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"*McNabney*: A Fundamental Philosophical Difference in the Logomachy of Divorce"

The following articles fairly summarize the division of opinion arising out of the *McNabney* decision.

Cassandra Campbell, Esq., supports the Majority opinion by reference to other equitable distribution jurisdictions, distinguishing the Arizona *Hatch* decision and discussing presumptions and burden or proof.

Leslie Shaw, Esq., disagrees with the Majority opinion by amalgamating NRS 123.225 to NRS 125.150, reviewing other conflicting Nevada opinions and identifying certain concerns in the application of the Majority opinion.

Undoubtedly, the Legislature will be summoned to address this issue. The conflict of opinions will not easily be abated. Both extremes have their supporters. There are those who are firmly convinced that no circumstance can justify a division of the community other than equally. On the other hand, there are those who recognize that each case must be decided on its own merits and that the Court must have the discretion to adjudicate the assets in an equitable manner, accounting for those inherent differences.

One thing is certain, the debate over how property should be divided will last longer than a handful of sundowns.

Ed.

Supporting the Majority Opinion

By: Cassandra Campbell, Esq. Law Offices of Ronald J. Logar, Reno

Since the decision of *McNabney v. McNabney* ,[1] entered on November 27, 1989, considerable debate has centered around who is right, the Majority or the Minority court. This article will focus upon these considerations and the legal principles which required the Majority Court to conclude as it did and why the reasons articulated by the Minority Court are not well founded.

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Supporting the Minority Opinion

By: Leslie Shaw, Esq., Feldman, Shaw and DeVore, Zephyr Cove, Nevada

So that there is no mistaking the obvious, the plain language of NRS 125.150 allows the courts of this state the discretion to make a "just and equitable" disposition of the community property of divorcing spouses. One could not have argued otherwise either before or after November 27, 1989, the date upon which our Supreme Court, in its majority decision, claimed to resolve more

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What distinguishes the two opinions is not that each applys different interpretations of existing case law and statutory provisions, but that each side philosophically differs as to how property should be divided in a marital dissolution proceeding. The divergence between the Majority and Minority opinions is as follows: Majority: the judicial creation of a presumption that equal is equitable is inherently inconsistent with N.R.S. 125.150; Minority: a husband and wife have an equal and existing interest in community property and thus a presumption that equal is equitable is mandated by N.R.S. 125.150. A secondary split arises over the question of whether or not specific findings were made by the lower court for its reasons in not granting an equal division.

The Majority repeatedly, but softly, states that to impose or construe a presumption that equal is equitable is to make a major, substantive change in Nevada's community property law. [2] The Minority in the *McNabney* decision proffers that Nevada has, or should have, a judicially created presumption that "equal" division of marital property upon divorce is "just and equitable".

The threshold question essentially asked and addressed by the Minority, given N.R.S. 123.225, is how can there be anything other than a presumption of a fifty-fifty distribution of marital assets?

N.R.S. 123.225 provides that a husband and wife have a present, existing and equal interest in community property. Taken to its logical extreme, if a husband and wife have an existing equal interest in property, how then can a court begin its analysis upon divorce by ignoring such an equal interest? The Minority cites the Arizona case of *Hatch v. Hatch* [3] suggesting support for its reasoning vis a vis N.R.S. 123.225. Since the majority opinion placed considerable reliance upon *Hatch*, an examination of that case and Arizona community property law generally is necessary. Prior to an analysis of Hatch, a review of the distribution of marital property upon divorce across the nation may serve to illuminate the issue and explain the divergence found within the Nevada Supreme Court in *McNabney*.

There are three systems for division of marital property among the states: community property, equitable distribution and common law or "title" states. There are nine (9) community property jurisdictions: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas and Washington. Mississippi, Virginia and West Virginia make up the common law or "title" states. The remainder are equitable distribution jurisdictions. This discussion will focus on the community property and equitable distribution systems.

Within community property states, three have statutory mandates of equal distribution of marital property upon divorce: California [4], Louisiana [5] and New Mexico [6]. The remaining community property states, are equitable distribution states.

