

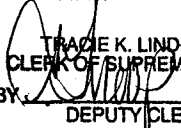
IN THE SUPREME COURT OF THE STATE OF NEVADA

ADRIAN HUDSON,  
Appellant,  
vs.  
MARGARITA TOBIAS,  
Respondent.

No. 47050

**FILED**

MAR 04 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY:   
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order concerning the parties' marital property and an order enforcing the property distribution. Eighth Judicial District Court, Family Court Division, Clark County; Lisa M. Kent, Judge.

Appellant Adrian Hudson raises several arguments on appeal concerning the district court's division of community assets and debts (the community estate).<sup>1</sup> For the following reasons, we conclude that the real

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<sup>1</sup>Hudson raises two additional arguments on appeal. First, he contends that the district court improperly denied his request for "preliminary attorney fees" under NRS 125.040, Nevada's suit money statute. However, because the district court was within its discretion to deny Hudson attorney fees under this statute based on his relative financial position, we conclude that this argument lacks merit. See Sargeant v. Sargeant, 88 Nev. 223, 227 495 P.2d 618, 621 (1972).

Second, Hudson asserts that the district court denied him due process by providing him only two days to prepare a written response to respondent Margarita Tobias' opposition to Hudson's motion to evict and Tobias' countermotion for damages, which Tobias filed on March 14, 2006. Because Tobias countermotion was timely filed, local rules of practice permitted the district court to hear the countermotion at the same time set for the original hearing on Hudson's motion to evict—March 16, 2006. Dist. Ct. R. 13; Nev. 8th J. Dist. Ct. R. 2.20(b)-(c). Because the district

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estate commission and the parties' personal bank accounts were part of the community estate and thus were subject to equal division. We note at the outset, however, that whether the division of the community estate is equal is not readily discernible from the district court's orders because the court did not make its offsets explicit. Thus, to the extent that the division was unequal, we remand this case to the district court to enter an order noting a compelling reason for the deviation. Alternatively, to the extent that the division is equal (but perhaps non-pro rata), we remand this case to the district court to enter an order explicitly noting all applicable offsets and making its equalization of the parties' respective shares of the community estate transparent. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Property division

Hudson asserts that the district court improperly assigned him a \$35,000 real estate commission and improperly allowed each party to retain their personal bank accounts. Hudson contends, and we agree, that the commission was a community debt and the parties' personal bank accounts were community property; thus, each should have been divided

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court's decision to hear Tobias' countermotion on this date complies with local rules of practice, which Hudson does not specifically assert are unconstitutional, we conclude that Hudson's due process argument is meritless.

equally.<sup>2</sup> As a result, Hudson argues that the district court's overall division of the community estate was unequal.

A debt that is contracted during a marriage is presumptively a community obligation unless shown to be a separate obligation by clear and convincing evidence.<sup>3</sup> Here, the parties agreed to sell the home on the open market to a third-party buyer and split the net proceeds well in advance of the district court's order directing Tobias to refinance the home and purchase Hudson's equity. Although Hudson entered into a listing agreement with Carolyn Pryor without Tobias' consent, the commission associated with Pryor's services was incurred during the marriage to accelerate the winding-up of the marital estate; thus, it was intended to benefit the marital community.<sup>4</sup> Moreover, Hudson contracted with Pryor

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<sup>2</sup>Hudson also contends that the district court improperly awarded Tobias her Bank of America CD as her separate property, and improperly assigned a \$17,666.23 Royal Bank of Scotland credit card debt to him as his separate obligation. Because we conclude that only Hudson's arguments with respect to the real estate commission and bank accounts have merit, we do not review the impact of the Bank of America CD or credit card debt on the overall division of the community estate.

<sup>3</sup>See Breliant v. Preferred Equities Corp., 112 Nev. 663, 670, 918 P.2d. 314, 319 (1996); NRS 123.070 (each spouse, acting alone, may contract debt on behalf of the community); cf. NRS 123.050 (no liability for spousal debts contracted before the marriage).

<sup>4</sup>Tobias maintains that Hudson should not be able to unilaterally bind her to the commission because she did not benefit from Hudson's contract with Pryor. We disagree. Unauthorized debts incurred during the marriage for the benefit of the community are presumptively community debts. See NRS 123.070. In our view, it therefore makes little difference whether Tobias authorized Hudson's choice of realtor. Furthermore, it is hard to see how the marital agreement could have

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in reliance on the parties' original agreement to sell the home.<sup>5</sup> Tobias cannot now repudiate the agreement, which impliedly requires the parties to evenly divide all costs and commissions associated with the sale.<sup>6</sup> For these reasons, we conclude that the real estate commission is a community debt; thus, the district court improperly assigned the entire commission to Hudson as his separate obligation. Accordingly, as a community debt, the commission should have been apportioned equally.<sup>7</sup>

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worked against the marital community, as Tobias claims. Thus, the real estate commission in this case is distinguishable from the \$17,666.23 credit card debt, which is significantly more one-sided than the commission.

<sup>5</sup>Oral marital agreements that are partly performed are enforceable in Nevada. See Schreiber v. Schreiber, 99 Nev. 453, 663 P.2d 1189 (1983) (oral agreement to divide proceeds from sale of marital home was enforceable where home was sold in reliance on that agreement).

