

DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

FREDERICK GEIER,)
)
 Plaintiff,) CASE NO. D245940
) DEPT. NO. E
 -vs-)
)
 NANCY SLOAN,)
)
 Defendant.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This case came before the court for a bench trial on Sept. 11, 12, and 13, 2001 and June 20, 2002 on the plaintiff's various causes of action, the plaintiff appearing personally and with counsel, Dan Marks, Esq., and the defendant appearing personally and with counsel, Fred Page, Esq. and Sharon Green, Esq. in September, 2001 and with Fred Page and Marshall Willick, Esq. on June 20, 2002. The court has heard the evidence and arguments of counsel and took the matter under advisement at the end of the trial on June 20, 2002.

This decision constitutes the Findings of Fact and Conclusions of Law required by NRCP 52(a). They are stated in narrative form for ease of reading and understanding. If any finding of fact should more properly be deemed a

conclusion of law, it shall so be deemed. If any conclusion of law should more properly be deemed a finding of fact, it shall so be deemed.

Fred Geier ("Fred") is an elderly senior citizen. He is now 80 years old. He is a rather wealthy man, having obtained his wealth from an old family business, Cincinnati Millicron, many years ago. This company was started by his grandfather and was originally known as Cincinnati Machine Milling Company. He worked there about 14 years in various capacities. Fred left the company in 1963 or 1964. He was essentially given a rather large sum of money by the family to stay out of the family business. There was some family control dispute over the business and Fred was ousted.

Fred was first married to a Susan Wurlitzer. She was a member of the family that owned Wurlitzer Music, a very substantial company in its time. They had five children together. When this marriage was breaking down, he tried to get a divorce in Mexico. That didn't work because Susan forced him to litigate the divorce in Ohio.

Fred moved to southern California some time after the divorce and after leaving the company. However, he was not without means. He never worked at a regular job after that and lived off of his dividends and company income. He married Rita around 1968. They and her children lived in southern California for

many years. Fred and Rita moved to Las Vegas, Nevada around 1988. Rita developed colon cancer in 1993 and died on May 29, 1994. Fred suffered a significant depression as a result of her death. He secluded himself for some three months after her death. This is a normal emotional response to the death of a long term spouse. They had been married for 28 years at the time of her death.

Fred forced himself to overcome his depression and sadness by getting out of the house and socializing with other people. He started taking dance lessons at Dance Charisma, a dance studio located on South Jones Street sometime in August, 1994. He took up ballroom dancing lessons and enjoyed the activity immensely. He met Nancy Sloan ("Nancy") there in August, 1994. She was a dance instructor and the former owner of Dance Charisma. The business was then owned by a Pat Williams.

DANCE CHARISMA

Nancy had started Dance Charisma in 1992 and she had created a corporation named Synergy Dynamics as the means to own this dance studio. She sold it to Pat Williams in 1993 and carried back a promissory note or notes as part of that sales agreement. She continued to work there as a dance instructor and did legal work for the studio.

...

At this time, Nancy was a licensed attorney in Nevada. She had a solo law practice in Las Vegas. Nancy had first been admitted to practice in Ohio in 1984 and then in Nevada in 1987. Nancy never made much money practicing law. She earned \$58,000 in her best earnings year. She admitted in her deposition testimony that she had wanted to get out of the practice of law. Her deposition was published at trial and is part of the record.

Her real passion, however, was ballroom dancing. She is an attractive woman and carries the grace and charm of a well trained ballroom dancer. Her real desire was to compete in the upper circles of ballroom dancing and she knew many of the people who were in that social circle.

Nancy was one of Fred's dance instructors during the fall of 1994. Nancy was also from Cincinnati, Ohio. That was a common thread in their backgrounds and over the next several months their friendship blossomed. Fred felt she was elegant, socially poised, attractive and danced well. Over this time, Nancy also learned about Fred's heart problems, etc.

Fred enjoyed the dance lessons and the company of the dance ladies so much that in January, 1995, he purchased Dance Charisma from Pat Williams for \$76,000.00. Fred had been approached that month by Carol Shute and David Martinez, employees of the studio, with the idea of taking over the studio. Nancy

acted as the attorney for the seller and drew up the sales paperwork. Nancy had previously sold Dance Charisma to Pat Williams and was owed money from that sale. When the sale was completed, Nancy was paid \$10,000.00 for the obligation due to her from the original sale. This information was never revealed to Fred at the time.

Fred did not have the business appraised at the time and did not independently determine any value of the business. He basically decided how much he wanted to pay for the business. He had never owned and operated a dance studio before. In fact, Dance Charisma was a money losing proposition at the time and needed monthly infusions of capital to keep it in business.

Fred was emotionally vulnerable at that time of his life. He always had the companionship of a woman in his life for the past forty plus years. While he liked Nancy, Fred first developed a personal relationship with Carol Schute around this time. He took her on a cruise to Alaska. He later acquired a house for Carol. Nancy was still the attorney for Dance Charisma and helped him draw up the lease/option papers that he used to acquire the house. Eventually, that relationship did not work out and was ended.

Carol was one of the dance instructors at the time he agreed to purchase the business. So was one David Martinez. They had talked to him about buying the

business. While they did not say the business was profitable, they did advise him that the business could be much better if competent instructors and managers were hired. Nancy did not have anything to do with Fred's acquisition of Dance Charisma. She did not call him or urge him to buy the business. Another man, Dominic, managed the business at the time. Some months later, Dominic was let go or quit and Fred installed Carol as the manager.

