NFLR
NEVADA FAMILY LAW REPORT

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APPORTIONMENT AND TRANSMUTATION UNDER MALMQUIST

by Sharon McDonald, McDonald & Petroni, Reno

A full understanding of the application of *Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990), requires a discussion of two different community property principles: apportionment and transmutation. The former does not involve a change of ownership or title. Rather, ownership or title remains fixed, but the court will determine whether or not the community or separate estate has an equitable interest in the separate or community estate, said interest to be *apportioned* to the other estate. Transmutation, on the other hand, involves a change in ownership or title and is the method by which there is a recharacterization of property: community becomes separate or separate becomes community.

NRS §123.220(1), which defines community property, specifically authorizes the parties to a marriage to transmute community to separate property through, among other methods, agreements in writing. NRS §123.130, which defines separate property, does not specifically address how such property may be transmuted, but it has been held to encompass the right of transmutation of separate to community property between parties to a marriage. *See Verheyden v. Verheyden*, 104 Nev. 342, 344, 757 P.2d 1328 (1988).

There is no doubt that *Malmquist* specifically addresses the concept of apportionment. The confusion surrounding *Malmquist* is, just what has it done to the concept of transmutation?

At common law parties could transmute property, either community to separate or separate to community, by oral or written agreement, gift or commingling. *In re marriage of Cupp*, 730 P.2d 870 (Ariz. App. 1986) and *Nationwide Resources Corp. v. Massabni*, 694 P.2d 290 (Ariz. App. 1984). And, such transmutation or alteration in property status could have been implemented with or without consideration. *In re Estate of MacDonald*, 794 P.2d 911 (Cal. 1990).

Agreements to transmute property need not be in writing, nor need there be express agreements. *Estate of Neilson*, 371 P.2d 745, (Cal. 1962). Rather, the court will examine the nature of the particular transaction and all the conduct and acts of the parties which constitute the circumstances surrounding it. Since 1975 Cali-

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IN THIS ISSUE

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From the Editor

by Marshal S. Willick

Amazing things are going on nationally that, like it or not, will dramatically affect the way family law is practiced in this state. I recently attended the fall meeting of the ABA Family Law Section in Florida and heard the report by former chair, Michael Barber, on the Interstate Commission on Child Support and the "Bradley Bill." Together, these pending enactments will greatly increase the nationalization of standards involved in child support.

The politically experienced members of the ABA Family Law Section indicate that the current bills will pass, and that the current provisions are only "the first shoe" of a fast-moving nationalization of family law. It is expected to be only a matter of time before the child support efforts branch into national requirements for visitation, custody, alimony, and property division. The "Interstate Commission on Family and Child Welfare" is already moving toward recommendations of nationally uniform custody rules and a uniform visitation enforcement statute.

There are some controversial things in the present bills, which some in our traditionally independent state may not much like having foisted upon them. For example, the bill will change the standards of determining jurisdiction, alter and regulate the roles of step parents, determine who can and cannot be a custody claimant . . . The list is a long one.

The time is past when a family law practitioner could afford to be parochial. With the existing UCCJA, PKPA, and federal pension and tax laws, the imminent passage of UIFSA (Uniform Interstate Family Support Act), and the current trend toward nationalization, what you do not know about what is going on elsewhere can hurt your clients greatly.

One good way of keeping tabs on such matters is to the join the Family Law Section of the ABA. Those interested in joining can call the American Bar Association Family law liaison office at (312)988-5613 for a membership packet. Those who want the ABA Family Law Section's Publications, but do not want to join the Section, can subscribe to the Family Law Quarterly and the Family Law Advocate for $39.50 per year.

A new feature will debut in the next issue of the NFLR, for the purpose of informing the membership of the decisions actually being made at the trial level in this state. Please make a few copies of the NFLR Judgment, Order and Settlement Report form as printed, and send in one case immediately that you think would be of interest to others in the Bar, either because it exemplifies how things do or should work, or because you think it is not compatible with existing law. Please share your experience.

