IN THE SUPREME COURT OF THE STATE OF NEVADA

MIKE THOMPSON,
Appellant/Cross-Respondent,
vs.
STEPHANIE A. THOMPSON,
Respondent/Cross-Appellant.

No. 49122

FILED

MAR 27 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a district court divorce decree. Third Judicial District Court, Lyon County; David A. Huff, Judge.

This case arises from a divorce between appellant/cross-respondent Mike Thompson and respondent/cross-appellant Stephanie Thompson. Both parties challenge certain distributions or determinations by the district court, and for the following reasons we affirm the district court's distribution of the marital assets. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Standard of review

This court will not interfere with a district court's disposition of community property or spousal support unless the entire record indicates that the district court abused its discretion. Shane v. Shane, 84 Nev. 20, 22, 435 P.2d 753, 755 (1968). In reviewing the district court's determinations, this court looks at whether the district court considered all of the evidence presented and whether it made a fair, just, and equitable division. Id.

An equitable division does not necessarily require an equal distribution of community property and debts. McNabney v. McNabney, 105 Nev. 652, 657-58, 782 P.2d 1291, 1294-95 (1989). The district court must look to the facts and decide each case on its merits. Id. at 657, 782

P.2d at 1294. So long as the district court's factual determinations rely on substantial evidence, which is evidence that reasonably supports the conclusion, this court will not disturb the district court's conclusions unless they are clearly erroneous. Schmanski v. Schmanski, 115 Nev. 247, 251, 984 P.2d 752, 755 (1999).

Justiciability of appeal

Stephanie argues that Mike's post-appeal request that the district court hear his motion for reconsideration, under Huneycutt v. Huneycutt, makes his appeal non-justiciable because Mike raised most of his appellate issues in the motion for reconsideration. See 94 Nev. 79, 575 P.2d 585 (1978) (allowing a party to seek relief from the district court after the party has filed a notice of appeal). Thus, according to Stephanie, many of Mike's issues are non-justiciable because the parties never litigated the issues and the district court did not decide them. We disagree.

Because a divorce decree is a final judgment, any issues determined by the divorce decree are appealable. York v. York, 99 Nev. 491, 493, 664 P.2d 967, 968 (1983); NRAP 3A. As discussed below, the record reflects that both parties presented evidence and the district court ruled on all of the issues raised on appeal, except the issue of the children's medical insurance. Therefore, all of the issues except the medical insurance issue are reviewable by this court.

Mike's direct appeal

Stephanie's attorney fees

Mike argues that the district court abused its discretion when it ordered him to pay 70 percent of the community debt, including Stephanie's attorney fees, because Stephanie only testified as to the amount of the fees, did not present an itemized billing, and the amount is unreasonable under NRS 125.150. We disagree.

District courts have the authority to award attorney fees in a divorce case, but the opposing party must have an opportunity to review and dispute evidence of the fees. Love v. Love, 114 Nev. 572, 581-82, 959 P.2d 523, 529 (1998).

When considering whether to award attorney fees, a district court must consider all relevant facts, including the quality of the attorney, the nature of the work, the outcome, and the disparity of the income of the parties. See Miller v. Wilfong, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005) (relying on the factors set forth in Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) and Wright v. Osburn, 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998)). Further, affidavits or other evidence must support these factors. Id. at 623-24, 119 P.3d at 730.

In this case, Stephanie's trial statement requested that the court award her the attorney fees she had already paid at the time of trial—$7,156—plus all additional attorney fees and costs. On the second day of the trial, Stephanie testified that her attorney fees were $28,021. Stephanie presented trial exhibit Q, a spread sheet outlining her expenses, in support of her testimony.

The record also reflects that Stephanie's attorney submitted to the court all copies of her billing statements for attorney fees, including a statement that the fees following Stephanie's offer of judgment totaled $11,000.

