RES JUDICATA IN NEVADA DIVORCE LAW: AN INVITATION TO FRAUD[1]

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The law of Nevada has radically departed from the mainstream of community property law concerning assets hidden or disguised at the time of divorce. That departure has encouraged and fostered fraud and deceit in divorce litigation, and has made it very difficult for divorce counsel to act both ethically and competently. The solution is simple, but will require the Nevada Supreme Court to acknowledge the problem and reverse the cases that caused it.

THE PROBLEM – HIDDEN, DISGUISED, OR MISCHARACTERIZED ASSETS

Theoretically, all property acquired during marriage, with a few well-defined exceptions, is considered community property, and is to be equitably divided between spouses at the time of divorce.[2]

Through fraud or the mistake of one or both parties, however, some community property may not be brought to the attention of the court for disposition. When the omitted property is a valuable community asset, the resulting property distribution is always inequitable, since it is not possible for an unaware court to "look to the overall justice and equity that must inform all alimony and property distribution decrees."[3]

Pensions appear to be the asset most frequently hidden, disguised, or mistakenly ignored at the time of divorce.[4] Especially in military families,[5] the pension is usually the single most valuable

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[1] This article was originally published in Vol. 4, No. 2 of the Nevada Family Law Report (Spr., 1989). Certain typographical and other errors have been corrected here, and cites have been updated.

[2] NRS 123.220; 123.225; 125.150.

[3] *Heim v. Heim,* l04Nev 605, 610, 763 P.2d 678, 681 (1988).

[4] *See Henn v. Henn*, 605 P.2d 10, 12 (Cal. 1980) (since no law precluded division of the pension at the time ofdivorce, it would be "anomalous" to establish that erroneous proposition in a later partition action); *Eddy v. Eddy*, 710 S.W. 2d 783 (Tex. Ct. App. 1986) (same rule in Texas); *Beesley v. Beesley*, 758 P.2d 695 (Idaho 1988) (same in Idaho); *Bryant v. Sullivan*, 715 P.2d 282, 285 (Ariz. Ct. App. 1985) (same in Arizona); *In re marriage of Bishop*, 729 P.2d 647 (Wash. Ct. App. 1986) (same in Washington); *Savoie v. Savoie*, 482 So. 2d. 23(La. Ct. App. 1986) (same in Louisiana); *Thorpe v. Thorpe*, 367 N.W .2d 233 (Wis. Ct. App. 1985).

[5] In no other profession can you retire at age forty with a pension, worth $150,000.00 to $500,000.00.

asset of the marriage, and is worth many times more than the rest of the property combined.[6]

When the pension is not divided upon divorce, the wage-earning spouse (typically the husband) leaves the marriage with 90% or more of the community property.[7] This is in *addition* to the "career asset" that the wage-earning spouse takes with him.[8] In this article, the wage-earner is called the "managing" spouse, and the other spouse is referred to as the "passive" spouse.[9]

THE SOLUTION — PARTIES REMAIN TENANTS IN COMMON OF ASSETS OMITTED FROM THE DECREE

In all other community property states,[10] parties have less incentive to hide or disguise assets because what is not disposed of in the divorce decree remains the property of both parties to the marriage as tenants in common. If an asset is hidden or disguised, the spouse who did not share in that marital asset has the right, by statute or common law, to bring an action to partition it upon its discovery.[11]

Nevada was originally aligned with all other community property states on this issue. In *Bank v. Wolff*,[12] the Nevada Supreme Court held:[13]

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[6] Our research has shown that military marriages ending in divorce tend to occur within four years of retirement. The military lifestyle (and pay rates) does not usually allow the accumulation of much else in the way of material possessions. *See* Legislative History to Pub. L. 99-348 (Military Retirement Reform Act of 1986 U.S. Code Cong. & Admin. News 1681, 1682).

[7] In our first fourteen military pension cases, the parties usually agreed that they divided less than $10,000.00 worth of cash and other property at the time of divorce. The average "present value" of the omitted pensions at the time of divorce was approximately $185,000.00. The pensions are now paying an average of $1,843.00 per month; the retirees have *already* received an average of $194,907.14 apiece since their divorces.

[8] The Nevada Supreme Court has recently noted that the "career asset" may well be the primary creation of worth of some marriages. *See Heim*, *supra*, 104 Nev. at 6.

[9] Technically, husbands have not been the "manager" of the community property since the 1975 amendments to NRS 123.230. In reality, of course, it is quite common for only one spouse to control, or even know about, substantial community assets.

