21st Annual Symposium
of the
Family Law Council of Community Property States

April 8-10, 2010, Seattle, Washington

Valuation and Disposition Strategies in a Changing Economy

Materials submitted by:

WILLICK LAW GROUP
3591 East Bonanza Rd., Ste. 200
Las Vegas, NV 89110-2101
(702) 438-4100
fax: (702) 438-5311
website: Willicklawgroup.com
e-mail: [First name of intended recipient]@Willicklawgroup.com

April, 2010

TABLE OF CONTENTS

BIOGRAPHY

Mr. Willick is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American and International Academies of Matrimonial Lawyers, former Chair of the Nevada Bar Family Law Section and former President of the Nevada chapter of the AAML. He has authored many books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual.

In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other states, and in the drafting of various state and federal statutes in the areas of pensions, divorce, and property division. He has chaired several Committees of the American Bar Association Family Law Section, AAML, and Nevada Bar, has served on many more committees, boards, and commissions of those organizations, and has been called on to sometimes represent the entire ABA in Congressional hearings on military pension matters. He has served as an alternate judge in various courts, and frequently testifies as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and his J.D. from Georgetown University Law Center in Washington, D.C., in 1982. Before entering private practice, he served on the Central Legal Staff of the Nevada Supreme Court for two years.

Mr. Willick can be reached at 3591 East Bonanza Rd., Ste. 200, Las Vegas, NV 89110-2101. His phone number is (702) 438-4100, extension 103. Fax is (702) 438-5311. E-mail can be directed to Marshal@willicklawgroup.com, and additional information can be obtained from the firm web site, www.willicklawgroup.com.

I. THE BASICS OF NEVADA'S COMMUNITY PROPERTY SYSTEM

Nevada's formal community property scheme came into existence through the Statutes of 1873. In 1975, during the debate regarding the proposed Equal Rights Amendment, Nevada altered its statutory scheme. Before then, the husband was the manager of the community estate. After the amendment, both parties had equal powers of management of community property.

The concept of the spousal interest evolved over time, from being merely a right to make a claim upon dissolution, to actual ownership upon acquisition. In 1959, 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.[1]

Characterization of property as separate or community at the time of divorce can be an extremely important issue, since Nevada courts are without jurisdiction to award the separate property of one spouse to the other or to the children except for support purposes.[2]

In Nevada, married persons may own property either separately or as a community. Community property is defined in NRS 123.220:

> 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.
> 2. A decree of separate maintenance issued by a court of competent jurisdiction.
> 3. NRS 123.190.[3]
> 4. A decree issued or agreement in writing pursuant to NRS 123.259.[4]

NRS 123.220 allows spouses to agree to the characterization of property as community or separate by entering into a written agreement. Separate statutory provisions govern Premarital Agreements.[5] The rents, profits, and issues of community property are community property, and the rents, profits, and issues of separate property are separate property.[6] Also separate property is the premarital

---

[1] NRS 123.225(2).

[2] *See* NRS 125.150(4) ("In granting a divorce, the court may also set apart such portion of the husband's separate property for the wife's support, the wife's separate property for the husband's support or the separate property of either spouse for the support of their children as is deemed just and equitable").

[3] "Earnings of either spouse appropriated to own use pursuant to written authorization of other spouse deemed gift."

[4] Division of income and resources of husband and wife when one spouse is institutionalized.

[5] *See* NRS ch. 123A.

[6] NRS 123.130; NRS 123.220.

property of either party, and all property acquired afterward by gift, devise, descent or by an award for personal injury damages.[7]

Nevada does not contemplate different "types" of community property – it either is, or it is not. Which is not to say that property cannot be of mixed character, requiring the tracing of interests.

Nevada also recognizes businesses and professional practices as "property" subject to valuation and equitable division upon divorce, and considers goodwill in a professional practice (whether or not marketable) part of that value.[8] To date, no Nevada authority distinguishes between "professional" and "personal" goodwill.

When separate and community property become so mixed and intermingled that it is no longer possible to determine their source, such intermingled properties are considered community property.[9]

NRS 123.190 allows either spouse to make the income earned by the other spouse his or her separate property:

> 1. When the husband has given written authority to the wife to appropriate to her own use her earnings, the same, with the issues and profits thereof, is deemed a gift from him to her, and is, with such issues and profits, her separate property.
> 2. When the wife has given written authority to the husband to appropriate to his own use his earnings, the same, with the issues and profits thereof, is deemed a gift from her to him, and is, with such issues and profits, his separate property.

