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Case No.: 82248

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Jan 18 2022 10:07 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

TARA KELLOGG
Respondent.

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ARGUMENT

I. Whether the district court abused its discretion when it modified the amount of spousal support due.

The district court has wide discretion in determining whether to grant spousal support, and this court will not disturb the district court's award of alimony absent an abuse of discretion. *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 17 P.3d 998, 1000 (2001) (citing *State, Dept of Motor Vehicles & Pub. Safety v. Root*, 944 P.2d 784, 787 (1997)). Spousal support may be modified based on a showing of changed circumstances. NRS 125.150(7). Specifically, NRS 125.150(7) states the following:

If 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. In addition to any other factors the court considers relevant in determining whether to modify the order, the court shall consider whether the income 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 the spouse has been ordered to pay.

Further NRS 125.150(11) states that a change of 20 percent or more in the gross monthly income of a spouse who is ordered to pay alimony shall be deemed

1 to constitute changed circumstances requiring a review for modification of the
2 payments of alimony. Other circumstances that may affect a spousal support award
3 include death of either party or remarriage of the party receiving the alimony award¹.
4

5 The issue is not whether the district court has *authority* to modify an award of
6 spousal support, as Appellant suggests.² The court clearly does have the authority to
7 modify a support obligation based on a showing of changed circumstances pursuant
8 to NRS 125.150. Here, the issue is whether the district court's decision to modify
9 the spousal support obligation was based on a finding of changed circumstances and
10 supported by substantial evidence. Respondent maintains that it was not.
11

12 Spousal support was originally agreed to by both parties at the Settlement
13 Conference, which was later incorporated in the terms of the Decree of Divorce.
14 During the Settlement Conference, both parties were made aware, acknowledged,
15 and agreed that the terms of the separation agreement could be incorporated into a
16 Decree of Divorce by either party at any time. AA 468. Specifically, the Decree
17 stated:
18

19 In exchange for waiving any claim that [Tara] might otherwise made
20 concerning Alex's dissipation of marital assets, Alex shall provide Tara with
21 family support in the minimum amount of \$2,500 per month for a period of
22 15 years or 50% of Alex's gross monthly income, whichever amount is higher.
23
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27 ¹ NRS 125.150(6).

28 ² See Appellant's Reply Brief on Cross Appeal, page 14.

1 AA 86. Appellant specifically agreed to this arrangement to acquire the
2 benefit of Respondent waiving any claim that she had regarding his dissipation of
3 marital assets. AA 86.
4

5 As there was already a spousal support obligation in place that was a product
6 of the agreement of the parties, the court had the authority to modify the amount
7 upon a showing of adequate changed circumstances. Here, there were no changed
8 circumstances that warranted a modification of the support obligation. There were
9 no representations made that Appellant's income was reduced by 20% or that he
10 could not afford to pay the amount agreed to in the Decree of Divorce. In fact,
11 according to the expert report provided by forensic accountant, Larry Bertsch, it not
12 only appears that Appellant had the ability to pay the agreed upon support, but also
13 that Appellant's income was increasing. RA 31-34.
14
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16

17 Also, there were no significant changes in respect to Respondent's
18 circumstances post-marriage. During the marriage, Respondent did not work. She
19 was a homemaker and stay at home mother, tending to the party's daughter. She was
20 out of the work force for a substantial amount of time tending to the home and her
21 family. She supported Appellant while he went to law school. Appellant states that
22 Respondent needs support due to her disability *See* Appellant's Reply Brief, page 6.
23 Respondent's disability is irrelevant to the support obligation agreed upon by the
24 parties as enumerated in the Decree of Divorce as it was never factored into
25 negotiations when calculating the obligation. The support amount was to ensure that
26
27
28

1 she retained the standard of living she had during the marriage, to compensate her
2 contributions to the community during the marriage, and to put the parties on equal
3 footing for a fixed duration post-divorce, while also giving Appellant the benefit of
4 Respondent waiving any of her potential marital waste claims against him.
5

6 Lastly, reducing the agreed upon obligation is unfair to Respondent as the
7 parties calculated the original support obligation to account for the fact that
8 Appellant received the benefit of Respondent agreeing to waive any and all of her
9 potential marital waste claims she had against him. Appellant agreed to pay more in
10 support in order to ensure that Respondent waive legitimate claims against him for
11 marital waste. Reducing the support obligation allows Appellant to benefit from the
12 bargain, as he is shielded from legitimate claims in which Respondent agreed to
13 waive, while harming Respondent by giving her less than she bargained for.
14
15

