IN THE SUPREME COURT OF THE STATE OF NEVADA

DORA ANN THIEN,
Appellant,
vs.
BUDDY JAMES THIEN,
Respondent.

No. 33907

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from the district court's order dividing marital property between Buddy and Dora Thien in an action for divorce. At issue were the valuation of the parties' dental ceramics business, Dentcor, Inc. ("Dentcor"), a loan by Bank of America to the business, and a bank loan to Buddy during the parties' first separation.

Under NRS 125.150(1)(b), the trial court must make an equal distribution of the parties' community property, unless the trial court finds compelling reasons to do otherwise. This court reviews the trial court's division of community property for an abuse of discretion.[1]

Dora first argues that the district court abused its discretion by failing to reappraise Dentcor after Buddy disclosed the existence of a newly created business, Pentcon, Inc. ("Pentcon"), at the evidentiary hearing. Buddy testified that he had created Pentcon and began to divert funds from Dentcor to Pentcon only after Dentcor was appraised. The district court awarded Dora half of the Pentcon funds, but credited that half toward her half of the value of Dentcor. Dora contends that the district court abused its discretion by ignoring the testimony of the expert witness that the companies would have to be valued together.

[1]Wolff v. Wolff, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996).

Alternatively, she argues that if Pentcon is treated simply as a savings account for Dentcor, then the district court abused its discretion by crediting her half of Pentcon toward her half of the value of Dentcor.

Our review of the record reveals no abuse of discretion by the district court. The business appraiser reviewed four years of financial statements for Dentcor, ending April 30, 1998. However, he more heavily weighted the last two years because Buddy told him he could no longer work at his previous pace due to health problems. Dentcor's fiscal year ended April 30, 1998, the last date included in the appraiser's evaluation. On May 1, 1998, Buddy began diverting funds generated by Dentcor to Pentcon. At that time, two clients were previous clients of Dentcor and one client was new.

After Buddy disclosed the existence of Pentcon at the hearing, the appraiser testified that the existence of Pentcon would impact his valuation. However, he based part of this changed valuation upon a financial statement reflecting the first five months of fiscal year 1999, a document that was not part of his appraisal. The real thrust of the appraiser's argument was that he based his appraisal on the lower income fiscal years of 1997 and 1998 because Buddy indicated that he was going to slow down the business because of health problems. The appraiser indicated that the 1999 financial statement, in addition to the Pentcon account, showed that Buddy may not have accurately disclosed how much he intended to work, and that the amount of revenue generated in the fiscal year of 1999 was more reflective of Buddy's higher income years rather than his lower income years of 1997 and 1998. The appraiser stated that he would have averaged the business' earning potential over a longer time period if he had known that the higher revenue years were more indicative of Buddy's true work habits.

Although the appraiser had available to him the higher revenue years of 1995 and 1996, he rejected those years as a basis for the appraisal because Buddy indicated he had to slow down his work due to his health. Buddy testified that he was taking Prozac to stabilize his serotonin levels, and that the lack of serotonin had enabled him to keep up his previous work pace of fifteen or sixteen working hours per day. He also testified to being diagnosed with asthma and having lung problems due to his exposure to nickel beryllium, a toxic metal used in the dental ceramics industry. No testimony or evidence to the contrary was introduced. Buddy also testified that he had worked extremely hard in those years because the cost of building their dream house had gone $100,000.00 over budget, they had suffered losses on the sales of their California properties and they needed cash to stay financially afloat.

"The weight and credibility of a witness's testimony is within the sole province of the trier of fact."[2] The trial court is in a better position than this court to judge the credibility of witnesses because it has the opportunity to hear and perceive witnesses' testimony.[3] In finding Buddy's testimony to be credible, the district court impliedly found that the appraiser properly gave more weight to the lower revenue years of 1997 and 1998. It is undisputed that monies generated by Dentcor were diverted to Pentcon after the close of Dentcor's 1998 fiscal year, which was also the last year of the financial statements reviewed by the appraiser. Furthermore, the district court did not, as Dora alleges, ignore the appraiser's testimony regarding the impact of Pentcon upon the business evaluation. To the contrary, the trial transcript shows the district court

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[2]Greeson v. Barnes, 111 Nev. 1198, 1202, 900 P.2d 943, 946 (1995).

[3]Fletcher v. Fletcher, 89 Nev. 540, 542, 516 P.2d 103, 104 (1973).

was very aware that there may have been a problem with the valuation after Buddy disclosed the existence of Pentcon, as shown by the district court's extensive questioning of the appraiser. When questioned by the district court as to his guess at a new value for Dentcor, based on the evidence regarding Pentcon's existence, the appraiser responded that he would guess the business could be valued at $220,000.00 to $270,000.00. However, he also testified that the new information might not at all affect his appraisal of Dentcor's value at $169,000.00 and admitted that the appraisal at $169,000.00 may not in fact be invalid. After considering all the evidence, the district court concluded as a matter of fact that Dentcor was worth $169,000.00. Since this conclusion is supported by substantial evidence, as the appraiser testified that his valuation might not change despite the disclosure of Pentcon's existence, the district court cannot be said to have abused its discretion.