Carol was the one to tell Fred that money was needed every month to keep the business going. The amount varied from month to month. Carol and Fred decided that some business planning was needed.

Fred had a business appraisal done of Dance Charisma by his California CPA., Patrick D. Rogan.. The CPA prepared a business analysis report in July, 1995 which was transmitted to Fred in a letter dated September 15, 1995. The report was admitted into evidence as Defendant's Exh. B.

The report stated that Dance Charisma was losing money and that it would continue to lose money well into the future. It had lost \$57,758.24 for the first five months of 1995. If Fred wanted to keep the business, he would have to continue to invest thousands of dollars into the business each month. Fred's CPA advised him to decide how much money he would be prepared to lose before he "pulled the plug" on the business, i.e. how long before the business would become

profitable. Nancy had no role or involvement in this business analysis.

Thus, Fred knew and has known that Dance Charisma was a money loser and would continue to be a money loser for a long time into the future. Nancy did not play any advisory or fiduciary role in Fred's purchase of Dance Charisma and did not have any role in persuading him to keep investing money into the studio. Nancy did act as attorney for the seller, Pat Williams, and was not in an attorney-client relationship with Fred at the time of the purchase.

Fred was given several recommendations by his CPA regarding fiscal management of the business and proper documentation of the income and expenses. Fred was advised to develop a business plan. He never did.

Fred later fired Carol. Nancy was later brought back in as manager.

Fred finally tired of owning and financing Dance Charisma and simply signed it over completely to Nancy and David Martinez in June, 1998. Nancy and David paid nothing for Dance Charisma. The handwritten agreement was written by Nancy and was admitted into evidence as plaintiff's Exhibit 76 (first page only). Fred was given the right to get the business back if he wanted it. The deal was effective as of July 1, 1998. By this point in time, Fred had lost \$652,350.50 in Dance Charisma from 1994 to 1998 (Plaintiff's Exhibit 111 – summary by Joseph Zerga, CPA).

NANCY'S ATTORNEY-CLIENT RELATIONSHIP WITH FRED

However, her friendship with Fred continued. On August 23, 1995, Fred paid Nancy a \$10,000 retainer to assist him in certain legal matters. Fred was involved in a probate dispute with his late wife's children and he needed legal advice. Nancy acted primarily as a litigation manager. She arranged for the actual legal representation to be done by other specialty attorneys. She had files on his various legal matters and communicated with those counsel by mail, phone or personal meetings while acting on Fred's behalf. Nancy's legal files were introduced into evidence for the limited purpose of establishing the existence of the attorney client relationship. (Plaintiff's Exh. 116).

On September 20, 1995, Nancy took Fred to see Ken Burns, a local attorney specializing in estate planning and related tax aspects. Nancy had previously sent a letter to Mr. Burns outlining the terms of the proposed trust. (Exh. 23). The purpose of the visit was to assist Fred in establishing the Frederick Geier Charitable Remainder Trust that was intended to be funded with \$6,000,000.00 and Nancy was to be listed as the trustee and the remainder beneficiary upon Fred's death. A trust instrument was drawn up (Exh. 80) and signed on September 20, 1995 and an abstract of the trust was recorded with the County Recorder. (Exh.81)

However, the trust was never funded by Fred. Nancy was upset that he did not do so. Nevertheless, it was abundantly clear that the terms of the trust would greatly benefit and enrich Nancy if the trust was funded and Fred subsequently passed away. The trust provided that Nancy would earn \$50,000 per year as trustee fees and would receive the remainder of the trust over time after Fred's death. Up to 12% of the trust could be distributed to Nancy in a calendar year. There was talk at one time that the trust would be funded with approximately \$6,000,000.00 worth of Cincinnati Millicron stock. If Nancy was not married to Fred at the time of his death, taxes would be owed on any distributions to her from the trust. However, if she was married to Fred at the time of his death, there would be no tax consequences to her.

Fred kept an attorney client relationship with Mr. Burns over the next several months. Fred wanted some advice in the fall of 1998 regarding his transactions with Nancy regarding a proposed holiday dance camp. After reviewing a lengthy memo from Nancy dated October 26, 1998, Mr. Burns advised Fred not to do any further business with Nancy. Mr. Burns never advised Fred with respect to the divorce case or to any earlier transactions with Nancy.

Fred utilized the professional services of other attorneys as well during this general time frame in connection with various legal matters. Nancy acted

principally as the coordinator of his various legal matters, supplied information, handled correspondence, etc.

THE PERSONAL RELATIONSHIP

The personal and professional relationship between them continued along.

By the fall of 1995, Fred was so enamored of Nancy that he agreed to pay her to quit the practice of law and spend much more time and companionship with him. What follows is one of the most shocking and extreme cases of greed and ethical malfeasance ever foisted upon an emotionally weak and vulnerable senior citizen by a licensed member of the bar.

Nancy prepared a handwritten letter for Fred to sign. This supposedly started out as an investment agreement and the entire agreement reads as follows”

9/20/95

“Money that is earned is shared 50-50 as follows. Fred would get what interest the bank would pay and the rest is shared 50-50.

I have a one year contract as a testing ground to see what we can do of \$250,000/yr on a monthly basis starting Oct. 1. Dance Charisma.” (Initials) FVG NS

Nancy flatly admitted she kept all of the money she got from Fred pursuant to this note. She did not invest it as stated and shared nothing with Fred. What is even more shocking is her admission on the witness stand that she paid \$50,000 of this money to David Martinez as a “commission” because he was instrumental in

getting this money for her. She was not paid any of this money for legal fees.

