

IN THE SUPREME COURT OF THE STATE OF NEVADA

JALAINNE MORABITO,
Appellant,
vs.
PETER MORABITO, JR.,
Respondent.

No. 40235

FILED

FEB 19 2004

ORDER OF AFFIRMANCE

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

This is an appeal from a final decree of divorce¹ resolving issues of child custody, distribution of community property assets and debts, spousal support and attorney fees.

Appellant seeks reversal, contending that the district court violated her procedural due process rights in its order awarding respondent temporary custody of the parties' minor children; erred in excluding evidence; abused its discretion in awarding respondent custody of the minor children under NRS 125.480; erred in its distribution of community assets and debts; erred in its failure to award appellant spousal support; and erred in its failure to award appellant funds to pay her attorneys. We affirm.

Procedural due process

All parties to contested proceedings are entitled to due notice and an opportunity to be heard on any contested issue presented in the course of litigation.² We conclude that the district court did not violate appellant's procedural due process rights. Although respondent was unable to effect service of the April 19, 2001 motion for temporary child

¹See NRAP 3A.

²See Kirkpatrick v. Dist. Ct., 118 Nev. 233, 246-48, 43 P.3d 998, 1008-09 (2002).

custody upon appellant, appellant appeared at the April 30, 2001 hearing on the motion and was given an opportunity to be heard on the custody question at the continuation hearings and at trial. The district court's award of temporary custody of the parties' minor children to respondent was not an abuse of the court's discretion.

Exclusion of testimony

We will not reverse a judgment based upon the exclusion of evidence in the absence of an abuse of discretion by the trial court and unless exclusion affects the substantial rights of the appellant.³ Appellant challenges the district court's refusal to allow testimony concerning when a photograph depicting domestic violence, allegedly perpetrated upon appellant by respondent, was taken. We disagree, concluding that appellant has failed to demonstrate an abuse of the district court's discretion in this instance. The witness was not listed in appellant's pre-trial memorandum and the district court considered a comprehensive body of evidence on the issue of incidents of domestic violence. Also, exclusion of the testimony did not substantially affect any determination of the district court in aid of its decree.

Findings concerning domestic violence and the award of child custody

The best interest of the child is determinative of issues of child custody in the first instance by the district court.⁴ Also, a finding based upon clear and convincing evidence that one of the parents "has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child" raises a rebuttable

³See Brown v. Capanna, 105 Nev. 665, 671, 782 P.2d 1299, 1303 (1989).

⁴NRS 125.480(1).

presumption that an award of custody to the offending party is not in the best interests of the child.⁵ Finally, “[t]he [trial] court enjoys broad discretionary powers in determining questions of child custody.”⁶

Appellant claims that the district court erred in its determination of custody in favor of respondent and, more specifically, erred in its application of the statutory presumptions under NRS 125.480. We disagree. The district court heard a substantial body of conflicting evidence concerning domestic violence in this matter. The district court was entitled to conclude that appellant was the primary instigator of acts of violence upon the person of respondent through the intercession of appellant’s fiancé. We also find no error in the overall determination in aid of the custody award.

Community property

Appellant contends that the distribution of the community property and debts of the parties was flawed. We disagree. The distribution of community assets and debts upon divorce should be, to the extent practicable, equal, absent compelling circumstances supporting unequal distribution.⁷ Again, the district court heard a substantial body of evidence concerning the asset-debt structure of this particular community estate. We conclude that the distribution was equitable and nearly equal. We find no substantial variance from the statutory requirements.

⁵NRS 125.480(5).


⁶Locklin v. Duka, 112 Nev. 1489, 1493, 929 P.2d 930, 933 (1996).


⁷See NRS 125.150(1)(b).

Attorney's fees and spousal support

We have considered these remaining assignments of error and find no grounds for reversal.

ORDER the judgment of the district court AFFIRMED.⁸


_____, J.
Rose


_____, J.
Maupin

cc: Hon. Robert W. Lueck, District Judge, Family Court Division
Gary E. Gowen
Goldsmith & Guymon
Clark County Clerk

⁸This matter was submitted for decision by a panel of this court comprised of Justices Rose, Leavitt, and Maupin. Justice Leavitt having died in office on January 9, 2004, this matter was decided by a two-justice panel.