IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS KOGOD,

Appellant/Cross-Respondent,

v.

GABRIELLE CIOFFI-KOGOD,

Respondent/Cross-Appellant.

Supreme Court No. 71147
71994
District Court Case No. D-13-489442-D

RESPONDENT/CROSS- APPELLANT'S PETITION FOR REHEARING

Respondent/Cross-Appellant, GABRIELLE CIOFFI-KOGOD ("Gabrielle") by and through Radford J. Smith, Chartered, and pursuant to NRAP 40, respectfully requests that this court reconsider its *Opinion,* filed April 25, 2019 and reverse its decision in the manner identified in the Points and Authorities below.

This Motion is based upon the Points and Authorities below, on all pleadings on file herein, and is made in good faith and not to delay justice.

Dated this 28th day of May, 2019.

RADFORD J. SMITH, CHARTERED

/s/ Kimberly A. Stutzman, #14085

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POINTS AND AUTHORITIES

I.

STANDARD OF REVIEW

NRAP 40 reads:

> (2) The court may consider rehearings in the following circumstances:
>
> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
>
> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

II.

THE COURT HAS MISAPPLIED NRS 125.150 BY LIMITING THE DISCRETION OF THE DISTRICT COURTS IN A MANNER CONTRARY THE STATUTE'S PLAIN LANGUAGE

There is no common law of alimony, it is "wholly a creature of statute." *Rodriguez v. Rodriquez,* 116 Nev. 993, 998, 13 P.3d 415, 418 (2000). The sole and controlling statute granting district courts the right to grant alimony is NRS 125.150. This case presented a claim by a husband, Dennis, that the district court abused its discretion under NRS 125.150 because it did not limit its determination of alimony to the "need" of the wife. The wife, Gabrielle, argued upon appeal that the district court was not limited to the determination of "need" of a recipient spouse, but could use any economic theory of alimony that was "just and equitable." In its decision, this Court has ostensibly interpreted the language of NRS 125.150 as limiting the court's discretion to two different economic models and has placed

a theoretical cap on an award of alimony. The court's interpretation misapprehends, and is contrary to, the plain language of NRS 125.150.

1) The Broad Language of NRS 125.150 Permits District Court's Wide Discretion to Use Various Economic Theories in Awarding Alimony, and does not Limit the Court to "Economic Loss" or "Contribution" Theories.

In its analysis in *Kogod,* the court cited a series of scholarly works and Nevada caselaw that identified various economic bases for post-divorce sharing of divergent income through alimony awards that were not limited to a recipient's "need." In *The Theory of Marital Residuals*, 24 Harv. Women's L.J., cited by the court, the authors identified various historical bases for alimony including contract theory, contribution theory and loss theory. Each of those theories has a different theoretical basis. *Id. at* 28-30; 39-40. The article's premise was that the use of various theories of alimony led to uncertain results, and that instead courts should adopt a formulaic approach to alimony.

NRS 125.150, however, does not contain a mathematical formula. There is no limit or minimum alimony, and the district courts have broad discretion in determining alimony that is "just and equitable." The statute requires that the district court make findings regarding certain statutory factors, but only "any other factors" the court considers relevant in determining whether to award alimony and the amount of such an award. NRS 125.150(9).

In *Kogod,* however, this Court has seemingly limited the theories under which a district court can fashion an alimony award utilizing the statutory factors:

> After considering these factors, and any other relevant circumstance, the district court may award alimony under 125.150(1)(a) to compensate a spouse for non-monetary contributions to the marriage and economic losses from early termination of the marriage, such as lost income-earning potential or a decreased standard of living.

