NFLR NEVADA FAMILY LAW REPORT

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Issues in Apportionment of Separate Property Acquired in part with Community Funds

by Lew Carnahan

Recent Nevada Supreme Court cases have created confusion in computing the extent of the community interest in a spouse's separate property when community funds are used either in the acquisition or improvement of that separate property. The uncertainty continues when the "value" of that community interest must be computed.

The decisions refer to the community acquiring a *pro tanto* interest in the spouse's separate property; however, the language used to determine the extent of that *pro tanto* interest varies. Issues of reasonable rental value and treatment of payments on interest, taxes and insurance, as opposed to principle, complicate the analysis.

An example commonly occurring today as a result of multiple marriages — both spouses entering the marriage with separate property — allows us to focus upon the problem.

Assume at the time of their marriage that John and Marsha each had certain real estate. John owned a lot free and clear and Marsha was in the process of purchasing a house. It was agreed that the family would live in Marsha's house. John and Marsha both worked during their marriage. Although John would occasionally make a payment on Marsha's house from his wages, this financial responsibility largely fell to Marsha, who made the payments from her earnings. John used most of his wages to purchase materials with which he built a house on his lot. He is handy with tools and performed much of the work himself. As the house was finished, unfortunately so was the marriage.

In the divorce proceeding, John claimed a community property interest in Marsha's house to the extent of the house payments made with community funds. Marsha claimed a right to be reimbursed for the reasonable rental of the house. Further, Marsha claimed a community interest in John's property, asserting that the entire value of the house was community property. John admitted the material purchased with his wages was community property. However, he pointed out that he had been regularly employed throughout the marriage, and that it was only after work and on weekends that he had built the house. Claiming that a man's spare time was his own, John argued that the value of his labor on the house was his separate property.

You be the judge and determine whether there is a community interest in any of the property and the extent thereof. In doing so, you should be aware that a trio of recent Nevada cases dealt with issues similar to those presented in the hypothetical marriage and divorce of John and Marsha.

Spouse's Labor is Community Property

In *Sly v. Sly*,[1] the Nevada Supreme Court rejected Mr. Sly's argument that there was no community interest as a result of Mr. Sly's efforts in building a house on his separate property lot. The Court held once again that the labor and skills of a spouse belong to the community. The fact that Mr. Sly built the house in addition to working at his regular job was held to be of no consequence.

Community Payments Create *Pro Tanto* Interest

In *Sly*, the trial court had awarded Mrs. Sly the house she had brought to the marriage as her separate property. Even though she had made some of the house payments with her earnings, the trial court found no community interest. This was reversed on appeal, our Supreme Court holding:

> Where part of the purchase price of one spouse's separate property is paid with community funds, the community acquires a *pro tanto* interest in the property *to the extent and in the proportion that the purchase price is contributed by the community*. See *Barrett v. Franke*, 46 Nev. 170, 208 P. 435 (1922).[2] (Emphasis added).

One Possible Exception

The rule expressed here is not an absolute. In footnote to *Sly*, the court noted that where one spouse makes mortgage payments from his or her earnings on that other spouse's separate property, a presumption of gift to that spouse's separate estate arises. *Lombardi v. Lombardi*[3] was cited. *Lombardi* held that an expenditure by husband in improving the wife's separate property would be presumed a gift. This was at a time when a husband had the sole right of management and control of all community property.[4] Given that NRS 123.330 now gives both spouses equal right of management and control of all community property without limitation as to whose efforts brought

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the property to the community, the rule of *Lombardi*, insofar as it applies to an expenditure of community funds to pay a mortgage on separate property, seems anachronistic. For example, the idea that an expenditure of community funds from a community checking account might create either a gift to separate property or a community acquisition, dependency, depending on which spouse signs the check, defies logic in an age of equal rights for men and women. Such a rule would more likely create a trap for the unwary and would defeat the intent of the parties more often than not.

Beware of Robison v. Robison

Just a few months after this formula was announced in *Sly*, the Supreme Court decided *Robison v. Robison*,[5] holding:

> Where payments are made with community funds on real property which was owned by one spouse before the marriage, the community is entitled to a *pro tanto* interest in such property *in a ratio that the community payments bear to the payments made with separate funds.* (100 Nev. 670). (Emphasis added.)