During the trial, Mike's lawyer cross-examined Stephanie regarding the attorney fees. During cross-examination, Stephanie admitted that Mike had paid $13,000 in attorney fees after the first day of trial. Further, Stephanie admitted that since the first day of trial, about

four months earlier, Stephanie's attorney had charged another $11,000 in fees.

We conclude that the district court did not abuse its discretion in requiring Mike to pay 70 percent of the total community debt of $78,300, which included Stephanie's attorney fees. Stephanie testified to the requested fee amount and provided trial exhibit Q. Mike's attorney had the opportunity to cross-examine Stephanie regarding the reasonableness of the amount. Thus, both parties had the opportunity to present evidence regarding the fees, and the testimony and trial exhibit Q reasonably support the district court's award of attorney fees.

The 1967 Corvette

Mike argues that the district court abused its discretion when it ordered an equal division of the proceeds from the 1967 Corvette because the car was a gift and not a bonus from Mike's employer. We disagree.

Pursuant to NRS 123.220, all property acquired during a marriage is community property unless there is an agreement between the spouses or a separate maintenance decree. Under NRS 123.130, any property acquired by "gift, bequest, devise, descent or by an award for personal injury damages" is the separate property of that party. To overcome the presumption that all property acquired after marriage is community property, Mike must provide clear and convincing evidence that the 1967 Corvette is his separate property. Norwest Financial v. Lawver, 109 Nev. 242, 245, 849 P.2d 324, 326 (1993).

At trial, Mike testified that the 1967 Corvette was a gift from Mr. Greg Berry, one of four shareholders of the Silverado Casino. Mike further testified that he had known Mr. Berry for six years and worked for Silverado Casino for three years. Conversely, Stephanie testified that

Mike told her that the 1967 Corvette was a two year bonus from Mr. Berry. On cross-examination, however, Stephanie stated that the car was in Mr. Berry's name before Mike received it.

We conclude that the district court did not abuse its discretion when it categorized the 1967 Corvette as community property. The only evidence Mike presented at trial was his own testimony, which conflicted with Stephanie's testimony. As the district court states in the divorce decree, the details about the car are unclear. Thus, the record supports the district court's determination that Mike failed to present clear and convincing evidence that the car was his separate property.

Stephanie's parental loan

Mike argues that the district court abused its discretion when it held that the money Stephanie's parents gave her was a community debt, and ordered Mike to assume 70 percent of that debt. We disagree.

Mike's reliance on Barry v. Lindner, 119 Nev. 661, 81 P.3d 537 (2003), is misplaced. In Barry, "Barry claimed that his credit card debt and the $18,000 he borrowed from his mother for legal expenses were community debts." Id. at 665, 81 P.3d at 540. However, a special master determined that Barry's lack of financial records and unusual business behavior raised many flags concerning his finances. Id. at 664, 81 P.3d at 539. After the trial, the district court denied Barry's claim. Id. at 666, 81 P.3d at 540-41. This court concluded that substantial evidence supported the district court's finding that Barry's loan from his mother was not a community debt, as the loan was not acquired for the benefit of the community and it was acquired after the parties separated. Id. at 671, 81 P.3d at 543.

In the present case, the amount Stephanie borrowed was relatively small, there was evidence that she used the money for living

expenses and attorney fees, and no other evidence suggested that Stephanie was lying. In fact, there was a note signed by Stephanie's mother that stated Stephanie needed to repay the loan. At trial, Stephanie testified that she needed to borrow money from her parents—$2,156—to pay for IRS records and living expenses, including attorney fees. She also testified that she agreed to repay the loan.

We conclude that Stephanie's testimony was sufficient evidence for the district court to reasonably conclude that the $2,156 Stephanie received from her parents was a loan, and that she used the money for the benefit of the community. Contrary to Mike's assertion, Barry does not require that a parental loan contain a signed promissory note in order for it to be a legitimate community debt. Thus, the district court did not abuse its discretion.

