IN THE SUPREME COURT OF THE STATE OF NEVADA

MALCOLM SCARRAH,

Appellant,

vs.

GWEN SCARRAH,

Respondent.

No. 35065

FILED

JAN 26 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court concerning the division of community property, and from the district court's refusal to allow the parties' eleven-year-old son to testify at trial.

On appeal, appellant Malcolm Scarrah contends that the district court abused its discretion in: (1) refusing to allow the parties' eleven-year-old son to testify at trial, and (2) awarding respondent Gwen Scarrah the equity in the marital residence. We conclude that Malcolm's contentions lack merit.

First, Malcolm contends that the district court abused its discretion in not allowing the parties' eleven-year-old son to testify at trial. Specifically, Malcolm asserts that the district court should have allowed the parties' eleven-year-old son to testify so as to lay a foundation to admit the son's journal into evidence. According to Malcolm, the journal documents physical and mental abuse allegedly sustained at the hands of Gwen.

In support of his contention, Malcolm directs this court to the child witness competency standard set forth in Wilson v. State, 96 Nev. 422, 610 P.2d 184 (1980). In Wilson, we stated that "[t]he standard of competence for a child witness is that the child must have the capacity to receive just impressions and possess the ability to relate them

truthfully." Id. at 423, 610 P.2d at 185; accord Moore v. State, 105 Nev. 378, 380, 776 P.2d 1235, 1237 (1989). Because the parties' son had the capacity to receive just impressions and possessed the ability to relate them truthfully, Malcolm argues that the district court erred in not allowing the son to testify at trial. We disagree.

NRS 125.480(1) mandates that "[i]n determining custody of a minor child . . . the sole consideration of the court is the best interest of the child." Further, in determining the best interest of the child, NRS 125.480(4)(a) provides that the district court should take into consideration "[t]he wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his custody." Moreover, in Sims v. Sims, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993), we stated that "[t]he trial court enjoys broad discretionary powers in determining questions of child custody. This court will not disturb the trial court's determinations absent a clear abuse of discretion."

Although the parties' son may have been competent to testify as a child witness in a criminal proceeding, in order to testify in a child custody proceeding, the district court must have been persuaded that the son was of sufficient age and capacity to form an intelligent preference as to where he should live. Because Gwen informed the district court that their son was under the care of a psychiatrist and a psychologist, and because their son was taking medication for clinical depression, we conclude that the district court did not abuse its discretion in refusing to allow the parties' son to testify at trial.

As to the admissibility of the journal, we conclude that the district court did not err in refusing to allow the

parties' son to testify so as to lay a foundation to admit his journal into evidence. On appeal, Malcolm alleges that the journal demonstrates that Gwen committed acts of domestic violence against the son. However, this is not the argument Malcolm presented to the district court. Rather, Malcolm's attorney vaguely argued that the journal would illustrate the "fitness of one parent or the other." Thus, the district court was unaware that the journal contained allegations of domestic violence.

In McCall v. State, 97 Nev. 514, 516, 634 P.2d 1210, 1212 (1981), we stated that "[w]here evidence is not offered for a particular purpose at trial, an appellate court will not consider it for that purpose on appeal." Accordingly, because Malcolm did not offer the journal for the particular purpose of showing that Gwen committed acts of domestic violence against the son, this court will not consider the journal for that purpose on appeal. Moreover, in Burgeon v. State, 102 Nev. 43, 47, 714 P.2d 576, 579 (1986), we determined that "[i]f appellant desired to preserve for our review the testimony that he reasonably expected the jury to hear, absent the adverse ruling of the trial court, a detailed offer of proof was essential." Thus, because Malcolm did not make an offer of proof that the journal would demonstrate that Gwen engaged in acts of domestic violence against the son, Malcolm did not preserve the issue for appellate review. See Van Valkenberg v. State, 95 Nev. 317, 318, 594 P.2d 707, 708 (1979) (holding that this court will not review exclusion of evidence where trial counsel makes no offer of proof).

As to Malcolm's second contention, Malcolm asserts that the district court abused its discretion in awarding Gwen the equity in the marital residence. In Shane v. Shane, 84 Nev. 20, 22, 435 P.2d 753, 755 (1968), we stated that

"[b]efore the appellate court will interfere with the trial judge's disposition of the community property of the parties . . . it must appear on the entire record in the case that the discretion of the trial judge has been abused." Further, "[t]his court's rationale for not substituting its own judgment for that of the district court, absent an abuse of discretion, is that the district court has a better opportunity to observe parties and evaluate the situation." Wolff v. Wolff, 112 Nev. 1355, 1359, 929 P.2d 918, 919 (1996) (citing Winn v. Winn, 86 Nev. 18, 20, 467 P.2d 601, 602 (1970)).

Malcolm argues that this court should interfere with the district court's disposition of the community assets because the district court abused its discretion in awarding Gwen the equity in the marital residence. By awarding Gwen the equity in the marital residence, Malcolm asserts that he received a disproportionate division of the community assets. We disagree.

In the Scarrah divorce matter, the district court awarded each party their respective retirement accounts. However, because Malcolm's 401(k) account and IRA account exceeded the value of Gwen's 401(k) account, Gwen was awarded the equity in the marital residence to offset the difference. Thus, we conclude that the district court did not abuse its discretion in awarding the equity in the marital residence to Gwen.

At the time of divorce, the approximate value of the equity in the marital residence was $22,000.00. Further, the approximate value of Gwen's 401(k) account was $59,600.00. Thus, Gwen's division of the community assets totaled $81,600.00. However, as to Malcolm's division of the community assets, neither the trial transcript of the district

court's ruling nor the divorce decree sets forth the value of his 401(k) account and IRA account. Nonetheless, the approximate value of these accounts can be ascertained from Malcolm's trial testimony.

At trial, Malcolm testified that the value of his 401(k) account was $74,081.00, and the value of his IRA account was $8,000.00. Based on these amounts, Malcolm received $82,081.00 in community assets. Thus, Malcolm received approximately $500.00 more in community assets than Gwen. Therefore, Malcolm's argument that he received a disproportionate division of the community assets lacks merit.

Having considered Malcolm's contentions on appeal and concluded that they lack merit, we

ORDER the district court's order affirmed.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. T. Arthur Ritchie, Jr., District Judge,
Family Court Division
Law Offices of Jeffrey S. Posin, Chtd.
Law Offices of Israel L. Kunin, P.C.
Clark County Clerk
Rhonda L. Mushkin, Chtd.