A CLE Seminar Presented by the Legal Aid Center of Southern Nevada

THE BASICS OF PROPERTY DIVISION IN NEVADA

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BIOGRAPHIES

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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 several 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, and has repeatedly represented the entire ABA in Congressional hearings on military pension matters. He has served on many committees, boards, and commissions of the ABA, AAML, and Nevada Bar, has served as an alternate judge in various courts, and is called upon to testify from time to time as an expert witness. He serves on the Board of Directors for Clark County Legal Services.

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.

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Mr. Creel has participated in dozens of divorce cases involving complex property division issues and has handled hundreds of cases involving the division of retirement benefits. Since receiving his license, Mr. Creel has practiced exclusively in the field of family law, in addition to volunteering his time to the Clark County Family Law Self-Help Center's "Ask a Lawyer" program, and acting as a judge for the HSGI/Truancy Diversion Programs (for at-risk children) at both Cannon Middle School and Morris/Global High School.

I. PREHISTORY AND PREFACE; HOW WE GOT THIS PROPERTY SYSTEM

For most of the history of modern humans, we have been concerned with regulation of relationships between bonded pairs. Some anthropologists even consider pair bonding one of the defining characteristics marking the evolution of our species in differentiation from our hominid ancestors and cousins.[1]

The history of the evolution of "marriage" as an institution is beyond the scope of this work, but in broad strokes it may be said that even ancient societies needed a secure environment for the perpetuation of the species, a system of rules to handle the granting of property rights, and the protection of bloodlines.

After the fall of Rome, marital practices in the West devolved to the level of tribal or local custom. The practice of community ownership had existed among the Germanic tribes after the fall of Rome, and was brought by them in their migrations to and through the Iberian Peninsula to what is now Spain and France.[2]

The Spanish community property system, because of its adoption by other countries and the Spanish colonization of Latin America, has become perhaps the dominant form of community property in the western world. In what has been characterized as its "most salient characteristic," this conceptualization appropriates to the community the fruit of labors during marriage, which is why it defines as "marital" that property which is earned during marriage by the labor of either or both parties, and as separate property that which is acquired before marriage, or during marriage by gift, bequest, or descent.[3]

There are other conceptualizations of marital property, of course. An alternate form called the "Roman-Dutch" system, adopted in the some Scandinavian countries (plus South Africa and Brazil), adopts the "hotch-pot" theory found in various common-law American States,[4] in which all property is considered marital, whether acquired before or during the marriage.[5] It is this conceptualization that most nearly gives meaning to the oft-recited wedding vow of "With all my worldly goods I thee endow."

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[1] *See*, *e.g.*, Nicholas Wade, BEFORE THE DAWN: RECOVERING THE LOST HISTORY OF OUR ANCESTORS (Penguin Press, 2006).

[2] William Reppy, Jr. and William De Funiak, COMMUNITY PROPERTY IN THE UNITED STATES at 1 (Bobbs-Merrill Company 1975).

[3] *See* Grace Blumberg, COMMUNITY PROPERTY IN CALIFORNIA at 2 (4th ed., Aspen 2003).

[4] Alaska, Delaware, Hawaii, Kansas, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, North Dakota, Oregon, South Dakota, Utah, Vermont, Washington, and Wyoming.

[5] *See* Rheinstein and Glendon, Interspousal Relations (ch. 4) at 49-77, 139, in 4 Int. Encyclopedia of Compl. L. (A. Chloros ed. 1980).

Another variant, found in Europe, considers property individual until divorce or death, at which time it is essentially treated as though it were community property.[6]

The common law received in this country from England was the common law as it existed upon the founding of the United States, and thus at a time when jurisdiction over matters of marriage and divorce still belonged to the ecclesiastical courts. The Nevada Supreme Court has held that the law of marriage and divorce, as administered by the ecclesiastical courts, is a part of the common law of this country, except as it has been altered by statute.[7]

In the U.S., common law marriage remained the norm in most of the country throughout its early history, presumably due to the size of the frontier and vast distances to government centers. The Spanish system of property ownership was, essentially, in place through much of the country prior in time to organized government.

Louisiana utilized the community theory as early as the 1700s under the "Custom of Paris," and later by the laws of Spain, retaining the system in its first legal code of 1808. Texas continued the system by Constitutional provision, even though the common law was adopted otherwise, in 1840. The California Constitution of 1849 continued the existing law of community property after much debate, modeling its laws on those of Texas. New Mexico operated solely under Spanish community property law until comprehensive statutes were enacted in 1901. Arizona – which included much of the area that is now Clark County, Nevada (including Las Vegas), and was part of New Mexico until 1863 – continued the community property system by statute as of 1865. Idaho recognized the community form of property in 1867, and Washington in 1869.[8]

Given these developments, and the time and place that they were being debated and implemented, it is unsurprising that Nevada followed suit. The original territorial laws were non-specific, stating only in Chapter 33, Section 25, that in granting a divorce, "the court shall also make such disposition of the property of the parties, as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it, for the benefit of the children."

The 1865 Nevada Constitution contained a Section 31 to Article Four, addressing the separate property of a wife owned by her upon marriage or thereafter acquired by gift, devise, or descent, and providing for the passage of further laws "defining the rights of the wife in relation, as well to her separate property as to that held in common with her husband" and "providing for the registration

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[6] *See* Grace Blumberg, COMMUNITY PROPERTY IN CALIFORNIA at 2 (4th ed., Aspen 2003).

[7] *Wuest v. Wuest*, 17 Nev. 217, 30 P. 886 (1882).

[8] William Reppy, Jr. and William De Funiak, COMMUNITY PROPERTY IN THE UNITED STATES at 2 (Bobbs-Merrill Company 1975).

of the wife's separate property." Nevada's formal community property scheme came into existence through the Statutes of 1873.

The constitutional provision was altered in 1978 so as to re-phrase it in gender-neutral language[9]:

> 31. Property of married persons.
> All property, both real and personal, of a married person owned or claimed by such person before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of such person. The legislature shall more clearly define the rights of married persons in relation to their separate property and other property.

From the time it was a territory, Nevada followed the common law tradition perhaps most succinctly framed as: "Husband and wife are one, and that one is the husband."[10] The Nevada Supreme Court held that upon marriage, at common law, "the legal existence of the wife is suspended or incorporated into that of the husband; she becomes *sub potestate viri*; is incapable of holding any personal property, or of having the use of any real estate; her earnings belong to her husband, and he is liable for her support."[11]

While the evolution of women's rights in Western societies generally is beyond the scope of these materials, the snippets above suffice to convey the subordinate role for women perceived and institutionalized by the legal framework in place in the middle of the 19th century.

Seen from that perspective, the rights of husband and wife established in the community property statutes adopted March 10, 1873, can be perceived as moderate, or even as progressive. Even so, the husband remained the manager of the community estate until 1975, during the debate regarding the proposed Equal Rights Amendment, when Nevada altered its statutory scheme to a system in which the parties had equal powers of management of community property.

During the hundred-year run-up to joint management and control of community property, the concept of the spousal interest evolved, from being merely a right to make a claim upon dissolution, to actual ownership upon acquisition. It was in 1959 that the statutes were amended (by addition of NRS 123.225) to specifically provide that the "respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests, subject to the provisions of NRS 123.230." The statute applied to all community property, regardless of the date acquired.[12]

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[9] Proposed and passed in Statutes of Nevada 1975, p. 1917; agreed to and passed in Statutes of Nevada 1977, p. 1703; and ratified at the 1978 general election.

[10] Ascribed to a "Professor Loring" by Theron G. Strong, *Joseph H. Choate* (1917).

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

[12] NRS 123.225(2).

Before 1975, that "subject to" statute – NRS 123.230 – vested management and control in the husband. The sea change at that time altered the system to joint management and control, and set out a series of rules for what the spouses could do individually or jointly, with their property.

II. WHAT IS CONSIDERED COMMUNITY PROPERTY: DIFFERENT TYPES, EXAMPLES

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.[13]

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, which is effective only as between them.
> 2. A decree of separate maintenance issued by a court of competent jurisdiction.
> 3. NRS 123.190.[14]
> 4. A decree issued or agreement in writing pursuant to NRS 123.259.[15]

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.[16] Agreements as to transmutation can be complex and are beyond the topic of these materials, and so generally are not discussed further here.

Nevada does not contemplate different "types" of community property; here, it either is, or it is not. Which is not to say that property cannot be of mixed character, as discussed in the sections below addressing questions of tracing.

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[13] *See* NRS 125.150(4) ("In granting a divorce, the court may also set apart such portion of the husband's 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").

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

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

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

Nevada also recognizes businesses and professional practices as "property" subject to valuation and equitable division upon divorce.[17] There, the Court also acknowledged the existence of goodwill in a professional practice (whether or not marketable), and approved the practice of allowing for the value of such goodwill in valuing the practice as part of the marital property.[18]

To date, no Nevada authority distinguishes between "professional" and "personal" goodwill, and there is a national debate as to which, if either, is legitimately considered divisible property, and how any such distribution should interface with other family law issues, such as alimony or child support.[19]

III. WHAT IS CONSIDERED SEPARATE PROPERTY, INCLUDING CHARACTERIZATION OF EARNINGS ON SEPARATE PROPERTY

Property specifically excepted from the definition of community property is "separate property," which is defined in NRS 123.130 as "[a]ll property of the wife owned by her before marriage, and that acquired by her afterwards by gift, devise, descent or by an award for personal injury damages, with the rents, issues and profits thereof" and "[a]ll property of the husband owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise, descent or by an award for personal injury damages, with the rents, issues and profits thereof . . . ."[20]

NRS 123.220 and NRS 123.130 together establish the presumptions that property acquired during marriage is community property, and that property owned prior to marriage is separate property.[21] When a spouse uses separate funds or separate credit to purchase property during the marriage, that property generally remains his or her separate property.[22] However, where no attempt is made by a spouse to keep separate and community property segregated, so that the properties have become so mixed and intermingled that it is no longer possible to determine their source, such intermingled properties are considered community property.[23]

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

[18] *Ford v. Ford*, 105 Nev. 672, 679, 782 P.2d 1304,1309 (1989).

[19] *See* Appendix 1, dealing with some considerations in that debate. The "double dip" debate and considerations are beyond the scope of these materials.

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

[21] *See Peters v. Peters*, 92 Nev. 687, 557 P.2d 713 (1976); *Todkill v. Todkill*, 88 Nev. 231, 495 P.2d 629 (1972); *Carlson v. McCall*, 70 Nev. 437, 271 P.2d 1002 (1954); *Lake v. Bender*, 18 Nev. 361, 7 P. 74 (1885).

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

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

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.[24]

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.[25]

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 to the world (including prospective purchasers) of that spouse's separate property title to the property.[26]

Pursuant to NRS 123.160, the effect of the failure to record such an inventory, or the omission of an item of property from such a recorded 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.[27]

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

[25] NRS 123.259.

[26] NRS 123.150.

[27] *Thomas v. Nevans*, 67 Nev. 122, 215 P.2d 244 (1950); *see also* NRS 123.160(3).

IV. WHEN DOES THE COMMUNITY END

Fox v. Fox[28] was the second of three appeals between the same divorcing couple. In that round, the Court noted that the term of office of the judge who presided at the hearings below had expired before the judgment could be entered. The Court set it aside, and remanded for formal entry of the amended decree, but specified:

> this court, in ordering the limited new trial in the case of Fox v. Fox, supra, did not intend that any new evidence be taken on the trial court's findings, but intended only that the value of Foxy's Restaurant be fixed to include the value of the goodwill as affected by the 1962 business receipts . . . .[29]

The Court made it clear that the hearings on remand were not to allow any new evidence or testimony, but only complete the judicial act of entry of a judgment.[30] 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."[31]

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, even though the case itself was not "final" until all the appeals were concluded.[32]

In the context of the 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. In *Forrest v. Forrest*,[33] the Court held that community property accrues until parties are divorced, but in issuing instructions for the trial court, the Court treated the trial and the divorce as synonymous. Pointing out that property rights accrued "during marriage" and did not terminate upon separation, the Court in remanding referenced the financial facts as they existed at the moment of trial, and directed the trial court on remand to address those specific numbers.[34]

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[28] *Fox v. Fox*, 84 Nev. 368, 441 P.2d 678 (1968).

[29] 84 Nev. at 371, 441 P.2d at 679.

