IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIA DARNOLD CLEMMONS,
Appellant/Cross-Respondent,
vs.
RICHARD A. DARNOLD,
Respondent/Cross-Appellant.

No. 44714

FILED

JAN 31 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal and cross-appeal from a district court order modifying a marital settlement agreement as to spousal support, an order determining spousal support arrears, and a post-judgment order denying attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; T. Arthur Ritchie Jr., Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Clemmons' duty to Darnold

Darnold contended below, and the district court agreed, that Clemmons owed Darnold an attorney's duty of full and fair disclosure and that their divorce agreement was subject to close scrutiny pursuant to Cook v. Cook,[1] and Williams v. Waldman.[2] We disagree.

When the parties entered into the divorce agreement, Clemmons was a paralegal at Christensen Law Offices and Darnold was a sophisticated businessman, a CPA and a vice president at Boyd Gaming.

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[1]112 Nev. 179, 184, 912 P.2d 264, 267 (1996).

[2]108 Nev. 466, 472-73, 836 P.2d 614, 618-19 (1992).

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An attorney from Christensen's law office drafted the divorce agreement, however, Darnold admitted that he did not recall discussing the terms of the agreement with any attorneys from Christensen's law office, and that the only person he relied on for advice at Christensen's office was Clemmons.

Clemmons was, at best, a paralegal, not an attorney. Therefore, when acting independently of her law firm and on her own behalf, Clemmons could not create an attorney-client relationship with her spouse; and she did not owe any attorney-client duties to her spouse when entering into an independent agreement with him. Further, given Darnold's relative sophistication, it was unreasonable for him to not seek independent counsel in light of Clemmons' adverse position.

Consequently, we conclude that Clemmons owed no duty to Darnold to inform him of his rights when the parties negotiated the divorce agreement.

Clemmons' waiver of alimony

Clemmons contends that there was insufficient evidence to support the district court's finding that she waived future alimony payments, and she argues that the district court's finding on this issue was clearly erroneous. We disagree.

Waiver occurs when a party intentionally relinquishes a known right.[3] Waiver may be implied from "conduct which evidences an intention to waive a right, or by conduct which is inconsistent with any

[3]McKellar v. McKellar, 110 Nev. 200, 202, 871 P.2d 296, 297 (1994).

intention other than to waive a right."[4] Further, waiver is a factual determination to be made by the trial court,[5] and we defer to a district court's factual findings if they are supported by substantial evidence.[6]

First, Clemmons remarried. While the divorce decree specifically states that alimony "is non-modifiable in the event of re-marriage of either party," or "as a result of changed circumstances," Clemmons remarriage tends to support Darnold's testimony that Clemmons voluntarily waived alimony.[7] Second, as noted by the district court, both Clemmons and Darnold testified that they discussed the termination of alimony after Clemmons' remarriage. Third, both Clemmons and Darnold testified that Clemmons asked for additional child support when they discussed the termination of alimony. Finally, Clemmons did not deny that she discussed the termination of alimony with her fiancé.

Given the foregoing, we conclude that there was sufficient evidence to support the district court's finding that Clemmons at least

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[4]Id.

[5]Id.

[6]Waddell v. L.V.R.V. Inc., 122 Nev. ___, ___, 125 P.3d 1160, 1166 (2006).

[7]The record indicates that Clemmons no longer needed alimony when she remarried, which bolsters Darnold's testimony that she told him he no longer needed to pay her alimony. Further, determining whether an implied waiver has occurred requires a review of the factual circumstances surrounding the alleged waiver, including changed circumstances such as remarriage.

impliedly waived her right to future alimony, and we, therefore, affirm the district court's determination as to this issue.

Clemmons' waiver of her right to a percentage of Darnold's bonuses

In his cross-appeal, Darnold asserts that the district court erred in failing to find that Clemmons waived her right to a percentage of his bonuses. We reject Darnold's contention. Similar to the waiver of future alimony, Clemmons' waiver of her right to a percentage of Darnold's bonuses is a factual question to be determined by the district court.[8] We will not overturn that decision absent an abuse of discretion, and we do not find an abuse of discretion here.

