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### Kogod v. Cioffi-Kogod, 135 Nev. Adv. Op. 9 (Apr. 25, 2019) (en banc)

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DIVORCE AWARDS: ALIMONY AND UNEQUAL DISPOSITION OF COMMUNITY PROPERTY

**Summary**

The Court articulated several decisions regarding the disposition of assets after a divorce. First, in determining an alimony award, a district court should consider the need of the receiving party in light of other income-earning property received. Second, extramarital spending can justify unequal disposition of community property; however, unequal disposition cannot be based on overconsumption of funds unless a specific showing is made to prove that consumption is excessive. Third, calculations of community property disposition should continue until the written decree is issued. Finally, a violation of an ambiguous injunction cannot result in sanctions.

**Background**

The parties in this action, Dennis Kogod and Gabriella Cioffi-Kogod, married in 1991 and moved to Las Vegas in 2003. Dennis worked for a healthcare company in southern California. In 2004, he was promoted to Chief Operating Officer of a Fortune 500 healthcare company; as a result, his average annual salary was \$800,000. After his bonuses were calculated, his annual income approached \$14,000,000.

According to Dennis, it was during this time that the couple began “living separate lives.” Dennis had secretly started a separate family in southern California with a woman named Nadya, although they never formally married. He told Nadya of his marriage to Gabrielle, yet Dennis and Nadya stayed together and had twin girls in 2007. Dennis paid for everything, such as luxury cars, vacations, Nadya’s college classes, and even an investment on behalf of Nadya. Dennis’s relationship with Nadya persisted until 2015 when Nadya discovered Dennis had another girlfriend in addition to his wife.

Dennis filed for divorce from Gabrielle in 2010; however, the action was dismissed and the couple informally separated the same year. Gabrielle, still unaware of Dennis’s secret family, filed for divorce in 2013. The community property in this case totaled \$47 million.

The divorce decree was entered in August of 2016. First, \$6 million was awarded to each party as separate property. The district court then divided the remaining \$35 million of community property. First, the district court found that Dennis had dissipated just over \$4 million of the community property, and they awarded Gabrielle \$1.6 million dollars in alimony to offset losses involved with the marriage and the divorce. In total, Gabrielle received approximately \$21 million in mostly cash assets and Dennis received approximately \$14 million, most of which came in the form of real property. The final finding sanctioned Dennis \$19,500 for violating a preliminary injunction and awarded Gabrielle \$75,650 in fees. Dennis appealed and Gabrielle cross-appealed. This opinion is the result of the consolidated appeal.

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<sup>1</sup> By Dallas Anselmo.

## Discussion

### II.

On his appeal, Dennis first challenged the alimony award to Gabrielle. The Court first explained the considerable discretion possessed by the district court when awarding alimony. The Court also highlighted statutes that guide district courts and require the consideration of eleven factors when awarding alimony.<sup>2</sup> This decision-making process was stressed because of the “nebulous” purpose of alimony. This “nebulous” nature creates unpredictability for parties and can “leave courts uncertain as to when, and in what amount, alimony should be awarded.”

Arguments in this case highlighted the undefined nature of alimony. Dennis asserted financial need should limit alimony awards; Gabrielle responded by asserting alimony can serve as a tool to “equalize” earnings or maintain a lifestyle.

Responding to these arguments, the Court held that alimony can satisfy the “just and equitable” standard when it is based on economic needs of a spouse and when it is intended to “compensate for a spouse’s economic losses from the marriage and divorce, including to equalize post-divorce earnings or help maintain the marital standard of living.” In other words, the assertions of each party were accurate, but neither encompassed all considerations that make up an alimony analysis.

#### A.

After announcing this ruling, the Court discussed a brief history of alimony. Nevada has recognized alimony as a remedy for “economic-power imbalance[s]” since its earliest cases. In some of those early cases, the need of the receiving spouse and the paying spouse’s ability to pay were the only factors considered. The Court distinguished this binary approach from the current approach outlined in NRS 125.150. Overall, and in light of the current approach, the Court articulates “a district court may award alimony to ensure that an economically powerless spouse receives sufficient support to meet his or her needs.”

The next issue is what qualifies as a “need,” especially in a case involving such wealth. When the receiving spouse needs assistance purchasing food and shelter, the need is “clear-cut” and an alimony award is of course appropriate. The Court again highlights the ambiguity that can be found when determining “needs”; however, the Legislature has placed this discretion with the trial courts. Ultimately, the ambiguity remains and it is the district court that must determine the meaning of “needs” and what is “just and equitable.”

#### B.

Beyond the need of the receiving spouse, alimony may also be awarded in order to compensate for a spouse’s loss in standard of living or earning capacity. For example, decreased earning potential as a result of “foregoing career opportunities for the sake of the marriage” may be considered.