[30] *Id*.

[31] *Fox v. Fox*, 87 Nev. 416, 418, 488 P.2d 548 (1971).

[32] *See* NRAP 3 (filing notice of appeal "vests jurisdiction in the Supreme Court"); *Perkins v. Sierra Nev. Silver Mining Co.*, 10 Nev. 405 (1876) (a judgment or decree is final that disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court).

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

[34] 99 Nev. at 606-607, 668 P.2d at 278-79.

In ***every*** contested case, there is some period of delay between the close of evidence and the formal entry of a decree, since the paperwork has to be drafted. The Court's previous remands have always directed the parties to the valuations and distributions of property made at the close of evidence; the only date referenced in *Forrest* was the date of trial, although the procedural history reflects that in that case post-trial motions were filed which tolled the date of final judgment for some time.[35]

There is no published Nevada case squarely addressing the question of whether one party can take advantage of the delay between trial and entry of judgment to assert that the other party (presumably working for a living) is accruing "unadjudicated assets" (or paying down debt) during that pendency which are then subject to further proceedings or division. Saying "no" to that question has been the uniform result in all known Nevada cases, and appears to be the consensus in published cases from other jurisdictions, reflecting a policy choice of encouraging promptness rather than delay.[36]

So while none of the Nevada opinions are truly explicit on the point, it can be said with fair certainty that the community ends on divorce, and for purposes of property division, "divorce " means the date of the trial.

As a practical matter, what this means for Nevada practitioners is that it might make sense to recite a "divorced as of" date in every decree, separate from the file-stamp date of the order. In the absence of such a provision in the decree, both the parties and others (such as pension plan administrators) will presumably use the file-stamp date as the relevant date, which could have significant economic and other consequences for the parties.

V. DIVISION 50/50 OR OTHER

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

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

> (1) The community property of the parties; and
> (2) Any property placed in joint tenancy by the parties on or after July 1, 1979, as appears just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by the divorce, and to the party through

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[35] 99 Nev. at 604.

[36] *See*, *e.g.*, *Markham v. Markham*, 909 P.2d 602 (Hawaii Ct. App.), *cert. denied*, 910 P.2d 128 (Hawaii 1996); *MacDonald v. MacDonald*, 698 So. 2d 1079 (Miss. 1997); *In re Graff*, 902 P.2d 402 (Colo. Ct. App. 1994); *Heine v. Heine*, 580 N.Y.S.2d 231 (1992); *Grinaker v. Grinaker*, 553 N.W.2d 204 (N.D. 1996); *Zuger v. Zuger*, 563 N.W.2d 804 (N.D. 1997); *Bell v. Bell*, 643 A.2d 846 (1994).

> whom the property was acquired, and to the burdens, if any, imposed upon it, for the benefit of the children.

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

The confusion stemmed from a series of Nevada Supreme Court opinions which seemingly advocated "equal distribution."[37] At the same time, however, the Court had issued decisions rebuffing appeals from orders dividing property ***un***equally.[38]

The confusion was eliminated in *McNabney v. McNabney*,[39] which clarified that as of that time, the applicable statutes should be so construed as to verify that Nevada was an "equitable distribution" jurisdiction, rather than an "equal distribution" jurisdiction, and that (the prior) NRS 125.150 did not mandate an "essentially equal" division of community property.[40]

Four years after the *McNabney* decision, the Legislature amended NRS 125.150, eliminating the "respective merits of the parties" language and inserting new directions. After 1993, 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.

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

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

[39] *McNabney v. McNabney*, 105 Nev. 652, 782 P.2d 1291 (1989).

[40] 105 Nev. at 660, 782 P.2d at 1296. In a footnote, the majority opinion pointed out that the phrase "respective merits of the parties" had never been defined. Without defining the phrase, the court noted that no claim had been made by either party that he or she was more deserving or more meritorious by reason of the fault of the other, and that in considering this factor, it was assumed that the trial court considered "only the respective *economic* merits of the parties." 105 Nev. at 656, n.4, 782 P.2d at 1294, n.4.

The treatment of property held in joint tenancy was moved to NRS 125.150(2).[41]

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

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

There is a question whether the "broad discretion" accorded to trial courts in making property distributions under the pre-1993 law has been changed in any meaningful way by the change from "equitable" to "presumptively equal" division. The matter could probably be argued either way. There is plenty of authority for the proposition that the legislative change reduced the scope of judicial discretion to make unequal distributions, since legislative enactments are to be construed so that "no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided."[42] On the other hand, the new statutory construction still appears to be leave plenty of wiggle room.

The legislature did not define what is meant by a "compelling reason" that would permit an unequal division of community property, and no existing body of statutory or case law provides a reliable

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

(a) The intention of the parties in placing the property in joint tenancy;

(b) The length of the marriage; and

(c) Any other factor which the court deems relevant in making a just and equitable disposition of that property.

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

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

precedent. In *Lofgren v. Lofgren*,[43] the Nevada Supreme Court identified one "compelling reason" which would justify an unequal division of community property as the financial misconduct of one of the parties, such as waste or secretion of community assets in violation of court order.[44]

The next year, in *Putterman v. Putterman*,[45] the Nevada Supreme Court held that both the husband's financial misconduct in the form of refusing to account to the court concerning earnings and other financial matters, and his lying to the court about his income, provided compelling reasons for an unequal disposition of community property.[46] The Court also noted, in dicta, that other possible "compelling reasons" for an unequal division of community property could include "negligent loss or destruction of community property, unauthorized gifts of community property, and even, possibly, compensation for losses occasioned by marriage and its breakup."[47]

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

Under the existing case law, the scope of judicial discretion in "disproportionate division" cases would appear to be at least as broad as that exercised by trial courts in other contexts, such as awarding alimony or awarding attorney's fees. In disproportionate division cases, the court need only find (and identify in writing) some "compelling reason" (presumably, tied to one of the categories identified by the two opinions) without doing any of the things that have been found to be an "abuse of discretion" in other contexts, such as making a pronouncement in the absence of any substantial evidence in the record, or reaching a conclusion based on an identifiably erroneous legal rationale.

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

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[43] 112 Nev. 1282, 926 P.2d 296 (1996).

[44] *Id*., 112 Nev. at 1283-84.

[45] 113 Nev. 606, 939 P.2d 1047 (1997).

[46] *Id.* at 609.

[47] *Id.* at 608.

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

VI. DIVISION OF JUST COMMUNITY PROPERTY OR OTHER PROPERTY CONSIDERED

While the presence or absence of a significant separate property estate by one of two married persons might be of interest to a Nevada divorce court considering an award of alimony, it is technically irrelevant to Nevada community property law.

The law is not well developed, but it would appear that the separate property of one spouse is most readily "set apart" for the support of the other when the sort of facts set out in *Daniel v. Baker*[48] are present: there is a great disparity in the financial condition of the two parties; the spouse in need has little or no potential for meaningful employment with a sufficient salary for the spouse to reach a decent standard of living; and there is a great age distance between husband and wife. The case becomes even stronger where, as in *Sargeant*,[49] one spouse is likely to violate court orders of regular support, or even destroy assets just to injure the other spouse.

The cases from over a century ago (*e.g.*, *Lake v. Bender*[50]) dealt with situations in which the then-new community property law did not affect the wealthier spouse's accumulation of all property in his name despite long years of work by the other spouse. Oddly, the more widespread modern use of prenuptial agreements and similar contracts may have brought society full circle, returning to a situation in which one of two spouses can accumulate a large separate property estate while the other does not accumulate even a small community property estate, even during a long-term marriage.

This sets up facts under which a heavier reference to the divorce courts' power to "set apart" one spouse's separate property estate for the support of the other may, and perhaps should, be seen. Courts are generally loathe to produce a result where one divorced spouse lives a life of relative luxury while the other is relegated to merely surviving on a meager – or non-existent – community property distribution. The existence of a substantial separate property estate on one side of a marriage of significant length is sometimes seen as a justification for an award of separate property from one spouse to the other to prevent such a situation.

It is, however, a standard-less and therefore dangerous power. Under what circumstances is it "fair" – or "unfair" – that one spouse's separate property should be reduced to provide assets to the other, just because the marriage did not create "enough" community property? What about the situation

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[48] *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990).

[49] *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972).

[50] *Lake v. Bender*, 18 Nev. 361, 7 P. 74 (1885).

where the parties marry at or after retirement, and necessarily are living off the pre-marital savings of one or both parties?

The availability of separate property set-aside creates a situation where, in the discretion of a judge, the act of marriage could create a hotch-pot effectively making even premarital separate property available for distribution upon divorce. Absent a situation where one party has subsidized the marriage, and essentially seeks compensation, the concepts of no-fault divorce and presumptive equal distribution would seem to militate against a gratuitous transfer of wealth from one party's separate property estate to that of the other.

But the power remains available, and the existence of substantial separate property assets on one side always at least raises the question of whether "regular" or lump-sum alimony should be awarded. Thus, in Nevada, not just community property, but separate property, may in fact be distributed upon divorce, at least in certain circumstances.

VII. JOINT TITLING/GIFT OR SEPARATE CLAIMS STILL ALLOWED/TRACING

An issue frequently addressed by the courts in divorce cases involves the transfer of property owned by a spouse prior to marriage into joint tenancy during the marriage, or the purchase of property held in joint tenancy with separate property funds. A long line of Nevada cases establishes that separate property placed into joint tenancy is presumed to be a gift of a half interest to the other party, unless the presumption is overcome by clear and convincing evidence.[51]

Likewise, when separate funds of a spouse are used to acquire property in the names of the husband and wife as joint tenants, it is presumed that a gift of one-half of the value of the joint tenancy property was intended.[52] The existence of a valid deed in the form of joint tenancy raises a presumption that the parties intend to own the property as joint tenants.[53]

These presumptions can only be overcome by clear and convincing evidence.[54] The opinion of either spouse is of no weight; the party who wishes to overcome the presumption must do so by presenting

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[51] *See Schmanski v. Schmanski*, 115 Nev. 247, 984 P.2d 752 (1999); *Graham v. Graham*, 104 Nev. 473, 760 P.2d 772 (1988); *Gorden v. Gorden*, 93 Nev. 494, 569 P.2d 397 (1977).

[52] *Campbell v. Campbell*, 101 Nev. 380, 705 P.2d 154 (1985).

[53] *Id*.; *Peters v. Peters*, 92 Nev. 687, 557 P.2d 713 (1976).

[54] *See Graham*, 104 Nev. at 690; *Todkill v. Todkill*, 88 Nev. 231, 495 P.2d 629 (1972).

"substantial evidence of conduct, expressions or intent at the time of taking or during the holding of the property."[55]

Case law from the time period where the husband was the manager of the community property held that the managing spouse must keep the community and separate property segregated.[56] If community and separate property becomes intermingled, it is the managing spouse's burden to prove the separate nature of the property so claimed.[57] Absent such proof, the entire property will be presumed to be community.[58]

This is one of those rules that has not proven problematic to make gender neutral, and in modern property trials, has evolved to the standard approach of placing the burden on the spouse asserting the existence of a separate property interest to prove that it exists, with the result being that the property is found to be community if the proof is insufficient, starting with NRS 123.220. Otherwise, Nevada case law appears unremarkable in that, generally, the burden is on the party going forward to make out a *prima facie* case for any legal proposition asserted.

This is not to say that the burden of proof always rests with the party disputing a characterization of property as community; the burden shifts in different factual scenarios.

For example, when community funds are the source for the purchase of property, the naked form of title to the purchased property as the sole and separate property of one spouse, standing alone without supporting evidence, has been held to ***not*** be "the clear and certain proof required to overcome the presumption of community property."[59] By contrast, the fact that title to all the real property of a couple was put by them in joint tenancy ***was*** considered "the clear and certain proof needed to overcome the presumption that it was community property."[60]

The cases are not as incompatible as they appear. The *Peters* court explained that:

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[55] *Graham*, 104 Nev. at 474.

[56] *Todkill v. Todkill*, 88 Nev. 231, 495 P.2d 629 (1972); *Ormachea v. Ormachea*, 67 Nev. 273, 217 P.2d 355 (1950).

[57] *See*, *e.g.*, *Lucini v. Lucini*, 97 Nev. 214, 626 P.2d 270 (1981) (finding the tracing of funds adequate to overcome the presumption of community property where accounts were somewhat commingled).

