IN THE SUPREME COURT OF THE STATE OF NEVADA

NAN B. MILLEN,
Appellant,
vs.
RICHARD D. MILLEN,
Respondent.

No. 50421

FILED

MAY 29 2009

TRACIE K. LINDEMAN
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 and a post-judgment order denying a new trial. Eighth Judicial District Court, Family Court Division, Clark County; N. Anthony Del Vecchio, Judge.

On appeal, appellant Nan Millen challenges the district court's property division in addition to several other aspects of the district court's decree of divorce. For the following reasons, with the exception of her claim to certain items of her uncontested separate personal property, we conclude that each of Nan's challenges on appeal fails. We therefore affirm in part and reverse in part and remand this matter to the district court to clarify its disposition of Nan's separate personal belongings. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Valuation of marital residence

Despite stipulating to its use, sharing payment, and not objecting to its admission, Nan challenges the district court's use of a joint appraisal of the marital residence from a licensed appraiser because the appraisal allegedly undervalued the home.

While the joint appraisal was less than the online appraisal obtained by Nan's counsel, the parties' own estimates, and Nan's independent post-trial appraisal, which purported to account for, among

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other things, the home's view, it was roughly consistent with an official appraisal conducted in 2005 and, as the district court observed, "appear[ed] to adequately reflect the downward trend the Nevada real estate market has experienced in the past year or two."[1]

Given the parties' prior stipulation, cf. Nelson v. Heer, 123 Nev. 217, 227 n.28, 163 P.3d 420, 427 n.28 (2007) (refusing to disturb the admission of a stipulated exhibit), and considering its consistency with past official appraisals, its apparent neutrality, and appearance of reasonable accuracy, we are not persuaded that using the joint appraisal to value the marital residence was improper. Accordingly, we fail to discern palpable abuse in denying Nan a new trial based on her independent post-trial appraisal or personal estimate of the home's fair market value.[2] Id. at 223, 163 P.3d at 424-25.

Separately, we reject Nan's claim that she was unfairly surprised by the results of the joint appraisal. Notably, instead of stipulating to a joint appraisal only weeks before trial, and risk being bound to an unsatisfactory result, Nan could have obtained her own

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[1]To the extent that the district court's reliance on its general knowledge of the real estate market in denying Nan's motion for a new trial was improper, we conclude that this reliance was harmless in light of the parties' stipulation to derive fair market value from the joint appraisal. See NRCP 61.

[2]Although Nan cites Carlson v. Carlson, 108 Nev. 358, 832 P.2d 380 (1992) in support of reversal, that case is distinguishable because, here, the parties jointly commissioned the appraisal, shared costs, and stipulated to its use as an impartial assessment of fair market value, and therefore, accepted its conclusiveness for purposes of trial. See Nelson, 123 Nev. at 227 n.28, 163 P.3d at 427 n.28.

competing appraisal. Moreover, while she expressed "reservations" about the joint appraisal's results, Nan wholly failed to oppose its admission. Given the patent risks of stipulating to a joint appraisal so late in litigation, and her failure to seek to have the stipulation set aside during trial, we conclude that Nan failed to demonstrate unfair surprise within the meaning of NRCP 59(a). See Havas v. Haupt, 94 Nev. 591, 593, 583 P.2d 1094, 1095 (1978) ("'[S]urprise' contemplated by NRCP 59(a) [entails a] situation in which a party is placed unexpectedly, to his injury, without any default or negligence of his own, and which ordinary prudence could not have guarded against.").

Separate property reimbursements

Nan claims that her ex-husband, Richard, was improperly allowed to recoup his down payments on the marital residence and cabin as those properties were placed in joint tenancy during the marriage. We disagree.

Although Nan claims that Richard presumptively forfeited his down payments as community gifts by placing the properties in joint tenancy, see Schmanski v. Schmanski, 115 Nev. 247, 250, 984 P.2d 752, 755 (1999) ("[S]eparate property placed into joint tenancy is presumed to be a gift to the community unless the presumption is overcome by clear and convincing evidence."), NRS 125.150(2) allows for reimbursement of separate contributions to joint tenancy property, and specifically includes down payments traceable to separate funds.

Based on the limited record on appeal, which notably fails to include any portion of the trial transcript, we decline to disturb the district court's ruling allowing Richard "to back out his separate funds he paid to

obtain both properties," because we must presume that the record contains clear and convincing evidence to overcome the gift presumption.[3] See Hampton v. Washoe County, 99 Nev. 819, 821 n.1, 672 P.2d 640, 641 n.1 (1983) ("If the record is insufficient to allow review of a lower court's decision, we will presume the lower court acted correctly.").

Uncontested separate personal property

Although Nan filed several inventories of her uncontested separate personal property located within the marital residence, the divorce decree ignored these inventories and instead awarded Nan "[a]ll personal property, jewelry, furs, and other belongings already divided by the parties and presently in [her] possession." (Emphasis added.) Because only part of Nan's personal belongings had been removed and placed in storage, this ruling appears to neglect the inventoried items remaining in the marital residence. We therefore remand this matter to the district court to clarify the disposition of this property.

Conclusion

Based on the above, with the exception of the challenge regarding her uncontested separate property still within the martial residence, the status of which should be clarified by the district court on

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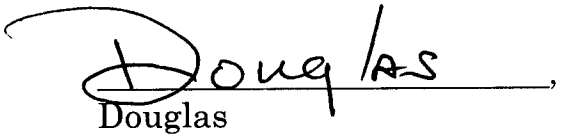
[3]For the same reasons, to the extent that Nan challenges these reimbursements as part of an unequal distribution of property made without the requisite findings, see NRS 125.150(1)(b), we must presume that a compelling reason existed for the division. See Schouweiler v. Yancey Co., 101 Nev. 827, 831, 712 P.2d 786, 789 (1985) (presuming that the denial of excess expert witness fees was correct, despite the absence of express findings of fact or conclusions of law, where trial transcript was not part of the record on appeal).

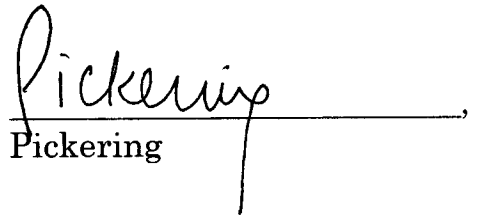
remand, we conclude that each of Nan's arguments on appeal fails.[4] Accordingly, we

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.
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

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[4]Separately, we decline to disturb the district court's additional award of attorney fees in Richard's favor, the denial of Nan's request for suit money to cover her litigation expenses, and the district court's refusal to award Nan continued spousal support. All three decisions are purely discretionary, see NRS 125.150(3); NRS 125.040(1); NRS 125.150(1)(a), and we must assume that these rulings were proper absent relevant transcripts and a record of the district court's reasoning that might reveal otherwise. See Hampton, 99 Nev. at 821 n.1, 672 P.2d at 641 n.1. Moreover, from what can be gleaned from the post-trial order denying Nan's motion for a new trial, the additional award of attorney fees in Richard's favor was supported by a finding that Nan was defending this divorce action in bad faith given, among other things, her attempt to have Richard killed during the pendency of these proceedings. See NRS 18.010(2)(b); Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 996, 860 P.2d 720, 724 (1993).

cc: Eighth Judicial District Court Dept. K, District Judge, Family Court Division
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