IN THE SUPREME COURT OF THE STATE OF NEVADA

SANDRA L. DELARGE,
Appellant,
vs.
GREGORY W. DELARGE,
Respondent.

No. 42690

FILED
APR 19 2006
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a final divorce decree. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

After a final decree of divorce, appellant Sandra DeLarge appealed to this court a discovery issue, the division of property, the award of alimony, and the restriction on the presence of Sandra's mother during Sandra's visitation with her children. For the reasons discussed below, we affirm most of the order of the district court, reversing only the award of the profit sharing plan, and remanding for the limited purpose of distributing the value of the plan between the parties as community property.

"This court reviews district court decisions concerning divorce proceedings for an abuse of discretion. Rulings supported by substantial evidence will not be disturbed on appeal."[1]

---

[1]Shydler v. Shydler, 114 Nev. 192, 196, 954 P.2d 37, 39 (1998) (citing Williams v. Waldman, 108 Nev. 466, 471, 836 P.2d 614, 617 (1992)).

06-08317

Discovery issue

Sandra argues that the district court erred by not permitting discovery of Plasma Etch, Inc. financial records. Under NRCP 26, discovery is permitted regarding "any matter, not privileged, which is relevant to the subject matter involved in the pending action." NRCP 34(c) provides that "[a] person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45," which enumerates the form, issuance, and service of subpoenas, as well as the protection of persons subject to subpoenas. Under NRCP 45(c)(1)(B), a person commanded to produce or permit inspection of documents may object in writing; thereupon the party serving the subpoena may not proceed without an order from the court. On a timely motion for such an order, the court "shall quash or modify the subpoena if it fails to allow reasonable time for compliance.[2]

At the hearing to discuss the subpoena, the district court noted that an objection had been filed to the motion to enforce, although the record is silent as to the form and service of the objection. However, the district court denied the motion to enforce the subpoena, and the pleadings and transcript of the hearing reveal just one passing mention of any of the pertinent procedural rules. Sandra's counsel cited NRCP 30(6) as permitting a party to depose a person to testify about relevant matters known to the corporation. There is never any mention of NRCP 45, even in the briefs to this court. In fact, Sandra's appellant brief and reply brief

---

[2]NRCP 45(c)(3)(A)(i). See also Humana Inc. v. District Court, 110 Nev. 121, 867 P.2d 1147 (1994) (denying a writ petition by a hospital that withheld medical records from discovery in spite of a subpoena; the hospital failed to make written objection as per NRCP 45).

are without citation to any relevant authority on the issue of enforcing a subpoena to discover relevant corporate documents. This court need not consider assignments of error where the appellant has not cited any authority in support of her contentions.[3]

Further, the record is silent as to why the trial was delayed just after the district court denied the motion to enforce the subpoena, and whether Sandra's counsel made any further attempts to have the court compel discovery or enforce the subpoena. "When evidence on which a district court's judgment rests is not properly included in the record on appeal, it is assumed that the record supports the lower court's findings."[4] Therefore, we conclude that the district court was within its discretion to deny the motion to enforce the subpoena.

Division of property

Under NRS 125.150(1)(b), a district court granting a divorce is to make an equal division of community property, but may make an unequal distribution "in such proportions as it deems just" if the district court sets forth in writing a compelling reason to do so.

The district court here noted that Sandra was requesting a "significant unequal distribution of the community assets," and provided a lengthy rationale for why some of Sandra's requests would not be accommodated. The district court then went on to divide the community property in a fashion that was not equal, but was, we conclude, equitable.

---

[3]Montes v. State, 95 Nev. 891, 897, 603 P.2d 1069, 1074 (1979).

[4]Stover v. Las Vegas Int'l Country Club, 95 Nev. 66, 68, 589 P.2d 671, 672 (1979).

Each party got the automobiles they already had, and Greg was ordered to pay Sandra an additional $12,000 to allow Sandra to purchase a reliable vehicle. One of the vehicles awarded to Greg was intended for the oldest daughter when she reached driving age. Each side was awarded the furniture in the house where they resided. Each side was to be responsible for their own debts after the date of separation; all debts from before the separation were allocated to Greg. Each party got a house, although it appears from the record that the district court misstated the value and equity of the house awarded to Sandra. Based on the figures presented at trial, Sandra got a house worth $330,000, not $359,000 as stated by the district court; with equity of $150,892, instead of $170,000 as stated by the district court. Greg got a house worth $460,000, with equity of $124,174.