Therefore, we affirm the district court's ruling that Clemmons did not waive her right to a percentage of Darnold's bonuses.

Alimony arrearages

Darnold contends that the district court erred when it effectively awarded Clemmons twenty-five percent of Darnold's gross income in alimony arrearages. We agree.

NRS 125.150(7) provides that the district court may not modify past-due court-ordered alimony. The alimony provision of the divorce decree clearly provides that Clemmons was to receive twenty-five percent of Darnold's bonuses, in addition to the $1,750 monthly payment, and a corresponding increase in this payment based on the percentage by which Darnold's salary is raised.[9]

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[8]McKellar, 110 Nev. at 202, 871 P.2d at 297.

[9]Despite the fact that Darnold was only required to pay additional alimony by the same percentage as his raise, Darnold admitted below and admitted at oral argument on appeal that he had paid Clemmons twenty-

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However, it appears that the district court calculated alimony arrearages based on twenty-five percent of Darnold's gross salary, instead of $1,750 adjusted upward by twenty-five percent of his raises, plus twenty-five percent of his bonuses. We are aware of Clemmons' contention that she intended the $1,750 to be twenty-five percent of Darnold's gross salary, and we are aware that the district court appeared to agree with this contention. However, the decree did not require Darnold to pay Clemmons twenty-five percent of his gross salary. If the parties had intended Darnold to pay twenty-five percent of his gross salary, they could have easily stated as much in the divorce agreement, and they could have requested that the district court include this language in the divorce decree.[10] Instead, the parties made the additional effort of inserting a fixed amount for alimony, which was to be supplemented by differing percentages of raises and bonuses. The decree clearly memorialized this agreement. While the district court may interpret ambiguous language in the divorce decree, it may not modify the amount of accrued court-ordered alimony where the language of the decree is unambiguous as to the amount of alimony due each month.[11]

. . . *continued*

five percent of both his raises and bonuses. Therefore, we conclude that the parties voluntarily modified the percentage of Darnold's raises to twenty-five percent.

[10]If Clemmons intended to receive twenty-five percent of Darnold's gross salary, she should have provided as much in the divorce agreement.

[11]See NRS 125.150(7).

Therefore, we reverse the arrearage award as to the amount only, and remand to the district court to recalculate arrearages based on $1,750 per month, adjusted upward by twenty-five percent of Darnold's raises, if any, plus Clemmons' share of Darnold's bonuses.[12]

Additional child support

Given the deference accorded to decisions concerning child support,[13] we conclude that the district court did not abuse its discretion in refusing to require Darnold to pay additional child support requested by Clemmons, especially in light of Darnold's payment of additional expenses for the children.[14]

Future stock options

We reject Clemmons' contention that the parties intended Darnold's future stock options to be categorized as "bonuses." As a preliminary matter, the district court's determination as to what types of compensation were intended to be categorized as "bonuses," must be given deference on appeal. The district court denied Clemmons' contention that the parties intended Darnold's future stock options to be included in alimony as "bonuses."

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[12]Clemmons' entitlement to arrearages stands, we are simply remanding the actual amount awarded for recalculation based on the formula set forth in the divorce decree.

[13]Garret v. Garret, 111 Nev. 972, 974 n.2, 899 P.2d 1112, 1114 n.2 (1995).

[14]We also note that Darnold was already paying the presumptive maximum in child support at the time Clemmons requested additional child support.

The parties had already divided Darnold's existing stock options in the property settlement agreement, and the parties were well aware that Darnold might receive stock options in the future. Had the parties intended that future stock options were to be categorized as bonuses, the parties could have requested that the district court include the options as bonuses in the divorce decree. Therefore, the failure of the parties to address future stock options in the divorce decree indicates that future stock options were not contemplated as "bonuses."

