

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHARI ANN SUTYLA, A/K/A SHARI
ANN LESTER,
Appellant,
vs.
PETER JAMES LESTER,
Respondent.

No. 69037

FILED

DEC 21 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for an annulment. Eighth Judicial District Court, Family Court Division, Clark County; Bryce C. Duckworth, Judge.

In her petition for an annulment, appellant asserted that her consent for marriage was obtained by fraud because respondent had lied about a prior sexual encounter. At trial, appellant asserted that, at all times prior to respondent filing his pre-trial memorandum, he had claimed this prior encounter was not consensual, but that his pre-trial memorandum admitted the encounter was consensual. Appellant further testified that, had she known the encounter was consensual, she would not have married respondent, thus her consent was obtained by fraud. Respondent testified that he fully disclosed the nature of the encounter two years into the marriage and more than a decade before appellant filed the annulment petition, that he never denied that it was consensual, and that appellant continued to live with him after that disclosure.

After the trial, the district court denied appellant's petition for an annulment because she failed to prove by clear and convincing evidence that her consent to marriage was obtained by fraud and because she continued to cohabit with respondent after discovering the alleged fraud.

See NRS 125.340 (allowing an annulment if consent for a marriage is obtained by fraud unless, after learning of the fraud, the parties continue to “voluntarily cohabit as husband and wife”); *Irving v. Irving*, 122 Nev. 494, 497, 134 P.3d 718, 721 (2006) (concluding that fraud under NRS 125.340 must be proven by clear and convincing evidence). We review annulment proceedings for an abuse of discretion. See *Irving*, 122 Nev. at 498, 134 P.3d at 721.

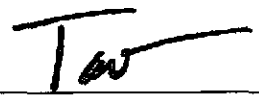
At the outset, we recognize that this case is unusual in that, even though her petition sought an annulment based on alleged fraud, according to appellant’s own testimony, the purported evidence supporting the fraud claim was respondent’s pre-trial memorandum. It seems apparent, then, that appellant’s complaint was not based on this alleged evidence as it was not discovered until after the petition was filed. The district court, however, concluded that respondent’s testimony that he confessed to the consensual encounter more than a decade before appellant filed the annulment petition contradicted appellant’s testimony such that appellant failed to prove this post-annulment-filing fraud by clear and convincing evidence. And, because we will not reweigh respondent’s credibility on appeal, see *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004) (refusing to reweigh the credibility of witnesses on appeal), we will not overturn the district court’s conclusion in this regard.¹ Therefore, because appellant failed to prove fraud by clear

¹Additionally, appellant has failed to include the pre-trial memorandum in the record on appeal and we therefore must presume that it supports the district court’s conclusions. See *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (“When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court’s decision.”).

and convincing evidence, the district court did not abuse its discretion in denying the annulment. *See Irving*, 122 Nev. at 498, 134 P.3d at 721 (reviewing annulment proceedings for an abuse of discretion).² Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

²To the extent appellant argues the alleged fraud was actually discovered when respondent confessed to her regarding the prior encounter, then the district court also properly denied the annulment petition as appellant continued to live with respondent as husband and wife. *See NRS 125.340(2)* (prohibiting annulment based on fraud when the parties continue to live together as husband and wife after the fraud is discovered).

³Appellant also argues that the district court order should be reversed because it erroneously states that clear and convincing evidence cannot be based on speculative testimony. We disagree. *See Peardon v. Peardon*, 65 Nev. 717, 755-57, 201 P.2d 309, 328-29 (1948) (concluding, in a divorce matter, that testimony regarding the other party's understanding of an agreement regarding the transfer of property was speculative and, thus, failed to meet the clear and convincing evidence standard); *see generally Edlund v. Massanari*, 253 F.3d 1152, 1159 (9th Cir. 2001) (holding that speculation does not even amount to substantial evidence, much less clear and convincing evidence); *In re Marriage of Moore*, 169 Cal. Rptr. 619, 621 (Ct. App. 1980) (concluding that clear and convincing evidence "does not leave the matter to speculation").

cc: Hon. Bryce C. Duckworth, District Judge, Family Court Division
Carol A. Menninger
Peter James Lester
Eighth District Court Clerk