IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROQUE SALAS VIRAMONTES,
Appellant,
vs.
KARLA M. PEREZ-RODRIGUEZ,
Respondent.

No. 79736-COA



*ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING*

This is an appeal from a divorce decree. First Judicial District Court, Carson City; James Todd Russell, Judge.

Karla M. Perez-Rodriguez and Roque Salas Viramontes were married in 2005 and subsequently divorced by decree in 2019 after a bench trial.[1] As relevant to this appeal, under the decree, the district court awarded Perez-Rodriguez the marital home as her separate property and reimbursed Viramontes $5,000 for improvements made to the home. Viramontes was ordered to reimburse the community for $33,600 in waste, which he accumulated while participating in an extramarital affair that resulted in children. The decree also valued Viramontes' community business "Lawn City Landscaping" at $50,000, which included assets and goodwill. Lastly, the district court found that Perez-Rodriguez was not required to reimburse the community for cash funds she had spent from the parties' safe during the divorce proceedings.

On appeal, Viramontes challenges the district court's determinations regarding distribution of property, marital waste, Lawn City's valuation, use of community funds during the divorce proceedings,

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

and the equalizing note. This court reviews a district court's distribution of community property for an abuse of discretion. *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 75, 439 P.3d 397, 406 (2019). This court will not disturb a decision that is supported by substantial evidence. *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004). "Substantial evidence is that which a sensible person may accept as adequate to sustain a judgment." *Id.*

We first address whether the district court abused its discretion by determining that the marital home was Perez-Rodriguez's separate property. Viramontes argues that the marital home was community property because it was purchased during the marriage, he contributed $2,000 towards the down payment, and the quitclaim deed he signed is unenforceable because no translator was present to inform him of what he was signing.

Property acquired after marriage is presumed to be community property unless the presumption is overcome by clear and convincing evidence. *Forrest v. Forrest*, 99 Nev. 602, 604-05, 668 P.2d 275, 277 (1983). However, property acquired during marriage, through a spouse-to-spouse conveyance, creates a gift presumption, and becomes the receiving spouse's separate property unless the presumption is rebutted by clear and convincing evidence. NRS 123.130; *Todkill v. Todkill*, 88 Nev. 231, 237-38, 495 P.2d 629, 632 (1972).

Here, the marital home was presumptively community property because it was purchased by Perez-Rodriguez during the marriage. To overcome this presumption, at trial, Perez-Rodriguez presented a quitclaim deed showing that after the home was purchased, Viramontes transferred his rights in the home to her. Further, Perez-Rodriguez testified that Viramontes signed the deed with full knowledge of its contents because

multiple people (the realtor, lender, and Perez-Rodriguez) told Viramontes what he would be signing, a translator was present, and he stated to Perez-Rodriguez several times that this would be her home. To rebut, Viramontes alleged that he was misled when he signed the deed because no translator was present. We conclude that it was well within the discretion of the district court to find that the home was Perez-Rodriguez's separate property and that Viramontes failed to overcome the gift presumption by clear and convincing evidence. Although the evidence was conflicting, the district court found Perez-Rodriguez to be truthful and there is substantial evidence in the record to support the district court's conclusion. *See Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 919 (1996) ("This 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.").

Next, we consider whether the district court abused its discretion by finding that Viramontes' only interest in the home was $5,000 as reimbursement for improvements he made to the home. Viramontes contends that because Perez-Rodriguez's income was used to pay the mortgage he is entitled to a pro rata ownership interest. Viramontes also argues that the district court's $5,000 award was improper because it was not supported by evidence or findings. Perez-Rodriguez responds that Viramontes was only entitled to reimbursement for improvements that he had made to the home because Viramontes failed to contribute any money towards the mortgage and instead secreted his community income to avoid financial support. We agree with Viramontes.

Earnings acquired during marriage are presumed "to be community funds regardless of which spouse earns the greater income or

which spouse supports the community." *Robison v. Robison*, 100 Nev. 668, 670, 691 P.2d 451, 453 (1984). As such, "the community is entitled to a *pro rata* ownership share in property which community funds have helped to acquire." *Malmquist v. Malmquist*, 106 Nev. 231, 238, 792 P.2d 372, 376 (1990).