Speaking of sharing experience, if you've written an appellate brief that you think would make a good subject for an NFLR article, please send me a copy so we can discuss turning it into an article and getting you some recognition of your expertise.

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fornia has had a statute that requires transmutations, either community to separate, or separate to community, to be in writing. The Nevada statute does not specifically require a writing to effectuate a transmutation.

Transmutation is a separate and distinct concept from that of apportionment, and the legal consequences and issues which flow from the two are distinct.

Gifting is one method of transmuting property. There are four distinct transmutation scenarios:

(1) Husband uses community property (regardless of which party actually earned the monies) to purchase, contribute to or improve the wife's separate property. Under the *Warren* case, this is a presumed gift. *In re the Marriage of Warren*, 28 Cal. App. 3d 706 (Cal. 1972).

(2) Husband uses community property (regardless of which party earned the actual monies) to purchase, contribute to or improve his own separate property. Under the *Warren* case, this is not a gift, but rather a breach of husband's fiduciary duty. Wife is therefore entitled to reimbursement. *In re the Marriage of Warren*, supra.

(3) Husband uses his separate property to purchase, contribute to or improve the community property. This is a gift. *Gordon v. Gordon*, 93 Nev. 494 (1977).

(4) Husband uses his separate property to purchase, contribute to or improve wife's separate property. This is a gift. *Gordon*, supra.

In the past, only scenario (2) would give rise to a reimbursement issue or, under *Barrett v. Franke*, 46 Nev. 170, 208 P 435 (1922), *Sly v. Sly*, 100 Nev. 236, 629 P.2d 1260 (1984), and its progeny, an apportionment issue.

For example, in scenario (1), where a husband uses community property (money, property or labor, effort, toil and skill) to improve, increase, enhance, reduce debt, purchase or affect wife's separate property, the law presumed an absolute gift. *Warren*, supra. But now, under *Malmquist*, at least with regard to reduction in the mortgage and improvements, there would be an apportionment issue.

Likewise in scenario (3), where the husband uses separate property (money, property, or labor, effort, toil and skill) to improve, increase, enhance, purchase or affect the community, the law presumed an absolute gift. *Gordon v. Gordon*, supra.

The only time the issue of reimbursement came into play (other than when there were agreements between the parties) was in scenario (2), where husband used community property to improve, increase, enhance or affect **his own** separate property. But, caution, this is not true in the case of a husband using his work efforts, which are community property, to enhance his own separate property business enterprise. In that case the issue would be one of **apportionment**.

In *Malmquist*, the Nevada Supreme Court stressed its desire that problems of apportionment in the distribution of community property equity in marital residences be treated with uniformity. The goal is to eliminate confusion and to promote reliable expectations by citizens as well as the attorneys representing them as to the division of their marital assets. *Malmquist* says that a separate property residence partially paid for with community property funds is subject to apportionment and sets out a formula to calculate the dollar return to the spouse who does not own the property. While the formula itself is new, the theory is not. See *Sly* and its progeny.

Additionally, *Malmquist* addresses the questions of community property enhancements to a separate property residence and includes such in the formula. It is in this respect that Nevada law, and most clearly in *Malmquist* overruled the common law principle exhibited in scenarios (1) and (2). For example, the use of community funds to improve one's separate property would not automatically have given rise to reimbursement (or later, to an apportionment). Rather, the courts would determine which party contributed the community funds and which parties' separate property was improved. If the husband decided to improve his own separate property with community funds, under *Warren* and its progeny, there should rightly be a reimbursement or apportionment. If the husband decided to improve the wife's separate property with community funds, the gift presumption should come into play, and no reimbursement or apportionment. If the parties decided together to use community funds to improve one or the other's separate property, again the gift presumption should come into play, and no reimbursement or apportionment.

Perhaps the *Malmquist* court intended to ease the evidentiary quagmire presented by the question of which person earned the community property and which person agreed to use the community property to enhance the other's separate property. The court thus recognized that for the most part parties tend not to have agreements one way or the other.

