IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

CHARLES DIMICK, Appellant, vs. CLAUDETTE HARRIS DIMICK, Respondent.	)	S.C. CASE 25828 D.C. CASE D 154544

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

Appeal from property distribution and alimony terms of Decree of Divorce; Hon. Frances-Ann Fine Starmer, Eighth Judicial District Court, Clark County, Nevada. Plaintiff, Appellant Charles Dimick, filed for divorce on September 16, 1992, praying for relief in accordance with the parties' 1989 pre-marital agreement. I ROA 1. Defendant, Respondent Claudette Dimick, answered, denying the pre-marital agreement was binding. I ROA 12.

On the day set for the evidentiary hearing as to the enforceability of the pre-marital agreement, Defendant conceded it was binding, and the parties stipulated that the agreement was "valid and enforceable." II ROA 273.

After trial, the parties were divorced on March 2, 1994. III ROA 495-505. Notice of Entry was served March 10, 1994. III ROA 506. Notice of Appeal was filed April 7, 1994. III ROA 518.

STATEMENT OF FACTS

The parties met on July 4, 1984. IV ROA 824. Both had been married before this marriage, and each had children from their former marriages. They dated, on and off, for four years. IV ROA 883-84. A child, Lindsey, was born to the parties on June 19, 1988. III ROA 415, 461. The parties were married on August 26, 1989. III ROA 414, 459.

Prior to their marriage, and wary of the possibility and perils of divorce, the parties negotiated a pre-marital agreement (the "Agreement") over an extended period. I ROA 81-88, 156.

Gary Huntsman, the Las Vegas lawyer who represented Respondent (Claudette) in her child custody dispute with her first husband, drafted the Agreement on her behalf, according to her terms, and upon her request; he reviewed it with her and explained it to her. I ROA 106-107. Mr. Huntsman believed that the Agreement was voluntarily entered by both parties, and was aware that Appellant (Charles) had the Agreement reviewed by his own attorney before signing it. I ROA 107.

The Agreement consisted of several parts, and was drafted in straight-forward, common language. First, there were a number of recitals, noting both parties' prior divorces, their desire to deal ahead of time with any issues as to spousal support, child support, and community property and separate property. It also noted that the property division terms were designed to give the custodial parent (Claudette) with "greater financial stability" than the alimony and child support laws. I ROA 6.

There were several property terms. Claudette was to retain as separate property her house on Jamestown, any inheritance or gift from her family, and any businesses she started or ran. I ROA 6-7. Charles was to retain as separate property his "business and any assets and profits from said business," any inheritance or gift from his family, his condominium in Brianhead. I ROA 6-7.

Charles' pre-marital house on Marcus was intended to be the marital residence; he agreed that it was to be transmuted to community property upon marriage. I ROA 6. Any inheritance

or gift from a person other than a family member of Charles or Claudette was to be community property. I ROA 7. The Agreement also provided that:

> Any houses, cars (for personal use) household objects, land or speculation-type investments, stocks, bonds retirement accounts, or gifts from non-family members as abovesaid, etc., will be deemed community property. Said community property, upon dissolution of the marriage and upon written notice to the other party, shall be liquidated, with seventy-five percent (75%) of the proceeds thereof to go to [Claudette] and the remaining twenty-five percent (25%) to go to [Charles].

I ROA 7.

The spousal support section of the Agreement started with the recitation that the parties agreed that Charles would be "primarily responsible" for earning a living, and Claudette would be "primarily responsible" for "homemaking duties." I ROA 7. Charles agreed to pay $200.00 per month during the marriage into a "trust fund," with Claudette as beneficiary. I ROA 7. Finally, the Agreement noted that the "75%/25% liquidation and distribution of assets upon divorce is to provide additional spousal support to [Claudette] in the event of dissolution of the marriage." I ROA 7.

Under "child support," the agreement provided that Charles would pay $500.00 per month per child upon divorce, plus medical and dental insurance, plus costs of college if progress toward a degree was made. I ROA 8. When they executed the document, they deleted the provision that provided that the children would reside with Claudette upon divorce. I ROA 8.

The Agreement preserved the parties' premarital debts to them individually, and made them separately liable for any obligations relating to their respective children of prior relationships, and provided that: "Any debts incurred by either party relating to his or her separate property will be deemed the separate debt of that party." I ROA 8.

The Agreement included an "in terrorem" clause, entitled "Attorneys Fees' [sic] and Costs": "In the event that either party is required to take legal action to enforce the provisions of this agreement, the non-prevailing party shall be responsible for all attorneys' fees and costs of suit relating to said action." I ROA 8. Claudette's attorney, who drafted the clause, explained that "this provision was to protect Claudette in the event someone disputed the contract's validity." I ROA 106.

