TEN COMMONLY MISSED ASPECTS TO COMMUNITY PROPERTY VALUATION AND DISTRIBUTION

by:

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I. WATCH FOR RETIREMENT BENEFITS, AND KNOW THE DETAILS

Today, most jobs include some kind of retirement benefits, but not all plans are created equally. The time rule under *Gemma* and *Fondi* guides us on the division of the funds. A Qualified Domestic Relations Order ("QDRO") is required to split funds under "qualified" plans from ***private*** employers, whether they are Defined Benefit Plans (monthly check style retirements) or Defined Contribution Plans ("401k style").

Similar, but different specialized enforcement orders are required for a public employee under the Public Employees Retirement System ("PERS"), a federal employee, who requires a Court Order Acceptable for Processing ("COAP") to go to the Office of Personnel Management ("OPM"), and for a current or retired member of the Armed Forces, who needs certain very special language that can be in the decree, or a separate order, to be processed through the Defense Finance and Accounting Service ("DFAS"). These orders, and transfers must be done correctly, and with view toward avoiding accidentally triggering massive tax consequences.

Probably the biggest malpractice trap relating to retirement benefits is survivorship benefits. One current issue is that *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996) holds that an Alternate Payee's portion of the retirement benefits is permanently transferred to the Alternate Payee, creating an interest that should be paid to his or her estate if the Alternate Payee predeceases the Member, but PERS will not enforce such clauses.

II. REMEMBER TO CONSIDER THE JURISDICTION OF THE COURT

New residents from all over the globe bring wonderful and interesting jurisdictional problems to Nevada! A spouse seeking a divorce can dissolve the "status" of the marriage by meeting the residency requirement of six weeks. There is no shortcut.

Child issues and property may not be covered even if a divorce can be issued. Children fall under the UCCJA, NRS Chapter 125A, which asserts jurisdiction based upon home state, significant connection, emergency jurisdiction, or "vacuum" (there is no other state that will assert jurisdiction). The PKPA, 28 USC §1738a, provides for full faith and credit of sister state decisions. No out-of-state property, or alimony issues, can be ruled upon, unless the court has personal jurisdiction over ***both*** parties – merely serving the other party out of state is not good enough.

There are lots of little jurisdictional angles to remember. Out of state property subpoenas

(especially retirement accounts) usually require a judge's original signature. Out of state realty will require a concurrent action or later domestication of the decree in that state for enforcement. Third parties' interests, and tort style actions may be wrapped into the family law case under *Barelli v. Barelli*, 113 Nev. 873, 944 P.2d 246 (1997).

III. DEBTS COUNT TOO, AND BEWARE OF BANKRUPTCY

Divorce cases are often as much about the shifting of debt as the allocation of property. If there is any doubt as to who-owes-what, run a credit check. Close out joint credit immediately. The Nevada Supreme Court has hinted that debt must be equally divided upon divorce. *Wolff v. Wolff*, *supra*. If one party files for bankruptcy in an attempt to eliminate his or her share of the debt, it might be possible to compensate the innocent spouse by way of an award of post-divorce alimony. *See Martin v. Martin*, 108 Nev. 384, 832 P.2d 390 (1992). Alimony can also be modified to take into account the bankrupting out of significant property distributions. *See Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807 (1992).

IV. WATCH FOR WASTE

Since 1993, Nevada trial courts have been required to make an *equal* disposition of community property except in cases in which the court "finds a compelling reason" for making an "unequal disposition" and "sets forth in writing the reasons for making the unequal disposition. *See Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997); *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996). The legislature did not define what is meant by such a "compelling reason," but the cases tell us that they include financial misconduct (such as waste or secretion of community assets in violation of court order, or refusal to account to the court concerning earnings, or lying to the court about income), or negligent loss or destruction of community property, or unauthorized gifts of community property.

V. OMITTED ASSETS AND HOW TO ANTICIPATE THEM

Our law is a bit confused. For the past 12 years, in an unbroken chain of cases since *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990), the Nevada Supreme Court has ruled that any community property not specifically disposed of by a decree remains owned by the parties as tenants in common, leaving it subject to partition by way of later motion or action. But the Court never overruled (or later acknowledged) its decisions to the contrary in a pair of military cases in the late 1980s. *See Taylor v. Taylor*, 105 Nev. 384, 775 P.2d 703 (1989).