In spite of the length of the *Malmquist* decision, and what at first blush appears to be the mathematical difficulty in using the formula, the case stands for just one proposition: When two people marry and live in one partner's separate property residence and pay the mortgage with the income of one or both of the partners, the payments have been made with community property funds. This factor then gives rise to an interest in the separate property residence by the non-owning party. That interest can be quantified by using the formula set forth in the *Malmquist* decision.

"The only solid and lasting peace between a man and his wife is doubtless a separation."

Lord Chesterfield (1694-1773)

SOME THOUGHTS ON THE NEW FAMILY COURT SYSTEM

by W.E. Freedman, Las Vegas

In 1989 the Legislature, pursuant to constitutional amendment, created the Family Court system in the state of Nevada by the creation of six family district court judges in Clark County and one family court district judge in Washoe County (NRS 3.012 and 3.018). As of January 1993, the Domestic Relations Referee system will cease to exist in those two counties. However, Family Court judges may still appoint a master pursuant to NRS 3.405 to determine paternity and child support.

The following is a summary of the original, exclusive jurisdiction that the Legislature has created in the Family Court: (NRS 3.223)

•NRS 62 is procedure in juvenile cases.

•NRS 123 is rights of husband and wife.

•NRS 125 is dissolution of marriage.

•NRS 125A is the uniform child custody jurisdiction act.

•NRS 125B is obligation of support.

•NRS 126 is parentage.

•NRS 127 is adoption of children and adults.

•NRS 128 is termination of parental rights.

•NRS 129 is minors' disabilities.

•NRS 130 is reciprocal enforcement of support. A uniform act.

•NRS 159 is guardianships.

•NRS 425 is support of dependent children.

•NRS 432B is protection of children from abuse and neglect.

•NRS 31A is recovery of payments for support of children.

•NRS 442.255 is a request for authorization for abortion.

•NRS 442.2555 hearing on the merits of a petition to request authorization for an abortion.

Judicial approval for the marriage of a minor. Judicial approval of a compromise of the claim of a minor. To establish date of birth, place of birth and parentage of a minor. To change the name of a minor. Judicial declaration of sanity of a minor. To approve the withholding or withdrawal of life sustaining procedures from a person as authorized by law.

Concurrent jurisdiction with Justice Court over actions for the issuance of a temporary or extended order for protection against domestic violence.

Although the Family Court has original, exclusive jurisdiction as set forth above, the legislature did not see fit to amend NRS 3.220 which gives equal coextensive and concurrent jurisdiction and power to all district judges. Therefore, the Family Court judges will, in addition to their exclusive jurisdiction, have the power to hear all matters that any of the non-family court district judges can hear. This will require that those seeking to be elected to the Family Court have a broad base of experience not only in family court proceedings, but all types of civil matters as well as criminal matters. It is foreseen that as the case load of the non-family court judges expands, the Family Court judges will be assigned more and more non-family court matters.

In order to facilitate this legislation, committees have been formed in Clark County. The committees' task, among others, is to select a site for a new Family Court building to house the six new family judges and support staff. Members of the committees have been consulted and it has been determined that the location of the Family Court building will be immediately to the west of the current juvenile facilities presently located at the northwest corner of Mojave and Bonanza.

Because of the logistics in practicing law before the Family Court this legislation will cause, to some extent, certain practitioners to become *de facto* specialists in domestic relations. This is because as a practical matter if the Family Court conducts its proceedings at the same hours as does the District Court located in downtown Las Vegas, it will be impossible to be in two separate courthouses at the same time. Currently, the 16 District Judges conduct their hearings on alternating civil and criminal days. In order to prevent confusion and allow a general practitioner to be able to practice in both courts, some sort of coordination will be mandatory, possibly through computerized data that will not place a lawyer at both places at the same time. Of necessity, this would require the 16 District Court judges to have the same civil and criminal days which would alternate with the 6 Family Court judges so that their

civil calendar is on the same days as the criminal calendars of the 16 District Court judges. This would narrow the conflict with the domestic practitioner so as to restrict his practice to cases other than criminal matters.