There were other funds paid for that.

Fred's expert CPA witness, Joseph Zerga, audited Fred's financial records and determined that Fred had paid directly to Nancy the sum of \$412,965.05 from July 30, 1995 to October 26, 1998. (Exh. 111). This summary includes the money Fred paid to her for legal services in the summer of 1995. That is \$11,600.00.

What this really turned out to be was an alleged agreement between them that Fred would pay her to cease the practice of law and spend time in companionship with him, spend time in dance competitions, etc. He was supposedly compensating her for the income she would lose from the cessation of her law practice. However, the most Nancy had ever made from her law practice was about \$58,000 per year. She admitted in her deposition testimony that she wanted to get out of the law business and spend her time in ballroom dancing competition and instruction.

Nancy never advised Fred of the ethical obligations she had pursuant to SCR 158 and that he should have the benefit of independent legal counsel as to this specific transaction before entering into this agreement.

In February, 1996, Fred underwent heart surgery and was left in a weakened condition. Nancy was given a trading authorization power of attorney by Fred in

the event that Fred died during surgery or soon thereafter (Exh. 82) and a Durable Power of Attorney for Health Care Decisions (Exh. 83). Both documents were dated February 7, 1996. He also changed the beneficiary designation on his life insurance policy in late January, 1996. (Exh. 79).

About three weeks after Fred's release from the hospital, Fred and Nancy were having dinner at Morton's Steak House. They had two bottle of wine during their meal and Fred testified that he was intoxicated. Nancy proposed to Fred that they get married. Fred held off agreeing to this proposal. He testified he talked to Nancy the next day and was hesitating. He said that he then got a call from David Martinez urging him to go through with the marriage. He then talked again to Nancy and they agreed to meet that day for lunch. He then agreed to the marriage. Nancy denies that she asked David Martinez to call Fred and push him into agreeing to the marriage. The court accepts the Fred's testimony in this regard and does not find Nancy's denial credible. It appears that she and David were acting closely together and that David was benefitting financially from Fred's involvement in Dance Charisma. Nancy was giving him a share of the money she got from Fred. David seemingly had a hand in many of these transactions and was an integral part of Dance Charisma.

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Nancy agreed to marriage only upon certain conditions, namely, they would not live together and they would not have sex. She admits she kissed him once during their entire relationship.

Nancy then arranged for them to fly to Reno for the marriage. She paid for the tickets for them and for David Martinez. They flew to Reno on March 20, 1996, got a marriage license (Exh. 5) and got married in a local wedding chapel. The witness to the wedding was David Martinez, Nancy's close friend and fellow dance instructor at Dance Charisma. After the wedding, David flew back to Las Vegas. Fred and Nancy went for a drive around Lake Tahoe to celebrate their wedding and flew back to Las Vegas that same evening.

THE MARABELLA PROPERTY

Nancy had seen a vacant lot in the Desert Shores area of Las Vegas that she really liked. She persuaded Fred to buy the lot and let her build a new, expensive home there. On or about September 21, 1996, Fred gave Nancy \$500,000 to build this house. The house is built. Title to the house was originally in Fred's name as his sole and separate property. The Grant, Bargain and Sale deed, dated April 10, 1996, vested the lot solely in Fred's name (Exh.15, 16). The funds for the acquisition and construction were all from Fred's separate property acquired before marriage. Fred paid \$126,898.79 for the acquisition. The property is located

at 8000 Marabella Circle, Las Vegas, Nevada.

The money provided by Fred for the construction was more than enough. Nancy kept no accounting of the money even though there were some refunds from the contractor. Nancy kept all of the money not used for construction.

Fred quitclaimed the property to himself and Nancy as "husband and wife, as community property with right of survivorship" in late May, 1996 (Def't. Exh. G) although the document itself shows no evidence of recordation with Clark County Recorder. The property was later quitclaimed to Nancy as her sole and separate property in June, 1997 even though she paid no consideration for the property to Fred. (Exh. 19). This deed was properly recorded.

Nancy later exchanged this property for a residence at 58 Echo Road, Mt. Charleston. This transaction was done in the spring of 1998. See Exhibits 20, 21 and 22. Fred seeks to place a constructive trust on the property and seeks to have it returned to him as a form of restitution of some of his funds.

THE DIVORCE

Nancy was just as deceitful and circuitous with their divorce as she was with their marriage and the other multitude of deceitful transactions she had either perpetrated or tried to perpetrate. She filed her complaint for divorce in the First Judicial District Court in Storey County, a rural county just to the southeast of

Washoe County. Neither party lived in that county.

On September 20, 1997, she went to Fred's house with the proposed Property Settlement Agreement and urged him to sign it, claiming she could get a lot more from him if he were to oppose the divorce and the case were to proceed to trial. Fred agreed to sign the agreement the next day and the PSA was signed on September 21, 1997. (Exh. 6). Fred also signed an Acknowledgment of Service and an Appearance and Waiver that same day. (Exh. 7, 8)

Nancy's cohort in these ventures, David Martinez, signed a resident witness affidavit on September 17, 1997, four days before Fred signed the agreements for the divorce. (Exh. 9). Nancy signed a prove-up affidavit that was filed in divorce action on September 30, 1997. (Exh. 10). The Decree of Divorce on October 2, 1997.