This rationale also supports the case law’s interest in maintaining the receiving spouse’s standard of living after the divorce. It is an “important aim” of the Supreme Court to allow the receiving spouse to “maintain a lifestyle as close as possible to the lifestyle enjoyed during the

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<sup>2</sup> NEV. REV. STAT. §§ 125.150(1)(a), 125.150(9) (2017).

marriage . . . .” The Court highlights how it has reaffirmed this goal in the past by defining two primary purposes of alimony: “to narrow any large gaps between the post-divorce earning capacities of the parties and to allow the recipient spouse to live ‘as nearly as fairly possible to the station in life [] enjoyed before the divorce.’”<sup>3</sup> In sum, the Court disagrees with Dennis’s assertion that alimony may only be awarded to meet financial need.

### C.

In an attempt to narrow the earning gap between both parties, the district court initially awarded Gabrielle alimony of \$18,000 a month to be paid over nine years. The district court ordered a lump sum be paid from the community property and “discounted the award by a four percent average rate of return.” As a result, Gabrielle received a payment of \$1,630,292. Gabrielle asserted that the alimony was necessary to narrow the wage gap and allow her to maintain her standard of living.

In a footnote, the Court noted that Gabrielle’s assertion focuses on the only two remaining grounds for alimony. Because Gabrielle’s nursing career was flexible with moves to accommodate Dennis’s occupation, she “did not forgo career opportunities” as a result of the marriage. Because no career opportunities were missed, standard of living and wage gap reduction constituted the other two grounds upon which Gabrielle could request alimony.

#### 1.

By itself, income disparity cannot mandate alimony. Gabrielle was correct, the Court held, in stating alimony can be instituted for the purpose of narrowing the wage gap; however, the Court held that the property Gabrielle received eliminated the need for awarding alimony. Even though the award will not directly supplement her earnings, there is no need for an alimony award because Gabrielle can earn substantial passive income from the assets she received. This earning potential is greater than the amount of the original alimony order; therefore, the Court disagrees with Gabrielle’s assertion that she requires the alimony. Ultimately, alimony to “achieve parity in income” must also advance another rationale for alimony.

#### 2.

Again, the Court held that Gabrielle was correct in her assertion that alimony is valid when it helps the receiving spouse maintain their standard of living; however, other awards must be considered when determining the receiving spouse’s ability to maintain their standard of life. “It would be the height of absurdity to suggest that a spouse, to whom income-producing property was awarded in a property settlement, would be entitled to have his or her need for alimony, or ability to pay alimony, determined without regard to the income produced by that property.”<sup>4</sup> Principles of alimony “do not contemplate an award for a spouse” who is capable of supporting herself and able to maintain her standard of life. Summarily, the Court found the district court had abused its discretion when it awarded alimony and it reversed. In so doing, the Court rejected Gabrielle’s cross-appeal requesting a larger alimony award.

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<sup>3</sup> Shydler v. Shydler, 114 Nev. 192, 198, 954 P.2d 37, 40 (1998).

<sup>4</sup> Lang v. Lang, 425 N.W.2d 800, 802 (Mich. Ct. App. 1988).

### III.

A court must equally dispose of community property in a divorce unless a compelling reason exists that supports an unequal distribution.<sup>5</sup> Dissipation or waste can be a compelling reason that can justify an unequal disposition.

Dennis dissipated just over \$4 million dollars of the community property, much of which related to Dennis's secret family and children. Both parties contest the district court's finding regarding the amount dissipated. Dennis contends he did not dissipate any property because the marital estate actually grew "tremendously." Gabrielle responded by asserting the district court erred in its calculations.

#### A.

There was no abuse of discretion on the part of the district court when it found a compelling reason to unequally disperse the community property in response to Dennis's extramarital spending. The Court was not persuaded by Dennis's argument that the extramarital spending was harmless because the estate's overall value increased.

The Court distinguished case law that provided "spousal abuse or marital misconduct is a compelling reason to make an unequal disposition of community assets only when it has an 'adverse economic impact' on the [receiving] spouse."<sup>6</sup> The "adverse economic impact" requirement in *Wheeler* is necessary because the Court in that case was deciding whether to unequally disperse assets as a result of uneconomic activity: spousal abuse.

The relationship between physical abuse and the community property in *Wheeler* was much more tenuous than the relationship between the extramarital spending of assets and the community property in this case. Here, there is a clear relationship between the asset expenditure and the community assets. This clear relationship caused the Court to be unpersuaded by Dennis's overall estate growth theory.

