NEVADA COMMUNITY PROPERTY LAW CONCERNING ALLOCATION OF DEBT AT DIVORCE

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I. STATUTORY AUTHORITY

The statutory authority for debt division upon divorce in Nevada is vague at best. NRS 125.040 states in part:

> 1. In any suit for divorce the court may, in its discretion, upon application by either party and notice to the other party, require either party to pay moneys necessary to assist the other party in accomplishing one of more of the following:
> (a) To provide temporary maintenance for the other party;
> (b) To provide temporary support for children of the parties; or
> (c) To enable the other party to carry on or defend such suit.
> 2. The court may make any order affecting property of the parties, or either of them, which it may deem necessary or desirable to accomplish the purposes of this section. Such orders shall be made by the court only after taking into consideration the financial situation of each of the parties.
> . . . .

Subsection (1) is clear enough that one party can't just abandon the other – taking all or most of the community assets – while the "out spouse" is required to maintain a home, take care of the children and to come up with the necessary assets to defend the suit.

Subsection (2), however, is not so clear. It is so vague that it could probably be interpreted as reaching any subject matter relating to either property or debt. While the statute does not use the term "debt," it does appear to contemplate the application of "property" to debt service, since debts are obviously part of the "financial situation of each of the parties" that the courts are directed to consider.

Just like all questions of law, this is not a black and white consideration by the courts and requires a comprehensive review of the facts of the case and the situation which the parties find themselves when before the court and possibly even after the divorce is complete.

II. DEBT INCURRED DURING THE MARRIAGE

Few restrictions on the ability of a spouse to incur debt during marriage are enforceable. The portions of NRS 123.230 explicitly addressing limitations on one spouse incurring debt alone are:

> . . . .
> 3. Neither spouse may . . . encumber the community real property unless both join in the execution of the deed or other instrument by which the real property is . . . 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.
> . . . .
> 6. Neither spouse may acquire, purchase, sell, convey or encumber the assets, 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.

Purchases on credit present specific problems. There is, of course, the general presumption that ***all*** property acquired during marriage is community property;[1] the conflict is created by the fact that in Nevada, the rents, profits, and issues of separate property remain separate, just as the fruits of community property are community.[2]

The burden is generally on the spouse suggesting that property is separate to show that it was acquired by use of separate funds or separate credit.[3] As to property purchased on credit, case law has expressed the burden of proof as one of clear and certain evidence that a lender or vendor ***primarily*** relied on that spouse's separate personal property to secure the credit – rather than on that spouse's earning capacity – to establish that loan proceeds are separate property.[4] This is known as the "intent of the lender" test.

Property purchased with such a separate loan remains separate property thereafter, absent transmutation.[5] Furthermore, the fact that both spouses sign a mortgage or note does not transform the separate property into community property.[6]

Creditors thus need to have the signature of both parties on an application for credit in order pursue collection of the credit debt from both parties. There do not appear to be any published cases dealing with limitations on garnishment against commingled assets (such as joint bank accounts). As a theoretical matter, creditors would appear to be restricted to collection against the person (or property of the person) incurring the obligation, either during the marriage, or after the divorce.[7] As a practical matter, this restriction appears to provide no barrier; banks do not typically care about the source of money in accounts being garnished, but only the name on the account.

If a debt is incurred during marriage and owed by both spouses, nothing in the divorce decree

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[1] NRS 123.220; *Peters v. Peters*, 92 Nev. 687, 557 P.2d 713 (1976).

[2] NRS 123.130.

[3] *Todkill v. Todkill*, 88 Nev. 231, 495 P.2d 629 (1972).

[4] See *Schulman v. Schulman*, 92 Nev. 707, 716-17, 558 P.2d 525, 530-31 (1976).

[5] *Schulman v. Schulman*, 92 Nev. 707, 716 n.9, 558 P.2d 525, 531 n.9 (1976).

[6] *Schulman v. Schulman*, 92 Nev. 707, 716 n.9, 558 P.2d 525, 531 n.9 (1976); see also *Dimick v. Dimick*, 112 Nev. 402, 915 P.2d 254 (1996) (husband's signature of both spouses' names on a trade-out purchase agreement, and both parties' signatures on "vesting instructions" that would have made them joint tenants of the property at the close of escrow, did not actually transfer any property interest to the wife).