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

[59] *Burdick v. Pope*, 90 Nev. 28, 518 P.2d 146 (1974).

[60] *Peters v. Peters*, 92 Nev. 687, 557 P.2d 713 (1976), *quoting Bowman v. Bowman*, 308 P.2d 906, 907 (Cal. App. 1957): "The deed to the property was taken in joint tenancy. This fact raises a rebuttal presumption that the property was, in fact, held in joint tenancy, and places on the party claiming it to be community property the burden of overcoming the presumption. . . . The fact that the property was purchased with community funds, standing alone, is insufficient to rebut the presumption created by the form of the deed" [internal cites omitted]).

> Property held in the individual name of a spouse or in the name of both spouses as tenants in common can be compatible with the concept of community property, but property held in joint tenancy cannot because certain incidents of joint tenancy would be inconsistent with incidents of community property. . . . Whenever property nominally held in joint tenancy is determined to be community property the right of survivorship is destroyed and is brought within the laws of descent and distribution.[61]

In other words, the apparently-joint placement of property into the joint tenancy form of ownership reversed the burden of proof, so that the party attacking the form of title (in *Peters*, the estate of the deceased party) had the burden of proof as to why any of the property should not be considered the sole and separate property of the surviving spouse as an incident of joint tenancy title.

The point for counsel is that, while the rule may be "all property acquired by the husband and wife during marriage is presumed to be community property,"[62] there are apparently a number of situations where the presumption – and the consequent burden of proof – will be the opposite.

What seems like an adequate tracing may not always be so, and in Nevada at least two entirely different tracing mechanisms, and reasoning, exist. In *Malmquist v. Malmquist*,[63] addressing the primary residence, the Nevada Supreme Court used a combination of two 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[64]; and (2) the *Moldave* modification.[65]

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.[66] 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)

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[61] *Peters v. Peters*, 92 Nev. 687, 690, 557 P.2d 713, 715 (1976). Statutory amendments after the time of these cases eliminated much of the differences between community property and joint tenancy that had made these distinctions so important to inheritance questions.

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

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

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

[65] *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).

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

reduced the mortgage principal.[67] 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.[68]

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 payment) than in the later years.[69] 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.[70] The actual formula is:

$$\text{Separate Property} = PDsp + [(PDsp + OLsp) \div PP \times A)],$$

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.[71]

So *Malmquist* contains a case-law-based algebraic tracing of separate property invested in a primary marital residence. Along the way, the Court discussed whether or not the initial down payment had been adequately traced, and held that whether the question was reimbursing a community property contribution to separate property, or a separate property contribution to community property, there were two ways to do so.

First, by way of "direct tracing." Second, to show that there was "exhaustion" of all potential funds of the opposite character in the source account at the time of the payment in question.

As to improvements to real estate, the Court found that "usually" simple reimbursement without interest is the proper measure, unless the party making the claim can establish that appreciation of the property was ***due*** to the improvements, not the market, in which case the trial court may apportion appreciation to the contribution of the party making the claim.

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[67] 106 Nev. at 238, 792 P.2d at 376 (citing *Moore*, 618 P.2d at 210-11).

[68] 106 Nev. at 238, 792 P.2d at 376 (citing *Moore*, 618 P.2d. at 210-11).

[69] 106 Nev. at 239, 792 P.2d at 377.

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

[71] 106 Nev. at 240, 792 P.2d at 377.

In 1993, the Nevada Legislature added an entirely different tracing methodology, applicable to ***any*** "contribution of separate property to the acquisition or improvement of property held in joint tenancy" as quoted above, in the amendment to NRS 125.150(2). The statute allows the court to provide reimbursement to a party for separate property contributions to property which is held by the parties as joint tenants, up to the value of the sums contributed.

VIII. ANY REIMBURSEMENT TO SEPARATE PROPERTY FOR MONIES EXPENDED

As noted and discussed in the preceding two sections, NRS 125.150(2) allows the court to provide reimbursement to a party for separate property contribution to property which is held by the parties as joint tenants, and case law permits the tracing out of community property contributions to separate property real estate, in at least some circumstances.

IX. MANDATORY DISCLOSURE ON DISCOVERY

Nevada is moving in the direction of California's mandatory disclosure rules. In the new State-wide rules provided by Rule 16.2 of the Nevada Rules of Civil Procedure, both sides are required to complete and file a new State-wide Financial Disclosure Form. Whether a General Financial Disclosure Form or a Detailed Financial Disclosure Form is required is dependent upon the circumstances of the parties.[72] A discussion of the intricacies of the new NRCP 16.2 is beyond the scope of these materials; however, the new Rule is intended to help at least identify and hopefully characterize the extent of the parties' real and personal property.

Also moving in the direction of the California law, intentional failure to disclose a material asset or liability could result in an order awarding that asset in its entirety to the innocent party, or making another form of unequal division of community property.[73]

The rule is specific to domestic relations cases, and new, and likely to be tweaked and revised as experience is developed. There seems little doubt, however, that Nevada has elected to reward disclosure and punish attempted concealment of assets as a matter of policy, a welcome evolution in family law practice to the hopeful advantage of all honorable litigants.[74]

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[72] *See* NRCP 16.2(b).

[73] NRCP 16.2(b)(2)(ii).

[74] *Cf*. Marshal Willick, *Res Judicata in Nevada Divorce Law: An Invitation to Fraud*, 4 Nev. Fam. L. Rep. No. 2, Spr., 1989, at 1.

X. AUTOMATIC TEMPORARY RESTRAINING ORDERS/TEMPORARY DOMESTIC ORDERS: WHAT IS ORDERED; CAN WILLS OR BENEFICIARY CARDS BE CHANGED

The local rules in the Eighth (Las Vegas) and the Second (Reno) Judicial Districts have specific court rules allowing for preliminary injunctions designed to prevent either spouse from transferring, encumbering, concealing, selling or otherwise disposing of any joint, common, or community property pending the completion of the case. As a matter of course, such an injunction is usually filed with each Complaint for Divorce and served upon the opposing party at the time of service of the Complaint.

The Reno version[75] also allows the injunction to mutually restrain the parties from cashing, borrowing against, canceling, transferring, or changing the beneficiaries of insurance coverage, or taking any of those same actions with regard to retirement benefits or pension plans existing for the benefit of the parties or their minor children. So Reno prohibits beneficiary changes; Las Vegas does not.

Such injunctions serve as protection against transfers of community property that may or may not be permitted pursuant to NRS 123.230,[76] except transfers made in the ordinary course of business or pursuant to a court order. Violation of the joint preliminary injunction could subject the offending spouse to a potential contempt citation by the court and, more relevant here, could trigger the granting of appropriate credits and offsets in the ultimate property division.[77]

In practice, some judges (at least in Clark County) have expressed the opinion that since the joint preliminary injunction ("JPI") form is issued by the Clerk without a judge's signature, it is not an "order" from which contempt may properly follow for a violation. Some of those judges have instituted a policy of signing JPIs upon request, which the judges will then enforce, making the unsigned copies obtained under the regular rules of questionable usefulness. However, this reading of the relevant laws and court rules appears to be erroneous, and a JPI violation should be considered sanctionable both by contempt and by way of other economic orders.[78]

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[75] WDCR 43.

[76] Governing management and control of community property.

[77] *See Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997); *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996).

[78] *See* Appendix 2, addressing this subject in some detail.

XI. PERMISSIBILITY OF STATUS DIVORCE, PARTIAL DECREES OR BIFURCATED DIVORCES

Subject matter jurisdiction over the marriage itself – and therefore, jurisdiction to grant a divorce – is present as long as the court has personal jurisdiction over ***either*** of the parties to the marriage, and every State is required under the Full Faith and Credit clause of the United States Constitution to recognize decrees entered by other States if those other States had such personal jurisdiction over one party and afforded notice to the other in accordance with procedural due process.[79]

A court arguably could have jurisdiction to entertain a divorce case but nevertheless decline to do so when another divorce action is pending elsewhere, and the other court has jurisdiction over a greater number of the incidents of marriage. For example, where a party comes to Nevada and files for divorce, but the other party does not appear here, but initiates a divorce action in the State from which the party came, and that State has jurisdiction over issues of child custody, child and spousal support, and the bulk of the parties' property.

The rationales are the doctrines of comity and abstention,[80] and the Nevada Supreme Court's repeated admonitions against bifurcating divorce actions.[81]

In *Gojack*,[82] the Court spoke of the potential complications arising in a case with certain kinds of facts. The *Opinion* warned of the dangers risked in granting a divorce without settling property and support issues at the same time. As summarized in the Nevada Family Practice Manual:

> The Court recited the "numerous problems inevitably flowing" from an interim divorce decree, such as the effect of such a Decree on the character of the property of the parties, the status of community property after the entry of the Decree (whether it was thereafter held as tenants in common), the allocation of rents, profits, and taxes, the effect of a subsequent death or remarriage of one or both of the parties prior to the final

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[79] *Williams v. North Carolina*, 317 U.S. 287 (1942); *see also Sherrer v. Sherrer*, 334 U.S. 343 (1947); *Coe v. Coe*, 334 U.S. 378 (1947).

[80] "Comity," strictly speaking, is a "rule of courtesy by which one court defers to the concomitant jurisdiction of another." Gifis Law Dictionary (Barron's 1984 ed.) at 79. As the dictionary definition further explains, "judicial comity is not a rule of law, but one of practical convenience and expediency based on the theory that a court which first asserts jurisdiction will not be interfered with in the continuance of its assertion by another court . . . unless it is desirable that one give way to the other."

[81] *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).

[82] *Gojack v. District Court*, 95 Nev. 443, 596 P.2d 237 (1979).

adjudication and disposition of community assets, and the "adverse effect" on "property settlement or reconciliation possibilities."[83]

The Court termed the "statutory mandate" to be "rather clear"[84]and held that a status-only divorce was "beyond the court's power to enter." In later cases, the Court used the term "disfavored," and held that such decrees could only be entered upon stipulation of the parties to the marriage.[85]

Some members of the Court have stated that they simply will not affirm ***any*** bifurcated divorces on appeal, whether stipulated to or not.[86] However, since *Gojack*, the Court has unanimously insisted that, at ***minimum***, entry of a partial, or "status-only," or bifurcated divorce be stipulated to by both parties.

Where actions are pending in courts of different states, whether to stay or dismiss one action or the other should be raised by motion.[87] A ruling on whether to stay or dismiss must take into consideration matters outside the pleadings, such as the seriousness of the threat of multiple and vexatious litigation, the convenience of the parties, the status of the foreign action, and the competing interests of the two forums.[88] Considerations of comity and prevention of multiple and vexatious litigation will most often militate in favor of dismissal of the later-filed action, unless there is some clear superiority of that action being the one that should proceed.[89]

The analysis to determine which State has jurisdiction over which issues is usually pretty straight-forward, since the various uniform acts (UIFSA, UCCJEA) determine whether or not a State has jurisdiction over child support and custody, and the State of last matrimonial domicile retains long-

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[83] Nevada Family Law Practice Manual, 2003 Edition § 1.316-1.317, quoting *Gojack*, 95 Nev. at 445-46, 596 P.2d at 239.

[84] *Id*.

[85] In *Smith v. Smith*, 100 Nev. 610, 691 P.2d 428, 431 (1984), the Court reviewed a case in which it concluded that the parties' convoluted procedural conduct had effectively stipulated to a bifurcated trial, in which the status of the marriage was terminated but jurisdiction over property issues had been reserved. The Court added, however, that "despite our acceptance of the separate trials in this case, we wish to emphasize that bifurcated divorce proceedings and the problems they are likely to engender are disfavored and should generally be avoided."

[86] Ten years after *Smith*, in *Milender v. Marcum*, 110 Nev. 972, 980, 879 P.2d 748, 754 (1994), two justices dissented from the decision affirming an order modifying property and alimony terms without vacating the divorce itself, complaining that it amounted to a prohibited *sua sponte* bifurcation of the divorce decree by the trial court.

[87] *See*, *e.g.*, *Marriage of Hanley*, 199 Cal. App. 3d 1109 (Ct. App. 1998).

[88] *Engle v. Superior Court*, 140 Cal. App. 2d 71, 82-83 (Ct. App. 1956).

