IN THE SUPREME COURT OF THE STATE OF NEVADA

RAY EAST,
Appellant,
vs.
LINDA EAST,
Respondent.

No. 48834

FILED

DEC 27 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court divorce decree. Third Judicial District Court, Churchill County; Wayne A. Pederson, Judge.

After approximately nine years of marriage, appellant Ray East and respondent Linda East were granted a divorce. Under the divorce decree, the parties were awarded joint legal custody of their two minor children, with respondent having primary physical custody and appellant having liberal visitation. Appellant was ordered to pay child support in the amount of $801.67 per month based on the statutory formula. The district court also determined that respondent was entitled to $9,705 as her interest in appellant's Public Employees' Retirement System (PERS) account. Appellant has appealed.

This court reviews divorce proceedings for abuse of discretion, and we will uphold a district court's rulings supported by substantial

07-28145

evidence.[1] Substantial evidence is that which a sensible person may accept as adequate to sustain a judgment.[2]

On appeal, appellant contends that the district court erred when it failed to award the parties joint physical custody of the children without making specific findings of fact. Moreover, appellant contends that the district court abused its discretion when it awarded respondent primary physical custody of the parties' minor children, with appellant having liberal visitation, when the court had awarded the parties temporary shared custody during the pendency of the divorce proceeding based on their oral agreement.

Matters of custody, including visitation, rest in the district court's sound discretion.[3] This court will not disturb the district court's custody decision absent a clear abuse of discretion.[4] In determining child custody, the court's sole consideration is the child's best interest.[5] "If it appears to the court that joint custody would be in the best interest of the child, the court may grant custody to the parties jointly."[6]

Here, the record shows that the parties did indeed agree to a shared custody arrangement while the divorce proceedings were pending.

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[1]Kerley v. Kerley, 111 Nev. 462, 893 P.2d 358 (1995).

[2]Schmanski v. Schmanski, 115 Nev. 247, 251, 984 P.2d 752, 755 (1999).

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

[4]Sims v. Sims, 109 Nev. 1146, 865 P.2d 328 (1993).

[5]NRS 125.480(1).

[6]Id.

The district court noted during a hearing on the matter that the temporary custody arrangement would "remain in effect only until such time as the matter is actually litigated." Thereafter, in the divorce decree, the district court expressly found that it was in the children's best interests for respondent to have primary physical custody. As substantial evidence supports the district court's child custody award, the court did not abuse its discretion.

Appellant also challenges the portion of the divorce decree concerning child support. In particular, appellant contends that because the parties should have been awarded shared physical custody, the district court applied the wrong standard. Specifically, appellant insists that the district court was required to apply the Wright v. Osburn[7] standard. Moreover, appellant contends that the district court should have deviated from the NRS 125B.070 formula because appellant is responsible for the cost of the children's health insurance, he has another child from another relationship that he is financially responsible for, and the income of the parties is significantly different.[8]

This court reviews a district court's child support order for an abuse of discretion.[9] Parents have a duty to provide support for their children.[10] NRS 125B.070(1)(b)(2) provides that child support for two

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[7]114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998) (setting forth a formula for determining child support when custody is shared equally and there is a disparity in income between the parents).

[8]See NRS 125B.080(9)(a), (e), & (l).

[9]Wallace, 112 Nev. at 1019, 922 P.2d at 543.

[10]NRS 125B.020.

children is 25% of a parent's gross monthly income. In addition, under NRS 125B.080(9), the district court must consider other factors if it adjusts the amount of child support.[11]

Here, because the parties do not share joint physical custody, the district court was not required to apply the Wright v. Osburn standard. Instead, the district court properly relied on the statutory child support formula under NRS 125B.070, and the court did not make any adjustments, and thus, it was not required to consider the factors under NRS 125B.080(9).

In the divorce decree, according to the district court, appellant "represented" that his gross monthly income was $3,206.66; twenty-five percent of that amount is $801.67. The record shows, however, that at the time of the divorce proceedings, appellant earned $18.33 per hour, or $3,177.20 per month, twenty-five percent of which is $794.03. Thus, the district court abused its discretion when it calculated appellant's statutory child support obligation, and we reverse that portion of the divorce decree and remand the matter to the district court for further consideration.

