IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL J. MARTELLA,
Appellant,
vs.
DONNA MARTELLA,
Respondent.

No. 65597

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a Decree of Divorce entered after a bench trial. Eighth Judicial District Court, Family Court Division, Clark County; William S. Potter, Judge.

The parties were married in Florida, and during their marriage also resided in New York and California before moving to Nevada in 2012. This appears to have been a highly contentious divorce proceeding with an arduous factual and procedural history.[1] On appeal, Michael raises four issues: (1) whether the district court erred in failing to modify the child custody and child support order,[2] (2) whether the district court did not equally divide the community property, (3) whether the district court relied on inaccurate figures in awarding alimony, and (4)

[1]We do not recount the facts except as necessary to our disposition.

[2]Although Michael initially appealed the district court's custody order, the parties later filed a stipulation stating "the issues involved in the case are economic; there are no minor children or custody matters at issue." Therefore, we only address the custody order to the extent it affects the child support order.

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whether the case should be assigned to a different department upon remand.

We review district court decisions in divorce proceedings for an abuse of discretion, and we affirm the district court's decision if supported by substantial evidence. *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004).

Child custody and child support

The parties stipulated to joint physical custody of their minor son, but Michael later moved for primary physical custody and to modify child support appropriately because he had de facto primary custody, as their son, Alex (who was almost 17 when the motion to modify was filed), refused to visit Donna and court-ordered reunification attempts between Donna and Alex failed. On appeal, Michael asserts that the district court abused its discretion in ordering Michael to pay Donna child support despite uncontested evidence that Michael had de facto primary custody.

Although the parties stipulated to joint physical custody, once they asked the court to review that provision, the court must apply Nevada law. *Bluestein v. Bluestein*, 131 Nev. ___, ___, 345 P.3d 1044, 1047 (2015). Physical custody is the time that a child physically spends in a parent's care. *Rivero v. Rivero*, 125 Nev. 410, 421, 216 P.3d 213, 222 (2009). In Nevada, joint physical custody requires each parent to share approximately equal parenting time. *Id.* at 425-26, 216 P.3d at 224. Primary physical custody, however, exists when one parent has the primary responsibility for maintaining the child's home and providing the child's basic needs. *Id.* at 428, 216 P.3d at 226. Generally, a primary physical custody arrangement requires one parent to have custody of the child more than 40 percent of the time. *Id.* at 425-26, 216 P.3d at 224; *see also Bluestein*, 131 Nev. at ___, 345 P.3d at 1049 (2015) ("*Rivero's* 40-

percent guideline should not be so rigidly applied that it would preclude joint physical custody when the court has determined in the exercise of its broad discretion that such a custodial designation is in the child's best interest.") (citing *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007).

The physical custody arrangement affects the child support award. *Id.* at 422, 216 P.3d at 222. When a parent has primary physical custody of a child, the noncustodial parent pays the custodial parent support in an amount determined by the formula established in NRS 125B.070, but the amount ordered may deviate from the statutory formula pursuant to NRS 125B.080. *Rivero*, 125 Nev. at 436, 216 P.3d at 231. However, when parents share joint physical custody, both parents pay a percentage of their income pursuant to NRS 125B.070, and the higher-income parent pays the lower-income parent, but this amount may also be adjusted by the district court pursuant to NRS 125B.080. *Id.* at 437, 216 P.3d at 231-32 (citing *Wright v. Osburn*, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998)). The amount of child support should be in accordance with NRS 125B.070, and deviations from the statutory amount must be justified in accordance with the NRS 125B.080(9) factors. *Id.* at 438, 216 P.3d at 232.

Here, the district court maintained the joint physical custody title in its orders despite actually setting a time share that provided Michael with primary physical custody.[3] Additionally, the record indicates

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[3]Although the district court has broad discretion in determining the custodial designation that is in the child's best interest and may designate joint physical custody when one parent has less than a 40% time share with the child, see *Bluestein*, 131 Nev. at ___, 345 P.3d at 1048, we are

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that Michael had de facto primary physical custody from the time of the incident between Alex and Donna through the time of the Decree of Divorce and thereafter. Despite Michael actually exercising primary physical custody, the district court maintained a child support order that was based upon a joint physical custody arrangement. Without an appropriate physical custody order, the child support order was necessarily erroneous. Therefore, this matter must be remanded for a proper determination of child support, which necessarily must be based on a proper physical custody order.[4]

Division of Community Property

NRS 125.150(1)(b) requires the district court equally dispose of the community property to the extent practicable, and states that the court "may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition." *Blanco v. Blanco*, 129 Nev. ___, ___, 311 P.3d 1170, 1175 (2013) ("NRS 125.150(1)(b) requires the court to make an equal disposition of property upon divorce, unless the court finds a compelling reason for an unequal disposition and sets forth that reason in writing.").

