STATE OF IDAHO)
County of Kootenai)ss

FILED _____

AT _____O'clock_____M
CLERK OF THE DISTRICT COURT

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Deputy Clerk

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JOAN SUTTON,)
)
Plaintiff, Respondent)
vs.)
EBEN SUTTON,)
)
)
Defendant, Appellant)

Case No. CV 1999 0005701

ORDER AFFIRMING MAGISTRATE and APPELLATE JUDGMENT (Judgment on Appeal, I.R.C.P. 83(z))

I. INTRODUCTION.

On October 22, 2001, Appellant Eben Sutton (Eben) filed a "Notice of Appeal", appealing the September 11, 2001 "Order Dividing Property and Debt Following Trial", issued by Magistrate Scott Wayman. The two issues raised by Eben are:

a) Did the Court err in using the date of the divorce of April 20, 2000, rather than the date of the trial in this matter, June 4, 2001, in valuating the liquid assets of the parties.

b) Did the Court err in ordering that Joan Sutton (Joan) receive a cash award rather than a division of the account, with the consequence of the order of the cash award requiring the liquidation of the funds with the capital gains penalty.

This Court has reviewed the file and the record. This review included all briefing provided on appeal by the parties, reading the June 1, 2001 trial transcript, and listening to the oral decision and findings given by Judge Wayman on July 31, 2001. Having done so, this Court

is convinced that the Magistrate did not abuse his discretion in: a) deciding that the date of the April 20, 2000 divorce rather than the June 4, 2001 date of the trial in this matter, was the appropriate date from which to value the assets of the parties, and in b) deciding that a cash award or a division of the account, based upon the parties decision, was the equitable way to divide the investment accounts.

The parties to this case were married on April 15, 1967 and divorced by partial summary judgment on April 20, 2000. At the subsequent June 4, 2001 trial, Judge Wayman determined the assets should be valued at the date of the divorce. At issue is the division of two accounts identified as items 92 (Waddell and Reed account) and 93 (Stratavest account at Howard Bank).

After the April 20, 2000 divorce, Eben, who had control over these accounts, began to withdraw money from them. In addition, the value of some of the stocks in the accounts also decreased. Due to the account balances being lower at the date of the trial than at the date of the divorce, Eben now appeals the case to have the valuation date changed from the date of the divorce to the date of the trial to prevent a perceived inequity. Eben is also appealing the Magistrate's decision in allowing Joan to take half of the liquidated value of the accounts rather than dividing the account equally because the sale of the stock would produce tax consequences for him.

II. STANDARD OF REVIEW.

Absent a clear showing of abuse: "Where the magistrate's findings of fact are supported by substantial and competent evidence, even if the evidence is conflicting, the magistrate's decision will not be disturbed on appeal." *Brinkmeyer v. Brinkmeyer*, 135 Idaho 596, 598, 21 P.3d 918, 920 (Idaho 2001). In addition, "when reviewing an exercise of discretion on appeal, this Court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly

perceived the issue as one of discretion; (2) whether the court acted within the outer bounds of such discretion and consistently with legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." 135 Idaho at 599, 21 P.3d. at 921.

The Court is convinced that the Magistrate: a) did not abuse his discretion in these matters, b) that he correctly perceived the matters as issues involving his discretion, c) that he acted well within the bounds of discretion and was consistent with legal standards, and d) exercised reason in reaching his decision.

III. DISCUSSION.

A. DATE OF VALUATION.

Eben asks this Court to reconsider the date used for the establishing the value of the two accounts represented by items 92 and 93. In doing so, Eben has made an argument to distinguish the primary case cited by Joan. Eben argues that *Brinkmeyer* didn't set a precedent, but that the court merely chose not to reverse because of the previous four-year battle between the parties. In *Brinkmeyer,* the valuation date was found to be the date of the order granting a partial divorce decree. 135 Idaho at 599-600, 21 P.3d at 921-22. The Supreme Court held that "since community property only exists as long as the community exists, once the magistrate issued the divorce and certified it as final *it necessarily follows* that the date of valuation *should* occur on that date. I.C. § 32-601." *Id*. Even though the Supreme Court recognized the lengthy battle between the Brinkmeyers, the Supreme Court's holding is certainly based in reason and statutory law. The use of the words "*necessarily follows*" and "*should occur*" show that the traditional date of valuation is the date of the divorce. A plain reading of such indicates that there is an opening for a different time of valuation based on extenuating circumstances.