Decrees should reflect the lawyers' choice of evils. If it is thought that there is a greater risk that the other side might be hiding some property than a fear that the other side might litigate truly trivial property matters for the purpose of harassment, then a clause specifically permitting an *Amie* action should be inserted. If the fear of baseless litigation is greater, than an anti-*Amie* clause (prohibiting later litigation, and stating that whoever gets possession of unmentioned property keeps it) should probably be used.

VI. INQUIRE INTO LIVING IN SIN

The cohabitation of unmarried individuals could have relevance to community property concerns whether engaged in before the marriage in question, or after the divorce.

As to premarital cohabitation, Nevada law is scanty, but recognizes the possibility of enforceable implied or express agreements to pool income or contract to hold property "as if married," creating "community property by analogy." *See Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984); *Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992). Premarital cohabitation can be used as the basis for asserting a spousal claim upon divorce to property, including retirement benefits, accrued during cohabitation and prior to the marriage.

Cohabitation property claims do not always work, however, and where the requisite intent cannot be made out, even a co-owner on a deed can be found to have no actual interest in the property, and left with nothing. *See Sack v. Tomlin*, 110 Nev. 204, 871 P.2d 298 (1994); *Langevin v. York*, 111 Nev. 1481, 907 P.2d 981 (1995).

Where property rights are given up in favor of receiving alimony, the recipient client must be cautioned that post-marital cohabitation might be usable as a basis for terminating the alimony award. *See Gilman v. Gilman*, 114 Nev. 416, 956 P.2d 761 (1998).

VII. WATCH FOR AGREEMENTS – PRENUPTIAL OR POST-NUPTIAL

Nevada is a party to the Uniform Premarital Agreements Act, NRS ch. 123A, and its terms and our few on-point cases should be consulted whenever the parties entered into any kind of agreement, anywhere, prior to or during the marriage. It is also possible, but not certain, that alleged agreements concerning property during the marriage – including ridiculously oppressive and one-sided agreements – might be given credence by a trial judge and upheld on appeal. *See Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998). On the other hand, courts might strike down any kind of agreements between spouses, including Property Settlement Agreements at the time of divorce, and especially where one of the parties to the agreement is a lawyer. *See Cook v. Cook*, 112 Nev. 179, 912 P.2d 264 (1996).

VIII. JUGGLE PRE-TAX AND POST-TAX EGGS IN TWO BASKETS

Failing to remember the difference in value between pre-tax assets (e.g., IRA accounts) and post-tax assets (e.g., regular savings accounts) is an invitation to disaster. For most wage-earners, pre-tax assets are only worth about 75¢ on the dollar, so taking a $10,000.00 retirement benefit in exchange for $10,000.00 cash is probably a bad idea. Instead, divide pre- and post-tax assets separately; if they must be weighed together, remember to convert the pre-tax assets into post-tax values before putting them on the balance sheet.

Note that the law concerning some kinds of assets has changed over the years to change how they must be considered. For example, since gains from liquidation of a primary residence are usually not taxable now, house equity can generally be balanced against cash assets, unless

liquidity is in issue.

IX. "WHEN WILL IT END?" HOW AND WHEN DOES COMMUNITY PROPERTY STOP ACCRUING

Keep in mind that in Nevada, community property (and, with some other considerations, community debt) continues to accrue throughout the divorce case, until the day of divorce. *See Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983). It is possible to affect this result by obtaining an appropriate interim order. If the parties have interstate connections, be cognizant of possible choice of forum issues – the "magic date" in California is date of separation and in Arizona it is the date of filing.

X. KNOW YOUR CHARACTERS, EVEN IN DISGUISE – CHARACTERIZATION ISSUES

There are lots and lots of instances when all is not what it seems. Separate property can be transmuted into community property, even accidentally, and gifts may or may not be gifts. *See Schmanski v. Schmanski*, 115 Nev. 247, 984 P.2d 752 (1999); *Kerley v. Kerley*, 112 Nev. 36, 910 P.2d 279 (1996). The rents, profits, and issue of separate property in Nevada is separate property, but community labor invested in a separate property business can be analyzed in two very different ways, yielding vastly different "compensation" to the community. *See Johnson v. Johnson*, 89 Nev. 244, 510 P. 2d 625 (1973). Property that is easily identifiable as community property here might nevertheless be separate property, if it was accrued while resident of a state that had laws making it so. *See Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975).