IN THE SUPREME COURT OF THE STATE OF NEVADA

MARGARET A. MURPHY, F/K/A MARGARET A. MURPHY-CARHART,
Appellant/Cross-Respondent.
vs.
CHARLES COLEMAN CARHART,
Respondent/Cross-Appellant.

No. 48310

FILED

DEC 19 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal and cross-appeal from a district court divorce decree. Second Judicial District Court, Family Court Division, Washoe County; Deborah Schumacher, Judge.

On February 17, 1996, Charles Carhart ("Charles"), a pilot for Northwest Airlines, married Margaret Murphy ("Margaret"). On July 8, 2004, Charles commenced an action for divorce against Margaret. Following a trial, the district court entered its findings of fact, conclusions of law, and decree of divorce on May 15, 2006.[1] Margaret now appeals from various district court distributions of property and the district court award of fees and costs. Charles cross-appeals regarding the district court's valuation of the community interest in his 401K plan.

Standard of review

In reviewing divorce proceedings on appeal, we will generally uphold the district court's rulings, so long as it applied the appropriate rule of law, its findings were supported by substantial evidence and the

[1]The parties are familiar with the facts of this case; we do not recite them here except as necessary to our discussion.

proceedings were otherwise free of a plainly appearing abuse of discretion.[2]

Pension benefits

On appeal, Margaret primarily argues that the district court erred in calculating her monthly share of Charles' NWA pension, and in denying her request for reimbursement for pension benefits "lost" by Charles. We disagree.

Prior to his marriage to Margaret, Charles was married to Judith Carhart. Charles worked as a pilot for NWA throughout his marriages to Judith and Margaret. Pursuant to the marital settlement agreement incorporated into their eventual California divorce decree, Charles agreed to pay Judith one half of his future NWA monthly retirement income accrued between November 7, 1965 and July 12, 1986.

Charles retired from NWA on October 11, 2004. Charles began the application process to receive his pension benefit of $10,000 a month in August of 2004. However, he did not complete the application at that time because he discovered that NWA had no Qualified Domestic Relations Order (QDRO) on record indicating that Judith was entitled to a portion of the pension. Accordingly, he notified Judith, and she obtained a QDRO from the Superior Court in California on March 17, 2005, while the divorce between Charles and Margaret was pending. The QDRO specified that Judith was to receive $1,467.60 of Charles' monthly pension benefit. Charles completed the application process in April 2005, and began receiving retirement benefits in May 2005.

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[2]Williams v. Walden, 108 Nev. 466, 471, 836 P.2D 614, 617 (1992).

When determining Margaret's share of Charles' pension, the district court determined that based on the length of Margaret and Charles' marriage, 22.8% of Charles' pension was community property. The district court therefore awarded Margaret 11.4% of Charles's pension benefit. The district court further specified that the 11.4% should be calculated after Charles monthly payment was reduced by the $1,467.60 payable to Judith. The district court denied Margaret's request that Charles be required to reimburse the community for "lost payments" as a result of the six-month delay in obtaining retirement benefits.

Despite Margaret's arguments, we conclude that the district court did not abuse its discretion in directing that Margaret's share of the pension was to be calculated after the payment to Judith was made. As established by this court in Gemma v. Gemma, portions of a spouse's nonvested pension accrued during marriage are community property, and the nonemployee spouse is entitled to receive a share of those benefits when the employed spouse is eligible to retire.[3] This court further indicated in Gemma that the "time rule" should be used to calculate the nonemployee's share in the pension. Under the time rule, the nonemployee is entitled to a percentage of the employee spouse's monthly payment, calculated by dividing the number of years the spouses were married by the total number of years of service accrued by the employee spouse.[4]

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[3]105 Nev. 458, 459, 778 P.2d 429, 430 (1989).

[4]Sertic v. Sertic. 111 Nev 1192, 1195 n.3, 901 P.2d 148, 150 n.3 (1995).

