

# WHEN IS GAMING MARITAL WASTE?

By Judge Egan Walker

When marriages end by means of a contested divorce, battles over children, china and cheating quickly become the fodder of litigation. Any gaps in the legal precedents that control resolution of those issues, and property issues in particular, create challenges to the parties and courts as they attempt to divide marital estates. One of the most challenging and least well developed areas in the jurisprudence of property distribution relates to chance: In what circumstances and in what amounts does gambling constitute marital waste?

Gaming is an ancient practice in Nevada that has been an economic savior at times, and an export product of the state to the rest of the world more recently.

Despite this history, few commentators have offered guidance on the topic of waste in general, and none have commented on the effect, if any, of gaming as it relates to property and debt distribution at the time of divorce.<sup>1</sup>

## What financial duties do spouses owe one another?

### a. Fiduciary Duty

The fiduciary duty owed between spouses is described as follows:

Either husband or wife may enter into any contract, engagement or transaction with the other ... **subject in any contract, engagement or transaction between themselves, to the general rules which control the actions of persons occupying relations of confidence and trust toward each other.** (Emphasis added.)<sup>2</sup>

The nature of the fiduciary relationship between husband and wife is that of partners:



It is generally recognized that the marital community is a partnership to which both parties contribute...his or her industry in order to further the goals of the marriage.<sup>3</sup>

Husband and wife are partners in a fiduciary relationship with concomitant obligations of labor, candor, honesty and transparency, which continue even during the process of divorce. Counsel, parties, and courts often fail to remember that although the parties' feelings are no longer complementary, their financial duties and responsibilities to one another remain intact throughout the process of divorce.

### b. Duty of Support.

#### i. During the Marriage

Husband and wife have a duty to financially support one another during marriage, even from their separate estates. For example:

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If the husband neglects to make adequate provision for the support of his wife, any other person may in good faith supply her with articles necessary for her support, and recover the reasonable value thereof from the husband. The separate property of the husband is liable for the cost of such necessities if the community property of the spouses is not sufficient to satisfy such debt.<sup>4</sup>

This duty is reciprocal on spouses:

The wife must support the husband out of her separate property when he has no separate property and they have no community property and he, from infirmity, is not able or competent to support himself.<sup>5</sup>

Finally, we are told:

A husband or wife abandoned by his or her spouse is not liable for the support of the abandoning spouse until such spouse offers to return unless the misconduct of the husband or wife justified the abandonment.<sup>6</sup>

One fertile field of examination during divorce litigation might be, therefore, to examine how a spouse's gambling may have negatively impacted his or her duties to the community. While one spouse may gamble and lose \$50 or \$100 per week without negatively impacting the community, in the same way the other spouse may spend similar amounts on alcohol, hair and grooming products or some other discretionary expense, such spending is not traditionally considered waste.

### ii. After a Complaint is Filed

Several statutes codify the obligation of support between spouses, and their continuing fiduciary duty to one another, even in the context of dissolution.<sup>7</sup> For example:

If, after the filing of the complaint, it is made to appear probable to the court that either party is about to do any act that would defeat or render less effectual any order which the court might ultimately make concerning the property or pecuniary interests, the court shall make such restraining order or other order as appears necessary to prevent the act or conduct and preserve the *status quo* pending final determination of the cause.<sup>8</sup>

In addition:

Except as otherwise provided in subsection 2, during the pendency of an action brought pursuant to NRS 125.190, the court may, in its discretion, require either spouse to pay any money necessary for the prosecution of the action and for the support and maintenance of the other spouse and their children...<sup>9</sup>

Even during litigation the parties must support one another and maintain their joint property:

1. In any suit for divorce the court may, in its discretion, upon application by either party and notice to the other party, require either party to pay moneys necessary to assist the other party in accomplishing one or more of the following:

- (a) To provide temporary maintenance for the other party;
- (b) To provide temporary support for children of the parties; or
- (c) To enable the other party to carry on or defend such suit.

2. The court may make any order affecting property of the parties, or either of them, which it may deem necessary or desirable to accomplish the purposes of this section. Such orders shall be made by the court only after taking into consideration the

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financial situation of each of the parties.

3. The court may make orders pursuant to this section concurrently with orders pursuant to NRS 125.470.<sup>10</sup>

### Where does gaming “fit” into the financial duties owed between spouses?

“Game” or “gambling game” means any game played with cards, dice, equipment or any mechanical, electro-mechanical or electronic device or machine for money, property, checks, credit or any representative of value.<sup>11</sup> In 1955, the state legislature unequivocally instructed that:

1. The Legislature hereby finds, and declares to be the public policy of this state, that:

(a) **The gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants.**<sup>12</sup>...