In comparing the extent of the *pro tanto* interest it is readily apparent that, whereas, in *Sly* the *pro tanto* interest is "in the proportion that the purchase price is contributed by the community," in *Robison* it is "in a ratio that the community payments bear to the payments made with separate funds."

Ironically, *Sly* is cited as authority for this proposition, perhaps indicating that the modification was unconscious and unintentional. The difference in practical effect, however, is dramatic. Assume a $100,000 house purchased as separate property with a five percent (i.e., $5,000) down payment and a thirty-year mortgage with monthly payments of $1,000. Assume a marriage quickly follows and the first five monthly payments are made with community earnings. Using the language in *Robison*, the community could have a 50 percent interest in the property. Using the language in *Sly*, the community could have at most of a five percent interest (5000/100,000) and perhaps less (5000/[1000 x 12 x 30] or 1/72).

Although the emphasized language from *Robison* has not been overruled, neither has it been repeated. In *York v. York*,[6] the Court returned to *Sly's* "purchase price" language. Thus, the continued vitality of *Robison's* formulation may be questioned.

No Right to Reimbursement for Rental Value

Probably of greater practical concern is the *Robison* Court's denial of any right of reimbursement to the separate estate for the reasonable rental value of the residence:

> The district court considered the benefit that Charles [non-owner/spouse] received from the use and enjoyment of the house during the marriage as offsetting the community's interest. This was error.[7]

The Supreme Court elected to treat the rental value as a gift of separate property, analogizing to *Cord v. Cord*,[8] wherein it was held that a spouse's conscious choice to use his separate property, rather than available community property, to pay community expenses would result in a gift to the community absent an agreement to the contrary. For an example of an implied agreement to the contrary, see *In re Marriage of Stone*.[9] There, Wife had made a down payment on a house with her separate funds. Wife applied for a loan in her name for the balance of the purchase price and Husband executed a quit claim deed on this property to Wife at the time of the loan. For the rest of the marriage, payments were made from Wife's community property earnings. Held: the quit claim deed transmuted what would have been a *pro tanto* community interest into separate property.

A Criticism of Robison

Conceptually it is difficult to apply the rule of *Cord* to the *Robison* situation. The *Cord* decision, quite logically and consistently, found that where two funds are existing and available, one community and one separate property, and a spouse consciously elects to use his or her

Continued next page

separate funds to meet a community expense, then a gift to the community will result. However, where, as in *Sly*, it appears there is only a community fund, or where, as between a community and separate fund, a community fund is selected to pay a community expense, such as a community residence, it is a distortion of logic to infer an intent to make a gift of separate property, such as the rental value of the residence owned as separate property of a spouse.

At the same time, it defies logic to allow payments which in no way accrue to equity in a property to be used to acquire a *pro tanto* interest in the equity of the property. Thus, payments applied to interest, taxes and insurance, should logically not be included when figuring the *pro tanto* interest of the community in the equity of a separate property asset.

An Alternative to Robison and Sly

In a 1980 case from California, *In re Marriage of Moore*,[10] the issue was squarely presented to the California Supreme Court whether amounts paid from community funds for interest, taxes and insurance, should be included for purposes of figuring the community property interest. This issue was not addressed by the Nevada Supreme Court in either *Sly*, *Robison* or *York*, and appears to be an open question in Nevada.

Initially the California court noted that the rule had developed giving the community a *pro tanto* interest where community funds are used to make payments on one spouse's separate property "in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds." On its face this appears to combine the language of both *Robison* and *Sly*. Thus, it may be instructive that the California court went on to note: "This rule has been commonly understood as excluding payments for interest and taxes."

In converting this common understanding to a rule of law, the California Supreme Court noted:

> Upon dissolution, it is the court's duty to account for and divide the assets and the debts of the community. *Payments previously made for interest, taxes and insurance are neither.* Moreover, if these items were considered to be part of the community's interest, fairness would also require that the community be charged for its use of the property.[11] (Emphasis added.)

In the case of John and Marsha, if Marsha's financing was obtained prior to marriage and on her own credit, it would be Marsha's separate property and, at least in California, would be counted in with payments made on the purchase price with separate funds.

