17th Annual Symposium of the Family Law Council of Community Property States

March 31 through April 2, 2005, Ft. Worth, Texas

Materials submitted by:

WILLICK LAW GROUP
3551 East Bonanza Rd., Ste. 101
Las Vegas, NV 89110-2198
(702) 438-4100
fax: (702) 438-5311
website: Willicklawgroup.com
e-mail: [First name of intended recipient]@Willicklawgroup.com

February 1, 2005

“DISPROPORTIONATE DIVISION”

I. STATUTORY BASIS

In Nevada, married couples own property either separately or as a community. The rights of husband and wife in Nevada are set forth in NRS Chapter 123, which provides the statutory definition of community property in NRS 123.220.[1]

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

After 1993, NRS 125.150(1) provides, in pertinent part, that in granting a divorce, the court:

(b) Shall, to the extent practicable, make an equal disposition of the community property of the parties, except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

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

---

[1] 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.
4. A decree issued or agreement in writing pursuant to NRS 123.259.

[2] 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

A. Default Division

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

B. Statutory Factors

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.

C. Scope of Judicial Discretion for Variance

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."[3] At the same time, however, the Court had issued decisions rebuffing appeals from orders dividing property ***un***equally.[4]

The confusion was eliminated in *McNabney v. McNabney*,[5] which clarified that as of that time, the applicable statutes should be so construed as to verify that Nevada was an "equitable distribution"

> 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.

[3] *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).

[4] *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).

[5] 105 Nev. 652, 782 P.2d 1291 (1989).

jurisdiction, rather than an "equal distribution" jurisdiction, and that (the prior) NRS 125.150 did not mandate an "essentially equal" division of community property.[6]

Four years after the *McNabney* decision, the Legislature amended NRS 125.150 as set out above, eliminating the "respective merits of the parties" language and requiring equal division of community property unless a "compelling reason" requires an unequal division and the trial court "sets forth in writing the reasons for making the unequal disposition."

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."[7] On the other hand, the new statutory construction still appears to be leave plenty of wiggle room.

II. CONTROLLING CASE LAW

The legislature did not define what is meant by a "compelling reason" which would permit an unequal division of community property, and no existing body of statutory or case law provided a reliable precedent. In *Lofgren v. Lofgren*,[8] 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.[9]

The next year, in *Putterman v. Putterman*,[10] the Nevada Supreme Court held that both the husband's financial misconduct in the form of his having refused 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.[11] The Court also noted, in dicta, that other possible "compelling reasons" for an unequal division of community property could include

---

[6] 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.

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

[8] 112 Nev. 1282, 926 P.2d 296 (1996).

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

[10] 113 Nev. 606, 939 P.2d 1047 (1997).

[11] *Id.* at 609.

negligent loss or destruction of community property, unauthorized gifts of community property, and even, possibly, compensation for losses occasioned by marriage and its breakup.[12]

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.

III. AUTHORITY REGARDING SETTING ASIDE OF ONE PARTY'S SEPARATE PROPERTY FOR THE OTHER

Unless it is contrary to a premarital agreement between the parties which is enforceable pursuant to chapter NRS 123A, the court in granting a divorce may "award such alimony to the wife or to the husband in a specific principal sum . . . as appears just and equitable." NRS 125.150(1).

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

In practice, these two simple statutory provisions have provided an ill-defined power to make awards that are somewhat difficult to classify. In *Foy v. Estate of Smith*,[13] the Nevada Supreme Court held that a motion to increase alimony becomes moot if the requesting spouse dies during the pendency of the motion, or an appeal related to the motion, because alimony is a personal right and not an assignable property right.[14]

---

[12] *Id.* at 608.

[13] 58 Nev. 371, 81 P.2d 1065 (1938).

[14] *See also Bank v. Wolff*, 66 Nev. 51, 202 P.2d 878 (1949).

However, in *Daniel v. Baker*,[15] the Court clarified that this general rule does not apply where a right to lump sum alimony is in question. The case concerned a wife's appeal of the lower court's denial of lump sum alimony. The Court noted that the husband was 20 years older than his 60-year old wife and in poor health, and the wife had few assets and no hope of employment, so that such an award of alimony would have been just and equitable. Finding an abuse of discretion in the lower court's failure to award permanent or lump-sum alimony, and noting that the claim for lump-sum alimony did not abate even upon the death of the husband (and that a permanent alimony award would not abate if the court had "otherwise ordered" so that the claim survived death), the court remanded. In passing, the Court found that authority for lump-sum alimony awards is found in NRS 125.150(4), which allows a court to set aside a portion of one spouse's property for the other's support.