The statute provides an exception to the usual rule that all property acquired by either spouse during the marriage is community property.[10]

Additionally, spouses may enter into an agreement dividing the community income, assets, and obligations into separate income, assets, and obligations of the spouses if one spouse is admitted to a facility for skilled nursing or a facility for intermediate care or if a division of the income or property would allow one spouse to qualify for community-based services available to the elderly.[11]

---

[7] NRS 123.130(1)&(2).

[8] *See Ford v. Ford*, 105 Nev. 672, 782 P.2d 1304 (1989).

[9] *Ormachea v. Ormachea*, 67 Nev. 273, 217 P.2d 355 (1950).

[10] *Goldsworthy v. Johnson*, 45 Nev. 355, 204 P. 505 (1922).

[11] NRS 123.259.

Further, NRS 123.140 provides a method by which a spouse may record a written "full and complete inventory of the separate property of a married person, exclusive of money." Recording the inventory serves as notice of that spouse's separate property title to the property.[12]

Nevada follows the "pure borrowed law" approach, whereby our courts determine the divisibility of assets according to the law of the state in which those assets accrued).[13] This is the ***opposite*** of a quasi-community property approach, under which property, wherever acquired, would be treated as if it was acquired in this State.

Separation is irrelevant to continuity of the community,[14] which continues until the time of divorce, which usually means the divorce trial.[15] In those cases holding that community property accrues "until the parties are divorced," the Court has always treated the trial and the divorce as synonymous, even when the decree is entered months later.

Nevada switched from being an "equitable distribution" to an "equal distribution" State in 1993. Thereafter, NRS 125.150(1) provided, 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). Such property is also to be equally divided, but tracing is allowed of separate property contributions to joint tenancy property and reimbursement can be ordered if found to be warranted.

The default division of all property characterized as community (or joint tenancy) is equal, and any division other than equal must be "deemed just" and based upon a "compelling reason," and supported by written reasons.

Such "compelling reasons" could be the financial misconduct of one of the parties, such as waste or secretion of community assets in violation of court order,[16] or refusing to account to the court

---

[12] NRS 123.150.

[13] *See Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975).

[14] *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

[15] *See Fox v. Fox*, 84 Nev. 368, 441 P.2d 678 (1968); *Fox v. Fox*, 87 Nev. 416, 488 P.2d 548 (1971) (collectively determining the outcome on the basis of the information presented at the divorce trial).

[16] *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996).

concerning earnings and other financial matters, and lying to the court about income.[17] Per dicta, 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."[18]

II. DEBT AND NEVADA COMMUNITY PROPERTY LAW

In 1997, the topic for the Council of Community Property States Symposium was division of debt. The Nevada paper submitted that year[19] noted that Nevada has no statute specifically governing debt division. The case law reviewed in that paper found no holding clearly specifying how courts should divide debt in future cases, or what factors might be used to make that decision.

In 1990, while Nevada was an "equitable distribution" State, the Nevada Supreme Court had indicated that debt allocation may be made in accordance with a lower court's conclusion of which party had the ability to pay it. In *Malmquist v. Malmquist*,[20] the Court awarded the ***entire*** community debt to the party with the apparently higher future income.

But that, too, might have changed in 1993, when Nevada went to a "presumptive equal" community property model. In a 1997 case, the Nevada Supreme Court reversed a district court decision that had required the husband to purchase a life insurance policy without imposing a corresponding duty on the wife. The appellate court ruled that the trial court's decree had "constituted an unequal distribution of debt."[21] The holding, while oblique, appeared to direct trial courts to effect an ***equal*** distribution of debt when they can do so.

Once debt has been adjudicated, Nevada courts have gone to some lengths to ensure enforcement of the division made. The Nevada Supreme Court has opined that where a party does ***not*** pay the debts that were supposed to be paid, that party is not entitled to the property share that was awarded based on anticipation of such payment.[22] The Court has likewise allowed the reopening of alimony

---

[17] *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997).

[18] *Id.*, 113 Nev. at 608, 939 P.2d at 1048.

[19] *See* Marshal Willick, *Where Will the Money Go? Community Debt Issues & Pendente Lite Orders in Community Property States* (Council of Community Property States & State Bar of Arizona, 1997).