The difficulty with this language is the use of the word "may" in statement "may award alimony under 125.150(1)(a)." The word "may" is capable of being interpreted as a limitation on what theories a district court can use to fashion an alimony award beyond a party's basic needs. Nothing in the plain language of NRS 125.150 limits the district courts consideration to certain types of economic theories when awarding alimony. The statute requires that a district court review certain factors, in addition to "any other factor the court finds relevant" to determine a just and equitable award. NRS 125.150(9). The factors are plain in their language, none is granted priority over the other, and the statute's language constitutes a broad grant of power to the district courts to fashion alimony awards. If the legislature wanted mathematical precision, or something akin to it, it could have adopted a formula, but it has failed to do so.

Moreover, what appears to be the conclusion of what theories are approved for the district court varies from the theories expressed in the citations that precede it. This Court quoted the sentence from *The Theory of Marital Residuals*, 24 Harv. Women's L.J. at 49 stating, "[T]here should be some degree of sharing of post-divorce incomes to reflect the returns flowing from efforts made while the marital joint venture was operational – an equitable sharing of the residual economic benefits from work done during the marriage."

That statement was part of a larger contract theory of alimony expressed as the "theory of marital residuals."

> [The theory] in practice would obviate the need to struggle with amorphous questions of the nature and value of past personal contributions, and the equally problematic inquiries into defining and calculating future needs. Rather than attempt to share the *loss* stemming from marital dissolution, this approach seeks to establish a fair allocation of the residual gains accruing after the fact from the marital venture.
>
> The theory of marital residuals is premised on the assumption that transfers between former spouses should provide an equitable sharing of some post-separation earnings because postmarital income results, at least in part, from efforts made during the marriage. The duration of the sharing would be set as a function of the length of the marriage--the period of the couple's joint efforts--and its amount as an ever-decreasing percentage of the differences in the former spouses' incomes.

Id. at 49-50 (Emphasis in original). Thus, the "efforts" in the quote from this article cited in *Kogod* referred to joint efforts of the parties in their economic outcomes, not a monetized value of the contribution of the recipient spouse. Moreover, the presumption under that theory is that the benefits of the marriage include the ability of the spouses to make money as an economic unit, and did not include a segregated view of the "lifestyle" need of a recipient spouse after marriage. The equity of the distribution of income arises from those presumptions that, as identified in *Kogod,* have been recognized by this Court in *Gardner v. Gardner,* 110 Nev. 1053, 881 P.2d 645 (1994), and *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998)([T]wo of the primary purposes of alimony, at least in marriages of significant length, are 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.)

Many of the factors contained in NRS 125.150 support a basis for the economic "theory of marital residuals" including all the factors recognized by this Court at pages 5 and 9 of the *Kogod* decision. There is no limit on a Nevada district court's ability to award alimony under that economic model utilizing the statutory factors found in NRS 125.150, nor any limit on the district court's ability to *greater* equalize the post-divorce earnings of the parties.

2) **The Limit of Alimony to "Economic Need" or Standard of Living is not found in Nevada Law**

Under the Kogod decision, if a recipient spouse's income from any source can meet the expenses in his or her FDF (marital standard of living) then that spouse will ***never*** be entitled to alimony. Mr. Kogod's income, as the decision acknowledges, including stock options and bonuses, was an average of approximately **$1,000,000** per month over the previous five years before trial. Arguably, if a spouse is not eligible without showing economic need or inability to meet a marital standard of living to receive alimony based upon the discrepancy of $942,000 ***per month*** in income Kogod, it is likely impossible to do so.

Under the *Kogod* decision, "standard of living" is equated to "need." The Court stated:

> A large gap in income, alone, does not decide alimony. The award must meet the receiving spouse's economic needs or compensate for economic losses resulting from the marriage and subsequent divorce.

The notions limiting alimony in the manner described by the Court are nowhere to be found in Nevada statute. Under Nevada statute, the district court has discretion to order an amount that is fair and equitable, and two of the factors the court may use are the relative earning capacity of the parties, and the level of marketable skills acquired during marriage. Here, Judge Duckworth keyed on those factors as the basis for his award, and those factors were undeniably supported by substantial evidence. 44 AA 8556-69.