[89] *Id*. at 83.

arm jurisdiction to resolve all regular incidents of a marriage not specifically overridden by such an enactment, such as property and alimony issues.[90]

Whether or not another action has been filed elsewhere makes a difference. In a strictly default divorce situation when ***no*** other action is pending elsewhere, a Nevada court with jurisdiction over only one party can dissolve the marriage, but not adjudicate any rights as to alimony, child support, or child custody without obtaining personal jurisdiction over both parties.[91] Technically, since the trial court lacks jurisdiction to adjudicate any issues other than status, those issues are thus "bifurcated," but no known case has denied a plaintiff a divorce on that basis.

Where there ***is*** another action pending, however, granting a "status-only" divorce effectively bifurcates the action, since those issues remain pending before another court. Since this is forbidden under *Gojack*, one State must defer to the other under principles of comity and abstention.

The doctrine of *forum non conveniens* is recognized by Nevada law,[92] and is typically the rubric under which an action may be dismissed in Nevada when this State has arguable jurisdiction over some incidents of the marriage, but the doctrines noted above indicate that the litigation really should proceed elsewhere.

XII. LEGAL SEPARATIONS ALLOWED

Nevada has only one form of divorce – an absolute divorce, with no interlocutory or partial forms, unlike certain other States. In addition to absolute divorce, however, Nevada has a separate statutory allowance for separate maintenance, commonly (if inaccurately) referred to in Nevada as a "legal separation."

Such an action is used to determine the temporary possession of real and personal property between spouses, along with their financial responsibilities to one another, and either temporary or permanent custody, visitation, and support of any minor children, without dissolving the marriage. Generally,

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[90] In 1993, the Nevada Legislature expanded the reach of our long-arm statute to "any basis not inconsistent with the constitution of this state or the Constitution of the United States" to make it as expansive as possible. NRS 14.065(1). The previous formulation was more selective and specific, but still allowed – as all States do – the exercise of long-arm jurisdiction over a person who was "living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for alimony, child support or property settlement, if the other party to the marital relationship continues to reside in this state." NRS 14.065(2)(e) (prior statute).

[91] *Simpson v. O'Donnell*, 98 Nev. 516, 645 P.2d 1020 (1982). In the years since this case was decided the various uniform acts governing matters of child support and custody may have altered its holding on those points; if permitted under the uniform acts, the court would gain jurisdiction over those issues irrespective of jurisdiction over the other party.

[92] *See Cariaga v. District Court*, 104 Nev. 544, 762 P.2d 886 (1988); *Martin v. DeMauro Constr. Corp.*, 104 Nev. 506, 761 P.2d 848 (1988).

any subject that may be addressed in a decree of divorce may be addressed in a decree of separate maintenance, except that the marital status continues to exist.

Specifically, NRS 125.210(1) enumerates the specific authority of the court to:

(a) Assign and decree to either spouse the possession of any real or personal property of the other spouse;
(b) Order or decree the payment of a fixed sum of money for the support of the other spouse and their children;
(c) Provide that the payment of that money be secured upon real estate or other security, or make any other suitable provision; and
(d) Determine the time and manner in which the payments must be made.

For the purpose of the topic of this seminar, only a limited discussion of the Nevada separate maintenance laws seems warranted. As to property, the particulars of what might be ordered are apparently different in separate maintenance actions than in divorce actions.

Nevada's formal community property scheme came into existence through the Statutes of 1873, and had been in effect for some 40 years when the separate maintenance statutes were passed in 1913. It is therefore unclear why no mention was made in the separate maintenance statutes of community property or any joint tenancy property. The statutes state only that a court has the power to "assign and decree to either spouse the possession of any real or personal property of the other spouse,"[93] which on its face would appear to reference only each spouse's ***separate*** property.

No explanation for the omission of community property from the separate maintenance statutes appears on their face, in the case law, or in any surviving legislative history. Still, each spouse owns an undivided one-half interest in all community property pursuant to NRS 123.225, so interpreting the statute as including authority for the district court to make orders concerning community or joint tenancy property, as well as separate property, seems reasonable under the law as it is today.

The problems is that the statute proclaiming that "present, existing, and equal interest" (NRS 123.225) dates to only 1959, and so did not so state when the separate maintenance statutes were enacted. To date, every court known has simply skipped over this historical problem and presumed that the separate maintenance statutes give the district court the same powers over community property as to the parties' separate property, as a matter of logic.

NRS 125.210(1)(a) permits a court to "Assign and decree to either spouse the possession of any real or personal property of the other spouse." The statute is framed not in terms of ***ownership*** of property, but in terms of "possession." In combination with the provisions making such separate maintenance orders and decrees modifiable at any time, and automatically terminable at death, the

[93] NRS 125.210(1)(a).

scope of authority granted to district courts in separate maintenance actions seems to contemplate only temporary, changeable orders as to property.

Notably, the Nevada laws appear to be a bit contradictory. Providing only for possession, rather than ownership of property by way of a separate maintenance decree seems contradictory to the portion of NRS 123.220(2)[94] stating that property could be defined as ***not*** community property by way of a decree of separate maintenance. While the statute itself dates to 1873, the "separate maintenance" notation was only added in 1975, during the make-over of Nevada's community property laws in the wake of the Equal Rights Amendment proposal, to make husbands and wives joint managers of community property, and eliminate gender-specific language. Apparently, there was no action to conform the separate maintenance provisions themselves at the time NRS 123.220 was changed, and there is no legislative history showing the reason for the change.

It seems likely that no one checked the separate maintenance statutes, and it was simply assumed that they included the power to declare parties to be owners, rather than mere "possessors," of property. Irrespective of intent, as of 1975, NRS 123.220(2) has given courts the apparent ability to declare, by way of decree of separate maintenance, that property acquired (presumably after the date of the decree) is the separate property of the party acquiring it. This is the construction given to the provision by the Nevada Supreme Court, without significant history or analysis, in *Forrest*,[95] where the Court deemed earnings acquired after the parties separated, but before divorce, to be community property because:

> despite the fact that since the time of separation both parties were represented by counsel, no written agreement or authorization between the parties was entered into, nor was a decree of separate maintenance obtained. In such a case, the statutes clearly mandate that all property acquired by the parties until the formal dissolution of the marriage is community property.[96]

It is beyond the scope of these materials, but there is some doubt as to the effect of a separate maintenance decree if one of the parties dies before divorce. During the parties' mutual lives, however, a decree of separate maintenance apparently may (but is not required to) permit the earning spouse to treat all earnings as separate property. In combination with the provision permitting a court to change its separate maintenance orders and decrees at any time,[97] NRS 123.220(2) creates the peculiar state of affairs in which a court can decree income to be separate or community property, alternately, during a continuing marriage.

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[94] Community property defined. All property, other than that stated in NRS 123.130 [defining separate property], acquired after marriage by either husband or wife, or both, is community property unless otherwise provided by: . . . A decree of separate maintenance issued by a court of competent jurisdiction."

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

[96] *Forrest v. Forrest*, 99 Nev. 602, 607, 668 P.2d 275, 279 (1983).

[97] NRS 125.210(3).

The Nevada statutes governing separate maintenance go beyond the classic definition of "separate maintenance," framed as "Money paid by one married person to another for support if they are no longer living as husband and wife."[98] The statutes encompass much of the possible scope of the typical definition of "legal separation": "An arrangement whereby a husband and wife live apart from each other while remaining married, either by mutual consent or by judicial decree."[99]

The distinction of the two concepts is much more pronounced in some other jurisdictions. In Washington State, for example, "separate maintenance" is an equitable remedy intended to provide maintenance to a needy spouse, providing limited jurisdiction to the court over the property of the parties, and a court decree anticipates the parties' reconciliation.[100] By contrast, "legal separation" in that jurisdiction is a statutory procedure providing a "permanent" remedy similar to the common law divorce from bed and board,[101] in which the court has the same jurisdiction to enter permanent orders as to property and other matters as in a divorce action, except as to marital status.[102]

By contrast, Nevada's separate maintenance provisions contain elements of both "separate maintenance" and "legal separation" concepts as used elsewhere. The court's jurisdiction is statutory-based, and its first section[103] speaks of the provision of "permanent support and maintenance," but the remaining provisions clearly provide that all separate maintenance orders and decrees are temporary, in that they may be altered at any time, and never survive the death of a party.[104]

These apparent contradictions on the face of the statutes render all separate maintenance proceedings and orders susceptible to uncertainty as to their permissible scope and effectiveness.

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[98] BLACK'S LAW DICTIONARY 965 (7th ed. 1999).

[99] BLACK'S LAW DICTIONARY 1369 (7th ed. 1999).

[100] 21 Kenneth W. Weber, Washington Practice, Family and Community Property Law With Forms §47.4 (West 1997).

[101] "Divorce a mensa et thoro." *See* BLACK'S LAW DICTIONARY 494 (7th ed. 1999).

[102] 21 Kenneth W. Weber, Washington Practice, Family and Community Property Law With Forms §47.4 (West 1997).

[103] NRS 125.190.

[104] NRS 125.210(3); NRS 125.210(4).

The bottom line for these materials, however, is that all such property dispositions apparently are temporary, and upon reconciliation, or the death of a party, return to their normal community property status for disposition.[105]

To date there is no guidance as to what might happen to property made the subject of a separation agreement entered into as part of such a separate maintenance decree that was contractually provided to be separately ***owned*** by the parties. If the contract was intended to survive the decree, it could be argued to survive the death of a party and remain in place despite the dissolution of the separate maintenance order adopting it. On the other hand, some courts have held that the setting aside of a decree necessarily nullifies all agreements referenced in such decrees, and it is hard to explain why that might be so for a decree set aside by later order, as opposed to one automatically dissolved by statute upon the death of a party.

XIII. A BRIEF ASIDE ABOUT TAXES

Failing to remember the difference in value between pre-tax assets (*e.g.*, IRA accounts) and post-tax assets (*e.g.*, regular savings accounts) is an invitation to disaster. For most wage-earners, pre-tax assets are only worth about 75¢ on the dollar, so taking a $10,000 retirement benefit in exchange for $10,000 cash is probably a bad idea.

Instead, pre- and post-tax assets should be separately divided and offset; if they must be weighed together for whatever reason, one should be converted – the pre-tax assets can be "tax affected" to determine post-tax values before putting them on the balance sheet.

XIV. HOW IS PROPERTY ACQUIRED IN DIFFERENT STATES TREATED

By case authority, 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.[106] The rule of *Braddock* (actually slightly mis-quoting the case it claims to be following) states that:

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[105] As noted above, the survivorship details for community property and joint tenancy property used to be far more different than they are now, and the separate maintenance laws were not altered in any way as the meaning of community property evolved, making it quite likely that the effect of the reversion of property whose "possession" was dictated by a separate maintenance decree is different than what the framers of the separate maintenance statutes had in mind when the provisions were enacted.

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

> The nature and rights of married persons in personal property acquired during marriage is determined by the laws of that state which is the matrimonial domicile of the parties at the time the property is acquired.[107]

The quote is inaccurate – the actual language from the earlier case is:

> The nature ***of the*** rights of married persons in personal property acquired during marriage is determined by the laws of that state which is the matrimonial domicile of the parties at the time the property is acquired.[108]

The latter court did not indicate that it was intending to alter the earlier holding, so it would appear to be an inadvertent misquote. The difference between the two would seem to make the actual legal doctrine one strictly of ***characterization***, not of distribution or any other aspect of marital property.

This is confirmed by the earlier *Choate* opinion itself – what the Court was trying to do was figure out if proceeds from an accident suit would be community property or separate property under Idaho community property law. Similarly, in *Braddock*, the question was whether the various kinds of property acquired in Ohio were marital property, or solely owed by the husband; it is only ***that*** question, and not how property might be divided by the Nevada court once the character f the property had been determined, to which the Court turned in "again applying the law of Ohio."[109]

In practice, the *Braddock* rule is best perceived as akin to an affirmative defense, in that if the matter is not raised by the party seeking an advantage under the law of some other State where the asset accrued, Nevada's community property law will apply by default.[110] Most judges and lawyers, in most cases, simply do so without even asking if the result might be different if the rule was applied; as detailed below, it can sometimes make a big difference in outcomes.

The Nevada Supreme Court has not closely analyzed the effects of *Braddock* on the relative rights of residents of Nevada who, by happenstance of their ***prior*** places of residence, could have considerably different rights from other residents vis-a-vis the distribution of identical property interests. A case could be made that any injustice created by selective importation of other States' laws creates a "compelling reason" basis for a disproportionate property division[111] – at least to the

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[107] 91 Nev. at 740-41, quoting from *Choate v. Ransom*, 74 Nev. 100, 104, 323 P.2d 700, 702 (1958).