In looking at the facts of the present case, Eben has not shown any significant extenuating circumstances. Indeed, some of the circumstances were his own doing. "Eben admitted he withdrew money from the bank accounts after the date of divorce." Respondent's Brief, p. 11. "Neither account had any withdrawals from the fund until after April 20, 2000, the date of divorce." Brief of Appellant, p. 2. On the other hand, some reduction in value of the accounts was due to the passage of time and the performance of the markets. However, that was considered by the Magistrate when he exercised his discretion. Judge Wayman was motivated to find an equitable solution, given the fact that Eben had control over the accounts.

The Magistrate did state that using *Brinkmeyer,* he was "constrained" to use the date of the divorce for purposes of establishing value for dividing assets. Tape 45599 at 1730. But a review of the entire tape of the July 31, 2001 oral decision, shows that he realized he had **discretion** in which date to apply. The Magistrate clearly knew he was not "constrained" by *Brinkmeyer* to use the date of divorce in **all** cases. Rather, the Magistrate indicated that **due to the facts of this case**, mainly the fact that Eben had sole **control** and exercised control of these funds after the divorce, he was "constrained" by *Brinkmeyer* to use the date of divorce as the equitable date to value these funds. Tape 45599 at 1670-1745. The Magistrate stated early on that he struggled with "which valuation date do I use, the date of divorce, the date of trial, the date of decision…and it makes a difference in this case as to how to best divide up these assets." Tape 45499 at 1368. When Judge Wayman later revisited the issue in more detail, the thought he gave to this issue and the effects of his decision on the parties, is extremely evident. Judge Wayman stated that using the April 20, 2000 date for valuation may result in "somewhat" unequal distribution, when viewed in light of the current prices for those shares in the accounts, yet this was obviously the most equitable date of valuation. Tape 45599 at 1825. The reason he felt that date was most equitable, was due to Eben's control of the accounts. Judge Wayman

stated that: "as far as dividing assets 92 and 93, ***since Mrs. Sutton didn't have control over these accounts from the time of divorce to the time of trial***, she receives either the cash payout for [her half of] these accounts, or what the court would prefer to see happen, an in kind distribution of these accounts, to have to have [your share of] the stock be placed in your name [Mrs. Sutton] on those accounts." Tape 45599 at 3224-3290. The option was clearly up to Joan. The reason the Magistrate preferred the second option, distribution of stock, was to minimize the tax ramifications for both parties. Tape 45599 at 3290-3380. At a later point in time, Judge Wayman again stated: "The Court again recognizing this [April 20, 2000 date of valuation] may result in a somewhat unequal distribution to Mr. Sutton since I'm not using the date of trial, **but since he had control of those assets,** I think the flip side, had they increased in value, I'd have to apply the same rule." Tape 45599 at 3380-3420. Clearly the Magistrate knew he had discretion to use a different date of valuation. Clearly he knew the facts of the case very well. Clearly he made his decision within the bounds of discretion, trying to make the most equitable distribution possible, while keeping in mind the facts of the case. The most pertinent fact was obviously the fact that Eben had control of these accounts.

Eben also argues that the two accounts should be valued at the date of the distribution because they were omitted property from the actual divorce, and as such are held in joint tenancy, citing *Clark v. Clark*, 125 Idaho 173, 175, 868 P.2d 501, 503 (Idaho 1994). The Supreme Court in *Clark* stated: "most jurisdictions hold that if a final decree of divorce fail to dispose of community property, the former spouses own the omitted property equally as tenants in common." *Id.* However, in *Clark* the Court found that ownership of the property was not "in common" since the judgment was not final due to being in the appeals process, and that the property was not actually omitted, but was incorrectly characterized in the divorce decree. *Id*. Similarly, in analyzing our case, an appeal is pending and the accounts in question were not

omitted from the divorce decree. The parties were divorced by a partial summary judgment, leaving all property matters to a later trial in which the magistrate distributed the assets. Looking at the Magistrate's order, and listening to his oral decision, the accounts were not omitted. Further, even though the defendant requested a 54(b) certification at the time of the partial summary judgment to finalize the divorce decree, the suit in its entirety was not final. Therefore, there is no merit to the argument that items 92 and 93 should be valued differently as omitted property.