The Court cited a Florida case, *Nousari v. Nousari,* 94 So. 3d 704, 706 (Fla.Dist.Ct. App. 2012) for the proposition that "permanent alimony is not to divide future income to establish financial equality between the parties, so disparity in income alone does not justify an aware of permanent alimony." Florida, however, has a completely different statutory scheme than Neavada. Its provision regarding permanent alimony reads:

> Permanent alimony may be awarded to provide for the needs and necessities of life as they were established during the marriage of the parties for a party who lacks the financial ability to meet his or her needs and necessities of life following a dissolution of marriage.

Fla. Stat. sec. 61.08(8). Because alimony is "wholly a creature of statute," citation to cases interpreting the statutory scheme in another jurisdiction is not applicable when the statutory language is different. In fact, the inclusion of the limitations regarding "needs and necessities of life" and limitation of alimony to only those recipients who "lack financial ability" in the Florida statute, and the lack of any such provisions in the Nevada

statutes, should instruct that it is the legislature, not the courts that should include limits on alimony to "economic need."

In limiting the district courts focus to economic need, the Court in *Kogod* eliminates the consideration of the economic *gain* that one of the spouses has accrued during the marriage. There is nothing under Nevada law that should prevent a district court from basing, as the court did here, on the massive gain in income afforded and acquired during the parties' marriage.

Further, the Court's emphasis on the "standard of living" of the parties seems to focus only on spending, not saving. Unlike Gabrielle, Dennis will continue to be able to save millions of dollars per year based upon his income, just as he has done over the five years preceding the marriage. Gabrielle, on the other hand, will not be able to save, and will need to use all or a portion of her savings to come close to maintaining the lifestyle that Dennis lived during the marriage. That result is neither equitable nor fair. The court should specifically identify savings as part of a marital standard of living.

II.

UNEQUAL DIVISION /COMMUNITY WASTE

1) The Court Misapprehended that Nature of the Accounting Performed by Gabrielle to Determine Monies Dennis had Gifted to Nadya and their Children in Violation of Nevada Statute

This Court has identified a non-exclusive list of actions by a spouse that can constitute a basis for an uneven distribution of community property, including dissipation or waste.

Lofgren v. Lofgren, 112 Nev. 1282, 1283, 926 P.2d 296, 297 (1996). Nevada statute, among other restrictions in the use of transfer of community property, prevents a party from gifting away community property without the express or implied consent of the other party. Nevada law treats married parties as both fiduciaries and partners of community property. *See, Cook v. Cook,* 112 Nev. 179, 912 P.2d 264 (1996), *Waldman v. Waldman,* 97 Nev. 546, 635 P.2d 289 (1981).

Nevada common law treats married parties as fiduciaries that owe each other a duty to account and to disclose. A fiduciary may not use common funds for his or her sole benefit and to the detriment of those to which he or she owes a fiduciary duty. The remedies for breach of fiduciary duty that include compensatory damages, and both pretrial and judgment interest. *See,* NRS 17.130; *Ramada Inns v. Sharp*, 101 Nev. 824, 826, 711 P.2d 1, 2 (1985)("Prejudgment interest is viewed as compensation for use by defendant of money to which plaintiff is entitled from the time the cause of action accrues until the time of judgment; it is not designed as a penalty."). If a fiduciary breaches his or her duty, he has duty to provide an accounting.

The first time that Gabrielle suspected that Dennis was engaged in an-extra marital affair with Nadya was approximately eight years after the commencement of the affair. AA.8.1532. Gabrielle did not know that Dennis had fathered children with Nadya until this litigation. AA.8.1532. Nadya did not contribute to any of her or the children's expenses during the 11 years of their extra-marital relationship prior to the entry of the Court's Decree

of Divorce. AA.44.08490-08492, It follows that Dennis paid *all* Nadya and the children's expenses with community funds, and none of those payments prior to 2015 were known to Gabrielle.

