PARTITION OF OMITTED ASSETS AFTER *AMIE*: NEVADA COMES (ALMOST) FULL CIRCLE[1]

by Marshal S. Willick, Esq.

The Nevada Supreme Court has reaffirmed its forty-year old holding authorizing the partition in a post-divorce action of community property assets not divided at the time of divorce. In doing so, however, the court largely disregarded its contradictory holdings of the past eleven years, leaving the subject area open to considerable uncertainty.

In the 1949 case of *Bank v. Wolff,* the Nevada Supreme Court held:

> In the absence of any reference thereto in the decree, the parties to the suit [for divorce] became tenants in common of the community property . . . this right must be enforced in an independent action.[2]

The *Wolff* case would not be substantively cited for another forty years.[3] In the meantime, the Court decided a series of cases brought by former spouses seeking to divide pensions that had been omitted from divorce decrees.[4] In those cases, however, the court refused to apply the *Wolff* reasoning or holding. Instead, the court repeatedly maintained that the principle of res judicata silently awarded retirement benefits to the spouse in whose name the benefits accrued unless the divorce court stated otherwise.

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[1] This article was originally published in Vol. 7, No. 1 of the Nevada Family Law Report (Spr., 1992). Certain typographical and other errors have been corrected here, and cites have been updated.

[2] 66 Nev. 51, 202 P.2d 878 (1949).

[3] It next appeared in *Adams v. Adams*, 85 Nev. 50, 450 P.2d 146 (1969), for the proposition that the divorce of two parties converts their community property into tenants in common property. In *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990), it was cited for the proposition that appeals generally abate upon the death of a party, unless property rights are involved. After *Daniel*, the case was next cited in *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990), the subject of this article.

[4] *See McCarroll v. McCarroll*, 96 Nev. 455, 611 P.2d 105 (1980); *Tomlinson v.Tomlinson*, 102 Nev. 652, 729 P.2d 1363 (1986); *Taylor v. Taylor*, 105 Nev. 384, 775 P.2d 703 (1989). *McCarroll* and *Tomlinson*, along with *Wolff*, were discussed at length in Willick, "Res judicata in Nevada Divorce Law: An Invitation to Fraud," Nev. Fam. L. Rep., Spr., 1989, at 1 (hereafter "An Invitation to Fraud").

THE *AMIE* CASE: A RETURN TO PARTITION

Amie v. Amie involved a suit by Deborah Amie to partition her community property share of the proceeds of a lawsuit brought by Frederick Amie for lost wages.[5] The parties "simply omitted" the property from their property settlement agreement and divorce decree "[f]or reasons that are not entirely clear from the record."[6]

Noting the *Wolff* holding quoted above, the *Amie* court found that the right to bring an independent action for equitable relief from a judgment is "not necessarily barred by res judicata."[7] The court noted that the proceeds of Frederick'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.[8]

The court then reaffirmed its adherence to *Nevada Industrial Dev. v. Benedetti*,[9] which involved a second suit by a party to an earlier suit over land. The parties had, by "mutual mistake," settled the earlier case for $30,000.00 too much. The *Benedetti* court found that the overpayment constituted "unjust enrichment," and that the court's 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."[10]

After quoting the earlier holding, the *Amie* court found that Deborah's equitable action 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*."[11] The court summed up by holding that since the proceeds of Frederick'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."[12]

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[5] 106 Nev. at 541.

[6] *Id*. at 542. The court expressly declined to rule on whether the general tort damages or punitive damages awarded to Frederick constituted community property, since those items had not been contested in the district court.

[7] *Id*. at 542-43.

[8] *Id*. at 543.

[9] 103 Nev. 360,741 P.2d 802 (1987).

[10] 103 Nev. at 365, 741 P.2d at 805.

[11] 106 Nev. at 543.

[12] *Id*.

CAN *McCARROLL* BE DISTINGUISHED?

Amie is not remarkable except in light of the court's prior denial of partition in cases between former spouses. The foundation for that line of cases was the 1980 decision of *McCarroll v. McCarroll*,[13] in which a former wife sought partition of an omitted forest service pension, but was rebuffed on the ground that she "had a fair opportunity to present the claim she is now making to the divorce court."[14] Although *McCarroll* itself was not cited, its reasoning was followed six years later in *Tomlinson v. Tomlinson*.[15]

The *Amie* court sought to distinguish *McCarroll,* claiming that in the earlier case the wife "had a fair opportunity during the divorce litigation to litigate the fraud allegations."[16] The face of the *McCarroll* opinion, however, 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."[17] In other words, as of the time of divorce, the facts of *McCarroll* were indistinguishable from those of *Amie.*

In *McCarroll*, the wife alleged that her husband's silent retention of the pension[18] was due to his "fraudulent concealment" of the asset, whereas Deborah Amie alleged only the parties' "mutual mistake" in leaving the asset out of the divorce. The fraud alleged by Mrs. McCarroll in her later partition case had not yet ***occurred*** at the time of divorce – as a matter of temporal logic, it had not yet been "omitted" or "concealed" from the divorce decree until the divorce was concluded. The *Amie* court therefore incorrectly stated that she 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.[19]

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[13] 96 Nev. 455, 611 P.2d 205 (1980).

