PARTITION ACTIONS: WHAT EVERY NEVADA DIVORCE LAWYER NEEDS TO KNOW

by

Marshal S. Willick
WILLICK LAW GROUP
3591 East Bonanza Rd., Ste. 200
Las Vegas, NV 89110-2101
(702) 438-4100
fax: (702) 438-5311
website: willicklawgroup.com
e-mail: Marshal@willicklawgroup.com

December 3, 2015

TABLE OF CONTENTS

I. INTRODUCTION: THE NEW/OLD NEVADA LAW OF PARTITION OF OMITTED ASSETS

As of October 1, 2015, when the 2015 Legislature's adoption of AB 362 went into effect, Nevada practice returned to how it had evolved in the time between *Amie*[1] and *Doan*.[2] The legislation also returned Nevada to compliance with its own original and recent, progressive case law, to adherence to community property theory, and to (near) uniformity with the other 8 community property states.

The new statutory language was based on the California codification of the 35-year line of authority following *Henn v. Henn*.[3] A post-judgment motion may be filed in the underlying divorce action to remedy the omission of an asset from actual distribution in a divorce.

Essentially, upon an assertion that a community property asset was not divided, the court that heard the underlying divorce shall divide it ***unless*** the Court finds that either:

> The property ***was*** included in a prior equal division of the community estate, or in an unequal division of the community estate supported by written findings in the decree;

OR

> There is a compelling reason to make an unequal disposition of the community estate and the court makes written findings to that effect.

The final enactment was not perfect. It strayed from consistency with community property theory and prior practice through imposition of two limitations periods.

First, the three-year limitation period from discovery of the "fraud or mistake" within which to file a motion to remedy it was (unfortunately) copied from NRS 11.190 by one of the committees through which the legislation passed. While there was an intention in both chambers to remove that language from the final bill, political happenstance prevented it, at least until a later legislature.

The second limitations period codified case law from New Mexico in saying that where partition is sought of a defined benefit pension plan already in pay status, partition may only be prospective, plus reach back to payments made within the past 6 years.

It is anticipated that the statute, like the case law before it, will most often be invoked where a decree of divorce failed to distribute retirement (pension) benefits. It is at this point a

---

[1] *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990).

[2] *Doan v. Wilkerson*, 130 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 48, June 26, 2014).

[3] *Henn v. Henn*, 605 P.2d 10 (Cal. 1980).

truism that retirement benefits, usually the most valuable asset of a marriage, are divisible upon divorce to at least the degree to which they were accrued during the marriage.[4] This is particularly true of military marriages, in which frequent moves are the norm and there is often less opportunity to accumulate large real estate equity,[5] but it is also true for most non-military marriages.

Even though they are almost always the most valuable asset of a marriage, few people understand retirement benefits; even family law attorneys get pension matters wrong all the time.[6] Most *pro se* (proper person) litigants are clueless, having no idea what benefits exist or how they work. This is especially common for non-employee spouses, but even employee spouses often have no idea what pension benefits they have, or what they are worth.[7]

The price paid for that lack of knowledge and understanding can be enormous. When a pension that accrued during marriage is omitted from distribution upon divorce, one party is wrongfully enriched, and the other is often consigned to an old age of destitution.

This paper is designed to explain how Nevada law got to this point, how and why the matter was resolved, and provide practical guidance for processing such cases going forward.

---

[4] *See*, *e.g.*, Annotation, *Pension or Retirement Benefits as Subject to Assignment or Division by Court in Settlement of Property Rights Between Spouses*, 94 A.L.R.3d 176; Marshal Willick, MILITARY RETIREMENT BENEFITS IN DIVORCE (ABA 1998) at xix-xx.

[5] *See* Legislative History to Pub. L. 99-348 (Military Retirement Reform Act of 1986 U.S. Code Cong. & Admin. News 1681, 1682).

[6] *See*, *e.g.*, Marshal Willick, *Retirement Plan Division: What Every Nevada Divorce Lawyer Needs to Know* (State Bar of Nevada, Ely, Nevada, 2013), posted at http://www.willicklawgroup.com/published-works/.

[7] In one recent *pro bono* case between a hotel housekeeper and a freelance handyman, we addressed a couple thousand dollars in house equity, a work truck and tools, and a big-screen TV – ***and*** the housekeeper's Culinary Union defined benefit pension plan benefits, which both parties were shocked to learn were more valuable than all their other assets put together and multiplied by ten.

II. CONTEXT: COMMUNITY PROPERTY LAW, THEORY, AND HISTORY

A. Absent Compelling Circumstances, Community Property Is to Be Equally Divided upon Divorce

In 1993, the Nevada Legislature changed our divorce laws from "equitable distribution" to "equal distribution." Thereafter, NRS 125.150(1)(b) provided that in granting a divorce, the court:

> 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 Nevada Supreme Court construed the 1993 revision of NRS 125.150 in *Lofgren*,[8] and concluded that the statute ***required*** an equal division of community property unless compelling reasons to the contrary existed and were expressly provided by the trial court in writing. Retirement benefits earned during a marriage are specifically included in the category of community property required to be equally divided.[9]

In short, since 1993, Nevada divorce courts were required to ***either*** equally divide the marital portion of pension benefits, or set out in writing what compelling circumstances exist for not doing so.

The force of the legislative mandate is such that any party seeking an ***unequal*** distribution has the burden of not only explicitly providing for such a distribution, but also placing in the *Decree* written findings of what compelling circumstances justify such an unequal distribution.

Absent such findings, an unequal distribution of community property is error.[10] This is true even when the order entered is upon default. Even then, the distribution of property is

---

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

[9] *Ellett v. Ellett*, 94 Nev. 34, 573 P.2d 1179 (1978); *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983). *See* NRS 123.220; 123.225

[10] The Court has repeatedly held, in a wide variety of contexts, that when a trial court enters an order on a subject where the Nevada Legislature has included a specific mandate of considerations, it is reversible error to fail to apply those considerations or to document in the order that it did so. *See*, *e.g.*, *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009) (noting mandatory consideration of 12 child support factors under NRS 125B.080); *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007) (reciting statutory mandate of custody modification factors); *Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005) (noting requirement of explicit recitation of factors supporting fee awards).

required to be in accordance with the equal division mandate of NRS 125.150, or provide some written findings of compelling circumstances adequate to sustain an unequal distribution of community property.[11]

B. Hidden, Overlooked, or Mischaracterized Community Property Not Actually Distributed upon Divorce Frustrates the Statutory Scheme

Through intentional fraud or the mistake of one or both parties, some community property may not be actually distributed upon divorce. The published cases show that pensions are the asset most frequently hidden, disguised, overlooked, or mistakenly ignored at the time of divorce.[12]

When valuable community property is omitted from actual distribution upon divorce – for ***whatever*** reason – the resulting property distribution is ***always*** incomplete and unequal, making it impossible for the court to "look to the overall justice and equity that must inform all alimony and property distribution decrees."[13]

When it is a pension that is not divided upon divorce, the wage-earning spouse (typically the husband) often leaves the marriage with 90% or more of the community property,[14] making the divorce unconscionably inequitable and unfair.

---

[11] *See Blanco v. Blanco*, 129 Nev. ___, 311 P.3d 1170 (Adv. Opn. No. 77, Oct. 31, 2013).

[12] *See Henn v. Henn*, 605 P.2d 10, 12 (Cal. 1980) (since no law precluded division of the pension at the time of divorce, it would be "anomalous" to establish that erroneous proposition in a later partition action); *Eddy v. Eddy*, 710 S.W.2d 783 (Tex. Ct. App. 1986) (same rule in Texas); *Beesley v. Beesley*, 758 P.2d 695 (Idaho 1988) (same in Idaho); *Bryant v. Sullivan*, 715 P.2d 282, 285 (Ariz. Ct. App. 1985) (same in Arizona); *In re marriage of Bishop*, 729 P.2d 647 (Wash. Ct. App. 1986) (same in Washington); *Savoie v. Savoie*, 482 So. 2d. 23(La. Ct. App. 1986) (same in Louisiana); *Thorpe v. Thorpe*, 367 N.W.2d 233 (Wis. Ct. App. 1985).

[13] *Heim v. Heim,* l04 Nev 605, 610, 763 P.2d 678, 681 (1988).

[14] In our first fourteen military pension partition cases two decades ago, the parties usually agreed that they divided less than $10,000 worth of cash and other property at the time of divorce. The average "present value" of the omitted pensions at the time of divorce was approximately $185,000, and were paying an average of $1,843 per month, with the retirees having already actually received an average of $195,000 since their divorces. With inflation since that time, those figures should be doubled for current cases.

