

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 42077

USHA AHUJA,
Appellant,
vs.
CHANDAR AHUJA,
Respondent.

FILED

JUL 20 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF CLERK

ORDER OF AFFIRMANCE

This is an appeal from a post-decree order modifying spousal support obligations. Second Judicial District Court, Washoe County; Scott T. Jordan, Judge.

FACTS AND PROCEDURAL HISTORY

The parties in this action, Chandar and Usha Ahuja, divorced in 1998 after a 28-year marriage. At the time of the divorce, Chandar, who is a CPA, was the Director of Corporate Audit at International Game Technology (IGT), earning an annual income in excess of \$200,000. During the marriage, Usha was a homemaker and primary caretaker for the parties' children. Additionally, she worked approximately 20 hours a week outside the home as a sales associate at a department store, earning approximately \$10 an hour.

The divorce decree awarded each party approximately \$450,500 in community property. Chandar's community property award consisted primarily of stock options in IGT and several other smaller investments. Consistent with her request during the divorce proceedings, Usha received the family's 5,600 square foot residence, valued at \$680,000 at the time of divorce, and the corresponding \$275,000 mortgage. Usha further received approximately \$17,000 in cash, the majority of the household goods, and a small retirement account. She executed an equalizing note to balance the division of the community property. The

district court additionally awarded Usha \$6,000 per month in permanent alimony.

In calculating the original alimony award, the district court considered the length of the marriage, the increase in Chandar's education and earning ability during the marriage, as well as Usha's contributions to the marriage as a wife, and mother and her limited earning capacity both during the marriage, and post-divorce. However, the district court explicitly excluded from its initial alimony consideration any income from the future exercise or sale of Chandar's IGT stock options. It is uncontroverted that both parties' community property award had, as of the hearing below, appreciated significantly from the time of the divorce, although Usha's award has appreciated to a lesser degree.

In April 2002, Chandar moved the district court to terminate the alimony based upon a material change of circumstances. Chandar asserted that he could no longer pay \$6,000 a month in alimony because he involuntarily lost his lucrative job as the Director of Corporate Audit at IGT, was unable to find a comparable job at the age of 58, and then only earned approximately \$3,000 a month running a small convenience store that he purchased prior to his termination from IGT. Following a hearing, the district court found a material change in circumstances based on the reduction in Chandar's monthly income and reduced his alimony obligation to \$1,500 per month.¹

On appeal, Usha challenges the district court's reduction of the alimony award for failure to impute income to Chandar based upon substantial increases in the value of his community property award, his

¹The parties' minor child at the time of the divorce, Ashley, is now over the age of 18. The appellant has not requested that this court review the district court's reduction of child support.

post-divorce personal expenses and earning capacity, the alleged underreporting of his post-divorce income, and his assertedly willful underemployment.

DISCUSSION

In Shydler v. Shydler,² we recognized that “[a]limony is an equitable award serving to meet the post-divorce needs and rights of the former spouse.” We went on to explain that “two of the primary purposes of alimony, at least in marriages of significant length, are to narrow any large gaps between the post-divorce earning capacities of the parties, and to allow the recipient spouse to live as nearly ‘as fairly possible to the station in life . . . enjoyed before the divorce.’”³ On the most basic level, alimony proceedings should evaluate the recipient spouse’s needs and the payor spouse’s ability to pay.⁴

Under NRS 125.150, a district court may modify an alimony award incorporated into a divorce decree upon a material change in circumstances not contemplated by the parties at the time the decree was entered.⁵ NRS 125.150(7) specifically provides:

In addition to any other factors the court considers relevant in determining whether to modify the order, the court shall consider whether the income

²114 Nev. 192, 198, 954 P.2d 37, 40 (1998).

³Id. (quoting Sprenger v. Sprenger, 110 Nev. 855, 860, 878 P.2d 284, 287-88 (1994)) (internal citations omitted).

⁴See, e.g., Fuller v. Fuller, 61 Nev. 427, 429, 131 P.2d 727, 728 (1942); see also Murphy v. Murphy, 64 Nev. 440, 453, 183 P.2d 632, 638 (1947) (stating that the “most important element, or factor, in fixing alimony [is] the husband’s ability to pay”).

⁵NRS 125.150(7); see also Gilman v. Gilman, 114 Nev. 416, 956 P.2d 761 (1998); Shydler, 114 Nev. at 196, 954 P.2d at 39.

of the spouse who is ordered to pay alimony, as indicated on the spouse's federal income tax return for the preceding calendar year, has been reduced to such a level that the spouse is financially unable to pay the amount of alimony he has been ordered to pay.

(Emphasis added.) If the alimony payor's "gross monthly income"⁶ changes by more than 20 percent, "changed circumstances" are presumed and review of an alimony award is required.⁷

The district court has broad discretion in deciding whether to modify alimony based on a material change of circumstances, and we review any decision for an abuse of discretion.⁸ We will not disturb findings supported by substantial evidence;⁹ however, alimony awards must be "just and equitable."¹⁰

Usha argues that the district court erred as a matter of law by failing to shift the basis of Chandar's alimony obligation from salary

⁶"Gross monthly income" is defined as:

the total amount of income received each month from any source of a person who is not self-employed or the gross income from any source of a self-employed person, after deduction of all legitimate business expenses, but without deduction for personal income taxes, contributions for retirement benefits, contributions to a pension or for any other personal expenses.

NRS 125B.070(1)(a) (internally referenced by NRS 125.150(10)).