Dennis admitted that he never advised Gabrielle of his affair with Nadya, nor advised her that he had fathered children with her until over a year after Gabrielle filed for divorce. He admitted that he had opened accounts at UBS, without Gabrielle's knowledge or consent, to hide the monies he was paying for Nadya and the children. Dennis placed the yachts and other monies in a trust in the name of his father who, at the time of his deposition in 2016, had no idea that he was the named trustee of a trust. AA.44.08491 FN26.

Dennis breached his fiduciary duty by gifting and secreting community funds for the benefit of Nadya and his children without Gabrielle's express or implied consent. His actions were both a breach of his fiduciary obligation, and a violation of NRS 123.230(2)("Neither spouse may make a gift of community property without the express or implied consent of the other"). Dennis paid direct expenses and monies to and for Nadya and the children that were plain in the financial documentation Gabrielle secured through discovery and for which she provided an expert reports and testimony at trial. AA.8.1570-1593; AA.9.1597-1766; RA.1.00151-RA.1.00171. This Court upheld that portion of the district court's judgment in its finding.

Since this Court found that direct payments to or for the benefit of another person without the other spouse's consent constituted a basis for an uneven division of community

property, then it follows that indirect payments should also be a basis for such unequal distribution. If a spouse directly pays money to a paramour so that person can pay his or her rent, groceries, car payment, utilities etc., under this Court's finding, that would amount to a waste of community funds compensable to the other spouse. Payment of those expenses without providing the money to the paramour first is no different. It is easy to understand that parties involved in affairs or attempting to otherwise cheat their spouse out of community funds, do not generally make direct payments; they transfer or hide funds leaving as little trail as possible.

Dennis's payments of community funds on Nadya's behalf was not limited, to direct payments. Dennis paid expenses for Nadya and the children for all of their living expenses, including the basic payments of food, shelter, utilities medical care, but also for entertainment, gifts, activities (including multiple outings on his two yachts, vacations, clothing, cars (including gas and maintenance), etc. Since Dennis, in violation of his fiduciary duty, refused to account for such expenses, Gabrielle was left with the difficult task of determining what amount of money Dennis used over the approximate seven years for himself, and what portion in gifted or transferred for the benefit of Nadya and the children.

The forensic accountant Gabrielle hired, Anthem Forensics, used Dennis's sworn Amended Financial Disclosure Form ("FDF") filed May 29, 2015 as his expenses for himself. That was the *only* accounting Dennis ever provided. He stated his monthly

obligations as **$92,553** per month. 10 AA 1931-51. Anthem Forensics then published an initial report with analysis of withdrawals and transfers from Dennis's hidden accounts beyond the amount that was identified in Dennis's FDF.[1] The report specifically indicated that Exhibit "6" of its report (potential waste not otherwise categorized) was to determine monies paid for the living expenses of Nadya and the children. *Id.*

Dennis's counsel, Dennis, and his expert were able to review and challenge any item that Anthem had identified in the "potential waste" category to rebut the claim that the money was paid to Nadya. Dennis gave hours of deposition testimony in which he stated his understanding of the expenditures. Anthem used that information to remove a substantial sum from the potential waste category in an amended report. Dennis's counsel was able to depose Gabrielle's expert, and present his own expert, Richard Teichner, who used the report of Anthem and presented Dennis's challenges to Anthem's findings in a written report. 33 AA 6162-6209. The district heard the testimony of both Jennifer Allen, and Joseph Leanaue, of Anthem, AA.8.1570-1593; AA.9.1597-1766; RA.1.00151-RA.1.00171; AA.44.8530-8554; AA.16.2133-3232; AA1.17.3233-3368; AA.18.3551-3578 and Mr. Teichner. Judge Duckworth meticulously went through that report, and based upon the evidence, reduced the amounts Dennis spent for Nadya and the children indirectly to $2,000,000. AA.44.08530.

