A legal note from Marshal Willick about the final word on *Carmona* – and an object lesson on the value of settlement.

I. BACKGROUND

For those readers who do not regularly peruse the advance sheets from the Ninth Circuit, that court elected to reject both sides' cross-motions for rehearing by way of an order filed September 10, 2010. This left in place the earlier decision (*Carmona v. Carmona*, 544 F.3d 988 (9th Cir. 2008), *amended*, 603 F.3d 1041 (2010)), which left the IATSE survivor's benefits to Janis, and the Hilton survivor's benefits to Judy, along with a truly awful holding that makes the life of every divorce lawyer more difficult and dangerous.

Specifically, as detailed in the article in the Winter 2010 Nevada Family Law Report (available at http://www.nvbar.org/Sections/FamilyLaw/NFLR/winter2010.pdf),

> Divorce lawyers should care about this because it makes them responsible for knowing at the time of divorce whether the deals they make in dividing up assets will or will not be enforced by various retirement plans – and because they will inevitably be sued for malpractice if the deals they make in divorce actions do not result in enforceable orders.
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> The panel decision explicitly discusses the possibility that parties to divorce cases could outright lie – getting financial concessions in exchange for giving up pension and survivorship rights – and then turn right around, double-cross the divorce court and opposing party, and claim those benefits anyway. The panel apparently did not consider the inequity of such a situation worthy of avoidance, or have any concern with the potential liability of counsel.
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> If this interpretation stands, divorce courts will not be able to enforce the equities upon divorce as the courts find them to exist, and divorce lawyers will be turned into insurers of the future compliance of pension plans with divorce court orders. It will not be possible to enforce some divorce court orders, even by QDRO, and happenstance will be more important than the intent of the parties, or the court.

That nutty result has now been made final, despite the fact that it effectively contradicts the holding of that same court's even-more-recent holding in *Mack* – but that is an article for another day.

II. WHAT WAS AT STAKE, WHAT HAPPENED, AND WHY

Our office substituted in for Lupe (the husband) in 1998, while the case was still confined to Family Court. He died later that year, and we continued representing his wife and widow, Judy, from then until now.

What was actually at stake in the case was the flow of survivor's benefits under two modest pension plans (IATSE and Hilton) – each paying about $500 per month. At our client's direction, we applied all sums actually received to the attorney's fee bill, the idea being that the client would receive all

sums received once that bill was paid.

We won the case at Family Court, and were defending it on appeal. At the appellate settlement conference, held June 2, 2000, I addressed the two opposing counsel (who I will reference here only as "Mr. F and Mr. J").

I told them that while we had already won at trial, and while the odds always favor a Respondent on appeal, the reality was that this was an evolving and rapidly-fluctuating area of the law, and it was impossible to know what case law (State or federal), or even Congressional enactment, could alter the outcome during the years that an appeal could take.

Given the unavoidable uncertainty of result, and certainty of significant further expense, I therefore proposed a settlement – Judy would keep one of the two streams, Janis would keep the other, the litigation would end, and the parties would each go on with their lives, with some income. The immediate and mutual response from Mr. F and Mr. J: "We'll see ***you*** in court!"

As detailed in the Winter 2009 article, this case has thereafter been in essentially constant litigation, in the Nevada Supreme Court (three separate cases), then back to Family Court, and then ranging at our opponents' insistence and continual re-filing in the Nevada District Court (Probate), the federal District Court (three times), federal Bankruptcy Court, the Ninth Circuit (three times) and even one trip to the U.S. Supreme Court.

III. THE MONEY, THE IRONY – AND THE VALUE OF SETTLEMENT

When I proposed settlement during the first appeal in 2000, total attorney's fees incurred (on our side) were about $43,000. Today – with precisely the same result that I offered Mr. F and Mr. J. over a decade ago – fees charged on our side are in excess of $319,000. Presumably, they are even higher on the other side, given the number and variety of actions they filed over the years; about the only place they did not drag this case was the Henderson Municipal Traffic Court.

Both of Lupe's ex-wives are now middle-aged. Neither is likely to live the more-than-50 years it would take to pay off the accrued attorney's fee bill with the flow of survivorship benefits – on either side.

The bottom line? The foolish obstinance of Mr. F and Mr. J injured ***everyone***. Both clients were deprived of a lifetime of income, the lawyers involved have been made to do work for which they will never be paid, and the life of every divorce lawyer has been made more difficult and onerous by a bad holding leaving them all open to risk, loss, and aggravation in every future case involving pension benefits.

This is hardly a new occurrence. Over a century ago, Charles Dickens lambasted the rapaciousness of lawyers more concerned with litigation for its own sake than the actual welfare of their clients:

> The lawyers have twisted it into such a state of bedevilment that the original merits of the

> case have long disappeared from the face of the earth. It's about a Will, and the trusts under a Will – or it was once. It's about nothing but Costs now.

Bleak House (1852).

There is nothing that can be done to spare the parties to this fifteen-year-long misadventure their losses of time, trouble, and money. But maybe this tale can serve as a cautionary one for lawyers so caught up in the passion of the moment that they forget the sage advice of Abraham Lincoln recounted below. Or, as one snarky modern variant puts it: "Perhaps your only function is to serve as a warning to others."

In any event, settlement should always be considered, and counsel should always be mindful of the costs – in time and in treasure – of failing to take the opportunity to bring a dispute to an end.

VII. QUOTES OF THE ISSUE

"A shell for thee – And a shell for thee – But the oyster is the lawyer's fee."
– Thomas Lewis Ingram

"Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough."
– Abraham Lincoln

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This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.