IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES K. WICHERT,
Appellant,
vs.
SUSAN M. WICHERT,
Respondent.

No. 33809

JAMES K. WICHERT,
Appellant,
vs.
SUSAN M. WICHERT,
Respondent.

No. 34357

AMENDED ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

These are consolidated appeals from a final decree of divorce and post-judgment orders. The parties were married on July 8, 1978. After the parties separated, appellant James Wichert started a business named One Dollar Store Services, Inc. James filed for divorce on May 14, 1996.

Following a bench trial, the district court ordered that: (1) James was obligated to pay alimony to Susan until she died or remarried; (2) Susan held one-half of any interest that James held in a tree farm; (3) James and Susan would bear their own debts incurred from the time of separation; and (4) a Charles Schwab bank account held by One Dollar Services was community property, and that James would pay Susan one-half of the Schwab account. In addition, the district court found that One Dollar Services was valued at $61,000.00.

After the trial, James filed a motion to amend the district court's findings, claiming that the district court had failed to account for a debt owed on a Discover Card that James and Susan had incurred before

they separated. The district court issued an order denying the motion, and found that compelling reasons existed for treating the Discover Card debt as James' separate debt because the credit card had been used exclusively by James for his personal business.

In the same order, the district court made a finding recognizing the tree farm land was owned by James' father and was not community property but that James, who planted the tree farm with his brother, had a community interest in the trees grown on the land. Accordingly, the district court determined that Susan had a one-quarter interest in the trees grown on the land.

Meanwhile, Susan filed a motion for relief from order and adjudication of omitted assets, claiming that James had failed to disclose the existence of certain community assets at the time of trial. In another post-judgment order, the district court found that, approximately thirty-seven days after the trial, monies present in a Wells Fargo account and Schwab account used by James to make a down payment on a personal residence were omitted community property and that Susan was entitled to fifty percent of the funds, or $50,000.00.

James first contends that the district court erred by awarding Susan an excessive alimony award. Under NRS 125.150(1)(a), district courts are empowered to award alimony that is "just and equitable." In Buchanan v. Buchanan, this court specified the following factors to consider in determining an alimony award:

> [T]he financial condition of the parties; the nature and value of their respective property; the contribution of each to any property held by them as tenants by the entirety; the duration of the marriage; the husband's income, his earning capacity, his age, health and ability to labor; and

> the wife's age, health, station and ability to earn a living.[1]

This court will not overturn a district court's grant or denial of alimony absent an abuse of discretion.[2] We conclude that the district court did not abuse its discretion in its award of alimony to Susan.

James next contends that the district court erred in finding the value of One Dollar Services to be $61,000.00 because of faulty testimony by Susan's expert witness, Dr. Terrence M. Clauretie. "Findings of fact of the district court will not be set aside unless clearly erroneous."[3] A district court's finding will not be disturbed on appeal unless it is clearly erroneous and is not based on substantial evidence.[4] In this case, Dr. Clauretie testified that a conservative range of values for the business would be between $50,000.00 and $75,000.00. We conclude that the district court did not err in finding the value of One Dollar Services to be $61,000.00, because that amount was within the range of reasonable values testified to by Dr. Clauretie and, thus, is supported by substantial evidence.

James also contends that the district court erred by awarding Susan one-half of the funds from a Charles Schwab bank account held by One Dollar Services. James contends that the district court erred because

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[1]90 Nev. 209, 215, 523 P.2d 1, 5 (1974) (as modified by Heim v. Heim, 104 Nev. 605, 608-09, 763 P.2d 678, 680 (1988) (superseded on other grounds)).

[2]See Daniel v. Baker, 106 Nev. 412, 414, 794 P.2d 345, 346 (1990).

[3]Hermann Trust v. Varco-Pruden Buildings, 106 Nev. 564, 566, 796 P.2d 590, 591-92 (1990).