The Court in *Daniel* explicitly relied upon its 1972 decision in *Sargeant v. Sargeant*,[16] in which it affirmed a lump sum award of over $331,000.00 where the husband's net worth was three million dollars, the husband was twenty years older and had a much shorter life expectancy than the wife, and a possibility existed that husband might dissolve his assets in recrimination against the wife.[17] In other cases, the same provisions have been cited as authority for ordering one spouse to liquidate separate property assets in order to provide "support" to the other,[18] and to transfer either fee simple ownership,[19] or a life estate in separate property,[20] to the "supported" spouse.

Thus, the case law has tended to blur the concepts of lump-sum alimony, and set-aside of separate property of one spouse for the support of the other. The nature and purpose of an award of lump sum alimony remains the same, whether it is payable immediately in full, or periodically in installments.[21] Further, whether it is payable immediately in full or periodically in installments, it is not subject to automatic termination upon death or remarriage, since the purpose of such an award is to "fully and finally fix the rights and obligations of the parties with respect to future support."[22]

The Court's discussion of lump sum alimony over the years has been somewhat vague, and it is not clear whether it is treated merely as a remedy or as a separate species of award. The Court

---

[15] 106 Nev. 412, 794 P.2d 345 (1990).

[16] 88 Nev. 223, 495 P.2d 618 (1972).

[17] *Id.*, 88 Nev. at 228-29, 495 P.2d at 621-22. In *Sargeant*, the Court noted that it had previously approved lump sum alimony awards in *Fenkell v. Fenkell*, 86 Nev. 397, 469 P.2d 701 (1970); *Winn v. Winn*, 86 Nev. 18, 467 P.2d 601 (1970); and *Shane v. Shane*, 84 Nev. 20, 435 P.2d 753 (1968).

[18] *Lewis v. Lewis*, 71 Nev. 301, 289 P.2d 414 (1955).

[19] *Powell v. Campbell*, 20 Nev. 232, 20 P. 156 (1888).

[20] *Greinstein v. Greinstein*, 44 Nev. 174, 191 P. 1082 (1920).

[21] *Kishner v. Kishner*, 93 Nev. 220, 562 P.2d 493 (1977).

[22] 93 Nev. at 223.

has also been at least apparently contradictory in its reference to NRS 125.150(4), since the general alimony provision in NRS 125.150(1) also must – as a matter of course – presume that post-divorce separate property earnings would normally be used as a resource for such payments.

Clearly, the Court has expressed the sentiment that there is a need for lump sum or permanent alimony to be available, to avoid the possibility that a party may be left without the ability of self support, or to prevent the possibility of future efforts to frustrate a divorce court's order by the payor spouse. Left unclear is whether there are ***any*** contingencies that could affect the recipient's entitlement to full collection. Traditionally, in the absence of the district court "otherwise ordering," all future payments cease upon remarriage, but it would appear that a periodic payment of lump sum alimony or even a designation of "permanent alimony,"[23] is sufficient to prevent remarriage from constituting a terminating event. Thus, it appears that reciting the words "lump sum" may be all that is necessary to make an award of alimony unmodifiable.

In short, Nevada law clearly allows the courts to set aside one party's separate property estate for the support of the other, although it is left somewhat unclear whether this is best considered a species of property division, or support, or a hybrid of both.

IV. INTERRELATIONSHIP WITH ALIMONY

In Nevada, at least theoretically, the concepts of alimony and property awards – equal or disproportionate, are largely unrelated. In the real world, of course, things are not usually that simple.

Probably the clearest restatement of the modern public policy distinction was made in the 1998 opinion of *Shydler v. Shydler*,[24] where the Nevada Supreme Court reversed a denial of alimony to a wife following a 17-year marriage.

The wife had been primarily responsible for raising two children, and had an insurance brokerage which was marginally viable, and which had made a maximum of $57,000.00 fifteen years earlier. The husband had a career in construction, which allowed him to earn $60,000.00 to $200,000.00 per year. The trial court had denied any award of alimony, finding that the wife had received a stream of payments from the husband during the divorce designated as temporary support, but actually necessary for the maintenance of assets ultimately divided during the divorce itself.