[14] 96 Nev. at 456.

[15] 102 Nev. 652, 729 P.2d 1363 (1986).

[16] 106 Nev. at 542.

[17] 96 Nev. at 456.

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

[19] 106 Nev. at 542.

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 Frederick asserted in the later case that he ***intended*** to defraud Deborah, or that he wanted to baselessly claim that the property was all his.

BUT WHAT OF TAYLOR?

The *Amie* court's distinction of *McCarroll* is even more problematic in light of the court's decision, just fourteen months before *Amie*, in *Taylor v. Taylor*.[20] The *Taylor* opinion addressed a consolidated case involving two sets of former spouses whose divorce decrees omitted military retirement benefits. The parties to the earlier of the two cases (the Taylors) were divorced in 1970. At trial in the partition case, all parties testified that they had no idea the omitted pension was a divisible asset at the time of divorce (i.e., they were mutually mistaken as to the character of the asset).

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.[21] 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. Mrs. Campbell 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 later 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.

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."[22]

The *Taylor* court refused the former wives' invitation to apply *Benedetti* and *Wolff*; the court's decision made no mention of either "unjust enrichment" or the status of the parties as tenants in common of the omitted assets. Rather, the court simply 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."

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[20] 105 Nev. 384, 775 P.2d 703 (1989).

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

[22] *Taylor*, 105 Nev. at 385, n.1.

In a footnote, the court stated that "there is no evidence of fraud in these cases," and ***denied*** that its holding would

> allow a party to "hide" the retirement benefits from the other party and the court and avoid having them divided as part of the property settlement agreement as long as the other party does not discover the retirement benefits within the six month period provided for by NRCP 60(b) for obtaining relief from a judgment. 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."[23]

Given the facts before the court in *Campbell*, however, the behavior that can be tolerated without giving rise to a need for judicial intervention seems remarkably great, since there was in that case a conscious, knowing, omission from the decree of assets known to be community property, by the husband's lawyer in consultation with his client, to prevent the unrepresented wife from obtaining a portion of the benefits.

The *Taylor* court's requirement of finding "fraud on the court" before allowing partition, moreover, was nowhere to be seen in the *Amie* decision a few months later, which did not cite *Taylor* at all. No legal distinction as to the character of the asset to be partitioned can be drawn, since both the omitted wages in *Amie* and the omitted pensions in *Taylor* are clearly community property.[24]

Perhaps more telling than anything directly stated by the court in *Amie* was its alignment of that decision with both its early decision in *Wolff* and the seminal California case of *Henn v. Henn*.[25] The *Henn* decision is widely considered the foundational case for modern partition actions generally[26]; the case itself 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*.[27] It seems possible, therefore, that *Amie* directly undercuts *Taylor* and foreshadows the eventual reversal of the earlier case.

CONJECTURAL CONCLUSIONS

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[23] *Taylor*, 105 Nev. at 387, n.4.

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

[25] 605 P.2d 10 (Cal. 1980).

[26] This is so much the case that partition cases in California are frequently referred to as "*Henn* actions."

[27] *Henn* exhaustively refutes any *res judicata* or collateral estoppel defense to such a partition action. Under California statutes virtually identical to Nevada community property law, the California Supreme Court has uniformly concluded that no such defense is even theoretically capable of being valid. *Henn* is discussed at length in "An Invitation to Fraud," *supra* n.5.

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

In the current, unsettled state of the law, practitioners must be very sensitive to potential malpractice considerations. If property is omitted from disposition at the time of divorce, it may, or may not, ultimately prove to be partitionable in a later action. There is thus possible exposure to the attorneys for both the possessory and the non-possessory spouses, whether the omission was calculated or inadvertent.

Given the lack of any meaningful factual distinction among *McCarroll*, *Taylor*, and *Amie*, 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.

Thus, practitioners can only speculate as to what partition cases may be validly brought. Those faced with such a case can either wait for clarification from our supreme court, or simply litigate the case, secure in knowing that one of the two contradictory lines of cases reaffirmed by the court within the past two years will support whatever position they take.