

SUMMARY OF NEVADA COMMUNITY PROPERTY LAW

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

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

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

¹ Consider the following inexhaustive examples:

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

Lake v. Bender, 18 Nev. 361, 403 (1884) *opn. on reh'g* (citing BISHOP ON MARRIAGE AND DIVORCE, vol. 1, sec. 89); [T]his section is hardly a model of clarity, . . .

Rodgers v. Rodgers, 110 Nev. 1370, 887 P.2d 269 (1994) (addressing Nevada's main child support statute). Regarding the award of spousal support, the legislature has failed to set forth an objective standard for determining the appropriate amount. Absent such a standard, there appears to be a disparity in the awards for spousal support on similar facts even greater than for child support.

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

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

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

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

In Nevada, married couples own property either separately or as a community. The rights of husband and wife in Nevada are set forth in NRS Chapter 123, which provides the statutory definition of community property in NRS 123.220.⁵

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

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

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

A spouse may, by written power of attorney, give to the other the complete power to sell, convey or encumber any property held as community property or either spouse, acting alone, may manage and control community property, whether acquired before or after July 1, 1975, with the same power of disposition as the acting spouse has over his separate property, except that:

1. Neither spouse may devise or bequeath more than one-half of the community property.
2. Neither spouse may make a gift of community property without the express or implied consent of the other.
3. Neither spouse may sell, convey or encumber the community real property unless both join in the execution of the deed or other instrument by which the real property is sold, conveyed or encumbered, and the deed or other instrument must be acknowledged by both.
4. Neither spouse may purchase or contract to purchase community real property unless both join in the transaction of purchase or in the execution of the contract to purchase.
5. Neither spouse may create a security interest, other than a purchase money security interest as defined in NRS 104.9107, in, or sell, community household goods, furnishings or appliances unless both join in executing the security agreement or contract for sale, if any.
6. Neither spouse may acquire, purchase, sell, convey or encumber the assets,

⁵ All property, other than that stated in NRS 123.130, acquired after marriage by either husband or wife, or both, is community property unless otherwise provided by:

1. An agreement in writing between the spouses, which is effective only as between them.
2. A decree of separate maintenance issued by a court of competent jurisdiction.
3. NRS 123.190.
4. A decree issued or agreement in writing pursuant to NRS 123.259.

including real property and goodwill, of a business where both spouses participate in its management without the consent of the other. If only one spouse participates in management, he may, in the ordinary course of business, acquire, purchase, sell, convey or encumber the assets, including real property and goodwill, of the business without the consent of the nonparticipating spouse.

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

Chapter 125 of the Nevada Revised Statutes provides the statutory framework for the issues involved in the dissolution of a marriage. NRS 125.150 provides guidelines for the court regarding numerous issues, including the adjudication of property rights.

Nevada switched from an “equitable distribution” to an “equal distribution” state in 1993. Prior to that year, NRS 125.150 required the court to make such disposition of:

- (1) The community property of the parties; and
- (2) Any property placed in joint tenancy by the parties on or after July 1, 1979, as appears just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by the divorce, and to the party through whom the property was acquired, and to the burdens, if any, imposed upon it, for the benefit of the children.

After 1993, NRS 125.150(1) provides, in pertinent part, that in granting a divorce, the court:

- (b) Shall, to the extent practicable, make an equal disposition of the community property of the parties, except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

The treatment of property held in joint tenancy was moved to NRS 125.150(2).⁶

⁶ Except as otherwise provided in this subsection, in granting a divorce, the court shall dispose of any property held in joint tenancy in the manner set forth in subsection 1 for the disposition of community property. If a party has made a contribution of separate property to the acquisition or improvement of property held in joint tenancy, the court may provide for the reimbursement of that party for his contribution. The amount of reimbursement must not exceed the amount of the contribution of separate property that can be traced to the acquisition or improvement of property held in joint tenancy, without interest or any adjustment because of an increase in the value of the property held in joint tenancy. The amount of reimbursement must not exceed the value, at the time of the disposition, of the property held in joint tenancy for which the contribution of separate property was made. In determining whether to provide for the reimbursement, in whole or in part, of a party who has contributed separate property, the court shall consider:

- (a) The intention of the parties in placing the property in joint tenancy;
- (b) The length of the marriage; and
- (c) Any other factor which the court deems relevant in making a just and equitable

As indicated on the face of the statute, the default division of all property characterized as community (or joint tenancy) is equal.

The Nevada statute is, typically, vague and expansive, providing only that any division other than equal must be “deemed just” and based upon a “compelling reason,” and supported by written reasons.

Under the pre-1993 case law, courts were provided a great range of discretion in the matter of property distribution, but the case law was still muddled by apparently conflicting directions.

The confusion stemmed from a series of Nevada Supreme Court opinions which seemingly advocated “equal distribution.”⁷ At the same time, however, the Court had issued decisions rebuffing appeals from orders dividing property *unequally*.⁸

The confusion was eliminated in *McNabney v. McNabney*,⁹ which clarified that as of that time, the applicable statutes should be so construed as to verify that Nevada was an “equitable distribution” jurisdiction, rather than an “equal distribution” jurisdiction, and that (the prior) NRS 125.150 did not mandate an “essentially equal” division of community property.¹⁰

Four years after the *McNabney* decision, the Legislature amended NRS 125.150 as set out above, eliminating the “respective merits of the parties” language and requiring equal division of community property unless a “compelling reason” requires an unequal division and the trial court “sets forth in writing the reasons for making the unequal disposition.”

disposition of that property.