<sup>6</sup>See Anderson v. Anderson, 107 Nev. 570, 816 P.2d 463 (1991) (estopping husband from denying oral agreement after he acknowledged its effect as well as his wife's detrimental reliance on the agreement in court).

<sup>7</sup>In reaching this conclusion, we assume that the commission was an actionable debt. However, based on our review of the record, even though the district court ordered the parties to sell the home and ordered Tobias to purchase Hudson's remaining equity, the home was not sold at the time of this appeal. Thus, it does not appear that the commission was due and owing at any time during the proceedings below or that the commission had become an actionable debt subject to allocation as Hudson's separate obligation. Even if the commission was not an actionable debt and thus assigning it to Hudson did not result in Tobias receiving a disproportionate share of the community estate, whether the division is equal is still indiscernible from the district court's orders. Moreover, there

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With respect to the parties' personal bank accounts, the district court awarded each party its balance but failed to note whether this was because the accounts were separate property or because the court believed it was making offsets to equalize the overall division of the community estate.<sup>8</sup>

Property acquired during a marriage is presumptively community property unless the spouse claiming otherwise proves its separate character by clear and convincing evidence.<sup>9</sup> On this record, neither party attempts to claim that these personal bank accounts were separate property. In his opening brief, for example, Hudson concedes Tobias' community interest in his account. Moreover, while Tobias testified to the existence of her account, she did not clearly testify that it was traceable to a separate property source. Thus, we conclude on appeal

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is at least the appearance of inequality because, as we conclude below, the parties' personal bank accounts are community property to be divided equally. Thus, regardless of whether the commission was an actionable debt, the district court is still bound by our instructions on remand to either (1) enter a compelling reason for the inequality or (2) note all applicable offsets demonstrating that the division of the community estate is roughly equal.

<sup>8</sup>At the time of trial, the parties' accounts contained highly divergent balances. Tobias lists her checking account balance as \$5,872.35 in her schedule of assets. Hudson lists his balance as approximately \$350 in his brief. The record, however, does not appear to exactly reflect these figures. The exact amounts of the parties' personal bank accounts is an issue for the district court on remand.

<sup>9</sup>NRS 123.220; Breliant, 112 Nev. at 670, 918 P.2d. at 318.

that substantial evidence does not support the district court's decision to allow the parties to retain the balance of their respective bank accounts.

Because the district court mischaracterized the real estate commission and the parties' personal bank accounts, the division of the parties' community estate appears to have been unequal. Nevada, however, is an equal division state.<sup>10</sup> As such, a district court may not divide community assets and debts unequally unless it sets forth a compelling reason in writing for the deviation.<sup>11</sup> Because the district court does not indicate a compelling reason to deviate from an equal division, we remand this case to the district court with directions to do so. Alternatively, should there be no compelling reason for the deviation, we instruct the district court to equally divide the community estate to the extent practicable, while explicitly identifying all equalizing offsets and fully articulating its reasoning.

#### Retirement accounts

Separately, we clarify the district court's ruling with respect to the parties' retirement accounts. Hudson asserts that the district court's orders are unclear as to whether he has a community interest in Tobias' individual retirement account (IRA). In its distribution order, the district court did not explicitly determine that Tobias' IRA was community

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<sup>10</sup>NRS 125.150(1)(b). Nevada cases construing NRS 125.150(1)(b) have implicitly suggested that debts are also subject to equal division. See Wolff v. Wolff, 112 Nev. 1355, 1361, 929 P.2d 916, 920 (1996) (concluding that requirement that husband purchase life insurance policy was "an 'unequal' distribution of debt" where wife had no corresponding liability).

<sup>11</sup>NRS 125.150(1)(b).

property and retained jurisdiction to enter any necessary qualified domestic relations orders. However, it ordered each party's retirement accounts to be divided under the formula in Gemma v. Gemma.<sup>12</sup> Because applying Gemma already presumes that a retirement account is subject to the community interest of a non-employee spouse, we conclude that the district court impliedly ruled that Hudson had a community interest in Tobias' IRA.

### Conclusion

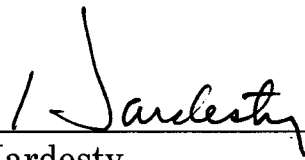
We conclude that the district court unequally divided the parties' community estate because it mischaracterized the real estate commission and the parties' personal bank accounts. As such, we remand this case for the district court to enter a compelling reason for the deviation. Alternatively, absent a compelling reason, we remand with instructions for the district court to equalize the division of the community

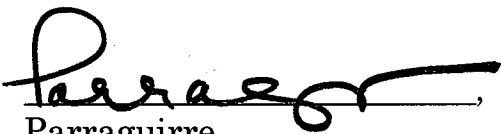
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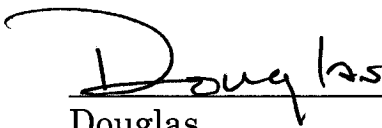
<sup>12</sup>105 Nev. at 462-63, 778 P.2d at 432. Under Gemma, the court determines the community property interest in the retirement plan, but defers payments of benefits until the employee becomes eligible for retirement and benefits vest. Id.

estate and to make specific findings with respect to the application of any offsets. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Lisa M. Kent, District Judge, Family Court Division  
Janet Trost, Settlement Judge  
Pecos Law Group  
Frances-Ann Fine  
Corinne M. Price  
Eighth District Court Clerk