

IN THE SUPREME COURT OF THE STATE OF NEVADA

LELA TARBELL,
Appellant,
vs.
ED TARBELL,
Respondent.

No. 53766

LELA TARBELL,
Appellant,
vs.
ED TARBELL,
Respondent.

No. 55015

FILED

MAR 31 2011

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

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court divorce decree and from a post-judgment order denying appellant's NRCP 60(b) motion. Eighth Judicial District Court, Family Court Division, Clark County; Charles J. Hoskin, Judge.

Respondent Ed Tarbell and appellant Lela Tarbell were married in 1989 in Oregon. Lela sued for divorce in 2007, which the district court granted after trial in a written decree. Lela timely appeals, challenging the district court's characterization and division of the parties' community and separate property. We affirm.

I. Facts and proceedings below

The parties maintained separate checking accounts and separate property throughout the marriage, opening a joint account only to handle community expenses associated with the divorce. Both Ed and Lela held separate property trusts. During their marriage, Ed provided Lela funds to pay the bills on properties they owned, and Lela would pay those bills out of her own checking account. However, Ed had a variety of investment accounts to which Lela did not have access.

The parties owned a variety of properties in Oregon, California, Nevada, and Mexico. One of the properties was the Lassen property, a property in California that Ed's mother originally owned. In 1980, Ed's mother sold the property to Ed, and Ed built condominiums on the property, one of which Ed's mother occupied. In 2000, in order to obtain tax-deferred treatment, Ed and Lela did a property exchange under Treasury Regulation § 1031, which required that the Lassen property be placed in both their names. Before then, the property had been in Ed's name alone.

At the time of the divorce, Ed and Lela were in the process of purchasing a condominium in Las Vegas, referred to as the Turnberry property. Lela paid \$163,500 down towards the \$540,000 purchase price of the Turnberry property out of her own checking account (to which Ed contributed funds). Lela was reimbursed \$163,500 from the sale of another home in San Diego, called the Horizon property. Ultimately, Ed and Lela never closed on the Turnberry property and a claim to partial reimbursement of the down payment was pending at the time of the divorce. Ed and Lela estimated that the reimbursement would be around \$24,000.

The district court's written findings concluded that Ed and Lela intended to maintain separate property as shown by the separate trusts they established. It also relied on Schreiber v. Schreiber, 99 Nev. 453, 663 P.2d 1189 (1983), which holds that oral agreements for separate property arrangements are enforceable if partially performed or based on estoppel. Id. at 455, 663 P.2d at 1190. The district court found that evidence of a partially performed agreement to maintain separate property existed and declared its intention to enforce that agreement.

Based on these determinations, the district court concluded that the separate property trusts were indeed separate property and awarded each party his or her own separate property.

Turning to the Turnberry refund claim, the district court found that \$80,000 of the \$163,500 put towards the Turnberry property was community property.¹ The district court awarded Ed the estimated refund of \$24,000 on the Turnberry property, recognizing it was only a possible refund and that Ed bore the risk of receiving nothing on the claim. The district court also granted Ed \$40,000 of the community property put towards the down payment that was reimbursed to Lela.

The district court determined that the Lassen property was Ed's separate property based on the testimony of the parties. The district court then divided the remaining community property between the parties.

After Lela appealed, she filed an NRCP 60(b) motion in district court, asking for relief from judgment due to newly discovered evidence. She based her motion on Ed having received an \$81,750 refund on the Turnberry property that he may have forged Lela's signature to get. Lela argued that although her appeal in this court was still pending, the district court had authority to act on her NRCP 60(b) motion under Huneycutt v. Huneycutt, 94 Nev. 79, 575 P.2d 585 (1978), disapproved of on other grounds in Foster v. Dingwall, 126 Nev. ___, 227 P.3d 1042 (2010). The district court denied Lela's NRCP 60(b) motion, finding that

¹Lela contends that the district court found that she purchased the Turnberry property out of her own personal proceeds. However, the record does not support this contention.

neither party knew the exact amount of the refund, and Ed had both the risk and the responsibility to collect or not collect the refund. Lela also appeals this order.

