IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ELSAYED ELNENAEY,
Appellant,
vs.
MERVAT O. ELNENAEY,
Respondent.

No. 67974

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a divorce decree dividing community property and awarding attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; T. Arthur Ritchie, Jr., Judge.

Appellant Elsayed Elnenaey asserts the following assignments of error on appeal: (1) the district court abused its discretion by denying Elsayed's motion to continue;[1] (2) the district court erred by characterizing the retirement and bank accounts as community property; (3) the district court abused its discretion by dividing the community property unequally without a compelling reason; (4) the district court abused its discretion by awarding respondent Mervat Elnenaey nearly all the cash assets;[2] (5) the

[1]We conclude the district court, being in the best position to assess the circumstances of the case, did not abuse its discretion by denying Elsayed's motion to continue. *See Benson v. Benson*, 66 Nev. 94, 98-99, 204 P.2d 316, 318-19 (1949).

[2]Essentially, Elsayed argues that the district court entered a default judgment against him because it did not award him his separate property and awarded Mervat an unequal share of the community property. We

continued on next page...

district court abused its discretion by crediting Elsayed with a $200,000.00 property located in Alexandria, Egypt;[3] (6) the district court abused its discretion by awarding Mervat attorney fees; and (7) the district court abused its discretion by denying Elsayed's request to alter or amend judgment,[4] for a new trial,[5] or to set the judgment aside.[6] We recount the facts only as necessary for our disposition.

...continued
conclude the district court did not enter a default judgment against him because it held a divorce trial, considered the evidence presented, made no findings under NRCP 55(a), and Mervat did not move for such relief. *Cf. Ogawa v. Ogawa*, 125 Nev. 660, 671-73, 221 P.3d 699, 706-07 (2009).

[3]We conclude Elsayed's argument is without merit because he failed to respond to Mervat's request for admission that he owned this property paid for by community funds. *See* NRCP 36(a) (providing a "matter is admitted unless . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter."). Further, Mervat's testimony at trial supported the district court's characterization and valuation of the property. *See Dugan v. Gotsopoulos*, 117 Nev. 285, 288, 22 P.3d 205, 207 (2001).

[4]This court will not set aside the district court's factual findings unless they are clearly erroneous. NRCP 52(a); *Lofgren v. Lofgren*, 112 Nev. 1282, 1284, 926 P.2d 296, 298 (1996). As discussed herein, substantial evidence supports the district court's findings.

[5]A district court's decision to deny a motion for a new trial is reviewed for abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. ___, ___, 319 P.3d 606, 611 (2014). We conclude the district court did not abuse its discretion by denying Elsayed's motion for a new trial.

[6]The decision to deny a motion to set aside a judgment "will not be disturbed on appeal absent abuse of discretion." *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996). We conclude the district court did not abuse its discretion by denying Elsayed's motion to set aside judgment.

Elsayed and Mervat married on May 15, 1992. Mervat filed a complaint for divorce on November 8, 2013. On February 21, 2014, the district court filed an order enjoining the parties from withdrawing in excess of a specified amount from their Fidelity and Vanguard retirement accounts. Thereafter, the district court set the trial date for September 12, 2014. Elsayed, however, obtained new counsel around that time and moved to continue the trial. The district court granted the continuance. After the December 4, 2014, case management conference, the district court reset the trial for February 19, 2015.

On January 14, 2015, Elsayed's new counsel moved to withdraw from the case. The next day, Elsayed moved to continue the trial again. The district court conducted a hearing on the motions and granted the motion to withdraw but denied the motion to continue indicating its concern that Elsayed could further deplete community assets during the delay, which would prejudice Mervat. Mervat, her daughter Nadine Korayem, and her financial expert, Richard M. Teichner, CPA, appeared and testified at the February 19, 2015, trial; however, Elsayed did not appear, nor did an attorney appear on his behalf.

The district court did not err by characterizing certain property as community property

Elsayed argues that the district court erred by failing to confirm each party's separate property pursuant to NRS 123.220. Specifically, Elsayed claims the district court failed to consider his separate property portion of the Fidelity Individual Retirement Account

(IRA).[7] Elsayed additionally claims during his marriage to Mervat he sold a New Jersey home acquired from his previous divorce and deposited the proceeds from the sale into a Barclays account, which he transferred into the parties' HSBC and Ahly accounts.

This court will not set aside a district court's factual findings unless they are clearly erroneous or not supported by substantial evidence. *Ogawa*, 125 Nev. at 668, 221 P.3d at 704. Substantial evidence is evidence that a reasonable person may accept as adequate to sustain a judgment. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007). It is not within this court's purview to weigh conflicting evidence or assess witness credibility. *Id.* at 152, 161 P.3d at 244. Property acquired during marriage raises a presumption that it is community property. *Forrest v. Forrest*, 99 Nev. 602, 604, 668 P.2d 275, 277 (1983); *Pryor v. Pryor*, 103 Nev. 148, 150, 734 P.2d 718, 719 (1987). The separate property proponent may rebut this presumption with clear and convincing evidence. *Forrest*, 99 Nev. at 604-05, 668 P.2d at 277.