[7] At least when the creditor is someone other than a former spouse of one of the parties to the marriage, as in *Greear v. Greear*, supra, 303 F.2d 893 (9th Cir. 1962).

prevents the creditor from chasing whichever spouse it chooses for payment.[8] Of course, where such a creditor chases one spouse for a debt allocated to the other upon divorce, the spouse saddled with the other's adjudicated debt has recourse to the divorce courts to obtain reimbursement.[9] Thus, where one spouse is ordered to pay a marital debt, but instead discharges it in bankruptcy, the other spouse still has a viable claim in Family Court.[10]

Just the statement in a divorce decree that a given obligation is to be paid "from the proceeds of the sale" of a community property asset "implies" that the debt was community debt, and where one spouse ends up paying the entirety of the obligation, gives rise to a post-divorce claim for reimbursement.[11] Thus, the characterization of property may be determinative of the obligation of two divorcing parties to pay any debt connected to the property. The reverse is also sometimes true – courts can look to who owes debt connected to property to determine whether it has a separate or community property character.[12]

As a general proposition, Nevada considers debts incurred during the marriage as presumptively a community obligation. Thus, a debt that is incurred from the date of marriage to the date of divorce is a community debt that is to be adjudicated and divided equally between the parties.[13]

If the parties, for whatever reason, decide to enter into a contract that alters their legal relationship, that contract can't affect their status as husband and wife, but can affect all property rights which include debt distribution. NRS 123.080(1) states:

> A husband and wife cannot by any contract with each other alter their legal relations except as to property, and except that they may agree to an immediate separation and may make provision for the support of either of them and of their children during such separation.

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[8] *Marine Midland Bank v. Monroe*, 104 Nev. 307, 756 P.2d 1193 (1988).

[9] *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997) (upholding the trial court's unequal division of community property for, among other things, the husband's violation of a Joint Preliminary Injunction by charging several thousands of dollars in credit card debt after separation, which the wife paid).

[10] *Martin v. Martin*, 108 Nev. 384, 832 P.2d 390 (1992) (where no alimony was awarded at trial in August, 1988, but the husband was ordered to pay child support and two Visa accounts, the property, debt, and alimony terms were inter-related, so that husband's discharge of the debts in bankruptcy permitted the former wife to file a motion for reimbursement by way of spousal support, because the debt the husband was supposed to pay was "characterized as being in the nature of alimony, maintenance and support").

[11] *Fuller v. Fuller*, 106 Nev. 404, 793 P.2d 1334 (1990).

[12] See *Schmanski v. Schmanski*, 115 Nev. 247, 984 P.2d 752 (1999) (the Court attempted to derive the community or separate character of property, in part, based on a characterization of the debt attached to that property).

[13] Of course, the parties can stipulate to end the community at any point in the divorce process or under the provisions in Nevada law for separate maintenance of a spouse. *See* NRS 123.080.

This "termination of the community" by way of an order for separate maintenance, will not be disturbed if either party subsequently files for divorce. NRS 123.080(3) states:

> In the event that a suit for divorce is pending or immediately contemplated by one of the spouses against the other, the validity of such agreement shall not be affected by a provision therein that the agreement is made for the purpose of removing the subject matter thereof from the field of litigation, and that in the event of a divorce being granted to either party, the agreement shall become effective and not otherwise.[14]

As such, property and debts divided by either an express agreement of the parties or by decree of divorce is appropriate in Nevada.

Even though it is presumptively assumed that all debt is to be divided equally between the parties, Nevada has considered that unlike the assets of the marriage that exist at the time of the divorce, debt can be allocated based upon the future earning power of one of the parties.

In *Malmquist v. Malmquist*,[15] the Nevada Supreme Court affirmed the trial court's allocation of the ***entire*** community debt to the party with the apparently higher future income, who had received a greater "overall property distribution." The Court held that district courts "are granted broad discretion to determine the equitable distribution of community property and debts; the court need not make an ***exactly equal distribution***."[16] Finding no abuse of discretion, the Court thus indicated that debt allocation may be made in accordance with a trial court's conclusion of which party will have the ability to pay it.