The divorce was most favorable to Nancy. She got to keep her house at 1513 Winwood Street, Las Vegas, the lot located at 8000 Marabella, Las Vegas, the 1995 Lexus and any other personal property in her name or possession. She had acquired the 1995 Lexus during the marriage using money she obtained from Fred. She traded in her older Toyota automobile at the time. Fred received his house at 6942 Emerald Springs Drive, Las Vegas, the real property he had bought at 3320 Campbell Road, his 1993 BMW and his personal belongings. He already

owned those assets as his sole and separate property before marriage and thus the divorce only “gave” to him that which he already owned.

The entire divorce was the result of Nancy’s deceit and undue influence. She obtained assets that were either Fred’s separate property at one time or which Nancy obtained by using the money Fred had given to her over several months. Fred signed the PSA under pressure from Nancy and this court specifically finds that Nancy’s claims she could get more in a contested divorce were false and Nancy knew that they were false. This was a very short marriage, Nancy was a licensed attorney and had a professional career. She had a second career as a dancer. The evidence about the Marabella house was overwhelming in that Fred had paid for the entire house out of his separate property funds and had acquired the property solely in his name. Nancy likely would not have been able to keep that house in that divorce.

Nancy also had an affirmative duty to allow Fred the opportunity to procure independent counsel for the divorce. He signed the PSA without the benefit of independent legal advice and after being strongly pressured by Nancy to agree to the divorce. It was Nancy who had the proposed PSA written up before she even went to Fred’s house.

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Fred has the legal right to set this divorce aside and the law pertaining to this portion of the litigation is set forth later in this opinion.

THE HOLIDAY BALL AND DANCE CAMP

Subsequent to their divorce, Nancy and Fred has additional business dealings. They were going to put together a holiday dance contest and dance camp that would seek to attract several high level ballroom dancers for competition and training. The initial funding was to be \$300,000.00 total with each putting up one half of the money. Fred put up his \$150,000.00 but Nancy was did not. Fred later pulled out of this business venture. Some money had been spent on this venture before the cancellation.

THE CIVIL LITIGATION

On March 1, 1999, Fred filed a civil complaint alleging seven causes of action. Nancy filed an answer and counterclaim on April 12, 1999. The Reply to Counterclaim was filed May 11, 1999. The issues were joined and after discovery was completed, the case came to trial. At the close of the plaintiff's case, Nancy moved for a directed verdict of dismissal pursuant to NRCP 41(b). The court dismissed the 3rd cause of action for constructive trust since the court viewed that claim more as a matter of remedy rather than as a separate and distinct substantive cause of action. The remedy of constructive trust is still available as a means of

relief for some of the remaining causes of action.

The defense presented its case. Some of its causes of action had already been dropped at the start of the trial. At the conclusion of the defense portion of the case, Fred's counsel moved for a directed verdict of dismissal pursuant to NRCP 41(b) on the remaining counterclaims. That motion was granted.

The plaintiff's causes of action are as follows:

1. Fraud and breach of fiduciary duty;
2. Annulment;
3. Constructive Trust (dismissed on NRCP 41(b) grounds);
4. Fraud and breach of fiduciary duty and punitive damages;
5. Legal Malpractice;
6. Breach of fiduciary duty and constructive trust;
7. Elder exploitation pursuant to NRS 41.1395;

**THE ATTORNEY-CLIENT RELATIONSHIP, FIDUCIARY DUTIES
AND ETHICAL OBLIGATIONS IMPOSED ON ATTORNEYS**

Nancy was a licensed attorney and was the attorney for Fred for most of the time of their relationship. She had been paid substantial fees for her services and acted as the coordinator for Fred's various legal entanglements and needs. She had referred Fred to other attorneys to handle disputes over his late wife's estate

and other legal matters including trust and estate planning.

Because Nancy was a licensed and practicing attorney at the time of their relationship and her personal transactions with Fred, she is subject to the mandatory ethical constraints imposed on attorneys by the applicable Supreme Court rules. Her conduct was particularly governed by SCR 158(1), transactions with clients, which reads in whole:

“1. A lawyer shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(a) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(b) the client is given a reasonable opportunity to seek the advise of independent counsel in the transaction; and

(c) the client consents in writing.”

There is also no doubt that Nancy had a fiduciary relationship with Fred.

This is imposed by law and the existence of the attorney client relationship. These fiduciary obligations imposed upon counsel in transactions with a client goes back several decades in Nevada and at the very least to the leading case of Davidson v. Streeter, 68 Nev. 427, 234 P.2d 793 (1951). The attorney had gained legal title to real property from his elderly female client and she sued for relief. She won and

the Supreme Court affirmed the lower court. The court held that a transfer of property to a fiduciary without adequate consideration raises a presumption of impropriety and the burden of overcoming that presumption is upon the fiduciary. Id at 439. The normal burden of proving a conveyance induced by fraud by clear and convincing evidence does not apply when there is a confidential relationship between the parties at the time of the execution of the deed. The transaction is presumed invalid on the ground of constructive fraud and this presumption can only be overcome by the attorney by the presentation of “the clearest and most satisfactory evidence.” Id at 440, citing Moore v. Rochester Weaver Mining Co, 42 Nev. 164, 174 P. 1017 (1918). Questionable transactions between an attorney and client “call for the closest scrutiny by the trial court.” Id 441.