Therefore, we affirm the district court's determination that Darnold's future stock options do not qualify as "bonuses."

Delivery of granted stock options

We reject Clemmons' demand for Darnold to deliver the 9,000 shares of stock options. Sufficient evidence in the record indicates that: (1) Clemmons did not demand delivery of the stock options, as required by the property settlement agreement, until after she filed suit to recover them, and (2) when the options were exercisable, they were valueless.[15] Therefore, we affirm the district court's refusal to order Darnold to deliver the 9,000 shares of stock options, or their value, to Clemmons.

EDCR 7.27 Trial Memoranda

We disagree with Clemmons' contention that Darnold's submission of pre-trial memoranda and his failure to serve her with a copy of one of his pre-trial memoranda substantially prejudiced her case. EDCR 7.27 provides that counsel may submit trial memoranda of points and authorities to the district court in any civil case, but that counsel

[15]Representations were also made below that the stock options were expired by the time Clemmons finally made a request for their delivery.

must serve a copy of the trial memoranda during or prior to the close of trial.

The trial memorandum contained many of the same arguments already raised in Darnold's motion to modify and the affidavit that accompanied the motion.[16] The issue with which Clemmons claims the most prejudice due to the submission – whether she owed Darnold a duty to inform him that alimony typically ends upon remarriage – was argued in his motion to modify, his affidavit accompanying his motion to modify, and was explored by Darnold in Clemmons' deposition taken approximately four months before the evidentiary hearing on this issue. Therefore, Clemmons had sufficient notice of these arguments, and we conclude that Darnold's failure to serve her with the trial memorandum under these circumstances was harmless error.

Attorney fees

The district court erroneously concluded that it did not have jurisdiction to award attorney fees or costs to either party after the notice of appeal was filed.[17] Therefore, we remand the issue of attorney fees and costs to the district court for final adjudication of those claims in accordance with applicable law.

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[16]Further, the district court stated on the record that it was more influenced by the testimony offered at the hearing than any arguments or statements offered in the pre-trial memorandum.

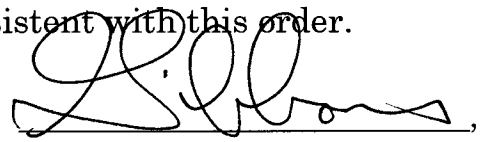
[17]See Lee v. GNLV Corp., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (clarifying that a "final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs").

CONCLUSION

We affirm the district court's finding that Clemmons waived her right to future alimony. Additionally, we conclude that the district court erred in determining that Clemmons owed Darnold an attorney's duty of full and fair disclosure when the parties negotiated the divorce agreement. We further conclude that the district court erred when it miscalculated alimony arrearages in contravention of the divorce decree, and we reverse the amount of the alimony arrearages award and remand for recalculation. Further, we remand the issue of attorney fees and costs for final adjudication by the district court.

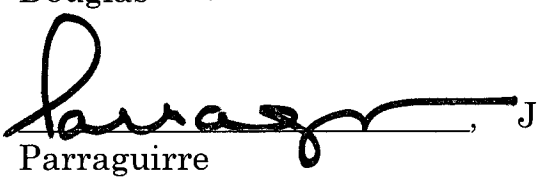
Finally, we reject the parties' remaining contentions on appeal.[18] Accordingly, we

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.



_____, J.
Gibbons

_____, J.
Douglas



_____, J.
Parraguirre

[18]Both parties have raised a number of other issues that we have not addressed here, including, but not limited to, contempt and jurisdictional arguments. We have reviewed the parties' briefs and the record, and we conclude that these remaining contentions are without merit.

cc: Hon. T. Arthur Ritchie Jr., District Judge, Family Court Division
M. Nelson Segel, Settlement Judge
Christensen Law Offices, LLC
Sterling Law, LLC
Mario D. Valencia
Clark County Clerk