IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LEE DAVID HUSTEAD,
Appellant,
vs.
MARJORIE L. HUSTEAD,
Respondent.

No. 71773

LEE DAVID HUSTEAD,
Appellant,
vs.
MARJORIE L. HUSTEAD,
Respondent.

No. 71872

ORDER OF REVERSAL AND REMAND (DOCKET NO. 71773) AND AFFIRMING IN PART AND DISMISSING APPEAL IN PART (DOCKET NO. 71872)

Lee David Hustead appeals from post-divorce-decree district court orders denying a motion to modify alimony payments (Docket No. 71773), and denying a motion to recover overpayments and modifying the division of Lee's retirement account under the decree (Docket No. 71872). These appeals are not consolidated. Second Judicial District Court, Family Court Division, Washoe County; Cynthia Lu, Judge.

Lee and respondent Marjorie Hustead divorced in 2005. As part of this process, the parties' marital settlement agreement (MSA), which included a provision for alimony whereby Lee was to pay Marjorie $2000 per month, was incorporated and merged into the decree of divorce. The

MSA also contained a non-modifiability clause, stating the amount of alimony was specifically bargained for and is not modifiable for any reason, no matter the economic situation of the parties.

The MSA also provided for the division of Lee's General Electric Pension Plan (GE retirement). Section 3.1 of the MSA awards Marjorie 50 percent of the marital portion of Lee's GE retirement pursuant to Section 4.2. However, Section 4.2 of the MSA dictates that Marjorie was awarded 25 percent of Lee's monthly allowance of his GE retirement. The MSA also states that, in the event of a divorce, the parties would obtain a Qualified Domestic Relations Order (QDRO) to divide Lee's GE retirement. But upon their divorce, the parties did not obtain a QDRO. Instead, Lee simply paid Marjorie 25 percent of his monthly GE retirement. It was not until the parties attempted to have a QDRO issued, approximately 10 years after the entry of the decree, that the parties discovered the terms of Sections 3.1 and 4.2 of the MSA were inconsistent as to the amount Lee was to pay Marjorie. The parties do not dispute that the MSA was merged into the decree of divorce.

In January 2016, Lee filed a motion to compel disclosure of certain financial information and to modify alimony, arguing that there was a change in circumstances as his income had changed by more than 20 percent. Lee further asserted that, under these circumstances, he was entitled to a disclosure of Marjorie's financial status. The district court rejected Lee's requests, however, concluding that the terms of the MSA provided that alimony was non-modifiable. As a result, the district court denied Lee's motion.

Around the same time, Lee also filed a motion to recover overpayments made in lieu of a QDRO, arguing that he had overpaid Marjorie because he paid her 25 percent of his monthly GE retirement, rather than paying her 50 percent of the marital portion as Section 3.1 of the MSA required. Marjorie opposed the request and sought the issuance of a QDRO awarding her 25 percent of Lee's monthly GE retirement, or in the alternative, 50 percent of the marital portion of the GE retirement. The district court concluded that the parties agreed in the MSA to Marjorie receiving 25 percent of Lee's monthly GE retirement, as evidenced by their compliance with that provision for nearly 10 years following the entry of the decree. However, the district court also concluded that, upon the ensuing litigation over the terms of the QDRO, the parties stipulated to modify the award, granting Marjorie 50 percent of the marital portion of Lee's GE retirement going forward. These appeals followed.

Docket No. 71773

We first address Lee's appeal from the order denying his motion to reduce his alimony payments. This court reviews the division of community property and alimony awards for an abuse of discretion. *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996). Additionally, this court will affirm the district court if it applied the correct legal standard and its ruling is supported by substantial evidence. *Doan v. Wilkerson*, 130 Nev. 449, 453, 327 P.3d 498, 501 (2014). But the district court's construction and interpretation of its divorce decree presents a question of law that we review de novo. *Henson v. Henson*, 130 Nev. ___, ___, 334 P.3d 933, 936 (2014).

It is true that parties to family law cases are free to contract and this court will enforce contracts so long as the terms are not unconscionable, illegal, or against public policy. *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009). And when a property settlement agreement is not merged into a decree of divorce, general contract principles apply. *Wallaker v. Wallaker*, 98 Nev. 26, 27, 639 P.2d 550, 550 (1982).