A number of equitable distribution jurisdictions have clear and certain statutory language providing a **presumption** favoring equal distribution of marital property. A sampling of this statutory language highlights the differences from that of Nevada's "just and equitable" language:

Idaho Code, Section 32-712 provides, "[u]nless there are compelling reasons otherwise, there shall be a substantially equal division in value. . . . "

Wis.State.Ann., Section 767.255 provides, "the court shall presume that all other property is to be divided equally between the parties, but may alter this distribution . . . after considering [the enumerated factors]."

Ark.Stat.Ann., Section 34-1214(A) (L) provides, "all marital property shall be distributed one-half [1/2] to each party unless the court finds such a division to be inequitable. . ."

N.C. Gen.Stats., Section 50-20-(C) provides, "there shall be an equal division . . . of marital property unless the court determines that an equal division is not equitable. . ."

The clear majority of equitable distribution states have language similar to Nevada's, "as appears just and equitable," with an enumeration of factors courts must consider in a determination of equitable division. [7] They provide no statutory or case law **presumption** favoring an equal distribution and in fact have repeatedly held that equitable does not necessarily mean equal [8].

The decision of the Arizona Court in *Hatch* presents the same reasoning and analysis as that presented by the Minority in *McNabney*. However, given the difference between Arizona's former distribution statute, which is the subject of *Hatch*, and its present one, this reliance is misplaced.

Arizona is a community property, equitable distribution state. [9] Arizona's present law of distribution provides that its courts "shall also divide the community, joint tenancy and other property held in common equitably, though not necessarily in kind, without regard to marital misconduct." [10]

The decision of the Arizona Court in *Hatch* presents the same reasoning and analysis as that presented by the Minority in *McNabney*. However, given the difference between Arizona's former distribution statute and its present one, this reliance is misplaced.

Until *Hatch*, Arizona courts repeatedly found no requirement that community property be divided equally between spouses. [11] It is fairly clear that the Arizona Supreme Court's language in *Hatch* is not interpreted by other Arizona courts as providing a presumption of equal division. [12] This is due to the fact that the *Hatch* court was deciding a divorce granted in 1968. The Arizona legislature specifically amended their distribution statute and deleted the language which the Arizona Supreme Court held to provide a presumption that equal is equitable.

Arizona case law provides, as does Nevada's N.R.S. 123.225, that the interest of a husband and wife in community property is equal, existing and present. This fact presented the threshold question to the *Hatch* Court, as it does to the Minority in *McNabney*. In conjunction with this Arizona case law, the *Hatch* court focused on the Arizona distribution statute as it read in 1968:

> On entering a judgment of divorce the court shall order such division of the property of the parties as to the court seems just and right. . . **according to the rights of each of the parties.** . .without requiring either party to divest himself or herself of the title to separate property."(emphasis added)

The Court in *Hatch* held that Arizona's statutory scheme presented a presumption favoring equal division of marital property

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upon divorce. It is precisely this additional statutory provision which led the Arizona Supreme Court to this conclusion. The court reasoned that the emphasized language, **according to the rights of each of the parties**, "must have some meaning" and "can only mean the rights which the parties had at the time the divorce was sought," namely a vested equal interest in community property. [13]

The *McNabney* Minority's adoption of the *Hatch* court's analysis fails for two reasons. First, N.R.S. 123.225 operates separate and apart from, and is unrelated to N.R.S. 125.150. Secondly, there is a distinction between property held by a spouse *during* marriage versus property distributed to marriage partners *upon dissolution*.

The Statutory Scheme of N.R.S. 123.225 and 125.150

N.R.S. 123.225, approved March 26, 1959, merely rectified an inequity present in many community property states in the past. Within most community property states, *during marriage*, the Husband was deemed to hold legal title to all or some types of property and was given exclusive and sole management and control over all property. The wife had a mere expectancy which was dependent upon her surviving her husband. N.R.S. 123.225 provides, in pertinent part,:

> 1. The respective interest of the husband and wife in community property *during continuance of the marriage relation* are present, existing and equal interests, subject to the provisions of NRS 123.230 [Control of community property.] (emphasis added).