As used in this subsection, “contribution” includes a down payment, a payment for the acquisition or improvement of property, and a payment reducing the principal of a loan used to finance the purchase or improvement of property. The term does not include a payment of interest on a loan used to finance the purchase or improvement of property, or a payment made for maintenance, insurance or taxes on property.

⁷ See *Weeks v. Weeks*, 75 Nev. 411, 345 P.2d 228 (1959) (there is no basis for the argument that an equal division of the community property is not “just”); *Stojanovich v. Stojanovich*, 86 Nev. 789, 476 P.2d 950 (1970) (reversing award of house to the wife where the record did not show the lower court’s reasons or purpose).

⁸ See *Cunningham v. Cunningham*, 61 Nev. 93, 116 P.2d 188 (1941) (rejecting wife’s claim that property division was “so out of proportion in favor of her husband” as to show absolute unfairness); *Lockett v. Lockett*, 75 Nev. 229 338 P.2d 77 (1959) (affirming award of 2/3 of the community property to the wife); *Freeman v. Freeman*, 79 Nev. 33, 378 P.2d 264 (1963) (on conflicting evidence, trial court is in best position to determine propriety of property division).

⁹ 105 Nev. 652, 782 P.2d 1291 (1989).

¹⁰ 105 Nev. at 660, 782 P.2d at 1296. In a footnote, the majority opinion pointed out that the phrase “respective merits of the parties” had never been defined. Without defining the phrase, the court noted that no claim had been made by either party that he or she was more deserving or more meritorious by reason of the fault of the other, and that in considering this factor, it was assumed that the trial court considered “only the respective *economic* merits of the parties.” 105 Nev. at 656, n.4, 782 P.2d at 1294, n.4.

There is a question whether the “broad discretion” accorded to trial courts in making property distributions under the pre-1993 law has been changed in any meaningful way by the change from “equitable” to “presumptively equal” division. The matter could probably be argued either way. There is plenty of authority for the proposition that the legislative change reduced the scope of judicial discretion to make unequal distributions, since legislative enactments are to be construed so that “no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided.”¹¹ On the other hand, the new statutory construction still appears to leave plenty of wiggle room.

The legislature did not define what is meant by a “compelling reason” which would permit an unequal division of community property, and no existing body of statutory or case law provided a reliable precedent. In *Lofgren v. Lofgren*,¹² the Nevada Supreme Court identified one “compelling reason” which would justify an unequal division of community property as the financial misconduct of one of the parties, such as waste or secretion of community assets in violation of court order.¹³

The next year, in *Putterman v. Putterman*,¹⁴ the Nevada Supreme Court held that both the husband’s financial misconduct in the form of his having refused to account to the court concerning earnings and other financial matters, and his lying to the court about his income, provided compelling reasons for an unequal disposition of community property.¹⁵ The Court also noted, in dicta, that other possible “compelling reasons” for an unequal division of community property could include negligent loss or destruction of community property, unauthorized gifts of community property, and even, possibly, compensation for losses occasioned by marriage and its breakup.¹⁶

In *Lofgren*, the reviewing court did not expressly state a standard of review, except to couch its decision as a finding that the lower court had not erred, and that its findings of fact were not clearly erroneous. Similarly, *Putterman* did not state on its face a standard of review, but contained findings that the lower court’s decision was detailed and did in fact support the conclusion that compelling reasons supported the modestly unequal division finally reached. While couched as finding no legal error, the analysis and conclusion in both cases were the sort that could be expected under an “abuse of discretion” review.

Under the existing case law, the scope of judicial discretion in “disproportionate division” cases would appear to be at least as broad as that exercised by trial courts in other contexts, such as awarding alimony or awarding attorney’s fees. In disproportionate division cases, the court need

¹¹ *Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994).

¹² 112 Nev. 1282, 926 P.2d 296 (1996).

¹³ *Id.*, 112 Nev. at 1283-84.

¹⁴ 113 Nev. 606, 939 P.2d 1047 (1997).

¹⁵ *Id.* at 609.

¹⁶ *Id.* at 608.

only find (and identify in writing) some “compelling reason” (presumably, tied to one of the categories identified by the two opinions) without doing any of the things that have been found to be an “abuse of discretion” in other contexts, such as making a pronouncement in the absence of any substantial evidence in the record, or reaching a conclusion based on an identifiably erroneous legal rationale.

In the absence of anything indicating otherwise, property is to be divided equally. And that “anything,” in Nevada, is required to rise to the level of a “compelling reason” for an unequal division. Still, it would appear that judges have significant latitude for finding such reasons, and need only make their findings in writing, and avoid obvious abuse of their discretion, to justify an unequal distribution of property.

The cases, to date in Nevada, indicate that disproportionate division is essentially a remedy for wrongful behavior on the part of the other spouse – waste, fraud, secreting or destroying community property, etc. Ultimately, the facts, and what can be proven, drive the availability of the remedy.