In Sanguinetti v. Strecker, 94 Nev. 200, 207 (1978), the Nevada Supreme Court elaborated upon the elements and duties of a fiduciary relationship:

“Under such circumstances, the Streckers were entitled not only to an accurate description of the instrument they were signing, but also to a full disclosure of Sanguinetti’s intentions....and of their rights and the effect and consequences of their acts.”

Other cases are relevant but none more so than In re Singer, 109 Nev. 1117, 865 P.2d 315 (1993), a case which imposes stringent requirements on lawyer-client business transactions. Mr. Singer had entered into certain financial

transactions with a client and personal friend that were favorable to him. He attempted at least a cursory compliance with SCR 158 but failed to disclose all the relative risks and merits of the proposed transactions with him. The Nevada Supreme Court affirmed the disciplinary sanctions recommended by the State Bar of Nevada. The court left no doubt that such transactions are presumed improper until proven otherwise:

“ . . . In any transaction in which an attorney is charged with obtaining a business advantage from a client, there is a presumption of impropriety which may be overcome only by clear and satisfactory evidence that the transaction was fundamentally fair, free of professional overreaching, and fully disclosed.”

In a personal divorce context, even a divorce decree between an attorney spouse and a non-attorney spouse is closely scrutinized for fairness. See Williams v. Waldman, 108 Nev. 466, 472, 836 P.2d 614 (1992) and Cook v. Cook, 112 Nev. 179, 912 P.2d 264 (1996).

Thus, there are four fundamental rules derived from these cases and they are (1) that any transactions between an attorney and client must be fair to the client; (2) the transactions will be closely scrutinized for fairness; (3) the burden of proof as to the fairness of the transaction to the client falls upon the lawyer who must prove that fairness by clear and convincing evidence; and (4) it is not enough for

the lawyer to merely advise a client to get independent counsel, the lawyer must make sure the client gets completely independent counsel without input or interference from the lawyer.

All of Nancy's financial and legal transactions with Fred are presumed unfair and improper and she has the burden of proof to show by clear and convincing evidence that the transactions were fair. Inasmuch as Fred spent some \$3,000,000.00 on Nancy or for her benefit and had nothing to show for it but a greatly reduced net worth, Nancy has a huge burden to overcome. She has failed to meet her burden.

THE ANNULMENT CAUSE OF ACTION

Fred has alleged causes of action to set aside the marriage and the divorce based upon fraud and undue influence by Nancy. Nancy claims that this court cannot sit in judgment of a judgment of another District Court, namely, the Decree of Divorce issued in the First Judicial District Court on October 2, 1997.

This argument creates no impediment to Fred's causes of action. The Nevada Supreme Court has already permitted such independent causes of action to be litigated in the District Courts. In Murphy v. Murphy, 65 Nev. 264, 193 P.2d 850 (1948), the Court affirmed a post-decree motion to change custody when the wife did not get the benefit of the agreement she had with her husband for ending

their marriage. The court said at page 271.

“Extrinsic fraud has been held to exist when the unsuccessful party is kept away from the court by a false promise of compromise, or such conduct as prevents a real trial upon the issues involved, or any other act or omission which procures the absence of the unsuccessful party at the trial. Further, it consists of fraud by the other party to the suit which prevents the losing party either from knowing about his rights or defenses, or from having a fair opportunity of presenting them upon the trial.”

Independent actions to set aside a divorce decree obtained by fraud have been approved by the Nevada Supreme Court. Muscelli v. Muscelli, 96 Nev. 41, 604 P.2d 1237 (1980); Hindenes v. Whitney, 101 Nev. 175, 697 P.2d 932 (1985).

In the latter case, an independent action was filed in 1980 by the ex-husband's guardian to set aside a 1976 divorce decree obtained by the ex-wife. It was alleged that the ex-husband was mentally incompetent prior to the divorce and that the ex-wife concealed that fact from the divorce court. A judgment for damages in favor of the ex-husband was reversed on appeal due to a faulty jury instruction on the standard of proof needed to prove fraud.

N.R.S. 125.340 provides that fraud constitutes a cause for annulment. An annulment is not permitted if the parties voluntarily cohabit after receiving knowledge of the fraud. N.R.S. provides as a cause for annulment any ground which would be a the basis for setting aside a contract in a court of equity. Both

are well established and long recognized bases for annulling a marriage.

Fred has proven by clear and convincing evidence that fraud and undue influence were used to induce the marriage and the subsequent divorce. The Property Settlement Agreement was grossly unfair to Fred and the disposition of property in that divorce was highly favorable to Nancy. Again, she used her dominant influence and her status as a lawyer to browbeat Fred into signing the Agreement without the benefit of independent legal counsel.

The Divorce Decree filed on October 2, 1997 in Storey County is hereby set aside and the marriage between these parties entered into on March 20, 1996 is hereby annulled.

THE ELDERLY EXPLOITATION CAUSE OF ACTION

Fred also filed a statutory tort claim for senior citizen exploitation as authorized by NRS 41.1395 which provides in pertinent part that "if an older person or a vulnerable person suffers...a loss of money or property caused by exploitation, the person who caused the...loss is liable to the older person or vulnerable person for two times the actual damages incurred by the older person or vulnerable person..

Subsection 2 provides for an award of attorneys fees if it is proven by a preponderance of the evidence that the person liable for damages acted with

recklessness, oppression, fraud or malice.