Dora next argues that even if the district court correctly refused to revalue Dentcor to take Pentcon's existence into account, she should have been awarded one-half of Pentcon in addition to one-half of Dentcor to equalize the distribution of community assets. We conclude that the district court did not abuse its discretion by crediting Buddy's check to Dora for half of the Pentcon account toward Dora's one-half interest in Dentcor. The appraiser reviewed documents from May 1, 1995, to April 30, 1998. Buddy began to divert funds from Dentcor to Pentcon on May 1, 1998, so the funds moved into the Pentcon account had been accounted for in the appraisal. The Pentcon funds were a part of Dentcor's accounts receivable and were generated solely by Dentcor. The accounts receivable represented Dentcor's expectation interest, of which half belonged to Dora. The fruition of Dentcor's expectation interest was held by Pentcon. If the district court were to assign to Dora half of the value of

Dentcor, which included its expectation interest, and then assign to her half of the fruition of its expectation interest, Dora would essentially recover both the value of Dentcor plus one of its major assets, the accounts receivable. Dora would receive more than half of the value of the dental ceramics business.[4]

Second, Dora argues that the district court erred by assigning to her one-half of the $23,500.00 owed to Bank of America. She contends the loan was a corporate debt and was accounted for in the business appraisal. She asserts that the effect of this division is to deny her corporate profits, but force her to assume corporate debts.

The characterization of an obligation as community or separate debt to a financial institution depends upon the intent of the lender.[5] The Bank of America loan was taken out by the parties during their marriage and is presumptively a community debt.[6] However, Dora showed, by clear and convincing evidence, that the loan was a corporate rather than community debt.[7] Dora submitted a Dentcor balance sheet showing notes payable in the amount of $23,300.00, an amount remarkably similar to the amount of the Bank of America loan.

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[4]Rodriguez v. Rodriguez, 116 Nev. 993, 997, 13 P.3d 415, 417 (2000) (holding that NRS 125.150(1) requires that "[c]ommunity property . . . be divided equally unless a specifically stated compelling reason exists for making an unequal division").

[5]Norwest Financial v. Lawver, 109 Nev. 242, 246, 849 P.2d 324, 326 (1993).

[6]Id.

[7]Bank v. Milisich, 52 Nev. 178, 183, 283 P. 913, 914, (1930) ("evidence necessary to show a transmutation of community property into separate property must be of a clear and convincing character").

Furthermore, Buddy asserted that the loan was taken out to establish credit for Bud Thien Laboratories, the predecessor to Dentcor. The only reason that Dora and Buddy personally guaranteed the loan was because the bank would not extend credit to the business entity otherwise. Buddy testified that Dentcor has made the interest payments on the loan. Although Buddy and Dora personally guaranteed the loan, it was incurred by the business to help establish credit for the business. It is a corporate debt and simply follows the business. As such, the district court erred by assigning half of the corporate debt to Dora.

Third, Dora argues that the district court erred in assigning one half of the $16,000.00 Norwest loan that Buddy incurred during the parties' first separation to her as community debt. She contends that Buddy admitted he used part of the loan to pay her alimony and child support, and the effect of making her liable for half of it is to make Dora reimburse Buddy for paying her support and to help support Buddy. She contends that that result is unfair given the disparity in incomes between the parties. Finally, she contends that Buddy failed to prove the loan benefited the community.

Although the Norwest loan was taken out during the parties' initial separation, it was still incurred during the marriage and is, therefore, presumptively a community debt.[8] Buddy testified that, in addition to the Norwest loan, he also took loans from Dentcor, in the amount of $130,000.00, and $8,100.00 from his father, to finish improvements to the marital residence, maintain the household and support Dora. Buddy could not separate the loans and directly attribute them to specific expenses. Nor could Dora trace the Norwest loan to

[8]Norwest Financial, 109 Nev. at 246, 849 P.2d at 326.

monies paid to her for her support. When the parties briefly reconciled, Dora enjoyed the improvements to the marital residence. Those improvements also benefited both parties because they increased the value of the property. No evidence was presented of the lender's intent to rely on Buddy's separate property to secure the loan. Dora did not overcome the presumption that the debt was community debt, and the district court did not abuse its discretion in dividing the Norwest loan between the parties.

For the foregoing reasons, 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.

Agosti, C.J.

Shearing, J.

Becker, J.

cc: Hon. Cynthia Dianne Steel, District Judge, Family Court Division
Rebecca L. Burton
George E. Holt
Leavitt Law Firm
Clark County Clerk