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BEFORE THE ARIZONA CORPORATION COMMISSION

2013 JUN -3 P 2: 58

COMMISSIONERS

BOB STUMP, Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

Arizona Corporation Commission
AZ CORP COMMISSION
DOCKET CONTROL

DOCKETED

JUN 03 2013

DOCKETED BY

In the matter of:

ULF OLOF HOLGERSSON and LAVERNE J. ABE, formerly husband and wife, doing business as Viking Asset Management, an Arizona registered trade name,

Respondents.

DOCKET NO. S-20762A-10-0416

**SECURITIES DIVISION'S
EXCEPTIONS TO THE
RECOMMENDED OPINION AND
ORDER**

I. INTRODUCTION.

The Administrative Law Judge ("ALJ") submitted his Recommended Opinion and Order dated May 23, 2013 ("ROO") in this matter for consideration of the Commission. Previously on September 15, 2011, the Commission entered a Consent Order, Decision No. 72588, with Respondent Ulf Olof Holgersson ("Holgersson"). In the ROO, the ALJ found Respondent Laverne J. Abe ("Ms. Abe") was married to Holgersson at the time of the liability, that the actions of Holgersson benefitted the marital community of Holgersson and Ms. Abe, that most of the victims had invested during the time they were married, and that the martial community of Holgersson and of Ms. Abe would be liable for restitution, except for the fact that a divorce had occurred before the Commission action was filed. As a result of that divorce, the ROO recommends that the marital community of Ms. Abe not be held liable for any of the funds raised and used by Holgersson and her while they were married. Pursuant to A.A.C. R14-3-110(B), the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") submits its exceptions to the ROO.

1 **II. LEGAL ARGUMENT.**

2 **A. UNDER ARIZONA COMMUNITY PROPERTY LAW, SPOUSES ARE**
3 **LIABLE FOR A MARITAL DEBT EVEN AFTER DIVORCE. THUS,**
4 **JOINING A DIVORCED SPOUSE IS PROPER.**

5 A.R.S. § 44-2031(C) gives the Commission the authority to bring actions against spouses
6 to determine the liability of their marital community for wrongdoing that benefitted, or were
7 intended to benefit, the community. The key questions in determining whether Ms. Abe was a
8 “spouse,” as that term is used by A.R.S. § 44-2031(C), and as such properly joined by the
9 Division are (a) when did the debt arise and (b) what was the marital status of the individuals at
10 the time such debt arose. Arizona courts have stated that “a debt is incurred at the time of the
11 **actions that give rise to the debt**” not the entry or execution of the debt. *See Arab Monetary*
12 *Fund v. Hashim*, 219 Ariz. 108, 111, 193 P.3d 802, 806 (Ct. App. 2008) (emphasis added). Here,
13 Holgersson’s actions that gave rise to the debt occurred while he was married to Ms. Abe. Thus,
14 Ms. Abe was properly named as a spouse so that she could contest the liability of hers and
15 Respondent Holgersson’s marital community.

16 The fact that Ms. Abe obtained a divorce before the Commission action was filed does
17 not prohibit a case being brought to determine if the marital community incurred a liability. For
18 example, in *Ellsworth v. Ellsworth*, 5 Ariz. App. 89, 423 P.2d 364 (Ct. App. 1967), though the
19 spouses obtained a divorce three months before the creditor brought an action, the wife (ex-
20 spouse) was joined and a judgment was entered against her for her portion of community
21 liability. On appeal by the wife, the Court of Appeals went on to affirm that the debt was a
22 community debt of the spouses. The Arizona Court of Appeals did not dismiss the matter nor did
23 they allow a divorce to shield the wife from having to answer for a community debt. Similarly,
24 in *Taylor Freezer Sales of Ariz., Inc., v. Oliphant*, 221 B.R. 506, 509 (Bankr. D. Ariz. 1998), the
25 United States Bankruptcy Court for the District of Arizona dealt with a situation where the debt
26 was incurred during marriage but the debtors obtained a divorce before a judgment was entered.
The bankruptcy court confirmed that under Arizona community property law, “[d]ivorce does not

1 absolve spouses of their community obligations.” *Id.* at 509. As such, this Commission can join
2 divorced spouses to determine the marital liability and order restitution or penalties, as
3 appropriate.