[108] *Choate v. Ransom*, 74 Nev. 100, 104, 323 P.2d 700, 702 (1958) (emphasis added).

[109] 91 Nev. 741.

[110] *See*, *e.g.*, *Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988), in which the Nevada Supreme Court simply noted without comment the equal division of a Michigan state retirement fund in a Nevada divorce court. *Id*. at n.1. This was legally significant only because it constituted a quasi-community property approach to division of that retirement, without acknowledgment of doing so.

[111] *See* NRS 125.150(2).

extent of restoring to the Nevada resident the effect of a distribution under local law – to prevent forum shopping.

XV. DIFFERENT METHODS OF DIVISION IN DIFFERENT COMMUNITY PROPERTY STATES – THINGS TO CONSIDER

It can be a very expensive mistake to assume that other community property States apply the same rules that the Nevada courts apply – especially in view of the directive of *Braddock* to use other State's rules for determining the character of property. While these materials cannot explore all the variations in property accruals and distributions among the various community property States, a few high points are worth mentioning as examples of how an enormous difference in property distribution can result depending on which States' rules are applied.

In the world of pension division, for example, the standard "time rule" formula seems simple enough – the spousal share is determined by taking the number of months of service during marriage as a numerator, and the total number of months of service as a denominator, and multiplying the resulting fraction by first one-half (the spousal share) and then by the retirement benefits received.

Yet there are variations around the country in terms of what is counted, and how, leading to very different ultimate results. Courts in different States may not even realize that the "time rule" cases decided elsewhere follow different sets of rules and assumptions.

A. Variations in When "Marriage" Begins

In previous years, it was relatively simple, in most places, to determine whether property was accrued by a single person or a couple. The period of joint acquisition started with a marriage, either common-law or ceremonial, and ended upon "termination of the community" (see the following sub-section).

Common law marriage[112] was widespread from Colonial times through the nineteenth century, when State regulations more consistently required license from the State and some ceremonial proceeding before a marriage would be recognized under law.

[112] A marriage that takes legal effect, without license or ceremony, when a couple live together as husband and wife, intend to be married, and hold themselves out to others as a married couple. A validly-entered common-law marriage is recognized in all States, but the only places still permitting them to be entered into are apparently Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah.

In Nevada, through a process that has come to be known as "tacking," property accrued during a period of premarital cohabitation may be divided between the cohabiting parties after they marry, and later divorce.[113]

This appears to be a trend. In 2002, after eleven years of work and four drafts, the American Law Institute ("ALI") published its *Principles of the Law of Family Dissolution: Analysis and Recommendations* ("*Principles*"). Consisting of 1,187 pages of single-spaced exposition, explanations, theoretical bases, and citations, the *Principles* considered many of the foundational questions in family law surrounding divorce, cohabitation, same-sex relationships, and parentage.

Among the various matters addressed in the *Principles* is the direction to count as part of the length of marriages any premarital period of cohabitation in which the parties were effectively "domestic partners."[114] Different States have and will adopt this suggestion in different circumstances, and in their own time. If this becomes ever more common upon divorce, as it appears it will, the period of marriage may be significantly different than it might appear, and under *Braddock*, it may be necessary to determine how some ***other***, prior State of marital residence treat the question, in order to figure out the property ownership of pension and other assets.

B. Variations in Final Date of Accrual

Probably the most obvious variation from place to place is when to stop counting. California, Nevada, and Arizona are three community property States sitting right next to one another, and it is not unusual for cases to involve parties with ties to any two of them. All three claim to apply the time rule to pension divisions, but they do the math differently.

Presume that a couple live together in marriage for ten years before they separate. The parties discuss reconciliation and possible divorce terms, but after six months, it becomes clear that the split is permanent, and one of them files for divorce. The divorce turns out to be a messy, acrimonious matter which proceeds through motions, custody evaluations, returns, etc., for another year and a half, when the parties finally get to trial and are declared divorced. Also presume that the member spouse accrues a retirement during marriage providing exactly $1,000 after 20 years.

In California, the spousal share ceases to accumulate upon "final separation."[115] So the math would be 10 (years of marriage) ÷ 20 (years of service) x .5 (spousal share) x $1,000 (pension payment) = $250.

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[113] *Carr-Bricken v. First Interstate Bank*, 105 Nev. 570, 779 P.2d 967 (1989).

[114] *Principles* at 896. The *Principles* do not use the term "tacking," and the status it terms "domestic partners" has been labeled "a single economic unit" in other writings. *See* Marshal S. Willick, *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-Marital Property and Support Law*, 19 NEV. LAW. 6 (May, 2011).

[115] *See*, *e.g.*, *In re Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661(Cal. Ct. App. 1985).

Arizona terminates community property accruals, for the most part, on the date of filing and service of a petition for divorce.[116] There, on the same facts, the math would be 10.5 (years of marriage) ÷ 20 (years of service) x .5 (spousal share) x $1,000 (pension payment) = $262.50.

Next door in Nevada, community property ceases to accrue on the "date of divorce."[117] There, the math would be 12 (years of marriage) ÷ 20 (years of service) x .5 (spousal share) x $1,000 (pension payment) = $300.

Presumably, other States could have still different rules for measuring when the community or coverture period started or ended. Such variations could lead to significantly different sums collected by the respective spouses over the course of a lifetime.

C. Variations in Qualitative/Quantitative Approach to Spousal Shares

As a matter of law, it is possible to value the spousal share in at least two ways. The majority of States applying the time rule formula seem to view the "community" years of effort ***qualitatively*** rather than quantitatively, reasoning that the early and later years of total service are equally necessary to the retirement benefits ultimately received.[118]

This view of the time rule essentially provides to the former spouse an ever "smaller slice of a larger pie" by getting a shrinking percentage of a retirement that is increasing in size based upon post-divorce increases in the wage-earner's salary and years in service.

Some critics complain that such a formula gives the non-employee former spouse an interest in the employee spouse's post-divorce earnings, at least where the divorce occurs while the employee is still working. They argue that the spousal share should be frozen at the earnings level at divorce;

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[116] Ariz. Rev. Stat. § 25-211 (1998).

[117] *See*, *e.g.*, *Forrest v. Forrest*, 99 Nev. 602, 606, 668 P.2d 275, 278 (1983). While there is scant published authority for the proposition, this is usually thought to mean the date of the divorce trial.

[118] *See*, *e.g.*, *Marriage of Poppe*, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (1979); *Bangs v. Bangs*, 475 A.2d 1214 (Md. App. Ct. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *In re Hunt*, 909 P.2d 525 (Colo. 1995); *Croley v. Tiede*, ___ S.W.3d ___, 2000 WL 1473854 (Tenn. Ct. App., No. M1999-00649-COA-R3-VC, Oct. 5, 2000); *Kiser v. Kiser*, 32 P.3d 244 (Or. Ct. App. 2001) (divorce court is required to look to the value of the benefit at retirement); *In re: Malpass*, ___ P.3d ___ (Or. Ct. App. No A146655, Feb. 13, 2013) (freezing spousal share to a fraction of the rank earned upon divorce was error under the time rule). Such jurisdictions typically add a hedge; the trial court can reserve jurisdiction to determine, after retirement, whether the benefits proved to be much greater than expected because of extraordinary "effort and achievement" (as opposed to "ordinary promotions and cost of living increases"), in which case the court could recalculate the spousal interest. *See*, *e.g.*, *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

a minority of States, including Texas, have adopted this approach, sometimes in cases that do not appear to have contemplated the actual mathematical impact of the decision reached.[119]

Certain other States, including Nevada, while rejecting the Texas approach, have nevertheless left the door open to a member establishing that increases in retirement benefits are "attributable to post-dissolution efforts of the employee spouse, and not dependent on the prior joint efforts of the parties during the marriage," and therefore are the separate property of the member.[120] Such cases invite fact-intensive hair-splitting since, as the Nevada Supreme Court observed, there is an expectation of pension increases by way of "ordinary promotions and cost of living increases, in contradistinction to the increased income the employee spouse achieved because of his post-marriage effort and accomplishments."[121]

The Texas minority approach undervalues the spousal interest by giving no compensation for deferred receipt, and also contains a logic problem, at least in a community property analysis, of treating similarly situated persons differently.

Specifically, the majority time rule approach comes closest to providing equity to successive spouses. Two consecutive spouses, during the first and last halves of a worker's career, would be treated equally under the qualitative approach, but very differently under any approach that freezes the spousal share at the level of compensation being received at the time of divorce.

An example is useful to illustrate this discussion. Presume a worker who was employed for exactly 20 years, and was married to wife one for the first ten, and wife two for the next ten, retiring on the day of divorce from wife two. Presume he had started work at $20,000 per year, and had enjoyed 5% raises every year. That would make his historical earnings look like this:

Yearly Salary	Monthly Salary
$20,000.00	$1,666.67
$21,000.00	$1,750.00
$22,050.00	$1,837.50
$23,152.50	$1,929.38
$24,310.13	$2,025.84
$25,525.63	$2,127.14
$26,801.91	$2,233.49
$28,142.01	$2,345.17
$29,549.11	$2,462.43
$31,026.56	$2,585.55
$32,577.89	$2,714.82
$34,206.79	$2,850.57

[119] *See*, *e.g.*, *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987).

[120] *Barr v. Barr*, ___ A.2d ___ (N.J. Super. Ct. App. Divorce. No. A-1389-09T2, Jan. 19, 2011).

[121] *Gemma v. Gemma*, 105 Nev. 458, 463, 778 P.2d 429, 432 (1989).

$35,917.13	$2,993.09
$37,712.98	$3,142.75
$39,598.63	$3,299.89
$41,578.56	$3,464.88
$43,657.49	$3,638.12
$45,840.37	$3,820.03
$48,132.38	$4,011.03
$50,539.00	$4,211.58

If this hypothetical worker had a standard defined benefit plan[122] the above wage history would make his average monthly salary during his last three years' service $4,014.21, and a standard retirement formula[123] would make his retired pay $2,007.11.

Under the ***qualitative*** approach to the time rule embraced by most time rule States, the worker would receive half of this sum himself – $1,003.55. Each of his former spouses, having been married to him for exactly half the time the pension accrued, would receive half of ***that*** sum – $501.78. In other words:

Worker:	$1,003.55
Wife one (10 years):	$ 501.78
Wife two (10 years):	$ 501.78
Total:	$2,007.11

If the calculations were done in accordance with the position of the critics of the time rule set out above, in a strictly quantitative way, the results would be quite different. Wife one's share of the retirement would be calculated in accordance with rank and grade at the time of her divorce from the member; in this case, she would get a pension share based on the salary at the ten year point, which was $2,464.38. The formula postulated above would produce a hypothetical retirement of $616.10. Wife one would receive half of that sum – $308.05, but not until after the worker's actual retirement, ten years later.

The smaller share going to wife one would leave more for wife two and the worker who, on these facts, would effectively split it as follows:

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[122] Such plans are often funded by employer contributions (although in some plans employees can contribute) and provide certain specified benefits to the employee after retirement, usually for life. Often, the benefit is determined by a formula taking into account the highest salary received and the total number of years worked for the employer (such as a "high-three" or "high five" plan). For example, a plan might pay one-tenth of an employee's average monthly salary over the three years before retirement, multiplied by one-fourth the number of years that the employee worked. A twenty-year employee earning an average of $2,000 per month during his last years would get $1,000 per month (i.e., $2,000 x .1 x 20 x .25). Generally, no lump-sum distributions (other than certain nominal amounts in some plans) can be distributed from such defined benefit plans.

[123] Years of service x 2.5% x last three year's average pay.

Worker:	$1,100.41
Wife one (10 years):	$ 308.05
Wife two (10 years):	$ 598.65
Total:	$2,007.11

Perhaps the clearest expositions of the reasoning behind the two approaches are found in those cases in which a reviewing court splits as to which interpretation is most correct. The Supreme Court of Iowa (a non-community property State) faced such a conflict in the case of *In re Benson*.[124] The trial court had used a time-rule approach, with the wife's percentage to be applied to the sum the husband actually received, whenever he actually retired.

