

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY A. MCKENZIE,
Appellant,
vs.
TAMMY MCKENZIE,
Respondent.

No. 41774 **FILED**

FEB 14 2009

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a district court order modifying a divorce decree and from an order denying a motion for a new trial. Eighth Judicial District Court, Family Court Division, Clark County; Robert E. Gaston, Judge, and Jennifer Elliott, Judge.

Pursuant to a divorce decree, respondent Tammy McKenzie was to receive 30 percent of appellant Jeffrey A. McKenzie's monthly military retirement payment, or \$276.30. After the divorce decree was entered, Jeffrey began receiving military disability payments and his retirement payments lessened. Tammy moved to enforce the decree, claiming that Jeffrey's decision to apply for disability benefits deprived her of her community property interest in his retirement. The district court concluded that it had no jurisdiction over Jeffrey's disability payments, but found changed circumstances and extended Jeffrey's spousal support obligation for an additional five years.

On appeal, Jeffrey argues that the district court abused its discretion when it modified the divorce decree and ordered Jeffrey to pay

additional spousal support. Jeffrey also claims that the district court miscalculated his spousal support arrearages.

FACTS

Tammy and Jeffrey married on September 5, 1987, while Jeffrey was serving in the United States Air Force. The couple had no children. On March 15, 1999, Tammy filed for divorce. At the time Tammy filed for divorce, Jeffrey was in the process of retiring from the Air Force and discussing any potential disability benefits with the Department of Veterans Affairs. On May 13, 1999, Jeffrey applied for disability benefits with the Veterans Administration and, on August 1, 1999, retired from the military.

On March 20, 2000, Judge Gerald W. Hardcastle entered a divorce decree, awarding Tammy 30 percent¹ of Jeffrey's military pension benefits. Since Jeffrey's monthly retirement benefits were \$921 per month at the time of divorce, Tammy's share was \$276.30 per month. The decree also awarded Tammy a 1995 Mazda Millenia and ordered Jeffrey to pay Tammy \$300 per month in spousal support for four years, beginning March 1, 2000, and concluding in February 2004, for a total of \$14,400. The decree awarded the marital residence to Jeffrey.

On May 31, 2000, the Department of Veterans Affairs approved Jeffrey's application for disability benefits. On June 12, 2000, Tammy learned that she would receive only \$97 as her share of Jeffrey's retirement benefits, and she contacted the Department of Defense to seek an explanation. The Department of Defense informed her that her share

¹Judge Hardcastle calculated the percentage based on twenty years of military service and twelve years of marriage.

diminished because a portion of Jeffrey's retirement benefits was offset by the disability benefits Jeffrey received. Allegedly, Tammy made numerous attempts to contact Jeffrey after she learned of the diminished payment, but to no avail.

After the divorce, Jeffrey began making car payments of \$354.72 per month in lieu of his \$300 per month spousal support obligation. Jeffrey never paid spousal support. Although Jeffrey asserted that the parties agreed he would make car payments in lieu of spousal support, Jeffrey did not obtain a court order to that effect and did not present evidence of a written agreement between the parties.

On May 3, 2002, Jeffrey made the last payment on the car for a total of \$12,304. On September 12, 2002, Tammy filed a motion to enforce the decree, to hold Jeffrey in contempt of court, for attorney fees, and other relief. On November 20, 2002, and December 9, 2002, Judge Robert E. Gaston conducted hearings on the matter. At the December 9, 2002, hearing, Judge Gaston stated that he had no jurisdiction over Jeffrey's disability benefits and, consequently, over the impact the disability benefits had on Jeffrey's retirement payments. Judge Gaston concluded that the divorce decree was ambiguous because it ordered that Tammy receive 30 percent of Jeffrey's gross monthly retirement benefits, but then also provided a specific sum. To clarify the ambiguity, Judge Gaston determined that Tammy should receive 30 percent of Jeffrey's gross monthly retirement payment or \$172 per month. Judge Gaston, however, concluded that the reduction in retirement benefits due to the disability award constituted a change in circumstances warranting a spousal support modification. Since the change in circumstances would result in a substantial loss of funds to Tammy, that were rightfully hers,

and because Jeffrey's spousal support obligations had not terminated, Judge Gaston determined that he could modify the spousal support award.