[10] Arizona, California, Idaho, Louisiana, New Mexico, Texas, Washington, and Wisconsin.

[11] At least five of the other eight states have formally legislated the availability of partition. *See* N.M. Stat. Ann.§ 40-4-20 (1973); Ariz. Rev. Stat. Ann. §25-318(b), (d); Tex. Prop. Code Ann. § 23.001 (Vernon 1984): La. Code Civ. Proc. Ann. art 82 (West 1960); Wis. Stat. Ann. 766.75 (West 1986).

[12] 66 Nev. 51, 202 P.2d 878 (1949).

[13] *Id*. 66 Nev. at 56, 202 P.2d at 881 (citing California authority).

> 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.

Wolff has never been overruled or criticized, and is in perfect accord with the law of all other community property states.

Partition of omitted assets is so run-of-the-mill in the other community property states (and several non-community property states) that the decisions do not tend to explain the reason for the remedy. One court explained:[14]

> [T]he cases . . . upholding [partition] proceedings, do not distinguish between failure for whatever reason to bring property before the dissolution court. . . and failure of that court to dispose of property brought before it. . . . Rightly so; the . . . provision for these post-decree proceedings is to remedy inadvertence, oversight, and worse, and the only issue germane to maintaining such a proceeding is whether property remains undisposed of, not why it remains so.

In 1980, the California Supreme Court decided *Henn v. Henn*,[15] an omitted military pension case. The parties had been married from 1945 until 1971; the former wife brought suit to partition the omitted pension in 1976.

In *Henn,*, the California Supreme Court expressly held that *res judicata* does *not* preclude a spouse from bringing an action to partition assets that could have been, but were not, disposed of at the time of divorce.

The court reasoned that in California (as in Nevada) "a spouse's entitlement to a share of the community property arises at the time that the property is acquired."[16] Since the wife's putative interest in the pension "arose independent of and predates the original decree of dissolution," it "was separate and distinct from her interest in the items of community property which were divided at the time of the dissolution."[17]

The court found that since the interest that was the subject of the later partition action was not before the divorce court, it could not be extinguished by that court's decree. *Res judicata,* which only precludes the parties from relitigating the *same* cause of action, cannot bar such a suit.[18]

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[14] *Ploch v. Ploch*, 635 S.W.2d 70, 72 (Mo. Ct. App. 1982) (citations omitted).

[15] 605 P.2d 10 (1980).

[16] *See* 605 P.2d at 13; *cf.* NRS 123.225(1): "The respective interests of the husband and the wife in community property during continuance of the marriage relation are present, existing and equal interests. . . ."

[17] *Henn, supra* 605 P.2d at 13.

[18] *Henn, supra* 605 P.2d at 13.

Collateral estoppel, by contrast, *can* apply against a party in a second suit on a *different* cause of action.[19] The *Henn* court carefully analyzed that principle as well, and held that the doctrine "cannot be stretched" to compel denial of the right to partition omitted assets.

The court explained:[20]

> [T]he rule prohibiting the raising of any factual or legal contentions which were not actually asserted but which were within the scope of a prior action, "*does not mean that issues not litigated and determined are binding in a subsequent proceeding on a new cause of action.*" Rather, it means that once an issue is litigated and determined, it is binding in a subsequent action notwithstanding that a party may have omitted to raise matters for or against it which if asserted may have produced a different outcome.

In language almost identical to that used by the Nevada court in *Wolff,* the California court held that community property interests are unaffected by a decree that does not include those assets: "property which is not mentioned in the pleadings as community property is left unadjudicated by [the] decree of divorce, and is subject to future litigation, the parties being tenants in common meanwhile."[21]

Henn has been widely cited and relied upon in the other community property states as a correct application of the doctrines of *res judicata* and collateral estoppel to omitted assets of community property.[22]

WHAT WENT WRONG IN NEVADA— OVEREXTENSION OF *RES JUDICATA*

The Nevada Supreme Court has established that a managing spouse who hides, disguises, or otherwise omits assets from disposition during a divorce proceeding gets to keep those assets. The three cases that collectively established the legality of such injustices were *McCarroll v. McCarroll*[23]

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[19] *See Clark v. Clark*, 80 Nev. 52, 389 P.2d 69 (1964).

[20] *Henn, supra* 610 P.2d at 13-14 (emphasis added), quoting from earlier cases.

[21] *See* 605 P.2d at 13. The court cited cases stretching back to 1950.

