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Eivazi v. Eivazi, 139 Nev. Adv. Op. 44 (Oct. 05, 2023)

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ADOPTING A LITIGANT-DRAFTED ORDER WITHOUT MODIFICATION DOES NOT IN AND OF ITSELF CONSTITUTE AN ABUSE OF DISCRETION, BUT COURTS ASSUME THE RISK THAT ANY LEGAL AND FACTUAL ERRORS MIGHT BE REVERSIBLE.

Summary

Following lengthy and highly contested divorce proceedings, the Nevada Court of Appeals reviews a district court's alimony determinations, attorney fee awards, and disposition of community property for an abuse of discretion. The district court adopted Respondent's order in its entirety without modification, and the Nevada Court of Appeals determined whether this constitutes an abuse of discretion in and of itself. The Nevada Court of Appeals held that utilizing a party's proposed order does not in and of itself constitute an abuse of discretion, but that courts who adopted litigant-drafted orders assume the risk that any legal or factual errors contained in the order might be reversible. The Court went on to urge courts and practitioners to diligently exercise their discretion and thoroughly review litigant-drafted orders before adopting them.

Background

Appellant, Parviz Eivazi, and Respondent, Fatemeh Eivazi, moved to the United States from Iran and married in Las Vegas in 2001. Respondent filed for divorce in June 2016. From the inception of the case, divorce proceedings were highly contested with each party filing multiple motions and countermotions, and requesting attorney' fees and costs in connection with those filings.

Following a series of pretrial evidentiary hearings, the district court entered a minute order in November 2018 ruling in favor of Respondent on all issues and directing Respondent to prepare the order. Respondent filed a notice of entry of order and a motion for reconsideration in December 2019. In her motion for reconsideration, Respondent argued that she was entitled to all attorney fees from the inception of the case through the evidentiary hearing. The district court granted Respondent's motion and set the case for trial. During the three-day divorce trial in 2020, Respondent alleged that Appellant had wasted a substantial amount of community funds constituting \$208,294 in potential marital waste. Appellant testified that the funds were used for marital expenses.

At the end of the trial, the district court directed both parties to submit proposed orders. In February 2021, the district court adopted Respondent's 61-page proposed findings of fact, conclusions of law, and decree of divorce in its entirety without modification. The decree awarded Respondent with alimony in the amount of \$5,000 per month for a period of ten years,

¹ By Alyson Smith.

\$176,976.99 in attorney's fees and costs, and \$19,565 in expert fees. The decree additionally ordered Appellant to reimburse Respondent for \$59,000 to fund the litigation, unequally distributed community property and debt, required Appellant to reimburse Respondent \$100,357.50 for half of the wasted community assets, ordered Appellant to pay half of Respondent's credit card debt, required Appellant to sell the marital home, and provided that any unpaid balance would be reduced to judgment and accrue interest. In the aggregate, the decree required Appellant to pay Respondent more than \$400,000 and required Appellant to remain solely responsible for his bankruptcy debt.

Both parties filed motions to amend the decree. The district court denied Appellant's motion and granted Respondent's motion in part. The district court ordered that Respondent would receive nearly the entire value of Appellant's retirement account, which the decree previously split equally between them. Appellant timely appealed.

Discussion

The Nevada Court of Appeals addressed five issues in consideration of Appellant's appeal from the divorce decree. The court analyzed whether the district court abused its discretion in adopting Respondent's proposed decree verbatim in its entirety; whether the district court abused its discretion in finding marital waste because Appellant was unable to account for unknown transactions by clear and convincing evidence; whether the district court adequately considered the alimony factors in NRS 125.150(9)²; whether the district court abused its discretion in awarding Respondent attorney's fees from the inception of litigation through the evidentiary hearing, \$59,000 to reimburse her for borrowed money to fund the litigation, and expert fees; and whether the district court abused its discretion in connection with other miscellaneous financial awards and allocations in the divorce decree.

Adopting Fatemeh's proposed decree verbatim was not, by itself, an abuse of discretion.

Did the district court abuse its discretion when it adopted Respondent's decree in its entirety without making any modifications?