The finding in *Malmquist* places community debt in a different light than we find community property. There are times when there is an unequal distribution of the existing community property in a divorce, but that is usually when one party has been found to have either wasted, hidden, or otherwise transferred property without the knowledge of the other spouse.[17]

Of course, the terms of a decree or a property settlement agreement will usually control how the debt is characterized and addressed by the court. The same year as *Malmquist*, the Court reviewed *Fuller v. Fuller*.[18] The divorce decree had ordered a debt paid from the proceeds of the sale of some community property. A different district court judge issued an order characterizing the debt

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[14] *See Ballin v. Ballin* 78 Nev. 224, 371 P.2d 32 (1962), cited in *Rush v. Rush*, 82 Nev. 59, at 60, 410 P.2d 757 (1966), distinguished in *Day v. Day*, 80 Nev. 386, at 389, 395 P.2d 321 (1964).

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

[16] *Id*. at 251.

[17] *See Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996); and *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997) which detail what constitutes a "compelling reason" for the unequal division of community property.

[18] *Fuller v. Fuller*, 106 Nev. 404, 793 P.2d 1334 (1990).

as the husband's separate debt, and denied the husband's motion to force the wife to reimburse the husband after he paid off the obligation. On appeal, the Court held that the divorce decree's order to pay the debt from the proceeds of the sale of a community property asset "implied" that the debt was community debt. The Court therefore reversed the order denying the husband's request for contribution from the wife, and remanded for determination of the proper amount. Thus, the characterization of property may be determinative of any debt connected to the property.

Recently, we were involved in a case where the parties had entered into a property settlement agreement affecting the division of a military retirement pension. The agreement required the member to pay the former spouse 40% of his military retirement as of the date he was first eligible to retire. The remainder of the member's retirement would remain his separate property and any future earned retirement from the date of the agreement would be his separate property. The District Court strictly (and quite literally) interpreted the poorly drafted agreement which caused the former spouse to lose any future cost of living adjustments.

Though this example does not concern the adjudication of debt, it is provided to demonstrate how the terms of an agreement can control how the court adjudicates community property or debt.

Further, Nevada has, for the most part, rejoined the rest of the community property states in providing that property left undistributed by the court upon divorce remains the property of the parties as tenants in common.[19] Accordingly, and especially in view of the 1996 *Wolff* Court's stated requirement of equal division of debt, some commentators maintain that a district court in an appropriate case ***could*** find the parties to be "debtors in common" of "omitted debt," as it could find them tenants in common of omitted property, by way of a motion or action mirroring those for omitted assets.[20]

In *Wolff*, the Nevada Supreme Court reversed the district court's order requiring the husband to purchase a life insurance policy for the benefit of the wife as an abuse of discretion, that the requirement for the husband to spend money for such a policy would be "an 'unequal' distribution of debt," citing NRS 125.150(1)(b) for its rationale.[21]

The holdings of *Malmquist* and *Wolff* are apparently contradictory on the question of whether the district court may allocate debt in accordance with its belief as to which party is most able to pay the debts, or must divide the debts equally in the absence of stated "compelling circumstances" for an unequal division or risk committing a reversible "unequal distribution of debt."

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[19] Tenancy in common. A tenancy by two or more persons, in equal or unequal undivided shares, who each have an equal right to possess the whole property but no right of survivorship. *Black's Law Dictionary* 621 (Bryan A. Garner ed., Pocket Edition, West 1996).

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

[21] *Id*. at 1361.

However, both of these views of the state of the law as to debts not specifically allocated in a divorce decree agree that, under *Fuller*, both parties can be held liable for contribution to payment of a "community debt" paid by only one of the parties.

The change in course may be due to the 1993 legislative change of the Nevada community property scheme from one of presumptive "equitable distribution" to one of presumptive equal distribution. NRS 125.150(1)(b). Indeed, that statute was the only authority cited by the Nevada Supreme Court for its reversal in *Wolff* of the order requiring purchase of an insurance policy by the husband. The statute itself says nothing about division or assignment of debts, but until there is further legislative or case law guidance, the *Wolff* holding appears to be authority that debt either must be equally divided, or a written explanation of the "unequal" debt division must be provided on the face of the decree.