II. Discussion

This court will not disturb a district court's finding that property is separate or community unless the finding is unsupported by substantial evidence, Waldman v. Maini, 124 Nev. 1121, 1128, 195 P.3d 850, 855 (2008), or the result of applying the wrong legal standard. Williams v. Waldman, 108 Nev. 466, 471, 836 P.2d 614, 617-18 (1992). Substantial evidence is that which a rational person might consider as adequate to support the decision. Williams v. Williams, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004). A district court's division of community property among parties normally will be upheld, unless it appears that the district court committed legal error or otherwise abused its discretion. Heim v. Heim, 104 Nev. 605, 607, 763 P.2d 678, 679 (1988), superseded by statute on other grounds as stated in Rodriguez v. Rodriguez, 116 Nev. 993, 994-96, 13 P.3d 415, 416-17 (2000).

A. Division of separate property

Lela contends that Ed's earnings, retirement, and investments are all community property, despite the separate property trusts both parties executed. However, the district court found that the separate accounts and separate property trusts evidenced a clear intent to keep certain property separate. The district court also determined that this course of conduct demonstrated an actual agreement to keep separate property, which is enforceable under Schreiber. 99 Nev. at 455, 663 P.2d at 1190. A rational person would consider this evidence adequate to support the decision; therefore, the district court had substantial evidence to grant Ed the separate property interests it did.

Regarding the Lassen property, Lela argues that the district court committed legal error and abused its discretion when it determined that the property was Ed's separate property. The district court found that, although the § 1031 exchange that occurred in 2000 put both Ed and Lela on the title, payments toward the property were from Ed's income, and Lela admitted that Ed owned the property. Although this court assumes that separate property placed into joint tenancy is presumed to be a gift to the community unless shown otherwise, the district court had clear and convincing evidence that Ed did not intend a gift to the community based on the testimony of both parties. Schmanski v. Schmanski, 115 Nev. 247, 250, 984 P.2d 752, 755 (1999). Therefore, the district court had substantial evidence to find that the Lassen property was Ed's separate property.

B. Condominium deposit refund


Although she was reimbursed with community property funds, Lela argues that she used her separate property only for the down payment on the Turnberry property and, therefore, the district court abused its discretion in awarding Ed \$40,000 from the Turnberry property down payment. The district court found that \$80,000 of the down payment came from community funds because both Ed and Lela admitted that Ed provided funds to Lela for bills. In addition, Lela testified that she was reimbursed for her expenditures on the down payment from community funds. Therefore, the district court had substantial evidence to support the finding that \$80,000 of the down payment was community property based on admissions by both parties that Ed paid the bills through Lela.

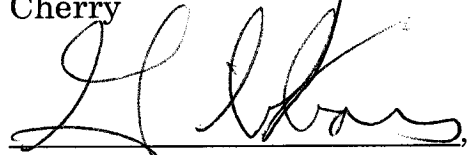
C. NRCP 60(b) motion

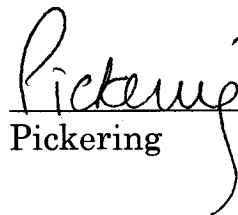
This court will not interfere with a district court's denial of an NRCP 60(b) motion unless the district court abused its discretion. Kahn v. Orme, 108 Nev. 510, 513, 835 P.2d 790, 792 (1992). Attempting to gain the de novo standard of review appropriate to jurisdictional determinations, Ogawa v. Ogawa, 125 Nev. ___, ___, 221 P.3d 699, 704 (2009), Lela argues that the district court denied her NRCP 60(b) motion based on lack of jurisdiction due to her pending appeal. We disagree. Although the district court did consider the pending appeal in this court, the district court denied the NRCP 60(b) motion on its merits, not on the basis that the district court lacked jurisdiction. Therefore, de novo review does not apply.

The district court found that Ed took the risk in collecting the refund on the Turnberry property. The alleged forgery is troubling but the district court found that it did not meet the NRCP 60(b) standard. This is correct given that the right to the refund had been awarded to Ed in the decree, making any forgery without legal consequence because both parties assumed the risk of the mistake by acknowledging they were uncertain as to the exact value, if any, of the potential refund. 27 Richard A. Lord, Williston on Contracts § 70:77 (4th ed. 2003). Therefore, the district court did not abuse its discretion in denying the NRCP 60(b) motion.

For these reasons, we
ORDER the judgment and order of the district court
AFFIRMED.


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

cc: Hon. Charles J. Hoskin, District Judge, Family Court Division
Backus, Carranza & Burden
Ed Tarbell
Eighth District Court Clerk