After going over factors applicable in alimony cases, the appellate court remanded with instructions to the lower court to determine a "fair award" to the wife, who could never earn what her husband was making, stating that "two of the primary purposes of alimony, at least in marriages of significant length, are to narrow any large gaps between the post-divorce earning capacities of the parties . . . and to allow the recipient spouse to live 'as nearly as fairly possible to the station in life

---

[23] *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994).

[24] 114 Nev. 192, 954 P.2d 37 (1998).

[] enjoyed before the divorce." The amount and length of alimony are to be determined by "the individual circumstances of each case," although the district court was not ***required*** to award alimony "so as to effectively equalize salaries."

The Court then turned to distinguishing alimony from awards of community property, defining alimony as "an equitable award serving to meet the post-divorce needs and rights of the former spouse." The Court held that "property and alimony awards differ in effect," so that the property equalization payments "do not serve" as a substitute for alimony.[25] The Court acknowledged that the amount of community property divided "may be considered" in setting alimony, but noted that here, the wife had to use her community property for support, while the husband's share of the community property "was actually providing a substantial income for his support." Somewhat confusing the concepts of permanent alimony and rehabilitative alimony, the Court held that there should be an award of spousal support in that case "at least for a period of rehabilitation."

Finally, the Court held that temporary support received by the wife during the divorce proceedings should "not preclude" post-divorce alimony, "particularly where part of all of those interim payments are used to make payments on community property."

While the Court held that property awards "may be considered" in making alimony awards, it is hard to see any pattern of consideration of the amount of property divided in the various cases setting alimony.[26] Rather, the lines of authority for division of property and awarding alimony appear to operate more in parallel than in synchrony. As a matter of common sense, of course, it would be impossible for a poor person to pay any large alimony award, but the alimony cases seem more concerned with income than with property accrued.

There is no modern authority explicitly considering disproportionate division of community property in the context of limited resources for alimony, or an award of alimony to make up for a property division seen as necessary but unfair. But situations in which both would be appropriate are easy to project.

---

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

[26] *Compare*, for example, *Gardner v. Gardner*, 110 Nev. 1053, 881 P.2d 645 (1994), *with Rutar v. Rutar*, 108 Nev. 203, 827 P.2d 829 (1992). In *Gardner*, the lower court had divided apparently unremarkable property not detailed in the opinion. The husband made about $75,000.00 per year, and the wife was making about $43,000.00 at the time of divorce. The appellate court reversed a two-year award of rehabilitative alimony at $1,000.00 per month, remanding with instructions to extend that award by an additional ten years to make the award "fair and just," and directing the lower court to retain jurisdiction "to review this modified award in the event of a substantial change of circumstances that would suggest the need for additional relief to either party." In *Rutar*, the parties had divided some one and a half million dollars in property, the husband made some $155,000.00 per year, and the wife had no income. The property split was effectively disregarded in the appellate court's reversal of a 3½ year rehabilitative support award at $1,000.00 per month, and remand with instructions that support at $1,700.00 per month should continue for 8 years, again with directions for the lower court to retain jurisdiction to further modify the award as circumstances changed.

For example, in *Williams v. Williams*,[27] the Nevada Supreme Court recently adopted the putative spouse doctrine, in accordance with which the parties to a purported (but void) marriage are to divide their property equally, in accordance with community property principles. The trial court had also ordered some spousal support. On appeal, however, the reviewing court found that the annulment statutes do not explicitly authorize such an award, and cases from elsewhere that awarded spousal support in the absence of such statutory authority did so under circumstances of bad faith. The court therefore ruled that no spousal support could be awarded.

Such a case is an obvious candidate for disproportionate division of property. The lower court had already made a finding that the "husband" was capable of paying support, and that it was fair and equitable that the "wife" should receive such support. Yet there was a legal impediment preventing such an award from being made. All the elements already existed in the court record for a "compelling reason" to divide the property acquired by the parties during their purported marriage other than equally.

There is already a clear line of authority in which alimony awards have been made in recognition of – and compensation for – the fact that one of two parties to a marriage leaves that marriage with property that would otherwise belong to the other. Courts have not expressed it in exactly this way, but they have been granting alimony for some time in cases where they have observed a disproportionate division of what should have been divisible "property" between the parties, but could not be divided because of a legal impediment.

Specifically, where the military member in a military marriage has an existing VA disability at the time of divorce, they are expressly non-divisible under federal law,[28] and a sum equal to retirement benefits otherwise to be divided between the parties will instead be paid solely to the military member. While a court cannot divide those benefits, they "may be considered as a resource for purposes of determining [one's] ability to pay alimony."[29] There are many similar cases so holding.