[22] The Nevada court has cited *Henn,* but not in an omitted property case. In *Haws v. Haws,* 96 Nev. 727, 615 P.2d 978 (1980), the court found that a California divorce decree adjudicating the parties' rights to property prevented re-litigation of the same issues in a later Nevada hearing. *Haws* comes closest, of the Nevada cases, to identifying the preclusive effect properly accorded a decree – i.e., to prevent the raising of new arguments that might have led to a different decision on the assets actually litigated and disposed of in that decree. The court in *Haws* claimed to be differentiating intrinsic and extrinsic fraud, however, instead of applying collateral estoppel. *See also Harris v. Harris*, 95 Nev. 214, 215 n.1. 591 P.2d 1147, 1148 n.1 (1979) (defining collateral estoppel).

[23] 96 Nev. 455, 611 P.2d 105 (1980).

York v. York,[24] and *Tomlinson v. Tomlinson.*[25]

There is no evidence that *Wolff* was cited to the court during the *McCarroll* or *York* appeals. It was not cited to the court in *Tomlinson*.[26] None of the *Wolff* court justices were still on the court when the later cases were decided. From all appearances, the bench and bar simply forgot that the remedy of partition was ever available in Nevada when an asset is omitted from a decree of divorce.

A. ***McCarroll***

McCarroll was a short *per curiam* opinion affirming a summary judgment in favor of a husband, whose Forest Service Pension had not been disposed of in the divorce. The wife had sought partition of the omitted asset. The court found that the former wife "had a fair opportunity to present the claim she is now making to the divorce court," and that NRCP 60(b) therefore barred her action.[27] It cited only *Colby v. Colby*[28] as authority.

Colby, however, was not an omitted property case, and did not cite any omitted property cases.[29] The cases examining the *res judicata* effect of other aspects of divorce decrees are generally not very helpful.[30] *Colby* was concerned with jurisdictional and "full faith and credit" issues, and quoted at length from the 1948 case of *Murphy v. Murphy*,[31] which had attempted to divine a distinction between intrinsic and extrinsic fraud.

In *Murphy*, the court stated that extrinsic fraud (for which an action to set aside the judgment *would* be entertained)[32]

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[24] 99 Nev. 491, 664 P.2d 967 (1983).

[25] 102 Nev.652,729P.2d 1363 (1986).

[26] I take personal responsibility for that oversight. since I was appellate counsel in that case.

[27] *See* 96 Nev. at 456.

[28] 78 Nev. 150, 369 P.2d 1019 (1962).

[29] In one of the cases it did cite, *Villalon v. Murphy*, 65 Nev. 264, 193 P.2d 850 (1948), the court found that a party's non-disclosure of facts constituted extrinsic fraud prohibiting a real contest on the issues as much as keeping the opponent out of court entirely would have done. *Id*. at 466-70. The fact at issue was the wife's non-disclosure of her never-terminated marriage to another.

[30] *Compare Harris v. Harris*, 95 Nev. 214, 591 P.2d 1147 (1979) (decree providing for child support is *res judicata* as to question of parentage even if question was never raised) *with Gilbert v. Warren*, 95 Nev. 296, 594 P.2d 696 (1979) (silence of divorce decree as to support for child is apparently *not res judicata* of parentage issue between parties to divorce).

[31] 65 Nev. 264, 193 P.2d 850 (1948).

[32] *See* 78 Nev. at 154, 369 P.2d at l02l, *quoting from* 65 Nev. at 271, 193 P.2d at 854.

> consists of fraud by the other party . . . which prevents the losing party either from knowing about his rights or defenses, or from having a fair opportunity of presenting them upon the trial.

Thus, the *McCarroll* court implicitly found that the husband's fraudulent concealment of the pension did ***not*** constitute preventing the wife from knowing about her rights.[33] The court did not differentiate between concealment of the ***existence*** of the pension and concealment of the community property ***character*** of the pension.

McCarroll imposed upon passive spouses the responsibility for knowing about all community property concealed by managing spouses. 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.

The *McCarroll* court completely ignored the fact that in Nevada, as in California, each spouse's entitlement to a share of the community property arises at the time that the property is acquired.[34] *McCarroll* radically departed from community property law everywhere else by providing a mechanism for divestment of community property without agreement of the parties or express judicial determination.

