A legal note from Marshal Willick about how the Nevada law governing property transfers between unmarried persons is different from – and less predictable than – the law governing property transfers within a marriage.

For married persons, Nevada law has evolved, from a disregard of title in favor of tracing of the source of funds, to a gift presumption evidenced by the deed itself requiring clear and convincing evidence to overcome.

For unmarried persons, title to property might – or might not – make a difference as to who will be considered to "really" own an asset if the relationship ends. The third case on the subject added structure, but ownership remains much less certain for those lacking a marriage certificate and the law governing property transfers remains muddled.

I. MARITAL AND NON-MARITAL RELATIONSHIPS

In modern America, countless millions of households consist of unmarried opposite-sex and same-sex cohabitants, either with or without children. According to the government, one-third of all children in the United States reside with only one biological parent.

All trends point toward an increase in cohabitant cases. Half of the American Academy of Matrimonial Lawyers Fellows polled in February, 2011, noted a spike in the number of suits between former cohabitants, and 39% noted an increase in the number of cohabitation agreements. Those trends have continued upward.

Both marital and non-marital relationships end, of course, and the development of law tends to lag real life by a period of years to decades. The rules governing how to figure out who owns what in marital relationships are therefore a lot clearer than it is for cohabitant relationships – and the presumptions applied for both acquisitions and transfers are radically different.

By fits and starts, Nevada decisional law has given some potential protection to the expectation and reliance interests of non-marital cohabitants. For a more complete explanation of that history than is provided in these notes, see Marshal Willick, *What Do You Do When They Don't Say 'I Do'? Cohabitant Relationships and Community Property* (Council of Community Property States & State Bar of Nevada, 1998), and *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-Marital Property and Support Law*, Nev. Lawyer, May, 2011, both of which are posted at http://www.willicklawgroup.com/palimonycohabitation. All articles and cases mentioned in this note are (of course) in the MLAW Case Summaries database.

II. PROPERTY ACQUISITION AND TRANSFERS BETWEEN MARRIED PEOPLE

Most of a century ago, the Nevada Supreme Court noted the presumption that "all property acquired after marriage is presumed to be community property." *In re Wilson's Estate*, 56 Nev. 353, 53 P.2d 339 (1936).

But the Court was perfectly willing to look past the presumption, and title to the property, stating that the "true test" of separate or community of character is whether it was acquired with community funds (or credit) or by separate funds. Further, the Court found that the "community estate" may be "vested in either spouse," and the Court would look to how the property was acquired to determine its character, "without reference to who retains the title."

The Court will not look to the opinion of either spouse as to whether they *believed* the property was separate or community, but will instead look to the time and manner in which it was acquired. The opinion of a spouse as to whether property is separate or community "is of no weight." *Peters v. Peters*, 92 Nev. 687, 557 P.2d 713 (1976).

Even if property is clearly the separate property of one party, the law also provides for "transmutation" of the "character" of property from separate to community, or vice versa. Gaps in the statutory law and open questions have been resolved by case law establishing presumptions when the parties disagreed about whether they intended to transmute property.

In 1996, the Court held in *Kerley* 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." In other words, absent solid evidence of some other reason that a spouse's name went on title to property, a transfer, even if entirely gratuitous, will normally be enforced as establishing equal co-ownership.

III. PROPERTY ACQUISITION AND TRANSFERS BETWEEN PEOPLE WHO BOTH COHABITED AND AT SOME POINT WERE (OR THOUGHT THEY WERE) MARRIED

For over 150 years, Nevada law has provided that all property acquired *during marriage* is presumptively considered community property belonging equally to both parties to a marriage.

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 depending on the law of the jurisdiction, ended upon either final separation (*e.g.*, California), filing and service of a complaint for divorce (*e.g.*, Arizona), or a divorce trial or decree (*e.g.*, Nevada).