Finally, the Court turned to *In re Marriage of Aufmuth*[12] and *In re Marriage of Lucas*[13] for the precise formula to be applied. This formula recognizes the economic value of the loan taken out to purchase the property. Thus, if the loan is made on the strength of community assets, it will be presumed to be community property; if based on separate assets, it will be presumed separate property.[14]

Interest or Reimbursement when Community Funds are used to Improve Separate Property

An additional question concerns whether the use of community funds to improve (as opposed to acquire) separate property gives the community an interest in the property or merely a right of reimbursement. In most community-property states, a right of reimbursement (where no gift was intended), rather than an ownership interest, would exist if it resulted in an enhancement in the value of the separate property."[15]

Conclusion

Adoption by Nevada of the rationale and formula set forth in *Moore* would have the effect of reconciling the apparently inconsistent language of *Sly* and *York* with that of *Robison*. Nowhere does it appear that the Nevada Supreme Court has had to rule on the precise formula to be applied, nor on the precise question of whether interest, taxes and insurance should be excluded when figuring the *pro tanto* interests. The California formula as adopted in *Moore* and *Aufmuth* seems both logical and fair. Both California and Nevada agree that the community acquires not merely a right of remibursement but, rather, a *pro tanto* interest in the property. Nevada should complete the work it has started and adopt in toto the rule and formulation of *Moore* and *Aufmuth*.

Lew Carnahan is an attorney practicing in Reno, Nevada. He has served both as a Deputy District Attorney and as a Deputy Public Defender.

NOTES

[1] 100 Nev. 236, 679 P.2d 1260 (1984).
[2] 100 Nev. at 239.
[3] 44 Nev. 314, 195 P. 93 (1921).
[4] *Nixon v. Brown*, 46 Nev. 439, 453, 214 P.2d 524 (1923).
[5] 100 Nev. 668, 691, P.2d 451 (1984).
[6] 102 Nev. Adv. Op. 42 (May 1, 1986).
[7] 100 Nev. at 671.
[8] 98 Nev. 210, 644 P.2d 1026 (1982).
[9] 147 Cal. App. 3d 858, 195 Cal. Rptr. 351 (Cal. App. 1983).
[10] 28 Cal. 3d 366, 618 P.2d 208.
[11] 168 Cal. Rptr. at 665, 28 Cal 3d at 372-373.
[12] 89 Cal. App. 3d 446, 152 Cap. Rptr. 668 (1979).
[13] 27 Cal. 3d 808, 166 Cal. Rptr. 853, 614 P. 2d 283 (1980).
[14] See discussion and cases cited in 54 ALR 2d 446.

Legal Remedies to Deter Child Kidnapping

by Richard F. Cornell

If it hasn't happened already, inevitably you will be counsel in a divorce case where your client calls frantically, telling you that his or her spouse has either "kidnapped" the child(ren) or is threatening to do so. How can you respond, self-help not being a consideration?

Chances are that advising your client to report the incident to the police will prove ineffective. Although child kidnapping is a potential felony in Nevada, punishable by imprisonment up to six years and/or a mandatory minimum fine of $1,000, one of the prima-facie elements of the crime is that the defendant must have acted contrary to the terms of a *prior custody order*.[1] If there is no prior custody order at the time of the frantic phone call, the police rightfully will do nothing. Even if there is a pending divorce action, the police are likely to consider the situation a civil matter and toss it back into your lap.

In 1985, the Nevada Legislature passed Senate Bill 383, substantially revising NRS Chapter 33. NRS 33.010 et seq., previously used for enjoining "domestic violence," has been expanded and strengthened considerably in its scope. The acts constituting domestic violence include battery, assault, sexual assault, *false imprisonment*, unlawful or forceable entry into the other's residence with forseeable risk of harm, intentional harassment, and compelling another to act or perform from acting by force or threat of force. Actionable domestic violence occurs when committed upon one who is related by blood or marriage and with whom he is or was actually residing, or with whom he has a child in common, or upon his minor child or the minor child of that person.[2]

Advantage of NRS 33.010

In addition to the typical restraining order, the legislature has given the courts the specific power to grant the applicant temporary custody of the minor if it has jurisdiciton under NRS Chapter 125A[3] (Uniform Child Custody Jurisdiction Act — UCCJA), to exclude the adverse party from the applicant's place of residence,[4] and to prohibit the adverse party from entering any place frequented regularly by the applicant and/or the minor child, such as school or place of employment.[5] The courts also have been granted the general power to order such "other relief as it deems necessary" in an emergency situation.[6] All relief can be granted *ex-parte*.[7]