However, once an agreement is adopted by the trial court and merged into the decree, the agreement loses its independent existence and the parties' rights rest solely upon the decree. *Day v. Day*, 80 Nev. 386, 389, 395 P.2d 321, 322 (1964); *see also Rush v. Rush*, 82 Nev. 59, 60, 410 P.2d 757, 757-58 (1966) (explaining that when the agreement and the decree each direct that the agreement is to survive the decree, subsequent litigation rests upon the agreement because the parties' rights flow from the agreement rather than the decree approving it). Here, the parties agree that their MSA was merged into the decree of divorce. Therefore, the MSA lost its independent nature as a contract and the parties' rights rest solely upon the decree.

A decree of divorce cannot be modified except as provided by rule or statute. *Kramer v. Kramer*, 96 Nev. 759, 761, 616 P.2d 395, 397 (1980). And here, NRS 125.150(8) expressly allows the district court to

modify alimony awards in certain circumstances.[1] As a result, we conclude that the district court improperly relied on contract principles to deny Lee's motion to reduce his alimony payments. Accordingly, we reverse that decision and remand this matter for the district court to determine whether a modification of alimony is warranted under NRS 125.150(8).[2]

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[1]Marjorie concedes that *Day* is binding legal precedent, but asserts we should clarify or overrule it as its holding is arbitrary and renders NRS 123.080, which addresses contracts altering married couples' legal relations and separation agreements, meaningless. To the extent Marjorie asks us to overrule *Day*, we are bound by that decision and lack authority to do so. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (explaining that principles of stare decisis require lower courts to adhere not only to the holdings of higher courts, but also their reasoning). Nonetheless, we note that Marjorie's arguments on this point are grounded in the erroneous assertion that *Day* holds that alimony agreements are *per se* modifiable, thereby barring non-modifiability clauses and rendering NRS 123.080 meaningless. But this is not what *Day* holds. Instead, *Day* recognizes that, under Nevada case law, once the MSA is merged into the decree, the MSA loses its independent nature as a contract. 80 Nev. at 389, 395 P.2d at 322. However, as noted above, where the agreement and the decree each direct that the agreement survives the decree, any subsequent controversy over the terms is governed by the agreement. *Ballin v. Ballin*, 78 Nev. 224, 230-31, 371 P.2d 32, 35-36 (1962). And here, the parties could have taken the steps outlined in *Ballin* to ensure that their MSA, including the non-modification provisions, survived the decree, but they simply failed to do so.

[2]The district court also denied Lee's request for post-judgment discovery in light of its erroneous conclusion that the alimony terms were not modifiable under contract principles. Because we reverse the denial of the motion to modify alimony payments, we likewise reverse the district court's denial of Lee's request for post-judgment discovery and direct the court to reconsider this request on remand.

Docket No. 71872

Second, we address Lee's appeal of the order denying his motion to recover overpayments made in lieu of a QDRO and modifying the award going forward based on the parties' stipulation. As noted above, we review the district court's construction and interpretation of its divorce decree de novo. *Henson*, 130 Nev. at ___, 334 P.3d at 936.

Pursuant to the terms of the MSA, which were merged into the decree of divorce, Lee paid Marjorie 25 percent of his monthly GE retirement for approximately 10 years. When Marjorie later attempted to obtain a QDRO, Lee discovered that the MSA also indicated he would pay a lower amount, 50 percent of the marital portion of his GE retirement. Below, Lee sought reimbursement for the amount he asserted he overpaid Marjorie (the difference between 25 percent of his monthly retirement and 50 percent of the marital portion). Marjorie opposed that request, arguing that Lee did not overpay as she was entitled to 25 percent of Lee's monthly portion pursuant to Section 4.2 of the MSA.

On appeal, as he did below, Lee agrees that he voluntarily paid Marjorie 25 percent of his monthly GE retirement, although he maintains that this was because he thought that was the correct amount and did not realize the MSA included inconsistent provisions. But after discovering there were inconsistent provisions, he contends that the provision providing Marjorie 50 percent of the marital portion, rather than the provision he had based his payments on, is the correct provision and therefore he is entitled to recover the amount he overpaid for approximately 10 years.