Case law has extended the time of "community" acquisition in some instances to include periods ***before*** a couple married, or after they divorced – often when they "cohabited" (although other cases not discussed in this note have established that the term "cohabit" is harder to define than might be thought at first blush).

Through a process that has come to be known as "tacking," property accrued during a period of *pre*-marital cohabitation may also be divided between the cohabiting parties after they marry, and later divorce, per *Carr-Bricken v. First Interstate Bank*, 105 Nev. 570, 779 P.2d 967 (1989).

And joint property can accrue ***after*** divorce as well. *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984) dealt with parties who married, divorced, and then lived together in a meretricious relationship. The Court held that property accrued by either of them during the cohabitation period may be equally divided when the relationship ended, because the public policy of encouraging legal marriage would not be "well served by allowing one participant in a meretricious relationship to abscond with the bulk of the couple's acquisitions."

Joint property apparently accrues equally to parties who thought they were married, but were not because the marriage was invalid. In *Wolford v. Wolford*, 65 Nev. 710, 200 P.2d 988 (1948), the property accrued by parties to a void marriage was divided. Nearly 60 years later in *Williams v. Williams*, 120 Nev. 559, 97 P.3d 1124 (2004), Nevada explicitly recognized the "putative spouse doctrine" by name in an annulment case – the kind of case in which parties live together as spouses, often for many years, only to discover when one of them files for a divorce that there was a legal impediment to their marriage in the first place.

IV. PROPERTY ACQUISITION AND TRANSFERS BETWEEN *NEVER*-MARRIED PEOPLE

The presumptions and tests applied are very different, however, if the parties did not actually get married before, during, or after the time they cohabited.

In one class of cases, where the parties have either an express or implied agreement to accrue property together, the property they accrue becomes community property by analogy. *Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992).

In other words, *Michoff*, like *Hay* and *Carr-Bricken*, involved a situation in which the court was asked to compel the party in possession of money or title to property at the end of the relationship to pay over half of what was acquired while the parties were "partners" in the acquisition of those assets.

But most cohabitation cases lack the kind of clear memorializations of intent found to exist in *Michoff*. In two cases from the mid-1990s the Court essentially held the ***opposite*** from *Kerley* for parties who were not married when both their names ended up on title, disregarding deeds establishing co-ownership of property and instead distributing jointly-titled property in accordance with the parties' actual contributions to its acquisition.

Sack v. Tomlin, 110 Nev. 204, 871 P.2d 298 (1994), involved a woman who obtained the former marital residence in her divorce, but had to refinance the house to pay off the community property interest of the former husband, and who added her boyfriend as a tenant

in common on the new title. Later, the boyfriend moved out, and the woman made payments on her own for five months, and then sold the house.

The parties were neither married nor holding themselves out to be so (the significance of this point is briefly discussed below). The former boyfriend claimed that he gained a half interest in whatever equity existed, by virtue of the woman's quitclaim to herself and him as tenants in common – which *would have been* the presumptive result under *Kerley* if the parties had been married.

But the Court announced that the applicable analysis was the "doctrine of contribution": where tenants contribute unequally to the purchase of real estate, the presumption is not of gift, but that they intend to share ownership in proportion to the amounts they contributed. In the absence of an agreement between two unmarried parties living together to pool their incomes and share equally in joint accumulations, each party is entitled to share in the property jointly accumulated in the proportion that his or her funds contributed to the acquisition.

The decision reasoned that while, under NRS 47.250(2), "it is a disputable presumption that a person intends the ordinary consequences of his voluntary act," which would be a transfer of a one-half interest as in *Kerley*, the land-transfer statute does not ***require*** a grantor to convey equal interests, and the presumption that equal interests are created by such a deed can be rebutted where there are unequal contributions toward acquisition of property by cotenants who are not related and show no donative intent.