C. Partition is the Universal Remedy for Omitted Assets in All Other Community Property States

In ***every*** other community property state,[15] parties have had less incentive to omit assets from distribution upon divorce because any community property not actually distributed by the divorce decree remains the property of both parties as tenants in common.[16] The same rule is in effect in many non-community property states.[17] If an asset is not distributed at divorce, the spouse who did not share in that marital asset has the right, by statute or common law, to bring a motion or action to partition it upon its discovery.[18]

Partition of omitted assets is so run-of-the-mill in the other community property states (and many non-community property states) that the decisions typically do not even include an explanation of the reason for the remedy. One court that did so explained that the only requirement for invoking partition is the simple fact of omission of the asset from distribution upon divorce:

> [T]he cases . . . upholding [partition] proceedings, do not distinguish between failure for whatever reason to bring property before the dissolution court. . . and failure of that court to dispose of property brought before it. . . . Rightly so; the . . . provision for these post-decree proceedings is to remedy inadvertence, oversight, and worse, and the only issue germane to maintaining such a proceeding is whether property remains undisposed of, not why it remains so.[19]

---

[15] Arizona, California, Idaho, Louisiana, New Mexico, Texas, Washington, and Wisconsin.

[16] *Henn v. Henn*, 605 P.2d 10 (Cal. 1980); *Casas v. Thompson*, 228 Cal. Rptr. 33, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987) ("Henn implicitly holds . . . that the policy favoring equitable division of marital property outweighs that of stability and finality in the limited context of omitted assets"); *Cooper v. Cooper*, 808 P.2d 1234 (Ariz. Ct. App. 1990); *Flynn v. Rogers*, 834 P.2d 148 (Ariz. 1992); *Gilmore v. Gilmore*, 227 P.3d 115 (NM 2009) (statute of limitations runs from each installment payment of pension benefits, not from divorce which did not address the benefits); *Norris v. Saueressig*, 717 P.2d 52 (N.M. 1986) (unaddressed and undistributed retirement benefits to be paid to former spouse once claim is made in partition); *Sparks v. Caldwell*, 723 P.2d 244 (N.M. 1986); *In re Marriage of Parks*, 737 P.2d 1316 (Wash. Ct. App. 1987); *Molvick v. Molvick*, 639 P.2d 238 (Wash. Ct. App. 1982); *Pike v. Pike*, 80 P.3d 342 (Idaho 2003).

[17] *See*, *e.g.*, *Schaub v. Schaub*, ___ P.3d ___ (S-14502, No. 6803, Alaska, August 2, 2013); *Johnson v. Johnson (Zoric)*, 270 P.3d 556 (Utah 2012); *Ploch v. Ploch*, 635 S.W.2d 70 (Mo. Ct. App. 1982); *Ochoa v. Ochoa*, 71 S.W.3d 593 (Mo. 2002); *Brewer v. Sheehan*, 565 S.W.2d 850 (Mo. App. 1978); *Fischbach v. Fischbach*, 975 A.2d 333 (Md. Ct. App. 2009); *Jordan v. Jordan*, 147 S.W.3d 255 (Tenn. Ct. App. 2004).

[18] At least six of the other eight community property states have formally legislated the availability of partition. *See* Cal. Fam. Code § 2556 (West 1992); N.M. Stat. Ann.§ 40-4-20 (1973); Ariz. Rev. Stat. Ann. § 25-318(b), (d); Tex. Prop. Code Ann. § 23.001 (Vernon 1984): La. Code Civ. Proc. Ann. art 82 (West 1960); Wis. Stat. Ann. 766.75 (West 1986).

[19] *Ploch v. Ploch*, 635 S.W.2d 70, 72 (Mo. Ct. App. 1982) (citations omitted).

In 1980, the California Supreme Court decided *Henn*,[20] an omitted military pension case. The parties had been married from 1945 until 1971; the former wife brought suit to partition the omitted pension in 1976. The California Supreme Court expressly held that *res judicata* does ***not*** preclude a spouse from bringing an action to partition assets that could have been, but were not, distributed at the time of divorce.

The court reasoned that in California (as in Nevada) "a spouse's entitlement to a share of the community property arises at the time that the property is acquired."[21] Since the wife's putative interest in the pension "arose independent of and predates the original decree of dissolution," it "was separate and distinct from her interest in the items of community property which were divided at the time of the dissolution."[22]

The court found that since the interest (i.e., property) that was the subject of the later partition action was not before the divorce court, it could not be extinguished by that court's decree. *Res judicata,* which only precludes the parties from relitigating the ***same*** cause of action, cannot bar such a suit.[23]

"Collateral estoppel," by contrast, can apply against a party in a second suit on a different cause of action.[24] The *Henn* court carefully analyzed that principle as well, and held that the doctrine "cannot be stretched" to compel denial of the right to partition omitted assets, explaining:

> [T]he rule prohibiting the raising of any factual or legal contentions which were not actually asserted but which were within the scope of a prior action, "***does not mean that issues not litigated and determined are binding in a subsequent proceeding on a new cause of action***." Rather, it means that once an issue is litigated and determined, it is binding in a subsequent action notwithstanding that a party may have omitted to raise matters for or against it which if asserted may have produced a different outcome.[25]

In language almost identical to that used by the Nevada court in *Wolff* in 1949 (discussed below), the California court held that community property interests are simply unaffected by

---

[20] *Henn v. Henn*, 605 P.2d 10 (1980).

[21] *See* 605 P.2d at 13; *cf*. NRS 123.225(1): "The respective interests of the husband and the wife in community property during continuance of the marriage relation are present, existing and equal interests. . . ."

[22] *Henn, supra* 605 P.2d at 13.

[23] *Henn, supra* 605 P.2d at 13.

[24] *See Clark v. Clark*, 80 Nev. 52, 389 P.2d 69 (1964).

[25] *Henn, supra*, 610 P.2d at 13-14 (emphasis added), quoting from earlier cases.

a decree that does not include those assets: "property which is not mentioned in the pleadings as community property is left unadjudicated by [the] decree of divorce, and is subject to future litigation, the parties being tenants in common meanwhile."[26]

The few community property states, like New Mexico, that have mentioned a "statute of limitations" in omitted pension cases have held that the statute of limitations runs from each installment payment made by the pension plan.[27] The date of the divorce decree is irrelevant in any event, in any of those states.[28]

Henn has been widely cited and relied upon in the other community property states as a correct application of the doctrines of *res judicata* and collateral estoppel to omitted assets of community property. In Nevada, the *Henn* decision has been approvingly cited by the Nevada Supreme Court in three separate opinions,[29] yet out of all community property states, only Nevada has ever had case law interpreting the doctrines addressed in that opinion differently, leading to Nevada being a solitary outlier on the issue of partition of omitted assets, as detailed below.

D. The Sad and Contradictory History of the Law of Partition in Nevada

1. Nevada Originally Partitioned Omitted Assets Like the Other Community Property States

The earliest authority in Nevada regarding the ownership of assets not specifically disposed of in a decree of divorce is a federal decision. In *Johnson v. Garner*,[30] the court held that "(t)he divorce terminated the community, as well as the marriage, and put an end to any right which either spouse may have had in or to the property of the other. . . . Thereafter the interest of the former husband and wife in the property was that of tenants in common."

---

[26] *See* 605 P.2d at 13. The court cited cases stretching back to 1950.

[27] *See Gilmore v. Gilmore*, 227 P.3d 115 (NM 2009) (statute of limitations runs from each installment payment of pension benefits, not from divorce which did not address the benefits. This is also the rule in Maryland. *See Fischbach v. Fischbach*, 975 A.2d 333 (Md. App. 2009).

[28] As stated in *Henn*: "a spouse's entitlement to a share of the community property arises at the time that the property is acquired"; it "arose independent of and predates the original decree of divorce." That interest is "not altered except by judicial decree or an agreement between the parties. Hence . . . 'property which is not mentioned in the pleadings as community property is left unadjudicated by decree of divorce, and is subject to future litigation, the parties being tenants in common meanwhile.' . . ."

[29] *Haws v. Haws*, 96 Nev. 727, 615 P.2d 978 (1980); *Amie v. Amie*, *supra* (for the core holding, that partition of all unadjudicated assets is allowed); *Gramanz v. Gramanz*, 113 Nev. 1, 930 P.2d 753 (1997) (again, for the core holding).