Even where disability payments are considered "exempt," the U.S. Supreme Court has ruled that a member can be imprisoned on a contempt charge for failing to pay child support, despite his claim that payments could be made only from his VA disability award, which was exempt from execution.[30] The holding has been extended to alimony cases as well, on the basis of the holding in

---

[27] 120 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 64, Sept. 13, 2004).

[28] *Mansell v. Mansell*, 490 U.S. 581, 584-85, 109 S. Ct. 2023 (1989).

[29] *See Riley v. Riley*, 571 A.2d 1261 (Md. Ct. Spec. App. 1990); *In re Marriage of Howell*, 434 N.W.2d 629, 633 (Iowa 1989).

[30] *See Rose v. Rose*, 481 U.S. 619 (1987).

Rose that: "It is clear veteran's benefits are not solely for the benefit of the veteran, but for his family as well."[31]

At least in those cases in which there is a "fallback" clause regarding alimony intertwined with the property award to the spouse, state courts have approved the use of alimony to enforce what is actually a property award.[32]

For example, in *In re Marriage of McGhee*,[33] the court approved compensation to the former spouse by means of alimony, as set out in the agreement between the parties, when it was imposed by the dissolution court after the member halted the flow of military retirement benefits to former spouse after the *McCarty* decision. The court termed use of such "back-up" clauses to be making the property award "supportified." Similarly, in deciding *In re Marriage of Sheldon*,[34] the court noted the "close relationship between the amount of a property division and the entitlement, if any, of a spouse to spousal support." In *In re Marriage of Mastropaolo*,[35] the court "conditionally" reversed an alimony award "on condition" that the court's affirmance of the retirement division became final.

While some courts have expressed the opinion that an outright award of spousal support in the sum of military retirement benefits lost by reason of a disability election constitutes a violation of *Mansell*,[36] the substitution of alimony for the intended property award has been quite direct in other cases. In *Austin (Scott) v. Austin*,[37] the court instituted an award of alimony, that had been previously reserved until remarriage, in lieu of the pension share lost because of the member's transfer to VA disability status. The court gave its approval to alimony continuing after the spouse's remarriage, where the alimony award is intended to compensate for distribution of a pension earned during marriage, citing *Arnholt v. Arnholt*.[38]

---

[31] *See In re Marriage of Anderson*, 522 N.W.2d 99 (Iowa Ct. App. 1994) (applying *Rose* to require a disabled veteran to pay alimony ***and*** child support in a divorce action, even when his only income is veterans' disability and supplemental security income).

[32] That is why there is such a fallback clause in the standard clause set used by this firm in such cases.

[33] 131 Cal. App. 3d 408, 182 Cal. Rptr. 456 (Ct. App. 1982).

[34] 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (Ct. App. 1981).

[35] 213 Cal. Rptr. 26 (Ct. App. 1985).

[36] *See*, *e.g.*, *Clauson v. Clauson*, *supra*.

[37] Mich. Ct. App. No. 92-15818 (unpublished intermediate court opinion), *rev. den.*, 546 N.W.2d 255 (Mich. 1996).

[38] 343 N.W.2d 214 (Mich. Ct. App. 1983) (non-military case).

Similarly, in *Waltz v. Waltz*,[39] the Nevada Supreme Court approved a decree which awarded the entire military retirement to the retiree, but ordered him to pay the former spouse, by military allotment, $200.00 plus cost of living adjustments on that sum, as "permanent alimony." The military service had overlapped the parties' marriage by just less than ten years, precluding direct payment of a property award through the military pay center, and the appellate court found that in the context of the case, the parties' use of phrase "permanent alimony," in conjunction with the COLA clause, showed an intent to link it to the military retired pay. Further, the court held that payments to a former spouse do not terminate upon her remarriage when the payments were clearly intended to achieve a property settlement.

The bottom line to these cases, and others, is that state courts have felt free to impose an alimony award where necessary to do substantial justice to the parties in front of them, taking into account the entirety of their actual financial circumstances in constructing court orders – and especially when the division of would have otherwise been divisible property is unequal.

In short, courts have proven more and more willing to substitute alimony for property, or vice versa, as necessary to achieve equity, secure orders, or prevent unjust enrichment. Regardless of theoretical distinctions between the "effect" of property and alimony awards, where it is seen as necessary to serve one of the basic purposes of a court's orders, alimony and disproportionate divisions of property can be very intertwined.