While acknowledging the house valuation error by the district court, we nevertheless conclude that the division of the property mentioned above was equitable and supported by substantial evidence.

As to Greg's stock in the corporation, under NRS 123.130(2), property acquired during the marriage by the husband as a gift is his separate property, along with any profits from that property. There was substantial evidence at trial that the stock was a gift from Greg's parents. Sandra cites Schmanski v. Schmanski[5] for the proposition that stock given because of employment, not filial love, can be considered community property. However, in Schmanski, this court found a gift to one spouse that was thereafter placed into joint tenancy was presumed to be a gift to the community unless overcome by clear and convincing evidence. In that

---

[5]115 Nev. 247, 984 P.2d 752 (1999).

case, one spouse was given company stock by his father, then sold that stock and put the proceeds in a joint account with his wife. Later, money from that account was used to purchase new stock from the father's company, which the husband put into a trust in his name. This court affirmed the district court's finding that the later stock purchased was community property, since the funds for the purchase came from a joint account, and since the husband's opportunity to buy the stock was offered to other employees, not just the son of the company's owner.[6]

There was no evidence here of Greg's stock being placed into joint tenancy, nor was any evidence introduced to show that any employees other than Greg and his brother were given a chance to acquire stock, so the analysis from Schmanski does not apply. We conclude, therefore, that substantial evidence supports the district court's determination that the stock was Greg's separate property.

Sandra next claims that the district court erred in choosing the Van Camp v. Van Camp[7] analysis over the Pereira v. Pereira[8] analysis for determining the community interest in the increase in the value of Greg's interest in the corporation. "[T]he increase in the value of separate property during marriage should be apportioned between the separate property of the owner and the community property of the spouses."[9] This court has approved two different methods of apportioning that increase,

---

[6]Id. at 250-51, 984 P.2d at 754-55.

[7]199 P. 885 (Cal. Ct. App. 1921).

[8]103 P. 488 (Cal. 1909).

[9]Johnson v. Johnson, 89 Nev. 244, 246, 510 P.2d 625, 626 (1973).

presuming that the increase is at least partly due to "the labor, skill and industry of one or both spouses."[10]

The district court judge used the Van Camp method, citing its discretion to choose based on achieving substantial justice. The district court correctly cited Wells v. Bank of Nevada,[11] where this court upheld use of the Van Camp method and a district court's finding that, as here, the community was fully compensated for the services of the husband through his substantial salary and benefits, and noting that the wife did not present evidence to establish otherwise.[12]

We conclude that first, it was within the discretion of the district court to choose the method for analyzing apportionment, and second, that substantial evidence supported the district court's conclusion that the community had been fully compensated for Greg's labor by Greg's salary and benefits.

As to the patent developed by Greg and his father during Greg's marriage to Sandra, if the patent is considered the separate property of Greg, he may convey it without Sandra's consent,[13] but if it is considered community property, he may not convey it without Sandra's express or implied consent.[14]

---

[10]Id.

[11]90 Nev. 192, 522 P.2d 1014 (1974).

[12]90 Nev. at 196, 522 P.2d at 1016.

[13]NRS 123.170.

[14]NRS 123.230(2).

There was testimony that the patent was developed not just by Greg, but by Greg and his father. No evidence was presented to establish a value of the patent; Sandra's attorney questioned Greg about it, but he had no information about the possible value of the patent to the company. Greg testified that he did not receive any money from the corporation for signing the patent over, nor was the value of the patent, and its inclusion as part of the community, argued to the district court below.

We conclude, therefore, that it was within the discretion of the district court to not include the patent or its value in the division of community property.

Finally, Sandra alleges error by the district court in allocating to Greg his entire profit-sharing account, contending that as a benefit given to Greg due to his employee status, it should be equally divided as community property. Under NRS 123.220, property "acquired after marriage by either husband or wife, or both, is community property unless otherwise provided by [written agreement of the parties]." There is a presumption that all property acquired during the marriage is community property, and the burden is on the party claiming it as separate property to show that by clear and convincing evidence.[15] "Generally, retirement benefits are divisible as community property to the extent that they are based on services performed during the marriage, whether or not the benefits are presently payable."[16]

---

[15]Milisich v. Hillhouse, 48 Nev. 166, 170, 228 P. 307, 308 (1924); Barrett v. Franke, 46 Nev. 170, 177, 208 P. 435, 437 (1922).