Appellant argued that by adopting Respondent's decree in its entirety without modification, the district court abdicated its judicial role and abused its discretion. The Nevada Court of Appeals disagreed, holding that entering a litigant-drafted order without modification is not in and of itself an abuse of discretion. The court went on to caution courts that there are inherent risks in adopting litigant-drafted orders and noted that scrutiny should be given to the contents of any proposed orders before entering them.

The Nevada Court of Appeals noted that court rules expressly contemplate that parties may submit proposed orders for consideration and adoption by the court.³ The Nevada Supreme

² NEV. REV. STAT. § 125.150(9) (2022).

³ NEV. R. PRAC. EIGHTH. JUDI. DIST. CT. 5.515 (2022).

Court has also recognized that a district court may properly admit a party's proposed order, provided that the opposing party is apprised of the order and given an opportunity to respond.⁴

Appellant did not argue that he was not given an opportunity to respond to Respondent's proposed decree prior to its adoption by the district court. Appellant had an opportunity to raise objections to the proposed order and was given an opportunity to request amendments under NRCP 52(b).⁵ By filing a motion to amend the decree, Appellant availed himself of that opportunity.

In determining whether the adopting of a decree in its entirety constitutes an abuse of discretion, the court analyzed the content and substance of the adopted order to decide whether any particular findings of fact or conclusions of law were unsupported by substantial evidence or were legally erroneous. The court held that although adopting a proposed decree verbatim is not in and of itself an abuse of discretion, by adopting the proposed order the district court assumed the risk that any legal or factual errors contained in the decree might be reversible. The court went on to address the several legal and factual deficiencies that were contained within Respondent's proposed decree.

The district court abused its discretion in finding marital waste.

Did the district court abuse its discretion in finding marital waste because Appellant was unable to account for unknown transactions by clear and convincing evidence?

The district court made an unequal distribution of community property in favor of Respondent in the amount of \$100,357.50 to account for marital waste. Appellant argued that the district court abused its discretion when it failed to distinguish between waste and discretionary expenditures, applied an erroneous legal standard that negligent expenditures of community funds constituted waste, and imposed an improper burden on Appellant to prove that all expenditures made without Respondent's knowledge were not waste.

In a divorce, a district court must equally dispose of community property unless there is a compelling reason to make an unequal disposition.⁶ Waste may constitute a compelling reason for unequal disposition of community property. The Court considered a Nevada Supreme Court case in which the court analyzed various types of expenditures to determine if they constituted dissipation or waste.⁷ In *Kogod*, the supreme court held that the district court erroneously found waste when the husband could not prove that unexplained expenditures affirmatively served a marital purpose. The supreme court found error in the district court's unequal disposition of community property and concluded that the husband's inability to account for unknown expenses did not constitute a compelling reason to unequally dispose of community assets.

⁴ Byford v. State, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007).

⁵ NEV. R. CIV. P. 52(b) (2019).

⁶ NEV. REV. STAT. § 125.150(1)(b) (2022).

⁷ Kogod v. Cioffi-Kogod, 135 Nev. 64, 439 P.3d 397 (2019).

The Court held that it was an abuse of discretion for the district court to unequally dispose of community property and order Appellant to reimburse Respondent in the amount of \$100,357.50 because Appellant was unable to account for all unknown expenditures. The district court adopted a broad definition of waste that was much more expansive than the one adopted by the supreme court in *Kogod*, encompassing all expenditures that Respondent was not aware of. The district court committed error by placing an evidentiary burden on Appellant to demonstrate the absence of waste by clear and convincing evidence without requiring Respondent to raise a reasonable inference that the expenditures were waste.

Respondent alleged that waste occurred because she was unaware of the expenditures at the time they were made and could not have consented to them. The district court found that Respondent established prima facie showing of waste and concluded that Appellant had a fiduciary duty to account for all the unknown expenditures. However, whether an expenditure constitutes waste does not turn on whether the other spouse had knowledge of them at the time they were made.⁸ The decree in the present case only identified one specific transaction that allegedly constituted waste and failed to indicate how any of the allegedly wasted funds were spent. Because the decree could not identify which transactions were made for an improper purpose, the district court's finding of waste was not justified.