This is significantly broader than the procedure contemplated by NRS Chapter 125. NRS 125.470 provides that where a "kidnapping" or a likely "kidnapping" occurs, the adverse spouse must appear before the court with the child and the court will decide temporary custody, pending further order. Unlike NRS 33.030, NRS 125.470 does not address awarding temporary custody or restraining the adverse party from carrying out any threatened conduct before the adverse party appears and is heard.

There are several other advantages of using NRS 33.010 instead of NRS 125.470 in a child-kidnapping situation. The court is statutorily required to rule on an application for a temporary order within one judicial day after it is filed;[8] NRS 125.470 has no similar requirement. And, whereas a NRS 125.470 motion is brought only in a divorce action, an application for a temporary order can be brought in an independent action, even if a divorce action is pending.[9] And, if brought in an independent action, the court costs can be deferred.[10] In fact, the statute contemplates that the justice court can issue an extended order from which an interlocutory appeal lies to the district court.[11] It is not clear whether this constitutes an independent grant of jurisdiction to the justice court.

Probably the most significant aspect of NRS Chapter 33 as amended, however, concerns the method of service of the temporary order. Every temporary order is transmitted within 24 business hours of its issuance by the clerk of the court to the local law enforcement agency which has jurisdicition over the residence of either the applicant or the minor child.[12] The court may order the appropriate agency to serve the adverse party personally with the order,[13] and the order must contain a provision requiring any law enforcement officer who witnesses a violation of any provision of the order to arrest the adverse party.[14] Furthermore, if the police can locate the adverse party but for some reason cannot personally serve him, they are required by law to put him on actual notice of the temporary order and inform him that a violation of the order will result in his arrest.[15]

Once the court places the language in the order regarding personal service on the adverse party, the temporary order becomes a very powerful tool for your client. Such an order places a *duty* on the police to serve the order, which, in terms of any potential civil liability on the part of the local governmental agency for not serving the order, removes the situation from the umbrella of sovereign immunity.[16] The statute means that if the police find the adverse party with the child and serve him with the temporary order, the police may then arrest him unless he immediately gives up control of the child.[17] Since the adverse party could likely lose custody of the child in that instance to the County Department of Social Services or State Welfare Division of the Department of Human Resources, upon being arrested he very likely will do the sensible thing and immediately relinquish control of the child. If the police contact the adverse party by telephone and put him on actual notice of the order, including the temporary award of custody, they can obtain an arrest warrant under NRS 200.359 unless he immediately relinquishes control of the child.

The temporary order is effective for only thirty days[18] unless an application to extend the order is filed within the period of a temporary order. The temporary order remains in effect until the hearing on the extended order.[19] The extended order is effective for one year or within the time fixed by the court.[20] In the extended order the court may, in addition to the relief with the jurisdiction of the temporary order, order supervised visitation by the adverse party;[21] order payment of child support or alimony or rental/mortgage payments on the applicant's home;[22] and order payment or all costs and fees incurred by the applicant in bringing the proceeding under NRS 33.[23]

You should note as a practical matter that the clerk of the court in your area may have forms for a temporary order application. The clerk has the duty to assist any party by informing him of the procedures and in completing and filing the application.[24] You should obtain a form in the district where you practice, and follow it.

Interstate Kidnapping

What if the adverse party takes the child outside the area? If the child is located in Nevada, you can file an independent action and obtain an *ex-parte* temporary order in the district where the child resides, whether or not a divorce action is pending in your area. If the child is removed outside of Nevada, you should check to see whether that state has enacted a counterpart to NRS 33 or adopted the UCCJA. If that state has a counterpart to NRS 33.090, then a temporary order issued here requires that the same order be issued in the jurisdiction and venue where the adverse party and child now reside. Under the UCCJA, *habeas corpus*, temporary custody and orders to show cause can be employed to cause the child's return to Nevada or secure the custody issue before the court which has proper jurisdiction.[25]

Once the court places the language in the order regarding personal service on the adverse party, the temporary order become a very powerful tool for your client.

