IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL ROGER TSAI A/K/A PAUL MIN WAI TSAI,
Appellant,
vs.
ANN HSU F/K/A ANN HSU TSAI,
Respondent.

No. 50549

FILED

APR 29 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from district court post-divorce decree orders concerning the distribution of sale proceeds from a property held in trust for the parties' children. Eighth Judicial District Court, Family Court Division, Clark County; Jennifer Elliott, Judge.

This case arose after appellant Paul Tsai and respondent Ann Hsu divorced. During their marriage, the parties purchased undeveloped land in Las Vegas. After their divorce, the parties placed the land in trust for their children's benefit by executing a quitclaim deed. The parties then sold the land for a significant profit. To determine how to distribute the sale proceeds, the family court held a bench trial. Following the trial, the family court ruled that: (1) the parties transferred their entire interest in the land to their children in trust; and (2) trust assets could be used to finance the children's primary, secondary, and post-secondary educations.

On appeal Tsai argues that: (1) the family court erred by ruling that the parties transferred their entire interest in the land to their children, (2) the family court erred by ruling that the trust could finance the children's primary and secondary educations, and (3) the family court lacked jurisdiction to make rulings affecting the children's trust. We disagree, and therefore, affirm the family court's judgment. In our

discussion below, we also address the preliminary issue of whether the parties created a valid trust by executing a quitclaim deed. Because the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

DISCUSSION

I. Standard of review

Interpreting a trust presents a legal question that is reviewed de novo unless the court's interpretation is based on the credibility of extrinsic evidence. Waldman v. Maini, 124 Nev. ___, ___, 195 P.3d 850, 855 (2008); Wells Fargo Bank v. Marshall, 24 Cal. Rptr. 2d 507, 510-11 (Ct. App. 1993). Because the credibility of extrinsic evidence must be weighed to interpret the children's trust, this court will not overrule the family court's conclusions unless they "'are clearly erroneous and not based on substantial evidence.'" DeLee v. Roggen, 111 Nev. 1453, 1456, 907 P.2d 168, 169 (1995) (quoting Nevada Ins. Guaranty v. Sierra Auto Ctr., 108 Nev. 1123, 1126, 844 P.2d 126, 128 (1992)).

Before considering Tsai's arguments on appeal, we must first address a preliminary issue: did the parties create a valid trust by executing the quitclaim deed? After addressing this issue, we consider the three arguments raised by Tsai.

II. The parties created a valid trust

Trusts are created to provide others with benefits, sometimes for consideration but usually as a gift. Amy Morris Hess, George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 46 (3d ed. 2007). To create an express trust, a document must include language showing that the settlor intended to create a trust, must clearly set forth the subject matter of the trust, and must plainly indicate who the trust's

beneficiaries are. Soady v. First National Bank, 82 Nev. 97, 102, 411 P.2d 482, 484 (1966).

Nevada statutes also require parties to meet several elements in order to create an express trust. First, a property owner must either declare that he or she holds the property as a trustee or meet one of the other requirements set forth in NRS 163.002.[1] Second, NRS 163.003 requires the settlor to manifest intent to make a trust. Third, NRS 163.006 requires the trust to provide for a beneficiary or grant someone the power to select a beneficiary. Fourth, NRS 163.008 requires real property used to create the trust to be evidenced by a written instrument signed by the trustee or settlor and recorded in the county recorder's office.

In this case, the parties executed a quitclaim deed transferring all right, title, and interest in the land to their minor children in trust, with the parties acting as co-trustees. By executing this quitclaim deed, we conclude that the parties created an express trust under Nevada law. The quitclaim deed's language indicates that the parties declared that they held the land as co-trustees, intended to create a trust and provided trust property to do so, named their children as beneficiaries of the trust, and evidenced their use of real property to create the trust by signing and recording a written instrument. NRS 163.002, 163.003, 163.006, 163.008.

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[1]While this appeal was pending, the Nevada Legislature amended this statute. NRS 163.002, amended by S.B. 287, 75th Leg. (Nev. 2009). The amendment does not affect the conclusions in this order.

III. Trust assets belong exclusively to the children

Tsai argues that the family court erred by concluding that the parties transferred their entire interest in the land to their children. He contends that a resulting trust should be created for the parents' benefit after the children's educations are financed. He also contends that the parties had property rights in a constructive trust as tenants in common. We disagree.

A constructive trust is a remedial tool applied when "'the holder of legal title to property is held to be a trustee of that property for the benefit of another who in good conscience is entitled to it.'" Bemis v. Estate of Bemis, 114 Nev. 1021, 1027, 967 P.2d 437, 441 (1998) (quoting Locken v. Locken, 98 Nev. 369, 372, 650 P.2d 803, 804-05 (1982)). In contrast, a resulting trust may be created when the parties specifically intended to create an express trust, but the trust failed in whole or in part. Bemis, 114 Nev. at 1027 n.4, 967 P.2d at 441 n.4. Other caselaw suggests a resulting trust may be created when a trust's purpose is fulfilled without exhausting the trust's assets. In Re Washburn & Roberts, Inc., 795 F.2d 870, 872-73 (9th Cir. 1986).