In its decision, this Court reversed the district court's award by finding:

[1] Anthem's report dated November 17, 2015, 16 AA 3122.

> The district court erred by requiring Dennis to explain everyday expenditures over the course of several years, including before the divorce action began, and finding dissipation when he failed in this task. Dennis was not called to account for these expenditures because Gabrielle raised a reasonable inference that he transactions furthered a purpose inimical to the marriage, that he made them to diminish Gabrielle's community property share, or even that they were unusually large withdrawals from community accounts.

Kogod v. Kogod, 135 Nev. Adv. Op. 9, at page 23. That statement is a misapprehension of both the purpose and substance of the reports. The reports were specifically designed to capture Dennis's spending that was the use of community funds as gifts for the payment of the day-to-day expenses of his hidden second family. There was no other way to account for that use of funds because Dennis refused to account. He was credited with all of the $92,553 of spending that he identified in his Amended FDF. All of the expenditures that he made on behalf of Nadya, the yachts, and directly for the children were also removed from that analysis.

The Court's decision ignores the fact that Gabrielle had no idea Dennis was spending even the $92,553 per *month* he claimed on his FDF. In reality the Anthem analysis shows he was spending far more than that. This court held:

> While Dennis's spending could appear wasteful in the aggregate, his expenditures seem typical of his general consumption during the marriage [...]

Kogod, 135 Adv. Op. 9, page 24. Missing from this analysis, however, is any evidence that supports the notion that the $92,553 plus was "typical" of the parties' expenditures during marriage. The parties spending for their residence and expenses in Nevada were consistent with the approximately $15,000 reflected in Gabrielle's initial FDF filed

February 25, 2015 34 AA 6440-56. In reality, when Dennis began making millions of dollars in stock options and bonuses, he placed that money in accounts at UBS with the intent to hide his spending from Gabrielle. AA.5.1011-1013.

The Court then cited *Putterman* for the proposition that, "Almost all marriages involve some disproportion in contribution or consumption of community property." **This general notion cannot logically be applicable when the spending or consumption is completely unknown by, and purposely hidden from, the other spouse.** The underlying notion behind the Court's finding in *Putterman* is that one party may be in charge of paying bills, or be responsible for payment for social events or charity, or perhaps have expensive hobbies – under those circumstances causing someone to pay for unequal spending is unjust. But where a party hides money or spending from the other party, the actions of the spouse are inimical to the marriage, and contrary to the fiduciary obligations of each spouse to the other. The nature of the difference in spending must be examined in each case to determine if it is, as the court found here, typical.

Nothing about this case involved typical spending. Dennis hid tens of millions of dollars from Gabrielle, and then unilaterally used those community funds to buy mansions, yachts, Ferraris and Bentleys, and gift millions of dollars to his hidden girlfriend and children with her. The district court was well within its discretion to find that the facts of this case justified an accounting of the living expenses paid by Dennis for Nadya. Since Dennis did not account for those expenditures, the district court was also within its

discretion to find that the preponderance of the evidence, that *clearly* showed that he had expended monies in excess of the $92,553 per month he had claimed were his expenses, demonstrated that he had gifted the accounted for funds to Nadya and the children for their benefit.

2) **The Failure to Grant Lost Opportunity Costs for the Money Taken Out of the Community Grants Incentive for Such Misconduct.**

Under the court's decision, if a party is caught improperly transferring funds to others, there is no duty to reimburse the community for lost opportunity costs. The effect is that if a spouse is caught gifting property to a paramour, or caught committing any other kind of nefarious transfer or use of the community monies of another spouse, the wrongdoing spouse needs only return the money. Such a rule is contrary to the treatment of all individuals who breach a contract, or breach a fiduciary obligation. One must wonder what the disincentive for someone to try to hide or transfer property or funds to a third party? Both the district court and this Court's explanation for denying an award of interest (lost opportunity costs) on the money improperly used or transferred was that such an award "too speculative."