Although official legislative history, prior to the 1960's, is not maintained in Nevada, the available information indicates that Nevada adopted, in toto, California's identically worded provision found in California Civil Code Section 5105 (formerly section 161(a) of the California Civil Code, adopted in 1927). [14] It is common practice, when a statute is adopted from another state, to incorporate it in its entirety, both as to legislative history and judicial construction, unless the legislature manifests a contrary intent. [15]

A review of the history of California's identically worded statute reveals that this law was specifically passed to rectify the inequity at the time of the "mere dependent expectancy" of the wife. [16] It is of particular note, that the passage of this California law in 1927 occurred at a time when California's disposition code, now Civil Code section 4800 (formerly section 140), required an *equal* distribution of property. This equal division statute had been the law in California since its adoption in 1872. Therefore, there can be no argument that the purpose of CC 5105 was to ensure equal distribution upon divorce.

A careful review of the few Nevada and federal cases citing to N.R.S. 123.225, reveal that the statute is applied for purposes of determining rights as between husband and wife, vis a vis third parties during the marriage. [17] When the statute is discussed within the divorce context, the purpose is to first determine what is the community's interest, as opposed to what the disposition, distribution or division should be upon the dissolution of the marriage, pursuant to N.R.S. 125.150.

The state of the title or interest in property, during a marriage, should not act as a bar to making an equitable, as opposed to an equal division of property upon divorce. Courts, across the country, see themselves as empowered to allocate marital assets between the spouses, upon divorce, regardless of the actual ownership. [18] For example, "title" states or common law states have, in the past the (10) years, consistently redistributed property upon divorce without regard to which spouse holds title to property. They do so on the basis of "equity." [19] Such redistribution has withstood constitutional challenge based upon the state's police powers, encompassing a broad control over marriage and its requirements, property rights of the marriage partners and an interest in regulating these for the general good of society. [20]

Presumption that Equal is Equitable

NRS 125.150 provides, ". . .

> "1. In granting a divorce, the court, . . .
>
> (b) Shall make such disposition of:
>
> (1) The community property of the parties; and
>
> (2) Any property placed in joint tenancy by the parties on or after July 1, 1979, as appears just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by the divorce, and to the party through whom the property was acquired, and to the burdens, if any, imposed upon it, for the benefit of the children."

The Minority posits that a judicially created presumption, that equal distribution is a "just and equitable" distribution, exists. An imperative question immediately comes to mind. Can the court impose such a presumption upon this statute without creating an internal inconsistency?

It is the fact that the language of the statute was intended by the legislation to have meaning and significance, that led the Majority to quietly recognize that, although the courts have the authority to create a judicial presumption, to impose such a presumption upon N.R.S. 125.150, would be inconsistent with the intention and plain language of the statute and, given Nevada's statutory scheme for presumptions, would substantially change our law. [21] This substantive change should only be made by the Legislature, not the courts.

Presumptions

A presumption is a rule of law, by which the existence of fact B (the presumed fact) will be assumed, when fact A (the basic fact), is established. For example, in the context of a divorce, assume the only community asset is $50,000.00 cash. Once it is established that $25,000.00 cash to each party is an equal division of the asset (Basic Fact A) the court presumes this distribution to be "just and equitable" (fact B). The issue involves a discussion of the effect of presumptions, generally, and specifically, within the context of Nevada's statutory scheme for presumptions, N.R.S. 47.180, et seq.

Presumptions act to shift the burden of proof assigned to one party or the other. There are two components to the "burden of proof": the burden of going forward and the burden of persuasion (the latter often being referred to as the ultimate burden of proof). Generally, there are considered to be two theories as to the shifting effect of

presumptions, the Thayer method and the Morgan method.

The Thayer method, known also as the "bursting bubble" or the "evaporating" presumption, acts only to shift the initial burden of going forward. The presence of any contrary evidence of the basic fact, A, causes the bubble to burst or the presumption to evaporate, resulting in no fact B and no change in the burden of persuasion.