[30] *Johnson v. Garner*, 233 F. 756 (D. Nev. 1916).

In *Bank v. Wolff*,[31] a divorce decree was granted and the wife filed a post-trial motion for a new trial; that motion was denied, and the newly ex-husband died the next day. The Nevada Supreme Court held that:

> it is fundamental that where property rights are not in issue in a divorce action, a decree which is limited to granting a divorce in no way prejudices such rights. Upon the entry of such a decree the former separate property of the husband and wife is his or her individual property, and the property formerly held by the community is held by the parties at tenants in common.
>
> From the necessities of the case the right of either party after a divorce has been granted, to enforce his or her rights to such property in a separate action brought for that purpose cannot be doubted.
>
> . . . .
>
> In the absence of any reference thereto in the decree, the parties to the suit became tenants in common of the community property, and the death of the plaintiff after the entry of judgment did not impair the [wife's] right thereto; but this right must be enforced in an independent action, in which all who may have any interest therein should be made parties.[32]

Wolff has never been overruled or criticized in any subsequent opinion. For several years, however, it was cited only in cases involving the situation where one party died at some point.

Adams[33] involved a case in which the parties divorced, and their decree indicated that the proceeds of the former marital home would be divided when it sold, but the former husband died before the house was sold, and the former wife claimed that she owned the entirety of the house as a matter of community property survivorship principles. Citing *Wolff* and *Johnson v. Garner*, *supra*, the Court held that the divorce had transmuted the house from community property to ownership by the parties as tenants in common.

In 1976, the Nevada Supreme Court ruled that if issues of fraud, misrepresentation and mistake as to value ***were*** raised at trial, a later independent action to reform the agreement is subject to dismissal on the basis of *res judicata*, since the claim in question would necessarily have already been directly considered.[34]

---

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

[32] 66 Nev. at 55-56, 202 P.2d at 880-81 (citations deleted).

[33] *Adams v. Adams*, 85 Nev. 50, 450 P.2d 156 (1969).

[34] *Spilsbury v. Spilsbury*, 92 Nev. 464, 465-66, 553 P.2d 421, 422 (1976).

One hard-to-categorize case is *Applebaum*.[35] There, the parties had married in 1968, divorced in 1972, remarried in 1973, and in 1975, the wife moved to invalidate the property settlement in the ***first*** divorce, and for separate maintenance. The husband counterclaimed for divorce, and when the divorce court refused to throw out the property settlement from the first divorce based on the wife's claim of extrinsic fraud, the case went up on an appeal of the second divorce decree. This case was, therefore, a "double-divorce" case, and its holdings might be considered limited to its facts, although the opinion did not say so on its face.

On appeal, the Court noted the wife's allegation that she received only $15,000 for her half of the husband's (never-specified) business, which she claimed was worth over a million dollars. The Court backed into an extrinsic fraud analysis, stating that only the increase in the value of the business developed during marriage was community property under either the *Pereira* or *Van Camp* approaches approved in *Johnson*,[36] and that in either case, from that increase the amounts drawn to meet family expenses had to be subtracted, under *Schulman*.[37] Noting the testimony as to the "high standard of living" enjoyed during the marriage, the Court found substantial evidence to support the conclusion below that "any community interest in the increased value of the business had already been withdrawn for this purpose."[38]

It was apparently based on those conclusions that the Court found unpersuasive the facts that the worldly-wise husband had drafted the agreement he had the wife sign, and that the wife claimed that she had only consulted with, and not retained, an attorney during the first divorce. The Court so much as said that it was not the husband's fault if the wife failed to ask the attorney about the substance of the agreement, but only its enforceability, and (in the statement for which the case is usually cited) that once the husband "announced his intention to seek a divorce," the wife "was on notice that their interests were adverse."[39]

---

[35] *Applebaum v. Applebaum*, 93 Nev. 382, 566 P.2d 85 (1977).

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

[37] *Schulman v. Schulman*, 92 Nev. 707, 558 P.2d 525 (1976), *citing Applebaum*, 93 Nev. at 385-86, 566 P.2d at 88.

[38] 93 Nev. at 386, 566 P.2d at 88.

[39] 93 Nev. at 384-85, 566 P.2d at 87.

2. *McCarroll* Through *Taylor*, Where Nevada Went off the Rails

McCarroll[40] was a short *per curiam* opinion affirming a summary judgment in favor of a former husband against his former wife. The parties had divorced three years earlier, and the divorce decree apparently approved "an oral agreement for the division of community property." The former wife later sued to divide the husband's Forest Service Pension, since "no mention was made of it during the divorce action"; the wife asserted that it had been fraudulently concealed.[41]

The district court had "found that the fraud, if any, was intrinsic since the former wife had a fair opportunity to present the claim she is now making to the divorce court," and concluded that NRCP 60(b) "barred relief."

The Nevada Supreme Court affirmed, stating only: "We perceive no error." The only citation of authority provided for upholding the lower court's opinion was *Colby*.[42] *Colby*, however, was ***not*** an omitted property case, and did not cite any omitted property cases, but was concerned with jurisdictional and "full faith and credit" issues, and quoted at length from the 1948 case of Murphy,[43] which in turn involved distinguishing intrinsic fraud from extrinsic fraud.[44]

McCarroll imposed upon the spouse ***without*** knowledge of assets the responsibility for knowing about all community property concealed by the spouse who ***did*** have such knowledge. No consideration was given to the wife's lack of actual knowledge of the existence and nature of the asset, or her opportunity to acquire such knowledge.

McCarroll radically departed from the law of every other community property state by providing a mechanism for divestment of community property without agreement of the parties or express judicial determination, and set the tone for the later decisions that would prove so oppressive to innocent spouses.

---

[40] *McCarroll v. McCarroll*, 96 Nev. 455, 611 P.2d 205 (1980).

[41] 96 Nev. at 456, 611 P.2d at 205.

[42] *Colby v. Colby*, 78 Nev. 150, 369 P.2d 1019 (1962).

[43] *Murphy v. Murphy*, 65 Nev. 264, 193 P.2d 850 (1948).

[44] The distinction in NRCP 60 between intrinsic and extrinsic fraud was eliminated in 1981, rendering earlier cases denying relief to spouses on that ground "not applicable." *Carlson v. Carlson*, 108 Nev. 358, 362 n.6, 832 P.2d 380, 383 n.6 (1992).

Tomlinson[45] was a common law action for partition of a military pension omitted from a 1971 Michigan decree of divorce. The district court dismissed the wife's complaint for partition, and the Nevada Supreme Court affirmed. The Court noted that the Uniformed Services Former Spouses Protection Act[46] had nullified *McCarty*,[47] and so made "Rosemary's right to a portion of Robert's military retirement benefits . . . the same now as it was before McCarty or the enactment of the USFSPA."[48]

The Court stated that Nevada would apply Michigan law in determining Rosemary's rights, and that the first Michigan appellate decision dividing a military pension as property was issued six years after the Tomlinsons' divorce.

The Court then held that Rosemary's failure to raise the issue of her right to division of the pension at the time of divorce (six years before she knew of that right) precluded her from requesting partition once she ***did*** know that the asset was marital property.[49]

The court claimed it was applying the principle of *res judicata*, but the rule it announced ***actually*** originated from collateral estoppel and was exactly the opposite of the reasoning and conclusion of the California Supreme Court. In Nevada, the rights of the parties to property accrued during marriage were deemed "adjudicated" by a divorce decree silent as to those assets, in favor of the party who obtained physical possession or title to the asset.

The holding in *Tomlinson* amplified the worst aspects of *McCarroll* and effectively condoned the practice of concealing, disguising, and mischaracterizing assets prior to and at the time of divorce. The case created a rule that a spouse who acquires physical control of an asset, or a titular right to a future asset, is automatically awarded that asset by a divorce decree that fails to state otherwise.

The endorsement of the practice of "divestment by silence" was adopted by the Nevada Supreme Court without any acknowledgment of the obvious damage to multiple public policies, from condoning unjust enrichment to encouraging attorney-assisted fraud; in short, the rule of *Tomlinson* was: if you hide it, you get to keep it.[50]

---

[45] *Tomlinson v. Tomlinson*, 102 Nev. 652, 729 P.2d 1363 (1986).

[46] 10 U.S.C. § 1408 (1982).

[47] *McCarty v. McCarty*, 453 U.S. 210 (1981).

[48] 102 Nev. at 653, 729 P.2d at 1364.