Can an activity that is ‘vitally important’ to the general welfare of the inhabitants of the State nonetheless constitute waste? If that is so, how and when it does are neither defined nor discussed in any reported case.

### What is waste?

c. *Lofgren, Putterman, Wheeler and the Doctrine of Waste*

i. *Lofgren – Intentional Financial Misconduct is Bad*

In November of 1996, the Nevada Supreme Court decided the case of *Lofgren v. Lofgren*.<sup>13</sup> Mr. Lofgren had, during the pendency of the parties’ divorce and after the issuance of a financial restraining order, transferred \$96,000 in marital funds to, among other things: improve and furnish a home; loan or give money to his father and to his children; and spent \$17,000 “for his own personal use” (apparently apart from his needs for food, shelter and housing). The Supreme Court reinforced that changes to NRS 125.150, made in 1993, require an equal as opposed to an equitable distribution of community proper-

ty absent “compelling reasons.” Nonetheless, when applied to Mr. Lofgren’s actions, the Supreme Court upheld the trial court decision to reimburse the community for unauthorized expenditures by adding the funds back into the marital balance equation. The effect for purposes of our discussion was to confirm that “intentional misconduct” in handling a fiduciary responsibility may be a compelling reason for an unequal distribution of a marital estate.

...we hold that if community property is lost, expended or destroyed through the intentional misconduct of one spouse, the court may consider such misconduct as a compelling reason...[for unequal distribution]<sup>14</sup>

It would appear, as a consequence, that a decision to hide income, (e.g. a failure to report gambling earnings), or to gamble away a paycheck knowing bills would go unpaid, or a savings account, or funds necessary for food, shelter and housing as a matter of spite after imposition of a financial restraining order would clearly constitute waste.

ii. *Putterman – Negligent Financial Misconduct is Bad*

A few months later, in May of 1997, the Nevada Supreme Court decided *Putterman*.<sup>15</sup> In *Putterman*, the trial court had again unequally divided a marital estate upon dissolution. In doing so, the trial court noted that Mr. Putterman had: (1) refused to account to the court concerning earnings and other financial matters over which he had control, and (2) had appropriated to his own use “several thousand dollars” (of credit card purchases) that had to be satisfied by the wife. The trial court chose as a remedy an unequal distribution that gave wife a country club membership and a portion of stock in a closely held corporation principally owned by husband but in which wife was an employee. (The trial court apparently had both a sense of humor and a sense of irony.)

The Nevada Supreme Court appears to have agreed with the trial court and believed that Mr. Putterman’s misconduct was at least negligent noting:

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In *Lofgren*, we defined one species of “compelling reasons” for unequal disposition of community property, namely, financial misconduct in the form of one party’s wasting or secreting assets during the divorce process. There are, of course, other possible compelling reasons, such as negligent loss or destruction of community property, unauthorized gifts of community property and even, possibly, compensation for losses occasioned by marriage and its breakup.<sup>16</sup>

The Nevada Supreme Court went on to explain as it examined the district court decision that:

It should be kept in mind that secreting or wasting of community assets while divorce proceedings are pending is to be distinguished from undercontributing or overconsuming of community assets during the marriage. Obviously, when one party to a marriage contributes less to the community property than the other, this cannot, especially in an equal division state, entitle the other party to a retrospective accounting of expenditures made during the marriage or to entitlement to more than an equal share of the community property.<sup>17</sup>

The message from the Supreme Court again was that Nevada is an equal division state. We know from *Putterman* that retrospective accounting that simply identifies “overconsumption” or “underproduction” is to be discouraged. One clue to the expansion *Putterman* offers over *Lofgren*, nonetheless, must be related to the duty of support spouses owe to one another, especially during divorce. Where one spouse fails, for example, to apply his or her full labor, talents and efforts to provide for the marital estate, such “negligence” may be actionable.

The question still remains, however: Is gambling during marriage, without more, waste and if so how would it

be proven without a retrospective accounting? Neither *Putterman* nor *Lofgren* directly answer the question. Even gambling during the process of divorce, absent a financial restraining order, would apparently be difficult to establish as waste. Further, when, then, does an activity that is undertaken in the context of the following syllogisms: (1) gaming is fundamental to the best interests of the citizens of the state, and (2) (the social fable) “they don’t build casinos on winners,” become waste?

