IN THE SUPREME COURT OF THE STATE OF NEVADA

ELEANOR ENCINAS NEVAREZ,
Appellant,
vs.
RUBEN NEVAREZ,
Respondent.

No. 40818

FILED

SEP 03 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a district court divorce decree dividing community property and making determinations as to child support. Eighth Judicial District Court, Family Court Division, Clark County; Robert W. Lueck, Judge.

Appellant Eleanor Encinas Nevarez argues that the district court erred when it enforced an agreement between Eleanor and Ruben Nevarez, divided Eleanor's pension, refused to award child support arrears to Eleanor from August 2000, and deviated from statutory support guidelines.

This court will not disturb district court decisions in divorce proceedings where the decisions are "supported by substantial evidence and [are] otherwise free of a plainly appearing abuse of discretion."[1] Finally, the district court's decision must be based on the correct legal standard.[2]

[1]Williams v. Waldman, 108 Nev. 466, 471, 836 P.2d 614, 617 (1992).

[2]Id. at 471, 836 P.2d at 617-18.

Agreement to divide specific property

First, Eleanor contends that the district court abused its discretion when it enforced the parties' April 2000 agreement dividing their property.

Because the parties executed the agreement in California, while they were both living in California, California law controls.[3] California Family Code § 850(a) permits married persons to transmute community property into separate property by agreement or transfer.[4] California Family Code § 852(a) states that "[a] transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected."[5] The "express declaration" provision of section 852(a) requires "language which expressly states that a change in the characterization or ownership of the property is being made."[6] The writing requirement is designed to eliminate proof of transmutation by extrinsic evidence and to discourage perjury.[7] "[T]he desirability of assuring that a spouse's community property entitlements are not improperly undermined, as well as concern for judicial economy

---

[3]See Braddock v. Braddock, 91 Nev. 735, 738, 542 P.2d 1060, 1062 (1975); Restatement (Second) of Conflicts § 188(1) (1971).

[4]Cal. Fam. Code § 850(a) (West 1994).

[5]Cal. Fam. Code § 852(a) (West 1994).

[6]In Re Estate of MacDonald, 794 P.2d 911, 913 (Cal. 1990). Although the MacDonald court actually construed California Civil Code § 5110.730, the identical predecessor statute to section 852, we refer only to section 852 throughout this order for ease of reference.

[7]Id. at 918.

and efficiency, support somewhat more restrictive proof requirements."[8] A grant deed satisfies section 852(a)'s express declaration requirement "since it contain[s] on its face a clear and unambiguous expression of intent to transfer the real property interest."[9]

Here, the district court found that the quitclaim deeds were a written manifestation of the parties' oral agreement and that the deeds constituted a writing for purposes of section 852(a). While the parties did not present the deeds at trial, the district court determined that the parties' testimony that they signed quitclaim deeds, their testimony concerning the present ownership of the properties, Eleanor's actions of selling the Valinda home and keeping all profits and the performance taken in accordance with the deeds demonstrated the existence of such deeds. Neither party disputed the existence of the deeds. On this basis, the district court found sufficient evidence of an intent by the parties to transmute specific community property to separate property as manifested by the written deeds. We conclude that the district court properly applied the law and that substantial evidence supports its decision.

Eleanor also argues that the agreement was made in bad faith, that Ruben took unfair advantage of her and that he unduly influenced her. Under the applicable California law, in a transaction between a husband and wife, each spouse has a fiduciary duty to the other.[10] "This confidential relationship imposes a duty of the highest good

---

[8]Id. at 919.

[9]Estate of Bibb, 104 Cal. Rptr. 2d 415, 416 (Ct. App. 2001).

[10]Cal. Fam. Code § 721(b) (West 1994).

faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other."[11]

Here, there is no evidence that the parties made the agreement in bad faith. While Eleanor argues that she relied on Ruben's assertions that the division of property was equal, Ruben testified that Eleanor chose the division of property, that neither party obtained the advice of counsel and that neither obtained appraisal services. Moreover, there is no evidence that either party requested or withheld information from the other.