Here, Margaret does not dispute the district court's calculation, using the rule set forth in Gemma, that she was entitled to 11.4% of his monthly pension benefit. At the time Charles married Margaret, Judith already had an ownership interest in Charles' pension, as provided in their divorce decree. Pursuant to the terms of the QDRO, the trustee of the pension plan was required to distribute this amount directly to Judith, on a monthly basis. Beyond Gemma and the general provisions of NRS 125.150, which directs the district court to make an equal distribution of all community property, Margaret cites no other authority to support her claim that she is entitled to have her share of Charles' pension calculated before Judith's share is subtracted. Accordingly, since Charles had no legal entitlement to the funds payable to Judith, the district court did not abuse its discretion in directing that Margaret's share of Charles' pension benefit was to be calculated after the payment to Judith was made.

We also conclude that the district court did not abuse its discretion when it denied Margaret's request that Charles reimburse the community for $60,000 in monthly retirement benefits "lost" while Judith obtained a QDRO in California. In Lofgren v. Lofgren, this court established that

> [I]f 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 making an unequal distribution of community property and may appropriately augment the other spouse's share of the remaining community property.[5]

[5]112 Nev. 1282, 1283, 926 P.2d 296, 297 (1996) (emphasis added).

Accordingly, the court found that when a husband had secreted assets in anticipation of a divorce proceeding, the wife was entitled to an increase in her distribution of community property.[6] Here, the district court's findings of fact and conclusions of law stated that

> The Court also rejects [Margaret's] claim that [Charles] intentionally forewent monthly retirement payments, entitling [Margaret] to compensation. Any delay in receipt of retirement payments is attributable to the exigencies of the legal processes in multiple states. There is no evidence (or logic) to support the notion that [Charles] chose to delay receiving retirement payments.

AA 139.

Based on its finding that Charles did not engage in an intentional misconduct by delaying his application for pension benefits, we conclude that the district court did not err in denying Margaret's request for reimbursement pursuant to Lofgren.

Valuation of Charles' 401K plan

In addition to Margaret's assertions of error, Charles cross-appeals regarding the district court's valuation of his 401K plan. Prior to his marriage to Margaret, Charles established a 401K plan through NWA. Both parties agree that at the time of his marriage to Margaret, Charles' separate property interest in the plan was $79,391.40. During the marriage, NWA and Charles both made contributions into the plan. Charles concedes that these contributions were community property.

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[6]Id. at 1284, 926 P.2d at 298.

Over the course of their marriage, Charles and Margaret both engaged in excessive spending, and their expenses exceeded their income. To meet their expenses, Charles and Margaret took multiple loans from Charles' 401K.

At trial, Margaret's expert accountant, Blair Mitchell, and Charles' accountant, Dan DeGeus, each testified regarding the remaining community interest in the 401K. According to Mitchell, the community share of the 401K was $165,900.35. Mitchell explained at trial that under his tracing method, he first determined, at the time of the withdrawal, what percentage of funds in the account were community property versus separate property. He would then apply that same percentage to the amount withdrawn, to determine what percentage of the withdrawal was community property.

According to DeGeus, the community share of the 401K plan was $62,612.00. He explained that from the date of the marriage to trial, all withdrawals from the 401K were deposited to community accounts, and to the best of his knowledge, were used for community expenses. Therefore, if there was a community balance in the account at the time of the withdrawal, DeGeus deducted the withdrawal from the community balance of the account. If the amount of the withdrawal exceeded the community balance, DeGeus deducted the remainder of the withdrawal from Charles' separate funds. The district court ultimately chose to use Mitchell, rather than DeGeus' valuation of the 401K.