It is apparent that the Legislature did not take into consideration the logistics of having two separate courthouses and its effect on the general practitioner who does not specialize in one field of law and who would be forced to limit his practice. It is assumed that each courthouse will have its own clerk's office and until something can be worked out through a computer interface system, the attorneys will have to set matters in the respective courthouses so as not to create a conflict.

It has been this author's experience that the Domestic Relations Referee system did not work. It caused more expense to the litigants because of more time spent in court before the Domestic Referee whose recommendations were not final unless either of the litigants failed to object. In domestic matters because of the emotional aspects, and where the litigants could afford it, there were many appeals to the district judge who treated the appeals sometimes as a trial de novo and sometimes as an appeal one would file with the Nevada Supreme Court. When the latter method was utilized by the judge, it was difficult to prevail. Usually there was no transcript of the proceedings before the Domestic Referee. It was been represented that the Family Court was created under the concept of "one family—one judge". It was thought by some that this meant if Judge "A" issues a divorce decree involving child custody and at a later date one of the children is involved in a juvenile matter, Judge "A" will hear those proceedings. However, the current thinking is that one of the six judges will be a juvenile judge and the other five will not hear juvenile matters. Thus, it appears that the one family—one judge concept would be utilized only in non-juvenile matters.

THE NEVADA COMMISSION FOR WOMEN - WHAT ARE THEY UP TO?

by Myra A. Sheehan, Esq.

The Nevada Commission for Women was mandated by the 1991 legislature to study the changing and developing roles of women in society, including the recognition of socioeconomic factors that influence the status of women, and recommend proposed legislation. The Commission is also authorized to collect and disseminate information on activities, programs and essential services available to women in Nevada.[1]

The Commission in its short existence has accomplished a great deal. However, have you heard of the positive things that the Commission has accomplished, with no funds allocated to it and on voluntary efforts alone? No? What you probably have heard is the stories in the media of how the Commission wants to propose legislation that eliminates joint custody. Can this be true?

The Commission has created a number of committees to bring forward suggestions and recommendations in particular areas that have been targeted as vital to Nevada's Women. One of those committees is the Legislative Committee, which is the committee which brought the Commission to the public eye. What the committee did was present a summary of legislative proposals for review, study and recommendation.

Included among legislative issue, brought before the Commission were the following domestic statutes:

•NRS 125.480 - which directs the court on how to decide a custody issue.

•NRS 125.490 - which is the legal presumption that joint custody is in the best interest of the child.

•NRS 125A.350 - which deals with the custodial parent needing either the consent of the non-custodial parent or court order to be able move out of state with the children.

•NRS 123.220 - which deals with community property.

Did the Commission recommend legislative proposals to eliminate joint custody? No! It identified the "presumption" that joint custody is in the best interest of the child as an issue of concern appropriate for consideration and possible modification.

In 1980, California became the model as the first state to pass joint custody legislation. However, in 1989, California amended its statute to eliminate the preference for joint custody. After a decade or more of experience with joint custody, many researchers and people in the legal community believe that court-imposed joint custody can be detrimental to both women and children.[2] The Commission is not proposing to eliminate joint custody; the Commission is interested in looking at those Nevada statutes that contain the presumption that joint

custody is in the best interest of the child and possibly amending them to remove the preference for joint custody.

The other Nevada statutes that the committee presented to the Commission for consideration also impact the women and children of Nevada. The Commission's mandate from the legislature is to look at the status of women in Nevada. It is attempting to do this with no legislatively obtained funds and with the volunteer help of a few. The Commission would like your input and experts in working on any of the committees.

The Commission has open meetings several times a year which are announced in advance with agendas posted. The public is encouraged to attend and become involved. The meetings alternate between Las Vegas and Reno. The July meeting was held in Las Vegas. A meeting in Reno will occur sometime this fall. During the month of August the leadership of the Commission will pass from the present Chair, Attorney General Frankie Sue Del Papa to Cheryl Lau, Nevada's Secretary of State. To place your name on the mailing list or simply to obtain more information about the Commission, you may contact the offices of the Attorney General or the Secretary of State. Their respective phone numbers in Carson City are 687-4170 and 687-5293.