There is no authority in Nevada for the proposition that a division of debt in a divorce decree may be modified for any reason, post-divorce. It would be possible to construct several logical reasons to allow such modifications, such as changed circumstances during the anticipated term of debt repayment. The case law, however, appears to presume that the ***debt*** terms set out in the decree are absolute, and that other terms, such as alimony, or property division, will be amended to enforce the debt division. *See Martin v. Martin*, *supra*; and *Allen v. Allen*.[22] While there is no significant appellate authority on the subject, proceedings in the district courts to enforce debt payment terms by less drastic means (primarily, contempt sanctions) are common.

Some district court judges have expressed the opinion that the courts lack jurisdiction to allocate debts not included in a divorce decree, once the limitation of *Kramer v. Kramer*,[23] has passed. Those courts consider partition of debts to be a "modification" of the divorce decree to include and allocate omitted debts, citing *Fuller v. Fuller*, *supra*, and *Gramanz v. Gramanz*.[24]

Fuller, however, was concerned with a debt that ***had*** been specifically addressed in a prior decree, and was concerned with post-divorce ***recharacterization*** of that debt from community to separate. The holdings in *Gramanz* were explicitly based on an interpretation of the parties' stipulated property settlement agreement, under California law.

There is no explicit relation of debt allocation and community property distributions to spouses. The Nevada statutes do not mandate any particular order of decision among child support, spousal support, property division, or debt allocation. This has led to a certain amount of confusion as judges attempt to achieve equity through a "holistic" approach to deciding all issues in cases. This, too, must apparently await further legislative or case law clarification.

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

[23] *Kramer v. Kramer*, 96 Nev. 759, 762, 616 P.2d 395, 397 (1980) (absent a reservation of jurisdiction over property rights, the property distribution in a decree is final after six months).

[24] *Gramanz v. Gramanz*, 113 Nev. 1, 930 P.2d 753 (1997).

III. BANKRUPTCY

Nevada has a significant number and variety of cases dealing with management and control of community property, between spouses (and ex-spouses) and in their interactions with third party creditors, where bankruptcy is thrown into the mix.

When one spouse files for a chapter seven bankruptcy during marriage, the filing protects the other. In *Norwest Financial v. Lawver*,[25] a husband and wife had jointly signed a promissory note to Norwest Financial, secured by household goods, and providing for liability of both. Only the husband filed for bankruptcy, and turned over to bankruptcy trustee all his separate property and all of the couple's non-exempt community property per 11 U.S.C. § 541(a)(2). In addition to filing a creditor's claim, Norwest sought relief against the wife for the unpaid balance on the note.

Summary judgment was granted to the wife, and the Nevada Supreme Court upheld the ruling, holding that 11 U.S.C. § 524(a)(3) creates an injunction against the commencement of an action against a debtor's spouse to collect community property acquired after the commencement of the debtor's bankruptcy. Since community property passes into the bankruptcy estate of the filing spouse, in community property states there is no need for both spouses to file unless the non-debtor spouse has substantial separate debt. The only question is whether the debt is "separate" or "community" as to the non-debtor spouse, which depends upon the intent of the lender in granting the loan. Here, the loan was found to be clearly to the community, so the wife's wages, after husband's bankruptcy filing, were immune from attachment by the lender.

Divorce changes both the parties' positions, and the equities. It seems pretty well established in Nevada that bankruptcy filings give rise to jurisdiction in Family Court to reconsider support orders. As discussed above, where one ex-spouse files for bankruptcy after divorce, and discharges debts allocated to him in the divorce decree, the burdened spouse has recourse to the Family Court to seek reimbursement by way of spousal support.[26]

In *Siragusa v. Siragusa*,[27] the doctor husband filed bankruptcy, wiping out $1,300,000 in property payment arrears owed to the wife. The district court ordered increased alimony on a new schedule to pay off original judgment, which was affirmed on appeal. The Court joined the majority of other courts elsewhere in holding that discharge of a property settlement obligation in bankruptcy may be taken into account in determining whether the parties' circumstances have changed sufficiently to justify a modification of alimony, although it described the question as "a close one,

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[25] *Norwest Financial v. Lawver*, 109 Nev. 242, 849 P.2d 324 (1993).