[20] *Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990).

[21] *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996).

[22] *Allen v. Allen*, 112 Nev. 1230, 925 P.2d 503 (1996).

to the party to whom a debt fell because the other party was supposed to pay that debt but failed to do so.[23]

III. VALUATION DATE – INCENTIVES AND STRATEGIES FOR BOOMS AND BUSTS

As detailed in prior CCPS submissions,[24] there is no statutory guidance on the issues of when the community ends, or the appropriate valuation date for marital assets (or liabilities).

Nevada case law tends to treat the date of divorce trial, and date of divorce, as the same date (even when a decree is not submitted until months afterward.[25] Similarly, Nevada divorce courts tend to try to value assets at the closest possible date to the divorce, which makes sense given Nevada's cutoff of accrual of community property. But there is no fixed limit of how far away from trial a valuation must be to be considered inappropriate or unusable.

In either boom or bust periods, this can make the parties' tactics in the litigation vastly different. In 2004 alone, average home values increased by some 49% in Las Vegas.[26] During such a run-up, if it is clear that one party will keep such an asset, and be required to buy out the equity interest of the other, the spouse intending to hold the asset will want to get to trial as quickly as possible, while the being-bought-out spouse has a strong financial incentive to delay that date as long as possible.

Where the market is in continuing decline – for example, Las Vegas in 2007 to 2009 – the same incentives exist for the same parties, but in reverse. Home prices plummeted, having peaked at an average of $285,000 in 2006 and then dropped to $120,000 by August, 2009, so that, overall, the

---

[23] *Martin v. Martin*, 108 Nev. 384, 832 P.2d 390 (1992).

[24] *See* Marshal Willick, *Back to Basics: Overview of Community Property* (Council of Community Property States & State Bar of New Mexico, 2009).

[25] *See Fox v. Fox*, 84 Nev. 368, 441 P.2d 678 (1968); *Fox v. Fox*, 87 Nev. 416, 418, 488 P.2d 548 (1971) (after remand and entry of judgment, in a third appeal, the husband asked the Court to change its mind and order additional evidence be taken, but the Court held the parties to the evidence that they had presented as of the time of trial, stating that "equity does not require a remand to permit appellant to proffer explanatory matter he should have adduced at the first hearing of this cause"); *Forrest v. Forrest*, 99 Nev. 602, 606-607, 668 P.2d 275, 278-79 (1983) (holding that community property accrues until parties are divorced, but treating the trial and the divorce as synonymous by referencing the financial facts as they existed at the moment of trial, and directing the trial court on remand to address those specific numbers). Thus, the critical time period as to evidence of the property belonging to the parties was the time of the ***divorce trial***, not that of the (much-delayed) filing of the judgment.

[26] *See* David Grainger, "Riding the Boom" (Fortune Magazine, Vol. 151, No. 11, May 30, 2005), posted at http://money.cnn.com/magazines/fortune/fortune_archive/2005/05/30/8261260/index.htm.

12-month median price for an existing home in Las Vegas fell 38 percent in 2009 alone.[27] Every expert considers the resulting property values "under-valued," since the market is depressed by the flood of foreclosures, but it is those actual foreclosures, short-sales, etc., that yield appraisals in 2010 at a fraction of what the same house would have appraised for in 2006.

In such a market, the buying-out spouse would be the party who would want the day of reckoning as far in the future as possible, making the buy-out value as small a number as possible. And the reverse for the spouse to be bought out.

Given the reality that court dockets are crowded, the net effect of such drastic changes in valuation over short period of time is to create a kind of valuation lottery, where vastly different outcomes for the parties result from the happenstance of case assignment to a trial date.

IV. AVAILABLE DISPOSITION METHODOLOGIES

There are at least four possible disposition strategies for divorce courts, each with its own risks and benefits.

First, certainty is most easily accomplished by breaking property down into units as to which finality and equal distribution is easiest – cash. Doing so requires forcing the actual sale of everything with any uncertainty as to valuation. That is a pretty severe resolution with assets such as houses or cars that parties had hoped to keep using post-divorce.

Most courts, accordingly, turn to the second possible strategy of "virtual sales," by which hypothetical values are ascribed to assets that are then either offset or ordered equalized by way of cash paid by one party to the other. This permits people to move on post-divorce with some continuity, and prevents having to sell things at a bad time, or for a loss, but necessarily involves a bit of guesswork and uncertainty, and opens the door to the delays, costs, and uncertainties of appraisals and valuations.

