IN THE SUPREME COURT OF THE STATE OF NEVADA

DARREN L. EVANS,
Appellant,
vs.
VALERIE J. EVANS,
Respondent.

No. 50979

FILED

JUN 30 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court divorce decree. Second Judicial District Court, Family Court Division, Washoe County; Frances Doherty, Judge.

Appellant Darren Evans and respondent Valerie Evans married in 1997. Darren had a daughter, Jade, whom Valerie adopted. Darren and Valerie had a son, Gavin, on March 13, 2003. Valerie filed for divorce from Darren on January 3, 2007.

Following a case management conference, a settlement conference, and a hearing in front of the district court, Darren and Valerie's marriage was dissolved. The district court awarded Darren full physical and legal custody of Jade. As to Gavin, the district court awarded both parties joint physical and legal custody. The district court also distributed the marital assets in its order dissolving the marriage. This appeal follows. The parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.

On appeal, Darren argues that the district court erred in: 1) unequally dividing the net marital estate, 2) failing to reopen the case to take additional evidence, 3) awarding custody of Gavin and 4) calculating Valerie's child support obligation.

Standard of review

We will not interfere with a district court's disposition of community property unless it appears from the entire record that the district court abused its discretion. Shane v. Shane, 84 Nev. 20, 22, 435 P.2d 753, 755 (1968). The district court may abuse its discretion if it clearly ignores established legal principles which have been recognized as proper in determining the course of justice. Franklin v. Bartsas Realty, Inc., 95 Nev. 559, 562-3, 598 P.2d 1147, 1149 (1979).

We have also concluded that "the decision to reopen a case for the introduction of additional evidence is within the sound discretion of the trial court." Ford v. Ford, 105 Nev. 672, 676, 782 P.2d 1304, 1307 (1989) (citing Andolino v. State of Nevada, 99 Nev. 346, 351, 662 P.2d 631, 634 (1983)). Further, in the interest of doing justice, leave to reopen a case should be freely granted by a district court. Id. We will likely conclude that the district court abused its discretion when the court refuses to reopen a case and "an essential element of a party's case can be easily and readily established by reopening the case." Id.

We will not disturb a district court's decision regarding child custody absent a showing of a clear abuse of discretion. Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005). A district court abuses its discretion when it fails to base its determination regarding child custody on appropriate reasons. Id.

"A district court has limited discretion to deviate from child support guidelines provided by NRS 125B.070." Anastassatos v. Anastassatos, 112 Nev. 317, 320, 913 P.2d 652, 654 (1996). The district court abuses its discretion if its deviation from the statutory child support guidelines are not based on statutorily provided factors under NRS 125B.080(9). Id.

Division of the net marital estate

Darren argues that that the district court abused its discretion in dividing the net marital estate for two reasons. First, Darren contends that the district court abused its discretion in finding that the jet skis were community property and dividing them equally. Second, Darren contends that the district court abused its discretion in finding that Darren's post-separation credit card expenses constituted waste.

Division of the jet skis

On January 17, 2007, the district court entered an ex parte temporary restraining order which restrained the parties "from transferring, encumbering, hypothecating, concealing or in any way disposing of any property . . . except in the usual course of business or for the necessities of life." While the temporary restraining order was in effect, Darren purchased two jet skis using his credit card. Darren contends that he purchased the jet skis for his then-girlfriend's son and his girlfriend's son was paying Darren back at a rate of $650 per month. Therefore, Darren contends that his purchase of the jet skis on credit did not impact the marital property because he did not waste or misuse the marital assets and thus the district court abused its discretion in dividing the jet skis equally while ordering Darren to assume the entire debt for them. We disagree.