4 It is undisputed under Arizona law that all debts incurred during marriage that are in
5 furtherance of the community, by either spouse, are community debts, unless rebutted by clear
6 and convincing evidence. *See Hrudka v. Hrudka*, 186 Ariz. 84, 91, 919 P.2d 179, 186 (Ct. App.
7 1995). It is similarly undisputed that a community debt is to be paid by the spouses jointly, even
8 if the parties get a divorce before a judgment is entered. *See Community Guardian Bank v.*
9 *Hamlin*, 182 Ariz. 627, 631, 898 P.2d 1005, 1009 (Ct. App. 1995). Simply obtaining a divorce
10 before a creditor, such as the Commission, files an action does not allow a spouse to avoid a
11 community debt.

12 Despite Arizona community property law on this subject, the ROO finds that Ms. Abe is
13 not liable because A.R.S. § 44-2031(C) uses the word “spouse” and does not include “ex-spouse”
14 as a term in the statute. The ROO, incorporates a court decision involving the state retirement
15 system and its application of the term “surviving spouse,” which noted that if the legislature
16 intended to include former spouses in the definition of “spouse,” for purposes of the “surviving
17 spouse” statute, it could have done so. *See Parada v. Parada*, 196 Ariz. 428, 432, 999 P.2d 184,
18 188 (2000). However, the ROO ignores the fact that the *Parada* court was dealing with a
19 discrete area of law, not applicable to general community property liability. Rather, the *Parada*
20 court was analyzing the statutory definition of a “surviving spouse” in the context of the
21 retirement plan statute, A.R.S. § 38-846(A), and was attempting to decide which spouse, the
22 current or former spouse, should be awarded a retirement death benefit. The difficulty there was
23 that the retirement plan “plainly implies that only one person can be eligible to receive such
24 benefits.” *Id.* In that context, in a competition between whether to award death benefits to the
25 current spouse at death or the former spouse, the court held that the statute supported the award
26 to the current spouse.

1 By contrast, A.R.S. § 25-215, the Arizona community property statute that requires that
2 both spouses be sued jointly, uses the term “spouse,” not surviving spouse, former spouse,
3 divorced spouse, or any other like modifier. *See* A.R.S. § 25-215. Despite simply using this
4 term, identical to the term used in A.R.S. § 44-2031(C), courts have had no difficulty in
5 determining that a divorced spouse is still liable to a creditor for a marital debt. *See e.g., Hrudka*
6 *v. Hrudka*, 186 Ariz. 84, 919 P.2d 179; *See also Community Guardian Bank v. Hamlin*, 182 Ariz.
7 627, 898 P.2d 1005. This comports with statutes outside the community property arena drafted
8 by the legislature which only use the term “spouse” and which Arizona courts have held include
9 former spouses. *See e.g.,* A.R.S. § 13-4062 (Marital privilege statute which uses the term
10 “spouse); *State v. Carver*, 227 Ariz. 438, 258 P.3d 256 (Ct. App. 2011) (A.R.S. § 13-4062
11 applies to divorced spouses.).

12 In the ROO, the ALJ cited to and relied on an unpublished decision regarding a
13 Commission order that was reviewed by the Superior Court in the case of Richard and Cynthia
14 Bradford (“Ms. White”), Case No. LC2010-000611. In that case, the Commission found a
15 divorced spouse was liable for the actions of her husband while married. The Superior Court
16 subsequently entered a minute entry order that vacated the Commission decision and stated that
17 Ms. White had made four arguments against the ruling finding her liable, one of which was that
18 the Commission did not have authority to sue an ex-spouse. Without analysis of the arguments,
19 the court stated that it agreed with the arguments made by Ms. White and adopted them for the
20 decision. There are two concerns with relying on the Superior Court’s minute entry order as a
21 dispositive ruling on the term spouse. First, without further analysis or explanation in the order,
22 the minute entry is of little benefit in analyzing A.R.S. § 44-2031(C). Second, the minute entry
23 order is an unpublished decision. The general rule is that unpublished decisions “shall not be
24 regarded as precedent nor cited in any court.” *Hourani v. Benson Hosp.*, 211 Ariz. 427, 435, 122
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1 P.3d 6, 14 (Ct. App. 2006); *See also* Ariz. R. Civ. App. P. 28(c).¹ As a result, this Commission is
2 not bound by Ms. White's minute entry order if it concludes that Ms. Abe was properly joined in
3 this action, even after divorce.