Here, Teichner testified at trial that he reviewed the Fidelity IRA statements and concluded that Elsayed opened the account on July 14, 2007. Mervat introduced seven years of account statements, including the July 2007 statement showing no beginning balance and initial transfers of $927,640.32. This evidence raised the presumption of

---

[7]We do not address Elsayed's argument that Mervat and/or Mervat's counsel misrepresented to the court the true character of the property in violation of NRCP 11 because Elsayed failed to cogently argue and provide relevant authority in support thereof. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

community property; thus, Elsayed bore the burden of proving any separate portion of the accounts. *See Malmquist v. Malmquist*, 106 Nev. 231, 245, 792 P.2d 372, 381 (1990) ("Once an owner of separate property funds commingles these funds with community funds, the owner assumes the burden of rebutting the presumption that all the funds in the account are community property."); *see also Lucini v. Lucini*, 97 Nev. 213, 215, 626 P.2d 269, 271 (1981) ("This presumption gains strength when any claimed separate property has been extensively intermingled with community property.").

Mervat testified at trial that the parties held the bank accounts jointly. Further, in her opposition to Elsayed's post-trial motion, Mervat attached the March 27, 2002, deed conveying the New Jersey house, which contained both parties' names. Thus, substantial evidence supports the conclusion that the proceeds of the sale of the house were community property. *See Ellis*, 123 Nev. at 149, 161 P.3d at 242.

Moreover, Elsayed failed to appear at the trial, and the district court did not admit any of the supporting exhibits upon which Elsayed now relies. Thus, Elsayed failed to satisfy his duty of actively and diligently procuring testimony and documents to support his position at trial. *See Drespel v. Drespel*, 56 Nev. 368, 368, 45 P.2d 792, 793 (1935) (providing that litigants must be active and diligent in procuring the testimony upon which they rely to maintain their cause and that available evidence must be presented at the initial trial on the matter). Therefore, because Elsayed failed to provide the district court with any evidence, and based on the substantial evidence in the record, we conclude the district

court did not err by characterizing the accounts as community property. *See Ogawa*, 125 Nev. at 668, 221 P.3d at 704.

The district court did not abuse its discretion by dividing the community property unequally because compelling reasons supported its decision

Elsayed argues the district court abused its discretion by awarding Mervat a greater than equal share of the community property without providing a compelling reason. Generally, a district court must "make an equal disposition of the community property of the parties . . . ." NRS 125.150(1)(b). A district court may make "an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition." *Id.* This court will not reverse a district court's community property disposition absent an abuse of discretion because "the district court has a better opportunity to observe parties and evaluate the situation." *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996).

Here, the district court divided $2,449,022.00 of community property—Mervat received $1,378,298.00 (approximately 56%) while Elsayed received $1,070,724.00 (approximately 44%). The record shows that the district court considered tax implications in dividing the parties' community property. Specifically, Teichner testified at trial that IRA accounts are valued lower than the same amount held in a bank account because of tax implications. Thus, the district court found it essentially divided the community property equally.

Insofar as there remained an unequal division after the tax implications, the district court found that Elsayed did not comply with a

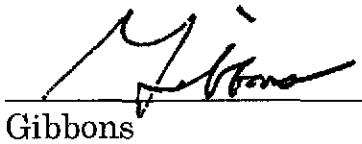
court order concerning the protection of assets. The district court's February 21, 2014, order enjoined the parties from withdrawing more than $6,000.00 per month for personal expenses and $20,000.00 total for attorney fees from the Fidelity and Vanguard retirement accounts. At the trial, Teichner testified that Elsayed withdrew $222,213.88 from the accounts, an excess of $92,213.88. Moreover, the district court found that Elsayed did not fully disclose certain assets in his January 2014 financial disclosure form, did not participate in the case, and did not provide discovery as requested. Accordingly, substantial evidence supports the district court's finding that compelling reasons existed to divide the community property unequally. *See id.*; *Lofgren*, 112 Nev. at 1283, 926 P.2d at 297 (concluding that the intentional financial misconduct of one spouse constitutes a compelling reason to make an unequal disposition of community property).

The district court abused its discretion in awarding attorney fees

Elsayed argues that the district court abused its discretion in awarding Mervat attorney fees. Specifically, Elsayed claims that the district court failed to consider the disparity in the parties' income, *see Miller v. Wilfong*, 121 Nev. 619, 623-24, 119 P.3d 727, 730 (2005), and Mervat failed to produce documentation supporting the reasonableness of the amount of attorney fees. An award of attorney fees is within the discretion of the district court; however, the district court must evaluate all four factors enunciated in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). *See Miller*, 121 Nev. at 623, 119 P.3d at 730. Additionally, the district court must consider the disparity of income between the parties. *Id.* at 623-24, 970 P.2d at 730.

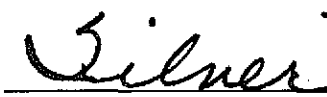
Here, the district court awarded Mervat $80,000.00 in attorney fees. Although Mervat testified at the trial that she incurred $80,000.00 in attorney fees, there is no indication that the district court considered the disparity in income between the parties. *See Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998). Further, Mervat did not provide documentation to the district court showing the work actually performed by her counsel.[8] *See Brunzell*, 85 Nev. at 349, 455 P.2d at 33. Therefore, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, C.J.
Gibbons

_____, J.
Tao



_____, J.
Silver

[8]The lack of complete documentation concerning the amount of fees and counsel's affidavit affirming the reasonableness of the fees and that counsel actually and necessarily incurred the fees necessitates this remand. *See* NRCP 54(d)(2)(B).

cc: Hon. T. Arthur Ritchie, Jr., District Judge, Family Court Division
Robert E. Gaston, Settlement Judge
Black & LoBello
Dickerson Law Group
Eighth District Court Clerk