

IN THE SUPREME COURT OF THE STATE OF NEVADA

LISA J. GIBSON,
Appellant,
vs.
THOMAS J. GIBSON,
Respondent.

No. 41699

FILED

SEP 26 2006

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a divorce decree that resolved issues concerning spousal support, the division of community debt, and attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; William O. Voy, Judge.

FACTS AND PROCEDURAL HISTORY

Appellant Lisa Gibson and respondent Thomas Gibson married in 1989. Two daughters were born in 1990 and 1992.¹ Both parties have law degrees, but Lisa ceased practicing law and became a stay-at-home mother after the birth of their first daughter. Although testimony regarding the parties' understanding as to Lisa's employment conflicted, Lisa and Thomas agreed that Lisa would be a stay-at-home mother until the youngest child started first grade. She remained unemployed throughout the divorce proceedings below.

For the first seven years of their marriage, the parties resided in Las Vegas. In 1996, Thomas accepted a position with the Federal Public Defender's Office in Tennessee and moved there with the family.

¹We have recited only those facts that are necessary to our disposition of appellant's contentions.

Four years later, he resigned to avoid facing termination. At the time of his resignation, Thomas's salary totaled approximately \$93,000 a year.

Thomas returned to Las Vegas in June of 2000 and obtained employment with the Nevada Attorney General's Office, with a starting salary of approximately \$67,000. Within a few months, Thomas accepted a position with the Nye County District Attorney's Office. Thomas now resides in Nye County and earns approximately \$72,000 a year.

Lisa and the children initially remained in Tennessee, but later moved to New Hampshire where they now reside with Lisa's extended family. New Hampshire has jurisdiction over child support and custody issues. Thomas currently pays \$1,334 per month in child support through the New Hampshire court system.

In April 2001, Thomas filed for divorce in Clark County, and Lisa proceeded to file motions for interim relief and requested production of documents. Thomas responded with a written answer to each request and a copy of his most recent paycheck, a copy of his resume, and copies of returned checks. In an order filed in July 2002, resolving all pending motions, the district court denied Lisa's motion for interim relief and ordered Thomas to pay Lisa's attorney fees. The district court also allowed some of Thomas's responses to Lisa's requests to stand and modified other requests.

A three-day trial began on November 18, 2002. During the course of the trial, Lisa was represented by Gary Gowen, Esq., and Lisa's sister, Robin Barber, Esq. Christopher Gilman, Esq., represented Thomas. Following trial, the district court filed a decree on May 30, 2003, dissolving the marriage.

The district court found that Thomas failed to provide discovery concerning his personnel records from the Federal Public Defender's Office, bank records and credit card statements generated during the pendency of the divorce proceedings. Due to these failures, the district court awarded Lisa \$10,000 in attorney fees and \$1,417 in costs.² The district court also awarded Lisa \$14,583 in rehabilitative and equitable spousal support.

Because a bank in Tennessee foreclosed upon the marital residence, the court found that the parties had no other substantial assets. The court further found that, from June 2000 to March 2001, Thomas provided Lisa approximately \$30,000 for family support and payment of community debts.

The district court further found that the parties incurred approximately \$52,000 in community debt. It appears from the record that the district court derived this figure from Thomas's affidavit of financial condition (AFC). The district court structured the debt allocation as follows: first it ordered Thomas to assume responsibility for the entirety of the community debts; second, it awarded Thomas a judgment against Lisa for her share of the community debt, \$26,000; third, it completely offset this judgment by the amount of her attorney fees, costs and, additionally, the entry of an equitable award of spousal support. The support award exactly equaled the difference between her one-half portion

²The court also found that Lisa was entitled to an award of attorney fees pursuant to Sargeant v. Sargeant, 88 Nev. 223, 495 P.2d 618 (1972). The district court found that Lisa was not otherwise prejudiced by Thomas's failure to comply with her discovery requests, as Lisa was able to obtain the financial information directly from the banks and lending institutions.

of the debt and her fees and costs. In this, the district court ordered Thomas to assume all responsibility for the community debt and to hold Lisa harmless therefrom.

Lisa now appeals, alleging approximately 40 errors which can be generally grouped into the following areas: the closure of the hearings, determination of community debt and payments to the family, waste, underemployment, discovery, and judicial bias. For the reasons stated below, we affirm in part, reverse in part, and remand.

DISCUSSION

Closed hearing

Thomas requested that the district court close several of the pretrial hearings and the first day of the trial pursuant to NRS 125.080 and EDCR 5.02.³ On appeal, Lisa argues that NRS 125.080 and EDCR

³NRS 125.080 provides:

In any action for divorce the court shall, upon demand of either party, direct that the trial and issue or issues of fact joined therein be private, and upon such direction all persons shall be excluded from the court or chambers wherein the action is tried, except the officers of the court, the parties, and their witnesses and counsel.

EDCR 5.02(a) provides:

In any contested action for divorce . . . the court must, upon demand of either party, direct that the trial or hearing(s) on any issue(s) of fact joined therein be private and upon such direction, all persons shall be excluded from the court or chambers wherein the action is heard, except officers of the court, the parties, their witnesses while testifying, and counsel.