As a third strategy, a court could find that for some reason – for example bad market conditions, contractual limitations, pending contracts – actual sale or valuation of an asset had to be deferred for some period of time, or indefinitely. Under various conditions, this could lead to fairer and more accurate division of property and debts, but at the cost of continued entanglements, and continuing (presumably more expensive) litigation. Further, as discussed below, some commentators do not believe courts actually have the power to indefinitely defer property matters.

---

[27] *See* Hubble Smith, "Home prices down in all ZIP codes in 2009" (Las Vegas Review-Journal, Feb. 21, 2010), posted at http://www.lvrj.com/business/home-prices-down-in-all-zip-codes-in-2009-84895272.html.

The relevant statute[28] requires the divorce court to make an equal "disposition" of property in the absence of stated grounds for an unequal disposition. But nothing expressly prohibits leaving parties as co-owners of an asset, in some manner and for some period of time. Unlike child custody, as to which the courts are required to enter a final order prior to divorce,[29] property distributions may be amenable to more creative court orders in times of severe and rapid changes.

On one hand, bifurcations of divorces are somewhere between disfavored and flatly prohibited.[30] On the other, courts reserve jurisdiction over property issues all the time – for example to divide pension benefits by way of further order (QDRO) at some future time or upon the happening of some future event.

There are those who believe that such indefinite reservations of jurisdiction are improper, since NRCP 60(b) contains a six-month limit for motions to modify on most grounds, and the Nevada Supreme Court has stated that the jurisdiction of district courts over any issues of property (and debt) therefore lapses after six months.[31]

Practitioners holding that view advocate essentially gaming the system by insertion of provisions indicating that the property and debt allocations are "in the nature of alimony, maintenance, and support" so as to provide indefinite jurisdiction.[32] Others have used the same tool (mixing alimony concepts with property division as a work-around); one California court called the gambit making the property award "supportified."[33]

Respectfully, that concern seems overblown, and the elaborate language to avoid that concern seems unnecessary, at least in Nevada. As the Nevada Family Law Practice Manual notes, the six month limitation to modify property allocations is a bar to modification in the ***absence*** of a reservation of jurisdiction over property rights.[34] And the community property statute speaks to "disposition," not

---

[28] NRS 125.150(1)(b).

[29] *See* NRS 125.450.

[30] *See*, *e.g.*, *Gojack v. District Court*, 95 Nev. 443, 596 P.2d 237 (1979); *Smith v. Smith*, 100 Nev. 610, 691 P.2d 428 (1984).

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

[32] *See* Robert Dickerson & Shann Winesett, *A Positive Approach to Negative Equity*, in Advanced Family Law Financial Strategies (State Bar of Nevada, Dec. 2, 2009) at 4-7 (hereafter, "Dickerson & Winesett").

[33] *In re Marriage of McGhee*, 131 Cal. App. 3d 408, 182 Cal. Rptr. 456 (Ct. App. 1982); *see also In re Marriage of Sheldon*, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (Ct. App. 1981) (noting the "close relationship between the amount of a property division and the entitlement, if any, of a spouse to spousal support"); *In re Marriage of Mastropaolo*, 213 Cal. Rptr. 26 (Ct. App. 1985) (reversing an alimony award "on condition" that the court's affirmance of the retirement division became final).

[34] *See* Nevada Family Law Practice Manual, 2008 Edition § 1.307.

unmodifiable ***distribution***, of property upon divorce. It may come down to the scope of inherent authority of trial courts since, while no statute, rule, or case expressly states that they have such authority, none says that they do not, either.

Finally, as a fourth disposition strategy, courts could take notice of extraordinary events and decline to accord a moment-of-trial valuation to assets, instead ascribing to them a hypothetical "real value."

This would be one way to avoid the calendar lottery for Las Vegas real estate described above, and could be used to ascribe an average value to stock in a company with cyclical increases and decreases in value. It would allow courts to ascribe values they believed more closely reflected the actual value of assets, instead of values artificially and perhaps transiently altered by the happenstance of events at the moment of trial.