On March 26, 2003, Judge Gaston entered an order continuing Jeffrey's \$300 monthly spousal support obligation for an additional five years, commencing on March 1, 2004. The order affixed Tammy's share in Jeffrey's retirement at 30 percent of Jeffrey's gross monthly pension benefits, "whatever that figure is to be." Although Judge Gaston concluded that Jeffrey unilaterally decided to make car payments in lieu of spousal support, Judge Gaston recognized that Jeffrey had paid off the car and should, therefore, receive an equitable offset for the payments he had made. Judge Gaston determined that "Defendant owes \$300.00 per month for 48 months, for a total of \$13,500.00, plus interest, from the date the payments were due each month." Since Jeffrey had already paid \$12,304 on the car, he would receive a \$12,304 offset from the above \$13,500 amount, after the addition of legal interest due.

On April 14, 2003, Jeffrey filed a motion for a new trial pursuant to NRCP 59(a) or, in the alternative, a motion to alter or amend judgment pursuant to NRCP 59(e). On May 20, 2003, Judge Jennifer Elliott conducted a hearing and subsequently entered an order denying Jeffrey's NRCP 59 motions. Judge Elliott reasoned that Judge Gaston did not repartition military benefits, but merely equalized the property distribution because it had become inequitable in light of the unforeseen disability. This appeal followed.

DISCUSSION

Standard of review

We review a district court's ruling on a motion for a new trial for abuse of discretion.² The same standard applies to a district court's ruling on a motion to modify spousal support.³

Spousal support modification

Although Jeffrey purports to raise seven separate issues on appeal, he essentially argues that the district court erred in extending his spousal support obligation for an additional five years. We disagree.

Under NRS 125.150(7),

[i]f a decree of divorce, or an agreement between the parties which was ratified, adopted or approved in a decree of divorce, provides for specified periodic payments of alimony, the decree or agreement is not subject to modification by the court as to accrued payments. Payments pursuant to a decree entered on or after July 1, 1975, which have not accrued at the time a motion for modification is filed may be modified upon a showing of changed circumstances, whether or not the court has expressly retained jurisdiction for the modification.

(Emphasis added.)

A. Ambiguity

Jeffrey raises two issues pertaining to ambiguity: (1) Judge Gaston erred in construing the divorce decree as ambiguous as to Tammy's share of Jeffrey's military retirement; and (2) Judge Gaston incorrectly

²DeJesus v. Flick, 116 Nev. 812, 816, 7 P.3d 459, 462 (2000).

³Gilman v. Gilman, 114 Nev. 416, 422, 956 P.2d 761, 764 (1998).

treated the question of ambiguity as a question of law rather than a question of fact. We conclude that his arguments are irrelevant.

The ambiguity finding had no bearing on Judge Gaston's decision because he modified Tammy's spousal support award based on changed circumstances, not because the decree was ambiguous. Consequently, we need not consider the ambiguity issue.

B. Federal preemption

Jeffrey contends that Judge Gaston improperly ignored the federal preemption on disability and did not have the power to order Jeffrey to pay an additional five years of spousal support because Jeffrey availed himself of disability benefits.

Federal law precludes states from treating disability benefits as community property, but it does not prevent states from reconsidering divorce decrees, even when the decrees deal with disability benefits.⁴ This is because "it is unfair for a veteran spouse to unilaterally deprive a former spouse of a community property interest simply by making an election to take disability pay in lieu of retirement pay."⁵

In Shelton v. Shelton,⁶ the divorce decree designated the husband's military retirement and disability pay as community property. Under the decree, the husband was to receive one half of his military retirement payment and the entire disability payment amount. The wife was to receive one half of the husband's retirement payment.

⁴Shelton v. Shelton, 119 Nev. 492, 495, 498, 78 P.3d 507, 509, 511 (2003).

⁵Id. at 496, 78 P.3d at 509.

⁶119 Nev. 492, 78 P.3d 507.

Subsequently, the husband learned that he qualified for 100 percent disability and waived all his military retirement benefits in lieu of disability payments. Deprived of her share in the husband's retirement, the wife filed a motion to enforce the divorce decree. Reasoning that federal law precluded treating the husband's disability payments as community property, the district court denied the motion. In reversing the district court's ruling, we held that although federal law precluded the district court from classifying the husband's disability benefits as community property, it did not preclude the district court from applying Nevada contract law principles.⁷ We specifically stated that "[a]lthough states cannot divide disability payments as community property, states are not preempted . . . from reconsidering divorce decrees, even when disability pay is involved."⁸

Judge Gaston's decision in the instant case is more compelling. To begin, at the December 9, 2002, hearing, Judge Gaston stated that he thought Jeffrey's disability election unfairly lowered Tammy's retirement share, but he was "not going to mess with the disability." That is why Judge Gaston determined that Tammy should receive 30 percent of Jeffrey's retirement payment, whatever that payment might be. This expressly indicates that Judge Gaston yielded to the federal disability laws.