The Nevada Commission For Women, so what are they up to:

It created a Legislative Committee which is to research possible legislation and review current legislation. It also accepts recommendations from other Commission committees.

It created a Judicial Systems Committee which hopes to act as an advisory committee to the Nevada Council of Judges and to eventually propose special education for judges working in the area of domestic law.

It created a Domestic and Family Violence Committee which compiled and produced a domestic violence handbook, which is now being distributed.

It created a Economic Issues Committee which is to research and study the economic factors that affect women in Nevada.

It created a Resource and Hotline Committee which is collecting data on publications and a wide variety of resources and services. It is hoped this process will be a springboard to the creation of a central resource center for Nevada's women and perhaps a publication on resources for women.

It created a Child Care Committee which is to research and study the problem of the lack of affordable child care.

It created a Legal Rights of Women Committee which is compiling and creating a guide to the law and available legal resources.

So what are they up to? A lot of good things. Please become involved. The Commission needs your input and expertise.

Myra A. Sheehan is a solo family law practitioner who is licensed in Nevada and California. She has worked closely with the Volunteer Lawyers of Washoe County and created a Divorce Manual for Volunteer Lawyers. She is a speaker for the Domestic Violence Education Program which is run by of the Second Judicial District Court and volunteers her time to work on two of the Nevada Commission On Women committees.

NOTES

[1] By-Laws of Nevada Commission For Women; See NRS Chpt. 2331.

[2] Pennington, Family Law Development, V.24 No.9 Clearinghouse Review 925.

"Marriage is the only war in which you sleep with the enemy."

-author unknown-

Case Summaries

Carrell v. Carrell, 108 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 116, Sept. 1, 1992) District court (Mosley) erred in characterizing a portion of husband's share of pensions as "spousal support" instead of property. Citing *Walsh* and NRS 125.150(5), (7), retirement benefits earned during marriage are community property, so not subject to future modifications, whereas spousal support can be modified upon a showing of changed circumstances, remarriage, or death. Citing *Schwartz*, award of attorney's fees in divorce action is within sound discretion of trial court and will not be overturned on appeal absent an abuse of discretion; if the court makes no findings regarding such an award, the Supreme Court will review the record. Here, award not supported since less than amount awarded was reported spent by other side, so remanded with instructions to recharacterize wife's share of pensions as community property, and to make findings regarding attorney's fees.

Moser v. Moser, 108 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 100, Aug. 6, 1992) Father had failed to return child to custodial mother after visitation, alleging that child exhibited evidence of sexual abuse. After emergency hearings before Referee and evaluation by a court-appointed psychologist, sexual abuse was not substantiated and Referee recommended returning child to mother. On Objection, father asserted that court should have considered report of psychologist he hired, rather than one appointed by Referee. District judge (Leavitt) ordered both psychologists to again meet with child and submit additional report, but did not order an

evidentiary hearing. Court found a "drastic" (but unspecified) change in circumstances since divorce, and ordered change in custody to father, with mother's visitations to be in Nevada only. Under NRS 125.005, court is not required to follow findings of fact made by Referees. Litigants in a custody battle have a right to a full and fair hearing concerning disposition of a child; at minimum, requires that before parent loses custody, elements that support change of custody must be supported by factual evidence. The party threatened with loss of child must be given the opportunity to disprove the evidence presented. A finding that a change of circumstances had occurred is a necessary precondition to a change of custody under *Murphy* standard, but here was not supported by finding of what the change was. Court noted that mother's request to depose father's psychologist had been denied. Held that district court's method of reviewing Referee's findings denied mother her right to a full and fair hearing. Where the Referee is the decision maker closest to the facts and makes explicit findings of fact, it is error for district court to wholly reject the Referee's findings without conducting a proper evidentiary hearing concerning the fact or facts in issue. Where the district court would affirm the Referee, an evidentiary hearing is unnecessary. Court reversed and ordered immediate return of child to mother. Justices Springer and Mowbray concur in reversal, but dissent from turnover order in that a full evidentiary hearing should have been ordered.

