*, which *Amie* cited and relied upon. 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,⁷⁷ but the absence of acknowledgment of virtually simultaneous, contradictory opinions is troubling.

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.⁷⁸ 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.

⁷⁷ 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.

⁷⁸ See, e.g., *Lesley v. Lesley*, 113 Nev. 727, 941 P.2d 451 (1997).

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*” clause⁷⁹ or an “anti-*Amie*” clause⁸⁰ for the purpose of guiding a reviewing court to achieve a specific result in any later litigation.

II. CONCLUSION

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, or the variable definition of “fraud on the court.”

Nevada law on both subjects is a bit of a mess, and is greatly in need of an intellectually honest, comprehensive review and reconciliation of the contradictory cases to date.

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⁷⁹ 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.

⁸⁰ 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.