IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY A. JOSLIN,
Appellant,
vs.
KAREN K. JOSLIN,
Respondent.

No. 38121

FILED

SEP 10 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Timothy and Karen were married on March 16, 1985 in Portola, California. There are two children of the marriage. Their son was born on September 29, 1987, and their daughter was born on June 16, 1992. Timothy and Karen separated in January 1998. On October 16, 2000, Timothy and Karen executed a settlement agreement dividing their community assets and debts, setting spousal and child support obligations, child custody, visitation, and property division.

Regarding spousal support, the settlement agreement stated:

> 10. Husband shall pay Wife the sum of Twelve Thousand Dollars ($12,000.00) in lump sum alimony for Wife's tuition, necessary equipment, and fees at [Truckee Meadows Community College], at the time the tuition, equipment or fees are due.
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> 11. Husband shall pay Wife the sum of Five Thousand Dollars ($5,000.00) per month in rehabilitative alimony for a period of thirty (30) months beginning October 1, 2000, and ending March 1, 2003. If Wife remarries during this time period, this alimony, including Wife's entitlement to a percentage of Husband's bonus as set forth in paragraph 13 below, shall continue as rehabilitative alimony.
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> 12. Husband shall pay Wife the sum of Three Thousand Dollars ($3,000.00) per month in non-rehabilitative alimony for the next thirty (30)

> months from April 1, 2003, until September 1, 2005. If Wife remarries during this time period, this alimony, including Wife's entitlement to a percentage of Husband's bonus as set forth in paragraph 13 below, will terminate.
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> 13. Husband shall pay Wife additional alimony consisting of fifty percent (50%) of his net bonus after federal and state income taxes for 2000, and shall pay Wife thirty-five percent (35%) of his next bonus after federal and state income taxes for 2001; then thirty percent (30%) of the net bonus after federal and state income taxes for the years 2002, 2003, and 2004. . . .

The settlement agreement was merged into the divorce decree by order of the court on October 20, 2000.

On March 23, 2001, Karen married J. Douglas Clark. Thereafter, Timothy filed a motion for relief from judgment pursuant to NRCP 60(b) or, in the alternative, modification of his alimony obligation. Timothy argued mistake, misrepresentation, and that Karen's remarriage, resulting in a significantly improved financial condition, constituted changed circumstances pursuant to NRS 125.150(7) and (9)(b).

In her opposition, Karen asserted that the court properly awarded rehabilitative alimony where: (1) Karen married Timothy when she was an impressionable eighteen-year-old girl; (2) Timothy obtained a graduate degree in hospital administration during the course of the marriage; (3) Karen and the two children moved eleven times to seven different cities during the course of the marriage in furtherance of Timothy's career precluding Karen from obtaining a college degree; (4) Timothy did not support Karen's efforts to work outside the home; and (5) Timothy earned $800,000.00 per year plus yearly bonuses.

On June 14, 2001, the district court entered its order denying Timothy's motion for relief from judgment or, in the alternative, his

motion to modify alimony. Regarding Timothy's motion for relief from judgment, the district court concluded that: (1) Timothy's motion for relief from judgment pursuant to NRCP 60(b) was timely; (2) Timothy failed to establish mistake, misrepresentation, or fraud by Karen which would justify setting aside the alimony provisions contained in the settlement agreement; (3) the explicit terms of the settlement agreement contemplated Karen's remarriage; (4) if Timothy wished to condition payment of the rehabilitative alimony on Karen's remarriage, he should have included that language in the settlement agreement; and (5) whom a person may marry in the future cannot be a basis for finding fraud or misrepresentation sufficient to set aside alimony provisions negotiated and agreed upon by the parties.

Regarding Timothy's alternative motion to modify his alimony obligation, the district court concluded that: (1) in light of the fact that the alimony provisions explicitly contemplated Karen's possible remarriage, the event of her actual remarriage could not be considered as a changed circumstance within the meaning of NRS 125.150(7); (2) Timothy did not base his motion for modification on his inability to pay but, rather, based his motion on Karen's changed financial status which was contemplated within the terms of the agreement; and (3) the settlement agreement was merged into the divorce decree and was thereby an order of the court and not in violation of public policy.[1] Timothy timely appealed.[2]

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[1]NRS 125.150(5) (providing that alimony must cease upon remarriage "unless otherwise ordered by the court.").