From a managing spouse's point of view, the rule to be discerned from *McCarroll* is that he should never share any information concerning the extent or nature of community holdings with the passive spouse. Under *McCarroll*, if the marriage breaks down, any asset about which she does not learn is an asset he gets to silently keep.[35]

B. York

York was a "double-divorce" case; the parties were married for three years, divorced, remarried shortly thereafter, and divorced again after another three years. The case concerned a claim by the wife during the second divorce to $15,000.00 in the wife's separate property that was dissipated by joint purchases and improvements to the husband's separate property before the first divorce. The wife had made no claim for reimbursement in the first divorce.

The basic holding of the case, that the disposition of assets in a divorce is limited to the

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[33] Since *McCarroll* went up on summary judgment, the charge of fraudulent concealment should have been accepted as true. *See County of Clark v. Bonanza No. 1*, 96 Nev. 643, 615 P.2d 939 (1980).

[34] *See In re Condo's Estate*, 70 Nev. 271, 266 P.2d 404 (1954); NRS123.225.

[35] The Supreme Court's Gender Bias Task Force has noted that the current procedures impose a financially impossible discovery burden on parties. *See* Justice For Women: Nevada Supreme Court Gender Bias Task Force Report (1989) at 38. Obviously, this is particularly true for passive spouses that do not even know whether there are concealed assets to be discovered.

property acquired only during ***that*** marriage, is sound.[36] The court rested its holding on adoption of the California law of res judicata,[37] and quoted expansive language from *Corpus Juris*: "a judgment is conclusive not only on the questions actually contested and determined, but on all matters which might have been litigated and decided in the suit."[38]

The *York* result was correct on its facts. When the court divided assets during the first divorce, the court necessarily decided the parties' rights to the money used to buy those assets. "Matters which might have been litigated" meant ***arguments*** that could have affected the disposition of the assets before the court.[39] The wife's right to reimbursement had been litigated along with ownership of the assets.

York therefore comported with the earlier explanation of *res judicata* in *Clark v. Clark*.[40] There, the court explicitly noted that "the rule (conclusive as to matters which might have been raised) has no application to those independent matters which the parties may, but are not required to and do not in fact, plead or rely upon."[41]

York relied upon *Kernan v. Kernan*,[42] from Nevada, and *Compton v. Compton*,[43] from Idaho. *Kernan* was a full faith and credit case concerned with a New York alimony arrearages order. Its use of the "might have been litigated" language matches that of the California court *in Henn*, and goes to those ***arguments*** that could have been raised for or against the final judgment. There was no omitted property issue.

Compton was not an omitted property case either. It concerned only the wife's allegation that the husband had undervalued assets during settlement negotiations. The court held that in the fiduciary relationship of husband and wife, the parties were not free to conceal the "existence of

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[36] From a public policy perspective, it would be unwise to give an unhappy litigant an incentive to remarry the same party in the hope of relitigating the same property issues at a later date. For a clear explanation of the policies involved, *see Henderson v. Henderson*, 764 P.2d 156 (Okla. 1988).

[37] *See Bernhard v. Bank of America Nat. Trust & Sav. Ass'n*, 122 P.2d 892 (Cal. 1942).

[38] *See* 99 Nev. at 493, 664 P.2d at 968, *quoting from* 50 C.J.S. Judgments § 716 (1947).

[39] The *York* court had no need to quote the explanatory language cross-referenced in *Corpus Juris:* "The general rule does not mean that the prior judgment is conclusive of matters not in issue or adjudicated, and which were not implied in, or essentially connected with, the actual issues in the case, although they may affect the ultimate rights of the parties and might have been presented in the former action." 50 C.J.S. Judgments, *supra*, at § 657. An asset that the parties do not know exists, or which one of the parties has convinced the other is not property, is ***not*** a "matter which might have been litigated."

[40] 80 Nev. 52, 389 P.2d 69 (1964).

[41] *Id*. 80 Nev. at 58-59, 389 P.2d at 72.

[42] 78 Nev. 93, 369 P.2d 451 (1962).

[43] 612 P.2d 1175 (Idaho 1980).

particular items or amounts of property."[44] In that case, though, the court found that no assets had been omitted, and held that once the wife was informed of the existence and community character of the assets, it was her responsibility to dispute any valuations that she felt were wrong.

As noted above, the Idaho courts, like those in all other community property states, have had no difficulty distinguishing such situations from cases in which property is *omitted* from the decree. In Idaho, like everywhere else in the community property system except Nevada, the latter situation authorizes a suit for partition.[45] Three years after *York*, however, the Nevada court proved unwilling or unable to make that distinction.