The Agreement specified that it was the "entire agreement" between the parties, that property or debts not specifically mentioned would be community property or community debts, and that any prior or subsequent "oral representations or modification" would be "of no form and effect" unless reduced to writing and referencing the Agreement. I ROA 9.

With the intent to "protect the enforceability of the contract," Mr. Huntsman asked Charles to seek independent advice of counsel before signing the agreement Mr. Huntsman had prepared for Claudette. I ROA 106. Charles consulted with independent counsel, after which the parties signed the Agreement. I ROA 106-107. They were married the next day. III ROA 414, 459.

The parties' accountants agreed that Charles' business did not do well during the course of the marriage, but were in some conflict as to the extent of the losses the business sustained, and the impact of those losses. IV ROA 674, 685-87; V ROA 964.

In July, 1990, Charles' company (Dimick Development) entered into a trade-out agreement with a Dr. Valladares, whereby the company was to do certain construction work on a development for a neighborhood, in return for transfer of one of the lots to Charles. IV ROA 853-54; Trial Exhibit 1. Claudette was aware that Dimick Development was being paid for its work by means of the trade of the piece of property. VI ROA 2068.

Charles intended to ultimately take title to the lot in joint tenancy with Claudette and build a future marital residence on it; he therefore signed both his own name and Claudette's name to the trade-out purchase agreement. IV ROA 855-56; V ROA 1054. Claudette, however, denied that she ever gave Charles permission to sign her name to that original purchase agreement. VI ROA 2064-66.

The company expended $82,000.00 performing the improvements over an extended period. IV ROA 854-55. Unknown to Charles at the time, his company was losing large sums of money and "was going upside down" during this time. IV ROA 857, 685-87. Charles realized Dimick Development was out of cash and had "some very serious business problems" by August, 1991, before his company completed the transaction with Dr. Valladares; neither Dimick Development, nor Charles and Claudette, ever took title to the property. IV ROA 860. In July, 1991, Charles and Claudette signed "vesting instructions" that would have instructed the title

company to vest title in the two of them as joint tenants if escrow closed. IV ROA 864; V ROA 1054; Trial Exhibit 1.

One of the creditors of Dimick Development was Jerry Walker, to whom the company owed some $12,500.00. IV ROA 862, 809-810. Mr. Walker threatened to sue, and Charles offered to assign Dimick Development's future right to take possession of the land, in exchange for cancellation of the debt from Dimick Development to Mr. Walker, plus cash from Mr. Walker. IV ROA 862. After viewing the property, and being informed there was no cash in the company to pay the business debt, Mr. Walker agreed, cancelled the debt, and paid an additional $12,587.99. IV ROA 811-12, 818.

When he discovered the trouble his company was in, Charles attempted to get Claudette to sign documents to transfer the future interest in the property; she refused, claiming an interest. IV ROA 862. The parties' recollections of their fight on the subject varied; Charles testified that Claudette "finally screamed at me to go ahead and sign her name but she wasn't going to make a trip down there out of her way to sign off on this property because she felt she had a right to it." IV ROA 863. Claudette testified that she refused to sign any papers and that Charles said "Fine. I'll just go around you." V ROA 1055.

The parties agree that Charles signed his own and Claudette's name to assignee instructions that permitted Mr. Walker to ultimately obtain the land from Dr. Valladares. IV ROA 863; V ROA 1054. Ultimately, Dimick Development lost about $43,000.00 on the Fort Apache project. IV ROA 867-68.

Charles testified that "irreconcilable differences" arose about a year after the marriage. IV ROA 844. From the parties' preliminary motion filings (primarily as to temporary custody of their daughter Lindsey), it can be concluded that their brief married life was not harmonious. Charles asserted that Claudette was irrational, hostile, and violent, that she physically abused children, and finally provoked physical conflicts with Charles requiring him to vacate the marital residence before there was further injury. I ROA 42-62.

Claudette, for her part, alleged that Charles was a repeated wife-beater who knowingly let a thief and a child molester into their home, did not comply with visitation terms, watched

"porn movies," and was more interested in hurting Claudette financially than in helping himself. I ROA 114-125, 127-150.

In any event, the parties agreed that Charles moved out in September, 1992, and filed his Complaint on September 16. I ROA 1, 49, 121. The Complaint requested primary physical custody to Claudette, with Charles getting reasonable visitation, prayed for division of community property and separate property as set forth in the Agreement, and agreed to pay spousal support as set forth in the Agreement. I ROA 1-5.