The appellate court restated the question as being the time of valuation, with the choices being the sum the husband ***would have*** been able to receive if he had retired at divorce, or the sum payable at retirement. The court acknowledged that the longer the husband worked after divorce, the smaller the wife's portion became. The court accepted the wife's position that to "lock in" the value of the wife's interest to the value at divorce, while delaying payment to actual retirement, prevented the wife from "earning a reasonable return on her interest."

Quoting at length from a law review article analyzing the mathematics of the situation, the court found that acceptance of the husband's argument would have allowed him to collect the entirety of the accumulating "earnings" on the marital property accumulated by both parties. Three judges dissented.[125]

The point of the mathematics is that practitioners must look beyond the mere label applied by the statutory or decisional law of a given State to see what it would actually do for the parties before it. This is particularly true when considering which forum would be most advantageous, in those cases in which a choice is possible.

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[124] 545 N.W.2d 252 (Iowa 1996).

[125] The Iowa court apparently did not even consider the possibility of having the wife's interest begin being paid to her at the employee's first eligibility for retirement, "freezing" it at that point and letting the husband enjoy all accumulations after that time. Presumably, this is because that possibility was not litigated at the trial level. That is the result in most or all community property States, however, and case law has made it clear that a spouse choosing to accept retirement benefits at first eligibility has no interest in any credits accruing thereafter, having made an "irrevocable election." *See In re Harris*, 27 P.3d 656 (Wash. Ct. App. 2001), and the citations set out in the following section.

D. Variations Regarding Payment Upon Eligibility

Several State courts have held that the interest of a former spouse in retired pay is realized at ***vesting***,[126] theoretically entitling the spouse to collect a portion of what the worker ***could*** get at that time irrespective of whether the worker actually retires.[127] As phrased by the California court in *Luciano*: "The employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition within the employee spouse's control."[128] This is the essentially universal rule in the community property system.

Most of those who advocate the "freeze at divorce" approach discussed above either oppose or ignore the question of whether distribution of the spousal share should be mandated at the time of the participant's first eligibility for retirement. It is not possible, however, to fully and fairly evaluate the impact of a "freeze at divorce" proposal ***without*** examining that question as well.[129]

Whether States follow a "payment upon eligibility" or "payment upon retirement" rule is another one of those doctrines which is not at all obvious from the label applied by the individual States, but again is usually hidden in their decisional law. Which way the State goes on this question can have a huge impact on the value of the retirement benefits to each spouse.

E. Rents, Profits, and Issues

Another variation among community property States that can have big effects on property distribution is how rents, profits, and issues of separate property are treated.

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[126] A "vested" pension is one that, having been earned and accrued, is beyond the power of the issuing authority to withdraw from payment. *See LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969) (exploring definitions of "vestedness" and "maturity" of retired pay).

[127] *See In re Marriage of Luciano*, 164 Cal. Rptr. 93, 104 Cal. App. 3d 956 (Ct. App. 1980); *In re Marriage of Gillmore*, 629 P.2d 1, 174 Cal. Rptr. 493 (Cal. 1981); *In re Marriage of Scott*, 202 Cal. Rptr. 716, 156 Cal. App. 3d 251 (Ct. App. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993); *Balderson v. Balderson*, 896 P.2d 956 (Idaho 1994); *Blake v. Blake*, 807 P.2d 1211 (Colo. Ct. App. 1990); *Harris v. Harris*, 107 Wash. App. 597, 27 P.3d 656 (Wash. Ct. App. 2001); *Bailey v. Bailey*, 745 P.2d 830 (Utah 1987) (time of distribution of retirement benefits is when benefits are received "or at least until the earner is eligible to retire").

[128] *In re Marriage of Luciano*, *supra*, 164 Cal. Rptr. at 95.

[129] I have independently verified the mathematical effects of the various approaches taken by courts. Unless payments to spouses are required at each first eligibility for retirement, regardless of the date of actual retirement, a "rank at divorce" proposal, at least in military cases, would result in a reduction in the value of the spousal share by at least 13%. A second spouse married to a member for the last couple years of service could actually receive more money after divorce than a first spouse who assisted the member for most of the military career. There does not appear to be any valid public policy that could be served by causing this result.

For example, in Nevada, the rents, profits, and issue of separate property are separate, and that of community property is community.[130] But that rule is not universal. In Texas, income from all property of the spouses – whether the property generating the income is separate or community property – is community property.[131]

So if one of the spouses has income-producing property and the parties' prior marital domicile was Texas, the *Braddock* rule would treat all the income generated by that separate property – and everything that had been acquired during the marriage ***with*** that money – as community property to be divided upon divorce in Nevada.

There are many other variations in community property law among the nine community property States, but the lesson remains to know the facts well. If there is any significant involvement of another State, learn the applicable property law at play, without making assumptions that it is the same there as here; the differences in outcomes might be significant.

XVI. ANALYSIS OF HYPOTHETICAL FACT PATTERN

Consider the following hypothetical fact pattern:

> **Before marriage**: Parties lived together for 5 years. Parties kept separate checking accounts. House they lived in was purchased by both of them, joint title; joint mortgage. Wife contributed 20% of purchase price as the only down payment funds. Her funds came from an inheritance, from a separately named account, with no commingled funds. Wife paid utilities and bought groceries from her checking account; husband paid mortgage from his checking account.
>
> **After marriage**: Parties have joint account and commingle earnings and expenses. Parties are married for 16 years. Wife is an accountant; husband is a lawyer – each has their own successful practices, wife's is worth $1 million, husband's is worth $2 million. No kids. Discuss what would be community property, how valued, how divided, process of divorce.

A. The House

The essential question for the period of premarital cohabitation is the intent of the parties; Nevada law permits two different interpretations of her clearly separate property-sourced down payment.

The facts do not say whether, during the cohabitation period, future husband or future wife in fact made the larger contribution. If the house, even if jointly titled, was unequally contributed to during

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[130] NRS 123.220; NRS 123.130.

[131] *Arnold v. Leonard*, 273 S.W. 799, 803 (Tex. 1925).

the period of cohabitation, it is possible for the trial court to award the parties their respective shares of the interest in the residence, in accordance with their unequal contributions of funds, under the line of authority including *Sack v. Tomlin*[132] and *Langevin v. York*.[133]

If the facts indicated an agreement, express or implied, to equally co-own the property, that partnership or joint venture could be given effect under the doctrine expressed in *Michoff*.[134] That decision stated that the remedies in *Marvin v. Marvin*[135] (i.e., "palimony," or the setting aside of property acquired by one unmarried cohabitant to the other) were expressly available to unmarried co-habitants.[136]

The same analysis would inform the future husband making the mortgage payments while the future wife bought groceries – it is a matter of divining what "deal" the parties actually had about their expenditures.

At bottom, if the parties intended to own the property in accordance with their contributions toward it, the court should parse out whether the parties contributed equally or otherwise (with a secondary question of whether there was a quid pro quo in the mortgage-for-groceries allocation). On the other hand, if the parties intended to and did live in a stable, marriage-like relationship while knowing that they were not, in fact, married, the court could and presumably would find that the property acquired by ***either*** of them during that relationship is to be divided exactly as community property would be, because any other division would be less fair than an equal division.[137]

The marriage itself is a defining moment. Even though the deed preceded the marriage ceremony, it is hard to believe that any court would use the various tracing tools discussed above to look past the fact of jointly-titled real estate owned by two married parties,[138] and the reasonable expectation would be an equal division of the house value upon divorce.

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[132] *Sack v. Tomlin*, 110 Nev. 204, 871 P.2d 298 (1994).

[133] *Langevin v. York*, 111 Nev. 1481, 907 P.2d 981 (1995).

[134] *Western States Construction v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992).

[135] *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

[136] 108 Nev. at 938.

[137] *See Connell v. Francisco*, 898 P.2d 831 (Wash. 1995); *In re Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984). While uncertain, this appears to be the direction in which Nevada law is headed. Daniel I. Weiner, *The Uncertain Future of Marriage and the Alternatives*, 16 UCLA WOMEN'S L.J. 97 (2007); Marshal S. Willick, *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-Marital Property and Support Law*, 19 NEV. LAW. 6 (May, 2011).

[138] *See*, *e.g.*, *Kerley v. Kerley*, 112 Nev. 36, 910 P.2d 279 (1996) (on rehearing, the Court stated that it has "consistently held that a spouse to spouse conveyance of title to real property creates a presumption of gift that can only be overcome by clear and convincing evidence").

B. The Professional Practices

Insufficient information is provided to see if either professional practice had any substantial value at the start of the marriage. Presuming not, in Nevada, it is irrelevant whether or not the parties commingled their earnings and expenses during marriage – they are community earnings, and community expenses. Also irrelevant is whether value of the practices is made up of goodwill, hard assets, or some combination; presumably, both would be community property, and the expected division would be for each to keep his or her own practice, and for husband to give wife $500,000 in order to equalize their distributions.

If the professional practices were ongoing at the start of the marriage, the analysis is longer and more complicated, because there is a separate property component to any end-of-marriage valuation of the professional practices, which alters the math.

It is a well-established principle of community property law that the labor and skills of a spouse are considered to be a community asset, and that income generated during the marriage from such labor and skills is also community property.[139]

When a spouse owns a business or an asset at the time of marriage and thereafter devotes his labor and skills to that business, that principle conflicts with the statutory mandate that the rents, issues, and profits of separate property remain separate property. Courts have consistently held that in such a situation, the community should receive a fair share of the profits which derive from the owner-spouse's devotion of more than minimal time and effort to the handling of the separate property business.[140]

In general, if the increase in the value of the separate property during the marriage is the result of the normal, or expected, appreciation in the asset (such as interest earned in a savings account), the increased value belongs to the owner-spouse as his separate property.[141] On the other hand, if the asset has increased in value during the marriage as the result of the spouse's labor and skills, the increase in value belongs to the community.[142] However, in the latter situation, an allowance is made for the natural increase in the value of the asset which would be expected from a reasonable return on the separate property investment.[143] Furthermore, because of the statutory presumption that rents, issues and profits from separate property are also separate property, the burden is on the spouse

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[139] *See Johnson v. Johnson*, 89 Nev. 244, 510 P.2d 625 (1973).

[140] *See Johnson v. Johnson*, 89 Nev. 244, 510 P.2d 625 (1973); *Beam v. Bank of America,* 490 P.2d 257 (Cal. 1971); *Pereira v. Pereira*, 103 P. 488, 490-91 (Cal. 1909).

[141] *Johnson*, 89 Nev. at 246.

[142] *Id.*

[143] *Id.*

claiming that an increase is due to the labor and skills of the other spouse to rebut this presumption.[144]

The Nevada Supreme Court explained the underlying rationale in *Johnson*:

> Profit or increase in value of property may result either from the capital investment itself, or from the labor, skill and industry of one or both spouses or from both the investment of separate property and the labor and skill of the parties. Where both factors contribute to the increase in value of a business, that increase should be apportioned between separate and community property. The rule we announce today is necessary in order to prevent the inherent injustice of denying the owner of separate property a reasonable return on the investment merely because the increase in value results "mainly" from the labor, skill or industry of one or both spouses.[145]

In *Johnson*, the Nevada Supreme Court held that where an increase in the value of separate property occurs during marriage as a result, either in part or in whole, of the owner-spouse's labor and skills, the increased value should be apportioned between the separate property of the owner and the community property of the spouses.[146] In so allocating the increased value, the court may choose between two approaches, the first commonly referred to as the *"Pereira"* approach, which is based upon *Pereira v. Pereira*,[147] and the second commonly referred to as the *"Van Camp"* approach, which is based upon *Van Camp v. Van Camp*.[148]

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[144] *Smith v. Smith*, 94 Nev. 249, 578 P.2d 319 (1978).

[145] 89 Nev. at 246-47.

[146] *Id.*

[147] *Pereira v. Pereira*, 103 P. 488 (Cal. 1909).

[148] *Van Camp v. Van Camp*, 199 P. 885 (Cal. 1921).

APPENDIX 1: LEGAL NOTE VOL. 12 (MAR. 16, 2010), "TIME TO DISTINGUISH ENTERPRISE & PERSONAL GOODWILL?"

A legal note from Marshal Willick about how it may be time for Nevada to distinguish enterprise from personal goodwill in business valuations

I. THE ROLE OF GOODWILL IN DIVORCES INVOLVING BUSINESSES

In divorce cases involving a business owned or operated by a spouse, the value of that business is usually a central concern. And often the largest component of the valuation is the "goodwill" value of the business – defined by the Nevada Supreme Court in *Ford v. Ford*, 105 Nev. 672, 782 P.2d 1304 (1989), as "a reputation that will probably generate future business."