Judge Gaston, however, concluded that Jeffrey was not disabled at the time of divorce and Tammy's retirement share diminished because of Jeffrey's subsequently arising disability. As a result, Tammy

⁷Id. at 495-98, 78 P.3d at 508-11.

⁸Id. at 496, 78 P.3d at 509.

would have lost thousands of dollars over her lifetime. Because this qualifies as “changed circumstances” under NRS 125.150(7), Judge Gaston properly modified the spousal support award.

Finally, Jeffrey’s reliance on Siragusa v. Siragusa⁹ is inapposite. As in Siragusa, where the husband who was solvent voluntarily filed for bankruptcy,¹⁰ Jeffrey’s election to pursue disability benefits in lieu of retirement negatively affected Tammy’s financial position. Since Jeffrey was not receiving disability at the time the parties divorced, the subsequent approval of his disability application constituted a “changed circumstance.” Although Tammy may have been aware of the potential disability receipt at the time of divorce, at that point the disability benefits were a mere contingency.

Jeffrey correctly asserts that one of the reasons for the modification in Siragusa was the husband’s improved financial situation,¹¹ and, distinguishable from Siragusa, Jeffrey earned less at the time of modification than he did at the time of divorce. However, the husband’s increased wealth was not the sole reason for the modification in Siragusa; a part of the modification decision rested on the discharged property settlement obligation.¹² Jeffrey’s decision to pursue disability, thus diminishing Tammy’s share in his retirement, constituted a sufficient change in circumstances warranting a modification.

⁹108 Nev. 987, 843 P.2d 807 (1992).

¹⁰Id. at 989, 843 P.2d at 809.

¹¹Id. at 990, 843 P.2d at 809.

¹²Id.

Jeffrey also argues that in Siragusa the husband exhibited bad faith in filing for bankruptcy to avoid the property settlement obligation and, unlike Siragusa, Jeffrey did not apply for benefits to circumvent Tammy's community property rights. While Jeffrey may be right, NRS 125.150(7) does not require a "bad faith" change in circumstances before a district court may modify a spousal support award. Consequently, Judge Gaston's decision was proper.

Spousal support arrears calculation

Jeffrey contends that Judge Gaston made a mathematical error in calculating Jeffrey's alleged spousal support arrearages and the amount of interest due. We agree.

At the December 9, 2002, hearing, Judge Gaston stated, "So we have a total right now, out of the forty-eight months he has not paid forty-five. We've had forty-five months come – go by. Twelve – Between March of 2001 – 2000 and 2001, is twelve months. Then twenty-four months, March of 2002. Add another nine months, that's forty-five months." (Emphasis added.) Judge Gaston then multiplied Jeffrey's monthly spousal support obligation of \$300 by forty-five and arrived at total spousal support arrears of \$13,500. Judge Gaston mandated that Jeffrey's \$13,500 obligation be offset by the \$12,304 Jeffrey paid on Tammy's car, but awarded Tammy interest from the date each spousal support payment was due because Jeffrey had unilaterally decided to make car payments in lieu of spousal support. The March 26, 2003, order reflected the \$13,500 amount.

Pursuant to the divorce decree, Jeffrey's spousal support obligation was to begin on March 1, 2000, and continue for four years, barring death or remarriage. Because the March 1 date indicates that


Jeffrey's spousal support payments were due at the beginning of the month, thirty-four months had elapsed between March 2000 and December 2002. Thus, Judge Gaston erred in concluding that Jeffrey was forty-five months in arrears.


Turning to Jeffrey's contention that Judge Gaston's interest award was improper, Jeffrey's spousal support obligation of \$300 per month multiplied by thirty-four months equals \$10,200, which is \$2,104 less than the \$12,304 Jeffrey had paid on Tammy's car. Technically, as of the December 9, 2002, hearing, Jeffrey had paid Tammy more money than he owed her. Therefore, the award of interest was improper.

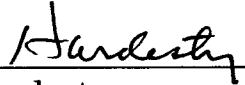
CONCLUSION

We conclude that Judge Gaston did not err in modifying Jeffrey's spousal support obligation and, consequently, Judge Elliott properly refused to disturb Judge Gaston's modification decision. Judge Gaston, however, erred in determining that Jeffrey was forty-five months in arrears and Judge Elliott should have granted Jeffrey's motion to the extent it pertained to the erroneous arrears calculation and payment of interest. Accordingly, we

ORDER the judgments 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.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Eighth Judicial District Court, Dept. F, Family Court Judge
Hon. Jennifer Elliott, District Judge, Family Court Division
Law Offices of John P. Foley
Kelleher & Kelleher, LLC
Clark County Clerk