Ashworth v. Ashworth, 108 Nev. ___, ___ P.2d ___ (Order of Remand, July 21, 1992, in Case No. 22753) Without full evidentiary hearing or hearing the parent's testimony, Referee recommended granting motion for change in primary physical custody, based in part on a finding that the minor child had spent a majority of time with the moving parent during the previous two years, thus constituting a "*de facto*" change in primary custody to the father. Reversed since prospective time to be spent with mother would have essentially equalized time between parents. "Moreover, the child's time with the father reflected a healthy maternal concern that the child spend adequate time with the father, rather than a desire in the mother to lessen her custodial time." *Murphy* standard (material change in parties' circumstances plus substantial enhancement of child's welfare) reiterated, so change of custody found to be abuse of discretion, so remanded for full evidentiary hearing under that standard. Move standard (NRS 125A.350) as applied in *Schwartz* upheld against constitutional attack.

GUIDELINES FOR ARTICLE SUBMISSION

The *Nevada Family Law Report* ("NFLR"), is intended to publish a wide variety of substantive articles related to Family Law. Please follow the guidelines below in submission of your article.

1. Articles should generally be about 2,500 words (some 10 typewritten, 8 1/2 x 11 inch pages), excluding footnotes. If your proposed article is much longer or shorter, please discuss it first with the editorial staff. Letters to the editor commenting on family law matters, including comments or criticism of previously-published articles, are welcome and will be printed if appropriate.

2. Please use *A Uniform System of Citation* (the "Blue Book") for citation style. Endnotes (footnotes printed at the end of the article) are preferred. Please keep them short; lengthy notes should be incorporated into the text or set up as an appendix.

3. Use of appropriate subheadings to break the text into smaller parts is encouraged. Subheadings should be very brief and centered. The NFLR often selectively pulls quotations out of articles to insert into "teaser" blocks. Please feel free to select appropriate passages for such quotation and include them on a separate sheet at the end of your article.

4. The NFLR will consider reprinting or simultaneously printing articles that are intended to appear elsewhere, when readerships do not overlap. If your article has appeared, or will appear, elsewhere, please discuss the matter with the editor *prior* to submitting an article for publication.

5. The NFLR uses volunteer editors and proofreaders. The NFLR reserves the right to make editorial changes, but substantive changes are subject to the author's approval.

6. Please include a brief biography with your article, included on a separate sheet, noting particular interest or credentials with respect to the subject of the article.

7. The NFLR is to be published quarterly, in the middle of January, April, July, and October. Proposed articles are due on the first day of the month preceding publication.

8. You are strongly encouraged to submit your article on disk as well as hard copy, to lessen the chance of errors in typesetting. WordPerfect or ASCII format are known to be acceptable; please call if you use another format.

9. Please submit articles to Marshal S. Willick, Editor, Nevada Family Law Reporter, 330 South Third Street, Ste. 960, Las Vegas, NV 89101. Telephone: (702) 384-3440. Please feel free to call if you have any questions.

Input Sought for New Family Court Practice Manual

• How would you revise, improve, or modify what is set out in the Domestic Relations section of the current (Michie) Civil Practice Manual?

• What specific areas of family law do you believe should be emphasized in the new Manual?

• What features (format, forms, etc.) would be most helpful to you or other practitioners? What forms would you suggest? Could you provide samples of forms you think would be helpful?

Please send your information to Hon. John S. McGroaty, Editor-in-Chief, Eighth Judicial District Court, 200 South Third St., Las Vegas, NV 89155-0001.

Articles, Case Summaries Wanted for NFLR

The Nevada Family Law Report seeks to provide interesting and substantive family law material to educate both the bench and the bar. NFLR needs articles for upcoming issues. If you are interested in writing critiques of pertinent cases, reports/opinions of family law legislation or discussions of family law trends and issues, please request authors guidelines from Editor Marshal Willick, 330 S. Third St., #960, Las Vegas, NV 89101. Telephone, 384-3440.

Articles published in the NFLR are eligible for continuing legal education credits. Contact the MCLE Board, 329-4443, for applications.

The Section's publication needs your input and contributions. Please contact an editor to discuss any article topic, critique or book review.

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