Langevin v. York, 111 Nev. 1481, 907 P.2d 981 (1995), concerned two parties who lived together, unmarried, from 1991 to 1993, during which they purchased four parcels, three in joint tenancy and one in "joint names," with the man paying for the land, and the woman "finding the deals." One of them was the lot for the woman's own mobile home, on which the man paid off the woman's mother (the co-owner) and the woman put the man's name on title.

Things did not work out, the parties became adversarial, and the trial court awarded the woman's home to her and changed title from joint tenancy to tenants in common on the other three parcels.

On appeal, the Court found no distinction between *Sack's* tenants in common deed and the joint tenancy deeds involved in *Langevin*. The Court interpreted *Sack* to hold that the "proper approach" is for the respective ownership interests (equal or otherwise) "to be determined," and for the proceeds to be so distributed upon sale, with any claims by one party against the other deducted and increased accordingly.

It was considered important that there was no *Michoff*-like "pooling agreement," no holding out as husband and wife, or indication of intent to treat property as community property, and "there was no agreement or understanding that the parties would share *dis*proportionately to the amount contributed toward the purchase price of property."

Expanding on *Sack*, the court held that since the man had paid for ***all*** of two of the parcels, the lower court should have awarded them to him outright. Since the third parcel had not yet been fully paid for, the percentage of ownership was ordered to be determined in accordance with the contributions made by each party as of the time of sale, or when all payments had been made.

As to the woman's house, the court found that the record was insufficient to show how much she had paid previously, and who would make future payments, so the matter was remanded for a determination upon sale or "such other disposition as the district court determines to be fair and consistent with the principles set forth in this opinion."

Essentially, the analysis and holding made the joint tenancy deeds useless for any legal purpose; the act of co-titling the property was made entirely illusory. The cases did not directly discuss, or give any weight to, expectation or reliance interests by either party.

The analysis used in the two cases lumped together considerations of *intent* with expressions regarding *status* (holding out as married) and left uncertain what analysis, and results, would apply in which circumstances.

V. THE *HOWARD* ANALYSIS

In *Howard v. Hughes*, 134 Nev. ___, 427 P.3d 1045, (Adv. Opn. No. 80, Oct. 4, 2018), the Court re-examined *Sack* and *Langevin*, and laid out with greater clarity the approach a trial court should take when determining whether or not to give effect to records of joint title to property between unmarried people.

The facts were reasonably similar to those of the earlier two cases – the man and woman enjoyed a years-long romantic but unmarried relationship. The woman received a clearly separate property award, and used more than $100,000 to buy a house and land, executing a quitclaim deed three days later to herself and the man as joint tenants.

The evidence indicated that the man subsequently put a lot of "sweat equity" and some $20,000 into improving the property over the next three years, and its value tripled during that time.

The relationship soured, the woman locked the man out, and he sued for partition; at the ensuing trial, "neither party was able to articulate, with any degree of certainty, how much time or money they had spent on the property," and the woman claimed to have no memory of why she had put the man's name on title in the first place. The trial court found the parties to be equal co-owners.

The Supreme Court affirmed, refining the approach to be followed in such cases as a series of alternating presumptions.

Initially, a court should presume that a deed showing co-ownership means the parties own a property in equal shares. The party *opposing* that position must demonstrate unequal contributions, which flips the presumption to division according to contributions. The other party must then prove "relatedness" or that the party contributing the greater amount demonstrated "donative intent" to result in full co-ownership.

What might constitute "relatedness" was not significantly discussed, but donative intent was declared to be a question of fact, with a gift to be found upon findings of "a donor's intent to voluntarily make a present transfer of property to a donee without consideration," plus "actual or constructive delivery of the gift to the donee, and the donee's acceptance of the gift."

The Court then found that "the law generally presumes" that a joint tenancy deed itself is proof of donative intent. Because there was no *contrary* evidence in the record, the Court affirmed the finding of equal co-ownership.