C. ***Tomlinson***

Tomlinson involved a common law action for partition of a military pension omitted from a 1971 Michigan decree of divorce.[46] Both parties were Nevada residents at the time of the action. The court correctly noted that the Uniformed Services Former Spouses Protection Act[47] had nullified *McCarty*[48] 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."[49]

The court stated that Nevada would apply Michigan law in determining Rosemary's rights,[50] and that the first Michigan appellate decision dividing a military pension as property was issued six

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[44] *See* 612 P.2d at 1183.

[45] *See Beesley v. Beesley*, 758 P.2d 695 (Idaho 1988).

[46] Factually, the case was nearly identical to *Henn, supra.* For a full explanation of the facts and circumstances leading up to the *Tomlinson* decision, *see* LePome & Willick, *The Nevada Former Military Spouses Protection Act: Partition of Military Retirement Benefits Omitted from Prior Decrees of Divorce*, 2 Nev. Fam. L. Rep., Spr.-Sum. l987, at 8.

[47] 10 U.S.C. § 1408 (1982); commonly known as the USFSPA.

[48] *McCarty v. McCarty*, 453 U.S. 210 (1981).

[49] *See* 102 Nev. at 653, 729 P.2d at 1364.

[50] The absence of a quasi-community property from Nevada law has led to a great amount of injustice through misapplication of the "pure borrowed law" approach to property acquired elsewhere. *See* Reppy, *Viewpoint: Louisiana's Proposed "Hybrid" Quasi-community Property Statute Could Cause Unfairness*, 13 Community Prop. J. 1, 4 (1986). Under that approach, our courts are supposed to determine both the character of property and the power of the court to dispose of that property pursuant to the law of the jurisdiction where the property was acquired. *Braddock v. Braddock*, 91 Nev. 735, 740-41, 542 P.2d 1060, 1063 (1975). Unfortunately, our courts often resort to "the traditional play-on-words approach, so called because "separate property" as used in a community property state has an entirely different meaning than the same term in a common law state. Judges using that approach simply adopt the label applied by the other state, and then treat the asset as if it had been so labelled here. The approach is almost universally criticized for promoting inequity. *See*, *e.g.*, Reppy, *supra*, at 2-4.

years after the Tomlinson's divorce.[51]

Citing *York*, 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 knew that the asset was marital property.[52] Again, the court claimed it was applying the principle of *res judicata*, although it was actually expanding the scope of collateral estoppel.[53]

To reach its result, the Nevada Supreme Court took the "might have been litigated" concept from *res judicata*, engrafted it upon the application of collateral estoppel to different causes of action, and developed a peculiar hybrid rule that all property rights are deemed adjudicated by a silent divorce decree in favor of the party who obtains physical possession or apparent title.[54]

The "might have been litigated" concept from *York* has nothing to do with ***assets***, in which ***both*** parties have continuing ownership from the time of acquisition. The *Tomlinson* court confused the omitted military pension at stake in that case with the previously litigated money at stake in *York.* In doing so, the court legitimized the established practice in Nevada of fraudulent omission of marital assets.[55]

The California Supreme Court had followed and explained *Henn* in *Casas v. Thompson*[56] just months before the Nevada court decided *Tomlinson*.[57] Like *Henn, Casas* has gone on to be widely and approvingly cited in the other community property States, and in the federal courts, as a correct

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[51] The fact that the original divorce occurred in Michigan was probably irrelevant to the *Tomlinson* court's determination, since the first *Nevada* case explicitly stating that pensions should be divided was also decided in 1978. *See Ellett v. Ellett*, 94 Nev. 34. 573 P.2d 1179 (1978). As explained by the California cases and silently accepted in *Ellett*, the property at issue was *earned* by both parties during the thirty years prior to the decision. Once the item was known to be property, the wife's interest already existed by virtue of its accumulation during marriage.

[52] *See* 102 Nev. at 654, 729 P.2d 1364.

[53] As authority for its reiteration of the "might have been litigated" principle, the court cited only *McGinn v. McGinn*, 337 N.W. 2d 632 (Mich. Ct. App. 1983). That case, however, was merely a finding that *McCarty* was not retroactive; it had nothing to do with omitted assets. On the contrary, Michigan does recognize a right to partition where a divorce does not dispose of property jointly held by the parties. *See Brown v. Estate of Prisel*, 293 N.W.2d 729 (Mich. Ct. App. 1980) (Michigan husband and wife became tenants in common of Michigan realty when parties obtained Nevada divorce that did not divide property).