### iii. *Wheeler* – Misconduct That Causes Financial Harm to the Community is Bad

Six months after *Putterman*, in October of 1997, the Nevada Supreme Court decided *Wheeler*.<sup>18</sup> In *Wheeler* the trial court had yet again unequally divided a marital estate when the Plaintiff, wife, produced photographic evidence the Defendant, husband, had battered her during the parties’ marriage. In admitting the evidence and then unequally dividing the parties’ marital estate, the trial judge said:

The Court finds that a compelling reason exists to make an unequal disposition of the community property. The Court bases this finding on a review of the evidence and finds that an abusive relationship existed between the parties in which the Plaintiff suffered from Defendant’s conduct.<sup>19</sup>

In reversing the trial court, the Nevada Supreme Court offered:

...[w]e conclude that, except for a consideration of the economic consequences of spousal abuse or marital misconduct, evidence of spousal abuse or marital misconduct does not provide a compelling reason under NRS 125.150(1)(b) for making an unequal disposition of community property. If spousal abuse or marital misconduct of one party has had an adverse economic impact on the other party, it may be considered by the district court in

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determining whether an unequal division of community property is warranted.

As a consequence, practitioners should focus on how gaming has materially harmed the financial standing of the community, as opposed to a specific focus on fault, and build cases around an analysis of the duties owed between spouses, and any failures to meet those duties reflected in the questioned pattern of gambling. Some simplistic ideas for relevant inquiry are:

- 1) Was the gambling activity, either in terms of winnings or losses, within the actual or constructive knowledge of both spouses?
- 2) Did gambling interfere with employment and therefore earnings of either spouse?
- 3) Did community debts suffer while gambling losses accrued?
- 4) Did any court order preclude gambling activity? Did the parties have any agreement about the limits of gambling activity in their marital community?
- 5) Does either spouse qualify for treatment as a problem gambler?
- 6) Can doctrines of laches or estoppel defeat a claim of waste given the mutual history and conduct of the parties?

### Conclusion

Spouses are partners in a legal contract – marriage – and they owe duties of financial fidelity to one another. Gaming as entertainment, gaming as avocation, and pathological gaming are all fertile fields for factual development and legal argument in light of the fiduciary duties owed between spouses. A troika of cases issued in the mid-1990s offer some guidance on the topic, but further refinement is necessary.

Intentional misconduct, negligent misconduct and fault based conduct that causes economic harm, may all give rise to a claim of waste. Practitioners are cautioned to focus on the negative financial effects of the misconduct,

as opposed to the more common equitable claims regarding the “relative merits” of the parties, given Nevada’s equal division statute.

Gaming is well established in the ancient and recent history of our country and our state. It can and does support the public coffers, employ thousands of Nevadans, and offer entertainment to its participants. In some cases, gaming can undermine the financial stability of a marital estate. In those circumstances, where gambling is contrary to the duties and obligations owed between spouses, it may also be waste.

### Citations

1. Two articles which are noteworthy exceptions and commended to interested readers are: “I Spent the Money on Whiskey, Women and Gambling; the Rest I Wasted,” Gary Silverman, Esq.; (*Nevada Lawyer*; May 2011); and, “Community Waste in Nevada,” Bruce Shapiro, Esq. (*Nevada Family Law Report*, Fall 2010).
2. NRS 123.070.
3. *York v. York*, 102 Nev. 179, 718 P.2d 670 (1986).
4. NRS 123.090.
5. NRS 123.110.
6. NRS 123.100.
7. The examples given here are illustrative and not dispositive of the topic of support between spouses during marriage and/or while in the process of dissolution.
8. NRS 125.050.
9. NRS 125.200.
10. NRS 125.040
11. NRS 463.0152.
12. NRS 463.0129.
13. *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 396 (1996).
14. *Lofgren* at 1283.
15. *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997).
16. *Putterman* at 608.
17. *Putterman* at 609.
18. *Wheeler v. Upton-Wheeler*, 113 Nev. 1185, 946 P.2d 200 (1997).
19. *Wheeler* at 1187.

Judge Walker was appointed to Department 2 of the Second Judicial Court by Governor Brian Sandoval in 2011. He previously worked as a Family Court Master, where he re-worked the child support dockets to increase both the volume of cases heard in court and the total number of cases resolved without a court hearing. He also assisted in the development of the Self Represented Litigant Program, an innovative program designed to manage cases in which at least one of the parties appears without counsel. Prior to serving as a judicial officer, Walker was in private practice, focusing primarily of family law litigation. Judge Walker currently serves on the Board of Directors of the Healthy Families Foundation and is the lead judge on the NCJFCJ’s Project ONE located in Reno, whose goal is to provide judges with guidance for supporting the needs of families and children no matter which jurisdictional “door” of the courthouse — family law, child welfare, family violence, juvenile justice, etc. — they enter.