

***Mack v. Estate of Mack*, 125 Nev. Adv. Op. 9 (Mar. 26, 2009)¹**

FAMILY LAW – DIVISION OF MARITAL ASSETS

Summary

Appeal from a district court nunc pro tunc order memorializing an oral order entered by the former presiding judge in a divorce case.

Disposition/Outcome

Affirmed the district court nunc pro tunc order memorializing the earlier order dividing marital assets.

Factual and Procedural History

Charla and Darren Mack were married on May 13, 1995 in Lake Tahoe, California. Charla filed the divorce action on February 8, 2005. Darren filed an answer and counterclaim on March 23, 2005. Division of property was one of the key disputes and the district court held a hearing on that issue on January 6, 2006.

Judge Weller issued oral orders mandating, *inter alia*: that within forty-eight hours of the agreement being written, Darren must pay Charla \$480,000; that a Qualified Domestic Relations Order (QDRO) be executed resulting in Charla receiving \$10,000 in monthly support from Darren's pension fund for a five-year period; and that Charla, Darren's mother Joan Mack, and the business entities owned by Darren and Joan (Palace, Mack & Mack I, and Mack & Mack II) would all sign releases waiving their rights to sue. Darren told the court that he would need to take the agreement to the people from whom he intended to borrow the money. The court allowed Darren to do so, and asked Charla's attorney, Shawn Meador, to write up the agreement by January 20, 2006. The court then thoroughly questioned both parties as to whether they understood its orders.

After the hearing, the Darren and Charla each submitted a proposed order, and the two drafts differed from each other. Charla filed an objection to Darren's proposed order, particularly to Darren's claim that he did not have authority to waive Joan's or Palace's right to sue; Charla argued that if Darren did not have the authority to do so, he should not have indicated otherwise. Darren's attorney, Jan Shaw, filed an affidavit in response in which Shaw claimed the root of the problem was whether Joan and the business entities would or would not sign waivers of all right to sue Charla and Charla would reciprocate. Shaw alleged that all the parties had done all they were required to do, and that all Charla had to do was pursue the non-parties' releases and waivers. Charla then filed an emergency motion for order to show cause, or, in the alternative, to enforce the settlement agreement, a motion for order shortening time to respond, and a motion for an award of attorneys' fees and costs. Charla alleged that Darren was creating delay to increase costs. Furthermore, Charla argued that she was not responsible to pursue waivers from Joan, Palace, and the Mack & Mack entities. Darren responded that the waivers are an issue

¹ By Julian R. Gregory.

between Charla and Joan, Palace, and the Mack & Mack entities. Next, Charla filed a notice of acceptance of settlement and request for entry of order, agreeing to waive the requirement that Joan and Palace waive their right to sue. In exchange, Charla would reserve any claims or defenses she may have had against Joan and Palace, unless Joan and Palace agreed to sign those waivers, in which case Charla would also provide a waiver. Darren filed an objection and Charla issued a subsequent reply.

On May 24, 2006, the district court held a hearing on these issues. Judge Weller reaffirmed his January 9, 2006 oral order. At this hearing, Darren requested to know Charla's physical address and Charla reluctantly agreed.

On June 12, 2006, Charla was killed, and Judge Weller was shot. Darren was convicted of both Charla's murder and Judge Weller's attempted murder. Subsequently, the district court allowed the Estate of Charla Mack to substitute for Charla in the divorce proceedings. On December 5, 2006, the Estate filed a motion for entry of an order nunc pro tunc, in which it sought to have Judge Weller's oral orders of January 9, 2006 and May 24, 2006 codified in a written order. Darren filed an opposition and motion to dismiss, arguing that the nunc pro tunc order was inappropriate. At the hearing, Darren argued that a divorce action must be dismissed upon the death of one of the parties. The Estate filed a reply and opposition to Darren's motion to dismiss, arguing that Nevada has long recognized that property issues do not abate at death, and that Judge Weller issued an enforceable decision.