[2]Timothy has elected not to pursue his claim for relief from judgment pursuant to NRCP 60(b)(1) and (2) on appeal.

Timothy first argues that the district court erred in denying his motion to modify his alimony obligation where he asserted that Karen's remarriage to a successful attorney constituted a change in circumstances. Specifically, Timothy argues that Karen's improved financial situation, and not her remarriage, constitutes the change in circumstances. As such, Timothy contends that the district court erred where it failed to apply the "economic needs" tests.[3] Timothy argues that the circumstances under which he agreed to pay rehabilitative alimony to Karen have dramatically changed where Karen's new husband, allegedly earning a substantial income, is more than able to adequately provide for Karen's needs. Moreover, Timothy asserts that, absent evidence of a clear intent not to be bound by Nevada's laws concerning modification of alimony, and absent any express waiver of his right to seek modification, he remains entitled to seek modification of the alimony award upon a showing of changed circumstances. Lastly, Timothy asserts that he and Karen did not expressly set forth in the settlement agreement a clear intent that legal principles other than the general law would govern their contractual relationship. Specifically, Timothy argues that there is no language in the settlement agreement regarding modification.

Karen argues that the settlement agreement, made part of the divorce decree, specifically provided that non-rehabilitative alimony would terminate upon remarriage but that rehabilitative alimony would not terminate upon remarriage. Karen contends that the economic needs test does not apply to the current situation where the parties contemplated Karen's remarriage within the settlement agreement and addressed the

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[3]Citing Gilman v. Gilman, 114 Nev. 416, 956 P.2d 761 (1998).

impact of a potential remarriage on both rehabilitative and non-rehabilitative alimony.

"In reviewing an award of spousal support, this court extends deference to the discretionary determination of the district court and withholds its appellate power to modify or reverse except in instances where an abuse of the trial court's discretion is evident from a review of the entire record."[4]

This court has concluded that the purpose of alimony is as "an equitable award serving to meet the post-divorce needs and rights of the former spouse."[5] As such, where a marriage has been for a significant length of time, alimony serves to "narrow any large gaps between the post-divorce earning capacities of the parties and to allow the recipient spouse to live 'as nearly as fairly possible to the station in life [ ] enjoyed before the divorce.'"[6] This type of alimony has been referred to as non-rehabilitative alimony.[7] A second type of alimony, rehabilitative alimony, is designed to provide necessary training or education "relating to a job, career or profession."[8]

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[4]Gardner v. Gardner, 110 Nev. 1053, 1055-56, 881 P.2d 645, 646 (1994) (internal citations omitted); see also Gilman, 114 Nev. at 422, 956 P.2d at 764.

[5]Shydler v. Shydler, 114 Nev. 192, 198, 954 P.2d 37, 40 (1998) (internal citations omitted).

[6]Id. (quoting Sprenger v. Sprenger, 110 Nev. 855, 860, 878 P.2d 284, 287-88 (1994)); see also NRS 125.150(1)(a).

[7]See Gardner, 110 Nev. at 1057, 881 P.2d at 647.

[8]Id. (quoting NRS 125.150(8)).

Where parties negotiate a settlement agreement setting out their rights and obligations "a court has no power to create a new contract for the parties which they have not created or intended for themselves."[9] Further, parties are presumed to contract with reference to existing statutes and, while applicable statutes will generally be incorporated into a contract, other legal principles may govern the legal relationship where they are expressly set forth in the contract.[10] Thus, "when parties to a contract foresee a condition which may develop and provide in their contract a remedy for the happening of that condition, the presumption is that the parties intended the prescribed remedy as the sole remedy for that condition."[11]

Regarding modification of alimony agreements incorporated into divorce decrees, this court has stated: (1) agreements should be construed fairly and reasonably and not too strictly or technically; (2) agreements are to be construed as meaning what may reasonably be inferred that the parties intended; and (3) equity regards the substance and not the form (i.e., alimony is equitable in character).[12] Lastly, this court has stated that the word "remarriage" is "readily understood and is

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[9]Gilman, 114 Nev. at 426, 956 P.2d at 767 (citing Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)).

