IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HOLLI LOFGREN,
Appellant,
vs.
LARRY ROBERT MEYER,
Respondent.

No. 70845



*ORDER OF REVERSAL AND REMAND*

Holli Lofgren appeals from orders granting respondent's motion for declaratory relief and requests for attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; Linda Marquis, Judge.

Lofgren and Larry Robert Meyer executed a separation agreement and joint petition for divorce on the same day.[1] Several days later, the parties filed the joint petition, but not the separation agreement, and were granted a decree of divorce. Two years later, the parties both filed actions for declaratory relief regarding the enforceability of the separation agreement.

Initially, Meyer requested that the district court declare the entire agreement "invalid." After he and Lofgren filed their briefs and after the court held a hearing on his motion for declaratory relief, Meyer filed an errata narrowing his argument to only challenging one provision of the 36-section agreement—provision 23, which requires Meyer to name Lofgren as his beneficiary of his will and other accounts for ten years.

Despite Meyer's errata, the district court granted Meyer's motion for declaratory relief, which effectively declared the agreement as a

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

whole invalid. Lofgren then filed a motion for reconsideration that the court denied. Meyer subsequently sought attorney fees, which the court granted.

Lofgren appeals the district court's order granting Meyer's motion for declaratory relief, its order denying her motion for reconsideration, and the court's order June 28, 2016, granting Meyer's request for attorney fees.

After the district court entered its order awarding Meyer attorney fees and after Lofgren appealed that order, Meyer filed a motion to strike Lofgren's unsworn declaration that she included in her opposition to his attorney fees request. Meyer's motion to strike was reviewed by the Nevada Supreme Court and the court issued an order of limited remand, which allowed the district court to strike the declaration. *Lofgren v. Meyer*, Docket 70845 (Order of Limited Remand, September 27, 2017). The district court then issued another order on October 20, 2017, granting Meyer attorney fees. Lofgren appeals that order as well.

Lofgren argues that the district court erred in its factual findings and legal conclusions in its order granting Meyer's motion for declaratory relief, including those interpreting the separation agreement and whether it survived the divorce decree. Meyer counters that the provision requiring him to name Lofgren as a beneficiary of his will, retirement, and/or pension accounts for ten years is an alimony or spousal support provision that did not survive after the court granted the divorce decree.

"Because a district court's interpretation of a divorce decree presents a question of law, this court reviews such an interpretation de novo." *Henson v. Henson*, 130 Nev. 814, 818, 334 P.3d 933, 936 (2014). Further, "[a] settlement agreement, which is a contract, is governed by

principles of contract law." *Mack v. Estate of Mack*, 125 Nev. 80, 95, 206 P.3d 98, 108 (2009). While "the question of whether a contract exists is one of fact," that requires deference to the findings of the district court, "[c]ontract interpretation is subject to a de novo standard of review." *Id.* (internal quotation marks and citations omitted).

At the outset, we note there are two primary flaws with the district court's decision. First, in its order, the court relied on a draft version of the separation agreement instead of the final version and it did not consider the effect of Meyer's errata. Second, the court did not consider the post-decree actions of Meyer when he concededly fulfilled the terms of the separation agreement, including the provision he challenges, and how that relates to the parties' intent when they drafted provision number 23 in the agreement.

To begin, we address the issue of merger, generally, as the district court failed to fully or accurately address merger as it related to the parties' separation agreement.

An agreement merges with the decree when the district court uses words of merger such as adopt, incorporate, approve, and ratify. *Day v. Day*, 80 Nev. 386, 390, 395 P.2d 321, 323 (1964). For an agreement to survive a decree, the decree must "specifically direct[ ] survival" of that agreement. *Id.* at 389, 395 P.2d at 322-23. Merger does not destroy the enforceability or significance of an agreement; it only effects *how* the agreement is enforced. *Compare Hildahl v. Hildahl*, 95 Nev. 657, 663, 601 P.2d 58, 62 (1979) (concluding that a divorce decree that incorporated a settlement agreement was a court order enforceable by the district court's contempt power) *with Renshaw v. Renshaw*, 96 Nev. 541, 543, 611 P.2d 1070, 1071 (1980) (determining that because an "agreement was neither

incorporated in nor merged in the judgment and decree of the trial court. Therefore, this is clearly a breach of contract action.").

Here, both the decree and joint petition contain words of merger. The issue, however, is that neither the decree nor the joint petition specifically references the separation agreement. Moreover, the separation agreement states that it may or may not be incorporated into a decree, yet it is the only document that divides the community property. While Meyer filed an errata before the district court's decision, stating that any statement that the agreement did not survive the decree should be changed to reflect only that one provision be invalidated, the court did not factor that into its order. Instead, the district court concluded that the agreement did not survive the decree nor was it an enforceable independent agreement as the separation had ended when the parties divorced. Accordingly it granted Meyer's original requested relief, which meant the court declared the agreement of no force or effect.