However, the Morgan method acts to shift both the burden of going forward *and* the burden of persuasion. the effect of this shift of both burdens can be that, regardless of evidence in support of or contrary to the basic fact, A, the opponent of the presumption must then show that the non-existence of the presumed fact, B, is more probable than not. The critical ramifications of the Morgan method is that the proponent of the presumption (or the party upon whose behalf the presumption benefits) need not necessarily introduce any evidence on the issue of the presumed fact. This person may sit back and require the opponent to show that it is more probably than not that the presumed fact, B, does not exist.

Nevada has adopted the Morgan method as to the effect of presumptions. [22]

The effect of Nevada courts judicially creating a presumption that equal is "just and equitable" has far reaching effects not necessarily contemplated by the Legislature when N.R.S. 125.150 was adopted. Without this presumption, a Husband and Wife each proceed in court, presenting evidence proffering a particular distribution of assets. Each side bears the burden of demonstrating by a preponderance of evidence that their particular suggested distribution is "just and equitable". Included in this demonstration is evidence addressing each of the factors delineated in the statute, to which the court must have regard in dividing property "as appears just and equitable".

Given that Nevada has adopted the Morgan theory of presumptions, it is inconceivable that the Nevada courts would adopt and impose such a substantive change in the law, as suggested by the Minority in *McNabney*, essentially, sub-silentio. One would expect a court creating such a presumption to discuss all the logistics, ramifications and effect upon the substantive law involved in such a creation. At minimum, one would expect more discussion than, "[e]qual distribution of the community property **appears** to be the rule in most cases." [23] This is precisely what the Majority of the Supreme Court meant by its repeated references to not being in a position to make a major, substantive change in Nevada's distribution scheme.

Moreover, it is worth noting that Arizona, rather than adopting the Morgan method, follows the Thayer method as to the effect of presumptions. [24] Consequently, the effect of its presumption that "equal" is "equitable," promulgated in *Hatch*, has far less serious consequences and results in a far less radical change in the law as to the assigned burden of proof.

Specific Findings Required

As the Majority and Minority of *McNabney* recognize, Nevada law, pursuant to *Stojanovich*, and Rule 52, N.R.C.P., requires that the court make findings, or give clearly expressed reasons why a particular division or distribution is made at divorce. The Minority opinion overlooks the fact that the appellate courts may liberally read a lower court's decision to determine whether the required findings exist. [25] This is precisely what the Majority did in *McNabney*. It examined three of the factors, applicable in this case, set forth in N.R.S. 125.150: "the respective merits of the parties" ,"the condition in which they will be left by the divorce" and "the party through whom the property was acquired." The Supreme Court found that the evidence presented to the lower court demonstrating these factors was suficient to justify its distribution as "just and equitable."[26]

There can be no question but that lower courts should be required to make specific findings of fact concerning the distribution of a marital estate. The point of departure between the Majority and the Minority is that the latter would have courts make such specific findings with regard to why a distribution is not "equal". The reality, and the trend across the nation, is that specific findings should be made specifying the value of the marital estate and the reasons for a particular distribution so that a reviewing court can make a reasoned determination as to whether or not there has been an abuse of discretion, given any particularly required statutory distribution. [27]

Perhaps the answer the Minority is searching for, rather than making a major change in Nevada's substantive law, is some expansion of the guidelines to be used in determining the distribution of marital property upon divorce. Such expansion may act to provide the necessary information to attorneys which might ensure more uniformity of result which the Minority appears to seek. Many of these factors which courts consider include: (1) respective age, background and earning ability of the parties; (2) duration of the marriage; (3) the standard of living of the parties during the marriage; (4) what money or property each brought into the marriage; (5) the present income of the parties; (6) the property acquired during the marriage by either or both parties; (7) the source of acquisition; (8) the current value and income producing capacity of the property; (9) the debts and liabilities of the parties to the marriage; (10) the present mental and physical health of the parties; (11) the probability of continuing present employment at present earnings or better in the future; (12) effect of distribution of assets on the ability to pay alimony and support; (13) gifts from one spouse to the other during the marriage; (14) contributions of each spouse to the acquisition of the marital property, including contribution of a spouse as homemaker; (15) value of the property set apart to each spouse; and, (16) economic circumstances of each spouse when the division of property is to become effective including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of any children. [28]