Interstate kidnapping can also be addressed by resort to several Federal Acts. The Federal Parental Kidnapping Prevention Act (PFKPA PS 96-611), expressly does not give the federal courts initial subject-matter jurisdiction over child custody disputes, but creates federal jurisdiction in order to resolve disputes between two states asserting concurrent jurisdiction.[26]

The Department of Health and Human Services has issued regulations to help a parent locate a child held by the other parent in violation of a custody order, 45CFR, Section 303.15.[27]

If a parent takes a child interstate in violation of a felony child-snatching statute, the parent may be subject to the Federal Fugitive Felon Act. The Missing Children's Act (PL 97-292) requires the FBI to keep a computer file of unidentified dead bodies in addition to its missing persons file. A parent who reports a child missing may check the FBI computer to see if it contains information about the child. There is also passport control. Under State Department regulations, a parent may request notice of filing of a passport application by or on behalf of his or her child.

Futher information can be obtained from the National Legal Resource Center for Child Advocacy and Protection, 1800 "M" Street, Washington, D.C. (202) 331-2250.

In conclusion, the 1985 amendments to NRS Chapter 33 give your client the most protection (s)he has had under Nevada law from child kidnapping or threatened child kidnaping situations. While no civil law is going to be a complete success in stopping this kind of terrorism, these statutes at least can cause you to assure your client not to lose hope.

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CALENDAR

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December 5, 1986 - Reno, Airport Plaza
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NOTES

[1] NRS 200.359.

[2] NRS 33.018. Clearly, the completed act is not necessary to give the Court jurisdiction to issue an injunction; a threatened act suffices. See NRS 33.010(3); 33.020(1).

[3] NRS 33.030(1)(d). This simply means that the child resides in Nevada or resided here within the last six months before being removed. NRS 125A.050.

[4] NRS 33.030(1)(b).

[5] NRS 33.030(1)(c).

[6] NRS 33.030(1)(e).

[7] NRS 33.020(3).

[8] NRS 33.020(4).

[9] NRS 33.040.

[10] NRS 33.050(1).

[11] NRS 33.030(3).

[12] NRS 33.060(1).

[13] NRS 33.060(2).

[14] NRS 33.070(1).

[15] NRS 33.070(2).

[16] See NRS 41.032(2); and for a discussion of the difference between "operational" and "discretionary" acts in delineating sovereign immunity, see *Hagblom v. State Director of Motor Vehicles*, 93 Nev. 599, 604-605 (1977) and *Andolino v. State of Nevada*, 97 Nev. 53, 55-56 (1981).

[17] Violation of a Temporary Order is a misdemeanor (NRS 33.100); and he might also be arrested in this instance on felony charges of violating NRS 200.359. Also, if the adverse party reacts to the situation in such a violent manner as to cause the child actual or potential physical or mental harm, he could be arrested on gross misdemeanor or felony charges of violating NRS 200.508.

[18] NRS 33.080(1).

[19] *Id.*

[20] NRS 33.080(3).

[21] NRS 33.030(2)(a).

[22] NRS 33.030(2)(b)(2).

[23] NRS 33.030(2)(b)(3).

[24] NRS 33.050.

[25] See NRS 125A.210; 125A.220; 125A.230.

[26] See 28 U.S.C., Section 1738A; *DiRuggiero v. Rodgers*, 743 F.2d 1009 (3d. Cir. 1984).

[27] See 28 U.S.C., Section 534.

"Qualified" Domestic Relations Orders

Since pensions and profit-sharing plans have become one of the more significant assets in a dissolution, understanding the particular plan and qualifying the order is necessary.

Historically, the extent to which federal anti-alienation provisions preempted the state's power to adjudicate plan assets was unclear. As a result, Congress recently passed legislation which protects the right of spouses and addresses certain inequities. The chart printed here lists legislation:

Retirement System	Significant Law	Type of Order
ERISA Plans (Corporate & Union)	Retirement Equity Act P.L. 98-397	Domestic Relations Order (DRO)
Federal Civil Service	5 USCS 8345 (j) (l) P.L. 95-366 Civil Service Retirement Spouse Equity Act (P.L. 96-615) H.R. 267 (pending) Federal Employees' Contributions Temporary Adjustment Act. 1986 (P.L. 99-145)	Qualifying Court Order (QCO)
Military	Uniformed Services Former Spouse's Protection Act (P.L. 97-252) Department of Defense Authorization Act 1986 (P.L. 96-145)	Military (MO)
Railroad (Tier II Benefits Only)	Railroad Retirement and Solvency Act of 1983 (P.L. 98-76) See Especially 54 USCS 231m)	Railroad Order (RO)