Subsection 4(b) defines exploitation:

“(b) ‘Exploitation’ means any act taken by a person or any use of the power of attorney or guardianship of an older person or a vulnerable person or any use of the power of attorney or guardianship of an older person or a vulnerable person to obtain control, through deception, intimidation or undue influence, over the money, assets or property of the older person or vulnerable person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of his money, assets or property. As used in this paragraph, ‘undue influence’ does not include the normal influence that one member of a family has over another.”

Subsection 4(d) defines an “older person” as age 60 or older and

“vulnerable person” is defined in subsection 4(e):

“(d) ‘Older person’ means a person who is 60 years of age or older.

“(e) ‘Vulnerable person’ means a person who:

(1) Has a physical or mental impairment that substantially limits one or more of the major life activities of the person; and

(2) Has a medical or psychological record of the impairment or is otherwise regarded as having the impairment.

The term includes, without limitation, a person who is mentally retarded, a person who has a severe learning disability, a person who suffers from a severe mental or emotional illness or a person who suffers from a terminal or catastrophic illness or injury.”

However, this statute was passed by the 1997 Nevada Legislature and effective on October 1, 1997. See NRS 218.530. The divorce decree was entered the next day, October 2, 1997. Generally, civil statutes are not retroactive. See Adair v. City of North Las Vegas, 85 Nev. 66, 450 P12d 144 (1969). Thus, certain actions which occurred before that date may not constitute evidence for that cause of action.

Since the overwhelming majority of the financial transactions between these parties had been completed before the effective date of this statute, the court will grant relief sought through this cause of action only as to funds paid by Fred to Nancy after the effective date of this statute.

Nancy's conduct fits easily into the parameters and elements of this statute. She acted in a fiduciary capacity and definitely exercised undue influence over an elderly senior citizen in poor health and in poor mental condition. The amounts of money procured from him and the methods used to extract that money were so extreme that the element of exploitation is easily satisfied. The amount of damages determined under this section are set forth further in the section on damages.

Fred was long past age 60 at the time of these transactions and was a "vulnerable person" due to his age, depression, and declining health.

THE LAW OF UNDUE INFLUENCE

The concept of undue influence has been a part of the common law in England and in the United States for over 200 years. Its ancestry can be traced to reported English cases as far back as 1787. The earliest reported American case is Gardner v. Gardner, 22 Wend. 526 (N.Y. 1839). Frolik, The Biological Roots of the Undue Influence Doctrine: What's Love Got to Do With It?, 57 U. Pitt. L.Rev. 841, 844-46 (1996).

A workable definition or explanation of “undue influence” can be found in Quinn, Friendly Persuasion, Good Salesmanship, or Undue Influence, Elder’s Advisor, Vol. 2, No. 4, p. 49 (Spring 2001):

“Undue influence is the substitution of one person’s will for the true desires of another. Unlike common persuasion and sales techniques, fraud, duress, threats, or other deceptions are often features of undue influence. Undue influence takes place when one person uses his or her role and power to exploit the trust, dependency, and fear of another. This power is used to gain psychological control over the decision making of a weaker person, usually for financial gain. Dependent and impaired people are particularly susceptible, but it can happen to anyone who would otherwise be considered capable and competent. The current interest in undue influence represents a coming together of three major forces: current and historical legal concepts, the study of domestic violence (specifically in the

field of elder abuse and neglect), and the distillation of relevant psychological processes.”

Another author explains the concept in the NAELA Quarterly, Summer 2000. Spar, M.D. Attorney’s Guide to Competency and Undue Influence at p. 9:

“Because it is typically based upon similar evidence of mental impairment, the claim of undue influence is commonly made in conjunction with a claim of lack of capacity to execute a contract, will, trust, or gift. Substantial inability to resist fraud or undue influence is also one of the criteria for appointment of a conservator of estate in California. Accordingly, elder law attorneys should consider the possibility of undue influence whenever symptoms of mental impairment are apparent and execution of a will, trust, contract or gift is planned, or when an individual appears to be vulnerable to or actually the victim of financial exploitation. However, even after due consideration, the proper course of action may be unclear to the elder law attorney, simply because undue influence remains a complex and poorly defined legal concept. . . .”

One legal scholar has argued that there are two main legal theories of undue influence, the “susceptibility” model and the “presumption” model. Both models assume that undue influence is wielded by a stronger party to the detriment of a weaker party and both regard evidence of mental weakness as a critical factor. See A.P. Wrosch, Undue Influence, Involuntary Servitude and Brainwashing: A More Consistent Interests-Based Approach, 25 Loy. L.A. L. rev. 499, 554 (1992). The

presumption model applies to the instant case since there was a confidential and trusting relationship between Nancy and Fred. The burden of proof then shifts to the stronger party to prove that undue influence did not occur.

Undue influence is not clearly defined by the courts and much depends on the circumstances of the particular case. 25 Am. Jur. 2d Duress and Undue Influence, Section 30. And as the Supreme Court of Arkansas said in Hyatt v. Wroten, 43 S.W.2d 726, 728 (1931):

“Undue influence is generally difficult of direct proof. It is generally exercised in secret, not openly, and, like a snake crawling upon a rock, it leaves no track behind it, but its sinister and insidious effect must be determined from facts and circumstances surrounding the testator, his physical and mental condition as shown by the evidence, and the opportunity of the beneficiary of the influenced bequest to mold the mind of the testator to suit his or her purposes. We cannot therefore say that there was not substantial evidence to support the jury’s verdict.”