Further, when presiding over a divorce, district courts are tasked with making equal dispositions of community property unless there is "a compelling reason" not to and it is articulated in writing. NRS 125.150(1)(b). Our supreme court has concluded that compelling reasons for unequal distribution include "financial misconduct" such as wasting or secreting funds during the divorce process. *Putterman v. Putterman*, 113 Nev. 606, 608, 939 P.2d 1047, 1048 (1997). However, "undercontributing or overconsuming" of community funds by one spouse during the marriage is not a "compelling reason" for an unequal disposition. *Id.* at 609, 939 P.2d at 1048-49.

Here, the district court concluded that Viramontes was not entitled to an ownership interest in the home because he contributed a minimal amount towards the family's monthly expenses and "he did not pay anything toward the house payment and should receive no equity in the home." This reasoning directly conflicts with precedent and we conclude was an abuse of discretion. Viramontes' failure to contribute does not negate Perez-Rodriguez's use of community funds (her income) to acquire and pay the mortgage on the home. Moreover, although Viramontes admittedly contributed substantially less to the family's expenses, "undercontributing" is not a compelling reason for an unequal disposition of property under NRS 125.150(1)(b). *See also Robison*, 100 Nev. at 671, 691 P.2d at 454 (holding that the use of wife's separate property as marital home

constituted a gift in the form of the rental value to the community that could not be reimbursed). Based upon this, it was inappropriate for the district court to conclude that the community was not entitled to a pro rata ownership interest in the home.

In addition, the district court also abused its discretion by awarding Viramontes a $5,000 reimbursement without expressing within the divorce decree the reasons for the reimbursement or an unequal disposition. NRS 125.150(1)(b) clearly states that unequal dispositions are permitted but only if they are articulated in writing. Although the district court stated its reasons at trial, it failed to explain them in writing in the divorce decree.

Next, we consider whether the district court abused its discretion in finding that Viramontes committed marital waste by expending community funds on an extramarital affair. Viramontes contends he lacked notice of the issue and that for public policy reasons the funds expended cannot be characterized as waste because he was providing support for his extramarital children. We disagree.

Because the parties requested division of community property assets, Viramontes had notice that the district court could make an unequal disposition "as it deems just if the court finds a compelling reason to do so." *See* NRS 125.150. Further, community funds expended on extramarital affairs, including those that result in extramarital children, are considered marital waste. *See Kogod*, 135 Nev. at 75-76, 439 P.3d at 406-07. This is also true when a spouse alleges that the community funds were used for child support if no further evidence is provided supporting that contention. *See, e.g., Agwara v. Agwara*, Docket No. 67713 at *3 (Order of Affirmance, Jan. 25, 2019) (concluding that it was not an abuse of discretion to find

marital waste when community funds were spent on alleged child support without any supporting evidence).

Viramontes next argues that substantial evidence does not support the district court's valuation of Lawn City Landscaping. Viramontes avers that the district court overvalued the business by attributing too much goodwill. *See Ford v. Ford*, 105 Nev. 672, 679, 782 P.2d 1304, 1300 (1989) (holding that a business's goodwill is community property and subject to division by the district court during a divorce). Based on our review, however, we conclude that the record contains ample evidence demonstrating that the district court's valuation, which included the business's goodwill, was not an abuse of discretion. *See Malmquist,* 106 Nev. at 251, 792 P.2d at 385 (stating that when valuing the goodwill of a business district courts may "use any legitimate method of valuation which measures the present value of goodwill by taking into account past earnings").

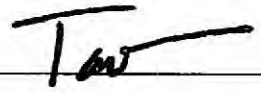
Finally, we consider whether the district court abused its discretion by concluding that Perez-Rodriguez was not required to reimburse the community for $17,100 in community funds spent while divorce proceedings were pending. Viramontes argues that reimbursement was warranted because the funds were spent on non-community expenses (Perez-Rodriguez's attorney fees). Alternatively, Viramontes avers that even if the use of funds was proper the district court should have absolved him from child support arrears. We disagree and conclude that Viramontes' arguments are without merit. Although Perez-Rodriguez did spend a portion of community funds on her attorney fees, substantial evidence shows that Viramontes also used community funds on his own attorney fees, thus supporting the district court's conclusion that reimbursement was not

required because each parties' use of community funds offset the other. Further, Viramontes' second argument on applying child support arrears is waived on appeal as he failed to raise it before the district court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

Based on the foregoing, we

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.[2]

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. James Todd Russell, District Judge
David Wasick, Settlement Judge
Bittner Legal LLC
Allison W. Joffee
Carson City Clerk

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[2]We note that the equalizing note may need to be adjusted upon remand in light of our ruling on Viramontes' pro rata ownership interest in the home.