[26] *Martin v. Martin*, 108 Nev. 384, 832 P.2d 390 (1992) (where no alimony was awarded at trial in August, 1988, but the husband was ordered to pay child support and two Visa accounts, the property, debt, and alimony terms were inter-related, so that husband's discharge of the debts in bankruptcy permitted the former wife to file a motion for reimbursement by way of spousal support, because the debt the husband was supposed to pay was "characterized as being in the nature of alimony, maintenance and support").

[27] *Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807 (1992).

and two strong competing interests must be weighed." The Court looked to the supremacy clause but found no preemption of state law, permitting alimony modification "to compensate the wife for the discharged obligation," and found that consideration of post-bankruptcy circumstances was not antagonistic to the federal "fresh start" policy of bankruptcy relief.

It appears that an intervening bankruptcy has no effect on the liability of the non-custodian for child support arrears, or the ability of the custodian to collect them. In *In Re Anders*,[28] the court held that a former wife who declared chapter seven bankruptcy could retain a child support arrears judgment (granted after she filed bankruptcy) despite the bankruptcy. The court held that child support "is a property interest belonging to the child" and the custodian "merely has a right to enforce the child's property interest." The 11 U.S.C. § 541(b) exception from the property of the bankruptcy estate for "powers which are exercisable solely for the benefit of another" apply to child support by analogy.

A bankruptcy can cause alterations in Family Court orders pertaining to property and debt allocations, as well as support. In *Allen v. Allen*,[29] the husband and wife had entered into an oral property settlement; the wife waived child support, and the husband agreed to pay certain debts and also pay $16,250 to the wife "to equalize the division of community property." The agreement was made during a "settlement conference" held by the district court judge, but was not reduced to writing for a year, when the court entered a divorce decree "nunc pro tunc" adopting the agreement.

In the interim, the husband had filed bankruptcy, and was "released" from most of the financial obligations. The wife claimed that the husband used the bankruptcy to defraud her out of her share of the community property and that because of the bankruptcy there was a failure to equalize the division of community property as intended. The wife moved to set aside the decree, which was denied by the district court as "barred by federal law."

The Supreme Court, noting that the district court knew all these facts, expressed an inability to understand why the district court entered the decree in the first place, but held that in any event, it was error to refuse to set it aside. Noting its holding in *Siragusa*, the Court again held that the lower court could consider the effect of the husband's bankruptcy upon the community and the rights of the parties, "but this is not to say the state court would be interfering in any way with the bankruptcy court's decree." The Court expressly rejected the husband's assertion that the wife's fraud claim was waived under 11 U.S.C. § 524 because she failed to file a complaint in the bankruptcy action.

Finally, the Court concluded that even aside from the question of fraud, the decree entered was inherently unfair and should be set aside: "Under no circumstances, bankruptcy or no bankruptcy, should one party to a divorce be allowed to take all of the benefits of the divorce settlement and leave the other party at the disadvantage suffered by the wife in the present case."

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[28] *In Re Anders*, No. BANKRUPTCY-S-91-24783-LBR (Bankruptcy. Ct., D. Nev., Mar. 10, 1993).

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

Although some of these comments appear to be dicta, *Allen* provides authority for the proposition that whenever a bankruptcy has "an effect upon the community and the rights of the parties," a motion may be entertained to rectify that effect. The respective rights and obligations between and among spouses and third party creditors may be altered significantly by a bankruptcy filing at any time during the marriage or after divorce.

Still, every aspect of the law in this area should be treated as a moving target, and checked carefully before being relied upon. The intersection between family law and bankruptcy law involves simultaneously-evolving lines of both federal and State law – both statutory and case by case – and the alignment, utility, and even validity of any holding can completely change very quickly.

For example, the characterization of an award as being "in the nature of support" or a property division used to be a crucial distinction that could make the difference between court orders that would, or would not, survive a bankruptcy filing. The law evolved, however, to largely erase the distinction.

First, American Bar Association committees, concerned with gamesmanship involving efforts to discharge spousal shares of retirement benefits, made recommendations to Congress to make division of retirement benefits non-dischargeable. These recommendations were apparently responsible in part for enactment of the prior subsection (a)(15) exceptions to discharge, but a detailed exploration of those provisions is beyond the scope of these materials.[30]

Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),[31] the balancing of hardships under the prior law between the debtor and creditor spouse was eliminated, and "domestic support obligations"[32] were made nondischargeable in Chapter 7 bankruptcies, but apparently not under Chapter 13 plans that are successfully concluded. Such obligations were given a high priority, requiring their payment before satisfaction of virtually any other obligations of the debtor.