Lofgren filed a motion for reconsideration arguing the district court used an earlier, incorrect version of the separation agreement in reaching its decision, which differed materially from the final agreement, and that the court's order made the actual agreement "evaporate." The district court denied the motion in a brief order.

It is apparent that the district court used the prior separation agreement regarding beneficiaries and not the final one as it quoted language not in the agreement at issue. Moreover, this was not the district court's only error. The errata was not considered in the district court's order, which Lofgren pointed out in her motion for reconsideration yet the district court, again, failed to acknowledge Lofgren's claim regarding the errata. Here, in light of: (1) the changes in Meyer's original motion as

described in the errata; (2) the resulting effect of the district court's order to completely nullify the agreement; and (3) the use of the wrong agreement in its analysis—the district court should have granted reconsideration or conducted a hearing on Lofgren's motion for reconsideration. *See Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) ("A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous."). Based on the foregoing, we conclude the district court abused its discretion in denying Lofgren's motion for reconsideration. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 585, 589, 245 P.3d 1190, 1195, 1197 (2010) (noting that an order from a motion for reconsideration is reviewed for an abuse of discretion). Therefore, we must reverse and remand.

The district court also did not consider the post-decree actions of Meyer, who concedes on appeal that he named Lofgren as a beneficiary of his will post-divorce. In its order, the district court declared the unequal distribution of net revenues to be a support provision, not a property division. The court may also have implied that other provisions were for support, but it did not specifically rule that provision number 23 on the naming of beneficiaries was support.

The parties heavily dispute whether the provision requiring Meyer to name Lofgren as a beneficiary of his will for a specified period of time, and to name her as the beneficiary on various accounts, is alimony, spousal support, or a property division. Meyer argues that it is alimony or spousal support and, therefore, does not survive the decree. Lofgren argues it is property as it is not subject to modification like alimony. *See Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 919 (1996) (explaining that

"community property is not subject to future modification whereas spousal support can be modified upon a change of circumstances, remarriage, or death."). The district court did not squarely address whether the provision was alimony, support, or property and only summarily concluded that it did not survive the decree.

Also, no distinction was made as to the future tense used in the separation agreement whereas the prior version quoted by the district court stated Meyer "would maintain 'the bequests in his will.'" The district court may need to determine at the evidentiary hearing if beneficiary documents were prepared or signed after the decree of divorce was filed. If the documents were signed post-decree by Meyer naming Lofgren as a beneficiary, as Meyer concedes in his brief on appeal, the analysis as to the viability of the will be different than that employed by the district court as the court considered the documents to be signed pre-decree and thereby automatically revoked.[2] *See* NRS 133.115 (revoking an interest to a former spouse "in a will executed *before* the entry of the decree of divorce" (emphasis added)). The district court may also need to parse the language in provision number 23 of the agreement as to the contingent beneficiaries and the different accounts rather than just determine the viability of the will as it did.

We note other concerns with the decision below. If there are ambiguous terms, the district court is required "to clarify the meaning of a disputed term in an agreement-based decree" and "must consider the intent of the parties in entering into the agreement." *Mizrachi v. Mizrachi*, 132

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[2]While the parties do not argue ratification, the district court may need to consider whether Meyer's actions post-decree ratified the parties' separation agreement, especially as it relates to the provision at issue.

Nev. ___, ___, 385 P.3d 982, 989 (Ct. App. 2016). "And in doing so, the court may look to the record as a whole and the surrounding circumstances to interpret the parties' intent." *Id.* at ___, 385 P.3d at 989.

The language in the separation agreement is not clear within the four corners. *See Cord v. Neuhoff*, 94 Nev. 21, 23, 573 P.2d 1170, 1171 (1978) (concluding that on appellate review, the court is not constrained to the lower court's interpretation of an agreement that "came from within the four corners of the document"). While the district court concluded that Lofgren's and Meyer's separation agreement was only supposed to last for the duration of separation, the court's order does not address a provision within the agreement that provided that the agreement can only be modified by written agreement. *See Ballin v. Ballin*, 78 Nev. 224, 231, 371 P.2d 32, 36 (1962) (concluding that when a decree does not "direct[ ] survival of [an] agreement, [the court] [is] required to determine what effect should be accorded [a] provision of the approved agreement that modification could occur only by further written agreement."). The agreement here states that it "may only be terminated or amended by the Parties in writing signed by both of them." Thus, the district court's failure to address this provision leaves open the question of whether the separation agreement was limited to the period of separation. This is an important distinction because if the separation agreement is "invalid" as the court's order now stands, and neither the decree nor the joint petition divides the community assets, what document separated the parties' property? Thus, it is imperative for the district court to determine the legal effect of the agreement.