But there are multiple problems with such an approach, including treating different assets differently (by altering the timing of their valuation, using some higher or lower value as the "real" value). And there is some question of whether a valuation of an asset other than as appraised at the closest possible time to trial is even legally permissible – the Nevada Supreme Court has held that any award made by a trial court is required to fall "within a range of possible values demonstrated by competent evidence."[35]

In short, no one distribution methodology is perfect for all circumstances and assets, and in an economy in rapid flux, lawyers and judges should perhaps consider more alternatives than those employed when circumstances are relatively stable.

V. DISPOSITION STRATEGIES FOR NEGATIVE VALUE ASSETS

Negative equity is the description of the situation in which the owner owes more on an asset than it is worth.[36] Dickerson & Winesett read *Wolff* and the post-1993 Nevada community property law to mandate an equal division of debt just as it requires an equal division of property, so if parties had a house worth $100,000 less than its mortgage, and had $100,000 in the bank, one party would get the house ***and*** the bank account, and the other would walk away with nothing.[37]

Their only real problem with such a scenario is what they termed the "potentially ephemeral nature of debt in the current economy" – the possibility that the party receiving the money and negative-

---

[35] *Alba v. Alba*, 111 Nev. 426, 892 P.2d 574 (1995).

[36] *See* Dickerson & Winesett at 1, citing *Americredit Financial Services v. Penrod*, 392 B.R. 835, 842 (9th Cir. 2008).

[37] *See* Dickerson & Winesett at 2-4.

equity asset could "reset to zero" the negative number by bankruptcy, or short-sale, or simply walking away, and thus take the positive asset but not the negative equity.[38]

The authors' primary solution was the reservation of jurisdiction and intertwining with alimony concepts discussed above. As an alternative, they suggest a judicially-imposed co-tenancy, finding both parties equally responsible for the negative equity, but charging the possessory spouse an imputed reasonable rental value.[39]

Others see the problem very differently. One family court judge has declared that the critical distinction is between secured and unsecured debt. He allocates unsecured debt (such as credit cards) equally, but considers that for secured debt, anything less than a zero value equals zero, on the theory that the debt has not been "realized" until there is a walk-away/surrender/foreclosure, the creditor has regained the asset, and then chosen to pursue a deficiency judgment, actually done so, and actually collected some money from one of the parties.

Nevada is a deficiency judgment State – a creditor foreclosing on an asset worth less than a debt can pursue and try to collect on such a judgment. In the real world, that has not been done much, and where it is not, the judge's approach ends up treating both parties equally as to the negative equity (they are both unaffected, or both suffer the consequences). Some creditors have been sending out 1099 forms for the difference.

Essentially, this view of negative equity treats it much like a possible tax liability. The Nevada Supreme Court has held that trial courts ***must*** consider tax consequences only when there is proof of an "immediate and specific" tax liability connected with that asset.[40] Courts only ***may*** consider potential tax liability when valuing marital assets when a taxable event has occurred as a result of the divorce or equitable distribution of property, or is certain to occur within a time frame so that the trial court may reasonably predict the tax liability.[41]

Critics of the judge's approach consider that, usually, the negative equity came about by taking on debt in excess of the value of the property (by refinancing when values were high, for example) and both parties to a marital community that did so presumably shared in the benefit of the money received, and should likewise equally bear whatever deficiency was created, through market forces or otherwise. This view sees the "negative equals zero" approach as unduly favoring the "out

---

[38] *See* Dickerson & Winesett at 2, 4.

[39] *See* Dickerson & Winesett at 10.

[40] *Ford v. Ford*, 105 Nev. 672, 782 P.2d 1304 (1989), citing *In re Marriage of Clark*, 145 Cal. Rptr. 602, 606 (Ct. App. 1978).

[41] *Ford v. Ford*, 105 Nev. 672, 782 P.2d 1304 (1989), citing *Hovis v. Hovis*, 541 A.2d 1378, 1380-1381 (Pa. 1988).

spouse" – the one left unconnected with the negative equity asset, who (presumably) still receives half of the assets.

No comprehensive solution to the "negative equity problem" is apparent, at least in Nevada practice, at least now. If things stay bad enough, long enough, a consensus will probably emerge, but virtually everyone hopes that the economy will recover before enough time passes for such a consensus to be reached.