5.02 violate the First Amendment of the United States Constitution because the statute and rule grant one party the sole right to exclude the public from proceedings in domestic cases.

Lisa fails to specify any substantive injury she incurred due to the closure of the hearings. Accordingly, we will not reach this claim of error. Moreover, as Lisa herself demanded that the proceedings below conducted on December 9, 2002, be closed, she cannot now claim she was injured by the court's closure of the hearings in this case.⁴

Community debt

Lisa argues that the district court abused its discretion by basing its computation of the community debt upon Thomas's AFC. This court will uphold a district court's findings of fact if they are supported by substantial evidence.⁵ We conclude that under the circumstances of this case, the district court did not abuse its discretion.

Thomas's attorney directly examined Thomas concerning the extent and details of the community obligations, including the amounts owed to each individual creditor. However, when counsel attempted to obtain formal admission of the creditors' statements, the district court stated it would calculate the community debt based upon Thomas's AFC. Shortly thereafter, Thomas's counsel indicated he was in possession of the creditors' statements, and had sent the statements to Lisa's attorneys a

⁴Lisa argues that she was manipulated into moving to close proceedings to compromise her opposition to the use of NRS 125.080. While she may have found it necessary to resort to NRS 125.080 to exclude a potential witness, we cannot conclude that any of the rulings related to the closure of proceedings or the exclusion of witnesses mandate reversal.

⁵Gepford v. Gepford, 116 Nev. 1033, 1036, 13 P.3d 47, 49 (2000).

few days prior. While Ms. Barber indicated that she did not anticipate disputing the creditors' statements, she asked to borrow the district court's copy of the proposed exhibits because she left her copy at the office. The district court then asked Ms. Barber to review the statements while Mr. Gowen continued to listen to Thomas's direct examination. For the duration of the hearing on that specific day, Lisa's attorneys did not object to the admission of the exhibits. While there was some dispute over the extent to which Lisa's attorney had stipulated to the statements, Lisa's counsel did not object to the admission of supporting documentation during Thomas's direct examination, did not object to the calculation at the time the district court adopted it, and has not produced in the record documents supporting her claims that the district court overstated the debt. It therefore appears from the record that Thomas attempted to testify to the accuracy of the AFC and that Lisa's attorneys were able to cross-examine Thomas about its contents. Accordingly, it appears that the district court relied upon the AFC because documentation supported it.⁶

Payments

Lisa argues that the district court erred in finding that Thomas provided Lisa "approximately" \$30,000 to pay community debts. We note that the district court order indicates that Thomas provided Lisa \$30,000 for community debt and support of the family from June 2000

⁶The district court again recalculated the community debt during Thomas's closing statements. The \$52,000 calculated debt included, in part, the following owed amounts: \$7,800 to City Bank, \$9,700 to First U.S.A., \$4,800 to MBNA, \$11,200 to U.S.A.A., \$500 to Capital One, \$3,500 to Clark County Credit Union Visa, \$2,000 to Clark County Credit Union for a signature loan, \$2,000 to Boulder Dam Credit Union for a signature loan, \$6,000 to the I.R.S., and \$3,400 to Silhouette for a makeup loan.

until March 2001. Lisa acknowledges that Thomas provided her approximately \$22,654 for payment of community debt and Lisa's own exhibits indicate that she received approximately \$7,200 in child support. We therefore discern no error in the court's determination that Thomas paid Lisa approximately \$30,000 for payment of community debt and support of the family.

We note, however, that Lisa's exhibits indicate that she received the majority of the ordered child support between June 2001 and February 2002. Thus, it appears that Lisa did not receive the entire \$30,000 until after March 2001. Therefore, it appears that the district court incorrectly stated the time frame during which Lisa received these sums. We conclude, however, that this error does not merit reversal.

Waste

Lisa argues that the district court abused its discretion by not finding that Thomas committed waste by paying child support or paying for necessities for the twins he fathered with his fiancée during the pendency of the divorce proceedings. Pursuant to NRS 125B.020, the parents of a child have a duty to provide the child necessary maintenance and support, and the father is also liable to pay the expenses of the mother's pregnancy and confinement.⁷ The trial transcript indicates that Thomas paid a portion of the expenses his fiancée incurred during her pregnancy. The trial transcript also indicates that Thomas has a child support obligation of \$950 per month for the twins, but he currently pays for the twins' necessities directly, rather than making child support payments, as his fiancée and the twins are currently living with him.

⁷NRS 125B.020(1) and (3).

Given Thomas's legal obligation set forth in NRS 125B.020, we conclude that the support Thomas provided to his fiancée while she was on bed rest and the support he provided for the twins after they were born does not constitute waste.

However, Lisa had a community property interest in Thomas's earnings until the entry of the divorce decree and the issue remains whether Thomas improperly used Lisa's share of the community property to provide support for his new family. Therefore, on remand, we direct the district court to determine Thomas's gross earnings from the time of separation until entry of the divorce decree, less federal income tax withholding, less his PERS contribution. Should Thomas's payments to Lisa be greater than one half of his net income, then Lisa is not an aggrieved party. If Thomas's payments to Lisa during this period is less than one half of his net income, then the district court must award the difference to Lisa.