The Court found that Respondent's decree as adopted by the district court improperly shifted the burden of proving the absence of waste to Appellant and failed to identify any transactions that constituted waste. The Court held this to be an abuse of discretion, reversing the district court's unequal distribution of community property and remanding for a proper evaluation of waste.

The district court abused its discretion by failing to adequately analyze alimony.

Did the district court adequately consider the alimony factors in NRS 125.150(9), including Respondent's need for alimony and Appellant's ability to pay, when it awarded Respondent alimony of \$5,000 per month for ten years?

Appellant argued that the district court abused its discretion when it awarded Respondent alimony of \$5,000 per month for ten years because the decree failed to properly consider the factors under NRS 125.150(9). Appellant further argued that the decree's alimony analysis lacked a rational nexus between those factors and the district court's decision and failed to include adequate facts when addressing each factor.

The district court conducted a superficial analysis of the factors proscribed by NRS 125.150(9)(a)-(k) and concluded that Respondent needs \$5,000 per month in alimony, and that Appellant has the ability to pay that amount. The district court reached this conclusion based on Respondent's need and Appellant's ability to pay, determining that Appellant's net income was

⁸ *Id.* at 75-76, 406-07.

\$13,000 per month and Respondent did not have any income. The district court failed to connect its finding with a determination that alimony was just and equitable.

The Court held that the district court's factual findings were incomplete, unsupported by substantial evidence, internally inconsistent, and improperly referenced misconduct by Appellant. In finding the district court's determination of alimony to be an abuse of discretion, the Court reviewed the district court's analysis of the factors listed under NRS 125.150(9).

When evaluating factor (a), which requires the court to consider each spouse's financial situation, the district court made no findings as to Respondent and did not discuss the parties' respective financial conditions. Factor (b) required the court to consider the nature and value of each spouse's respective property, and factor (j) required the court to consider the property that Respondent would be awarded in the divorce. The district court did not assign monetary value to the parties' property or explain how the division of that property would impact Respondent's need for alimony or Appellant's ability to pay. The district court's findings of income, earning capacity, age, and health of each spouse under factor (e) were incomplete and unsupported by substantial evidence. The court abused its discretion in erroneously relying exclusively on unadmitted evidence from Transparent Nevada to calculate Appellant's income. The decree was internally inconsistent in acknowledging that Appellant was unable to compensate Respondent without selling the marital home, while also finding that Appellant had significant resources to pay for alimony. The district court also made insufficient findings when considering Appellant's age and health in connection with factors (e) and (k) in relation to his ability to work, failing to address Appellant's ability to continue working for the ten-year period of the alimony award as he was nearing the age of retirement.

The district court focused its analysis on Appellant without making any findings as to Respondent's earning capacity, rather focusing on her current lack of income after finding that she was not willfully unemployed. This was an abuse of discretion because the district court was still required to consider Respondent's earning capacity when evaluating an award of alimony. In failing to do so, the court could not have properly evaluated Respondent's ongoing need for alimony in relation to Appellant's ability to pay.

The Court held that it was not enough for the district court to superficially address the eleven factors contained in NRS 125.150(9), and that the court's findings had to be supported by substantial evidence. Finding an abuse of discretion in evaluating alimony, the Court reversed the district court's alimony award and remanded for a proper determination.

The district court abused its discretion when it awarded Fatemeh all attorney fees and costs from the inception of litigation, an additional \$59,000 that she borrowed to fund the litigation, and \$7,450 for translation services.

Did the district court abuse its discretion when it awarded Respondent attorney fees from the inception of litigation through the evidentiary hearing, \$59,000 to reimburse Respondent for money she borrowed to fund the litigation, and \$7,450 for translation services?

Appellant contended that several of the decree's other financial awards, amounting to \$176,976.99, were legally improper and not based on substantial evidence. Appellant first challenged the district court's award of all attorney fees and costs through the pretrial evidentiary hearing to Respondent. The district court's award of attorney fees and costs was entered in response to Respondent's motion for reconsideration of the court's December 2019 order. In doing so, the court improperly awarded Respondent attorney fees and costs that were the subject of prior motions that had already been resolved and were never challenged. The court improperly awarded costs even though Respondent's motion for reconsideration only asked for attorney fees and expert fees. This was outside the scope of the order for which Respondent sought reconsideration and constituted an abuse of discretion. The Court reversed the award of attorney fees and costs in the amount of \$176,976.99 and remanded for the court to consider only the fees associated with the summary judgment motion and evidentiary hearing. The Court further noted that any fees already addressed in prior court orders must be excluded from the calculation of attorney fees, and that the district court must consider the fees that Appellant has already paid to ensure that the award is not duplicative.

