IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY MOORE,
Appellant,
vs.
PHYLLIS M. KIRKPATRICK,
Respondent.

No. 45315

FILED

FEB 21 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order setting aside a portion of a divorce decree. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Appellant Jerry Moore appeals a district court order granting respondent Phyllis Kirkpatrick's NRCP 60(b) motion in part to set aside a portion of the divorce decree. Specifically, Jerry asserts that the district court erred by (1) setting aside the property division portion of the divorce decree, particularly as it concerns Phyllis's Public Employees Retirement System (PERS) pension benefits, based on mutual mistake and the doctrine of impossibility; (2) "nullifying" congressional intent by taking action already preempted by the Employee Retirement Income Security Act (ERISA); and (3) finding that Jerry had adequate notice of Phyllis's motion, despite Phyllis's failure to follow a local court rule, and that Jerry waived any procedural concerns by filing a timely opposition to the motion. Phyllis asserts that the district court did not abuse its discretion by setting aside the property division based on mutual mistake and the doctrine of impossibility; however, Phyllis does not respond to Jerry's other arguments.

NRCP 60(b) motion

Jerry argues that the district court erred by granting Phyllis' NCRP 60(b) motion to set aside the property division portion of the divorce decree based on mutual mistake and the doctrine of impossibility.

Determining motions filed under NRCP 60(b) is within the sound discretion of the district court; this court will not disturb the district court's decision absent an abuse of discretion.[1]

Following a hearing on Phyllis's NRCP 60(b) motion, the district court determined that both Phyllis and Jerry had mistakenly relied on a November 2004 letter from PERS, which inaccurately suggested that Jerry could relinquish his status as a beneficiary of Phyllis's PERS benefits. We have previously ruled that a district court is permitted to modify or set aside a decree of divorce for reasons set forth by a rule or statute.[2] NRCP 60(b) permits a district court to relieve a party from a final judgment or order for mistake. Accordingly, we conclude that, under the facts presented, the district court did not abuse its discretion when it set aside the property division portion of the divorce decree on the basis of mutual mistake.[3]

---

[1]Carlson v. Carlson, 108 Nev. 358, 361, 832 P.2d 380, 382 (1992) (citing Heard v. Fisher's & Cobb Sales, 88 Nev. 566, 568, 502 P.2d 104, 105 (1972)).

[2]Lam v. Lam, 86 Nev. 908, 909, 478 P.2d 146, 147 (1970).

[3]The district court also cited the doctrine of impossibility as an alternative basis for setting aside the property division portion of the divorce decree. Nonetheless, even if the district court erred by citing the doctrine of impossibility, we determine that the error was harmless because the district court properly set aside the property division under NRCP 60(b). See Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 403, 632 P.2d

continued on next page . . .

Federal preemption

Jerry also argues that the district court erred by issuing an order related to Phyllis's PERS benefits, which he asserts is preempted by ERISA.

"The question of whether particular state action is preempted by federal law involves interpreting the language of the statute in accordance with congressional intent."[4] To avoid ERISA preemption, "[a] claim must exist even without . . . failure to pay [the] benefit."[5]

Phyllis's claim concerns the agreement the parties made, when drafting the divorce decree, that Jerry would relinquish his status as beneficiary to her PERS benefits, and whether the parties' reliance on the inaccurate PERS letter constituted a mutual mistake. This claim exists regardless of whether there is a failure to pay Phyllis's PERS benefits. Consequently, Phyllis's claim is not preempted by federal law and the district court did not encroach upon an area fully occupied by federal law.[6]

. . . *continued*

1155, 1158 (1981) (stating that "[i]f a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons").

[4]Marcoz v. Summa Corporation, 106 Nev. 737, 741, 801 P.2d 1346, 1348-49 (1990) (citing Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985)).

[5]Serpa v. SBC Telecommunications, Inc., 318 F. Supp. 2d 865, 871 (2004).

[6]See Marcoz, 106 Nev. at 741, 801 P.2d at 1348-49.

Adequate notice and waiver

Finally, Jerry contends that the district court erred when it found that he had adequate notice of Phyllis's NRCP 60(b) motion, despite Phyllis's failure to follow a local court rule, and that he had waived any procedural concerns by filing a timely opposition to the motion.

"On appeal, this court will not disturb a district court's findings of fact if they are supported by substantial evidence."[7] "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion."[8]

In addition to filing a timely opposition to Phyllis's motion, Jerry also appeared at the hearing on the motion and argued his substantive and procedural concerns. Therefore, we conclude that the district court's findings that Jerry had adequate notice of Phyllis's motion and that he waived his procedural concerns by filing a timely opposition are supported by substantial evidence.[9]

For the reasons stated above, we conclude that the district court did not err or abuse its discretion when it set aside the property

---

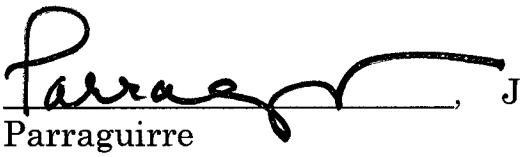
[7]Keife v. Logan, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003).

[8]Bongiovi v. Sullivan, 122 Nev. ___, ___, 138 P.3d 433, 451 (2006) (citing First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990)).

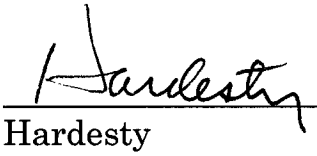
[9]Mill-Spex, Inc. v. Pyramid Precast Corp., 101 Nev. 820, 822, 710 P.2d 1387, 1388 (1985) ("A waiver may be implied from conduct which evidences an intention to waive a right, or by conduct which is inconsistent with any other intention than to waive the right.").

division portion of the divorce decree. Accordingly, we affirm the district court order setting aside a portion of the divorce decree.

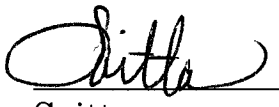
It is so ORDERED.



_____, J.
Parraguirre



_____, J.
Hardesty



_____, J.
Saitta

cc: Hon. Cheryl B. Moss, District Judge, Family Court Division
E. Paul Richitt Jr., Settlement Judge
Mark A. Jenkin
Law Offices of John P. Lukens
Eighth District Court Clerk