⁷NRS 125.150(10).

⁸Shydler, 114 Nev. at 196, 954 P.2d at 39.

⁹Id.

¹⁰NRS 125.150(1)(a).

income to business and investment gains. Usha contends that, regardless of whether Chandar “jumped or was pushed from his lucrative job at IGT,” his primary economic activity is not running a convenience store, but managing “his investments and wide-ranging business deals and financing of various enterprises.” Ultimately, Usha contends that the district court erred by not considering the extraordinary gain, exclusive of principal, on Chandar’s share of the community property.

Conversely, Chandar argues that the district court did not err because Usha failed to present any evidence of recurrent investment income above his declared earnings. Chandar further argues that the district court has no continuing jurisdiction over a community property award distributed under a divorce decree and therefore cannot consider the appreciation of that property in ruling on a motion to modify alimony. Thus, under Chandar’s view, the only relevant figure for computing support payments is income received on a regular and periodic basis.

In this connection, the district court explained its ruling as follows:

The only argument that I can think of . . . is that part of the skill and experience that Mr. Ahuja took from the marriage that Mrs. Ahuja is entitled to be compensated for by spousal support is his skill and ability as an investor, but that wasn’t the basis of the alimony award in the first place. The basis of that award was his job and income at IGT. And I don’t think it’s fair to have a different theory of the case at this point as there was at the time of the divorce.

The district court was apparently under the impression that it could only consider the original factual basis for the award in resolving Chandar’s motion to modify. While a change in Chandar’s original employment status was a preeminent relevant consideration in ruling on the

modification motion, under NRS 125.150(7), the district court was not limited to this factor.¹¹ Moreover, Usha failed to prove the existence of any other factor that the district court could have considered under the modification statute.¹²

First, Chandar satisfied his burden of showing changed circumstances: loss of a \$200,000 per annum income with IGT. Second, Usha failed to introduce evidence that the change of circumstance was not genuine or reasonable. Third, she failed to provide any concrete proof of other relevant factors under NRS 125.150(7) that would undermine the district court's decision to reduce alimony.¹³ In particular, she failed to produce evidence of a recurring income stream stemming from Chandar's investments, evidence that a conversion of those assets to income producing investments was feasible, or evidence regarding the actual scope and frequency of Chandar's investment activity. And, although the district court felt constrained to follow the original basis for the award in granting modification, it correctly went on to note that:

[t]he evidence is uncontradicted that the assets owned by Mr. Ahuja are set forth in [the] exhibits on behalf of Mrs. Ahuja. They're substantial. I know of no legal authority that gives me the ability to award alimony based on assets independent of income, and I don't believe there's

¹¹See NRS 125.150(7).

¹²We make no comment upon the basic validity of Usha's claim that the district court should have imputed income from the appreciation in value of Chandar's community property award.

¹³See, e.g., Blackburn v. Michael, 515 S.E.2d 780, 783-84 (Va. Ct. App. 1999) (party moving for alimony modification bears burden of proving change in circumstances and party asking the court to impute income bears the burden of proving circumstances justifying imputation).

been any evidence presented from either side as to what the income from these assets is.

Thus, while the district court could have considered evidence concerning Chandar's other abilities to generate income, no such evidence was forthcoming. Additionally, the district court did not abuse its discretion in finding that Chandar's exercise of his stock options and management of his investments do not make him such a sophisticated investor that income should be imputed to him for this reason. Further, Usha failed to provide adequate proof that Chandar had hidden assets or income, acquired ownership interests in businesses owned by members of his family, or intentionally maintained a state of underemployment. While she tried to present evidence to these effects, the district court could have reasonably discounted it.¹⁴

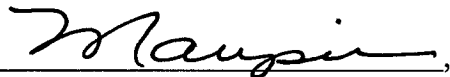
Finally, while Usha provided proof that the value of the property distributed to Chandar substantially increased over the years after the divorce, Chandar provided proof that her distributed share of the community also increased in value, albeit to a different degree. Given the subjective nature of the proof concerning these increases, the district court did not abuse its discretion under NRS 125.150(7) in limiting its considerations for modification to those that governed the original award, here, income from employment.

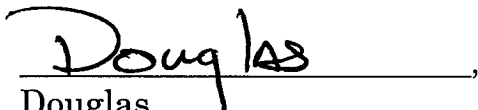
¹⁴See Barry v. Linder, 119 Nev. 661, 671 n.17, 81 P.3d 537, 543 n.17 (2003) (citing Rowland v. Lepire, 99 Nev. 308, 312, 662 P.2d 1332, 1334 (1983) and noting that "it is exclusively within the province of the trier of fact to weigh evidence and pass on credibility of witnesses and their testimony").

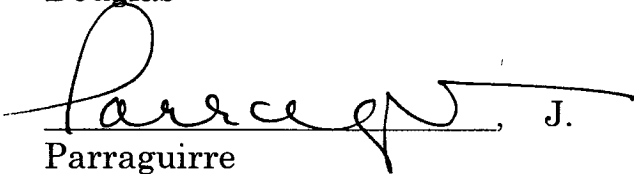
CONCLUSION

We conclude that substantial evidence supports the district court's refusal to impute income based on the community property award, alleged expenses, earning ability, willful underemployment and underreporting of income. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Maupin

 J.
Douglas

 J.
Parraguirre

cc: Hon. Chuck Weller, District Judge, Family Court Division
Henry Egghart
Silverman, Decaria & Kattelman, Chtd.
Washoe District Court Clerk