Moreover, both parties here acknowledge that the separation agreement is valid as it is the only document that divides the community property. They disagree as to its characterization as an independent

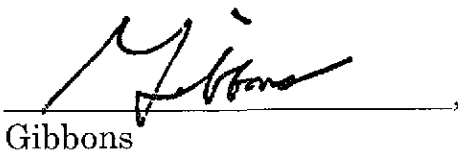
agreement subject to full enforcement or as a merged document to be enforced by the district court as the court's own order. If it is still an unmerged independent agreement, then provision number 23 and the balance of the agreement must be enforced as is. *See Gilbert v. Warren*, 95 Nev. 296, 300, 594 P.2d 696, 698 (1979) (concluding that the agreement at issue "was not merged into the divorce decree and, therefore, was not subject to modification by the district court in the absence of a stipulation by the parties"), *superseded by rule on other grounds as recognized in NC-DSH, Inc. v. Garner*, 125 Nev. 647, 651-53, 218 P.3d 853, 857 (2009); *Renshaw*, 96 Nev. at 543, 611 P.2d at 1071. If it is an order because it merged into the decree, then the district court may enforce it if it is clear, or interpret it if there is an ambiguity, and then enforce it. *See Mizrachi*, 132 Nev. at ___, 385 P.3d at 988-89; *Hildahl*, 95 Nev. at 663, 601 P.2d at 62; *Kishner v. Kishner*, 93 Nev. 220, 225, 562 P.2d 493, 496 (1977).

On remand, the district court is to conduct an evidentiary hearing to determine the intent of the parties regarding the terms in the separation agreement and their enforceability. *See Mizrachi*, 132 Nev. at ___, 385 P.3d at 990 (remanding for an evidentiary hearing to determine the parties' intent). This situation is quite unusual in that the separation agreement and joint petition for divorce were both signed by the parties on the same day and the petition and decree were filed with the court shortly thereafter, suggesting that the parties did not intend the separation agreement to last for only the period of separation, but rather intended the agreement to divide their assets. *Cf. Lemkuil v. Lemkuil*, 92 Nev. 423, 424-25, 551 P.2d 427, 428-29 (1976) (noting that a separation agreement lasted for about five years until the husband filed for divorce). Further, the joint petition and decree of divorce are both form documents that are often used

by parties with few or no assets, while the parties here had substantial assets that were divided in the agreement. Accordingly, we[3]

ORDER the judgment of the district court REVERSED and REMAND for proceedings consistent with this order.[4]


, C.J.
Silver


, J.
Gibbons

TAO, J. , concurring:

I agree that reversal is in order, but for a much simpler and straightforward reason. The district court determined that the separation agreement did not contain any division of property but rather merely referenced a future agreement, and furthermore that it did not survive the decree of divorce.

But these conclusions appeared to have been based, mistakenly, upon an earlier, superseded, version of the separation agreement, which did

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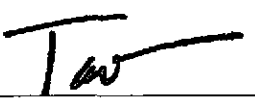
[3]The district court's orders awarding attorney fees are necessarily reversed in light of our disposition. On remand, we remind the district court to identify the legal basis for attorney fees before considering such an award and to apply all *Brunzell* factors. *See Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969); *see also Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (noting that this court "will affirm an award that is supported by substantial evidence."); *Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005) (holding that fee award requests should identify the legal basis).

[4]Given our disposition, we need not address Lofgren's remaining claims.

not contain a division of property, rather than the final version of the agreement, which did. Because of this mistake, the district court concluded that the decree did not merge or incorporate any part of the separation agreement. Technically that's true in the most literal sense, but the decree did incorporate the joint petition for divorce, which specifically states that the parties' assets had already been divided. The only prior agreement in the record that reflected any such division was the separation agreement. Consequently, I would conclude that the divorce decree incorporated the division of assets set forth in the separation agreement, albeit without mentioning the separation agreement by name, and would therefore conclude that the district court erred in striking down the entirety of the separation agreement rather than determining instead which particular provisions of it, if any, were or were not individually superseded by the decree.



_____, J.
Tao

cc: Hon. Linda Marquis, District Judge, Family Court Division
Carolyn Worrell, Settlement Judge
Pecos Law Group
The Abrams & Mayo Law Firm
Eighth District Court Clerk