[54] If the Nevada Supreme Court is right on this issue, then the supreme courts of at least a dozen different states have misinterpreted the doctrine of *res judicata* for the past twenty years.

[55] This is not to say that the Nevada court does not use the label *"res judicata"* where it is proper. *See, e.g.. Spilsbury v. Spilsbury*, 92 Nev. 464, 553 P.2d 421 (1976) (disposition of claims of fraud and misrepresentation in post-trial motion precludes subsequent separate suit on identical issues).

[56] 720 P.2d 921 (Cal. 1986), *cert., denied*, 479 U.S. 1012 (1987).

[57] Both *Casas* and *Henn* were cited to the Nevada court in the briefs and at oral argument in *Tomlinson.* The Nevada court, however, disregarded both cases without even citing them.

application of *res judicata* and collateral estoppel to omitted property cases.[58]

The holding in *Tomlinson* amplified the worst aspects of *McCarroll* and encouraged spouses to conceal, disguise, and mischaracterize assets prior to and at the time of divorce. The court 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.

The *Tomlinson* ruling invites fraud that would be impossible anywhere else in the community property system. A managing spouse, for example, could move to Nevada, establish residency, and obtain a simple default divorce that did not deal with property in any way. If the assets (pensions, stocks, cash, etc.) happened to be in that spouse's physical possession or titled in his name, the *Tomlinson* decision effectively vests him with complete ownership.[59]

In the much more common situations a managing spouse can simply decline to mention the stock certificates, pension plan, or Swiss bank account. The failure of the passive spouse to discover and obtain division of the omitted asset results in it being silently "awarded" to the managing spouse, with the apparent blessings of the Nevada Supreme Court.[60]

In short, the rule of *Tomlinson* is: if you hide it, you get to keep it.

ETHICAL CONSIDERATIONS

Many Nevada divorce practitioners consider it their primary responsibility in each case to obtain the maximum financial advantage for their client. Under *Tomlinson*, that necessarily requires the systematic, silent omission of assets whenever the other spouse either does not know of their existence or is unaware that they are community property.[61]

Practitioners are aware that not taking advantage of the *Tomlinson* "if you hide it you get to keep it" rule would operate against their clients and could even create malpractice liability. As one

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[58] *See, e.g., Beesley v. Beesley*, 758 P.2d 695 (Idaho 1988); *Fern v. United States*, 15 CI. Ct. 580 (1988).

[59] Such a result confuses property rights, which come into existence automatically as assets accrue, with alimony, which is wholly a creature of legislation. In *Cavell v. Cavell*, 90 Nev. 334, 526 P.2d 330 (1974), the court examined the impact of a default divorce upon a wife's power to subsequently bring an action for alimony. The majority held that since the wife was on notice of the pending divorce, she had only that opportunity to request alimony. Concurring and dissenting opinions insisted that the court had jurisdiction to hear the request for alimony, since a divorce decree entered without personal jurisdiction over one of the parties could not be *res judicata* as to alimony. *Tomlinson* extends the *Cavell* holding to property issues, effectively allowing silence to divest spouses of their property rights.

[60] I do not suggest that it was the court's intention to institutionalize fraud as a normal part of Nevada divorce practice. One local attorney, however, has suggested that the rule favoring fraud could increase the appeal of this jurisdiction to forum shoppers elsewhere.

[61] This firm interviewed some four to five hundred former military spouses. Those interviewed were virtually unanimous in stating that they had always been told -- by their husbands, the military, and sometimes by attorneys--that the pension was not a marital asset. Obviously, a spouse who knows of only a few thousand dollars in possibly divisible assets is unlikely to contest the proceedings even if she is financially able to do so.

commentator put it:[62]

> In this imperfect world, where lawyers have differing views on ethical questions (and, let's face it: some are dishonest) there is no question that in a given case you may be putting your client at a disadvantage by. . . being fair. . . When it comes to the merely unseemly, your adherence to perceived moral scruples had better be fully thought out.

Supreme Court Rule 173(6) appears to condone the fraud permitted by *Tomlinson* by providing that [a] lawyer shall not "... Request a person *other than a client* to refrain from voluntarily giving relevant information to another party. . . ." (Emphasis added.)

The Model Rules[63] repeat that language.[64] They also require an attorney "to give an honest opinion about the actual consequences that appear likely to result from a client's conduct."[65] In Nevada, that presumably includes advising divorce clients that they can keep any property that they can keep hidden for six months.