In light of the continuing evolution of bankruptcy law, it has generally become easier for spouses to prevent discharge of any inter-spousal obligations; recently, it has become more difficult to discharge obligations to third parties, as well. But that matter is one of Congressional policy, which could change at any time. The point here is that the contours of the intersection of bankruptcy

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[30] Basically, a property distribution or debt division obligation arising from a divorce decree would normally be dischargeable under § 523(a)(15), unless the creditor spouse timely filed an objection based upon the exceptions found in the old § 523(a)(15)(A) or (B). This led to the court balancing hardships between allowing the debtor a discharge and its effect on the creditor spouse as compared to denying the discharge and its effect on the debtor.

[31] Apparently referred to in certain circles as the "Bankruptcy Abuse Reform Fiasco (BARF)."

[32] The term domestic support obligation is defined very broadly to include all debts to a spouse, former spouse or child incurred during a divorce or separation regardless of whether the debt is designated as a "support" obligation or not.

law and family law are, at best, unstable, and there is little that can be established as any kind of stable, lasting, governing principle on the subject.

IV. FRAUDULENT CONVEYANCE

As discussed above, the Nevada courts will go to some efforts to prevent inter-spousal fraud, even if that requires recharacterizing the form of ownership of property,[33] expansively interpreting the homestead laws[34] – or holding them inapplicable,[35] or generously interpreting Nevada's support statutes.[36]

The bankruptcy opinions indicate a somewhat less protective attitude toward businesses that find themselves frustrated by the community property form of ownership and control of marital assets. There are some protections for third parties and business entities unsure of who owns what. NRS 123.140 provides a method by which a spouse may record a written inventory of his or her separate property. The recordation of such an inventory serves as notice to the world of the spouse's title.[37]

Pursuant to NRS 123.160, the absence of such an inventory "is prima facie evidence, as between such married person and purchasers in good faith and for a valuable consideration from the other spouse, that the property of which no inventory has been so filed . . . is not such person's separate property." However, failure of a spouse to prepare and record such a written inventory does not automatically result in forfeiture of the property's status as separate; rather, it may be used as evidence to be considered in determining whether the property is separate or community.

Overall, while Nevada has no separately-identifiable body of "community property management and control law regarding fraudulent conveyances," it is probably fair to conclude that on a case by case basis, the courts go to substantial lengths to prevent, or correct, fraud when it is identified.

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[33] *Neumann v. McMillan*, 97 Nev. 340, 629 P.2d 1214 (1981).

[34] *Besnilian v. Wilkinson*, 117 Nev. 519, 25 P.3d 187 (2001).

[35] *Breedlove v. Breedlove*, 100 Nev. 606, 691 P.2d 426 (1984).

[36] *Martin v. Martin*, 108 Nev. 384, 832 P.2d 390 (1992); *Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807 (1992).

[37] NRS 123.150.

V. PREMARITAL AGREEMENTS

Nevada is a Uniform Premarital Agreements Act State,[38] and the general rules and requirements concerning such agreements are well-enough known to not require repetition here. However, a few Nevada specifics are worth noting.

First, the dual management and control statute,[39] on its face, explicitly gives either spouse the ability "by written power of attorney," to have complete power to sell, convey or encumber any community property. Such an agreement, however, would expand, rather than limit, the rights of a creditor to do business with one of two spouses.

Nevada does have a couple of peculiar statutes, tracing to original 1873 enactments. One,[40] modified in 1973, allows either spouse to give the other "written authority to . . . appropriate to [his or her] own use [his or her] earnings," upon which those earnings are the separate property of the earning spouse.

The Nevada Supreme Court has held that the statute creates an "exception" to the rule that earnings during marriage are community property,[41] but the statute comes from the day when all of the wife's earnings automatically fell under the husband's control absent such an agreement, and it has not been the subject of any mention in the case law since well before it was amended to become gender neutral. Whether and under what circumstances it can be used to circumvent the results otherwise seen in actions between creditors and one or both spouses remains to be seen.