The district court entered an order nunc pro tunc. The district court determined that it had authority to enter an order nunc pro tunc and to render the record truthful as to the acts done or intended to be done by the district court without changing the actual judgment rendered. The district court concluded that, had a written order been available, Judge Weller would have signed it immediately. Some factors that the district court relied in finding a factual basis for a nunc pro tunc order included: (1) Judge Weller's questioning of the parties and the parties' subsequent agreement to the settlement; (2) Judge Weller's statement that the settlement "shall be the order of the court"; (3) Judge Weller's assignment to Charla's attorney to draft the order; and (4) Judge Weller's statement that if the parties were unhappy with his ruling they were free to appeal.

Discussion

The court discussed four issues inherent in this appeal. First, whether the Nevada Supreme Court may take judicial notice of the appellant's convictions for the murder of Charla Mack and the attempted murder of Judge Weller. Second, whether the district court's order nunc pro tunc was appropriate. Third, whether the QDRO issued was a violation of the Employee Retirement Income Security Act (ERISA). Fourth, whether appellant, as a slayer-beneficiary, may benefit from his wrongdoing in the ERISA context.

Judicial Notice of Appellant's Conviction for the Murder of Charla Mack

The appellant argued that the record of the appeal did not contain mention of the criminal proceedings that occurred after the filing of the appeal, and that the court could not consider those matters. The court held that it could because Nevada statutes grant the court discretion to

take judicial notice of facts generally known or capable of verification from reliable sources,² or where the “fact is not subject to reasonable dispute.”³ Although the court generally will not take judicial notice of records in another case different from the one before it, this rule is flexible.⁴ When there is a valid reason to do so, and the cases are closely related, the court will take judicial notice.⁵ The court held that it may take judicial notice of a murder trial when the victim was in a position to gain financially from the defendant.⁶

Whether the Nunc pro Tunc Order Was Properly Granted

The appellant argues that the nunc pro tunc order was not appropriate because the Estate did not allege a clerical error, nor did the Estate seek to amend a prior judgment. The court noted that the grant of an order nunc pro tunc is within the discretion of the trial court and is reviewed for abuse of that discretion.⁷ An order nunc pro tunc is intended “to make a record speak the truth concerning acts done,” not “to supply omitted action” or “for the purpose of correcting judicial errors or omissions of the court. Nor . . . to change the judgment actually rendered”⁸ Therefore, the court concluded, the order nunc pro tunc was proper as a means to memorialize oral records from earlier hearings, and that the district court did not abuse its discretion since this was not used to supply omitted action, to correct judicial errors or omission, or to change the judgment actually rendered.

The appellant argued that the district court erred in relying on *Koester*,⁹ and instead should have relied on *McClintock v. McClintock*.¹⁰ In *Koester*, the court held that a district court could relate back a divorce decree to a point before the death of a party if the facts were adjudicated during the lifetime of the parties.¹¹ In *McClintock*, the court held that a district court abused its discretion when it entered an order nunc pro tunc to change the date of a divorce to a date prior to the decision.¹² Here, the court held that since the district court did not change the date the divorce decree was entered, the district court did not abuse its discretion.

The appellant also argued that the order constituted an abuse of discretion on the part of the district court for failure to apply the law to the facts shown by the record. First, the appellant claimed that the settlement agreement was invalid and unenforceable because there was no meeting of the minds as to a material term. However, the court found evidence of a meeting of the minds, as demonstrated by the canvassing of the parties. The appellant also claimed that the district court’s elimination of the settlement provision calling for waivers deprived him of the benefit of the bargain. Nevertheless, the court held that the appellant acquiesced to the terms of the settlement agreement, and the agreement should be enforced.

² NEV. REV. STAT. § 47.150(1) (West, Westlaw through 2007 Sess.).