[10]Id. (citing Wagner v. Wagner, 621 P.2d 1279, 1282 (Wash. 1980)).

[11]Id. (quoting S.L. Rowland Const. Co. v. Beall Pipe & Tank Corp., 540 P.2d 912, 920 (Wash. Ct. App. 1975)).

[12]Murphy, 64 Nev. at 452-53, 183 P.2d at 638; see also Wilde v. Wilde, 74 Nev. 170, 172-73, 326 P.2d 415, 416 (1958); Aseltine v. District Court, 57 Nev. 269, 274, 62 P.2d 701, 702 (1936) (stating that the agreement of the parties should be given effect according to intent and spirit).

not ambiguous[;] . . . [c]ourts are bound by language which is clear and free from ambiguity and cannot, using the guise of interpretation, distort the plain meaning of the agreement."[13]

In considering a modification of Timothy's alimony obligation, the court is bound by the contractual principles mentioned above as well as whether or not the agreement is reasonable and fair, reflects the intention of the parties, and is equitable in substance.[14] The term "remarriage" as used in the settlement agreement should be given its plain meaning.[15] Specifically, if Timothy intended to limit Karen's potential remarriage, notwithstanding public policy prohibitions against such clauses, he had an opportunity to include the prohibition in the agreement. He did not do so. Thus, the terms of the settlement agreement: (1) are reasonable and fair where there is no dispute that Karen sacrificed obtaining an advanced degree and/or gaining marketable work experience during her fifteen-year marriage to Timothy; (2) reflect the intent of the parties at the time the settlement agreement was negotiated;[16] and (3) are equitable in substance insofar as the rehabilitative award gives Karen the opportunity to gain an education or training relating to a job, career or profession.[17] Therefore, the district

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[13]Watson v. Watson, 95 Nev. 495, 496, 596 P.2d 507, 508 (1979).

[14]See Murphy, 64 Nev. at 452-53, 183 P.2d at 638.

[15]See Watson, 95 Nev. at 496, 596 P.2d at 508.

[16]We note that both parties were represented by counsel during negotiation and ratification of the settlement agreement.

[17]See NRS 125.150(8).

court did not construe the decree erroneously in denying Timothy's motion to modify his alimony obligation.[18]

Timothy next argues that neither the settlement agreement nor the divorce decree provide any language indicating that he waived his right to seek a modification of the alimony agreement. Timothy argues that his waiver of his right to automatic termination of alimony upon remarriage, pursuant to NRS 125.150(5), should not be construed as a blanket waiver of his right to seek modification of the agreement based upon a change of circumstances. Timothy contends that the district court, in issuing its order denying Timothy's motion to modify his alimony obligation, created a new and unintended contract for the parties. Further, Timothy asserts that it was error for the district court to infer that because Timothy waived his right to automatic termination of alimony he also waived his right to seek a modification of the agreement.

Karen argues that the district court did not make a finding that Timothy had waived his right to seek modification of the alimony agreements, but instead, made a finding that Timothy had failed to establish mistake, misrepresentation, or fraud. Karen contends that, by agreeing to the alimony provisions in the settlement agreement, Timothy has chosen his own contractual remedy and is bound by the terms of the agreement.

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[18]The parties relied on Gilman (114 Nev. 416, 956 P.2d 761), a case involving a settlement agreement with a cohabitation provision, cohabitation with a third-party and continued alimony support. Because we conclude that the parties specifically contemplated Karen's potential remarriage in the terms of the settlement agreement and that Timothy cannot, therefore, avail himself to the changed circumstances provisions of NRS 125.150(7) and (9)(b), the economic needs test enunciated in Gilman is not applicable.