The other statute worth mentioning here is NRS 123.140, under which "a full and complete inventory of the separate property of a married person" can be recorded, which provides notice to all potential purchasers of such property as to its character. Presumably, by agreement, spouses may transmute property from community to separate, and thereby limit the ability of creditors of the transferring spouse to reach the property. Given the variety of measures discussed above used by courts to defeat transfers deemed fraudulent, however, the purpose and effect of such a transfer might well be determinative of how final such a transfer proves to be.

VI. DOCTRINE OF NECESSITIES

Nevada recognizes "the doctrine of necessities, or necessaries" although the stated statutory grounds for when husbands' property is liable for the support of wives is different from that in which wives' property is liable for the support of husbands. NRS 123.090 provides:

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[38] See NRS ch. 123A.

[39] NRS 123.230.

[40] NRS 123.190.

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

> If the husband neglects to make adequate provision for the support of his wife, any other person may in good faith supply her with articles necessary for her support, and recover the reasonable value thereof from the husband. The separate property of the husband is liable for the cost of such necessities if the community property of the spouses is not sufficient to satisfy such debt.

NRS 123.110 states a different standard for when husbands must be supported by wives:

> The wife must support the husband out of her separate property when he has no separate property and they have community property and he, from infirmity, is not able or competent to support himself.

In other words, men, but not women, have an implied duty of self-support when they are physically capable of doing so. Why the spouse requiring assistance is in need may be relevant. NRS 123.100 provides:

> A husband or wife abandoned by his spouse is not liable for the support of the abandoning spouse until such spouse offers to return unless the misconduct of the husband or wife justified the abandonment.

The 1873 enactment regarding non-support for abandoning spouses was construed only once, in 1929, when the Nevada Supreme Court held that a wife should not have been granted a divorce on the ground of the failure of her husband to support her, when she had ordered him from the home and refused to permit him to live with her, since she had "waived her right to support" by doing so.[42] Thus, her debts accrued in the interim were apparently not his responsibility.

The statute regarding a wife's payment of "necessaries" for a husband has been interpreted. The statute was found to create a duty of support that ran to the benefit of creditors who supplied the necessaries of life to an infirm, impecunious husband. A hospital was therefore able to reach the separate property of a woman whose spouse had died at the hospital leaving no community or separate property.[43]

The continuing vitality of either the statute regarding non-liability for "necessaries" in the event of "abandonment" or the case (*Smith v. Smith*, *supra*) interpreting that statute are questionable in the age of no-fault divorce. In the intervening years, the statutory ground for divorce of abandonment has been eliminated.[44] A different statute (passed in 1861 but amended most recently in 1975) grants a district court the authority to award temporary support "in its discretion."[45] Case

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[42] *Smith v. Smith*, 51 Nev. 271, 274 P. 9 (1929).

[43] *Swogger v. Sunrise Hosp., Inc.*, 88 Nev. 300, 496 P.2d 751 (1972).

[44] See NRS 125.010.

[45] See NRS 125.040.

law has established an ***economic*** test for the propriety of alimony.[46] Today, it is not clear that one spouse accused of abandoning the other (or proved to have done so) is ineligible for either temporary spousal support or permanent alimony. Thus, it is not clear that the doctrine of necessaries would ***not*** apply to a spouse who had abandoned, or been abandoned by, his or her spouse.

VII. ATTACHING SEPARATE PROPERTY

As a theoretical matter, the debts brought into a marriage by a spouse are the responsibility of that spouse, to be paid with premarital funds, and with that spouse's share of any post-marital income. NRS 123.050 provides:

> Neither the separate property of a spouse nor the spouse's share of the community property is liable for the debts of the other spouse contracted before the marriage.

Nevada law does not, however, have an explicit "definition" of either separate debt or community debt, although both are created by implication under the above provision. The Nevada Supreme Court stated in dicta that it considered the statute to be in accord with federal tax law and California Family Code Section 910, in that half of a spouse's post-marital earnings are liable for that spouse's premarital debts.[47] The other half belongs to the other spouse and is not available for those debts.

