

IN THE SUPREME COURT OF THE STATE OF NEVADA

KATHRYN BOVARD SKELLY,
Appellant,
vs.
STEPHEN J. SKELLY,
Respondent.

No. 41387

FILED

APR 19 2005

ORDER OF AFFIRMANCE

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

This is an appeal from an amended divorce decree. Eighth Judicial District Court, Family Court Division, Clark County; William O. Voy, Judge.

Kathryn appeals the district court's order, arguing that the district court abused its discretion in (1) not awarding her a greater sum of spousal support, (2) determining that Stephen had only \$160,000 in cash, (3) awarding Stephen \$54,000 as his separate property, and (4) allowing Stephen to pay her community cash award in \$4,000 monthly payments. For the reasons set forth below, we determine that Kathryn's arguments lack merit and affirm the district court's amended order.

Standard of review

All property acquired during marriage, except by gift, devise, bequest, descent, or personal injury award, is presumed to be community property.¹ Property acquired before marriage is separate property.² However, the community property presumption may be overcome by clear

¹NRS 123.130(1); NRS 123.220; Kelly v. Kelly, 86 Nev. 301, 309, 468 P.2d 359, 364 (1970).

²NRS 123.130.

and convincing evidence to the contrary.³ The party claiming that property is separate bears the burden to overcome the community property presumption.⁴ We review divorce proceedings for an abuse of discretion.⁵ We will not disturb a district court's separate property determination that is supported by substantial evidence.⁶ "However, a court must award such alimony as appears 'just and equitable,' having regard to the conditions in which the parties will be left by the divorce."⁷

In Sprenger v. Sprenger, we enumerated seven factors to be considered in determining the appropriate spousal support award:

(1) the wife's career prior to marriage; (2) the length of the marriage; (3) the husband's education during the marriage; (4) the wife's marketability; (5) the wife's ability to support herself; (6) whether the wife stayed home with the children; and (7) the wife's award, besides child support and alimony.⁸

Wife's career prior to the marriage

Kathryn and Stephen were married for a seven-year period. The parties did not have any children during the course of the marriage. Neither Kathryn nor Stephen acquired any additional education during

³Pryor v. Pryor, 103 Nev. 148, 150, 734 P.2d 718, 719 (1987).

⁴Id.

⁵Williams v. Waldman, 108 Nev. 466, 471, 836 P.2d 614, 617 (1992).

⁶Pryor, at 150, 734 P.2d at 720; Neumann v. McMillan, 97 Nev. 340, 340, 629 P.2d 1214, 1215 (1981).

⁷Sprenger v. Sprenger, 110 Nev. 855, 859, 878 P.2d 284, 287 (1994) (quoting NRS 125.150(1)(a)).

⁸110 Nev. at 859, 878 P.2d at 287.

the course of their marriage. Kathryn became a licensed real estate agent in 1979 and earned a living selling houses for sixteen years before she married Stephen. During the marriage, Kathryn worked on occasion and earned an average net income of \$15,000 to \$16,000 per year. Kathryn kept her real estate license active throughout the marriage and, in 2001, earned a net income of \$25,000. Kathryn did not give up her real estate career as a result of the marriage; instead, she worked part-time and raised her two minor children from a previous marriage. Kathryn's children are now adults.

The district court awarded Kathryn two houses from the division of community assets. Stephen received one house. Additionally, Kathryn received all the furniture and household property, except twelve items. She also received the BMW automobile, other personal property items, and funds for property landscaping and moving expenses. Finally, Kathryn received \$67,500 as her half of the community cash.

Based on the evidence presented at trial, the district court did not abuse its discretion. There is substantial evidence to support the findings of the district court for the following reasons: (1) Kathryn did not give up her career during the marriage; (2) the parties were only married for a seven-year period; (3) the district court divided the community property equally; (4) Stephen did not increase his education during the marriage; (5) Kathryn has marketable skills as a real estate agent; (6) Kathryn has the ability to support herself and work full-time; and (7) there are no children from the marriage for Stephen to support. The district court reviewed the Sprengr factors and concluded that Kathryn was entitled to a spousal support award of \$2,500 for thirty months. The

district court properly based Kathryn's spousal support award on substantial evidence from the parties.

Division of the parties' community cash

"Before the appellate court will interfere with the trial judge's disposition of the community property of the parties or an alimony award, it must appear on the entire record in the case that the discretion of the trial judge has been abused."⁹ In rendering its decision, the district court considered the parties' circumstances, their earning capacity, the length of the marriage, and how the parties would be left after the divorce.