Claudette, through counsel, answered, denying that she was bound by the Agreement, and alleging as affirmative defenses that the Agreement was defective, was "the product of coercion," and that she had no independent counsel regarding the Agreement. I ROA 12-15. She followed up with a motion seeking various forms of temporary relief, including spousal support and attorney's fees. I ROA 24.

Charles responded, requesting primary custody of the child, and specifically requesting a finding of validity of the Agreement and for its enforcement. I ROA 39, 74. He requested immediate sale of the house in accordance with the terms of the Agreement, noting that he was making all payments on the property, although Claudette was to receive 75% of the equity upon liquidation. I ROA 75.

Charles specifically offered to make an additional nine house payments of about $800.00 each (i.e., $7,200.00) to satisfy the alimony provision of the Agreement.[1] I ROA 76. He argued that the Agreement was valid, was created by Claudette's attorney, and gave to her significantly more than she would be entitled to in the absence of the Agreement. I ROA 81-88. He suggested specific orders to carry the provisions of the Agreement into effect. I ROA 84-85.

Claudette responded, attacking the Agreement on the ground that "the parties apparently had the same Counsel" and that it was "all done in the period of two days." I ROA 115. Charles produced the bill from Claudette's lawyer, showing that she had him working on the Agreement about two months before it was signed. I ROA 155-56.

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[1] When the motion was filed, the parties had been married about 39 months; at the $200.00 per month set out in the Agreement, that entitled Claudette to $7,200.00.

On January 12, 1993, the lower court held a hearing on those issues; Charles defended the Agreement through counsel, and Claudette attacked it. I ROA 157; III ROA 539-582. Judge Fine stated that she could not make a ruling on the validity of the Agreement because she only had affidavits, and required an evidentiary hearing. III ROA 545. Claudette's counsel wanted to take the deposition of Claudette's prior attorney before proceeding to a hearing. III ROA 546.

Going over the issues, Judge Fine remarked: "Spousal support -- he's been paying the house payment, that should continue." III ROA 571. Counsel neglected to put that provision in the order after hearing. I ROA 157-159. The formal order noted that an evidentiary hearing would be held regarding the validity of the Agreement. I ROA 158.

Prior to the hearing, Charles' counsel submitted a comprehensive analysis arguing that the Agreement was valid, binding, and applicable to the case. I ROA 163-246. Charles noted that the Agreement was signed prior to Nevada's adoption of the Uniform Premarital Agreements Act, and argued that the Agreement was valid whether or not the terms of the Act applied. I ROA 166-172. He further noted that his liability for spousal support under the Agreement was limited to $200.00 per month of marriage, that he had already paid $4,776.00 in the form of house payments for the former marital house after he departed, and that he would be willing to pay the remaining sums in cash if the house was sold immediately. I ROA 172-73.

On the day set for the evidentiary hearing on the validity of the Agreement, Claudette's counsel called Charles' counsel and conceded the validity of the Agreement. III ROA 584. Counsel for Claudette drafted a formal Stipulation and Order agreeing that the Agreement was "valid and enforceable," that the remaining factual issues, including attorney's fees, were deferred to trial, and resolving various visitation conflicts. II ROA 273-74.

After various visitation issues not relevant to this appeal were decided, Charles again requested sale of the house, on June 3, 1993. II ROA 284. He asserted that at that time, he had already paid the full amount due to Claudette under the terms of the Agreement, by paying some $7,200.00 in house payments on her behalf. II ROA 287-88.

Charles pointed out that he had defended the validity of the Agreement, while Claudette had contested it at some length, only to concede its validity on the morning of the scheduled

evidentiary hearing, and attached an affidavit from the attorney doing the work that $5,720.50 had been expended defending the Agreement. II ROA 289-291, 300-302.

Charles also requested return of a number of items of his personal property that were either his before marriage or gifted to him by his family. II ROA 291, 304, 307.

Claudette's Opposition stated that the house should not be sold because she wanted to keep it. II ROA 343. She argued that Charles should not receive attorney's fees for defending the Agreement because Claudette "did legitimate discovery" before abandoning her attack and stipulating to the validity of the Agreement. II ROA 345. Charles replied, again insisting that under the terms of the Agreement, stipulated as valid, he was entitled to demand sale and distribution of the equity in the house. II ROA 360-391.

