

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARY CIOFFI,  
Appellant,  
vs.  
PASQUALE CIOFFI,  
Respondent.

No. 39994

**FILED**

NOV 21 2003

JANE T. M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

Mary Cioffi appeals from a district court order dividing proceeds from a post-divorce sale of community property assets,<sup>1</sup> to wit: a restaurant business owned with her former spouse, respondent, Pasquale Cioffi. The district court determined that the business had no further value after an accounting for the real property, equipment and inventory, and held Ms. Cioffi responsible for one-half of the debt incurred during Mr. Cioffi's post-divorce operation of the business. On appeal, Ms. Cioffi claims that the district court refused an award of goodwill without sufficient due process notice; abused its discretion in failing to make such an award; and abused its discretion in charging her with the post-divorce debts of the restaurant business. We affirm in part and remand for further proceedings in the district court concerning the issue of goodwill.

FACTUAL AND PROCEDURAL BACKGROUND

During their twenty-three year marriage, Mr. and Mrs. Cioffi acquired Two Guys from Italy, a restaurant located in Gardnerville, Nevada, which they jointly owned, along with its associated real and personal property. On April 14, 1998, Ms. Cioffi filed suit for divorce.

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<sup>1</sup>See NRAP Rule 3(c).

Following the commencement of proceedings, Mr. Cioffi exercised sole control over the restaurant business, including its income and assets. He thereafter discontinued payment of the sewer, trash, and water bills, as well as installment payments on the Small Business Administration (SBA) loan secured by a deed of trust against the underlying real estate and its improvements.

Division of the restaurant business was the subject of considerable dispute in the original divorce proceedings in the district court. Ms. Cioffi moved for an order requiring the parties to list the restaurant business for sale, which Mr. Cioffi opposed. On September 17, 1998, the district court ordered the parties to determine each party's percentage of ownership in the business, and that Mr. Cioffi could buy out Ms. Cioffi's share. The district court also stated that if the buyout did not occur within thirty days, the court would order the parties to list and sell the business. Because the buyout did not occur, the parties listed the restaurant for sale for one million dollars.

On December 10, 1998, Mr. Cioffi filed a motion for summary judgment on the ground that the restaurant was his separate property due to a prenuptial agreement that Ms. Cioffi destroyed. Ms. Cioffi opposed this motion. The district court denied Mr. Cioffi's motion and determined that the restaurant was community property.

On March 5, 1999, the district court entered the divorce decree effective nunc pro tunc to February 3, 1999, the date of Mr. and Ms. Cioffi's settlement agreement. The divorce decree stated, in part:

The restaurant Two Guys from Italy is a community property asset. The business shall be sold. Each party hereto shall be entitled to one-half of the proceeds of the sale of that business.

The proceeds of the sale shall be evenly distributed.

Additionally, as part of the divorce decree, the district court awarded Ms. Cioffi sole ownership of her real estate business, one-half the value of which the district court would offset against Ms. Cioffi's share of the proceeds from the sale of the restaurant business.<sup>2</sup>

On May 14, 1999, Ms. Cioffi filed a motion to reduce the listing price to \$870,000.00, which Mr. Cioffi opposed. On June 18, 1999, the district court ordered the listing price reduced to \$925,000.00 for a period of forty-five days, providing for a further reduction to \$870,000.00 if the business did not sell within that time.

The parties eventually sold the real estate, equipment, and fixtures for \$650,000.00.<sup>3</sup> The purchase agreement and escrow instructions stated that the buyer did not pay any "consideration for the business." Following the sale, Mr. Cioffi and the buyer signed an agreement under which Mr. Cioffi leased the real property and equipment back from the buyer and continued to run the restaurant business. Ms. Cioffi then filed a motion in the district court for leave to conduct discovery to determine the value of the business because the sale only

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<sup>2</sup>Ms. Cioffi states in her brief that following the district court's entry of the divorce decree, she paid Mr. Cioffi \$7,500.00 and was awarded the real estate business. However, the district court, in its July 10, 2002 order, offset Ms. Cioffi's proceeds from the restaurant real estate sale by \$7,500.00 in accordance with the divorce decree.

<sup>3</sup>The SBA began foreclosure proceedings before the sale because of consolidated arrearages. The SBA appraised the real property at \$778,000.00, with a liquidation value of \$700,000.00.

included the real property, equipment and fixtures and, thus, arguably did not fully comply with the requirements of the divorce decree.