4 Given that the Division's interpretation that the term spouse includes former spouses,
5 which fits within marital community law and also comports with statutory construction as to how
6 the legislature has used the term "spouse" in other contexts, and given the distinguishable
7 caselaw underlying the ROO and Respondent Abe's position, the Division requests that the
8 Commission grant its exceptions and find that A.R.S. § 44-2031(C) allows actions against former
9 spouses who, as here, benefitted from the fraudulent actions of their spouse. There is no
10 Legislative history to suggest that the Legislature intended to provide divorced spouses greater
11 protection over married spouses, under the same underlying facts. As the ROO determined,
12 except for the ALJ's determination that former spouses are not included in A.R.S. § 44-2031(C),
13 he would have found Ms. Abe liable for the investors' losses. Therefore, the factual findings
14 exist to support a finding of marital liability on Ms. Abe.

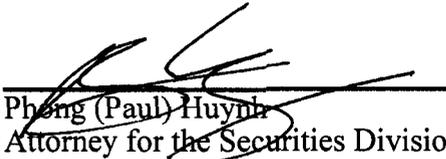
15 **III. CONCLUSION.**

16 This Commission has jurisdiction, pursuant to A.R.S. § 44-2031(C), over individuals who
17 were spouses at the time of the securities violations, even if the spouses obtain a divorce before
18 the filing of a Commission action. The term "spouse" is defined at the time the debt arose, which
19 is consistent with Arizona's community property statutes. For all the foregoing reasons, the
20 Division asks that this Commission find Ms. Abe a spouse that can be joined and that Ms. Abe be
21 liable for \$800,198, which is the amount of restitution outstanding to investors who invested
22 while she was the spouse of Respondent Holgersson. As a result, the Division requests that the
23 Commission adopt the Division's Proposed Amendment #1, attached hereto as Exhibit A,
24

25 ¹ Contrast this with a published decision on an established point of law issued by the Arizona Court of Appeals or the
26 Arizona Supreme Court, which would then require "all courts of lower rank in subsequent cases where the same
legal issue is raised" to follow that precedent, under the doctrine of stare decisis. *See Francis v. Arizona Dept. of
Transp.*, 192 Ariz. 269, 271, 963 P.2d 1092, 1094 (Ct. App. 1998).

1 proposing deletions of sentences and paragraphs that are unnecessary to a ruling finding Ms. Abe
2 a spouse and binding her for the marital liability.

3
4 Respectfully submitted this 3rd day of June, 2013.

5
6 By: 
7 Phong (Paul) Huynh
8 Attorney for the Securities Division

9 ORIGINAL AND THIRTEEN COPIES
10 of the foregoing filed this 3rd day of
11 June, 2013, with

12 Docket Control
13 Arizona Corporation Commission
14 1200 W. Washington St.
15 Phoenix, AZ 85007

16 COPY of the foregoing hand-delivered
17 this 3rd day of June, 2013, to:

18 Administrative Law Judge Marc Stern
19 Arizona Corporation Commission
20 1200 W. Washington St.
21 Phoenix, AZ 85007

22 COPY of the foregoing mailed this
23 3rd day of June, 2013, to:

24 Gregory A. Larson
25 RUCHTMAN WILENCHIK & LARSON, PLLC
26 7373 E. Doubletree Ranch Road
Scottsdale, AZ 85258
Counsel for Respondent Laverne J. Abe

By: 