Stephanie's post-separation credit card debt

Mike argues that the district court abused its discretion when it ordered him to assume 70 percent of Stephanie's $30,000 post-separation credit card debt. Mike alleges that the credit card debt amounts to waste and should be Stephanie's separate debt. We disagree.

As noted previously, a district court has the authority to unequally distribute community property if it finds compelling reasons and sets forth the reasons in writing. NRS 125.150(1)(b). Financial misconduct is a compelling reason for a district court's unequal distribution of community assets or debts. Putterman v. Putterman, 113 Nev. 606, 608, 939 P.2d 1047, 1048 (1997). However, undercontributing or overconsuming community assets during marriage does not constitute financial misconduct. Id. at 609, 939 P.2d at 1048-49.

In Putterman, the district court made specific findings of fact that the husband had committed numerous acts of financial misconduct,

including refusing to account for his finances, post-separation credit card charges, and lying about his income. Id. at 609, 939 P.2d at 1049. In this case, however, the district court made no findings of fact that Stephanie committed financial misconduct.

At trial, Mike testified that at the time he and Stephanie separated, she had a credit card balance of $0. Stephanie admitted that during the 20-month separation she charged $30,000, mostly on clothes, while Mike paid her mortgage, car payment, and her other expenses. But according to Stephanie, this was the lifestyle she was accustomed to during the marriage. Mike testified that from February to May 2005, he received over $50,000 in salary, while Stephanie received about $16,380. Further, Mike made about $40,000 from June to October 2005 and gave his wife only $7,250.

We conclude that the district court did not abuse its discretion when it ordered Mike to pay 70 percent of the credit card charges. The court did not find that Stephanie committed financial misconduct under the mutual property restraining order, and it based its unequal division of the community debt on the disparity in the parties' income. Further, evidence suggests that Stephanie's spending was consistent with the marital standard of living. Stephanie had gone from a family income of almost $200,000 per year to an income of $39,300 per year. Although Mike was paying many of Stephanie's bills, there is sufficient evidence for the district court to reasonably conclude that Stephanie's $30,000 in credit card charges over 20 months was consistent with her standard of living during the marriage.

The Chevrolet Tahoe

Mike argues that the district court abused its discretion when it awarded Stephanie the Chevrolet Tahoe, but did not order her to

refinance the car in her own name or to remove Mike's name from the title. We disagree.

This court will not reverse a district court's decision unless the appellant cites to relevant legal authority or the record illustrates a clear mistake. Howarth v. El Sobrante Mining Corp., 87 Nev. 492, 492, 489 P.2d 89, 89 (1971). Mike does not cite to any legal authority that suggests a district court may order a party to refinance a car to remove the other party's name from the title when the divorce decree awards the car to one party.

Regarding the vehicle, the divorce decree states "[t]he Chevy Tahoe, with no quantified equity value, shall be the sole and separate property of [Stephanie], together with the liability owing." At the trial, Mike testified that although he gave Stephanie a birthday card saying the Chevrolet Tahoe belonged to her, it was not a gift; rather, he intended it as a family car, which is why Mike kept it in his name. Stephanie testified that Mike frequently gave her gifts whenever the couple fought about Mike's girlfriends, and that Mike gave her the Chevrolet Tahoe after they fought about his trip to Hawaii with a girlfriend.

We conclude that there was substantial evidence for the district court to conclude that Mike gave the Chevrolet Tahoe to Stephanie as a gift, and therefore the car is her own separate property. Because the divorce decree clearly states that Stephanie is liable for the car payment, Mike has a course of action against Stephanie under the divorce decree if she fails to satisfy her liability. Thus, although the district court did not order Stephanie to refinance the vehicle, the record does not clearly illustrate an error by the district court, and therefore we conclude that the district court did not abuse its discretion.