In determining the amount of community cash Stephen held, the district court heard testimony that Stephen kept accurate records of his income and cash balance. At trial, Stephen testified that he and Kathryn had spent all of the money they had earned. Neither Stephen nor Kathryn saved any money. Kathryn submitted a summary sheet to the district court as evidence of Stephen's expenditures in 2001. Stephen rebutted the summary sheet, stating that there were several inaccuracies and specifically explaining each error. Stephen testified that he kept a minimum of \$150,000 cash on hand in order to continue gambling. He also testified that in April 2001 he had approximately \$450,000 but by April 2002 he had only \$246,000 because of expenses and gambling losses. By October 2002, those expenses and gambling losses caused Stephen's cash to dwindle to \$160,000.

There is no evidence in the record that Stephen was not truthful in his testimony to the district court about his income. Stephen testified that he filed his taxes and intended to report income even if he

⁹Shane v. Shane, 84 Nev. 20, 22, 435 P.2d 753, 755 (1968).

did not deposit cash into his checking account. In explaining his financial status, Stephen testified that Kathryn inflated the amounts of money that he had given her in the past and listed the same expenses in multiple categories, resulting in unrealistic figures.

Stephen further testified that over an eight-year period, \$2.3 million was transacted through his gambling account; however, he did not testify that this amount reflected his net or gross revenue. Stephen clarified that the \$2.3 million was the amount he would have received if he had won every bet. Since Stephen lost several bets over eight years, he did not win \$2.3 million. Therefore, Kathryn is not entitled to half of that amount. Accordingly, the district court did not abuse its discretion.

Stephen's separate property award

A party's property acquired before marriage is separate property.¹⁰ When a spouse seeks to overcome the community property presumption, that spouse has the burden of establishing the separate character of the property by clear and convincing evidence.¹¹ The presumption that funds are community property may be rebutted in two ways: (1) direct tracing of the funds to a separate property account, or (2) proof that family expenses had exhausted all community income.¹² Neither party argues for application of the family exhaustion method. Direct tracing requires Stephen "to establish that the timing and amounts of separate

¹⁰NRS 123.130.

¹¹Pryor v. Pryor, 103 Nev. 148, 150, 734 P.2d 718, 719 (1987).

¹²Malmquist v. Malmquist, 106 Nev. 231, 246, 792 P.2d 372, 381 (1990).

property deposits and withdrawals . . . clearly indicate that the payments came from separate property funds.”¹³

Stephen testified that he had between \$125,000 and \$150,000 in cash at the time of their marriage. He further testified that this money was in offshore accounts, runners’ hands, and in local phone accounts. In spite of this testimony, Stephen was unable to prove that the \$125,000 or \$150,000 was his separate property. When questioned whether he had documentation to prove his cash balance when he married Kathryn, Stephen presented documents from three different gambling accounts indicating a total balance of \$54,000. When questioned whether he could prove anything more than the \$54,000, Stephen answered that he could not. Neither party presented evidence that those gambling accounts were jointly held, nor did either party demonstrate that those funds were commingled with community funds. We conclude that Stephen established that those accounts were his separate property.

The district court concluded that the \$54,000 was Stephen’s separate property. The evidence supports this conclusion because Stephen provided documentary evidence to the court of the \$54,000 balance. Because Stephen proved a \$54,000 bankroll at the time of marriage, the district court awarded those funds to Stephen as his separate property. Stephen met his burden to prove that the \$54,000 was his separate property by showing that he had obtained that cash before marriage.¹⁴ Once Stephen presented this evidence at trial, Kathryn did not refute or

¹³Id.

¹⁴NRS 123.130(2).

deny it. Accordingly, the district court did not abuse its discretion because the award was based on substantial evidence.

Monthly payments for Kathryn's community property award

We have held that district courts have "broad discretion to determine the equitable distribution of community property."¹⁵ In this case, the district court determined that Stephen needed to maintain his bankroll in order to produce income from his gambling. Accordingly, the district court ordered Stephen to pay Kathryn her community property award in payments of \$4,000 per month bearing 10 percent interest. We conclude that the district court did not abuse its discretion by permitting Stephen to pay Kathryn \$4,000 per month on her community property award. Any disadvantage Kathryn suffered was offset by an award of 10 percent interest. Additionally, the district court was in the best position to determine the weight and credibility of the testimony, and substantial evidence supports the district court's award.

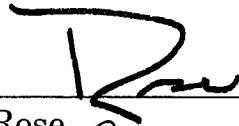
CONCLUSION


The district court properly determined Kathryn's spousal support award because Kathryn worked during the marriage and was capable of working full-time in her profession. Also, the district court did not abuse its discretion in determining that Stephen had only \$160,000 in cash and in permitting him to pay Kathryn her community cash in monthly payments. Finally, the district court properly awarded Stephen \$54,000 as his separate property because Stephen met his burden of


¹⁵Malmquist, 106 Nev. at 251, 792 P.2d at 384.

proving by clear and convincing evidence that the money was his separate property. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. William O. Voy, District Judge, Family Court Division
Bruce I. Shapiro, Ltd.
Stephen J. Skelly
Clark County Clerk