[49] 102 Nev. at 654, 729 P.2d 1364.

[50] *See* M. Willick, *Res judicata in Nevada Divorce Law: An Invitation to Fraud*, 4 Nev. Fam. L. Rep. No. 2, Spr., 1989, at 1.

But the Nevada Supreme Court was inexplicably ***much*** more concerned with substantive justice than with "finality" in ***non***-family law cases. In 1987, the Court considered *Nevada Industrial Dev. v. Benedetti*,[51] in which the Court had permitted a second suit where the parties to an earlier action had, by "mutual mistake," settled the earlier case for $30,000 too much, constituting "unjust enrichment" of the receiving party.

Where commercial real estate was involved, the Court held that the interest in finality did ***not*** bar a later independent action under NRCP 60(b), where "the policies furthered by granting relief from the judgment outweigh the purposes of *res judicata*"[52] because the "salutary purpose of Rule 60(b) is to redress any injustices that may have resulted because of excusable neglect or the wrongs of an opposing party. Rule 60 should be liberally construed to effectuate that purpose."[53]

All such declarations of "public policy" as stated in *Benedetti* continued to be ignored when the Court reviewed ***divorce*** cases. In 1989, the Court returned to the subject in *Taylor*,[54] which was a consolidated case involving two sets of former spouses whose divorce decrees omitted military retirement benefits.

Both partition cases were litigated in 1987, and resulted in judgments granting the former wives portions of the pensions earned during the marriage but not divided upon divorce. Both cases were appealed, and both were reversed, so the former wives ultimately received no part of the most valuable asset of their marriage.

The published decision did not detail the factual background of the cases. The parties to one of the two cases (the Taylors) were divorced in 1970. At trial in the partition case, both of the Taylors testified that they had ***no idea*** that the pension benefits were a divisible asset at the time of divorce.

---

[51] *Nevada Industrial Dev. v. Benedetti*, 103 Nev. 360, 741 P.2d 802 (1987).

[52] *Amie*, 106 Nev. at 543, 796 P.2d at 234-35, *quoting from Benedetti*, 103 Nev. 360,741 P.2d 802 (1987) (citations omitted in quoted text).

[53] *Nevada Industrial Dev. v. Benedetti*, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987) (citations omitted); *see also Sherman v. Southern Pac. Co.*, 31 Nev. 285, 102 P. 257 (1909); *Brockman v. Ullom*, 52 Nev. 267 at 269, 286 P. 417 (1930).

[54] *Taylor v. Taylor*, 105 Nev. 384, 775 P.2d 703 (1989). During the three years since *Tomlinson*, that case had been legislatively overruled by NRS 125.161, which was passed in 1987, but that statute was repealed in 1989 after fierce lobbying by military retirees who did not want to divide their retirement benefits with their former spouses.

However, in the second case (Campbell), the parties had been divorced in ***1980***, two years ***after*** Nevada case law established that pensions were community property divisible upon divorce.[55] That wife had been unrepresented at the time of divorce.

The Campbell's divorce decree awarded to the wife custody of three children, a used car, and some raw land in another state gifted by her mother. The husband received the house, its furnishings, and the bulk of the parties' tangible assets. He also actually kept all assets ***omitted*** from recitation in the decree, including all cash in joint bank accounts and all monthly payments of the military pension, which had a "present value" upon divorce of about $200,000. He paid no alimony, no property equalization, and minimal child support.

In the partition trial, the husband conceded that he knew all along during the divorce that the pension was divisible community property. He admitted that he had discussed the matter with his attorney before the divorce, and that the divorce attorney had deliberately omitted the pension from the divorce complaint and from the *Decree* to prevent the unrepresented wife from making any claim to the asset.

The Nevada Supreme Court had no problem with that behavior. Unmoved by any distinction between property omitted from a decree because of "mistake" and property omitted because of deliberate fraud, it recited that it had consolidated the cases for disposition on appeal "because they involve identical issues of law," and then affirmed, refusing to apply – or even ***acknowledge the existence of*** – the Court's own holdings in *Benedetti* and *Wolff*, nevertheless the well-developed California case law of partition of omitted assets.

The decision made no mention of the public policy of preventing "unjust enrichment," and ignored the prior case law and community property theory stating that the parties were tenants in common of any omitted assets. Instead, and in contradiction of both *Benedetti* and *Wolff*, the Court flatly held that it did "not recognize a common law cause of action to partition retirement benefits not distributed as part of the property agreement at the time of divorce."[56]

The two cases consolidated in *Taylor* included one set of spouses mutually mistaken as to the community property nature of the retirement benefits, and one set in which the husband consciously chose to omit the asset from the decree for the purpose of preventing the unrepresented wife from making a claim to it.

In a footnote defying the actual facts of the cases involved, the Court stated that "there is no evidence of fraud in these cases." It responded to the argument by the former wives' counsel

---

[55] *See Ellett v. Ellett*, *supra*, 94 Nev. 34, 573 P.2d 1179 (1978).

[56] 105 Nev. at 387, 775 P.2d at 704-705.

that the ruling would allow a party to "hide" the retirement benefits from the other party and the court by stating that:

> On the contrary, such conduct would most likely constitute a fraud on the court and NRCP 60(b) specifically provides that it "does not limit the power of a court to entertain an independent action to relieve a party from a judgment . . . for fraud on the court."[57]

No explanation was offered for how or why the conduct of the husband and his counsel in *Campbell* could ***be*** any more deliberately fraudulent than it had been admitted to be.

Taylor essentially declared Nevada law to be that retirement benefits omitted from explicit recitation and division upon divorce belonged to the husband. All burdens and risk were put on the non-employee spouse, whether she knew of the asset or not, and whether she was represented upon divorce or not.

3. A Seeming Return to Partition in *Amie* and *Waldman*

Mere months after *Taylor*, however, the Court took up *Amie v. Amie*.[58] That case did not address retirement benefits, but rather the proceeds of a lawsuit for lost wages that had been brought by the husband during the marriage, but not collected until after divorce.

The wife filed an independent action to partition her community property share of the proceeds from that lawsuit. The appellate opinion recited that the parties had "simply omitted" the property from their property settlement agreement and divorce decree "[f]or reasons that are not entirely clear from the record."[59]

Embracing the 1949 holding from *Wolff* that it had refused to acknowledge a few months earlier, the Court in *Amie* found that the right to bring an independent action for equitable relief from a judgment is "not necessarily barred by res judicata."[60] The opinion surmised that the proceeds of the husband's lost wages claim were omitted from the parties' divorce settlement only because of their "mutual mistake" in leaving it out of the property settlement agreement.[61]

---

[57] 105 Nev. at 387, n.4, 775 P.2d at 704, n.4.

[58] *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990).

[59] 106 Nev. at 542, 796 P.2d at 234.

[60] 106 Nev. at 542-43, 796 P.2d at 234.

[61] 106 Nev. at 542, 796 P.2d at 234.

The Court then reaffirmed its adherence to *Benedetti*. After quoting that holding, the *Amie* court found that the wife's equitable action for partition of a portion of the suit for back wages did not violate any of the "policies and purposes of the doctrine of res judicata," so there was "no reason in fairness and justice that she should not be allowed to proceed to have this property partitioned in accordance with *Wolff*."[62]

The Court purported to distinguish *McCarroll*, stating that in ***that*** case:

> the trial court found, and we agreed, that the wife had a fair opportunity during the divorce litigation to litigate the fraud allegations. Under such circumstances, the fraud issue could not be later litigated in another civil action. Unlike McCarroll, this case involves property omitted from the divorce controversy. There was no dispute as to the nature of the property, and neither party claimed exclusive entitlement to this property.[63]

The Court summed up by holding that since the proceeds of the husband's suit were left unadjudicated and were not disposed of in the divorce, they were held by the parties as tenants in common, and the property was "subject to partition by either party in a separate independent action in equity."

In *Amie*, ***no mention*** was made of the requirement, which the Court had mandated in *Taylor* just a few months earlier, of finding "fraud on the court" before allowing partition of assets omitted from a decree. The case did not cite or discuss *Tomlinson* or *Taylor* ***at all***, and provided no explanation for the obviously contradictory holdings. No valid legal distinction as to the character of the asset to be partitioned can be drawn, since both the omitted wages in *Amie* and the omitted pensions in *Tomlinson* and *Taylor* were both clearly community property.