As established by the California Supreme Court in Beam v. Bank of America, "it is presumed that the expenses of the family are paid from community rather than separate funds thus, in the absence of any evidence showing a different practice the community earnings are

chargeable with those expenses."[7] This court largely adopted the Beam approach in Cord v. Cord.[8] However, in Cord, this court acknowledged that "[i]n the absence of an agreement to the contrary, the use of his separate property by a husband for community purposes is a gift to the community."[9] Only in circumstances where a spouse does not make a "conscious choice" to spend separate property on community expenses may that spouse recover for expenditures made with separate property on behalf of the community. Thus, in Cord, when a husband's sole source of funds was separate property, and he used those funds to pay community expenses, this court concluded that he did not make a "conscious choice" to gift the community with those assets, and was entitled to reimbursement.[10]

Here, the district court concluded that Charles made a "conscious choice" to use the separate property in his 401K plan to pay community expenses, and adopted the tracing protocol used by Margaret's expert. The district court stated that

> [[E]quity and fairness require the Court to reject [Charles'] reimbursement claim. These parties lived beyond their means year in, and year out. . . . If [Charles'] separate funds had been used to meet ordinary and necessary community bills, this Court would be willing to apply the Cord reimbursement rationale. There was no evidence

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[7]490 P.2d 257, 263 (1971).

[8]98 Nev. 210, 644 P.2d 1026 (1982) (internal quotations omitted).

[9]Id. at 213, 644 P.2d at 1029.

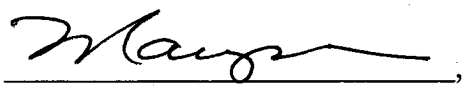
[10]Id. at 214, 644 P.2d at 1029.

> that either party was a greater spender than the other. Where the parties have been joint, unrepentant spendthrifts, it would be inequitable to tax the community to reimburse separate outlays. [Charles] bears equal responsibility with [Margaret] for choosing long term spending patterns that his income could not fund. On these facts, the use of separate 401 (k) [sic] funds cannot be characterized as anything other than the "conscious choice" that the Cord case says E.L. Cord did not make. [Charles] clearly understood that mortgaging Los Altos and tapping his 401(k) put separate assets at the service of family bills. . .
>
> Based on the foregoing discussion and findings, the Court [sic] substantial justice is met by adopting the pro rata approach articulated by Mr. Mitchell. The community share of [Charles'] 401(k) plan is therefore found to be $165,900.35.

We conclude that the district court correctly applied the law insofar as it concluded that Charles' was not generally entitled to reimbursement for any expenditures made from separate 401K funds for the benefit of the community. However, as established in Beam, it is presumed that community expenses are paid from community funds. Both Charles and Margaret agree that all funds withdrawn from the 401K were used to pay community expenses. Accordingly, we conclude that when tracing withdrawals from the 401K, DeGeus was correct in first deducting any withdrawals from all available community funds, and deducting a withdrawal from Charles' separate funds only if community funds were insufficient. The district court misinterpreted both Beam and Cord when it adopted the tracing method proposed by Margaret's expert. Therefore, we remand this matter to the district court for the purposes of recalculating the community share of the 401K plan using the rule set forth in Beam.

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.[11]



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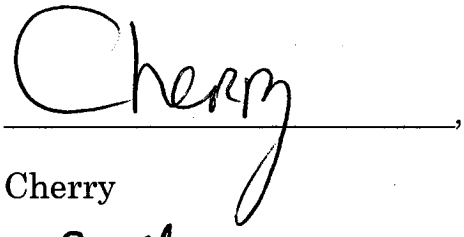

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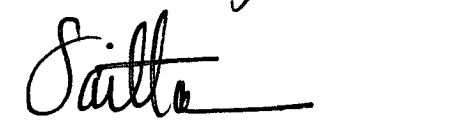
Cherry



_____, J.

Saitta

cc: Hon. Deborah Schumacher, District Judge, Family Court Division
Shawn B. Meador, Settlement Judge
Clarkson Law Office, Ltd.
Law Office of Logar & Pulver, APC
Washoe District Court Clerk

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[11]We have also examined Margaret's other claims on appeal, including those related to reimbursement for monetary gifts made by the community to Charles' brother; the valuation of classic cars owned by the community; and the district court award of fees and costs, and conclude that they lack merit.