The evidence of undue influence is most overwhelming. Fred had just lost his wife to cancer, he was seriously depressed, he was in his late 70's and suffering from chronic heart problems. Nancy was an attractive, younger, elegant woman, skilled ballroom dancer and an attorney who helped Fred with a myriad of legal problems. During the course of their personal relationship and the early part of the

attorney client relationship, she learned much about his personal fortune and his health problems.

The fact that Fred was consulting with other attorneys does not provide a defense for Nancy because he was doing so in conjunction with his various legal proceedings. SCR 158(1) can only be satisfied if Fred consults with outside legal counsel explicitly for the purpose of obtaining independent legal advice regarding his financial transactions with Nancy. No such independent legal advice was given. Nancy had the ethical obligation to so advise Fred prior to entering into any transactions with Fred.

Nancy's conduct is even more egregious when we consider that she proposed several dubious and one-sided transactions in her never ending efforts to separate Fred from his money. The court has already alluded to the proposed trust which was highly favorable and lucrative to Nancy had the trust been funded and become operational.

Nancy's other manipulative ploys include the following:

1. Nancy arranged for them to fly to Bermuda to set up an secret numbered bank account so Fred could transfer money into that account. Nancy would have full access to those funds upon Fred's death and since the funds were outside the territorial limits of the United States and in a secret account, the money would be

beyond the reach of Fred's heirs if there would be a probate.

Nancy also arranged for Fred to have a Bahamas corporation. In early 1997, Nancy arranged for a law firm in Nassau, Bahamas to create a Bahamian corporation called Dynamic Synergy LTD (Exh. 86, 87). Fred paid the legal fees from his own bank account. (Exh. 85).

There was no legitimate business purpose for Fred to have a secret numbered Swiss bank account set up in the Bahamas. Joseph Zerga, a licensed CPA, testified that the money put into the account would have been Fred's after tax income and no tax benefit or financial management could accrue to Fred to have this account. The court finds this is nothing more than another effort by Nancy to part Fred from his money. The whole effort was intended to benefit Nancy personally had it not been stopped.

2. Nancy was hired by Fred to manage Dance Charisma after he let a prior manager go. Nancy had previously started Dance Charisma and had its ownership in her own company, Synergy Dynamics. The corporation continued to be the entity that actually owned the studio. Fred had purchased the corporation.

There came a time when Nancy drafted a corporate resolution which Fred signed. The document is undated but was introduced in evidence as Exhibit 69. The resolution was drafted to cover certain contingencies if Fred were to die or

become incapacitated. The document recognized that cash infusions were needed from Fred to cover the business operations of the studio and that Nancy and David were considered critical to the operations of the studio.

This document is incredulously one sided in Nancy's favor. It provided that if someone else, i.e. guardian or executor, were to take over Fred's estate assets and try to close the business, Nancy had the right to resign and would receive \$70,000.00 in severance pay. She would get the same if she were fired and removed "from office or directorship."

David Martinez would be entitled to \$30,000.00 in severance pay if he were fired or if he resigned. If the assets of the corporation were insufficient to pay such sums, Fred's estate would be liable for the same.

Nancy also had the right to buy the business for the lowest value determined by certain different accounting methods. This would be highly favorable to her since the corporation was a money losing business. The resolution further provided that she could resign from the business and still get her severance pay plus she had reserved the right to buy the business from the estate. In other words, Nancy could get money, i.e., her severance pay, from the business or from Fred's estate and then use it to buy the business. Fred's own money would be used to buy the business from him or his legal representative.

This is an incredibly act of indulgent and unethical self-dealing and was nothing more than another devious ploy to possibly separate Fred or his estate from his money. There is no evidence in the record that Nancy advised Fred to obtain independent legal counsel to review the resolution.

The transactions in this case were so extreme and one-sided that there is no doubt left in the court's analysis that Nancy engaged in highly unethical and tortious conduct against Fred. The attorney in the Singer case, supra, at least made a modest, albeit inadequate, effort to comply with SCR 158(1). And Mr. Singer had put the client's funds in secured investments. The client had the capacity to recover her money and Mr. Singer presumably had the ability to make his client whole.

Here, Nancy made NO effort to comply with rules and restrictions of SCR 158(1). She seemingly operated in an ethical vacuum, concerning herself only with how much money she could get from Fred and the means by which she could do it and protect herself from his heirs and from the tax man. The marriage was a sham in the normal sense of that word. Fred was in his late 70's and his health was very poor. He had heart problems and been in the hospital twice during their relationship. They did not ever live together or share intimacies.

In this light, all Nancy had to do was go through a sham marriage and then

simply wait for Fred to die. If all went according to her plans, his wealth would have been in her hands, tax free or nearly so, and protected from his heirs.

Nancy did not like the legal business and wanted to get out it and into her passion for dancing. Fred was her means of doing so, a personal cash register for her personal indulgences. Cha ching for cha cha cha.

The evidence and law imposing liability on Nancy are overwhelming. This is now only a question of remedies.

LEGAL MALPRACTICE CLAIM

Fred's Fifth Cause of Action related to a claim for legal malpractice. In this case, Nancy functioned principally as a coordinator of legal services for Fred and arranged for the actual legal work and representation to be done by other attorneys. There was no apparent legal malpractice committed in any of the legal disputes in which Fred was involved and in which he was represented by other counsel.

The court denies any relief to Fred on this cause of action. The damages he suffered came about principally because of his personal relationship with Nancy and not from the attorney client relationship per se. Damages are awarded on other causes of action.

...