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unable to discern from the record whether the court believed such a designation was accurate when Alex refused to visit Donna for more than a year and given other facts in this case.

[4]On remand, even if the district court determines it was joint physical custody, child support must comply with NRS 125B.070 and *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998).

Preliminary Distribution of $200,000 to Donna

Early in the case, upon a motion, the district court allowed Donna to withdraw $200,000 of community funds to pay attorney fees and living expenses during the pendency of the action. During the litigation and in the Decree of Divorce, the district court noted there was a disparity in income between the parties, and indicated this was a *Sargeant*[5] case, but upon distribution of the $200,000 the district court also stated Donna was required to account for the money spent and if there was any waste, the district judge would equalize the distribution to Michael at trial.

During a divorce action, the district court has discretion to require one party to pay necessary amounts to assist the other party in carrying on or defending the divorce suit, where the recipient spouse cannot afford proper representation without destroying his or her financial position, so long as the fees awarded are not excessive. NRS 125.040; *Sargeant*, 88 Nev. at 227, 495 P.2d at 621 (1972).

However, here, the district court's findings are inconsistent. The district court stated this was a *Sargeant* case (whereby Michael should have to pay Donna's attorney fees to keep her on equal footing with him during litigation), but also indicated the money given to Donna was simply a release of some of the community funds, that were previously frozen, so Donna could pay her expenses during the litigation. Notably, the district court also permitted Michael to withdraw $10,000 at the same time so he could pay his attorney fees, and released other sums to Michael throughout the litigation to cover other expenses. Moreover, at the November 21, 2013 trial, the district court made an oral disposition that

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[5]*Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972).

the preliminary cash distributions were deemed "prior distributions," but the Decree refers to this distribution as a "prior allocation" and also an "award."

The district court combined attorney fees and spousal support in a lump sum distribution and the description of the distribution is inconsistent. Consequently, it is impossible for this court to determine whether the preliminary distribution was an award of fees pursuant to *Sargeant* or simply a release of frozen community funds as an early community property distribution for the parties to use. Therefore, we must remand this matter to the district court for it to determine whether the fees awarded were *Sargeant* fees, and if so, the amount; to determine whether a preliminary distribution of community funds occurred, and if so, the amount; and to modify its distribution of the community funds as necessary.

Similarly, Michael asserts the district court erred in allowing him to retain the $17,000 he had remaining of his preliminary distributions and allowing Donna to keep the $19,700 she had remaining from the initial $200,000 distribution. Because this court cannot determine whether the preliminary distribution was appropriate, and how much may have been attorney fees pursuant to *Sargeant*, we likewise cannot determine whether the remaining funds were equally divided.[6]

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[6]We also note that if Michael is correct, and the $17,000 he was awarded as a remaining balance from his preliminary distribution is the same $17,000 the district court equally divided from the Bank of America Account ending in 0993, there was an over-distribution to Donna, but it is impossible to tell from the record whether these are the same funds. On remand, the district court must address and equalize the distribution of the remaining funds as necessary.

The Arcata Residence

Michael asserts the district court erred when it divided the parties' marital residence. The district court is required to equally divide the community assets. NRS 125.150(1)(b). The district court abused its discretion by awarding Donna the $260,000 community home while only awarding Michael $130,000 of community funds for his ½ interest in the home, because the district court gave Michael his $130,000 from community funds instead of from Donna's separate property. On remand, the district court must modify its award, giving Michael an additional $130,000 of community funds to correct the over-distribution to Donna (or an additional $65,000 from Donna's separate property).

The Businesses

Michael asserts that the district court abused its discretion in finding that the businesses were community property, that the bank accounts were included in the valuation, and by overvaluing the building.

There is a presumption that all property acquired after marriage is community property, but this presumption may be rebutted with clear and convincing evidence. *Forrest v. Forrest*, 99 Nev. 602, 604-05, 668 P.2d 275, 277 (1983) (citing *Cord v. Cord*, 98 Nev. 210, 644 P.2d 1026 (1982); *Roggen v. Roggen*, 96 Nev. 687, 615 P.2d 250 (1980)); *see* NRS 123.220. Either spouse's opinion "as to whether the property is separate or community is of no weight whatsoever." *Id.* at 605, 668 P.2d at 277; *Peters v. Peters*, 92 Nev. 687, 692, 557 P.2d 713, 716 (1976) ("The opinion of either spouse as to whether property is separate or community is of no weight whatever."); *see, c.f.*, NRS 123.220 (all property acquired after marriage is community property unless provided for by a written instrument as enumerated in the statute).