Employment

Both parties contend that the other party was either willfully underemployed or unemployed throughout the proceedings below. In support of her position that Thomas was willfully underemployed, Lisa notes that upon his return to Nevada, Thomas accepted a position with the Nevada Attorney General's Office with a starting salary of approximately \$67,000, whereas Thomas previously earned approximately \$93,000 with the Federal Public Defender's Office in Tennessee. Thomas testified at trial that his supervisor at the Federal Public Defender's Office discovered that Thomas had overstated his expenses for an out-of-state trial, and gave Thomas the option to resign or be terminated. Thomas testified that, upon his resignation, he sought various positions in the public and private

sector, but all the available positions paid salaries ranging from \$50,000 to \$75,000 a year. Thomas also testified that he ultimately accepted a position with the Attorney General's Office with a starting salary of \$67,000, because the position allowed him to regain access to the PERS system in which he had already accumulated six years of credit. Given the starting salaries of the positions available to Thomas, we conclude that Thomas was not purposefully underemployed. In this, we note, that the circumstances under which he left his employment with the Federal Public Defender's Office may have significantly reduced Thomas's chances of obtaining a higher paying position.

Thomas contends that Lisa remained willfully unemployed throughout the divorce proceedings. During the proceedings below, Lisa maintained that various medical conditions limited the types of employment she could obtain. However, Lisa's attorney failed to enter into evidence a copy of Lisa's physical exam verifying these health conditions. As Lisa failed to present such evidence, we conclude that the district court did not abuse its discretion in refusing to grant Lisa interim support. We also conclude that the district court's award of alimony adequately addressed Lisa's other financial constraints including the lack of appropriate business attire and transportation.

Divorce decree

Lisa argues that the divorce decree fails to dissolve the parties' marriage. While the decree does not specifically provide that the bonds of marriage were dissolved, it does state that Thomas is "entitled to a decree of divorce" from Lisa. Additionally, the decree is entitled "FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE OF DIVORCE." We conclude that to the extent that the decree omits the

standard language adjudicating the actual divorce, the omission is a clerical rather than judicial error and subject to nunc pro tunc correction.⁸

Discovery

Lisa next argues that the district court abused its discretion by failing to compel Thomas to produce financial records requested by Lisa or, in the alternative, to hold such evidence as adverse to Thomas and preclude Thomas from testifying on any issues related to those documents. At trial, Thomas acknowledged that, during the pendency of the divorce, he would pay the couple's monthly bills and then throw away the creditors' statements. Thomas also testified that he did not produce documents for accounts he held jointly with Lisa because he assumed that she could acquire the documents herself. The district court concluded that Thomas failed to comply with Lisa's discovery requests, but that she was not ultimately harmed by this failure because she was able to acquire the statements by subpoena. We conclude that the district court committed no abuse of discretion in this regard.⁹ While Thomas failed to comply with Lisa's discovery request, the district court adequately compensated Lisa for the attorney fees and costs she incurred in acquiring the documents by subpoena.

⁸See Smith v. Epperson, 72 Nev. 66, 69-70, 294 P.2d 362, 363-64 (1956).

⁹Diversified Capital v. City N. Las Vegas, 95 Nev. 15, 23, 590 P.2d 146, 151 (1979).

Bias

Lisa next argues that she was denied her right to a fair and impartial trial because of the district court's bias against her. Lisa cites several examples of the district court's animus, including one instance in which the district court stated, "[Lisa is] a very smart woman. I don't have anything in the record that shows . . . she couldn't be working at a 7-Eleven, for example" Lisa takes issue with the district court's suggestion that she take a position as a clerk at a convenience store.

We admonish the district court from making such statements in the future. However, while this statement was inappropriate, our review of the record reveals no discernable bias warranting reversal.

[F]ew trials are totally devoid of inadvertent remarks or actions by a trial judge which may seem inappropriate The question is whether the trial umpire's misadventures are so pervasive and of such a magnitude that the trial ambiance is discernibly unfair to . . . [a party] . . . when viewed from the cold record on appeal.¹⁰

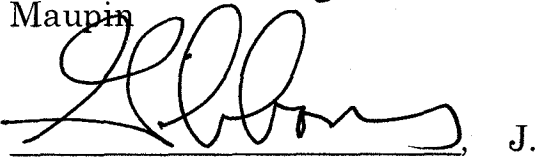
We conclude that this remark, albeit ill-advised, does not mandate reversal.

¹⁰McNair v. State, 108 Nev. 53, 62, 825 P.2d 571, 577 (1992).

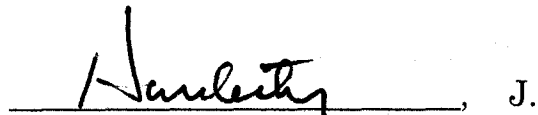
We have reviewed Lisa's other contentions, and conclude they lack merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

 J.

Maupin
 J.

Gibbons

 J.
Hardesty

cc: Hon. William O. Voy, District Judge, Family Court Division
Robin J. Barber
Gary E. Gowen
Thomas J. Gibson
Clark County Clerk