The Minority and some members of the Nevada divorce bar are aghast at what they perceive as a turning back of the clock to the days when inordinate amounts of time and money were consumed in trying to show which spouse was guilty of greater fault, *McNabney, id.*, at p. 5, or the likelihood that all divorce litigants will now suffer the further indignities of litigation at a time of tremendous emotional crisis and upheaval. Critics cry that a referral to judicial discretion is, in a sense, a referral to litigation, and that judicial discretion is always, to some extent, an exercise in uncertainty. However, it must be remembered, as one Wis-

consin court, opined:

> "The formula for division derives from the facts of the individual case. If it is argued that this approach gives great leeway and also places a heavy responsibility on trial courts in divorce cases, there is no gainsaying that fact. However, both flexibility and responsiblity are called for by the endless variety of human situations that come to court in family cases. No two are exactly alike.[29]

Conclusion

Given the plain language of Nevada's distribution statute, the Majority in *McNabney* came to the only conclusion it could. Responsibility for any substantive change to our equitable distribution scheme belongs with the Legislature.

It seems fairly clear that the verbal feud between the Majority and the Minority has as its basis a fundamental difference in philosophy. In short, the Majority believes in an equitable division of marital property upon divorce. The Minority, on the other hand, believes that property should be divided equally. However, Nevada's statutes, their history of origin and case law simply do not support the reading given by the Minority.

1. *McNabney v. McNabney*, 105 Adv.Op. 123 (1989).
2. *McNabney, id.*, at pp. 4, 6 and 7.
3. *Hatch v. Hatch*, 547 P. 2d 1044 (Ariz. 1976).
4. Cal.Civ.Code, Section 4800.
5. La.Civ.Code, tit V, ch3, art 159.
6. N.M. Stat.Ann., Section 40-3-8(B) through 40-4-20.
7. *See, White v. White*, 308 S.E.2d 68 (N.C.App. 1983) [overview of distribution among equitable distribution jurisdictions].
8. *E.g., In re Marriage of Fenimore*, 782 P.2d 872,874 (Colo.App. 1989) [no requirement of an equal division of marital property], *In re Marriage of Garner*, 781 P.2d 1125,1127 (Mont. 1989) [M.C.A., Section 40-4-202, equitable distribution need not be equal]., *In re Marriage of Tower*, 780 P.2d 863 (Wash.App. 1989) [R.C.W., Section 26.09.080, key to equitable distribution is not mathematical preciseness, but fairness]. *Rothman v. Rothman*, 320 A.2d 496,503 (N.J. 1974) [given the language of "fair and equitable", there is no statutory basis for imposing a presumption of assigned proportion], and I*n re Marriage of Fong*, 589 P.2d 1330,1335 (Ariz.App. 1979) [a presumption favoring absolutely equal division of community property upon divorce flies in the face of statutory language requiring equitable division].
9. D. Freed and H. Foster, "Divorce in the Fifty States: An Overview as of August 1, 1981", 7 *Family Law Reporter* 4049, 4056-4057 (1981).
10. Arizona Revised Statute, Section 25-318(A)).
11. *E.g., Hanner v. Hanner*, 388 P.2d 239 (1964), and Nace v. Nace, 448 P.2d 76 (1968)).
12. *Neely v. Neely*, 563 P.2d 302 (Ariz. App. 1977) and *In re: Marriage of Fong*, id., 589 P.2d at 1335 (Ariz. App. 1979).
13. *Hatch*, id., 547 P.2d at p. 1047.
14. Legislative Counsel for Nevada advised that some materials concerning legislation remain confidential, but Counsel may divulge whether or not another state's law is the source of Nevada law. Such is the case with N.R.S. 123.225.
15. E.g., *In re Marriage of McMahon*, 403 N.E.2d 730,733 (1980) [Illinois adopted the Marriage and Dissolution of Marriage Act and its attendant "abuse of discretion" standard of review.]
16. 32 Cal.Jur.3d, Family Law, Section 396, at pp. 439-441.
17. *E.g., Sparks Nugget, Inc. v. Commissioner*, 458 F.2d 631 (9th Cir. 1972) and *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978).
18. *E.g., Painter v. Painter*, 320 A.2d 484,493 (N.J. 1974).
19. Scott Greene, "Comparison Of The Property Aspects Of The Community Property And Common-law Marital Property Systems And Their Relative Compatibility With The Current View Of The Marriage Relationship And The Rights Of Women". 13 *Creighton Law Review*, 71, 99 (1979).
20. *Bacchetta v. Bacchetta*, 445 A.2d 1194,1197 (Penn. 1982).
21. *See, Privette v. Faulkner*, 92 Nev. 353,357, 550 P.2d 404 (1976) [creating an owner-driver presumption in the State of Nevada].
22. N.R.S. 47.180(1), 47.200, *Privette v. Faulkner*, at p. 359, and *Weinstein's Evidence, United States Rules*, Vol. 1, Section 301[05] at pp.301-70-301-73.
23. *Weeks v. Weeks*, 75 Nev. 411, 345 P.2d 228 (1959), (emphasis added).
24. *Weinstein's Evidence, United States Rules*, Vol. 1, Section 301[05] at p. 301-50.
25. Vol. 9, Wright and Miller, *Federal Practice and Procedure*, Section 2580, p. 719.
26. The Minority posits that "[t]he factors listed by the Majority are not persuasive in supporting a deviation from the general rule." This begs the question concerning the existence of a "general rule" that equal is equitable.
27. *E.g., Rothman v. Rothman*, 320 A.2d 496 (N.J. 1974).
28. *Painter, id.*, 320 A.2d at p. 484.
29. *Lacey v. Lacey*, 173 N.W.2d 142 (Wis. 1970).