VI. PROBLEMS WITH REAL ESTATE VALUATION FORMULAS IN A RAPIDLY-CHANGING ECONOMY

Nevada uses a combination of two California approaches to allocate, between separate and community property, the increase in value of separate property purchased on credit and subsequently brought into a marriage by one of the spouses: (1) the *Moore* approach[42]; and (2) the Moldave modification;[43] all as summarized and recapitulated in *Malmquist*.[44]

The *Moore* approach grants the community a pro rata share in the increased value of a separate property residence according to the ratio that mortgage principal reduction attributable to community property bears to the original purchase price.[45] Thus, if the community paid 10% in principal of the original purchase price of the home, the community would be entitled to 10% of the increased value of the home.

Under *Moore*, the entire unpaid mortgage balance at divorce is credited to separate property, in addition to the amount by which the separate property mortgage payments (pre-marriage) reduced the mortgage principal.[46] The total of the separate property mortgage principal is then divided by the original purchase price of the home to yield the fraction of appreciation that remains separate property.[47]

The *Malmquist* court modified the *Moore* approach because principal pay down in the earlier years of an amortization schedule requires more money (due to the higher percentage of interest in each

---

[42] *See In re Marriage of Moore*, 618 P.2d 208 (Cal. 1980).

[43] *See* Peter M. Moldave, "The Division of the Family Residence Acquired with a Mixture of Separate and Community Funds," 70 CAL. L. REV. 1263 (1982).

[44] *Malmquist v. Malmquist*, 106 Nev. 231, 240, 792 P.2d 372, 377 (1990).

[45] *Malmquist*, 106 Nev. at 238, 792 P.2d at 376 (citing *Moore*, 618 P.2d at 210-11).

[46] 106 Nev. at 238, 792 P.2d at 376 (citing *Moore*, 618 P.2d at 210-11).

[47] 106 Nev. at 238, 792 P.2d at 376 (citing *Moore*, 618 P.2d. at 210-11).

payment) than in the later years.[48] Thus, the separate property owner would get a windfall under the *Moore* approach. The Moldave approach solved the inequity by allocating separate and community property based on the number of payments made while single or married, respectively, rather than the actual pay down of principal.[49] The actual formula is as follows:

$$\text{Separate Property} = \text{PDsp} + \underline{[(\text{PDsp} + \text{Olsp})}/\text{PP} \times \text{A})],$$

where Separate Property (SP) is the total separate property interest in home equity; PDsp is principal pay down attributable to separate property before the marriage (including the down payment); OLsp is the portion of the outstanding loan to be credited to separate property, which is determined by dividing the number of monthly payments made while single by the total number of monthly payments made through the date of divorce, and multiplying that ratio by the outstanding loan balance at the time of trial; PP is the purchase price; and A is the appreciation of the home.[50]

Since 1990, a remarkable expansion of the real estate market brought a rapid escalation of home prices. Divorces tried in that environment exposed arguable weaknesses in the *Malmquist* formula, as massive "community property" interests appeared in short-term marriages.

Since that time, the real estate market trend has reversed and home prices have sharply declined. Now, instead of dealing with the effects of *Malmquist* during a real estate market bubble, where speculators caused hyper-appreciation in appraised home values, divorcing couples saw a formula which, applied during the bursting of that bubble, caused peculiar results when applied to homes suddenly worth significantly less than the mortgages that encumber them.

In fact, literal application of the formula produced negative numbers in some circumstances, leading to the question of whether such a formula could inadvertently create "community debt" by magnifying the negative equity in a separately-titled asset – obviously a result no one predicted, in the cases.

Saying that application in either boom or bust produces inequity, critics of the *Moore*/Moldave/*Malmquist* formula cases have proposed various other approaches that they believe are more equitable. One set of authors proposes using the same basic analyses as set out in *Pereira*[51]

---

[48] 106 Nev. at 239, 792 P.2d at 377.

[49] 106 Nev. at 239, 792 P.2d at 377 (citing *Moldave*, 70 CAL. L. REV. at 1288-89).

[50] 106 Nev. at 240, 792 P.2d at 377.

[51] *Pereira v. Pereira*, 103 P. 488 (Cal. 1909) (court is to allocate to separate property a reasonable rate of return on the original capital investment. Any increase above the amount arrived at in this fashion is to be allocated to community property).

and *Van Camp*[52] for business valuations, selecting whichever would achieve substantial justice between the parties.[53]

Whenever it is true that roller-coaster valuation changes produce absurd results in terms of instant (if temporary) "community property" riches or "community debt" unrelated to anything other than market forces acting on a separate property asset, there is a problem requiring correction. The problem is still there, if more subtle even when the assets being so valued is titular community property – either way, the valuation-date lottery is an inappropriate way to value property and allocate debts.