Eleanor also argues that Ruben took unfair advantage of her. Eleanor relies on In re Marriage of Haines, which holds that the presumption that a deed determines the characterization of property does not apply in marital proceedings in which the presumption stated in section 721 applies.[12] The Haines court concluded that, according to section 721, "when an interspousal transaction advantages one spouse over the other, a presumption of undue influence arises,"[13] which defeats the presumption of title that arises from the deed. The Haines court concluded that, because the conveyance of the wife's interest in the residence in exchange for her husband's co-signature on a vehicle was inadequate consideration, a presumption of undue influence arose. The court further held that, although a deed normally demonstrates record title, because of the confidential relationship, the husband had the burden to prove that "the advantage was not gained in violation of the

---

[11]Id.

[12]39 Cal. Rptr. 2d 673, 679 (Ct. App. 1995).

[13]Id.

[relationship],"[14] and to prove that "the quitclaim deed 'was freely and voluntarily made, and with a full knowledge of all the facts, and with a complete understanding of the effect of the transfer.'"[15]

Here, there is no evidence that Ruben held an unfair advantage over Eleanor. Eleanor received two properties and Ruben received one. Although a recent appraisal valued Ruben's residence higher than the combined value of Eleanor's two properties, neither party attempted to appraise the properties in April 2000. Moreover, Ruben's property was encumbered with a large debt and the Valinda property, which Eleanor received, produced income as rental property. Finally, before the marriage, and with his separate property, Ruben purchased the Valinda home that he conveyed to Eleanor. He did not receive a refund or a setoff for his separate property interest. Moreover, Eleanor's level of education and income were much higher than Ruben's.

Even if we were to accept, arguendo, Eleanor's contention that the transaction advantages Ruben, the record still supports the district court's finding that Ruben did not exert any undue influence. Eleanor argues that she was unduly influenced because of the domestic violence and emotional abuse she endured from Ruben throughout their marriage. Although Eleanor testified as to the dates of certain alleged domestic violence by Ruben, she also admitted that she had no bruises or marks, or photographs of the injuries, did not contact the police and did not tell family or friends. Ruben testified that he had never abused Eleanor and

---

[14]Id. at 685.

[15]Id. (quoting Brown v. Canadian Industrial Alcohol Co., 289 P. 613, 614 (Cal. 1930)); see also In re Marriage of Baltins, 260 Cal. Rptr. 403, 414 (Ct. App. 1989).

that, on two occasions, Eleanor had abused the children. The district court weighed the evidence and apparently found Ruben's testimony more credible.

The parties also presented conflicting evidence at trial as to which party initiated the division of the property. Eleanor contends that Ruben demanded that he keep the Montebello home and that she keep the other two properties. Ruben testified that Eleanor divided the property, that she had even written out the division on paper, that she was the one who wanted to leave the relationship, and that, at Eleanor's insistence, they had obtained a realtor to assure that the paperwork was correct. Neither Ruben nor Eleanor obtained counsel or attempted to appraise the properties. Accordingly, we conclude that substantial evidence supports the district court's determination that Eleanor freely and voluntarily entered into the agreement.

Additionally, Eleanor contends that the district court failed to consider that the parties had rescinded the agreement when they agreed to shred the deeds. The district court did consider this evidence at trial, but found it "irrelevant." Eleanor testified that she and Ruben had agreed to shred the deeds. Ruben testified that they had never discussed shredding the deeds. He also testified that Eleanor was aware that he had signed the deeds, specifically the Pahrump deed because he had given it to Eleanor so that she could record it when she was in Nevada. Ruben also testified that Eleanor had never asked for his help when she was selling the Valinda home. Therefore, the testimony suggests that Eleanor was aware that Ruben had recorded the deeds. Accordingly, we conclude that substantial evidence supports the district court's determination that the agreement was fair and enforceable.