Judge Fine stated that the house was to be listed, and all offers were to be presented to the court for approval. III ROA 603. After Claudette's attorney represented that Claudette would be owed other sums upon divorce, Judge Fine modified her oral order, allowing Claudette to keep the house and pay Charles 25% of its value. III ROA 609-610, 616. At the suggestion of Claudette's attorney, the court appointed appraiser Sharon Harris as "the Court's expert" to perform an appraisal, stating: "Well take what she says -- if you don't like it, I'm sorry." III ROA 617. Judge Fine then directed Charles to make another payment on the house, for July, and Claudette to assume the payments thereafter. III ROA 618.

Charles made an attempt at the hearing to obtain an order to retrieve his premarital and family-gifted personal property, but Claudette insisted that she should keep his separate property, including his premarital bed, because he had broken Claudette's bed. III ROA 620. Charles supplied evidence that Claudette earlier had sworn under oath that she sold the bed. II ROA 369.

Obviously irritated, Judge Fine first declared that she was "not going to pot and pan this case," and then told the parties to "forget it. Sell it at a garage sale, see what you can get for it. And get on with your lives." III ROA 620-21. Immediately thereafter, Judge Fine declared: "that's my order on that one. Boy, that's an interesting order, I never made that one before." III ROA 621.

Claudette's attorney prepared the written order, which stated that the house should be listed, and offers brought to the court's attention, but that the property should also be appraised and Claudette could pay Charles his 25% interest if she was able to refinance the house. II ROA 400-402.

There were further proceedings relating to child custody and visitation, and the parties each filed pretrial memoranda. III ROA 414, 459. After a great deal of pre-trial sparring, and trial, the parties were divorced on March 2, 1994. III ROA 495-505. This appeal followed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO AWARD ATTORNEY'S FEES TO CHARLES AS THE "PREVAILING PARTY" REGARDING THE VALIDITY OF THE PREMARITAL AGREEMENT.

A. **The Premarital Agreement was Valid**

The lengthy proceedings relative to the formal Stipulation and Order finding the Premarital Agreement to be "valid and enforceable" is recited above. II ROA 273-74. It is worth noting that the parties reaffirmed their stipulation as to the validity of the Agreement during trial. IV ROA 868. The Decree reiterates the stipulation, which notes that the trial court "adopts and ratifies this Agreement." III ROA 496.

Since the Agreement was valid, its terms were to be enforced. See Sogg v. Nevada State Bank, 108 Nev. 308, 832 P.2d 781 (1992) (agreement drafted prior to adoption of Uniform Premarital Agreements Act (UPAA) is enforceable if it either conforms to act or if conforms to common law prior to act).

An important term, drafted by Claudette's lawyer for her protection, provided that

> In the event that either party is required to take legal action to enforce the provisions of this agreement, the non-prevailing party shall be responsible for all attorneys' fees and costs of suit relating to said action.

I ROA 8, 106.

B. **Claudette Challenged the Validity of the Agreement, and Charles Defended its Validity**

It should be noted that Claudette never amended her Answer and Counterclaim that asserted the invalidity of the Agreement. I ROA 12. As noted above, Charles' attorneys made multiple requests for payment of attorney's fees based on his defense of the Agreement against Claudette's claims of invalidity. I ROA 163. The trial court deferred all such requests to time of trial. See, e.g., II ROA 273-74.

With unfortunate success, Claudette's counsel presented a steady stream of obfuscating arguments and testimony as to what position the parties had taken. In a series of answers to very leading questions from her counsel, Claudette answered "no" to the question "Do you feel that you

attacked the prenup," and "yes" to the question "Did you agree to enforce the prenup." V ROA 1062. Belying the face of the record, Claudette testified that "in her mind" she had never attacked the Agreement. V ROA 1062.

By the time of closing argument, Claudette's counsel even advanced the proposition that she should be awarded fees for going to court to enforce the Agreement.[2] V ROA 1063; VI ROA 2095.

When this incredible position was challenged by Charles' attorney, who noted that Claudette had challenged the Agreement until forced to give up the argument, the court below appeared to allow Claudette to challenge the Agreement without paying the fees it called for on the ground that she had a different attorney at trial than the one she had draft the Agreement in the first place. VI ROA 2109. Responding to the statement that the Agreement was drafted by Claudette's attorney, Mr. Huntsman, Judge Fine stated:

> He's not her attorney now. . . . Now, if Gary [Huntsman] was representing her today and they were doing that, then they would be . . . then I'd really think there was a problem.

VI ROA 2109.

The trial court then entirely disregarded the attorney's fee clause of the Agreement, and instead ruled that because the court saw "shenanigans on both of them," and required each to bear his or her own fees. VI ROA 2110; III ROA 505.