V. DISCUSSION

A. Strategies for Requesting a Disproportionate Division in Favor of One Party

Other than the few special categories of arguments discussed below, most arguments in favor of disproportionate division involve some sort of allegations that one spouse has been naughty in one way or another, and the appropriate judicial response is by way of disproportionate division of assets in favor of the other.

The immediately-apparent problem with all such efforts, at least in no-fault, equal-division community property states, is the clear public policy of removing "fault" from determinations of property division and alimony awards.[40] As shown by *Lofgren* and *Putterman*, however, at least one ***species*** of "fault" – economic fault – is alive and well even in such no-fault, equal-division community property states. To the degree that it can be proven that one spouse's wrongful behavior has

---

[39] 110 Nev. 605, 877 P.2d 501 (1994).

[40] *See Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000), in which the Nevada Supreme Court declared that simple marital misconduct or fault are expressly ***not*** to be alimony factors, so alimony is not "a sword to level the wrongdoer" or "a prize to reward virtue." This commentary was apparently designed to eliminate any reliance on "fault" as discussed in earlier cases. The Court closely examined the legislative history of the 1993 amendment to NRS 125.150, and concluded that the legislature deleted the language about the "respective merits of the parties" in direct response to the Court's decisions which suggested that marital fault could be considered in determining alimony and property distribution.

deprived the other of property that would otherwise have been awarded, the court will entertain a request to (at least) compensate the deprived spouse.

What this means to counsel for the deprived spouse is that such counsel bears the burden of conducting such discovery, and producing such evidence, that enough economic fault can be shown to satisfy the burden of proving a "compelling reason" for the trial court to do anything other than divide the remaining property down the middle.

Additionally, there are a few "niche" arguments that might prove useful in exceptional circumstances. For example, normally, the "my spouse doesn't need the money" argument will (understandably) fall on deaf judicial ears. Historically, however, there have been a few extreme cases that have justified such a result. In *Herzog v. Herzog*,[41] for example, the wife was maintained without charge in a state mental hospital, and the husband had full responsibility for the parties' children, causing the trial court to award to him ***all*** of the parties' property. The ruling was affirmed on appeal.

The basic message of that case was, eventually, enshrined in statute. Spouses may now enter into an agreement dividing the community income, assets, and obligations into separate income, assets, and obligations.[42] However, this agreement is effective only 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 pursuant to NRS 427A.250-.280.

Once such an agreement is entered into, the separate income or property of each spouse is not liable for the costs of supporting the other spouse, including the costs of medical care and other necessities.[43] This statute also allows a court to enter a decree dividing the assets, community income, and obligations between the parties upon petition filed by a spouse or guardian upon a showing that the decree is in the best interest of both spouses and one spouse has been or is about to be admitted to a skilled nursing or intermediate care facility or if the division would allow a spouse to qualify for community-based services for the elderly pursuant to NRS 427A.250-.280.[44]

B. Strategies for Defending Against Such a Request

As might be expected, these mirror their counterparts above. As to the facts, counsel seeking to prevent a disproportionate division of community property might have to come up with a reasonable explanation for disappearing assets, or at least show that the loss, if it did occur, was not

---

[41] 69 Nev. 286, 249 P.2d 533 (1952).

[42] *See* NRS 123.259.

[43] *See* NRS 123.259(4).

[44] The court may not enter such a decree, however, if the division is contrary to the terms of an enforceable premarital agreement. NRS 123.259(2).

in bad faith. Arguing the law, the burden of proof in such matters, given the legislative expression of public policy to remove fault from considerations of property division, should be placed squarely on the party requesting anything other than an equal division of the property.

And, of course, there is the common perception that Snow White does not usually end up married to Beelzebub – if ***both*** parties have been guilty of similar behavior, even if not to precisely equal degrees, it might be possible for counsel to argue that the court should leave them where it found them, and not intervene.

VI. CONCLUSIONS

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.

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.

There is substantial precedent for setting aside one party's property for the support of the other – a kind of relief that appears to blur the lines between property division and alimony. More directly, there is both logic and precedent indicating that alimony can be awarded where there has been unjustified disproportionate division, and disproportionate division is an appropriate response to an inability to award adequate alimony, in proper cases.

While the strategies for proposing or opposing disproportionate division of property seem to echo outdated "fault" grounds, they have restricted the conflict to the field of economic impacts. "Disproportionate division" is perhaps best seen as a remedy for wrongful behavior that otherwise would not have an adequate judicial response.

P:\wp13\WLGADMIN\Disproportionate Division of Community Property.wpd