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than thirty years of "confusion and contradiction" by pronouncing Nevada's rule of community property to be one of equitable, not equal, division.

The legislature had pronounced the "just and equitable" rule, and going back to the Supreme Court decision of *Weeks v. Weeks*[1] which is as far as the majority decision in *McNabney* [2] goes, the courts of our state went about defining and clarifying what constituted a "just and equitable" division. That evolution established that, barring circumstances to the contrary, a "just and equitable" division was one in which each spouse received an equal, or close to equal, share of the community estate.

Initially, it is important to consider how decisional law has refined the concept of a "just and equitable" division of community property, and what other statutory provisions have been of assistance in doing so. An analysis of those decisions suggests that the majority opinion in *McNabney* represents an abrupt departure from, rather than explanation of, the existing decisional law.

The majority in *McNabney* refers to the *Weeks* holding that "equal distribution of the community property appears to be the rule in most cases" as unfortunate language.[3] The language may only be unfortunate in that it is inconsistent with the direction that the *McNabney* court chose to pursue. The *Weeks* language is dismissed by the *McNabney* court as nothing more than a "statistical estimate," merely a recognition of what was most commonly occurring in the trial courts at that time. Why is there reason to believe that the Supreme Court in *Weeks* meant anything more or less than what it said? Is it reasonable to believe that the Weeks court felt that equal distribution was "just and equitable" in most cases, without regard to what was being done, as a statistical likelihood, in the trial courts of the state. That was the understanding of the opinions that followed *Weeks*. Such was the conclusion reached by Ronald Logar in that language set forth by the *McNabney* Court relative to the judicially created presumption that equal is equitable in most cases.[4] If that were not the case, one would be compelled to look for the statistical data that not only supported the *Weeks* court determination of statistical

probabilities, but those which also supported the reaffirmation of that concept in *Schick v. Schick*.[5] More likely, twenty-two years after *Weeks*, the Supreme Court in *Schick* was still of the mind that equal division was synonymous with just and equitable division except where circumstances compelled otherwise.

