

IN THE SUPREME COURT OF THE STATE OF NEVADA

KARL F. GRUMBACH,
Appellant,
vs.
PATRICIA M. GRUMBACH,
Respondent.

No. 38734

FILED

NOV 09 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. ...*
CHIEF DEPUTY CLERK

This is an appeal from a post-decree order denying a motion to modify spousal support. Eighth Judicial District Court, Family Court Division, Clark County; William O. Voy, Judge.

In its divorce decree, the district court ordered appellant Karl F. Grumbach to pay respondent Patricia M. Grumbach \$750 per month in permanent spousal support until either party died, Patricia remarried or a substantial change in circumstances occurred. The divorce decree also awarded Patricia a one-half interest in Karl's 401(k) retirement plan. The parties subsequently stipulated that Karl's spousal support obligation was to continue no longer than 2010, and the district court so ordered. Three years later, upon realizing that Patricia's share in his 401(k) plan had almost doubled, Karl requested that the district court modify his spousal support obligation based on changed circumstances. The district court denied Karl's request.

The sole issue on appeal is whether the district court erred in concluding that the increase in Patricia's 401(k) share did not constitute changed circumstances, thus denying Karl's motion to modify spousal support.

FACTS

Karl and Patricia divorced in 1998 after thirty-five years of marriage. They had five children who had all reached the age of majority at the time the parties divorced. The divorce decree ordered Karl to pay Patricia \$750 per month in permanent spousal support until either party died, Patricia remarried or a substantial change in circumstances occurred. The decree also awarded Patricia a one-half interest in Karl's 401(k) retirement plan which, at the time of divorce, amounted to \$54,133.04.¹ Later that same year, the parties stipulated that Karl's spousal support obligation was to end upon either party's death or Patricia's remarriage, but no later than 2010.² The district court entered an order adopting the parties' stipulation. The order also stated that either party could request the district court to modify the spousal support award upon showing a substantial change in circumstances.

Because Patricia did not assert her interest in Karl's 401(k) plan for over two years, Karl moved to compel Patricia to execute the divorce decree terms and prepare a qualified domestic relations order (QDRO) dividing the 401(k) benefits. On October 30, 2000, the district court entered a QDRO ordering that Patricia receive one-half of Karl's 401(k) account balance. On January 9, 2001, Karl's 401(k) plan manager transferred \$98,118.69 to Patricia as her one-half interest in Karl's then-

¹The \$54,133.04 figure represents Patricia's interest in the retirement plan. The total value of Karl's 401(k) account was \$108,266.08 at the time of divorce.

²After the twelve years, Patricia would have been eligible for social security benefits.

existing 401(k) benefits. Patricia's share had significantly increased because Karl's 401(k) account had accrued earnings for almost three years.

On June 12, 2001, Karl moved to modify his spousal support obligation based on changed circumstances, alleging that Patricia's 401(k) share had nearly doubled. On September 17, 2001, the district court held a hearing on Karl's motion and concluded that the increase would not qualify as changed circumstances until Patricia was able to withdraw the funds from the account without a penalty. Since Patricia was born on December 12, 1943, she was fifty-seven years old at the time of the hearing. The district court found that Patricia could not freely access the funds until she reached the age of sixty-five, and thus the increase did not warrant a support modification at the time of the hearing. The district court, however, noted that the increase could constitute changed circumstances in the future when withdrawal penalties would no longer apply. On October 1, 2001, the district court entered an order denying Karl's motion for spousal support modification. This appeal followed.

DISCUSSION

Spousal support modification

Karl argues that the district court should have modified his spousal support obligation because the increased amount of Patricia's 401(k) share constituted changed circumstances. We disagree.

Under NRS 125.150(7),

[i]f a decree of divorce, or an agreement between the parties which was ratified, adopted or approved in a decree of divorce, provides for specified periodic payments of alimony, the decree or agreement is not subject to modification by the court as to accrued payments. Payments pursuant to a decree entered on or after July 1, 1975, which have not accrued at the time a motion for

modification is filed may be modified upon a showing of changed circumstances, whether or not the court has expressly retained jurisdiction for the modification.

(Emphasis added.) We review a "district court's ruling on a motion to modify spousal support for an abuse of discretion."³

As an initial matter, the district court could have modified Karl's support obligation because the obligation had not yet terminated.⁴ The October 1, 2001, order specifically stated that "[t]he Court does not find the increase in funds in the EG&G retirement account to be a basis for a substantial change in circumstances. When the parties reach retirement age, a substantial change in circumstances may exist."

While the order does not shed much light on the basis for the district court's decision, the September 17, 2001, hearing transcript illustrates the district court's reasoning. At that hearing, Patricia's counsel represented to the district court that Patricia "cannot touch this money at this time . . . [because] to do so would incur great penalties." Karl's counsel, however, informed the court that Patricia would not bear a penalty for withdrawal because the withdrawal was pursuant to a QDRO. The district court disagreed and stated that Patricia would bear the penalty unless she rolled her 401(k) share over into another qualifying plan. Thus, the funds were unavailable to her at the time of the hearing. We conclude that the district court was correct in finding that, at the time of the hearing, Patricia could not withdraw the 401(k) funds without incurring a penalty.

³Gilman v. Gilman, 114 Nev. 416, 422, 956 P.2d 761, 764 (1998).

⁴NRS 125.150(7).

Turning to Karl's "economic needs" test argument, Karl cites to Gilman v. Gilman,⁵ for the proposition that a decrease in an ex-spouse's financial needs may constitute sufficient changed circumstances warranting a spousal support modification. Karl's reliance on Gilman is inapposite. In Gilman, we held that "a showing that the recipient spouse has an actual decreased financial need for spousal support due to the fiscal impact of a cohabitant may constitute changed circumstances sufficient to require a modification of unaccrued payments under that support obligation."⁶ There is no evidence of cohabitation in the case at bar. Furthermore, the language "may constitute changed circumstances" merely indicates that cohabitation could provide the district court with a basis to consider support modification. Whether modification is appropriate is still a matter within the district court's discretion.

The rest of Karl's arguments also lack merit. Karl argues that the anticipated growth of his 401(k) plan would meet Patricia's financial needs. Although that might be true in the future, Patricia could not easily access the funds at the time of the hearing, and thus, there was no change in Patricia's then-existing financial condition. Furthermore, that Patricia's 401(k) share has greatly increased since the parties divorced does not necessarily mean that it will continue increasing in the future. In fact, it is possible that it may decrease in value.

Karl's contention that the \$750 per month spousal support award did not reflect the significant increase in Patricia's 401(k) benefits

⁵114 Nev. 416, 956 P.2d 761.


⁶Id. at 424, 956 P.2d at 766 (emphasis added).


because neither the court nor the parties anticipated the funds' growth is also unavailing. The district court specifically recognized that the increased 401(k) amount might constitute a change in circumstances in the future when Patricia could freely access the funds. Absent such access, the 401(k) increase has not changed Patricia's financial position since the divorce.

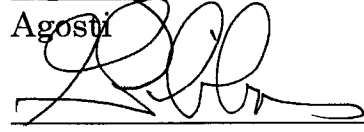
Finally, Karl claims that early withdrawal penalties and taxation are inconsequential because every spouse receiving support pays taxes on it. This argument is unpersuasive because it downplays the effect of the early withdrawal penalties. Consequently, the district court did not abuse its discretion in refusing to find changed circumstances.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. William O. Voy, District Judge, Family Court Division
Xavier Gonzales
Frank J. Toti
Clark County Clerk