The *Ford* case maintained that a professional practice – even a solo business – has goodwill divisible upon divorce, even if the business is not salable. In that case, the expert proposed, and the Nevada Supreme Court approved, a valuation methodology based upon "three months gross receipts."

Some lawyers over-reacted to that holding, and claimed that particular valuation methodology was the only acceptable one in Nevada. A fair reading of the case supports no such conclusion, because it also includes the specific holding that goodwill can be measured by "any legitimate method of valuation which measures the present value of goodwill by taking into account past earnings."

The Court has said little about the subject in the past 20 years, merely re-affirming its *Ford* holding in *Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990), where it repeated the holding stated above.

II. DEVELOPMENTS ELSEWHERE – "ENTERPRISE" VS. "PERSONAL" GOODWILL

In the meantime, courts elsewhere have been giving the matter some thought, and a distinction thus far unseen in Nevada appears to be gaining a majority consensus. Specifically, the distinction between "enterprise" and "personal" goodwill – the former of which is considered divisible marital property, and the latter of which is not.

Representative of the wave of similar cases across the country was *Gaskill v. Robbins*, 282 S.W.3d 306 (Ky. 2009), in which an oral surgeon set up a solo practice during the marriage, and earned roughly 90% of the income the couple received during that time. The doctor's husband had assisted with setting up the office, but made little income thereafter.

The case facts recited in the opinion indicated that the doctor was hard working and managed her practice with frugality, and was solely responsible for patient acquisition.

During the divorce, both sides presented experts. The doctor's accountant collected data from the business records and investigated the practice on-site, and prepared a detailed report laying out all of the financial information, a discussion of various accounting methods, and definitions of frequently used accounting terms.

At trial, after testifying about why various valuation methods were not applicable due to the unique nature of this sole proprietorship, the accountant settled on an asset-based analysis. He chose this approach because the business was not actually to be liquidated, no similar sales of a reasonably similar business were available, and there was no previous transaction in this business with which to compare. He testified at trial that the practice had a value of $221,610, which he later adjusted downward to make the valuation more current.

Relevant to this discussion is that the accountant assigned a value of zero to goodwill based on his opinion that the doctor's role in the business amounted to a "non-marketable controlling interest." To illustrate, he asked, "Why would a purchaser pay more than fair market value of the tangibles if Dr. Gaskill can take her patients, go down the hall, and set up a practice?"

The husband's expert used the accountant's detailed data, against which he applied four different methodologies to evaluate the business: capitalized earnings, excess earnings, adjusted balance sheet, and the market approach. He calculated a value for the business under each method, then averaged the four numbers to arrive at a value of $669,075, and quibbled about various other assumptions used by the accountant.

The trial court accepted the husband's expert's view, primarily because, under established Kentucky law, there was no legal authority for a distinction between personal and enterprise goodwill.

The appellate court reversed. The court began with the assertion of how "complicated, often speculative or assumptive, and at best subjective" the valuation of a business is, "particularly in a divorce case where the business is a professional practice with only one practitioner, clients or patients come to the business to receive that particular person's direct services, the business is not actually being sold, and the success of the business depends upon the personal skill, work ethic, reputation, and habits of the practitioner."

In balance, the court acknowledged the obvious fact that "at times," a business can be sold for more than just the value of its assets, which statement it based on findings very much like the Nevada Supreme Court's reasoning in *Ford* – that the reputation of the business will draw customers, get them to return, and thus contribute to future profitability. But the Kentucky court found that its line of cases focused on professional practices, and assumed that there was a potential buyer.

The court found a basis for distinguishing personal and enterprise goodwill in its existing law (identical to that of Nevada) that an advanced professional degree is not marital property because it is personal to the holder and cannot be transferred to another, citing *Lovett v. Lovett*, 688 S.W.2d 329 (Ky. 1985). Examining the rationale for that conclusion, the court recited that a professional degree:

> does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on the death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property ....

The court mused that "goodwill" generally gives a businesses "value beyond fixtures and accounts receivable," as when what is being sold is "any . . . reputational thing a buyer could reasonably be expected to pay for." But the court found that analysis alone inadequate, because ***sometimes*** "part of goodwill . . . is personal and nontransferable, much like the professional degree. . . ."

Finally reaching the crux of the matter, the court adopted the view developed elsewhere that "personal" and "enterprise" goodwill are properly distinguished upon divorce, on the basis of whether any "goodwill could reasonably be marketable as continuing with the business absent the presence of a particular person." The court adopted the holding and reasoning of *May v. May*, 589 S.E.2d 536 (W. Va. 2003).

That court had defined "goodwill" as the value of a business or practice that exceeds the combined value of the net assets used in the business. And it specifically contemplated that the goodwill in a professional practice ***might*** be attributable to the business enterprise itself by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business. However, the *May* court also found that such goodwill ***might*** be attributable to the individual owner's personal skill, training or reputation.

Factors going to enterprise goodwill are a business's location, name recognition, business reputation, "or a variety of other factors depending on the business" that "contribute to the anticipated future profitability of the business" and therefore constitute an asset of the business divisible in a dissolution. The *May* court acknowledged that enterprise goodwill is "not necessarily marketable" in the sense that there is a ready and easily priced market for it, but it is "in general transferrable to others and has a value to others."

By way of contrast, the *May* court defined "personal goodwill" as that which depends on the continued presence of a particular individual, holding that any value that attaches to a business as a result of such "personal goodwill" represents nothing more than the future earning capacity of the individual and is therefore not divisible.

The *Gaskill* court therefore concluded that, to the extent a business or profession has goodwill (or has a value in excess of its net assets) it is a factual issue to what extent, if any, that goodwill is personal to the owner or employee and to what extent it is enterprise goodwill and therefore divisible property.

The trial court was directed to consider as "personal" the skill, personality, work ethic, reputation, and relationships developed by Dr. Gaskill, which were to be hers alone because such things cannot

be sold to a subsequent practitioner. The court found that any consideration of these factors in a case where alimony was at issue also created a risk of "double dipping," because the same qualities were involved in setting such support.

On the other hand, the court held that if a doctor, even a solo practitioner, was willing to leave her name on the practice, even though she herself did not continue to practice, there arguably could be some reputational reliance that she would stand behind the quality of the practice which could have some pecuniary value.

Finally, the Kentucky court found the potential value of a hypothetical non-compete agreement to be too speculative to value.

III. APPLICATION OF THE DISTINCTION IN NEVADA DIVORCE LAW

In States like Kentucky where earning capacity is a factor for disproportionate property division, such future earning capacity could go into the property division.

In a State such as Nevada, with a presumptively equal property split, it would become a potential ***alimony*** factor, but perhaps factors such as "skill, personality, work ethic, reputation, and relationships" most properly belong in that analysis anyway. It isn't much of a jump from those things to the "career asset" or "business acumen" that the Nevada Supreme Court has already directed courts to evaluate in making alimony awards.

And considering as part of the business only the "enterprise good will" that is actually transferable to a hypothetical buyer goes some distance toward valuing the business as a business without blurring the lines between business valuation and an alimony analysis. This would largely eliminate the "double dip" angst occasionally seen – as in the debate at the recent Advanced Family Law Seminar on whether a goodwill component to a business valuation necessarily created a double dip when alimony was in issue.

According to a survey of jurisdictions in the *May* decision, as recounted by the *Gaskill* court, 13 courts made no distinction between personal and enterprise goodwill, 5 courts held that goodwill is not a part of marital property, and 24 states differentiated between personal and enterprise goodwill. This would appear to be an emerging consensus.

Perhaps it is time for the issue to be squarely presented by counsel in an appropriate Nevada divorce case involving valuation of a business.

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To visit our web site and review its contents, go to http://www.willicklawgroup.com/home. For a number of articles relating to the division of various kinds of community property, see the multiple articles posted at http://www.willicklawgroup.com/published_works.

This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.

APPENDIX 2: LEGAL NOTE VOL. 44 (SEP. 14, 2011), "JPI VIOLATIONS AND CONTEMPT"

A legal note from Marshal Willick on whether violation of a Joint Preliminary Injunction can constitute contempt of court, and more generally on appreciation of "place" by the folks collectively making up the justice system.

A split has developed in the family court bench, between a majority who enforce court rules saying that violation of those rules is punishable by contempt, and a handful of dissenters who have decreed that in their departments, the absence of their signature on the underlying document constitutes the equivalent of a "Get Out of Jail Free" card for violators. Given the failure of the bench to agree to enforce meaningful uniform policies, this has created just one more place where the meaning of "substantial justice" varies excessively from room to room.

In this case, the majority appears to have it right, and the jurists believing otherwise should alter their policy – or counsel handed such rulings should take them up and have them reversed.

I. BACKGROUND: WHAT A JPI IS AND WHY IT EXISTS

The joint preliminary injunction, or "JPI," is a creation of the Eighth Judicial District Court, in rules approved by an administrative order of the Nevada Supreme Court. EDCR 5.85(a) provides:

> At any time prior to the entry of a decree of divorce or final judgment and upon the request of either party in a family relations proceeding, a preliminary injunction will be issued by the clerk against both parties to the action enjoining them and their officers, agents, servants, employees or a person in active concert or participation with them from:
>
> (1) Transferring, encumbering, concealing, selling or otherwise disposing of any of the joint, common or community property of the parties or any property which is the subject of a claim of community interest, except in the usual course of business or for the necessities of life, without the written consent of the parties or the permission of the court.
>
> (2) Molesting, harassing, disturbing the peace of or committing an assault or battery on the person of the other party or any child, step-child or any other relative of the parties.
>
> (3) Removing any child of the parties then residing in the State of Nevada with an intent or effect to deprive the court of jurisdiction as to said child without prior written consent of all the parties or the permission of the court.

The joint preliminary injunction is automatically effective against the party requesting it at the time it is issued, and effective upon all other parties upon service. EDCR 5.85(b). By the terms of the rule itself, the injunction is enforceable by ***all*** remedies provided by law, including contempt. *Id*. It remains in effect until a decree of divorce or final judgment is entered or until modified or dissolved by the court. EDCR 5.85(c).

II. A WASHOE COUNTY CONTRAST

In Washoe County, much of the same purpose and subject matter is covered by WDCR 43(2)(b), which provides that an *ex parte* order may be obtained without notice:

> (1) Where the order mutually restrains the parties from transferring, encumbering, concealing, selling or in any way disposing of any of any property, real or personal, whether community or separate, except in the usual course of business or for the necessities of life, without written consent of the parties or the Court.
>
> (2) Where the order mutually restrains the parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance coverage, including life, health, automobile, and disability coverage.
>
> (3) Where the order mutually restrains the parties from cashing, borrowing against, canceling, transferring, or disposing of retirements benefits or pension plans held for the benefit (or election for benefit) of the parties or the minor children.
>
> (4) Where a child's health and safety is in danger.
>
> (5) Where such other circumstances exist as the court may find to warrant the issuance of an order without notice.

No hearing is required or permitted for the issuance of a mutual financial restraining order. All other *ex parte* order requests must be heard within ten days of filing.

The Washoe County procedures are more formal, and because they require issuance by a judge necessarily take longer, and therefore almost certainly cost the litigants a bit more. The trade-off is that the conduct prohibited is somewhat more specific, and the formal judicial signature makes it more likely that third parties will respect the orders once issued, reducing the likelihood of motion practice necessary to recover funds or punish the other spouse for having withdrawn them despite the order.

III. THE SOURCE OF THE JUDICIAL CONNIPTION, AND A RECENT EXAMPLE

I am unaware of any written order from any of the dissenters clearly laying out the reasoning behind their refusal to enforce JPI violations by way of contempt sanctions. From comments at bench/Bar meetings, and at hearings, the reluctance appears to be concern that "the awesome power of the State to punish" by means including incarceration is somehow suspect as a matter of Constitutional due process unless there is first a specific court order, signed by a district court judge, clearly spelling out what must be done, or not done, and then a finding that a person subject to the order, after notice, violated its terms.

The root of this judicial dithering appears to be the fact that, unlike other injunctions, a Joint Preliminary Injunction in Clark County is issued automatically, by the Clerk's Office, upon request, while the procedure to enforce such an order is the same as that regarding other types of restraining orders and injunctions.