The grounds asserted in *Amie* for distinguishing *McCarroll* were not analytically valid, either. The claim in the *Amie* opinion that the wife in *McCarroll* "had a fair opportunity during the divorce litigation to litigate the fraud allegations" is simply false; the face of the *McCarroll* opinion shows that the parties in that case had orally agreed to divide their property, but that their agreement "did not include the pension and no mention was made of it during the divorce action."[64]

The fraud alleged by Mrs. McCarroll in her later partition case had not yet ***occurred*** at the time of divorce – as a matter of temporal logic, it had not been "omitted" or "concealed" from the divorce decree until the divorce was concluded.

---

[62] 106 Nev. at 543, 796 P.2d at 235.

[63] 106 Nev. at 542, 796 P.2d at 234.

[64] 96 Nev. at 456, 611 P.2d 205.

In other words, as of the time of divorce, the facts of *McCarroll* were ***indistinguishable*** from those of *Amie*, involving omitted ***property***, not an omitted "fraud allegation." The *Amie* court therefore incorrectly stated that the wife could have litigated "that claim" (fraudulent omission) in her divorce action; what Mrs. McCarroll ***could*** have done in her divorce case was litigate her right to the property ***itself*** – if she had realized that she had such an interest – just as Mrs. Amie could have done in ***her*** divorce action.

It is difficult to come up with any real distinction between the cases, except as to the form of pleading. In *McCarroll*, the wife alleged in a ***post-divorce proceeding*** that her husband's silent retention of the pension[65] was due to his "fraudulent concealment" of the asset, whereas the wife in *Amie* alleged only the parties' "mutual mistake" in leaving the asset out of the divorce.

The *Amie* court apparently relied substantially on form in reaching its result, finding:

> Since the parties omitted to include this property in their written agreement and hence in the divorce suit itself, the property never came within the field of the prior divorce litigation. . . . There was no dispute as to the nature of the property, and neither party claimed exclusive entitlement to this property.[66]

The court thus implied that its holding was based on the existence of mistake but ***not*** fraud, and the failure of the party holding the omitted asset to "claim exclusive entitlement" to it.

Such an implication, however, would lead to the absurd result that partition in *Amie* was granted only because the omission of the property from the decree was innocent, but that partition would have been denied if the husband in *Amie* asserted that he ***intended*** to defraud the wife (as Mr. Campbell had admitted in *Taylor*), or that he wanted to baselessly claim that the property was all his.

It is likewise impossible to reconcile *Amie* with *Tomlinson* or *Taylor*.[67] Factually, *Tomlinson* was nearly identical to the California case of *Henn*, which was relied upon as authority in *Amie*, but not even acknowledged to exist in *Taylor*. The California Supreme Court had followed and explained *Henn* in *Casas v. Thompson* just months before the Nevada court decided *Tomlinson*, but even though *Casas* was presented to the Nevada Supreme Court during the briefing and argument of both *Tomlinson* and *Taylor*, the Court refused to address ***any*** of the California holdings in its decisions denying spouses any share of the omitted pensions.

---

[65] The *Amie* opinion erroneously refers to this asset as "prison benefits." 106 Nev. at 542.

[66] 106 Nev. at 542, 796 P.2d at 234.

[67] *See* M. Willick, *Partition of Omitted Assets After Amie: Nevada Comes (Almost) Full Circle*, 7 Nev. Fam. L. Rep. No. 1, Spr.1992, at 8.

Amie aligned its result and holding with both the earlier Nevada decision in *Wolff* and the seminal California case of *Henn*. The *Henn* decision expressly held that military retirement benefits omitted from a decree of divorce ***are*** subject to partition in a later independent action by the nonmilitary spouse – precisely the holding rejected by the Nevada Supreme Court only a few months before *Amie*, in *Taylor*.

Williams v. Waldman[68] involved a lawyer-husband who had obtained partial ownership of his law firm during the marriage. When the parties had divorced seven years earlier, he had stopped the wife from getting her own lawyer with promises that "I will take care of you" and "I will be fair to you and the children," and he prepared all papers in the divorce. The wife, without benefit of independent counsel, signed the agreement prepared by the husband and filed an answer in proper person, which said the agreement was merged into the decree of divorce. The agreement did not provide that the law practice was community property divisible upon divorce, nor was the wife so advised.[69]

Seven years later, in consulting with a lawyer, the wife first learned that the law practice was considered to be community property and a divisible asset. She filed an independent action for partition. It was rejected by the district court.

On appeal, the Nevada Supreme Court held that the general "each to keep the property in his possession" release clause in the property settlement was non-binding where the asset in question, the law practice, was not specifically mentioned. The Court reversed the dismissal below, concluding that the district court had failed to recognize the parties' agreement as the product of an attorney/client relationship giving rise to a fiduciary relationship, and that all transactions growing out of such a relationship were subject to the "closest scrutiny."[70]

Explaining, the Court held that when an attorney deals with a client for his own benefit "the attorney must demonstrate by a higher standard of clear and satisfactory evidence that the transaction was fundamentally fair and free of professional overreaching."[71] The Court held that there was detrimental reliance by the wife on the husband's representations.

---

[68] *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992).

[69] 108 Nev. at 469, 836 P.2d at 617.

[70] 108 Nev. at 471-74, 836 P.2d at 617-19.

[71] 108 Nev. at 472, 836 P.2d at 618.

Addressing its earlier holding in *Applebaum*, the Court modified the oft-cited holding of that case, stating that "the issue of whether a confidential relationship survives an announcement of an intention to seek a divorce necessarily depends on the circumstances of each case."[72]

The Court found that the husband failed to prove that the wife "completely understood her property rights when she executed the agreement," and found the wife's alleged disclaimer of an interest in the law practice "unavailing" where it was "made in an informational vacuum, without a full understanding of the rights she was relinquishing."[73] Citing *Amie* and *Wolff*, the Court held the unadjudicated property was subject to partition in an independent action in equity, because property not disposed of in a divorce action is held by the parties as tenants in common.[74]

The Court purported to distinguish *McCarroll* on the basis that "after a careful review of the record . . . under the circumstances of this case, where [wife] did not have independent representation, she did not have a fair opportunity to present this issue to the original divorce court."

For the first time, the Court specified the burden of proof in a partition suit, stating that upon remand, the wife was not required to prove fraudulent omission, "but simply that the community property at issue was left unadjudicated and was not disposed of in the divorce."

4. Evolution of Family Law Practice from 1990 to 2014

Based on *Amie*, partition actions (and motions) were brought in family court for the next 25 years. By the time *Williams v. Waldman* was decided in 1992, however, it was obvious that *Wolff*, *Henn*, and *Amie*, on the one hand, and *McCarroll*, *Tomlinson*, and *Taylor*, on the other, were directly contradictory.

The Nevada State Bar Family Law Section's Family Practice Manual noted the contradiction, observed that it was irreconcilable, and suggested that counsel use either an "*Amie*" clause[75]

---

[72] 108 Nev. at 472 n.4, 836 P.2d at 618 n.4. The Court found adequate grounds for distinction in the fact that while *Applebaum* involved a short-term divorce without children, where the husband had told the wife to hire a lawyer and that he would pay for it, the parties in *Waldman* "had a longstanding marital partnership with three young children at the time of the divorce," the husband was a lawyer and drafted the agreement personally, and the husband had convinced the wife ***not*** to hire independent counsel.

[73] 108 Nev. at 473 n.5, 836 P.2d at 619 n.5.

[74] 108 Nev. at 474, 836 P.2d at 619.

[75] IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all community property which is not listed herein shall be owned by the parties as equal co-tenants, subject to future partition upon discovery; in the event that any property has been omitted from this decree that would have been community property or

or an "anti-*Amie*" clause[76] to guide reviewing courts toward a preferred treatment of assets not specifically recited on the face of a decree, since Nevada law included two lines of authority that were directly contradictory.

5. *Doan*: *Amie* and *Waldman* Eviscerated; *McCarroll* and *Tomlinson* Made Worse

In *Doan v. Wilkerson*[77] the Court snapped back to its focus on "finality," finding that property distributions – including the ***omission*** from distribution of the most valuable asset of the marriage, were final 6 months after entry of a decree.

The basic facts of *Doan* were unremarkable. The marriage was some 20 years in length. The husband was an air traffic controller making some $110,000 per year, and was a participant in the federal Civil Service Retirement System, and so had both a defined contribution Thrift Savings Plan ("TSP") fund, and a defined benefit CSRS pension. The wife was an uneducated part-time, minimum-wage casino change girl. The tangible assets were very modest – small house equity, a used car, and minimal possessions.