Finally, Eleanor contends that, because the district court discussed a Nevada case, it improperly relied upon Nevada law in its decision. The district court referred to Anderson v. Anderson while announcing its rulings.[16] In Anderson, we determined that an agreement between spouses to divide property that resulted in $110,000 to the wife and $54,000 to the husband was equitable in light of the factual circumstances of the case, including that the husband lived rent-free after the separation and had received other valuable property.[17] It appears that the district court referred to the factual situation in Anderson as persuasive authority to demonstrate that a division of property need not be equal in all respects, so long as it is fair. Eleanor provides no California authority stating that a division must be equal. Therefore, Eleanor's argument is without merit.

Division of pension

Eleanor next contends that the district court abused its discretion when it characterized the stipulated value of her pension as community property and failed to consider the parties' date of separation. Eleanor contends that, under California law, any post-separation accumulations derived from post-separation efforts is the separate property of the spouse who earned it and not subject to a community property interest,[18] and therefore, the community interest is determined as of the date of separation.

---

[16]107 Nev. 570, 816 P.2d 463 (1991).

[17]Id. at 571-72, 816 P.2d at 464.

[18]See In re Marriage of Adams, 134 Cal. Rptr. 298, 301 (Ct. App. 1976).

Despite Eleanor's correct summary of California law, Nevada law governs the division of the pension. Upon separation and pursuant to a promotion in August 2000, Eleanor moved to Nevada with the children. While keeping his California residence, Ruben followed, spending nights with Eleanor at the Las Vegas home, sharing funds and making improvements to the home. Because the evidence demonstrates that the couple lived in Nevada and because Eleanor filed for divorce in Nevada, Nevada law governs the division of the couple's marital personal property. Unlike the parties' agreement, which was made in California and concerned real property in California, Eleanor's pension continued to accrue in Nevada and was personal property rather than real property so that the State of California had no real attachment to it. Eleanor has failed to convince this court otherwise. Accordingly, the district court had no alternative except to apply Nevada law to the division of the parties' marital personal property.

In Nevada, the community interest in a pension is determined by the number of years the parties were married divided by the number of years worked before the employee retires.[19] "Except as provided by statute, separation of the parties does not dissolve the community, and does not alter the character of the parties' income during the period of separation."[20]

---

[19]Fondi v. Fondi, 106 Nev. 856, 859, 802 P.2d 1264, 1265-66 (1990) (This rule of law incorporates the "wait and see" approach, meaning that "the community gains an interest in the pension ultimately received by the employee spouse, not simply the pension that would be recovered were the spouse to retire at the time of divorce.").

[20]Hybarger v. Hybarger, 103 Nev. 255, 259 n.5, 737 P.2d 889, 891 n.5 (1987) (internal citation omitted); see NRS 123.220 (providing, in part, that all property obtained after the marriage is community property

continued on next page . . .

The district court valued the pension as of the date of the final divorce decree. The district court correctly determined that neither the date of the parties' property settlement agreement nor the date of their separation applies for valuation of the pension. First, the agreement did not purport to divide the pension. Second, after the agreement was executed, the parties reconciled for a temporary period. Third, as mentioned, under Nevada law the separation date is irrelevant. Accordingly, the district court properly divided Eleanor's pension under Nevada law.

Child support arrears

Eleanor contends that the district court improperly considered Ruben's financial condition when it denied her request for payment of child support arrears from August 2000 to May 2002.

We review child support orders for an abuse of discretion.[21] NRS 125B.030 provides, in part, that "[w]here the parents of a child are separated, the physical custodian of the child may recover from the parent without physical custody a reasonable portion of the cost of care, support, education and maintenance provided by the physical custodian." NRS 125B.030 indicates that the physical custodian may recover child support, thereby providing the district court with discretion to award child support.

Here, the district court determined that ordering Ruben to pay child support arrears from August 2000 would be difficult, if not impossible, for Ruben based on his income and his present difficulty in

---

. . . *continued*
except in certain specified circumstances, none of which is applicable to the instant case).