Some courts have not honored this protection of the spousal share of a worker's wages. In 1962, a federal court held that the statute was no bar to a collection action by the husband's prior spouse against the community property the husband shared with his new wife, at least to the extent of his earnings.[48] In 1992, however, the Nevada Supreme Court refused to impute half of a second spouse's income to a payor of child support in setting the amount of current child support due.[49]

It is uncertain how far this consideration for the rights of a second spouse will go, however, since the Court has also expressed at least some willingness to invade legal protections for second spouses when necessary to provide support to children of a first marriage. Certain kinds of creditors are given an effective "super-priority" that permits collection against both spouses, during marriage or even after divorce, despite legal defenses that would stop other creditors.

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[46] *See Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000); *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994); *Gardner v. Gardner*, 110 Nev. 1053, 881 P.2d 645 (1994).

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

[48] *Greear v. Greear*, 303 F.2d 893 (9th Cir. 1962). While not entirely clear, the holding seemed to go to the ***entirety*** of the husband's community property income, and not just to half.

[49] *Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992); see also *Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994).

For example, while a homestead is generally a solid defense preventing execution against a home – even blocking the parties to a current marriage from selling their respective interests in it – it may provide no defense at all against a former spouse seeking to enforce a child or spousal support order that has remained unsatisfied.[50]

In *Breedlove v. Breedlove*,[51] the Nevada Supreme Court held that homestead laws were designed for the purpose of protecting families, a purpose not served by allowing it to be used to block collection of a support judgment. Adopting a "balancing test" between the earlier and later families, the Court noted that the father owed his first family a duty of support long before the second marriage arose, and he entered into the second marriage aware of the earlier duty, and allowed the earlier former spouse to execute against the house.

Some years later, this rationale was applied to permit a first ex-wife to execute against a homesteaded house owned solely by a second ex-wife.[52] The second ex-wife had divorced the husband as well, but she was to pay him money for his share of equity in the home, and the first ex-wife had recorded a child support arrears judgment. Instead of paying the ex-husband, the second ex-wife gave him free rent in the home, and paid certain of his bills, so that he ultimately quit-claimed his interest in the house to her without being paid for his share of the equity. Finding that the second ex-wife had acted in such a way as to prevent the first ex-wife from collecting on her support judgment, the Court applied the *Breedlove* balancing test and determined that the second wife's homestead would not bar the first wife's execution against the house.

These cases illustrate that the supposed freedom of a spouse from liability for "any" premarital debts of the other under NRS 123.050 is not absolute, and under certain circumstances, both the spouse's community property interest, and even that spouse's separate property, could be found at risk for the premarital debts of the debt-incurring spouse.

VIII. TIP FOR PROTECTING ATTORNEY'S FEES AND THEIR COLLECTION

The first rule every law office should have, is to get paid up front. However, in the event that we break this cardinal rule – and unfortunately, we all do – any award of attorney's fees should be awarded to the client and not to the lawyer.[53] Additionally, if you can get the court to classify or

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[50] See discussion of legal effects of a married couple filing a homestead exemption as discussed in *Besnilian v. Wilkinson*, 117 Nev. 519, 25 P.3d 187 (2001).

[51] *Breedlove v. Breedlove*, 100 Nev. 606, 691 P.2d 426 (1984).

[52] *Phillips v. Morrow*, 104 Nev. 384, 760 P.2d 115 (1988). Notably, this is the same result, and essential reasoning, followed by the Ninth Circuit a quarter century earlier in *Greear v. Greear*, 303 F.2d 893 (9th Cir. 1962) ("such an obligation [alimony to a former spouse], founded in the marital relationship and not terminated by divorce, must remain a charge upon the earnings of the obligor until its termination, irrespective of whether a new community is formed").

[53] Make the payments to the client payable through the attorney's office.

characterize the fees as support, or in the way of support, the award is non-dischargable in bankruptcy by the debtor.[54]

All of this may seem counter-intuitive. However, if you get an order that the other spouse is to pay you, if they should file for bankruptcy, that order will not be considered a "domestic relations" order and will be dischargable. It is virtually impossible to get paid in this particular circumstance if the individual files under Chapter 7.

[54] Of course, this will not protect you from a discharge in bankruptcy by your client if they should file after you have completed the work and are owed money. However, if the debt is still to be paid by the other spouse, you have a good claim for payment by filing a proof of claim in your client's bankruptcy action.