During the divorce, each party hired several lawyers, who withdrew when payments got thin, leaving both parties *pro se* at the time of divorce.

The *Decree* – drafted by the husband – purported to divide all property equally, including the $10,000 TSP fund in husband's name, but it omitted any mention of the CSRS defined

---

otherwise jointly-held property under the law applicable as of the date of this decree, the concealing or possessory party will transfer or convey to the other party, at the other party's election:

(a) The full market value of the other party's interest on the date of this agreement, plus statutory interest through and including the date of transfer or conveyance; or

(b) The full market value of the other party's interest at the time that party discovers that he or she has an interest in such property, plus statutory interest through and including the date of transfer or conveyance; or

(c) An amount of the omitted property equal to the other party's interest therein, if it is reasonably susceptible to division.

Nothing contained herein shall alter the sole and absolute ownership of pre-marital property to which there has been no community contribution.

[76] IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that except as may be otherwise expressly provided herein, each of the parties is and shall continue to be the sole and absolute owner of: (a) all real and personal property, whether tangible or intangible, and all interests in such property whether legal, beneficial, or equitable, titled separately in his or her name; (b) all rights and privileges in any such property, including, without limitation, those in any individual retirement account, trust, pension or profit-sharing plan or other employee benefit plan; and (c) all tangible or intangible personal property which he or she now or in the immediate past has in fact, used, controlled, or enjoyed as an owner would.

[77] *Doan v. Wilkerson*, 130 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 48, June 26, 2014).

benefit pension which had a present value upon divorce of about a million dollars. The trial court awarded the wife minimal alimony for a few years.

It was not until about 6 years post-decree, during an arrearages hearing on other matters, that the wife's lawyer noticed that husband had a pension that had never been addressed. The wife's lawyer filed a motion requesting partition.

The husband asserted that the pension had been "disclosed" because some discovery responses provided during a time when lawyers had been involved mentioned the word "retirement," although that mention actually was referring to the tiny TSP account, not the million dollar pension.

Unfortunately, the trial court at first got both the facts and the standard confused and found that the mention of the word "retirement" in discovery meant there had been "full and fair disclosure" and that the wife was therefore precluded from partitioning. The husband also claimed that wife had given up all rights to the most valuable asset of the marriage in an off-the-record conversation in chambers of which there was no record, and which the trial court judge denied had ever happened.[78]

Eventually, the district court, applying *Amie* and *Waldman*, reversed its earlier decision, and found that if the pension had not been divided upon divorce, it could be partitioned later.

The husband appealed and the Nevada Supreme Court reversed. The Court reasoned that since there was some reference to "retirement benefits" in the FDFs and pre-trial moving papers, on file, "the pension" had been disclosed – apparently not realizing any better than the district court had originally that there were ***two*** completely different "pensions" involved, and that discussing one of them gave no notice whatsoever of the other one.

Ignoring the substantive mandatory equal division provision of NRS 125.150, the Court instead focused on the general ***procedural*** standard in NRS 125.090 requiring that family law cases "conform to the Nevada Rules of Civil Procedure as nearly as conveniently possible." Finding that generally motions for relief from judgment must be filed within 6 months under NRCP 60(b), the Court saw no difference between modifying a distribution that ***was*** made in a divorce decree,[79] on one hand, and addressing property not mentioned at all, on the other hand.

Disregarding the entire 35-year history of partition cases in California – under identical relevant community property law – the Nevada court found that "The policy in favor of

---

[78] In fairness to the Nevada Supreme Court, the district court record was terrible, and included directly contradictory statements on the record by the trial court judge, giving fodder for any possible result on appeal.

[79] *Kramer v. Kramer*, 96 Nev. 759, 762, 616 P.2d 395, 397 (1980).

finality and certainty underlying NRCP 60(b) applies equally, and some might say especially, to a divorce proceeding."

Turning *Henn* entirely on its head, the Court recharacterized the California case as saying the opposite of its actual holding, deciding that *Henn*'s reach was limited to property "not mentioned in the pleadings as community property" and thus "left unadjudicated."[80] Those verbal gymnastics permitted the Court to conclude that "adjudicated" did not mean ***actually divided*** – which was the actual ***holding*** of both *Henn* and *Wolff* – but rather "disclosed at some point in the litigation."

Relying on the trial court's earlier, confused statement that "the retirement" had been disclosed, the Court found that "the marital asset in this case was disclosed and discussed during the divorce proceedings and the parties had a fair opportunity to litigate its division." The central concept in *Waldman* – that it does not make any difference ***why*** property is omitted from division, but only that the facts show that it was not divided – was ignored.

So while the Court ruled that "nonadjudication of marital assets is an exceptional circumstance justifying equitable relief," it further held that an arguable ***mention*** of an asset during pre-trial proceedings (as opposed to actual ***distribution*** of the asset upon divorce) would constitute such an "adjudication," preventing partition of the omitted asset.

Holding that "independent actions for relief must meet a demanding standard to justify 'departure from rigid adherence to the doctrine of res judicata,'" the Court basically concluded that if the wife got no portion of the single asset constituting more than 90% of the community property, it was her own fault and she would get no assistance from the judiciary.

In reaching that conclusion, the Court totally ignored the Nevada statutory law[81] and resulting community property theory espoused in *Wolff*, *Henn*, and *Amie* that because property acquired during marriage belonged to both parties upon acquisition, it remained their property as tenants in common if not explicitly divided upon divorce. Instead, apparently resurrecting the standard from *Tomlinson* and *Taylor* that it had rejected in *Amie*, the opinion

---

[80] The *Doan* Court's recitation of *Henn*'s holding was not intellectually honest. It is not that our Court did not actually understand that holding, which it recited succinctly and accurately in 1997 in *Gramanz v. Gramanz*, 113 Nev. 1, 930 P.2d 753 (1997): "Under California law, when an item of community property is not awarded in dissolution proceedings, a spouse has a right to a judicial determination of her interest in the property. See Bowman v. Bowman, 171 Cal. App.3d 148, 217 Cal. Rptr. 174, 179 (1985). In the interim, the parties are considered tenants in common of the property. Henn v. Henn, 26 Cal.3d 323, 161 Cal. Rptr. 502, 505, 605 P.2d 10, 13-14 (1980)."

[81] NRS 123.225: The rights of both parties to ***all*** property acquired during the marriage are "present, existing and equal."

concluded that to partition an omitted asset, a dispossessed party would have to prove fraud on the court.[82]

The rule of "if you hide it, you get to keep it," was back, even if denied by the Court in a footnote. On this go-round, the Court effectively gave ***directions*** for how to effect spousal dispossession: "the relevant inquiry is whether the asset was litigated and adjudicated, not merely whether it was written down in the decree."

So for a party to keep the entirety of an asset, the only apparent requirement was that it had to have been mentioned, by someone, to someone, at some point during the divorce litigation. If so, the fact that an asset – even the most valuable asset of the marriage – was "not mentioned in the decree is not an exceptional circumstance justifying equitable relief."

Having mischaracterized the history and meaning of the California case law, the Court stated that "It is up to the Legislature whether to create an action, or permit continuing jurisdiction, for partitioning property that was merely left out of the divorce decree."[83]

The Court dismissed the Amicus brief filed by the Family Law Section warning that any such rule would encourage fraud, finding that the asset was not "hidden" because the word "retirement" existed in the pre-trial paperwork. It entirely ignored the concern stated in that brief that the Court was creating an impossible and unwise malpractice burden on all divorce lawyers, as they would become insurers for discovery and actual division of assets at their malpractice peril if they missed anything.

6. The Public Policy and Practical Ramifications of the *Doan* Decision

The law of partition fits perfectly with the modern divorce law of required disclosure of marital (community) property upon divorce; it is the ***only*** means of giving substance to the requirement of disclosure in the real world, since a right without a remedy is at best an empty gesture. The rules now embodied in NRCP 16.2 were developed over ***years*** of excruciating effort to give meaning to the equal division mandate in NRS 125.150 and produce a family law regime in which courts could and would know what property existed in each marriage ***and*** accurately divide it between the parties.

---

[82] In passing, the *Doan* court found that the 1986 decision in *Tomlinson* had been reversed by *Amie*, but again held, as in *Taylor*, that partition of omitted assets would only be permitted if the party who did not know about those assets could prove, after the fact, fraud on the court by the omission.

[83] As noted above, AB 362 was drafted, and passed, to do exactly that.