It appears more than mere coincidence that at the time *Weeks* was decided, the Nevada legislature also enacted the provisions of NRS 123.225. Subparagraph (1) of that section, unchanged since its 1959 enactment, provides as follows:

"The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing in equal interests, subject to the provisions of NRS 123.230."

It is difficult to reconcile the provisions of NRS 123.225 set forth above, and our Supreme Court's analysis of community property division concepts under NRS 125.150 as analyzed in *McNabney*. One approach may be that while spouses have equal interests in community property, they are not entitled to be awarded an equal interest should they terminate their marriage. Such does not appear likely. This is not to say that the enactment of NRS 123.225 was necessarily a reaction to the *Weeks* decision. Yet it establishes a time line, spanning more than thirty years, which can be analyzed to show that equal division was synonymous with just and equitable in most circumstances.

In the late 1970's, the Supreme Court rendered its opinion in *Cord v. Neuhoff*[6], and recognized a court's obligation to give "proper recognition" to the present, existing and equal interest held by a spouse in community property. In doing so, with a citation to NRS 123.225, the court indicated that not only did spouses have an equal interest in community property, but that equal interest had to be recognized by a court at the time of property division in divorce. The Court's conclusion that a spouse's equal interest had to be given proper recognition is hard to reconcile with the *McNabney* holding that a trial court is now empowered to make a disproportionate, unequal distribution of the community estate as it sees just.

With all due respect to the Court, if confusion exists as to the standard for community property distribution, one need not go back thirty years to find its source. Just some ninety days before the rendition of the *McNabney* opinion, that same court rendered its decision in *Gemma v. Gemma*,[7] in which the "time rule" method of dividing community property interests in pensions was determined to be the preferred method of pension division in this state. In coming to such a conclusion, a unanimous court held that the "time rule" method "divides the community property interest in the pension equally in accordance with NRS 123.225." It is difficult to reconcile the August 23, 1989, dictate of the Supreme Court to make an equal division of pension benefits with the November 27, 1989, ruling in *McNabney* that any item of community property, apparently including pensions, can be divided unequally. Is there any reason to believe that a community interest in a pension should be handled any differently than a community interest in a house, business, or any other asset? Again, it is important to note that in *Gemma*, the court was not satisfied with making a "just and equitable" division of the husband's pension benefit, but looked to a methodology that would result in a division of the community pension interest "equally," *Gemma*[8].

Looking back over the years addressed by the *McNabney* court, our highest court had established that equal division and equitable division were synonymous, save and except for compelling circumstances to the contrary. Nowhere in any reported decision of that court is there support for the proposition that *Weeks*, *Schick* and all others referring to equal division were merely recognizing the *de facto* reality of what was occurring in the trial courts. In an effort to reconcile decisional law with the legislative dictates of NRS 123.225, it is clear that the trial court's power to divide the community estate under NRS 125.150 is indeed broad. Yet, the starting point may be more defined than the *McNabney* court held. Proper recognition must be given to each spouse's equal interest in community property, and the methods of division must seek to satisfy the equal ownership rights of the spouses established in accordance with NRS 123.225.

Understanding that the *McNabney* decision represents a decided change in the concepts of community property division, and not simply a clarification of that concept, it is equally important to consider how this decision will impact on future resolution of community property disputes.

The majority opinion notes that one of the factors to be considered in dividing community property is the merits of the parties.[9] In a footnote to that language, the Court, by way of *dicta*, assumes that the trial court in *McNabney* only considered the respective *economic* merits of the parties.[10] In that footnote, the Court also notes that the phrase "respective merits of the parties" has not been defined by the legislature or the Supreme Court of this state. The language of *Heim v. Heim*[11] is to be considered. In that decision, the Supreme Court recognized that the merits of the parties could include such notions as the good or bad marital behavior of the parties. While *Heim* opened the door to fault in an analysis and presentation of an alimony claim, *McNabney* appears to open that same door relative to issues of community property division. Family lawyers may now be duty bound, in properly representing their clients, to pry into the parties' marital and post-marital bedroom behavior to maximize alimony and property division awards. The *dicta* in *McNabney* certainly does not preclude or restrict such considerations.

