

Community Property and Debt Division

1.5 Hour CLE Training

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Presenter:

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LEGAL AID CENTER¹⁹⁵⁸
■■■■ *of Southern Nevada*

COMMUNITY PROPERTY AND DEBT DIVISION

I. Separate Property vs. Community Property

A. Separate Property Defined

NRS 123.130 Separate property of wife; separate property of husband.

1. All property of the wife owned by her before marriage, and that acquired by her afterwards by gift, bequest, devise, descent or by an award for personal injury damages, with the rents, issues and profits thereof, is her separate property.

2. All 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, is his separate property.

B. Community Property Defined

NRS 123.220 Community property defined. 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.
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 entered pursuant to NRS 123.259

II. Division of Community Property In A Divorce

A. Absent A Compelling Reason To Do Otherwise, The Court Must Divide Community Property Equally (Not Equitably)

NRS 125.150 Alimony and adjudication of property rights; award of attorney's fee; subsequent modification by court. Except as otherwise provided in NRS 125.155 and unless the action is contrary to a premarital agreement between the parties which is enforceable pursuant to chapter 123A of NRS:

1. In granting a divorce, the court:

(a) May award such alimony to the wife or to the husband, in a specified principal sum or as specified periodic payments, as appears just and equitable; and

(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.**

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 or her 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, without limitation, 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. Except as otherwise provided in NRS 125.141, whether or not application for suit money has been made under the provisions of NRS 125.040, the court may award a reasonable attorney's fee to either party to an action for divorce.

4. 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.

5. In the event of the death of either party or the subsequent remarriage of the spouse to whom specified periodic payments were to be made, all the payments required by the decree must cease, unless it was otherwise ordered by the court.

6. If the court adjudicates the property rights of the parties, or an agreement by the parties settling their property rights has been approved by the court, whether or not the court has retained jurisdiction to modify them, the adjudication of property rights, and the agreements settling property rights, may nevertheless at any time thereafter be modified by the court upon written stipulation signed and acknowledged by the parties to the action, and in accordance with the terms thereof.

...

(Emphasis supplied).

B. Unequal Division Of Community Property

In Lofgren v. Lofgren, 112 Nev. 1282, 1283, 926 P.2d 296, 297 (1996), the Nevada Supreme Court held as follows:

In deciding the cross-appeal in this case, we interpret for the first time language in the 1993 amendment to NRS 125.150, which requires that courts "make an equal disposition" of community property rather than the equitable division required prior to 1993. The 1993 amendment to NRS 125.150 requires an equal disposition of community property, unless "the court finds compelling reasons" for not dividing the property equally and "sets forth in writing the reasons for making an unequal disposition."

When the legislature changed property division from equitable to equal, it deleted the equitable factors that formerly had to be applied by the courts in making a "just and equitable" disposition of community property; but, in making these changes, the legislature did not define the "compelling reasons" exception to equal division. As a consequence, trial judges were left to their own devices in deciding what reasons should *compel* the unequal division of property. Although the trial judge in this case did not undertake to define the term "compelling reasons," as such, he did correctly apply the law to the facts when he ruled, in effect, that **the financial misconduct of the husband provided compelling reasons for an unequal division of the community property.**

The financial misconduct in this case is found in the husband's having transferred funds to his father and in his having used community funds for his own purposes, all in violation of the court's preliminary injunction. The trial court made a finding that the husband violated the joint preliminary injunction which prohibited the husband from “[t]ransferring, encumbering, concealing, selling or otherwise disposing of” any of the community property of the parties. The trial court further found the husband “wasted and/or secreted most of the \$80,000.00 transferred to him” by his “father in order to avoid sharing that money with” his wife. The trial court was justified in making an unequal disposition of community property under these circumstances; and **we hold that if community property is lost, expended or destroyed through the intentional misconduct of one spouse, the court may consider such misconduct as a compelling reason for making an unequal disposition of community property and may appropriately augment the other spouse's share of the remaining community property.**

(Emphasis supplied)

In Putterman v. Putterman, 113 Nev. 606, 608-09, 939 P.2d 1047, 1048-49 (1997), the Court expanded on what may constitute “compelling circumstances,” as follows:

In Lofgren, we defined one species of “compelling reasons” for unequal disposition of community property, namely, financial misconduct in the form of one party's wasting or secreting assets during the divorce process. There are, of course, **other possible compelling reasons, such as negligent loss or destruction of community property, unauthorized gifts of community property and even, possibly, compensation for losses occasioned by marriage and its breakup.** See, e.g., Moge v. Moge, 3 S.C.R 813, 43 R.F.L.3d 345 (Canada 1992); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn.1981) (compensation (not favorable property allocation) granted to wife as “reimbursement” for her support of husband while he obtained a medical degree).

It should be kept in mind that the **secreting or wasting of community assets while divorce proceedings are pending is to be distinguished from undercontributing or overconsuming of community assets during the marriage.** Obviously, when one party to a marriage contributes less to the community property than the other, this cannot, especially in an equal division state, entitle the other party to a retrospective accounting of expenditures made during the marriage or to entitlement to more than an equal share of the community property. Almost all marriages involve some disproportion in contribution or consumption of community property. **Such retrospective considerations are not and should not be relevant to community property allocation and do not present “compelling reasons” for an unequal disposition;** whereas, hiding or wasting of community assets or misappropriating

community assets for personal gain may indeed provide compelling reasons for unequal disposition of community property. (Emphasis supplied).