Those rules mandate full disclosure and disposition of marital property upon divorce by permitting an award to the short-changed spouse of not just half, but the ***entirety*** of property concealed or omitted from full disclosure and distribution.[84]

Undeserved windfalls – unjust enrichment – result when one party absconds with the property of the other without recourse, and litigation is minimized by policies encouraging disclosure and distribution of all community property at the time of original divorce. The remedy of partition directly supports the legislative and judicial policy of encouraging full disclosure and equal division, by eliminating the reward for duplicitous behavior.[85]

The fact that a commercial case involving the sale of property could be, and was, corrected outside the six-month scope of NRCP 60(b) by way of proceedings alleging "mutual mistake" resulting in "unjust enrichment,"[86] makes it ***more***, not less, reasonable for the courts to entertain such proceedings in family law matters, in which the Nevada Supreme Court has repeatedly ***claimed*** that public policy concerns are "heightened" and courts are urged to resolve cases "on their merits."[87]

Objectively, there is no legitimate policy reason to hold commercial land sale mistakes between strangers to be any easier to correct than divisions of assets between spouses; rather the opposite is called for given the express statutory fiduciary duty of one spouse to the other.[88] Omissions of property upon divorce should therefore have the ***least*** stringent standards for correction by way of later proceedings.

Yet the adherence by the Nevada Supreme Court to pursuit of full disclosure and prevention of unjust enrichment has been tepid and vacillating at best, and has disappeared entirely whenever it considered any form of retirement benefits; in every single such case, the Court has demonstrated inexplicable hostility toward spouses attempting to secure their community property share of such benefits. It is difficult to succinctly describe the nearly-schizophrenic caselaw establishing that pattern:

Wolff (1949): Property not disposed of upon divorce remains available by way of partition, with parties remaining tenants in common of that property.

---

[84] *See* NRCP 16.2(a)(1)(B).

[85] *See Partition of Omitted Assets After Amie, supra*.

[86] *Nevada Industrial Dev. v. Benedetti*, 103 Nev. 360, 741 P.2d 802 (1987).

[87] *Lesley v. Lesley*, 113 Nev. 727, 941 P.2d 451 (1997).

[88] *See* NRS 123.070, setting out the fiduciary duty of spouses in any transaction with one another.

Henn (CA 1980): Retirement benefits not distributed upon divorce may be partitioned at any time.

McCarroll (1980): *Henn* ignored; no partition of retirement benefits omitted from the divorce decree.

Casas (CA 1986): Retirement benefits may be partitioned, following *Henn*; any concerns about the time since divorce can be addressed by limiting retrospective (arrears) awards.

Tomlinson (1987): *Wolff*, *Henn*, and *Casas* ignored; wife gets no share of retirement benefits in husband's name if not explicitly recited in divorce decree.

Taylor (1989): *Wolff*, *Henn*, and *Casas* ignored; "We do not recognize a common law cause of action to partition retirement benefits not distributed as part of the property agreement at the time of divorce."

Amie (1990): *Wolff* and *Henn* embraced and followed; property not adjudicated and disposed of upon divorce remains available for partition, the parties being tenants in common of that property until actual division.

Waldman (1992): *Wolff* and *Henn* embraced and followed; unadjudicated property is subject to partition in an independent action in equity, because property not disposed of in a divorce action is held by the parties as tenants in common; there are no time limits to make such a claim; a wife is not required to prove fraudulent omission, "but simply that the community property at issue was left unadjudicated and was not disposed of in the divorce."

Doan (2014): *Wolff* ignored, *Henn* mis-represented, and *Amie* and *Waldman* eviscerated; "adjudicated" means "mentioned sometime during the litigation"; property "merely omitted" from distribution belongs to whoever has possession of it once six months from the divorce has passed; wife gets no share of the pension.

In the years between *Amie* and *Doan*, partition had become a widely-used mechanism for "post-decree proceedings . . . to remedy inadvertence, oversight, and worse"; with that remedy removed, untold numbers of dispossessed spouses were being left permanently destitute.[89] The aside in *Doan* about the policy in favor of finality applying "some might say especially, to a divorce proceeding" was at best an abandonment of prior declarations of public policy, and at worst a disregard for substantive statutory direction and a denigration of the importance of equity in family law cases.

[89] Within months of the decision, at least half a dozen Nevada attorneys who were litigating such cases contacted me asking for some assistance in finding a way to avoid their clients being left in utter poverty in old age.

The nearly visceral hostility of the Nevada Supreme Court to spousal interests in pension benefits did not stop with *Doan*. The Court made the situation even worse for spouses a few months later in *Henson*.[90] There, based upon recitation of a false "fact" about PERS pension divisions, the Court found that the "pension" division provision in the decree did not include a survivor beneficiary interest since "neither the employee nor the nonemployee spouse automatically receives a survivor beneficiary interest."[91]

That recitation is just not true because the employee in any system like PERS (or the military) has an ***automatic*** survivorship interest in the non-employee spouse's benefits. Survivorship interests are ***necessarily*** a part of ***any*** pension division, especially for a system like PERS. But on the basis of the false "fact" it recited, *Henson* held that only a lifetime series of payments was involved when a decree recites that "the pension" is divided, so that a divorce decree that does not explicitly recite an award of survivorship benefits awards only a lifetime interest, thus dispossessing the spouse of a valuable community property asset by silence in the divorce decree.

Henson did nearly the opposite of what it ***said*** it was doing, essentially redefining the spousal share of a PERS pension from community property into a life estate based on the employee's life. If the decree of divorce is silent as to survivor benefits, those benefits are lost to the spouse, dispossessing the spouse if the employee pre-deceases her.

Henson was a logical outgrowth of *Doan*, and set up a system in which ***every*** pension division is grossly ***un***equal (in favor of the employee) unless divorce counsel is sufficiently skilled and knowledgeable to ensure that the decree formally recites the distribution of every part of the property being divided (specifically, the survivorship component of the retirement benefits).[92]

As many courts have observed, ensuring that ***both*** spouses get a survivorship interest securing their respective shares of a pension being divided between them simply provides

---

[90] *Henson v. Henson,* 130 Nev. ___, 334 P.3d 933 (Adv. Opn. No. 79, Oct. 2, 2014).

[91] *Henson* slip op. at 9.

[92] And this presumes that there ***are*** any such counsel. In the majority of family law cases, at least one party is unrepresented. Most such parties have no idea that they should recite retirement and pension interests in their decrees at all, and virtually none of those that do manage it are sophisticated enough to specify both lifetime and survivorship components of pension plans. The great majority of divorce decrees we see in which parties – with or without counsel – manage to say ***anything*** about pension interests usually have a line saying "the wife shall get her time-rule portion of the retirement benefits" or some such general statement of intent.

the spouse a right already enjoyed by the employee: "the right to receive her share of the marital property awarded to her."[93]

It is poor public policy for the Nevada Supreme Court to not perceive and declare the survivorship component of retirement benefits as being included in the ***definition*** of "property" that must be divided upon divorce under NRS 125.150. The Court's failure to do so directly undercut the holdings in *Wolff* and *Blanco*, and is certain to cause both unjust enrichment and wrongful deprivation in violation of the mandate of NRS 125.150 – all without ***any*** valid purpose being served.[94]

For all of those reasons, *Doan* was quite possibly the worst family law decision handed down in the past 10 years. It made a mockery of the disclosure requirements in NRCP 16.2, and encouraged the gamesmanship of mentioning an asset early on in a case and then "forgetting" to mention it in the divorce decree. Along the way, it created a host of ills:

> It cited *Waldman* while completely reversing its sound holding that in a partition suit the injured party is not required to prove fraudulent omission, "but simply that the community property at issue was left unadjudicated and was not disposed of in the divorce."
>
> It virtually assured a massive increase in the number of cases in which there would be both unjust enrichment and unjust deprivation.
>
> It contradicted the holdings of *Lofgren* and *Blanco*[95] requiring ***actual equal division*** of assets under NRS 125.150, without even mentioning that statutory requirement.
>
> It created enormous malpractice exposure for every divorce attorney, because even if an asset was mentioned to some predecessor, or even to the client, it became the responsibility of counsel to figure out that the asset existed, and to actually divide it, whether the attorney knew about it or not. If omitted from actual distribution upon divorce, the client could not get any recovery of the property afterward, leaving their only recourse to sue the attorney after the fact, while the other party got to keep the entirety of the property.

---

[93] *In re Marriage of Payne*, 897 P.2d 888, 889 (Colo. App. 1995). *See* AA 298-303 & fn. 144 for a detailed explanation of the case law and public policy considerations relating to providing a survivorship interest with ***every*** allocation to a spouse of an interest in a pension.