In sum, the law of cohabitant relationships, as it is has evolved in Nevada, is essentially a contract analysis, directing a court to look for evidence of an express contract or implied contract, or to enter into a partnership or joint venture; the core concept is the *Michoff* holding that "courts will protect [parties'] reasonable expectations with respect to transactions concerning property rights."

VI. THE ANALYSIS REMAINS MUDDLED

It is disquieting that the decision in such cases turns on the happenstance of self-interested testimony. Would *Howard* have reached the opposite conclusion if, as in *Langevin*, no one at trial had thought to mention "donative intent," or if the woman had simply ***denied*** ever having such an intent years earlier when she executed the quit-claim deed?

The trial court apparently found that the testimony at trial ***did*** contain "clear and convincing evidence" – but that it supported, not opposed, a finding of gift. How Ms. Howard's intent to make a gift by putting her boyfriend's name on title was "clear," but Mr. Langevin's intent to make a gift by putting his girlfriend on title was non-existent and irrelevant, was not adequately discussed, analyzed, or explained.

If anything, *Howard* has formalized that in unequal-contribution-to-joint-deed cases between unmarried parties, the burden on the party contributing the greater share is to prove a negative – the lack of donative intent. The opinion provides no clear direction of what sort of evidence might be found adequate.

While a deed between unmarried people creates a "presumption of donative intent," notably absent from *Howard* was any discussion of the simpler presumption set out in *Kerley* for spouses – that the deed itself creates a presumption of gift requiring "clear and convincing evidence" to rebut.

No specific and defensible rationale was expressed in *Howard* for starting with different presumptions of intent (and different burdens for overcoming them) for persons who are and are not married, from the same act (re-titling an asset). As with *Michoff's* discussion of "holding out," the contract analysis is conflated with "status" issues.

Put another way, it does not seem logical, or proper, to have different presumptions arise from the act of putting one's cohabitant on the title to property, depending on whether or not the cohabitants happen to have once been married (*Hay*), or later get married (*Carr-Bricken*), or are not married but tell people they are (*Michoff*). But that seems to be the message of the cases.

In an era in which there are millions of households consisting of unmarried cohabitants, and in which cohabitants in same-sex relationships *could not* get married until recently, the distinction is questionable.

VII. CONCLUSIONS

Howard was a missed opportunity to bring greater coherence to the case law regarding property transfers between unmarried cohabitants; while the decision added procedural structure to such cases, it still leaves the actual outcome of such disputes essentially unpredictable even when based on similar facts.

Sack, *Langevin*, and now *Howard* have had the beneficial effect of establishing evidence of intent as the critical element for deciding such cases. It is troubling, however, that there is a never-explained variance in presumed intention as to married persons, on one hand, and unmarried persons, on the other. Equally problematic is that for cohabitants intention is to be evaluated from subjective intent, whereas for married parties intention is presumed from action.

The "bottom line" to these cases is that the unmarried cohabitant in the weaker economic position (i.e., the party not paying for acquisition of property) can never obtain ***greater*** benefits than if married. In fact, the best case possible for such a person is to attain a legal position ***equal*** to what a married person would have obtained. And to reliably achieve that result, Nevada law appears to require some holding out as married, or some additional evidence of a clear intention (beyond the terms of the deed itself) to gift equity, or to own property equally.

The area is still replete with significant danger that any transfer of property could prove to be illusory. It still lacks a reliable analysis that could prevent the frustration of reliance interests, and treats similarly-situated people unequally. *Kerley* should be reconciled with *Howard*. At least one further appellate decision is warranted.

VIII. QUOTES OF THE ISSUE

“What we think, or what we know, or what we believe is, in the end, of little consequence. The only consequence is what we do.”
- John Ruskin

“He who chooses the beginning of a road chooses the place it leads to. It is the means that determine the end.”
- Harry Emerson Fosdick

“It ain’t what you don’t know that gets you into trouble. It’s what you know for sure that just ain’t so.”
- Mark Twain

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