You will avoid confusion by noting that a Qualified Domestic Relations Order (QDRO) is limited to the Retirement Equity Act[1] and the Employee Retirement Income Security Act of 1974 (ERISA). Domestic Relations Order (DRO) is the general designation for all orders qualified to alienate participants' present or future pension benefits.

A DRO, then, is a carefully drafted order of the court meeting the following requirements:

1. It must be a domestic-relations order in that it is contained in a marital settlement agreement approved by the court and/or contained in the court's decree, judgment or order;
2. it relates to marital property division, alimony or child support, and entered pursuant to the state's domestic-relation law (community property);
3. it creates or acknowledges the existence of the alternative payee's right, independently or by assignment, to receive all or a portion of the benefits payable to the participant of the plan;
4. it must contain the name and last known mailing address of the participant and each alternate payee, the name of the plan, the amount and percentage payable, and the number of payments or term applicable; and
5. it does not change the options or benefits of the plan.

A DRO which does not meet the requirements is unenforceable under the constitutional provision of federal preemption.

To effectively draft a DRO, the matrimonial lawyer must obtain the current plan documents and carefully review its guidelines for qualification. He must request the procedure for qualification from the plan administrator. After drafting, the provision or marital settlement agreement containing the provision should be forwarded to the plan administrator for his review and prequalification. Only then should the agreement or provision be submitted to the court for its approval or order, then resubmitted to the plan administrator for final approval. The suggestion of prequalification eliminates the necessity of reserving in the order "the right" to modify or amend the provision should it fail to be qualified by the plan administrator.

Be aware that each plan, whether ERISA, Federal Civil Service, military, railroad or private, are vastly different in their requirements, benefits and alienation procedures. Do not assume that similar companies or affiliated companies have the same provisions and guidelines as the parent company. Excercise caution in the review of the plan and the drafting of the DRO. Forms are useful only when the terms and requirements are known and understood.

— RJL, Ed. —

NOTES

[1] P.L. 98-397

Visitation Conditioned upon Father's Payment of Child Support and Undergoing Psychotherapy

Camacho v. Camacho (2nd Cir. Ct. App. Oct. 1985), 218 Cal Rptr 810, 173 CA3d 214, involved a child born after his parents' divorce. The father visited the child infrequently and paid no child support. The mother cut off all visitation when she remarried. The father countered with an action seeking to establish paternity and visitation rights. The mother then requested child support. Following trial, the Court entered judgment establishing paternity, conditioned visitation upon current child support and following the recommendations of the psychologist employed by the wife, and required the father to undergo counseling during the reintegration period with his son.

Upon appeal by the father, the appellate court reversed that portion of the judgment conditioning visitation on the prompt payment of child support and requiring psychotherapy. Notwithstanding CC 4601 (reasonable visitation shall be awarded unless it would be detrimental to the child), and CC 4382 (support duty shall not be affected by failure or refusal to allow court-ordered visitation), the Court confirmed that visitation and support are exclusive and the child's rights of visitation accrue to his benefit and are not dependent upon payment of support. *In Re Marriage of Ciganovich* (1976) 61 CA3d 289. This seems to represent the better rule. 51 ALR 3rd 525.

On the issue of psychotherapy, the Court noted that the child's health was not in question. From *In Re Marriage of Matthews* (1980), 101 CA3rd 811, it confirmed that the court cannot order psychotherapy for an indefinite period of time as an implied condition of custody.

— RJL, Ed. —

Can a Spouse be Required to File a Joint Tax Return?

All too often during separation, one spouse is reluctant to sign a joint federal tax return. The refusal is based either upon an unwillingness to accept possible liability for its content or on grounds of harassment. Since the filing of a joint return may create a favorable tax result, courts are called upon to decide the issue. As one might expect, some courts have compelled signing while others have not.