[16]Forrest v. Forrest, 99 Nev. 602, 607, 668 P.2d 275, 279 (1983).

There was evidence that Greg's profit-sharing plan was intended as a retirement account. The district court did not explain its decision to award the profit-sharing account to Greg as separate property.

Although no law is cited by Sandra as to the proper division of a husband's retirement account accrued during the marriage, we conclude that the district court erred in awarding the entire value of the account to Greg as separate property, since it was established and accrued during the marriage, and Greg did not present evidence to rebut that presumption.

Alimony

"Alimony is an equitable award serving to meet the post-divorce needs and rights of the former spouse."[17] Its primary purposes, "in marriages of significant length, are to narrow any large gaps between the post-divorce earning capacities of the parties, and to allow the recipient spouse to live 'as nearly as fairly possible to the station in life [ ] enjoyed before the divorce.'"[18]

Under NRS 125.150(1)(a), a district court may award such alimony as appears "just and equitable." A district court determining alimony should consider the "individual circumstances of each case,"[19] and "the conditions in which the parties will be left by the divorce."[20] The factors to be considered in determining appropriate alimony are:

---

[17]Shydler, 114 Nev. at 198, 954 P.2d at 40.

[18]Id., (quoting Sprenger v. Sprenger, 110 Nev. 855, 860, 878 P.2d 284, 287-88 (1994)); other internal citations omitted.

[19]Id.

[20]Id. at 196, 954 P.2d at 39.

> [T]he financial condition of the parties; the nature and value of their respective property; the contribution of each to any property held by them as tenants by the entirety; the duration of the marriage; the husband's income, his earning capacity, his age, health and ability to labor; and the wife's age, health, station and ability to earn a living.[21]

The alimony award by the district court contains references to all of the above factors. The primary factors disputed in this case were the husband's income and the wife's age, health and ability to earn a living. Initially, we conclude that there was substantial evidence in the record to support the district court's determination that Greg's salary had dropped in recent years, due primarily to economic factors in the high-tech industry.

As to Sandra, although the district court seemed to imply that Sandra's mental health issues would not be addressed by the award of alimony and the property division, the district court did in fact make a generous award to Sandra of both property and alimony. The district court heard evidence from several mental health professionals that some of Sandra's issues manifested in such a way as to make it difficult for her to seek or complete treatment. The alimony award evidences recognition that it would take Sandra some time before she would be making a significant income, although the district court noted that "Sandra is capable of making an income, and must do so." The district court further stated that "[t]he support established will require Sandra to reduce her expenses and seek employment."

---

[21]Buchanan v. Buchanan, 90 Nev. 209, 215, 523 P.2d 1, 5 (1974).

We conclude, therefore, that there was substantial evidence to support the district court's award of alimony.

Visitation restrictions

Custody determinations, such as those regarding visitation, rest in the sound discretion of the district court.[22] "It is presumed that a trial court has properly exercised its discretion in determining a child's best interest."[23] NRS 125C.050(4) creates a rebuttable presumption that when a parent of a child denies or unreasonably restricts visitation with a person, it is in the child's best interest to not have visitation with that person.[24]

Greg expressed a strong desire that the children's contact with Sandra's mother, Nancy, be restricted or at least supervised. There was substantial evidence that Nancy did not have a good relationship with the children, and that her presence negatively impacted Sandra's relationship with her children. This evidence came from the children, Greg, Sandra, and several of Sandra's mental health professionals.

We find that Sandra did not present sufficient evidence to rebut the presumption that Greg's restrictions on visitation with Sandra's mother was in the best interest of the children. We conclude, therefore, that the district court did not abuse its discretion in permitting Greg to

---

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

[23]Id.

[24]See also Steward v. Steward, 111 Nev. 295, 303-04, 890 P.2d 777, 782 (1995) (interpreting an earlier version of the statute, NRS 125A.340).

restrict Nancy's visitation with the children, and to order that she not be present during Sandra's visitation with the children.

In summary, we find no merit to Sandra's assignments of error by the district court with the exception of the failure to distribute the profit sharing plan as a community asset. 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.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Michael R. Griffin, District Judge
Allison W. Joffee
Kathleen T. Price
Carson City Clerk