The Model Rules imply otherwise in the vague admonition that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."[66] Commentators on ethics and malpractice, however, have concluded that "the apparent principle of modern malpractice liability [is] that 'if you can get away with it, you have to do it."[67]

As long as *Tomlinson* remains valid, divorce practitioners are thus authorized, if not *required,* to advise their prospective divorce clients that they are allowed to hide, disguise, and mischaracterize the community nature of assets.

The Nevada Supreme Court's Gender Bias Task Force recently acknowledged husbands' incentive to fraudulently hide or disguise assets, and recommended that the parties be compelled to disclose all assets prior to the dissolution.[68] Presumably, the parties would each have to supply some sort of affidavit, and their attorneys would be obliged to conduct a "reasonable inquiry" as to

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[62] *See Crouch, Selected Ethics Issues*, 1988 A.B.A. Sec. Fam. L. Annual Meeting Compendium 339, 346.

[63] The Model Rules of Professional Conduct, as adopted by the American Bar Association in 1983, were made part of the Nevada Supreme Court Rules through SCR 150.

[64] *See* Model Rules of Professional Conduct Rule 3.4(f) (1983).

[65] *See* Model Rules of Professional Conduct Rule 1.2 comment (1983).

[66] *See* Model Rules of Professional Conduct Rule 3.3 comment (1983)

[67] Crouch, *Ethics Aspects of Family Law Practice,* Trial, Apr., 1989, at 63.

[68] *See* Justice For Women: Nevada Supreme Court Gender Bias Task Force Report (1989) at 38, 40, 75. The Task Force Report indicates that women are typically injured even when all the marital assets are divided upon divorce. *Id.* at 11-40.

completeness.[69]

Such a weak means of securing disclosure of property would provide no remedy to parties who are mutually mistaken as to the extent or community character of their assets. It would have no effect on unscrupulous parties, and would provide little remedy to those victimized.[70] It would also discourage attorneys from investigating their clients' assets, by rewarding a party whose attorney conducts the least thorough inquiry.

A better enforcement mechanism for implementing the Task Force recommendations is the simple and effective partition remedy specified in 1949 in *Wolff* and in universal practice in the other community property states. Making the parties tenants in common of omitted assets eliminates the major incentive for parties to hide assets, and promotes equitable distribution of property. If the *Wolff* rule is re-established, and *Tomlinson* is overruled, the incentives for attorneys to advise the silent omission of property would disappear. Counsel would have to advise each client that property not explicitly brought to the court's attention and disposed of at the time of divorce would be fair game in a later partition action by the defrauded spouse.

A rule permitting partition actions would give attorneys a good reason to thoroughly investigate marital assets and encourage their clients to make full disclosure.[71] From an ethics perspective, that situation would be far preferable to the current one, which has put divorce lawyers in the business of promoting fraud.[72]

RECENT CASES GIVE SOME GROUND FOR OPTIMISM

Since *Tomlinson*, the Nevada Supreme Court's opinions have appeared less tolerant of condoning fraud and inequity.

Nev. Ind. Dev. v. Benedetti [73] concerned a commercial sale of real estate. The court held that a separate action to set aside a judgment is appropriate where mutual mistake results in unjust enrichment, and that the social policy of correcting unjust enrichment outweighs that *of res judicata.* It is hard to see why the same logic should not apply to cases in which the spouses are mutually

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[69] *See* NRCP 11.

[70] Presumably, the victimized spouse would have to bring an action, perhaps years after the divorce, against the attorney representing the other spouse. The expense and uncertainty of such litigation (not to mention collection problems) make it unlikely to be useful in the average case concerning the silent omission of property.

[71] A recent survey of the Family Law Section of the Nevada Bar showed nearly unanimous support for adoption of a provision permitting partition of omitted assets.

[72] Many attorneys have admitted, publicly or privately, that they systematically avoid raising the existence or community nature of property that the other spouse, or opposing counsel, has not made into an issue, particularly in uncontested cases in which the other spouse is unrepresented. Unless attorneys are given some motive (such as the possibility of later suits for partition of omitted assets), they will continue to encourage and practice fraud by omission.

[73] 103 Nev. 360, 741 P.2d 802 (1987).

mistaken as to the community nature of an omitted asset.

In *Murphy v. Murphy*,[74] the court permitted an untimely motion under NRCP 60(b) to set aside the property distribution in a decree of divorce, finding that the husband's physical abuse of the wife constituted "fraud on the court" which made the time limit irrelevant.