Since *Kann v. Commissioner of Internal Revenue*, 210 F.2nd 247 (3rd Cir. 1953) (Cert. denied), it has been clear that a spouse may be liable on a joint return even if the spouse did not sign. IRC § 6013(a); 6012(a)(1)(A)(iii).

Can a court compel a spouse to sign a joint return? In *Leftwich v. Leftwich*, 442 A 2d 139 (App. Div. 1982), the District of Columbia Appellate Court reversed the trial court's order requiring the wife to sign the joint return. The Court noted that the federal tax law guaranteed to each taxpayer the right to elect whether to file jointly, without judicial mandate as to the manner in which she must manage her financial affairs. It observed that as an alternative, the court can determine the parties' relative tax positions, then compensate for the difference when equitably adjudicating the property. *Wadlow v. Wadlow*, 200 N.J. Super, 372 (App. Div 1985). *Wadlow* also held that it was inappropriate to condition the signing of the return upon a party agreeing to indemnify the other against any loss, civil or criminal, occasioned by the signing.

Traase v. Traase 315 N.W. 2nd 271 (1982) and *Wolk v. Wolk* 464 A.2d 780 (1983) held that the court can compel a party to execute a joint return.

To resolve the impasse, the better approach would be to request the court to determine the relative benefit or loss occasioned by the joint return and thereafter account for it during the final division of assets and liabilities.

— RJL, Ed. —

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A Child's Enforcement of Support

Morelli v. Morelli, 102 Nev. Adv. Opinion 74 (June 16, 1986).

Wife died two years following parties' divorce. The marital settlement agreement, approved and incorporated into the decree provided for a joint payment of alimony and child support (*Commissioner v. Lester* (1961) 366 U.S. 299), and after the death or remarriage of wife, support for the child of $475.00 per month thereafter. Child support continued until each child reached 22 years of age, so long as the child attended college and maintained a minimum "C" average. The agreement further provided that the father would pay the college tuition of such institution "[a]s the parties may reasonably agree . . ."

The mother died when the child was 16 years old. For a time the child lived with her father and then with another family. The father paid only child support until the child reached the age of 18 and graduated from high school. The child attended college and maintained better than a "C" average.

The child commenced this action for child support arrearages and for her tuition. The trial court found that the father was responsible for the tuition but denied arrearages due to the child's lack of standing to enforce the payments. On appeal, the Supreme Court reversed assessing arrearages.

The principle issues raised, and those which are the most significant to the family lawyer, involve the child's contractural relationship to the parties and her "standing" to enforce child support and educational provisions.

The court confirmed the rule that children are third-party beneficiaries of their parents' divorce agreement as to matters relating to their support, care and maintenance. As authority, it cited *Lipshie v. Tracy Investment Co.*, 93 Nev. 370, 566 P.2d 819 (1977), a non-divorce case. The court should have cited *Gibbs v. Giles*, 96 Nev. 243, 607 P.2d 118 (1980), wherein it was held that a minor child, through her guardian ad litem, had standing as a third-party beneficiary to bring a motion to compel the father to pay her support as provided in the marital settlement agreement and decree of divorce. It is generally accepted that children are third-party beneficiaries of contracts made for their benefit. (See Annot. 99 A.L.R.^{3} 322).

The court in *Morelli* then addressed the issue of the child's standing to compel compliance, observing that a third-party beneficiary who seeks to enforce a contract does so subject to the defenses that would be available between the parties. It discussed, generally, the court's reluctance to give children standing to enforce provisions made for their benefit since the payment for such support is due to the custodial parent responsible for the child's financial needs. It pointed out, however, that special circumstances, such as death, disability or the contracting parents' refusal to require compliance, would give the child standing. Although the conclusion is correct, again there was Nevada authority for the child's standing in *Gibbs*, Id. at 246.

Clearly a child is a third-party beneficiary of the parents' agreement made for his or her benefit. Whether the child on his own behalf, if over 18 years or emancipated, or through a guardian ad litem, can enforce the provisions depends upon whether the child's rights are being enforced by the custodial parent. It matters not whether the separation agreement was merged into the decree or survived as an independent contract.

Finally, interest to arrearages arising from a settlement agreement is payable, pursuant to N.R.S. 99.040, beginning from the date each payment becomes due.

— RJL, Ed. —

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