A district court may make an unequal disposition of community property where one spouse intentionally loses, expends, or destroys community property. Lofgren v. Lofgren, 112 Nev. 1282, 1283, 926 P.2d 296, 297 (1996). We have approved an unequal disposition of community property when the conduct of one spouse, which was in violation of a court order, resulted in "'wasted' or 'secreted' community assets.'" Putterman v. Putterman, 113 Nev. 606, 607, 939 P.2d 1047, 1048

(1997) (quoting Lofgren, 112 Nev. at 1283, 926 P.2d at 297). However, this is not the only possible compelling reason for a district court to give an unequal disposition of property and this court has held that negligent loss, destruction of community property, and an unauthorized gift of community property are also compelling reasons. Putterman, 113 Nev. at 608, 939 P.2d at 1048.

Darren purchased the jet skis while the district court's restraining order was effective. Darren's purchase was thus in contravention to the district court's restraining order and is the same action that we disapproved of in Putterman, 113 Nev. at 607, 939 P.2d at 1048 (allowing unequal disposition of community property due to the husband's refusal to provide the district court with an accounting of his finances, lying to the district court about his income, and charging several thousand dollars on credit cards funds after separation). Additionally, Darren burdened credit which belonged to both him and Valerie with the purchase of the jet skis on a community credit card. Further, Darren was secretive about his purchase of the jet skis, as Valerie was not told of the purchase, and Darren did not divulge this information to his attorney until Valerie discovered the purchase through a third party.

Under these circumstances, we conclude that the district court did not abuse its discretion in its division of the jet skis because Darren's purchase of the jet skis was done in violation of the district court's restraining order and was wasteful and secretive.

Post-separation credit card expenses

During a hearing held by the district court on October 29, 2007, Valerie raised issues concerning certain credit card purchases made by Darren during the time the couple was separated. Specifically, Valerie took issue with the fact that Darren had taken $10,000 from the proceeds

of the sale of the marital residence to pay off some credit cards and with Darren's use of the credit card to make repairs to his truck and skis and to bail a relative out of jail.

Darren argues that the district court abused its discretion in finding that he had expended community funds on unnecessary, non-community expenditures during the separation. We disagree.

We have held that one compelling reason that allows the district court to make an unequal disposition of community property is an unauthorized gift of community property made by one spouse. Putterman, 113 Nev. at 608-9, 939 P.2d at 1048-9.

We conclude that Darren made unauthorized gifts of community property. Specifically, Darren acquired debt by paying for a third party's criminal bail as well as by paying for tires for a third-party's vehicle and repairs for the jet skis, which he claims he does not own. As was the case with the purchase of the jet skis, Darren expended this community credit in violation of the district court's restraining order. Therefore, we conclude that the district court did not abuse its discretion in dividing the post-separation debt because the district court had a compelling reason to make an unequal disposition of the community property.

Reopening the case to take additional evidence

Darren argues that the district court abused its discretion in refusing to reopen the case to allow him to give additional evidence regarding the jet skis. We disagree.

We have long held that it is in the interest of the public good for there to be an end to litigation. Pinschower v. Hanks, 18 Nev. 99, 107, 1 P. 454, 458 (1883). Further, we have held that a second trial should only be granted in the interest of justice and not to alleviate the neglect or

thoughtlessness of a litigant. Id. We developed this interest-of-justice standard because "[t]he law demands of the parties all reasonable diligence and caution in preparing for trial, and furnishes no relief for the hardships resulting from inexcusable negligence or want of diligence." Id.

We conclude that the district court did not abuse its discretion in refusing to reopen the case in order to allow Darren to submit additional evidence pertaining to the jet skis. Darren was responsible for neglecting to present this evidence at the hearing because he "forgot" to advise his attorney about the jet skis. Further, Darren was secretive about his purchase of the jet skis. Valerie was not told of the purchase and Darren did not divulge this information to his attorney until Valerie discovered the purchase through a third party. Therefore, allowing Darren to reopen the case and present additional evidence on this issue does not further the interest of justice and thus, the district court acted within its discretion in denying Darren's request.

Child custody

Darren argues that because the court was presented with evidence of child abuse committed by Valerie against Jade, the district court committed plain error by entering an order in regard to the custody of Gavin without holding a hearing on whether an independent report by the court-appointed psychologist constituted clear and convincing evidence of domestic violence.[1] We disagree.