VII. INTEREST ON JUDGMENTS

Any payments due for either child support or alimony become "judgments" by operation of law from the date they are due but unpaid. Other payments due (either periodic, or lump sum) do not have this automatic provision, and if they were not formally "reduced to judgment" in the earlier proceedings constitute unliquidated damages until the person owed the money returns to court to reduce those sums to judgment.

When a judgment requires payments at a series of future dates, and a payment is missed, the missed payment "draws interest . . . until satisfied." The person owed the money does not have to do anything to start the running of interest – that is automatic – but it is usually the burden of the person owed the money to calculate the sum owed, and to collect it from the party owing the money. The rate owed varies every six months, at 2% more than the prime rate of interest.[54]

Child support is treated specially under Nevada law, in several ways. Because of a change to the laws in 1987, the Nevada Supreme Court has ruled that the statute of limitations never runs on child support obligations that accrued on or after July 1, 1981.[55]

---

[52] *Van Camp v. Van Camp*, 199 P. 885 (Cal. App. 1921) (court is to deduct from the total income or increase in value, the amount of reasonable compensation received by the owner of the property for his services rendered. That amount is said to have represented the community interest. The balance is all allocated to separate property).

[53] Bruce Shapiro & Joseph Leauanae, *The Abolishment of Malmquist v. Malmquist* (2010 pre-publication draft in the possession of the author).

[54] NRS 17.130(2) (along with NRS 99.040(1), governing contracts). The calculations, especially if multiple sums are outstanding over a significant period, can be quite complex. WILLICK LAW GROUP developed the "Marshal Law Judgment and Interest Calculator Program" in 1991, and has updated and improved it over the years since then. Version Three added the child support penalties calculator.

[55] *State of Washington v. Bagley*, 114 Nev. 788, 963 P.2d 498 (1998).

A court that finds that an arrearage in child support has accrued is required to add interest to the sum due, as well as "a reasonable attorney's fee," which is to be awarded "unless the court finds that the responsible parent would experience an undue hardship if required to pay such amounts."[56]

Further, and in addition to interest and attorney's fees incurred for collection, a court finding an arrearage in child support must add a 10% per year penalty on each delinquent payment from the date it was due, for all sums accruing on or after October 15, 1995.[57] District attorneys and other public agencies are specifically charged with enforcement of the provision.

The penalties provision was given a two-year delay before it went into effect (from its passage in the 1993 legislature, until October, 1995), presumably for the purpose of allowing anyone then in arrears to catch up on payments.

This is the rare area where Nevada is actually ahead of the curve. It's not perfect, but Nevada's interest statutes track the economy (if lagging it by six months), adjusting interest rates up and down to reflect the larger economy.

VIII. CONCLUSIONS

Nevada's community property system is a fairly basic, presumptive-equal-division statutory scheme. There is no real statutory guidance, and little case law, concerning the division of debt, but the most recent authority appears to indicate that debt is to be divided equally, at least as a presumption.

Since Nevada continues the community to the point of the divorce trial, changing economic times create perverse incentives to either accelerate or delay the divorce – depending on who owns what and which way the market is moving. This gives rise to multiple possible disposition methodologies that informed counsel can argue to increase their clients' share of assets, while decreasing exposure to liabilities.

A debate is in process in Nevada as to disposition of "negative equity" property, and it is unclear whether, in the long run, the negative number, or zero, appears on the marital balance sheet for such assets. Both approaches are fraught with theoretical and practical shortfalls and inconsistencies, and no uniform consensus has yet appeared.

The formulaic approaches to apportioning community and separate components of essentially mixed marital assets (specifically, the marital home) can and do produce absurd results as the economy yo-yos from boom to bust and back, creating vastly different results for similarly-situated people depending on the happenstance of trial setting. Various fixes have been suggested, but none have yet been crash-tested.

---

[56] NRS 125B.140.

[57] NRS 125B.095.

One bright spot for Nevada is its interest laws, which are now designed to ride and reflect changes in applicable interest rates, making interest meaningful, but not absurdly onerous, no matter what the economy does.

Overall, any rapidly "changing economy" – in any direction – seems to give meaning to the ancient Chinese curse: "May you live in interesting times."

P:\wp13\CCPS\MSW6060.DOC