Stephanie's pension plan

Mike argues that the district court abused its discretion when it failed to award him 50 percent of Stephanie's pension plan. In fact, the divorce decree did not address the pension plan. Mike previously filed a motion for reconsideration regarding the PERS pension plan, which stated that Stephanie did not object to the division of the plan pursuant to the qualified domestic relations order statutory provisions. Stephanie conceded in her response to Mike's motion for reconsideration that he should receive 50 percent of her pension, and further stated that she had always been willing to stipulate to a modification of the divorce decree in order to avoid an Amie v. Amie action. See 106 Nev. 541, 796 P.2d 233 (1990) (allowing an independent action for equitable relief). Thus, we conclude that the issue is moot, and the parties should seek a modification of the divorce decree.

The children's medical insurance costs

Mike argues that the district court abused its discretion when it did not order Stephanie to pay one-half of the children's medical insurance and uncovered medical expenses. We disagree.

We conclude that the parties did not litigate the issue. Therefore, there is an inadequate record for this court to review. This court has stated that a party's failure to litigate a nonjurisdictional issue at trial amounts to a waiver of the issue on appeal. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Mike's annual income

Mike argues that the district court abused its discretion when it found that his income was between $150,000 and $173,000 per year. We disagree.

At trial, Ms. Diane McCoy, assistant controller at the Silverado Casino, testified that Mike's total gross earnings were $170,150 in 2005, but on cross-examination she agreed that Mike's gross income was closer to $173,350. Mike testified that although he had received bonuses in the past three years, he did not expect to receive any bonuses for the next few years because the Silverado Casino was opening two new locations.

Dean Albright, a Certified Public Accountant who had reviewed the payroll records of the Silverado Casino, testified that Mike's gross annual salary in 2005 was $173,650, including bonuses. On cross-examination, Mr. Albright admitted that without bonuses Mike's annual salary was $144,000.

We conclude that the district court did not abuse its discretion when it determined that Mike's gross annual income was between $150,000 and $173,000 a year, including bonuses. Both parties presented testimony regarding Mike's annual salary and bonuses, and agreed that over the past three years his minimum salary was $144,000, and the maximum was about $173,000. Thus, there was substantial evidence to support the district court's conclusion.

Spousal support: the monthly amount

Mike argues that the alimony award of $2,000 a month is excessive. We disagree.

NRS 125.150(8) lists the relevant factors that a district court shall consider when determining an award of spousal support. These factors include:

> (a) The financial condition of each spouse;
>
> (b) The nature and value of the respective property of each spouse;

(c) The contribution of each spouse to any property held by the spouses pursuant to NRS 123.030;

(d) The duration of the marriage;

(e) The income, earning capacity, age and health of each spouse;

(f) The standard of living during the marriage;

(g) The career before the marriage of the spouse who would receive the alimony;

(h) The existence of specialized education or training or the level of marketable skills attained by each spouse during the marriage;

(i) The contribution of either spouse as homemaker;

(j) The award of property granted by the court in the divorce, other than child support and alimony, to the spouse who would receive the alimony; and

(k) The physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse.

NRS 125.150(8). These factors, however, are not an exhaustive list. Id.; Rodriguez v. Rodriguez, 116 Nev. 993, 999, 13 P.3d 415, 419 (2000).

At the trial, Mr. Albright, Stephanie's expert witness, calculated that Mike's alimony payment under the California guidelines should be $2,457 per month. Further, Mr. Albright testified that although Nevada has not adopted specific guidelines, district courts in Nevada have previously used these, or similar, guidelines.

In addition, as noted earlier, Stephanie is an elementary school teacher who makes about $35,000 per year, while Mike is a casino manager who makes at least $144,000 per year. The district court considered the length of the marriage, both parties' education,

employment, income, and other factors and concluded that Stephanie should receive $2,000 per month for five years.