> "To establish a valid waiver, the party asserting the defense must show that there has been an intentional relinquishment of a known right. [ ] Additionally, while a waiver may be the subject of express agreement, it may also be implied from conduct which evidences an intention to waive a right, or by conduct which is inconsistent with any other intention than to waive a right. . . . Whether there has been a waiver is a question for the trier of fact."[19]

In the present case, the district court did not conclude that Timothy had waived his right to seek a modification of his alimony obligation. Rather, in denying Timothy's motion to modify, the district court concluded that the terms of the settlement agreement specifically contemplated Karen's possible remarriage and that the event of her actual remarriage cannot be considered a changed circumstance within the meaning of NRS 125.150(7). Moreover, the negotiated terms of the settlement agreement explicitly contemplated the termination of the non-rehabilitative alimony but not the rehabilitative alimony upon Karen's remarriage. Thus, the district court did not create a new contract for the parties by denying Timothy's motion to modify but, rather, adhered to the negotiated terms of the agreement. As such, Timothy is bound by the terms of the settlement agreement that explicitly evince an intent to waive challenges to non-rehabilitative alimony based upon remarriage, but not rehabilitative alimony.

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[19]McKellar v. McKellar, 110 Nev. 200, 202, 871 P.2d 296, 297 (1994) (citing Parkinson v. Parkinson, 106 Nev. 481, 483, 796 P.2d 229, 231 (1990) (involving an alleged waiver of the right to child support payments after a fourteen-year delay in filing an action to recover).

Lastly, Timothy argues that the district court erred in construing NRS 125.150. Timothy contends that the plain language of NRS 125.150, including the phrase "subsequent modification by the court," makes clear that the legislature intended to provide payor spouses with an opportunity to seek modification of their obligations. Timothy also asserts that neither NRS 125.150(7) or (9)(b) describe any set of circumstances under which a party would be forbidden from seeking modification of an alimony agreement. Timothy contends that the language of subsections (7) and (9)(b) merely requires the moving party to demonstrate changed circumstances.

Karen argues that Timothy has construed NRS 125.150 as being applicable in all cases in spite of the specific contractual language in a settlement agreement. Karen asserts that this court in Gilman v. Gilman[20] set forth clear principles governing the conflict between contractual language in a settlement agreement and existing statutes. In particular, Karen asserts that Gilman stands for the proposition that, once a remedy is directed by the parties, it is the sole remedy and general statutes that are no longer applicable.

"When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it."[21] The record indicates that the district court properly reviewed and applied the mandates of NRS 125.150. Specifically, there is no indication that the district court exceeded the ordinary meaning of NRS 125.150(7) and (9)(b).

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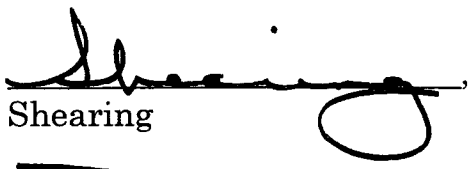
[20]114 Nev. 416, 956 P.2d 761 (1998).

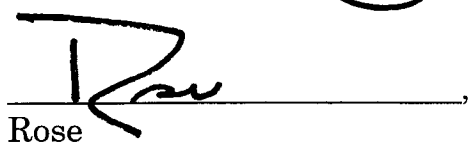
[21]City Council of Reno v. Reno Newspapers, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).

"Where a document is clear on its face, it will be construed from the written language and enforced as written."[22] The district court correctly relied on the explicit, negotiated language of the settlement agreement in concluding that Timothy was bound by the terms of the agreement and that the changed circumstances provision of NRS 125.150(7) and (9)(b) did not apply where the parties had contemplated Karen's possible remarriage and allowed for the termination of non-rehabilitative alimony but not rehabilitative alimony. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Shearing



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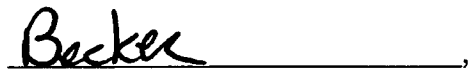

_____, J.
Becker

cc: Hon. Deborah Schumacher, District Judge
Sinai Schroeder Mooney Boetsch Bradley & Pace
Belding, Harris & Petroni
J. Douglas Clark Jr.
Washoe District Court Clerk

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[22]Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990) (internal citation omitted).