It is difficult to see how beating a wife into silent acceptance of a disproportionate property settlement is any more a "fraud upon the court" than obtaining the same settlement by failing to disclose the existence or community nature of marital assets. In both cases, the parties, motives, and results are the same; only the means of obtaining the wife's silence is different.[75]

Partition could be rationalized under *Benedetti* and *Murphy* to correct "unjust enrichment" where the parties are mutually mistaken as to the existence or community character of assets, and to correct "fraud on the court" where one spouse knew of the existence and nature of the asset but concealed those facts from the other spouse. That circuitous path, however, would only further cloud this subject area. It is clear that *Tomlinson* and *Wolff* are mutually exclusive, and that one of them must be overruled.

If the court wishes to rejoin the other community property states in recognizing the remedy of partition of omitted marital assets, it must recognize that *Tomlinson* was wrongly decided. *Benedetti* and *Murphy* merely give hopeful signs that the court will do so, and thus come down on the side of equity and fairness.

AN ASIDE REGARDING NRS 125.161

Tomlinson was legislatively reversed between June 15, 1987, and March 20, 1989.[76] Since the statute was designed only to overturn *Tomlinson*, it addressed only suits brought to partition omitted military pensions.

Defendants in those cases conducted a well-funded and successful lobbying effort to repeal the statute on the ground that military retirees were being unfairly "singled out." Attorneys representing defendants in those cases so testified.[77]

In each case that went to trial, the Plaintiff was able to establish a gross inequity in property

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[74] 103 Nev. 185, 734 P.2d 738 (1987).

[75] *Murphy* does not appear to satisfy the test for "fraud upon the court" set out in earlier decisions, where the standard was explained as greater than non-disclosure of pertinent facts, amounting to bribery of the judge or other conduct showing an unconscionable plan to influence the court in its decision. *See Occhiuto v. Occhiuto*, 97 Nev. 143, 146 n.2. 625, P.2d 568, 570 n.2 (1981). It is not clear whether the court intended to change the earlier standard.

[76] *See* NRS 125.161; LePome & Willick, *supra* note 42.

[77] Ed Raby, Richard Koch, and Anita Webster.

distribution by omission of the military pension.[78] The defendants apparently appealed every such case. None has yet been ruled upon by the Nevada Supreme Court, and the fate of those cases is uncertain in light of the repeal of NRS 125.161.[79]

Since the Nevada Legislature has demonstrated its lack of sufficient will to put equity above appeasement to monied special interests, the issue will probably return to the body that created the divergence from common law in this area in the first place – the Nevada Supreme Court. Given the theoretical basis of the partition remedy,[80] it would be more appropriate for any rule established by the court to apply to ***all*** omitted assets.

CONCLUSION

The unjustifiable rule established *by McCarroll* and *Tomlinson* is that any asset that is hidden or disguised by a managing spouse becomes the property of that spouse once six months and one day have elapsed from the date of the decree. Nevada's ethics rules apparently require attorneys to counsel their clients that such behavior is legally protected.

The Nevada Supreme Court's confusion of *res judicata* with collateral estoppel has made Nevada the one community property state in the country where mistaken or fraudulent non-division of community property cannot be corrected by means of a later partition action.

As a matter of social policy, it is indefensible to maintain that there should be no relief if a former spouse can prove that a substantial asset of the marriage was silently omitted from distribution. That is what happened in *Tomlinson*, however, and what continues to occur daily in Nevada divorces.

The Nevada Supreme Court has recently authorized separate actions to correct unjust enrichment in commercial cases. In the context of the marital relationship, however, where the parties have an extreme fiduciary duty of honesty and full disclosure, the court has inexplicably adopted a rule that permits a spouse to be silently and summarily dispossessed of community property.

The court has previously declared its willingness to alter common law rules depending on their continuing "viability."[81] It can only be hoped that the court recognizes that the *McCarroll/Tomlinson* rule encourages fraud and deceit, which cannot be considered "viable" in any

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[78] *See* text and notes *supra* at notes 4-6.

[79] The repealer bill purports to "terminate the jurisdiction of the district court" to further consider those cases. It is not certain that the legislature has the authority to do anything to a case once judgment has been rendered by a court, but that issue awaits appellate resolution.

[80] I.e., that the parties are co-owners of all community property assets at the moment the assets are acquired, and their status as joint owners can only be altered by agreement or specific judgment. *See Henn*, *supra*.

[81] *See, e.g., Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974).

legal system devoted to justice. The Nevada Supreme Court must overturn that unfortunate line of authority and return to the rule stated in *Wolff*.

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