Upon receiving the sale proceeds of \$650,000.00 for the real property, equipment, and fixtures of the restaurant, the title company paid \$1,790.90 for sewer service arrearages, \$15,002.55 to Douglas County for 1998-2000 property taxes, \$3,785.58 for trash and water services, and \$540,722.38 (including principal and interest) to the SBA. Additional deductions included: \$1,485.00 for escrow and title charges; \$975.00 for agent commissions, \$10.00 in recording fees, \$432.50 in transfer taxes; and \$120.00 for a Uniform Commercial Code search. The subtotal of deductions was \$564,323.91, leaving a balance of \$87,544.82. By stipulation, the title company deposited the remaining proceeds with the district court clerk, pending distribution by the district court.

On November 29, 2001, the district court ordered the parties to submit documents regarding the sale of the restaurant real property to resolve the remaining issues of (1) whether the sale of the real property included the restaurant operation; and (2) whether the district court should offset Ms. Cioffi's portion of the proceeds for any of the restaurant business' expenses. In response, Ms. Cioffi filed numerous documents to demonstrate that the restaurant business was not sold, including: copies of the restaurant real property purchase agreement, escrow instructions, the lease-back agreement concerning the equipment and real property between the purchasers and Mr. Cioffi, a written appraisal of the restaurant business, and correspondence with an accountant allegedly documenting that the restaurant had significant independent value. Mr. Cioffi also filed several documents, including, two unaccepted offers to

purchase the restaurant, affidavits of the purchasers stating that they bought "everything," and income and expense reports for 1998-2001.

Upon review of the documents supplied by the parties, the district court scheduled a hearing for June 17, 2002, for the parties to submit proposals regarding the proper distribution of the funds currently held by the court clerk. The scheduling order ostensibly prefaced the scope of the hearing by stating that the "restaurant itself was not sold along with the real property."

At the hearing, the district court provided the parties an opportunity to present their positions regarding the division of the sale proceeds. In its order of July 10, 2002, the district court denied Ms. Cioffi's request that the post-divorce debts of the restaurant not be included in the calculation of her distribution, concluding that the business was community property and the debts were community debts.<sup>4</sup> In addition, the district court stated it would not attempt to balance the benefits each party should have received from each other's business following the divorce, *i.e.*, net proceeds from Mr. Cioffi's post-divorce operation of the restaurant business and Ms. Cioffi's post-divorce operation of her real estate business. Finally, the district court found no further value remained in the restaurant because it had accounted for the real estate, equipment and inventory. It based this finding on "repeated indications by [Ms. Cioffi] throughout the four years of proceedings . . . that the restaurant has no inherent value." The funds held by the district

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<sup>4</sup>The district court also evenly distributed the proceeds from the sale of the parties' marital residence.

court clerk were distributed according to the district court's order.<sup>5</sup> Ms. Cioffi appeals.

### DISCUSSION

Ms. Cioffi contends that the district court abused its discretion in its failure to determine the goodwill of the restaurant business. She therefore contends that the division of the value of the business was improperly restricted to the sale of the real property, equipment and fixtures. Mr. Cioffi argues that "[t]he business had no existing value," and the "property was in foreclosure." We will uphold the district court's conclusions in divorce proceedings, if supported by substantial evidence.<sup>6</sup>

NRS 125.150(1) grants district courts broad discretion in determining equitable distribution of community property assets.<sup>7</sup> "Before the appellate court will interfere with the trial judge's disposition of the community property of the parties . . . , it must appear on the entire record in the case that the discretion of the trial judge has been abused."<sup>8</sup> A district court's decision should be upheld "if a review of the record indicates that 'the trial judge after considering all the evidence in the

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<sup>5</sup>The district court awarded one-half the net sales proceeds to Ms. Cioffi after a deduction of debts against the property and the offset for the value of Ms. Cioffi's real estate business.

<sup>6</sup>Williams v. Waldman, 108 Nev. 466, 471, 836 P.2d 614, 617 (1992); see Buchanan v. Buchanan, 90 Nev. 209, 216, 523 P.2d 1, 5 (1974).

<sup>7</sup>Johnson v. Steel Incorporated, 94 Nev. 483, 485, 581 P.2d 860, 861 (1978).

<sup>8</sup>Id. at 485, 581 P.2d at 861 (quoting Shane v. Shane, 84 Nev. 20, 22, 435 P.2d 753, 755 (1968)).

record made a fair, just and equitable award.”<sup>9</sup> “Community property is to be divided equally unless a specifically stated compelling reason exists for making an unequal division.”<sup>10</sup>

“In essence, goodwill is a reputation that will probably generate future business.”<sup>11</sup> This court has adopted the modern rule that recognizes “goodwill as part of the community property estate subject to division at divorce.”<sup>12</sup> “In valuing the business good will, the district court [is] free to use any legitimate method of valuation which measures the present value . . . by taking into account past earnings.”<sup>13</sup>

Following the sale, the parties were entitled to one-half of the net proceeds of the real property, equipment, fixtures and inventory<sup>14</sup> and were responsible for one-half of the debt incurred by the business because the restaurant was community property. We conclude that the district court did not err in holding Ms. Cioffi accountable for one-half of the post-divorce debt of the restaurant business and affirm this part of the district court’s order.