16 Modifying the support obligation, without an adequate showing of changed
17 circumstances is an abuse of discretion. A reduction of the support obligation under
18 these circumstances was not supported by substantial evidence and should be
19 reversed by this Honorable Court. This Court should reverse and award Respondent
20 the amount of alimony that was initially agreed to in the settlement conference and
21 later incorporated in the Decree of Divorce.
22
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25 **II. RESPONDENT’S EMPLOYMENT STATUS IS NOT A CONDITION**
26 **TO RECEIVING SUPPORT.**
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1 Appellant claims on two occasions that Respondent admitted that she was
2 required to finish school pursuant to the marital separation agreement. He cites “AA
3 136; lines 13-23³” and “AA 136; lines 17-21.⁴” Upon review of Appellant’s
4 Appendix, AA 136 is the confidentially block of an email that has nothing to do with
5 Respondent or her admission of anything. Appellant’s allegation is misleading and
6 prejudicial as it implies that Respondent admitted to something, when Appellant
7 cannot point to the record to substantiate his claim. Respondent reiterates that there
8 was no agreement at any point, at the Settlement Conference or in the Decree of
9 Divorce, that Appellant’s obligation of support was somehow conditioned on
10 Respondent finishing her degree or otherwise gaining employment. In fact, the
11 Decree clearly states that the obligation amount was agreed to because Respondent
12 was going to waive all her marital waste claims against Appellant. The Decree says
13 nothing about Appellant’s support obligations being conditioned on Respondent
14 graduating or finding employment.
15

16 The Decree of Divorce states:

17 Upon Tara obtaining full-time employment (more than 32 hours per week),
18 the monthly support payment that Alex is required to pay may be re-calculated
19 to an amount of no less than 50% of the difference between the parties’ gross
20 monthly income. **Regardless of the difference, Tara shall receive the
21 minimum sum of \$2,5000 per month.**
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28 ³ See Appellant’s Reply Brief, page 3.

⁴ See Appellant’s Reply Brief, page 7.

1 AA 086 (emphasis added). Regardless of whether she was employed or
2 finished her degree, her minimum alimony payment would never be less than
3 \$2,500.00. The current order by the district court reduced Appellant's obligation to
4 \$2,500.00 per month but did not create conditions that Respondent must gain
5 employment or finish her degree in order to be entitled to such.
6

7
8 Based on the evidence, there is no indication that Appellant's obligation was
9 conditioned on Respondent's employment status or whether she finishes school.
10

11 **III. RESPONDENT'S DISABILITY DOES NOT AFFECT**
12 **APPELLANT'S SUPPORT OBLIGATION.**

13 Respondent's disability was not factored into the amount or duration of the
14 support obligation agreed to by the parties and incorporated in the Decree of
15 Divorce. When filling out her financial disclosure form, Respondent, under penalty
16 of perjury, answered honestly that she has a disability. She also provided all
17 supporting documents required by the financial disclosure form. Regardless, the
18 party's agreement at the Settlement Conference did not consider the fact that
19 Respondent had a disability. The Decree specifically states that the amount agreed
20 to was because Respondent waived any claims of marital waste that Respondent may
21 have against Appellant. While her disability may make it difficult for her to find
22 employment, the fact that she has a disability does not affect Appellant's obligation
23 to pay spousal support.
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1 Appellant further alleges that Respondent has a substantial income and that
2 her parents provide her with an income. *See* Appellant’s Reply Brief, 3. Respondent
3 maintains that the money from her parents were provided to her as a loan. The money
4 is not income, nor is it a gift. Respondent has had to resort to obtaining loans from
5 her own family because Appellant refuses to pay her court-ordered support. She is
6 going to have to pay back all of these loans. In respect to the court finding that she
7 in willfully underemployed, the court imputed income to Respondent. Respondent
8 maintains that this imputation was based on speculation and not supported by
9 substantial evidence.

13 Lastly, it bears mentioning that in his Reply Brief, Appellant states that
14 “[Respondent’s] testimony was an issue as well as she brazenly lied to the Court
15 during her testimony.” He cites “AA 361; lines 13-23” in the record. AA 361; lines
16 13-23 reflect Appellant’s testimony on redirect from his counsel (emphasis added).
17 This statement is misleading and highly prejudicial as Appellant is trying to illude
18 that the court made a finding that Respondent was lying, when the record reflects
19 Appellant’s opinion during his own testimony that Respondent was lying, not a
20 finding from the court. There has been no evidence to suggest that Respondent has
21 answered any less than truthfully during the proceedings.

25 Based on the foregoing, Respondent’s disability was not a factor considered
26 in setting or establishing the spousal support obligation. The spousal support award
27 agreed to by the parties was based on the standard of living Respondent had during
28

1 the marriage, to compensate her contributions to the community during the marriage,
2 and to put the parties on equal footing for a fixed duration post-divorce, while also
3 giving Appellant the benefit of Respondent waiving any of her potential marital
4 waste claims against him.
5

6 **IV. CONCLUSION**

7
8 This Honorable Court should reverse the district court for the following
9 reasons:

- 10 1. The district court abused its discretion in modifying the spousal support
11 amount when adequate changed circumstances did not exist for doing so.
12
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14

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared a proportionately spaced typeface using Times Roman 14-point
2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7)(a)(i) and (ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7) (C), it is 27-pages and contain 6583 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is no in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 18th day of January 2022.

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1 **THE NEVADA SUPREME COURT**
2 **AFFIRMATION- NRS 239B.030**

3 The undersigned does hereby affirm that the preceding document,
4 RESPONDENT’S REPLY BRIEF ON APPEAL filed in case number 82248 does
5 NOT contain the social security number of any person.

6 DATED this 18th day of January 2022

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on January 18, 2022. Electronic service of the foregoing document RESPONDENT’S REPLY BRIEF ON CROSS APPEAL shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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