Finally, Eben asks the court to reconsider the Magistrate's decision giving Joan the option of taking half the value of the accounts instead of equally dividing the assets, based on *Batra v. Batra*, 135 Idaho 388, 394, 17 P.3d 889, 895 (Idaho 2001). Eben argues *Batra* indicates each party should have the ability to decide what, if anything, they want to do with their share of the stocks. In *Batra*, the party's argument arose after the defendant was given the right to exercise her stock options instead of receiving a lump sum payment. *Id.*. The stocks in question, however, were not yet vested and as such could not be properly valued. *Id*. By dividing the stocks, the Supreme Court allowed the defendant to remain in control over her half of the assets and removed the possibility of tax consequences to the plaintiff by requiring each party to bear the costs of any exercise in their stock options.

In our case, the value of the stocks was determinable at the date of the divorce. Further, the value of the stocks declined without the aide of either party. When Eben's control is factored in, the Magistrate divided the property under I.C. § 32-712(1)(a), as substantially equal as he could.

B. CASH AWARD.

In his "Notice of Appeal", Eben states his second ground as follows:

> Did the Court err in ordering that the Plaintiff receive a cash award rather than a division of the account, with the consequence of the order of the cash award requiring the liquidation of the funds with the capital gains penalty.

First, this is a misstatement of what was ordered by Judge Wayman. Both the "Order Dividing Property and Debt Following Trial" and the tape of the July 31, 2001 proceedings make it clear that Judge Wayman did not "order" the cash award, rather he left that decision up to Joan, with the encouragement that Joan and Eben look at what is most advantageous from a tax standpoint. Judge Wayman stated: "Its difficult to equalize these things…I've just got to give you an alternative method so Mr. and Mrs. Sutton can work out the best arrangement, if not, the asset can be sold and the amount paid over to Mrs. Sutton." Tape 45599 at 3420-3471. Judge Wayman didn't make the choice of a cash award, he gave Joan the choice, and encouraged a division of the account. "The Court, recognizing that there may be some tax ramifications to both parties in this case, if there is a way to make an in kind distribution that would reduce the tax ramifications and ultimately benefit the parties in the long term, they should be given the opportunity to do that." Tape 45599, at 3290-3320. He gave the parties 90 days to resolve this issue, given them time to speak with their accountants and financial advisors, but clearly the ultimate decision was Joan's. Tape 45599 at 3320-3380. Again, this was due to Eben's control.

Second, obviously Judge Wayman appreciated the tax ramifications, due to the fact that he discussed them in detail. He perceived that it was up to his discretion as to how to handle these tax consequences. He handled the tax consequences in a very equitable way, again, keeping in mind that Eben had control over these accounts from the time of the divorce.

C. ATTORNEY FEES.

Each side has requested attorney fees. Joan argues she should be awarded attorney's fees because the defendant has put her through a needless round of litigation with only a small chance for success. Respondent's Brief, p. 18. Eben argues he should be awarded fees and costs involved in bringing the appeal. Brief of Appellant, p. 6. Eben obviously has not prevailed on appeal. Neither party stated a basis for attorney fees. "In order to be awarded attorney fees, a party must actually assert the specific statute or common law rule on which the award is based; the district judge cannot *sua sponte* make the award or grant fees pursuant to a party's general request." *Brinkmeyer*, 135 Idaho at 601, 21 P.3d at 923, citing *Bingham v. Montane Resource Associates,* 133 Odajp 420, 987 P.2d 1035 (1999). "It is incumbent on the moving party to assert the grounds upon which it seeks an award of attorney fees." *Id*. In *Brinkmeyer*, the appellant's request for attorney's fees was denied since she did not cite a basis for her request. 21 P.3d at 923. Accordingly, attorney fees are denied as to both parties.

IT IS THEREFORE ORDERED, that the Magistrate Scott W. Wayman's September 11, 2001 "Order Dividing Property and Debt Following Trial" is AFFIRMED in all respects, and the matter is REMANDED back to the Magistrate, pursuant to I.R.C.P. 83(z), for any further action.

DATED this __10th___ day of November, 2002.

_____
John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that, pursuant to I.R.C.P. 83(z), on the _____ day of November, 2002 a true and correct copy of the foregoing was faxed, mailed, postage prepaid, or sent by interoffice mail to:

David W. Lohman @ 765-1101	P. O. Box 2332	Coeur d'Alene, ID 83816
Ramona R. Liesche @ 667.4034	P. O. Box 2127	Coeur d'Alene, ID 83816-2127
Hon. Scott W. Wayman @ 446.1121	324 W. Garden Ave.,	Coeur d'Alene, ID 83816-9000

DANIEL J. ENGLISH
Clerk of the District Court

By:_____
Merri Thorne, Deputy Clerk