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EXHIBIT A

1 **SECURITIES DIVISION PROPOSED AMENDMENT #1**

2 TIME/DATE PREPARED:

3 MATTER: Laverne J. Abe, et al.

AGENDA ITEM NO. _____

4 DOCKET NO: S-20762A-10-0416

OPEN MEETING DATE: _____

5
6 **Page 9, line 27 – page 10, line 1**

7 DELETED: Page 9, lines 27- page 10, line 1. “, and if they had remained married, the
8 evidence would establish”

9 INSERT: Page 9, lines 27- page 10, line 1. “ and the evidence established”

10
11 **Page 10, line 5-24**

12 DELETED: Page 10, lines 5-24 and footnote 3.

13
14 **Page 11, lines 2-26**

15 DELETED: Page 11, lines 2-26 and footnote 4.

16
17 **Page 12, lines 1-11; 16-27**

18 DELETED: Page 12, lines 1-11.

19 DELETED: Page 12, lines 16-27.

20
21 INSERT: page 12, beginning at line 16:

22 2. On September 15, 2011, the Commission issued Decision No. 72588, a Consent
23 Order, which found that Respondent Holgersson violated A.R.S. §§ 44-1841, 44-
24 1842 with respect to registration provisions of the Act and A.R.S. § 44-1991, the
anti-fraud provisions of the Act.

25 3. Respondent Holgersson’s conduct is grounds for an order of restitution pursuant to
26 A.R.S. § 44-2032.

1 4. Respondent Holgersson acted for the benefit of his marital community and, pursuant
2 to A.R.S. §§ 25-214 and 25-215, this order of restitution is a debt of the marital
3 community.

4 Page 13, lines 2-3

5 DELETE: Page 13, lines 2-3.

6 INSERT: page 13, beginning at line 2:

7
8 IT IS THEREFORE ORDERED, pursuant to A.R.S. § 44-2032, that the Holgersson Order
9 under Docket No. S-20762A-10-0416 as entered against Holgersson is a liability of the marital
10 community of Holgersson and Laverne J. Abe (“Respondent Spouse”). More specifically, the
11 marital community of Respondent Spouse shall, jointly and severally, with Holgersson, pay
12 restitution to the Commission in the amount of \$800,198. Payment shall be made to the “State of
13 Arizona” to be placed in an interest-bearing account controlled by the Commission.

14 IT IS FURTHER ORDERED, that the restitution ordered hereinabove shall bear interest at
15 the rate of the lesser of ten percent per annum or at a rate per annum that is equal to one per cent
16 plus the prime rate as published by the board of governors of the Federal Reserve System in
17 statistical release H.15 or any publication that may supersede it on the date that the judgment is
18 entered.

19 IT IS FURTHER ORDERED, that the Commission shall disburse the funds on a pro-rata
20 basis to the investors shown on the records of the Commission. Any restitution funds that the
21 Commission cannot disburse because an investor refuses to accept such payment, or any restitution
22 funds that cannot be disbursed to an investor because the investor is deceased and the Commission
23 cannot reasonably identify and locate the deceased investor’s spouse or natural children surviving
24 at the time of distribution, shall be disbursed on a pro-rata basis on the remaining investors shown
25 on the records of the Commission. Any funds that the Commission determines it is unable to or
26 cannot feasibly disburse shall be transferred to the general fund of the State of Arizona.

1 IT IS FURTHER ORDERED, that if Respondent Spouse does not comply with this Order,
2 any outstanding balance may be deemed in default and shall be immediately due and payable.

3 IT IS FURTHER ORDERED, that if Respondent Spouse fails to comply with this order, the
4 Commission may bring further legal proceedings against Respondent Spouse, including application
5 to the superior court for an order of contempt.

6 IT IS FURTHER ORDERED, that pursuant to A.R.S. §44-1974, upon application the
7 Commission may grant a re-hearing of this Order. The application must be received by the
8 Commission at its offices within twenty (20) calendar days after entry of this Order. Unless
9 otherwise ordered, filing an application for re-hearing does not stay this Order. If this Commission
10 does not grant a re-hearing within twenty (20) calendar days after filing the application, the
11 application is considered to be denied. No additional notice will be given of such denial.

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