C. Division of Retirement Accounts

1. Pensions And Other Defined Benefit Plans (Qualified Domestic Relations (QDRO) Or Equivalent Order Needed)

(a) Time Rule/“Wait and See” Approach (preferred method)

The non-employee spouse shall be entitled to one-half of the community interest in the employee spouse’s pension with the community interest in such pension represented by a fractional portion of the total. In determining the fractional community interest, the numerator will be the number of months that the parties were married while the employee spouse was subject to the pension, and the denominator will be the total number of months that the employee spouse was subject to PERS. See Gemma v. Gemma, 105 Nev. 458, 778 P.2d 429 (1989); Fondi v. Fondi, 106 Nev. 856, 802 P.2d 1264 (1990).

(b) Present Value

Not an error to divide a pension at trial if: (1) the district court could determine the present value of the community share of the employee spouse’s pension with reasonable certainty; (2) there was sufficient existing funds to distribute the non-employee’s interest; and (3) both parties agreed that the distribution would be the final distribution of the pension regardless of what might occur in the future. Sertic v. Sertic, 111 Nev. 1192, 1194, 901 P.2d 148, 149 (1995)

2. Defined Contribution Plans (e.g., 401(k) (QDRO Or Equivalent Order Needed)

(a) Value taken and asset divided at time of divorce

3. IRAs (QDRO Or Equivalent Order May Not Be Needed)

(a) Value taken and asset divided at time of divorce

D. Division of Omitted Assets

In Amie v. Amie, 106 Nev. 541, 542-43, 796 P.2d 233, 234 (1990), the Court provided the following analysis concerning assets omitted from a decree of divorce:

In First Nat'l Bank v. Wolff, 66 Nev. 51, 202 P.2d 878 (1949), community property was...omitted from consideration by the parties. The court in Wolff stated that where property is not mentioned in the findings or the decree, such a decree in no way prejudices the parties' rights to bring a separate independent action to partition previously undivided property. After the divorce, the parties to the divorce suit become tenants in common in the omitted property. *Id.* at 56, 202 P.2d at 881; *accord* Molvik v. Molvik, 31 Wash.App. 133, 639 P.2d 238 (1982); Henn v. Henn, 26 Cal.3d 323, 161 Cal.Rptr. 502, 605 P.2d 10 (1980).

The right to bring an independent action for equitable relief is not necessarily barred by res judicata. Nevada Industrial Dev. v. Benedetti, 103 Nev. 360, 365, 741 P.2d 802, 805 (1987).

III. Division Of Specific Mixed Character Assets

A. Division Of Community Interest In Appreciation To Real Property Acquired Prior To Marriage

In Malmquist v. Malmquist, 106 Nev. 231, 239-40, 792 P.2d 372, 377 (1990), Nevada Supreme Court set forth the formula for calculating the community's interest in the appreciation in real property acquired before marriage:

The approach is essentially to assign credit for the unpaid mortgage balance according to a time rule. [Author Peter M. Moldave] explains:

The proposed method is to allocate the appreciation attributable to the loan proceeds to separate or community sources pro rata according to the total number of monthly payments made from separate or community sources....

The appreciation is shared according to the *number* of monthly payments, and not the amount of monthly principal payments, both for reasons of simplicity and fairness. Adding the varying principal payments is more complicated, but the more important objection is that it gives a windfall to the party making the later payments, because the principal portion of the monthly payment rises over the term of a fully amortized level payment loan. Counting only the number of payments avoids affecting the shares because of the timing factor. 70 Cal.L.Rev. at 1288–89 (footnotes omitted) (emphasis in original).

Modified slightly to incorporate Moldave's approach, the...formulae for determining the community and separate property interests in total home equity, including appreciation, can be stated arithmetically as follows:

1. $SP = PD_{sp} + [\frac{(PD_{sp} + OL_{sp})}{(PP)} \times (A)]$; and
2. $CP = PD_{cp} + [\frac{(PD_{cp} + OL_{cp})}{(PP)} \times (A)]$, WHERE:
 - (a) SP = total separate property interest in home equity;
 - (b) CP = total community property interest in home equity;
 - (c) PD_{sp} = mortgage principal due to separate property payments, plus the separate property downpayment, if any;
 - (d) PD_{cp} = mortgage principal due to community property mortgage payments, plus the community property downpayment, if any;
 - (e) OL_{sp} = portion of outstanding (unpaid) loan to be credited to separate property;
 - (f) OL_{cp} = portion of outstanding (unpaid) loan to be credited to community property;
 - (g) PP = contract purchase price of the residence;
 - (h) A = appreciation of the residence.

B. Division Of Community Interest In Appreciation To Business Interest Acquired Prior To Marriage

Two Methods:

1. Pereira Method (Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909)): Allocates a fair return on the spouse's separate property investment as separate income and allocates any excess to the community property as arising from the husband's efforts; and
2. Van Camp Method (Van Camp v. Van Camp, 53 Cal.App. 17, 199 P. 885 (1921)): Determines the reasonable value of the spouse's services, allocates that amount as community property, and treats the balance as separate property attributable to the normal earnings of the separate estate.

Both approaches (Pereira and Van Camp) have vitality and may be applied as circumstances warrant. Courts of this state are not bound by either the Pereira or the Van Camp approach, but may select whichever will achieve substantial justice between the parties. . . ." Schulman v. Schulman, 92 Nev. 707, 714-15, 558 P.2d 525, 530 (1976) (quoting Johnson v. Johnson, 89 Nev. 244, 247, 510 P.2d 625, 626-627 (1973)).

IV. Division Of Community Debts

Although not directly addressed by statute, community debts are generally accepted to be those debts acquired during marriage and are subject to equal division by analogy to NRS 125.150(1)(b), which requires the equal division of community property. See Wolff v. Wolff, 112 Nev. 1355, 1361, 929 P.2d 916, 920 (1996).