Appellant also challenged the \$59,000 award to reimburse Respondent for money she borrowed to fund the litigation. The Court held this award to be an abuse of discretion. The decree makes no factual findings as to this award, which appears to be duplicative of the other attorney fees awarded by the decree. The Court reversed this award and directed the district court on remand to ensure that Respondent does not receive double recovery for attorney fees.

Appellant additionally challenged the award of \$19,565 in expert fees for three experts, including \$7,450 for translation services. NRS18.005(5) provides for the recovery of fees in the amount of \$1,500 for each witness, unless the court determines that a larger fee is required by the expert's testimony. A district court abuses its discretion when it fails to provide an express explanation of the court's analysis in determining the reasonableness of the requested fees, and whether the expert's testimony was of such necessity to require larger fees.⁹ The Court found that the decree made specific findings to justify the fees for two experts but failed to address the translation fee. The Court held that granting Respondent expert fees without justifying the translation services award was an abuse of discretion.

Miscellaneous financial awards and allocations.

Did the district court abuse its discretion in connection with other miscellaneous financial awards and allocations in the divorce decree?

⁹ Frazier v. Drake, 131 Nev. 632, 650, 357 P.3d 365, 377 (Ct. App. 2015).

Appellant challenged a number of miscellaneous financial awards to Respondent including an award for interim spousal support arrears, the division of insurance proceeds from Respondent's car accident, the unequal allocation of the parties' debt, and the sale of Appellant's house. Appellant argued that these awards were not supported by factual findings or substantial evidence.

The Court held that it was an abuse of discretion for the district court to unequally distribute the parties' debt. The decree did not contain adequate findings to support the district court's order for Appellant to pay half of Respondent's community credit card debt while remaining solely responsible for his bankruptcy debt. Failing to state its reasoning for the unequal distribution was an abuse of discretion, and the Court reversed these allocations and remanded for further findings.

The Court held that the interim spousal support arrears were supported by substantial evidence because Respondent filed a schedule of arrearages shortly before trial. The Court also held the division of insurance proceeds from Respondent's car accident to be supported by substantial evidence because Respondent testified that Appellant received the full insurance payout. The Court affirmed these two awards.

The final issue raised by Appellant was the sale of Appellant's home. Appellant argued on appeal that the district court violated his due process rights by ordering the forced sale of his home without affording him the opportunity to be heard. Initially, the parties stipulated that Appellant would keep the marital home and buy out Respondent's interest so long as Appellant paid for an appraisal. However, the Appellant requested in his closing brief after trial that the district court order the sale of the home and split the proceeds between the parties. In her closing brief, Respondent requested that the district court order the sale of the home to satisfy Appellant's financial obligations under the decree. Appellant repeated his request for the district court to order the sale of the home in his rebuttal brief. The Court applied the doctrine of invited error to hold that because Appellant introduced the error that he challenges on appeal by requesting the district court to order the sale of the home, Appellant invited the error and is not entitled to relief.

Conclusion

The Nevada Court of Appeals held that although adopting litigant-drafted orders without modification does not in and of itself constitute an abuse of discretion, in doing so, district courts assume the risk that any legal or factual errors contained in the order might be reversible. The Court examined the district court's substantive findings to conclude that the court abused its discretion when making several of the financial awards that were ordered by the decree it adopted. The Court further cautioned courts against adopting litigant-drafted orders without modification without first engaging in thorough and diligent review.

In conclusion, the Nevada Court of Appeals affirmed the financial award for interim spousal support arrears, the distribution of insurance proceeds from Respondent's car accident, and the decree's order to sell the marital home. The Court reversed and remanded the financial awards for alimony, attorney fees, and translation services; the decree's \$59,000 award to reimburse Respondent; and the unequal distribution of the parties' community property and debt.