It is respectfully submitted that on the face of the file, Charles was the prevailing party as to the validity of the Agreement.

C. **The Agreement Required Claudette to Pay Charles' Attorney's Fees**

Recently, this Court has commented that an award of attorney's fees in the trial courts must have some statutory basis. Duff v. Foster, 110 Nev. ___, ___ P.2d ___ (Adv. Opn. No.

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[2] Even in the middle of making those claims, however, counsel for Claudette rather half-heartedly conceded that he was contesting the legitimacy of the Agreement, stating "This [the Agreement] doesn't comply [with the UPAA]. I would have been absolutely derelict in my duty if, shown this agreement without a schedule of finances, without a schedule for assets and liabilities, without independent counsel to both, if I didn't say to Mrs Dimick, we must look into the validity of this agreement." VI ROA 2094.

157, Nov. 30, 1994). It is conceded that with the finding of wrongful behavior on both sides, the lower court could well decide to award no fees under NRS 18.010(2)(b).

NRS 18.010(1), however, states that: "The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law." NRS 18.010(5) states that the restrictive provisions of the statute "do not apply to any action arising out of a written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees.

This Court has repeatedly held that where a lower court refuses to grant the prevailing party attorney's fees, it must state its reasons for doing so, and the lower court's failure to do so constitutes an abuse of discretion. See Pandelis Constr. Co. v. Jones-Viking Assocs., 103 Nev. 129, 734 P.2d 1236 (1987); Lyon v. Walker Boudwin Constr. Co., 88 Nev. 646, 503 P.2d 1219 (1972).

The court below having upheld the validity of the Agreement, and it being indisputable on the face of the pleadings and the record that it was Charles who urged that the Agreement was valid, the court below was required to award Charles attorney's fees in accordance with the Agreement. This case is the flip-side of Duff, supra; once the court below has established a contractual and statutory basis for the award of attorney's fees, it cannot simply fail to award them.

Accordingly, this Court should reverse the district court's order regarding attorney's fees, and remand for the purpose of entry of an order awarding to Charles "all attorney's fees and costs of suit relating to said action."

It should be noted that if Charles is successful in persuading this Court that he was entitled to attorney's fees under the Agreement, he is also entitled to recover fees and costs in this appeal. See Musso v. Binick, 104 Nev. 613, 764 P.2d 477 (1988).

II. THE DISTRICT COURT ERRED IN ORDERING CHARLES TO PAY THE SPOUSAL SUPPORT DUE UNDER THE PREMARITAL AGREEMENT DURING THE PENDENCY OF THE CASE, AND TO PAY IT AGAIN AFTER THE CASE WAS OVER.

After the parties separated and litigation of this case began, Charles made 10 months of house payments on Claudette's behalf, totalling $7,920.00. IV ROA 912.

It is clear that the parties considered the ongoing house payments to be spousal support. At the June 17, 1993, hearing on Charles' request to sell the house, the following colloquy took place:

> MR. MARKS [Claudette's attorney]: Your Honor, before you make your decision, you had ordered Mr. Dimick to pay the house payment.
>
> MR. EVANS [Charles' attorney]: I don't believe she did.
>
> MR. MARKS: In lieu of any spousal because when we came in we said he's making that -- when we came in on the motion for fees and allowances we had asked for spousal support and attorney's fees. And you had -- we had told you that he was making the payment and you had indicated he'll continue to make the payment in lieu of attorney's fees of spousal or anything like that.

Again, the reaffirmation of the Premarital Agreement is relevant. The Agreement provided that Claudette was entitled to $200.00 for each month of marriage. I ROA 7.

The Agreement stated that its 75%/25% property split, and the $200.00 per month, were intended to give Claudette spousal support. This Court has recently re-affirmed that the principal of inclusio unius est exclusio alterius is applicable in interpreting statutes. See Bopp v. Lino, 110 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 148, Nov. 30, 1994).

It is respectfully submitted that the legal maxim is equally applicable to interpretation of this Agreement. By providing for a disparate property division and a specific sum of spousal support, the Agreement was a contract as to "the modification or elimination of alimony or support or maintenance of a spouse" within the meaning of NRS 123A.050(1)(d). Having found the Agreement valid, the trial court was without jurisdiction to award spousal support beyond the limits of that Agreement.

Accordingly, once the district court made an interim ruling that Charles was required to maintain payments of the house as temporary spousal support, it was not free to disregard those payments in awarding further spousal support.