Here, because the ownership of the businesses was transferred to Michael during the early years of the marriage, it is presumed that the businesses were part of the community. Michael only offered his testimony that his father gifted him the businesses and the building in 1985, but did not provide any other evidence to support his assertion. Moreover, the purchasing documents in evidence indicate Michael purchased the businesses; they were not gifted to him.[7] Based on these facts, we cannot say the district court abused its discretion in determining the businesses were community property.

Additionally, the district court heard evidence that the businesses' value ranged as follows: the franchise at $50,000; the pizza restaurant at $30,000 to $40,000; and the building at $100,000 to $130,000. At the December 18, 2013 hearing, Michael's counsel conceded that, based on evidence at trial, the value of the businesses should range between $180,000 and $220,000. Similarly, the district court was faced with competing testimony regarding what information was provided to the experts and what information was included in their reports. Because the district court adopted values within the ranges offered by the experts, and because we do not assess witness credibility on appeal, we cannot say the district court erred in valuing the businesses. *See Alba v. Alba*, 111 Nev. 426, 427, 892 P.2d 574, 574-75 (1995) (The district court's valuation of property in a divorce case will not be overturned so long as the value placed upon the property falls within the range of possible values as

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[7]The district court also found that there was no evidence of an inter-vivos gift; significant debts were paid towards the acquisition of the property; and that Michael provided significant time, effort, and work to maintain and enhance the property.

demonstrated by competent evidence); *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004) (credibility determinations rest "within the trier of fact's sound discretion").

The missing $35,000

Michael also asserts that Donna took $35,000 in cash from the parties' safe and the district court failed to find Donna hid the $35,000, resulting in an over-distribution of community assets to Donna.

In the Decree of Divorce, the district court found "[t]he existence of the $35,000 is speculative and its current whereabouts is unconfirmed." This finding is inherently inconsistent; if the whereabouts of the money is unconfirmed, that necessarily means the money exists, but the district court also found that the existence of the money is speculative. If the $35,000 existed, the district court erred by failing to equally divide it, regardless of its present status or whereabouts. On remand, the district court must make a clear finding regarding whether the money ever existed, and if it did, the division of community property must be modified to equally divide the $35,000 absent clear findings supporting an unequal distribution. *See Blanco v. Blanco*, 129 Nev. at ___, 311 P.3d at 1175 (2013) ("NRS 125.150(1)(b) requires the court to make an equal disposition of property upon divorce, unless the court finds a compelling reason for an unequal disposition and sets forth that reason in writing.").

Alimony Award

It appears Michael is not challenging the district court's decision to award Donna alimony, but only argues that the district court abused its discretion by awarding the amount it did, based on evidence that the district court knew was inaccurate.

The district court has discretion to grant alimony, so long as it is just and equitable. NRS 125.150(1)(a). However, the district court

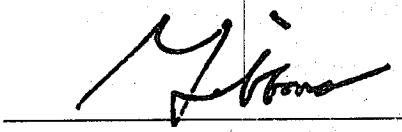
must consider the factors enumerated in NRS 125.150(9), along with any other relevant factors, in determining the alimony award.

Here, the district court made a finding that, despite a significant decrease in Michael's income, Michael's monthly income was still $8,000. Based on this, the district court awarded Donna $1,500 monthly alimony for a twelve year period. However, the district court's determination that Michael's monthly income was, or could be, $8,000 even after being terminated as his son's manager was not supported by substantial evidence because there was no finding based on evidence that his income would return to its prior level and the finding is inconsistent with other findings in the Decree of Divorce.

Specifically, the district court maintained the $594 child support order, based on a gross monthly income of $3,300, not $8,000, in the final Decree of Divorce. Similarly, at the March 27, 2013 hearing, the district court awarded Donna child support based on Michael's reported income of $3,300; and nothing in the record suggests a substantial change in circumstances occurred between the March 2013 hearing and entry of the final Decree. Although the district court as the trier of fact has discretion to assess the evidence, the district court's finding that Michael's income was $8,000 was inconsistent with other findings in the Decree and was not supported by substantial evidence. Moreover, the parties' income is not the sole factor in determining the award for alimony and it does not appear from the Decree that the district court considered all of the factors enumerated in NRS 125.150(9). Thus, the district court abused its discretion in determining the alimony award.

We therefore,

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[8]


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. William S. Potter, District Judge, Family Court Division
Lansford W. Levitt, Settlement Judge
Willick Law Group
Hutchison & Steffen, LLC
Eighth District Court Clerk

[8]We have considered Michael's remaining arguments on appeal and conclude that they are without merit.