DAMAGES AND REMEDIES

Any lawyer who engages in personal business transactions with a client is treading a path fraught with perils. The mandates of SCR 158 as construed by the Nevada Supreme Court in In re Singer, supra, are stringent and are intended to protect clients from being taken advantage of by the lawyer.

The breach of fiduciary duties and a confidential relationship is recognized in Nevada law as an independent cause of action. Long v. Towne, 98 Nev. 11, 13 (1982) and Perry v. Jordan, 111 Nev. 943, 946-7 (1995).

Fred is entitled to a judgment against Nancy based upon his first and sixth causes of action for breach of fiduciary duties and to an award of damages for breach of those duties.

The court is not awarding any damages for his purchase of and investments in Synergy Dynamics dba Dance Charisma. He purchased the business from the prior owner and at the suggestion of someone else. He did not have the business appraised, did not seek to look at the books and records of the company, and had no input from Nancy as to whether or not to buy the business. She was the attorney for the corporation at the time and did not have any attorney-client relationship with him then. Her personal relationship was platonic at the time. Furthermore, Fred was aware that the business needed cash infusions from the

beginning. He also got an evaluation some months later from his own CPA who advised him that this business was losing money and that he (Fred) would have to decide how long and how much he would invest in Dance Charisma before he should “pull the plug” and stop his investment into this business. Nancy was not a part of this arrangement at the time. It was not until the summer of 1995 before she started doing any legal business with Fred.

However, Fred is entitled to damages against Nancy for all the monies he expended on her personally as set forth in Exhibit 112 except for the monies paid to her for legal fees in the summer of 1995 (\$1,600.00 and \$10,000.00). Thus, the total amount of damages for this part is \$401,365.05 (\$412,965.05– \$11,600.00).

Fred is also entitled to damages against Nancy for all the monies he expended on the Marabella property which ended up as Nancy’s sole and separate property. Fred paid out \$710,615.94 total for the Marabella property acquisition and construction costs. He overpaid by \$251,900.24 which was retained by Nancy for her own benefit. (Plaintiff’s Exh. 107). Fred is entitled to damages for this aspect in the sum of \$710,615.94.

Fred is also entitled to limited damages on his seventh cause of action, elderly exploitation, but only for those damages that accrued after October 1, 1997. According to Exhibit 112, Fred paid \$30,500.00 to Nancy after that date.

Since that sum is already included in the first calculation of damages set forth above, Fred is entitled only to an additional damage award of \$30,500.00 as authorized by N.R.S. 41.1395(1).

The damages total from these three categories is \$1,142,480.99.

No damages are awarded for the Holiday ball and dance camp since that matter came up after they were divorced and the fiduciary relationship had ended. Fred expended a small amount of money and then cancelled the deal due primarily Nancy's failure to put up her share of the money.

A constructive trust is recognized as a remedy in Nevada law, aptly summarized in Schmidt v. Merriweather, 82 Nev. 372, 375 (1966):

“A constructive trust will arise whenever the circumstances under which property was acquired makes it inequitable that it should be retained by him who holds the legal title, as against another, provided some confidential relationship exists between the two and provided the raising of the trust is necessary to prevent a failure of justice.”

The court hereby imposes a constructive trust on the real property located at 58 Echo Glen Road, Mt. Charleston. It is furthermore ordered that the plaintiff shall be entitled to obtain ownership of this property free and clear of any liens filed or imposed by her counsel. Muije v. North Las Vegas Cab Co., 106 Nev. 664 (1990).

...

The fair market value of the property shall be deducted from the total amount of the damages awarded to Fred.

The remaining issue is a determination of whether Fred is entitled to an award of punitive damages as authorized by N.R.S. 42.005 if clear and convincing evidence shows that the defendant is “guilty of oppression, fraud, or malice, express or implied.”

“‘Oppression’ is present where the plaintiff has been subjected to ‘cruel and unjust hardship in conscious disregard of his rights.’” Jeep corporation v. Murray, 101 Nev. 640, 650 (1985). A violation of a duty imposed by law can constitute a tort and is independent of contract. Bernhard v. Rockhill Dev. Co., 103 Nev. 132, 135 (1987).

The court finds that Nancy did commit a violation of tort law and is guilty of oppression as that phrase is used in N.R.S. 42.005. The problem is that subsection 3 requires a supplemental proceeding to determine the amount of punitive damages. Thus, no amount is set at this time.

JUDGMENT

The court hereby renders judgment in favor of the plaintiff and against the defendant as follows:

1. Damages of \$1,111,980.99 collectively on plaintiff’s first, fourth and

sixth causes of action;

2. Damages of \$30,500.00 on plaintiff's seventh cause of action;

3. For the imposition of a constructive trust on the real property presently held in defendant's name at 58 Echo Road, Mt. Charleston, Nevada and such constructive trust is to be free and clear of any liens on the property filed by defendant's counsel;

4. For judgment of annulment cancelling the marriage the parties heretofore entered into on or about March 20, 1996 and setting aside the Decree of Divorce entered with the First Judicial District Court on or about October 2, 1997.

5. For an award of exemplary damages pursuant to N.R.S. 42.005 to be set at a supplemental hearing.

6. For costs of suit as permitted by N.R.S. 18.020 and 18.005;

7. For judgment dismissing the remaining causes of action in defendant's counterclaim, being the second and fifth causes of action with prejudice. The remaining claims in the counterclaim were previously voluntarily dropped by the defendant at the conclusion of the trial.

DATED this 20th day of September, 2002

ROBERT W. LUECK, District Court Judge