[21]See Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

meeting both his living obligations and child support obligations. The district court acknowledged the disparity in the parties' incomes and recognized that the children had certainly not suffered due to the lack of court-ordered child support from Ruben beginning in August 2000. The district court further noted that Eleanor earned substantially more than Ruben and that Eleanor had not sought any child support since the time of separation, instead waiting over a year and a half to file a motion for temporary child support. Eleanor has provided no authority supporting her contention that the district court should not consider the parties' relative circumstances in making its decision. Accordingly, we conclude that the district court did not abuse its discretion when it awarded child support arrears beginning in March 2002, rather than August 2000.

Deviation from statutory formula for child support

Eleanor contends that the district court abused its discretion when it deviated from the statutory support guidelines without stating the basis for its deviation.

We review child support orders for an abuse of discretion.[22] A court may deviate from the statutory formula only upon making findings of fact as to the basis for the deviation and stating the presumptive support amount under the statutory formula.[23] NRS 125B.080(9)(l) provides that the court may consider "[t]he relative income of both parents" when it deviates from the statutory formula.

The district court's order stated that the statutory obligation was $968 a month, but that it would reduce the amount to $600 for the next three months to allow Ruben "an opportunity to refinance the

---

[22]See id.

[23]See NRS 125B.080(6).

Montebello residence." While the district court failed to specify the statutory basis for the deviation from the statutory support formula in its order, we conclude that the error is harmless.

Immediately after trial, the district court announced its findings and its rulings. From the bench, the district court specifically stated that it was reducing Ruben's child support obligation based on the relative income of the parties. The district court determined that Eleanor earned about $2,600 more per month than Ruben earned. In addition, the district court recognized that deviating from the statutory obligation would allow Ruben the opportunity to refinance his home so that he could continue paying child support in the future. Finally, the district court noted several times that the children would not be harmed by the reduction in child support for several months.

Eleanor also contends that the district court abused its discretion because it failed to find that unfairness and injustice would result to Ruben if he were required to pay the full statutory amount. Eleanor relies on Barbagallo v. Barbagallo[24] to support her contention.

Our main concern in Barbagallo, however, was that the children were cared for to the best of the parents' abilities, given the parents' post-divorce change in financial circumstances.[25] We stated that courts must consider "the standard of living and circumstances of each parent, their earning capacities and the 'relative financial means of parents.'"[26] Here, the district court recognized the disparity of income

---

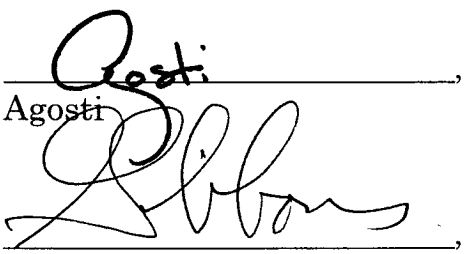
[24]105 Nev. 546, 779 P.2d 532 (1989).

[25]Id. at 551, 779 P.2d at 536.

[26]Id.

between the parents and that ordering Ruben to pay more than he could afford would result in financial hardship and unfairness to him and, eventually, the children. Therefore, we conclude that the district court did not abuse its discretion when it deviated from the statutory child support formula. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Agosti

_____, J.
Gibbons

cc: Hon. Robert W. Lueck, District Judge, Family Court Division
Law Offices of Bradley J. Hofland
Frank J. Toti
Clark County Clerk

BECKER, J., concurring in part and dissenting in part:

I concur with the majority on all but one issue, the division of Eleanor's pension. The majority indicates that the parties' agreement to separate and transmute community property to separate property applied only to the real property and that Nevada law controlled the division of the pension. I disagree. The district court found that they had agreed to separate, divide and transmute their community property to separate property while living in California. While the district court used the testimony relating to real property to support its finding of an agreement under California Family Code § 850(a), the record does not reflect that this finding only applied to the real property. I submit that the agreement applied to all of the property and that the pension should have been divided as of the date of their separation, not the date of trial. I would reverse and remand only for a recalculation of the pension benefits.

Becker _____, J.
Becker