#### B.

Dennis conveyed \$72,200 worth of gifts to family members prior to the divorce. Whether a gift constitutes dissipation pivots on the existence of an injunction or the nature and timing of the gift. First, when a pre-divorce gift violates an injunction, it constitutes dissipation and can justify unequal distribution of community property.<sup>7</sup>

Without a specific injunction, a gift to family does not constitute dissipation unless the gift is (1) given at a suspicious time prior to the divorce or is (2) suspiciously large when compared to prior gifts. Using this analysis, the Court held the district court appropriately found the \$72,200 conveyed by Dennis constituted dissipation.

#### C.

Dennis could not account for all of his expenditures in the months leading up to the divorce, so the district court classified these expenditures as "potential waste." Dennis promised to provide

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<sup>5</sup> NEV. REV. STAT. 125.150(1)(b) (2017).

<sup>6</sup> *Wheeler v. Upton-Wheeler*, 113 Nev. 1185, 1190, 946 P.2d 200, 203 (1997).

<sup>7</sup> *Lofgren v. Lofgren*, 112 Nev. 1282, 1283, 926 P.2d 296, 297 (1996).

a forensic accountant to make sense of the unclassified expenditures; however, he failed to do so. Gabrielle then provided her own forensic accountant. The district court required Dennis to “account for each of these [] transactions . . . .” The Court held the district court erred by requiring this of Dennis.

An additional consideration is required when examining expenditures made by high-income individuals. Expenditures by wealthy individuals, like Dennis, especially when viewed in the aggregate, appear indicative of waste. However, it is possible the expenditures were mere overconsumption. Overconsuming community property is not a compelling reason that supports unequal disposition. Therefore, the Court reversed the district court’s unequal disposition of property because of the insufficient showing that expenditures “not elsewhere classified” actually constituted waste.

#### D.

The Court agreed with Gabrielle’s assertion that the district court erred when it ended its community property calculations in February of 2016 instead of when the decree was entered in August of the same year. An “oral pronouncement of divorce” does not “terminate the community.” Calculations of the community property should continue until the community is terminated. Because calculations should have continued for another six months, this issue was remanded to the district court for further calculations and determinations of waste.

#### IV.

The next issue concerns the sanctions placed on Dennis as a result of expenditures that violated the joint preliminary injunction that required all spending be made for the “usual course of business or for the necessities of life.” Given the wealth in this case, the meaning of “usual course of business or for the necessities of life” was found to be ambiguous. Before placing sanctions on a party, the order they allegedly violate must be clear and unambiguous.<sup>8</sup>

Therefore, the ambiguity in the order led the Court to hold sanctions were an inappropriate remedy altogether. The appropriate remedy would have been an unequal disposition of community property. Accordingly, the Court reversed the sanctions and denied Gabrielle’s appeal for additional sanctions.

#### V.

The next award at issue was the \$75,650 awarded to Gabrielle to help offset her forensic accountant fees when Dennis failed to provide a forensic accountant of his own. The district court ordered this award without any “apparent basis.” A district court must state a basis for its decision to award fees.<sup>9</sup> Because no basis was given, the district court abused its discretion and the award of fees to Gabrielle was reversed; additionally, her appeal for attorney fees was denied.

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<sup>8</sup> *Cunningham v. Eighth Judicial Dist. Court*, 102 Nev. 551, 559–60, 729 P.2d 1328, 1333–34 (1986).

<sup>9</sup> *Khoury v. Seastrand*, 132 Nev. 520, 541, 377 P.3d 81, 95 (2016).

Hardesty, J., with whom Stiglich, J., agrees, concurring in part and dissenting in part:

Justices Hardesty and Stiglich write separately to express their disagreement with one part of the majority holding: the reversal of the alimony award. First, the dissenting justices felt that the majority failed to show sufficient deference to the trial court. Second, the dissent takes issue with the majority's initial statement that alimony is without an official purpose only to later summarize Nevada alimony jurisprudence and seemingly assign a purpose for alimony. Third, the majority opinion speculates, without making any citation to the record, that the district court's alimony award "could have been improperly motivated by Dennis's marital indiscretions . . . ." The dissenting justices also pointed to the record and acknowledged the trial court's use of the eleven factors found in NRS 125.150(9).

Summarily, the dissenting justices are of the opinion that the combination of a deferential standard of review and the "thorough and specific" analysis of NRS 125.150(9) should have resulted in the affirmation of the alimony award.

### **Conclusion**

The Court affirmed in part, reversed in part, and remanded one issue with instructions. First, the alimony award was reversed because Gabrielle's award from the community property was capable of earning income sufficient to offset the wage gap and maintain her standard of living. Second, the unequal dispersal of community property was affirmed as it related to Dennis's extramarital spending; however, it was reversed regarding his consumption that was not definitively shown to be waste. Third, the case was remanded for calculations of the community property for the sixth months between the oral decree and the official written decree. Finally, the sanctions placed upon Dennis and the award of costs to Gabrielle were reversed.