In this case, the district court ordered Charles to make 51 payments (equal to the number of months of marriage) of $200.00 per month commencing January 1, 1994. III ROA 496. By that date, Charles had already paid some $7,920.00. IV ROA 912. This was error.[3]

The Agreement, being valid, limited Charles' total exposure to pay spousal support to $10,200.00 (i.e., 51 months x 51 months). The maximum sum remaining that the district court had jurisdiction to award to Claudette under the Agreement was $2,280.00 (i.e., $10,200.00 - $7,920.00).

The district court, apparently arbitrarily, elected to award to Charles "a 50% reimbursement, or $4,000.00, for those payments on the home" as a matter of equity. III ROA 497-98. The district court did not have to go through all of the gymnastics set forth in the decree. As with other issues, the question before the district court was legal, not equitable; the court below simply did not perceive the limits of its jurisdiction upon recognition of the validity of the Agreement.

This Court should reverse the alimony award, and the "equitable offset," and remand for amendment of the decree so that it imposes a total spousal support award of not more than $10,200.00.

Finally, it must be noted that the decree as entered by the district court is contradictory on its face and must be amended irrespective of this Court's determination of this issue. On page 2-3 of the decree, it expressly limits the award to 51 payments in accordance with the Agreement. III ROA 496-97. On page 9, however, the decree restates the award as permanent alimony of $200.00 per month. III ROA 503.[4]

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[3] It is worth noting that counsel for Claudette argued the matter backwards during closing argument. Analogizing Charles' lengthy spousal support payments to a principal pay-down analysis, he argued that, if anything, Charles should only be credited with paying a sum in alimony that paid down the principal of the residence. VI ROA 2103; cf. Malmquist v. Malmquist, 106 Nev. 231, 792 P.2d 372 (1990).

It is submitted that there is no logic whatsoever in such an analysis. There would be internal logic to denying Charles credit for payment of sums that ultimately returned to him in the division of the house equity. Accordingly, the correct inquiry would have been to determine the amount that Charles' payments reduced the outstanding mortgage during the 10 months he paid them, multiply that very small number by 25%, and subtract that number from the $7,920.00 credit to which Charles is entitled under the Agreement.

[4] The decree was drafted by Claudette's counsel. It is impossible to tell if this contradictory statement was deliberate or is merely the result of a scrivener's error; appellate counsel was not

III. THE DISTRICT COURT ERRED IN FINDING THAT CLAUDETTE HAD ANY INTEREST IN THE FORT APACHE PROPERTY FOR WHICH SHE OBTAINED A MONEY JUDGMENT UPON DIVORCE.

The record, cited above, sets forth clearly that neither Charles, nor Claudette, nor even Dimick Development, ever had an ownership interest in the Fort Apache property. What Dimick Development had was a contingent future right to take title to a parcel upon completion of certain work and an escrow. Charles had an intention to transfer the property upon close of escrow to himself and Claudette to build a future house. Claudette had a desire to be given property.

The legal question is what property rights were created or transferred by the transactions shown by the record. First was Charles' addition of Claudette's signature to the trade-out purchase agreement between Dimick Development and Dr. Valladares. VI ROA 2065; Trial Exhibit 1. While the document may well be evidence of Charles intention to create a joint tenancy in the future, the trade-out agreement that Claudette did not sign did not create any property interest in her. This was pointed out in Charles' pre-trial filings. III ROA 487-494.

Next was Claudette's signature on the "vesting instructions" to the title company. It is this document that Claudette's trial counsel argued somehow "put the house [sic] in joint tenancy" and vested title in Claudette under the legal doctrines of "forgery and waste." VI ROA 2105. During the presentation of evidence, the trial court opined that there was some monetary significance to the intention to someday hold the property as joint tenants. IV ROA 886-87. At the close of trial, Judge Fine stated:

> Especially with the improvements. I've got a big problem, equity has got a weight here somewhere. Your argument is absolutely correct. His argument is absolutely correct. I got a problem. . . . Both of your arguments are correct. Neither one of your arguments are wrong, but one of you has to win and one of you doesn't. So just please -- I'm going to make new law in this case; I know it.

VI ROA 2116.

It is respectfully submitted that the trial court judge's approach was incorrect; the question is one of law, not equity. Absent some ownership interest in the property by Charles, he could

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counsel for Charles below.

not have possibly transferred anything to Claudette even if he wanted to do so. See, e.g., Simpson v. Harris, 21 Nev. 353 (1863) (noting actual ownership as prerequisite to analysis of gift).