[94] Unfortunately, the decisional law of Nevada is widely perceived in other community property states as seeking to find rationalizations for unequal and inequitable distributions of community property despite the Nevada statutory mandate of presumptive equal division. *See Everything You Wanted to Know About Retirement Benefits But Were Afraid to Ask* (Council of Community Property States & State Bar of Idaho, Coeur d'Alene, Idaho, 2003 annual Symposium).

[95] *Blanco v. Blanco*, 129 Nev. ___, 311 P.3d 1170 (Adv. Opn. No. 77, Oct. 31, 2013).

The Nevada Supreme Court sees extremely few family law appeals because the people in those cases often do not have the funds to retain counsel even at the trial court stage; it is an extremely rare case in which the parties can fund an appeal regardless of the injustice they suffer or the harm inflicted on them. In a stroke, the Court's decision in *Doan* unjustly injured more already poor people than all the poor people who have been benefited by the Court's much-heralded "One Campaign" seeking to provide *pro bono* assistance.

It is difficult to overstate the damaging repercussions of the *Doan* decision, if left uncorrected. As a practical matter, *Doan* made it virtually impossible to fix omissions of community property when they occurred, encouraging fraud and non-disclosure, harming the innocent, permitting unjust enrichment, making Nevada a singular outlier among the community property states as a haven for divorce fraud by omission, undermining public policy, and setting family law in Nevada back by decades.

E. The Nevada Partition Statute and What Remains for Amendment

The Nevada partition statute puts the burden of proof back where it belongs – on the party receiving the windfall in property distribution in violation of the equal-division mandate of NRS 125.150.

The Nevada enactment was informed by the litigation history of partition law elsewhere. As in Nevada's holding in *Wolff*, most states (including California) originally required partition cases to be brought by way of independent action rather than by motion in the underlying divorce case. As a practical matter, that requirement led to problems, jurisdictionally and otherwise, due to people moving out of state after the divorce and before the partition action.

This led to statutory changes specifically permitting ***continuing*** jurisdiction by the divorce court to effect partition by motion, which solves those problems. The Nevada partition statute adopted the modern trend in its original enactment, permitting partition by motion in the original divorce case.

As noted above, the enactment was marred by an amendment from a committee inserting two limitations periods into the statute that do not belong there as a matter of community property theory, and were not in the version of the legislation proposed by the Family Law Section of the Bar. ***No other community property state*** has any such limitations period in its statutory enactments, and they should be eliminated, as was intended but not accomplished during the legislative session.

The case law makes it clear that courts are quite able to protect against unfairness in application of the remedy of partition by way of equitable doctrines. One example of the ability of trial courts to handle the matter is in the Alaska statutes; Alaska Stat. 25.24.160(a)(4) provides simply: "In a judgment in an action for divorce . . . or any time after

judgment, the court may provide . . . for the division between the parties of their property, including retirement benefits . . . ."[96]

That resolution is just what happened in California in *Casas*; the experience elsewhere shows that courts are very good at being fair to both sides in such cases, once partition of omitted assets is made available by statute.

It is theoretically awkward – perhaps even a bit contradictory – to speak of a "statute of limitations" (as opposed to equitable limitations on collection) for partition cases. Both spouses gained a "present, existing and equal" right to the property upon its acquisition.

A decree silent as to parties' rights just does not affect either of them, and the law of the states in which parties remain tenants in common of property omitted from divorce decrees is that there ***is no*** statute of limitations to make the claim to that property.[97] The Nevada 3-year statute of limitations should be eliminated because a partition suit, by definition, only provides a party with a procedural mechanism to obtain possession of his or her own property.

Considerable credit for taking the time and making the effort to correct the damage done by the *Doan* decision by helping pass AB 362 belongs to people who took the time and made the effort to improve the law with no concern for any personal benefit for themselves.[98]

There are a lot of loose ends still remaining. As detailed above, one of these is that the Nevada Supreme Court exacerbated the harm of *Doan* by later holding that survivorship benefits, if not specifically provided for in a *Decree*, are lost to the spouse – while simultaneously being automatically provided to the employee – in contravention of the equal distribution requirement of NRS 125.150.[99]

It is possible that some of these problems may be resolved by cases now pending appellate resolution.

---

[96] *See Schaub v. Schaub*, ___ P.3d ___ (S-14502, No. 6803, Alaska, August 2, 2013) (rejecting laches defense to prospective payments from when wife asserted her claim, while upholding trial court rejection of claim to benefits received for the preceding 20 years).

[97] "A cotenant's action for partition has no limitations period." *Adams v. Hopkins*, 77 P. 712 (CA 1904).

[98] Notably Assemblywoman Heidi Swank and attorneys Kim Surratt, Tom Standish, Joseph Karacsonyi, Shann Winesett, Peter Jaquette, and Anthony Wright; there were several others, and no slight is intended by omission of any names here.

[99] *Henson v. Henson,* 130 Nev. ___, 334 P.3d 933 (Adv. Opn. No. 79, Oct. 2, 2014).

III. ELEMENTS OF A PARTITION MOTION UNDER CURRENT LAW

A. Prosecuting a Partition Motion

The partition statute was made extremely simple and straightforward by design. A party filing such a motion must (at least for now) identify the property that was not actually distributed during the divorce and probably should assert that the motion is being filed within 3 years of discovery of the facts constituting the fraud or mistake causing the non-distribution of that property.

B. Model Form Motion

The attached model motion for partition should suffice as a framework for motions under the new statute.

C. Defending Against a Partition Motion

A party seeking to defend against a partition motion has several possible tacks.

First, the relevant statute of limitations could be asserted, if relevant, either generally or as to installment payments under a defined benefit plan already in pay status.

Next, if the property in question ***was*** actually considered in the distribution of assets and debts during divorce, and it appears in the *Decree*, that fact can be asserted.

If the property was considered but not specifically recited, then the burden is on the defending party to show how the distribution was actually equal including the retention of the unrecited asset, or was knowingly unequal with some justification for the unequal distribution. If a "compelling reason" for an unequal distribution is made out, then the unequal distribution of property can be left intact, upon written findings.

There are also equitable defenses. The lead case of *Henn* declared that there was no danger of injustice by partition because the husband "may seek to limit ***retrospective*** enforcement ... on an equitable estoppel theory by demonstrating that the wife received additional support payments in lieu of a share in the pension," and that any problem could be "adequately addressed under the defense of laches."

What has evolved in the case law is that all equitable defenses exist to a claim of partition; it is this that provides the safety valve preventing possible abuse or hardship.

Equitable defenses work very well in practice. In *Casas v. Thompson* in California in 1986, the non-employee spouse waited until 14 years after the divorce to seek partition, so the California court limited the spouse's share of the pension to payments received by the employee after she made her claim for her community property share of the pension. In the 35-year history of partition cases in California, the case law indicates that courts have no problem being fair to both sides.

IV. CONCLUSIONS

It is preferable to deal with pension benefits correctly during the divorce proceedings itself. The chances of uncertain and inequitable results are greatly magnified when the assets are omitted from the original disposition by the court and left to the law of partition of omitted assets.

If, however, valuable community property ***is*** omitted from actual distribution during the divorce, Nevada law has now been conformed (mostly) to that of the other community property states, in that partition of omitted assets is now provided for by statute, and can be accomplished by motion in the underlying divorce case.

While the statutory enactment requires some amendment to eliminate the 3-year statute of limitations that does not belong in a partition statute, the basic law has been returned to a focus on the ***actual distribution*** of marital assets. If valuable marital property is not equally divided upon divorce – or unequally divided by way of a decree setting forth findings supporting that unequal division – the shortchanged spouse can return to the divorce court for distribution of the omitted asset.

The Nevada Supreme Court should honor that policy by reversing the *Henson* divestment-of-survivorship-by silence rule that exacerbated the damage done by the *Doan* decision, either on the basis of legitimate public policy regarding the parties being tenants in common of any undistributed property interests accrued during the marriage, or at least in light of the partition statute.

In pension cases, "discovery by the aggrieved party of the facts constituting the fraud or mistake" typically occurs only after the retirement of the employee spouse; the Nevada law of partition should save a multitude of silently dispossessed spouses from being forced to live their twilight years in undeserved and unnecessary privation.

TABLE OF EXHIBITS

1. Assembly Bill No. 362.
2. Sample Motion for Partition of Omitted Asset.