We conclude that the district court did not abuse its discretion when it ordered Mike to pay spousal support of $2,000 per month. Stephanie presented expert testimony that under the California guidelines and other guidelines used in Nevada, Mike's spousal support should be almost $2,500. Regardless, the district court ordered spousal support of only $2,000, which is the amount it ordered in Stephanie's motion for alimony pendente lite. Conversely, Mike did not present any testimony regarding spousal support. Thus, there is substantial evidence to reasonably support the district court's conclusion.

Stephanie's cross-appeal

Spousal support: the award period

Stephanie argues that the district court abused its discretion when it limited the payment of alimony to five years. We disagree.

As previously stated, the district court considered the individual circumstances of this case when it determined the amount and length of spousal support. Although Stephanie presented testimony that she should receive spousal support for nine and one-half years because her children are still young, Mike and Stephanie share custody. Therefore, the parties share in the costs of raising the children. Further, Stephanie testified that she had earned three-fourths of her bachelor's degree and her special education certification while Mike supported her. Stephanie now works full time as an elementary school teacher.

We conclude that the district court did not abuse its discretion in awarding alimony for a period of five years because it considered all the facts in this case, including the disparity in the parties' income, the length of the marriage, the community assets, and the parties' education and

employment. There is substantial evidence to reasonably support the district court's conclusion that five years of spousal support is sufficient.

Retroactive child support

Stephanie argues that the district court abused its discretion when it failed to award her child support for the time period of June 10, 2005, to July 12, 2006—the date child support and alimony began. We disagree.

NRS 125B.030 states that during a marital separation, a custodial parent may recover a reasonable portion of the costs of caring for the child from the noncustodial parent. The statute, however, does not address findings of fact or require that a district court provide an explanation when it denies a motion for retroactive child support. Although this court has previously held that a district court may deny arrearages if it explains why doing so is in the best interest of the child, this court has not addressed whether a denial of retroactive child support must be explained with the best interest of the child in mind. See Westgate v. Westgate, 110 Nev. 1377, 1381, 887 P.2d 737, 739 (1994) (holding that "the best interest of the child cannot be served by refusing to reduce arrearages to judgment as a form of punishment for failing to allow visitation").

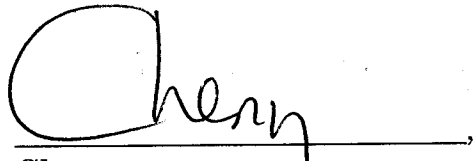
In this case, Stephanie did not file a motion for child support until April 19, 2006. In her motion, Stephanie asked for $28,035 for past child support. Mike's response stated that he had been paying all of Stephanie's household expenses, car payments, auto insurance, and the children's health insurance, and provided her with $300 per week. Further, Mike and Stephanie shared custody. Thus, Mike requested that if the district court awarded Stephanie retroactive child support, then he

should receive a credit for all of the bills he paid and money he provided during the time period in question.

On July 12, 2006, the court granted Stephanie's order for child support, but did not address the issue of retroactive child support. In the divorce decree, the district court denied Stephanie's motion for retroactive child support, but did not state why it was denying her motion.

Stephanie fails to cite to any relevant authority that requires a district court to explain why its denial of retroactive child support is in the best interest of a party's child. We conclude that the district court did not abuse its discretion when it denied Stephanie's motion for retroactive child support without an explanation. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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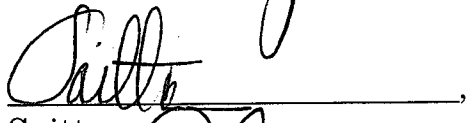
Cherry



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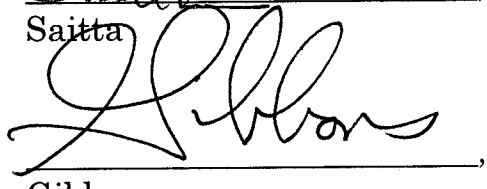

_____, J.
Gibbons

cc: Hon. David A. Huff, District Judge
Brent Begley, Settlement Judge
Jeffrey Friedman
Richard F. Cornell
Lyon County Clerk