[4]Gibellini v. Klindt, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994); see also NRCP 52(a).

the Schwab account was a business account that was already accounted for in Dr. Clauretie's valuation of One Dollar Services. We conclude that the district court did not err in awarding Susan one-half of the funds from the Schwab account because it appears from the record that Dr. Clauretie's valuation of One Dollar Services did not include the Schwab account as a business asset. Dr. Clauretie used deposits made to the account in evaluating the business cash flow but did not include the account as a business asset.

James also contends that the district court erred by awarding Susan one-half of James' unknown interest in a tree farm because there was no evidence, beyond testimony to conversations that occurred years earlier, to support the district court's conclusion that James or Susan had an interest in the tree farm. James further contends that the district court erred in finding that Susan had a one-quarter interest in the trees grown on the tree farm.

We conclude that the district court did not err in awarding Susan one-half of James' interest in the tree farm because substantial evidence supports the district court's finding that James' interest was community property. However, we conclude that the district court did err in its subsequent order awarding Susan a one-quarter interest in the trees grown on the tree farm. There is no evidence to support that the community owned any interest in any trees grown on the tree farm. Although there is some evidence that James might in the future receive payments, this alone is insufficient to establish an actual property interest in the trees grown on the tree farm. Accordingly, we conclude that the district court abused its discretion to the extent that the subsequent finding exceeds the more limited finding in the earlier decree of divorce.

James next asserts that the district court erred in failing to adequately describe why it made an unequal distribution of the Discover

Card debt. The district court found that compelling reasons existed for treating the Discover Card debt as James' separate debt because the credit card had been used exclusively by James for his personal business.[5] As mentioned above, this court will not disturb a district court's finding unless it is clearly erroneous and is not based on substantial evidence.[6] We conclude that the district court did not err in determining the distribution of the Discover Card debt.

Lastly, James contends that the district court erred in finding that, approximately thirty-seven days after the trial, monies present in a Wells Fargo account and Schwab account used by James to make a down payment on a personal residence were omitted community property. Susan contends that she is entitled to fifty percent of the funds in both accounts after the trial because it was omitted community property.

We disagree. Generally, post-trial assets are not considered to be community property, unless the assets are omitted at the time of trial. In this case, Susan is entitled to fifty percent of community property as of the time of the trial, which was completed on April 23, 1998. Therefore, Susan is not entitled to fifty percent of the amount James stated was in the Wells Fargo and Schwab accounts in June 1998 when he signed the financial documents to purchase his personal residence after the trial.

However, the record reflects that several deposits were made in those accounts in the amount of $114,937.95, up to and including the last day of trial. The record also reflects outstanding checks chargeable to the account in the amount of $36,813.07, leaving a balance of $78,124.88.

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[5]See NRS 125.150(1)(b).

[6]See Gibellini, 110 Nev. at 1204, 885 P.2d at 542; see also NRCP 52(a).

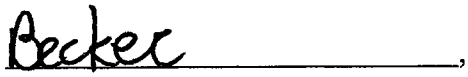
In addition, the record reflects that Susan acknowledged in a pleading that $11,292.00 had already been divided in the original divorce decree, leaving $66,832.88 in combined accounts representing the alleged omitted assets. We conclude that substantial evidence supports the district court's finding that this was community property (particularly James' use of the money for a down payment on his personal residence shortly after the conclusion of the trial). As to the $50,000.00 award to Susan, we reverse and remand the matter to the district court to issue an amended decree awarding her fifty percent of $58,972.22, which is the amount of the omitted community property at the time of the trial.

Based on our discussion above, we affirm the district court's final decree of divorce and reverse those portions of the post-judgment orders awarding Susan a one-quarter interest in the tree farm and $50,000 in community property from the Wells Fargo and Schwab accounts. We remand this matter to the district court for proceedings consistent with this order.

It is so ORDERED.

_____, J.
Shearing

_____, J.
Leavitt



_____, J.
Becker

cc: Hon. Robert E. Gaston, District Judge, Family Court Division
Hon. T. Arthur Ritchie, Jr., District Judge, Family Court Division
Marshal S. Willick
Stephen R. Minagil
Clark County Clerk