The application of interest to a judgment, even one where there are multiple breaches of differing amounts, is common in family law. Courts are regularly called upon to apply judgment interest, and interest for penalty for late or incomplete payment of child support. Moreover, the Court approved the application of an interest rate to the funds Gabrielle received in property to address the issue of alimony. Conceivably, under the court's rule a

party could take a large sum of the parties assets, invest them into an interest bearing account, spend the money on an extra-marital affair, then never have to reimburse the community for those funds. The court should reverse its decision

3) **The Court's Finding that a Joint Preliminary Injunction can Only be Enforced through an Unequal Division of Property will Undermine the Purpose of Rules and Statutes Designed to Maintain the Status Quo During the Divorce**

The record of the case that Dennis continuously violated the Joint Preliminary Injunction issued in this case. The district court found that none of the expenditures listed on Exhibit 73 of the Decree met the JPI criteria of "necessities of life" or "business expenses." AA.44.08555. The district court found that spending, with 39 violations, totaling $1,486,452 not including Dennis' purchase of a yacht and the Wilshire residence without Gabrielle's knowledge or consent, was in violation of the JPI. AA.45.08555. The district court sanctioned Dennis a paltry $500 per violation, but this court, ignoring the court's discretion to award sanctions for violations of its orders, found that to enforce a JPI, the "appropriate remedy was a finding of waste and an unequal disposition of community property." That rule, contrary to Local Rules and statute, gives little or no incentive for anyone to abide by the JPI.

The apparent distinction the Court gave to this case was that it was not clear what the necessities of life were "given the parties' wealth." The district court considered the parties' wealth in setting a floor of $10,000 in relation to their other spending. The average expenditure of the 39 transactions was $38,114. It is hard to imagine that spending in those

sums were for necessities. Whether a specific level of expenditure is beyond the normal spending of the parties is best determined by the district court after review of the evidence, and here the evidence of the expenditures was outlined in a specific exhibit identified by the Court in his findings. Perhaps most important, a court should be able to impose sanctions to prevent individuals from unusual spending during the divorce action. Without the remedy, the rule is meaningless to individuals earning significant income.

III.

CONCLUSION

Based upon the foregoing, the Court should

1. Reverse its decision on alimony, finding no court imposed limitations on district courts ability to grant alimony other than the statutory duty to utilize the stated factors, and a determination of alimony that is "just an equitable." The court should find that "need" is not a limit on alimony because no such limit is found in Nevada statute;

2. Reverse its decision on the issue of the district court's finding of an unequal division based upon Dennis's failure to account after Gabrielle had made a prima facie case of improper gifting of community property through direct and indirect or circumstantial evidence;

3. Reversing its decision regarding the imposition of interest on money improperly removed from the community;

4. And reversing its decision limiting the district court's ability to impose sanctions to enforce the Joint Preliminary Injunction.

Dated this 28th day of May, 2019.

RADFORD J. SMITH, CHARTERED

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CERTIFICATE OF SERVICE

I certify that on the 28th day of May, 2019, I served a copy of this Petition for Rehearing upon Daniel Marks, Esq., counsel of record for Appellant Dennis Kogod via the Electronic Filing System of the Supreme Court of Nevada.

/s/ Kimberly A. Stutzman

KIMBERLY STUTZMAN, ESQ.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of (a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast Respondent's Answering Brief (Amended) has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Font Size 14, in Times New Roman;

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP32(a)(7) because, excluding the parts of the petition/brief exempted by NRAP 32(a)(7)(C), it is either proportionally spaced, has a typeface of 14 points or more, and including the footnotes, contains 4,259 words.

3. I further certify that I have read the Respondent's Petition for Rehearing, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules Appellate Procedure.

Dated this 29th day of May 2019.

RADFORD J. SMITH, CHARTERED

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