³ NEV. REV. STAT. § 47.130(2)(b) (West, Westlaw through 2007 Sess.).

⁴ *Occhiuto v. Occhiuto*, 625 P.2d 568, 569 (1981).

⁵ *Id.* See also *State Farm Mut. Auto. Ins. Co. v. Comm’r of Ins.*, 958 P.2d 733, 735 (1998); *Cannon v. Taylor*, 493 P.2d 1313, 1314-15 (1972).

⁶ *Mack v. Estate of Mack*, 125 Nev. Adv. Op. 9 at 15-16 (Mar. 26, 2009).

⁷ *Allen v. Allen*, 270 P.2d 671, 672 (1954).

⁸ *Finley v. Finley*, 189 P.2d 334, 336 (1948).

⁹ 693 P.2d 569 (1985).

¹⁰ 138 P.3d 513 (2006).

¹¹ *Koester*, 693 P.2d at 572.

¹² *McClintock*, 138 P.3d at 516.

The Validity of the QDRO

The appellant claimed that the QDRO was issued in violation of ERISA. ERISA, he argued, precludes Charla from receiving payments from his pension because she is not an alternate payee.¹³ Further, the appellant claimed that before the court may issue a QDRO, it must issue a domestic relations order which must be examined by the plan administrator to determine whether it is qualified. However, the court held that the district court had issued a valid QDRO because the oral order created a right for Charla to receive a portion of plan.¹⁴

Applying Nevada's Slayer Statute to ERISA

The appellant argued that the district court's backdating of the settlement agreement was merely an attempt to get around preemption of Nevada's slayer statute by ERISA.¹⁵ The court noted that federal district courts have held that ERISA was not intended to preempt slayer statutes,¹⁶ and chose to follow that line of cases. The court relied on the Second Circuit's reasoning that the only statutes preempted by ERISA "are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee."¹⁷ Therefore, the Nevada slayer statute is not preempted by ERISA.

Conclusion

First, the Nevada Supreme Court held that it may take judicial notice of the outcome of a murder trial when the victim stood to gain financially from the killer since there is a close relationship between the murder trial and the victim's entitled benefits. Second, the court held that the district court did not abuse its discretion in entering the order nunc pro tunc, as the order was proper and the basis for the order was valid. Third, the court determined that the district court properly issued a QDRO to Charla during her lifetime, and that gave Charla a recognized right to receive a portion of the appellant's ERISA pension plan. Lastly, the court determined that Nevada's slayer statute is not preempted by ERISA, and as a result the appellant may not benefit from killing Charla; therefore, the court affirmed the order of the district court.

¹³ An alternate payee is "any spouse, former spouse, child, or other dependent who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant." 29 U.S.C. § 1056(d)(3)(K) (2006).

¹⁴ 29 U.S.C. § 1056(d)(3)(B)(i)(I) (2006).

¹⁵ ERISA preempts state law, and makes the regulation of pension plans a matter of exclusive federal interest. 29 U.S.C. § 1144(a) (2006).

¹⁶ *See, e.g.,* Mendez-Bellido v. Bd. of Tr. of Div. 1181, A.T.U., 709 F. Supp. 329, 331 (E.D.N.Y. 1989); UNUM Ins. Co. of Am. v. Locke, No. 2:06 CV 0861, 2006 WL 2457106 (W.D. La. Aug. 22, 2006); Atwater v. Nortel Networks, Inc., 388 F. Supp. 2d 610, 614 (M.D.N.C. 2005); Conn. Gen. Life Ins. Co. v. Riner, 351 F. Supp. 2d 492, 497 (W.D. Va. 2005); Admin. Comm. for the H.E.B. v. Harris, 217 F. Supp. 2d 759, 761 (E.D. Tex. 2002); New Orleans Elec. Pension Fund v. Newman, 784 F. Supp. 1233, 1236 (E.D. La. 1992).

¹⁷ Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 146 (2d Cir. 1989).