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<sup>9</sup>Id. at 485, 581 P.2d at 861.

<sup>10</sup>Rodriguez v. Rodriguez, 116 Nev. 993, 997, 13 P.3d 415, 418 (2000).

<sup>11</sup>Ford v. Ford, 105 Nev. 672, 678, 782 P.2d 1304, 1308 (1989).

<sup>12</sup>Id. at 679, 782 P.2d 1309.

<sup>13</sup>Malmquist v. Malmquist, 106 Nev. 231, 252, 792 P.2d 372, 385 (1990).

<sup>14</sup>Ms. Cioffi does not contest the district court’s offset regarding the inventory.

The value of the restaurant business includes the real property, equipment, fixtures and the inherent value of the business over and above the physical assets. Upon its initial review of the supplemental documents regarding the sale of the restaurant, the district court concluded, "the restaurant itself was not sold" because the sales and escrow documents only included the real property, equipment and fixtures. Additionally, Mr. Cioffi leased back the real property and equipment and continued to run the business. However, at the hearing to determine the division of funds held by the court clerk, the district court determined that the restaurant no longer had any value after an accounting of the real property, equipment and inventory, based upon alleged assertions made by Ms. Cioffi throughout the proceedings. We conclude that this finding is at odds with substantial evidence in the record.

Ms. Cioffi argued throughout the proceedings that she was entitled to a percentage of the value of the business and provided an evaluation of the restaurant's gross revenues and profits for 1999 in her supplemental documents to the district court to support this position. Although both parties submitted exhibits in support of their respective valuation positions, we cannot determine from the district court's finding whether Ms. Cioffi was provided a sufficient opportunity to present her evidence concerning the goodwill value of the restaurant, or the extent to which the district court considered the conflicting evidence on the issue.

We conclude that the proceeds from the sale of the real property, fixtures and equipment were properly subject to an equal distribution after the payment of debts against the property and the offset for Ms. Cioffi's real estate business. However, we conclude the district



court erred in its apparent failure to take and/or consider evidence on the inherent value of the restaurant business over and above the physical assets and erred in its failure to make specific findings of fact and conclusions of law concerning that valuation.<sup>15</sup> Accordingly, the distribution of sales proceeds may be subject to further offsets of Ms. Cioffi's claims against the goodwill of the restaurant business. In the event the district court finds that a goodwill valuation is appropriate, but also finds that the sale proceeds are insufficient to pay Ms. Cioffi her portion of the goodwill in the business, a separate award must be crafted by the district court. Therefore, we remand this issue to the district court for further proceedings in accordance with this order.<sup>16</sup>

#### CONCLUSION

We affirm the district court's offset determinations concerning the post-divorce debts incurred in the operation of the restaurant

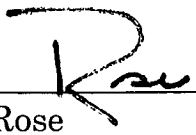
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<sup>15</sup>We note Mr. Cioffi's claims that the restaurant had no inherent value over and above the proceeds from the sale of the realty, fixtures and equipment and that the property was in foreclosure. On remand, we instruct the district court to consider the inherent value of the business, keeping in mind that the foreclosure is only evidence that may corroborate Mr. Cioffi's claims of non-value. We make no judgment concerning any contention that the foreclosure occurred as a result of a concerted attempt to artificially devalue the business, for the purposes of a distribution to Ms. Cioffi, through intentional non-payment of the SBA installments and other obligations or otherwise. It is quite possible that the failure to keep up with the various payments was the result of marginalized viability of the business stemming from any number of reasons.

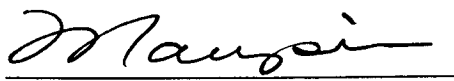
<sup>16</sup>Ms. Cioffi claims that the district court violated her due process rights. Having concluded that the district court erroneously failed to consider the inherent value of the restaurant business at the June 17, 2001 hearing, we need not reach this issue.

business. However, we remand this matter for a full evidentiary hearing on whether, and the extent to which, Ms. Cioffi is entitled to an award of goodwill, either from the proceeds of the sale or otherwise. Therefore, we remand this issue to the district court for further proceedings to resolve de novo the question of goodwill in the restaurant business. Accordingly, we

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

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Leavitt

  
\_\_\_\_\_, J.  
Maupin

cc: Hon. David R. Gamble, District Judge  
Brooke Shaw Zumpft  
Pasquale Cioffi  
Douglas County Clerk