We conclude that the parties did not create a constructive trust. Constructive trusts are implied and arise to prevent a failure of justice, whereas the trust in this case arose because the parties executed a quitclaim deed with the intent of giving property to their children in trust. 76 Am. Jur. 2d Trusts § 168 (2005) (citations omitted).

We also conclude that a resulting trust in favor of the parents is inappropriate in this case. In Werner v. Mormon, this court explained that a resulting trust will not arise when the transferor intended the money at issue to be a loan or gift. 85 Nev. 662, 666, 462 P.2d 42, 45 (1969). Therefore, a resulting trust is improper in this case if there is

substantial evidence that the parties intended the entire trust estate to be a gift to their children. See id. To determine whether there is substantial evidence that the parties intended the entire trust estate to be a gift, we refer to the quitclaim deed, the 1996 post-divorce decree order, and Tsai's testimony at trial.

First, the quitclaim deed states that the parties released and forever quitclaimed to their children in trust all right, title, and interest in the land, with the parties acting as co-trustees. This express language confirms that, when executing the quitclaim deed, the parties intended any remaining funds to go solely to the children after their educations are financed. The fact that the land's value dramatically increased after the parties executed the quitclaim deed does not change its express language, nor does it change the effect of the parties' intent at that time to transfer the land in its entirety to their children.

Second, the post-divorce decree order issued in 1996 sets forth the parties' final property agreement. This order states that "the vacant land located off Sahara Avenue [in Las Vegas] shall be placed in trust for the children and that the Parties will be co-trustees of that property." It also states that any proceeds from the sale of the property "shall be either placed in trust or reinvested for the benefit of the children." Like the quitclaim deed, this order does not reserve any interest in the land for the parties, nor does it indicate that the trust is limited to one specific purpose. This order's language supports the conclusion that the parties intended to give their entire interest in the land to their children.

Third, Tsai testified at trial that he did not understand the consequences of signing the quitclaim deed. He also testified that the parties discussed putting the land in trust to pay for their children's

college educations. This testimony suggests that Tsai did not intend to give the land in its entirety to his children, but did intend to give them enough assets to finance their college educations.

Despite this testimony, the family court concluded that the parties transferred their entire interest in the land to their children. In the 2007 order, the family court concluded that Tsai "has challenged the children's trust in bad faith, and that he has lied under oath in an attempt to deceive this Court in an opportunistic shot at personal gain." We believe that this family court ruling is supported by substantial evidence because the value of Tsai's testimony is questionable.

IV. The trust can finance the children's primary and secondary educations

Tsai argues that the family court erred by permitting the trust to reimburse Hsu for the children's primary and secondary educations in private schools. He contends that such payments to Hsu constitute an improper retroactive modification of his child support obligations. We disagree.

Retroactive modifications to child support obligations were addressed in Day v. Day, 82 Nev. 317, 417 P.2d 914 (1966). Day arose after a divorced father voluntarily made payments to his son for college expenses, and then claimed such payments afforded him credit against support arrearages owed to the mother. Id. at 318, 417 P.2d at 915. When affirming the district court's denial of the father's claim, this court explained that, "[P]ayments once accrued for either alimony or support of children become vested rights and cannot thereafter be modified or voided." Id. at 320-21, 417 P.2d at 916. Although a decree may be revised due to changed circumstances, such revisions only look "to the future and [do] not act in retrospect." Id. at 321, 417 P.2d at 916.

This court also addressed retroactive modifications to child support payments in Khaldy v. Khaldy, 111 Nev. 374, 892 P.2d 584 (1995). Khaldy arose when a district court suspended a mother's support obligations for one year to penalize a father for his failure to voluntarily enlarge his support payments after receiving a wage increase. Id. at 377, 892 P.2d at 585. This court concluded that suspending the mother's support obligations "effectively modified the original decree retroactively," and such modifications are clearly prohibited under Nevada law. Id. at 377, 892 P.2d at 586.

In this case, the family court noted in the 2007 order that the parties intended to provide their children with the best educations possible. The family court also noted that Hsu was able to give the children a high-quality education in Hong Kong. Because Hsu's efforts were in furtherance of the trust's purpose, the family court concluded that the trust could directly finance these education expenses.

Tsai argues that the trust's reimbursement for private school expenses to Hsu is a retroactive modification in his child support obligations. We disagree for two reasons. First, the reasoning in Day and Khaldy do not apply to this case because Tsai does not have an interest in the trust's assets used to reimburse Hsu for the education expenses. Because the parties gave their entire interest in the land to their children by executing a quitclaim deed, neither has an interest in the funds which remain after the children's educations are financed.