It is a bit ironic that some of the dissenting judges have given notice that they would be happy to enforce JPIs – so long as the procedure for their issuance set out in the rule is ignored in favor of submitting the JPI to the judge for signature, as in Washoe County. The irony is probably lost on anyone who did not practice family law more than 20 years ago when the JPI rules came into existence, but to drive home the fact that they were intended to ***replace*** precisely the procedure the dissenting judges have announced, the rules originally provided that judges would issue ***no*** temporary restraining order covering any matter contained in a JPI. In other words, the newly-announced proposal is another great leap – backward.

And there are real world effects. I recently completed a case in which the opposing party was one of those hopelessly self-centered and delusional folks that just could not distinguish between what he wanted and what was allowed. During trial, we spent more than an hour just trying to figure out how ***many*** contempt counts were pending for evidentiary hearing, eventually figuring out that four or five had simply been lost in the shuffle of the paperwork and never actually presented for a show-cause order.

One of the counts that did get to hearing concerned the party's decision – despite a JPI – to sell a bunch of the spouse's property at a yard sale during the pendency of the case, obviously without permission or the court's consent, and equally obviously in violation of the JPI provision against "selling or otherwise disposing of any . . . property." When the judge got to that count, he simply announced that no contempt sanction could issue because the judge had not personally signed the JPI form when it was issued, and moved on to the next count.

Now, in that case, it made little practical difference to the outcome – the violating party was found in contempt on a dozen or so other counts and sanctioned accordingly, and one more or less would probably have made little difference. On the facts of that case, it is just not worth doing anything about the ruling. ***However***, that will not always be the case, and the law and policy involved in that analysis and ruling should be examined before some litigant is truly denied substantial justice on the basis of an unsupportable analysis.

IV. MORE THAN JUST JPIS ARE INVOLVED

This analysis is not just about Joint Preliminary Injunctions. The Nevada Rules of Civil Procedure are ***filled*** with specific instances in which rule violations can and should result in contempt sanctions.

For example, NRCP 16.2 requires each party to complete and file a Financial Disclosure Form within 45 days of service of the Complaint. The rule further provides that if a party fails to do so without clear and convincing evidence of "good cause" for that failure to file, a court may treat it as a contempt of court.

The rule is designed to compel prompt and efficient obedience to the process of disclosing information. The Nevada Supreme Court has deemed it the duty of the district court to determine whether the rule has been violated, and to treat that rule violation as a contempt if so found. *See* NRCP 16.2(a)(1)(A)(i).

The dissenters, however, will apparently require an additional (and expensive) round of motion proceedings – first to get the judge's signature on an order telling the violator to actually follow the rule, and then seeking to hold the violator in contempt if he or she still fails to do so.

And some judges persist in the maddeningly time-and-money-wasting process of demanding a round of motion proceedings just to issue an order setting ***another*** hearing to decide whether someone is in fact in contempt of court (instead of using the ex parte, in-chambers review of an application for a contempt motion that was supposed to have been agreed upon by the bench many months ago).

Those judges demanding two – or three – rounds of motion practice before issuing a contempt order don't seem to realize, or at least appreciate, that doing so effectively punishes the innocent and abuses parties who comply with the rules, causing them to expend money and suffer ***months*** of delay on interminable proceedings to get to the point of even seeking relief. And, as explained below, the Constitutional rationalization for this abuse of innocent parties is hollow.

The Summons accompanying Complaints is issued by the Clerk, not a judge. And counsel directly draft and issue subpoenas, pursuant to NRCP 45, which like JPIs are issued by the Clerk under seal of the court; the rule provides specifically that failure to obey a subpoena (regardless of its source of issuance) "may be deemed a contempt of court from which the subpoena issued."

A judicial interpretation that the absence of a judge's signature on such documents is equal to permission to ignore them would only slow down and make even less efficient litigation that does not need either slower speed or greater inefficiency.

V. WHY CONTEMPT IS CONSTITUTIONALLY PROPER FOR A JPI VIOLATION

A. SUPREME COURT JUSTICES ARE JUDGES TOO

The court rules were issued by the Nevada Supreme Court – which rules prescribe (and proscribe) behavior, and mandate that upon a finding that the requirements have been violated, deem such actions or inactions contempt of court. And the Justices of the Nevada Supreme Court unanimously signed the order establishing those rules – ***that*** is the "judicial signature" necessary for any constitutional purpose before a contempt may be established.

To date, there has not been an explicit Nevada Supreme Court opinion stating that the district courts can and should do what that Court's rules tell them to do, but it would be absurd to speculate that the Court would do anything other than hold that the rules it promulgated are enforceable as written.

The Court has already approved the finding, moreover, that a JPI has legal effect, affirming the unequal distribution of community property based upon a spouse's ***violation*** of a joint preliminary injunction. *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996).

In fact, even in the ***absence*** of an explicit court rule, or a statute, a court has power to punish for contempt; the Nevada Supreme Court has long held that such authority is "inherent" in courts. *See Halverson v. Hardcastle*, 123 Nev. 245, 163 P.3d 428 (2007) (a trial court has the inherent authority to construe its orders and judgments, and to ensure they are obeyed); *Grenz v. Grenz,* 78 Nev. 394, 274 P.2d 891 (1962) (a trial court has the inherent power to construe its judgments and decrees); *Murphy v. Murphy*, 64 Nev. 440, 183 P.2d 632 (1947); *Lindsay v. Lindsay*, 52 Nev. 26, 280 P. 95 (1929); *Reed v. Reed*, 88 Nev. 329, 497 P.2d 896 (1972) (court has inherent power to enforce its orders and judgments); *In re Chartz*, 29 Nev. 110, 85 P. 352 (1907) ("The power of courts to punish for contempt and to maintain decency and dignity in their proceedings is inherent, and is as old as courts are old").

In light of this century of pretty clear authority, the judicial reticence to find that contempt power extends to violation of terms proclaimed by the Nevada Supreme Court, and duly served on a party, seems inexplicable. It is clearly within the power of a court to determine if a particular action is a violation of a preliminary injunction, and what liability or punishment for the action will lie. *Bell v. Bell*, 896 S.W.2d 559 (Tenn. Ct. App. 1994).

What has been delegated by the Nevada Supreme Court to the district courts is the fact-finding function of determining ***whether*** a JPI was properly served, and, if so, whether the terms set out in the JPI were violated, and the discretion upon those two findings to determine whether punishment for contempt is warranted.

What was ***not*** delegated to the district courts was authority to determine whether the Nevada Supreme Court ***could*** decide that the violation of the terms of an approved JPI is a contemptible act. As the condition, violation of which constitutes contempt, has been issued by a superior tribunal, it is not within the province of a district court to determine that the Nevada Supreme Court lacked such authority.

B. AN ANALOGY

NRCP 70 permits a judge to direct the Clerk of the Court to sign a deed or other official document in place of the owning party. It is not an excess of authority for the Clerk to do so: the Clerk obtains the authority by delegation from a tribunal entitled to perform the same act – the district court. Why, then, is it so hard for district court judges to acknowledge that they have the authority (and responsibility) for finding contempts of violations prescribed by a superior authority (the Nevada Supreme Court)?

VI. THE TREATMENT OF SIMILAR LAWS ELSEWHERE

EDCR 5.85 is essentially identical to Arizona's joint preliminary injunction statute (A.R.S. § 25-315), which likewise directs the clerk of the court to issue a preliminary injunction in all dissolution actions enjoining the parties. The only difference is that Arizona requires the joint preliminary injunction be issued in ***all*** divorce actions, whereas in Clark County it is only issued upon request of a party.

The Ninth Circuit examined the Arizona statute authorizing such injunctions in *Minnesota Mut. Life Ins. Co. v. Ensley*, 174 F.3d 977 (9th Cir. 1999). It approved the injunctions as enforceable, despite the lack of any district court judge's signature: "The Arizona injunction was of a temporary nature, designed to preserve the property of the marital estate and to keep it within the reach of the court." *Id*., citing to *Briece v. Briece*, 703 F.2d 1045, 1047 (8th Cir. 1983). Sanctions for the violation of an injunction are generally administered by the court under the authority of which the injunction was issued.

Obviously, if the Legislative branch can promulgate rules, the finding of violation of which constitute "contempts," a superior ***court*** has the same power. And this is where it is worth reiterating that the rules governing the Eighth Judicial District were enacted by the Nevada Supreme Court. Per the directions of that superior tribunal, it is the task of the district court to determine whether or not a party had been served with notice of a joint preliminary injunction, and violated its terms – and in that event to punish that violation by way of a finding of contempt.

A number of states have similar "automatic" injunctions, restraining the parties in a domestic matter from transferring, encumbering, concealing, selling or otherwise disposing of any of the joint, common or community property, without consent of the parties or the permission of the Court. These States include Arizona, Kansas, Missouri, New York, and Texas. Violation of those injunctions is, almost universally, punishable by contempt sanction. In other words, although a joint preliminary injunction is not signed by a judge, it is enforceable by contempt sanction.

VII. A PROPER SENSE OF PLACE

For a district court to find that it has no contempt power regarding a JPI violation is, in effect, to overrule the Nevada Supreme Court edict finding that such authority exists. This is an act of hubris disguised as, or confused with, humility.

In the parable of the Blind Men and the Elephant, each perceived and announced that he had identified the whole of the creature from the part he touched – the one touching the trunk identified a snake, the one touching the tail identified a rope, the one touching a leg identified a tree, and the one touching a side identified a wall. All were incorrect to so describe the entire elephant.

In precisely the same way, it is arrogant and incorrect for anyone – litigant, lawyer, or judge – to confuse his or her part in the justice system with the whole of it. District court judges – like lawyers and litigants – are cogs in the machine of law, not divinely-inspired living embodiments of Justice, and it is when they lose sight of their place in the process that talk begins of "black robe fever" having taken hold.

In this small example, it means that a district court judge should accept that the assigned role is that of fact-finder – applying tests imposed by a higher authority – and the role is limited to determining whether notice has been given and the rule has been violated, in which case the duty is clear. An assumed role greater or lesser than this task is either unauthorized excess or unwarranted timidity, and in either event improper.

In short, it is simply absurd to argue that a joint preliminary injunction is not enforceable via the district court's contempt power, given that the rule so stating was promulgated and approved by the Nevada Supreme Court. Such a position entails the untenable belief that the Supreme Court lacked either the power or intention for the rules it passed to be enforced by the judges whom it oversees.

VIII. CONCLUSIONS

It is completely within the power of the district court to enforce the terms of a joint preliminary injunction, if violated, by way of an order of contempt. Refusing to do so is an abrogation of the job of district court judge. Lawyers faced with judicial refusal to execute that duty should appeal, or file a petition for writ of mandamus. And judges refusing to do their duty as prescribed by court rule should expect to be reversed, and criticized accordingly.

This discussion also give rise to a few "bigger picture" conclusions.

First, "Substantial Justice" entails ***both*** dealing with individual litigants fairly, ***and*** treating similarly-situated litigants the same way from case to case. The continuing refusal of the family court judges to abide by the majority opinion of their own members as to matters of policy and procedure undercuts such consistent treatment. It is damaging to both the perceived status and actual efficacy of the court as a whole, and therefore also harmful to the litigants, and the Bar.

Second, the variety of procedures and results detailed above highlight that insufficient attention is being paid to the time and money of innocent litigants who comply with the rules. As with so many other matters, a continuous focus on making family practice regarding contempts more efficient, economical, and rational for the ***litigants*** should be part of the daily job of every lawyer, and every judge.

Third, those active in the Family Law Section should consider making JPI practice the next area (after Financial Disclosure Forms) where State-wide uniformity would be a useful step in furthering the goal of integrating family practice throughout Nevada. With conscientious effort, the era in which it is heard in Las Vegas that "Practicing law in Reno is like practicing law on Mars" [and the reverse is heard in Reno] could be relegated to the past, as it should be – in our lifetimes.

IX. QUOTES OF THE ISSUE

"Humility leads to strength and not to weakness. It is the highest form of self-respect to admit mistakes and to make amends for them."
– John (Jay) McCloy

"Sometimes only a change of viewpoint is needed to convert a tiresome duty into an interesting opportunity."
– Alberta Flanders

"All the world's a stage,
And all the men and women merely players:
They have their exits and their entrances;
And one man in his time plays many parts . . . ."
– Shakespeare, *As you Like It*

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This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.