In further analyzing the language of NRS 125.150(1), the Court in *McNabney* noted that another relevant factor to consider was the party through whom the particular community property item was acquired. The minority opinion saw the inequity of such a consideration. The reality in our society, right or wrong, is that it is the husband who is most likely to be the acquiring party, since the husband is more often than not the superior wage earner in most marriages. However, beyond the inequity noted by the minority opinion, the concept of analyzing community property division in terms of who acquired the property completely disregards the common and extremely significant contribution made by wives to the financial gains that could be traced to a husband's efforts. How does the court now value the contributions of a homemaker and mother in freeing a hus-

band to pursue income and property acquiring activities? Do family law cases now require a presentation of evidence as to the economic value of homemaking and child rearing efforts to help establish a joint venture or partnership concept to be applied to the acquisition of property during marriage? One can only hope that our judicial system is more aware of the often thankless, and clearly poor paying position of a homemaker and mother. To simply stop with an analysis of which party acquired property is but to analyze the tip of the iceberg.

As recongized by the minority in *McNabney*, the community property system of law is predicated upon the notion that each party to a marriage contributes equally. The only way to reconcile that notion and the language of NRS 125.150(1) is to recognize a trial court's discretion to award to one party or another certain properties, provided that the other spouse is compensated for his or her one-half interest in those properties. It is unbelievable that the legislature intended, by its enactment of NRS 125.150(1) to vest a trial court with unbridled discretion to distribute community value, rather than simply to distribute particular items of community property.

Finally, in considering the prospective effect of the *McNabney* decision, the minorities' recognition of the chaos to be created by the majority decision is clearly well taken. Without guidelines as to how community property is to be divided, and without a recognition that equal division is the rule absent extreme circumstances, family lawyers can no longer counsel their clients as to guidelines for settlement. Rather than resolve confusion as to how community property is to be divided, the majority opinion may create uncertainty that renders settlement a virtual impossiblity. At present, it is hard to determine who will suffer most from these development. Will it be the spouses with a limited estate who now will sustain an even greater expense of attorney's fees and costs in litigating over the division of their rather meager holdings, or will it be the more affluent spouses whose large community estate creates an even greater opportunity for an extensive range of financial variance in outcome? The likelihood is that all divorce litigants will now suffer the further indignities of litigation at a time of tremendous emotional crisis and upheaval. No attorney sensitive to the needs of his or her family law client can possibly welcome such a state of affairs.

The majority opinion seems compelled to come to its conclusion by virtue of the language set forth in NRS 125.150(1). If that be the case, it appears incumbent for the legislature to take a long and careful look at amending NRS 125.150(1) at its next session. For those whose practice regularly involves them in the family law arena, a specific legislative pronouncement that an equal division is the rule, save and except for exceptional circumstances, can only assist in meeting the needs of the divorcing client. Robert Frost once wrote that good fences make good neighbors. Fence-mending seems to be of the highest order now that we stand in the shadow of the *McNabney* decision.

1. *Weeks v. Weeks*, 75 Nev. 411, 345 P.2d 228 (1959).
2. *McNabney v. McNabney*, 105 Adv. Op. 123 (November 27, 1989).
3. *McNabney, id.* at p. 6.
4. *McNabney, id.* at p. 4.
5. *Schick v. Schick*, 97 Nev. 352, 630 P.2d 122 (1981).
6. *Cord v. Neuhoff*, 94 Nev. 21, 27, 573 P.2d 11700 (1978).
7. *Gemma v. Gemma*, 1105 Nev. Adv. Op. 94 (August 23, 1989).
8. *Gemma, id.* at p. 4.
9. *McNabney, id.* at p. 5.
10. *McNabney, id.* at p. 5.
11. *Heim v. Heim*, 104 Nev. Adv. Op. 95 (1988).

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