The classic formulation of the test for a gift was stated in Simpson: "To consummate a gift there must be such a delivery by the donor to the donee as places the property under the dominion and control of the donee, with the intent and purpose on the part of the donor to transfer the title absolutely, never reclaiming or expecting repayment of the thing transferred." Id. at 362. In the hundred years since then, repeated cases have made it clear that delivery of documents of ownership, from the owner, is the beginning of the analysis as to whether an enforceable gift has been made. See, e.g., Peardon v. Peardon, 65 Nev. 717, 201 P.2d 309 (1948); Weeks v. Weeks, 72 Nev. 268, 302 P.2d 750 (1956) (stressing requirement of immediate delivery to consummate gift).

Here, Charles, as the principal of Dimick Development, intended to gain ownership of the land parcel from Dr. Valladares, and intended when he had ownership to transfer it to himself personally, along with Claudette, as joint tenants. That simply never happened, as the business was forced to give up its potential of gaining ownership in a series of transactions that were necessary for the business to survive.[5]

The execution of "vesting instructions" to a title company has no effect on the title to property; a transfer requires a deed, acknowledged or proved, and recorded. See NRS 111.105. Title does not pass until delivery of the instrument of conveyance, before which there is nothing more than an contingent expectancy of a future interest in property. Attorney General Opinion 149 (Nov. 2, 1992).

Dimick Development almost gained ownership of the parcel. If it had, Charles, as the principal of Dimick Development, could have transferred the property to himself and Claudette. There was never any point, however, where Dimick Development, Charles or Claudette ever had any ownership interest. The property was always a possible acquisition that the company never

[5] It should be noted in passing that there was no "option to purchase" within the legal meaning of those words. Claudette's argument based on California cases dealing with transfers of realty during marriage by one spouse are simply irrelevant, since there was no legal interest to convey. III ROA 483-85.

attained, and which it took a significant loss in attempting to attain before abandoning the acquisition.

This Court recently commented at some length on the legal effect to be accorded the signature of a spouse to purchase or sale documents of a husband's corporation as if she had an interest. In Sprenger v. Sprenger, 110 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 104, July 26, 1994), the husband had a half-interest in a premarital lawn business. Seven years after marriage, the lawn-care segment was sold (and the wife signed as a seller), and the business name was changed to show it was a nursery. This Court found that transmutation requires a showing by "clear and convincing" evidence. While wife signed a "stock transfer restriction," no shares were ever issued to her. The Supreme Court held that "the appearance of [wife's] signature as a shareholder on certain documents, without more, is not clear and convincing evidence of transmutation."

In this case, Claudette's signature on "vesting instructions" to a title company, which were never executed or acted upon, conveyed to her nothing, and created no more interest to her than Mrs. Sprenger's incidental signature on a "stock transfer restriction" created in that case. Where an interest does not exist, a spouse's signature means nothing.

The only other document discussed at trial was the Assignee Instructions of August 15, 1991. Charles signed both names to the instructions. Depending on whose testimony was believed, Charles signed that document with Claudette's consent, or despite her objections.

In either event, Claudette never had an interest to convey. Charles' signature of her name on the assignment had no more effect than his signature of her name on the original trade-out purchase agreement. Claudette's non-receipt of the contingent expectancy that she wanted did not give rise to anything for which Claudette could be awarded money upon divorce, and the trial court clearly erred when it ruled that:

> The evidence is clear that this land, which may have been sold or exchanged for services, was placed in joint tenancy. Mr. DIMICK **signed** Mrs. DIMICK's name on crucial documents relating to the property. Mr. DIMICK's affirmative action evidences the community nature of the Fort Apache property.

III ROA 498 (emphasis in original).

The lower court's reaffirmation of validity of the Agreement also figures in here. Since there was no taking possession of an ownership interest in the parcel, any putative interest belonged solely to Dimick Development. The Agreement specifically recited that "any assets . . . from said business will remain [Charles'] separate property." I ROA 6. Absent actual transfer of a property interest to the community, and finding that the Agreement was valid, the trial court had no legal option but to rule that the assets of Dimick Development belonged solely to Charles.

Accordingly, the computations by which the trial court found Claudette's interest to be $18,750.00 were unnecessary, and any award to Claudette for that transaction was error.[6] Likewise, the $2,000.00 "sanction" awarded to Claudette for Charles' "fraudulent sale of said property" was error. III ROA 498-99. The trial court's award of $18,750.00, and its $2,000.00 "sanction," should be vacated by this Court.