The second reason why Tsai's argument lacks merit is because the parties did not limit the trust's purpose solely to paying for college expenses. Although Tsai testified at trial that the parties intended to use the trust's assets for college expenses, the family court found Tsai's

testimony to be unreliable. We agree that there is evidence showing that the trust's purpose is to pay for the children's education expenses generally. However, evidence does not support the conclusion that the trust's purpose is to exclusively pay for college expenses. Neither the quitclaim deed nor the 1996 order state that the trust's assets may only be used to pay for post-secondary educations.

V. The family court had jurisdiction over the children's trust

Tsai argues that the family court did not have jurisdiction over the children's trust because no one joined the trust as a party as required by Olsen Family Trust v. District Court, 110 Nev. 548, 874 P.2d 778 (1994). We disagree.

In Olsen, the district court made an adverse ruling against a trust even though the trust was not a party. Id. at 551, 874 P.2d at 780. The district court ruled that an ex-wife could satisfy her judgment against her ex-husband based on a trust executed by the ex-husband's mother. Id. When reversing the district court's ruling on appeal, this court explained that "all persons materially interested in the subject matter of the suit [must] be made parties so that there is a complete decree to bind them all." Id. at 553, 874 P.2d at 781.

Other cases have also addressed joinder of indispensable parties. In Guerin v. Guerin, this court concluded that a district court order was void insofar as it affected a nonparty trust. 114 Nev. 127, 132, 953 P.2d 716, 720 (1998), abrogated on other grounds by Pengilly v. Rancho Santa Fe Homeowners, 116 Nev. 646, 646, 5 P.3d 569, 569 (2000). In Schwob v. Hemsath, this court reversed a district court's judgment because no one joined a corporation as a party even though it owned the asset being disputed in the litigation. 98 Nev. 293, 294-95, 646 P.2d 1212, 1212-13 (1982).

Here, we conclude that this case is distinguishable from Olsen, Guerin, and Schwob. Unlike Olsen and Guerin, where district court orders substantially affected the rights of nonparties, the family court's order in this case affected a trust where both co-trustees were parties to the litigation. Olsen, 110 Nev. at 551, 874 P.2d at 780; Guerin, 114 Nev. at 132, 953 P.2d at 720. Unlike Schwob, where a nonparty owned the asset being disputed in district court, the assets in dispute in this case are controlled by Hsu and Tsai, the co-trustees and parties to the proceedings. 98 Nev. at 294-95, 646 P.2d at 1212. The purpose of this litigation was to determine Hsu and Tsai's intent for creating the trust. Because Hsu and Tsai were the appropriate parties for this case, we conclude that Tsai's joinder argument fails.[2]

Although Tsai's joinder argument fails, there is another jurisdictional issue to consider: whether the family court had subject matter jurisdiction to clarify the children's trust.[3] In Landreth, this court explained that the Nevada Legislature limited the jurisdiction of family courts to matters listed in NRS 3.223. 125 Nev. at ___, 221 P.3d at 1286. Matters listed in NRS 3.223(1) include "divorce, child custody and support, guardianships, and other family matters." Id. Despite this limited

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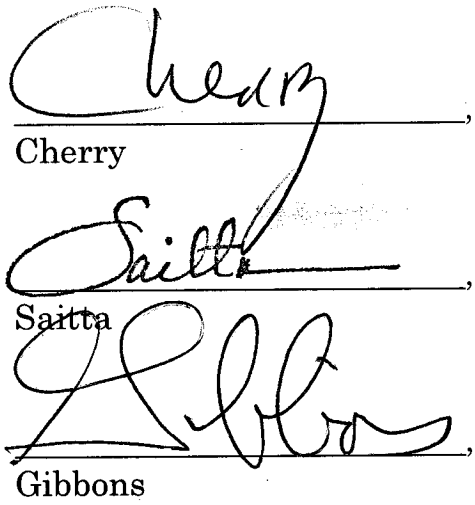
[2]Hsu argues that this court should not address whether the district court had jurisdiction over the trust because Tsai waived this issue by not joining the trust himself and the trust must challenge jurisdiction by filing a petition for an extraordinary writ. We disagree because the failure to join an essential party can be "raised by the appellate court sua sponte." Olsen, 110 Nev. at 554, 874 P.2d at 782.

[3]This court can raise the issue of jurisdiction sua sponte. Landreth v. Malik, 125 Nev. ___, ___, 221 P.3d 1265, 1267 (2009).

jurisdiction, family courts nonetheless have pendent jurisdiction over matters so long as they had original jurisdiction over other aspects of the dispute. Barelli v. Barelli 113 Nev. 873, 877-78, 944 P.2d 246, 248-49 (1997).

Based on Barelli, we conclude that the family court in this case had jurisdiction to enter a judgment clarifying the children's trust. Because the family court had original jurisdiction over the marriage dissolution, it had pendent jurisdiction to clarify the trust's terms. See id. Our conclusion is strengthened by the fact that the family court ordered the parties at the dissolution proceedings to create the trust. Accordingly, we ORDER the judgment of the district court AFFIRMED.



Cherry, J.

Saitta, J.

Gibbons, J.

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