Appellant further contends that the district court abused its discretion when it made an unequal distribution of community property, without stating a compelling reason for doing so. Specifically, appellant contends that the district court erred by declining to find that respondent committed waste by allegedly using $92,000 of community funds to gamble

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[11]See Hoover v. Hoover, 106 Nev. 388, 389, 793 P.2d 1329, 1330 (1990) (recognizing that when a district court applies the child support formula under NRS 125B.070, it may make "equitable adjustments" to the amount of support based on the factors under NRS 125B.080(9)).

during the marriage, but the court considered appellant's $13,000 use of community funds to hire a private investigator to establish whether respondent was gambling.

NRS 125.150(1)(b) provides that while the district court must make an equal disposition of community property to the extent practicable, it may make an unequal distribution if it finds, and states in writing, compelling reasons for doing so. Moreover, this court will not substitute its own evaluation of the evidence for that of the district court when the district court had an opportunity to hear the witnesses and judge their demeanor.[12]

Here, the district court found that appellant failed to establish, based on ATM charges from the parties' bank records, that respondent gambled more than $92,000 during the marriage.[13] Moreover, the court noted in the divorce decree that respondent would receive approximately $10,000 more in equity for the Fallon residence, and that that amount was to be offset by the $9,705.68 interest respondent was entitled to in appellant's PERS account. As to the $294.32 balance respondent owed to appellant, the district court concluded that in light of appellant's testimony admitting the $13,000 expenditure on the investigator, respondent did not owe appellant any additional amount in

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[12]Kobinski v. State, 103 Nev. 293, 296, 738 P.2d 895, 897 (1987); see also Williams v. Williams, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004) (recognizing that it is the role of the fact finder to determine the credibility of witnesses and weigh the evidence).

[13]During the divorce proceedings, respondent testified that she has gambled, but she did not admit that she was responsible for using $92,000 in community funds to gamble.

equity. Thus, the district court did not abuse its discretion (1) when it found that appellant failed to establish that respondent used $92,000 of community funds to gamble during the marriage, and (2) when the court explained its unequal distribution of community property in appellant's favor.

Lastly, appellant contends that the district court erred when it entered an order distributing appellant's PERS retirement account, rather then entering a qualified domestic relations order as to the pension.[14] Under NRS 125.155(1)(a), the district court may make a determination of value of a PERS account based on the employee's contribution years and interest received, beginning on the date of the marriage and ending on the date the divorce decree is entered. The statute further authorizes the district court to make a distribution of a PERS pension.[15]

Here, the district court determined that appellant's PERS account contained approximately $62,617, of which the marital contribution to the account was two years, or 31%. Thirty-one percent of $62,617 is approximately $19,411, and the district court determined that respondent's community interest in that amount was $9,705. Thus, as the statute authorizes the district court to make a community property

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[14]In his fast track statement, appellant cites to Sertic v. Sertic, 111 Nev. 1192, 901 P.2d 148 (1995), to support this contention, but he does not offer any analysis related to the case. See Browning v. State, 120 Nev. 347, 361, 91 P.3d 39, 50 (2004) (recognizing that an appellant must provide this court with "cogent argument, legal analysis, or supporting factual allegations").

[15]NRS 125.155. The district court noted that respondent also has a PERS pension, but the account has not yet vested.

distribution from appellant's PERS account and the court's calculation awarding respondent $9,705 is supported by substantial evidence, the district court did not abuse its discretion when it awarded respondent a community distribution in appellant's PERS account.

Based on the above discussion, we affirm the portions of the divorce decree concerning child custody, and the distribution of community assets and the PERS account. We reverse the portion of the decree concerning child support and remand the matter to the district court for further consideration.

It is so ORDERED.

_____, C.J.
Maupin

_____, J.
Hardesty

_____, J.
Cherry

cc: Third Judicial District Court Dept. 2, District Judge
Carolyn Worrell, Settlement Judge
Victoria S. Mendoza
James F. Sloan
Churchill County Clerk