IV. THE DISTRICT COURT ERRED IN FAILING TO RESTORE CHARLES' SEPARATE PROPERTY TO HIM, AND IN FAILING TO EXPLAIN ITS DISPROPORTIONATE AWARD OF COMMUNITY PROPERTY.

As noted in the statement of facts above, Charles tried throughout the litigation of this matter to recover possession of his pre-marital separate property, and still did not have them by time of trial. IV ROA 832-39. In the earlier portions of the case, the district court judge admonished Charles not to resort to self-help even to recover property that was undeniably his, and that he would just have to wait until the end of the case to get his personalty. II ROA 291; III ROA 611-612.

Expressing reluctance to deal with "pots and pans," the district court simply directed the parties to sell whatever they had in their possession, whether it was theirs or not. III ROA 616-620.

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[6] While not referenced by the trial court in making its award, Claudette's alternate argument for money out of the Fort Apache transaction should be disposed of as well. At trial, her counsel argued that under the Agreement, Claudette was entitled to 75% of the profit made by Dimick Development. VI ROA 2104-2106. The evidence was unrefuted that Dimick Development lost $43,000.00 on the Fort Apache transaction by the time it was abandoned. IV ROA 867-68. Under the terms of the Agreement, that loss (or any profit that might have been made) belonged solely to Charles. I ROA 6.

At trial, Claudette readily conceded still being in possession of various items of Charles' personalty, such as his pre-marital bed, but simply stated that she should be able to keep his separate property because of wrongs she felt she had suffered during the marriage; she wanted his bed because of some oral agreement to get rid of her property, and wanted to keep his bookcases because she alleged that he had "totally destroyed" a desk of hers. V ROA 1072-73, 1077. Claudette denied having possession of the expensive silver set gifted by Charles' mother. V ROA 1077.

Upon entry of the decree, the district court simply stated that: "Each party shall have their own personal property, which is in their [sic] possession, as their [sic] sole and separate property. III ROA 504. This was error.

The district court may only assign the separate property of one of the parties to the other upon a finding that such property is necessary for the support of the other spouse. NRS 125.150(4). Again, in this case, the court's discretion to do even that was limited by the admittedly valid and enforceable Premarital Agreement. This Court should, upon remand, require the district court to order a turnover to Charles of all of his premarital property.

As to the community property purchased during marriage, Charles had requested 25% in accordance with the Agreement. IV ROA 832. By the end of trial, it was noted that Claudette had retained the entirety of such property. VI ROA 2120-21. Since October, 1993, the district courts of this state were only to make disproportionate awards of community property upon the finding and recitation of "compelling reasons" for doing so. NRS 125.150(1)(b).

Many such items were recited on the parties Affidavits of Financial Condition and in their pre-trial statements, the largest of which was the Plymouth Van, valued at $20,000.00 by Claudette, and $15,000.00 by Charles. III ROA 433, 465; IV ROA 838. The decree did not expressly address the vehicles, but sub silentio appeared to lump them in with other "personal property."

This is still another area where the Agreement should have governed, but was selectively ignored. The jeep vehicle driven by Charles was not community property, but was an asset of Dimick Development, and thus preserved for Charles under the terms of the Agreement. III ROA

433; I ROA 6. Only by selectively choosing to ignore the Agreement while examining personal property issues could the district court reach the distribution it made.

V. CONCLUSION.

The Premarital Agreement was valid, but getting an order to that effect took Charles many thousands of dollars in attorney's fees, in overcoming Claudette's efforts to invalidate the Agreement. Pursuant to the terms of the contract, Charles is entitled to his fees and costs, and the district court erred in denying them to him.

The district court failed to properly credit Charles with the payments he had made in spousal support, pursuant to the contract. In attempting to do equity, the lower court lost sight of upholding the law.

Similarly, the district court erroneously concluded that Claudette's signature on a piece of paper in the middle of an attempted trade-out purchase of real estate, which was never completed, by Dimick Development, somehow acted as a conveyance to her of a property interest. Dimick Development never gained title to the Apache property; Charles never gained title to the Apache property, and no gift of any property interest was ever made to Claudette.

The district court failed to perform its duty in ordering return of separate property personalty to the owner thereof, and in distributing the community property either in accordance with the Agreement, or with the relevant statutes.

This Court should reverse the alimony and property terms of the decree, remand for entry of an alimony award in keeping with the maximum permitted under the Agreement, eliminating any purported distribution to Claudette of money for an interest in the Apache property, for legally proper distribution of community property and return of personal property, and for the determination of an attorney's fee award, in accordance with the Agreement, for Charles' expenses below and in this appeal.

Respectfully submitted,
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