Because Section 3.1 of the MSA awarded Marjorie 50 percent of the marital portion of the GE retirement, while Section 4.2 awarded Marjorie 25 percent of Lee's monthly GE retirement allowance, an ambiguity exists as to the amount Marjorie was to receive under the decree. *Mizrachi v. Mizrachi*, 132 Nev. ___, ___, 385 P.3d 982, 987 (Ct. App. 2016) (explaining that a provision in a divorce decree "is ambiguous if it is capable of more than one reasonable interpretation" (internal quotation marks omitted)). When interpreting an ambiguity in a decree of divorce, this court must determine the district court's intent, and may examine the record as a whole and the surrounding circumstances to do so. *Id.* at ___, 385 P.3d at 988. Further, when interpreting an ambiguity in an agreement-based decree, the court must consider the intent of the parties in entering into the underlying agreement. *Id.* at ___, 385 P.3d at 989; *see also Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003) (stating that the best approach when interpreting an ambiguity in a decree is to go beyond the express terms and examine the surrounding circumstances to "determine the true mutual intentions of the parties" (internal quotation marks omitted)).

Based on our review of the record, we agree with the district court that the decree intended to give effect to the parties' agreement and that the parties intended to provide Marjorie with 25 percent of Lee's monthly GE retirement. This conclusion is evidenced by the fact that, although Section 3.1 of the MSA awards Marjorie 50 percent of the marital portion of Lee's GE retirement, Section 3.1 also specifically states that the award is pursuant to Section 4.2, which dictates that Marjorie was awarded

25 percent of Lee's monthly allowance. *See Shelton*, 119 Nev. at 497, 78 P.3d at 510 (noting that when interpreting an ambiguity, "a specific provision will qualify the meaning of a general provision"). Additionally, our conclusion is supported by the parties' practice for almost a decade. *See id.* (noting that, when interpreting an ambiguity, examining the surrounding circumstances includes "subsequent acts and declarations of the parties"). Just as the district court concluded, our review of the record demonstrates Lee calculated the monthly payment to Marjorie as 25 percent of his monthly payment; if the parties' intent when entering into the MSA was 50 percent of the marital portion, his own calculation would have been different. The fact that Lee did not know that an inconsistency existed in Section 3.1 does not affect the parties' intent as evidenced by their conduct in implementing the agreement following entry of the decree. Thus, because the decree required Lee to pay Marjorie 25 percent of his monthly GE retirement, the district court correctly determined that Lee did not overpay Marjorie and he was not entitled to any recovery. Accordingly, we affirm the district court's denial of his motion for return of alleged overpayments.

After establishing that the decree awarded Marjorie 25 percent of Lee's monthly GE retirement, the district court modified the decree to award Marjorie 50 percent of the marital portion of the GE retirement. While Lee does not dispute this is the result he requested below, he contends the district court erred in basing this modification on the parties' stipulation. But because the district court awarded Lee his requested relief—modifying the decree to award Marjorie 50 percent of the marital

portion of Lee's GE retirement—Lee is not an aggrieved party who may appeal under NRAP 3A(a). *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994) ("A party is aggrieved within the meaning of NRAP 3A(a) when either a personal right or right of property is adversely and substantially affected by a district court's ruling." (internal quotations omitted)). As a result, we dismiss Lee's appeal in Docket No. 71872 for lack of jurisdiction to the extent he challenges the modification of the decree to award Marjorie 50 percent of the marital portion of the GE retirement. *See* NRAP 3A(a).[3]

It is so ORDERED.[4]

_____, C.J.
Silver

_____, J.
Gibbons

cc: Hon. Cynthia Lu, District Judge, Family Court Division
Lee David Hustead
Surratt Law Practice, PC/Reno
Washoe District Court Clerk

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[3]Given our resolution of this matter, we deny as moot all requests for relief currently pending in these appeals.

[4]The Honorable Jerome Tao, Judge, voluntarily recused himself from participation in the decision of this matter.