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[1]Darren acknowledges that he did not object to the child custody award, and thus, this issue should be reviewed for plain error. See Bradley v. Romeo, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) (holding that we may consider an issue sua sponte when a district court fails to apply a controlling statute in order to avoid plain error).

When determining the custody of a child the district court's sole consideration is what is in the best interest of the child. NRS 125.480(1); see also Ellis v. Carucci, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007). NRS 125.480(5) states that

> [A] determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Upon making such a determination, the court shall set forth:
>
> (a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and
>
> (b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

We conclude that the district court did not commit plain error in determining child custody because the district court entered its child custody order only after Darren had stipulated to the terms of that order. Therefore, the district court did not err in failing to hold a hearing under NRS 125.480(5) because the parties agreed on custody and the hearing would not have been held for its intended purpose: to determine custody when an agreement could not be reached. Further, if Darren had serious reservations about Valerie having joint custody of Gavin, he would not have stipulated to the terms of the custody agreement.

Child support calculation

Darren argues that the district court abused its discretion in calculating Valerie's child support obligation. Specifically, Darren contends that the district court applied the child support statute in such a way that the result was as if the couple had three minor children and Darren had primary custody of two of those minor children. Thus, Darren argues that the district court's method of determining Valerie's child support obligation was an abuse of discretion since there are only two minor children and not three. We disagree.

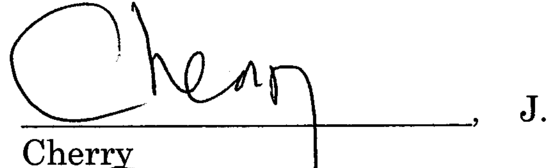
We have held that "the child support formula mandated by NRS 125B.080 and NRS 125B.070(2) does apply in joint and shared custody cases." Barbagallo v. Barbagallo, 105 Nev. 546, 548-9, 779 P.2d 532, 534 (1989). The district court must determine which of the two joint or sharing custodians is entitled to child support before this formula can be applied in these cases. Id. at 549, 779 P.2d at 534. In order to determine which custodian is entitled to receive child support in a shared custody case, the district court must "[c]alculate the appropriate percentage of gross income for each parent, subtract the difference between the two and require the parent with the higher income to pay the parent with the lower income the difference." Wright v. Osburn, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998).

We conclude that the district court did not abuse its discretion in its calculation of Valerie's child support obligation because the district court correctly followed the formula set forth by our ruling in Wright. Specifically, the district court took the statutory percentage of Darren's and Valerie's income, subtracted the higher number from the lower, and ordered Valerie to pay the difference. Further, Darren's trial counsel calculated the numbers himself and withdrew his objection to the district

court's calculation of child support. Thus the district court did not abuse its discretion in its calculation of child support.

In light of the foregoing discussion, we,

ORDER the judgment of the district court AFFIRMED.



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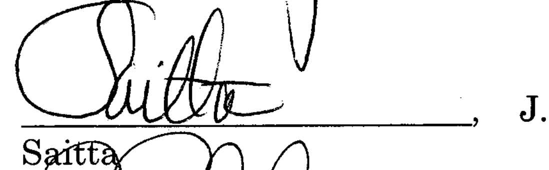
Cherry



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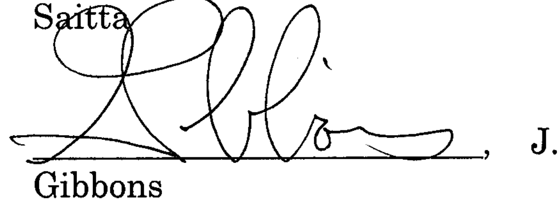

_______________, J.
Gibbons

cc: Hon. Frances Doherty, District Judge, Family Court Division
Carolyn Worrell, Settlement Judge
Richard F. Cornell
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Washoe District Court Clerk