IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ERIC N. KOHLI,
Appellant,
vs.
JULIE ALLEN KOHLI,
Respondent.

No. 69650

FILED

OCT 13 2017

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

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Eric N. Kohli appeals from the district court's findings of fact, conclusions of law, and decree of divorce, and its order granting in part and denying in part his motion to alter or amend the judgment. Eighth Judicial District Court, Family Court Division, Clark County; T. Arthur Ritchie, Jr., Judge.

Eric Kohli and Respondent Julie Kohli were married in Illinois and relocated to Nevada.[1] They have three minor children together. Eric was a patent prosecutor at a large law firm in Chicago at the start of the marriage, but ran a baby furniture and accessory business called USA Baby in Las Vegas for most of the marriage. During the last few years of the marriage, Eric also attempted to start a hedge fund and financial services business. Julie worked as a consultant to various pharmaceutical companies throughout the marriage.

Eric filed a complaint for divorce. During the divorce proceedings, Eric and Julie agreed to joint legal and joint physical custody of their children. After more than a year and a half of litigation, including four days of trial, the district court issued its decree of divorce.

[1]We do not recount the facts except as necessary to our disposition.

Eric took issue with many of the district court's findings of fact and conclusions of law, and filed a motion to alter or amend its judgment shortly after it issued its decree. The district court denied the parts of Eric's motion relevant to this appeal.

Eric appealed from that order as well as the district court's findings of fact, conclusions of law, and decree of divorce raising six issues in his appeal. We affirm in part, reverse in part, and remand.

Julie's unvested stock options

During the marriage, Julie earned income, bonuses, and stock options from her employers, including a number of unvested stock options. The district court found those unvested stock options were not community property and awarded them to Julie as her separate property.

On appeal, Eric argues the district court misapplied the law by concluding the unvested stock options Julie earned during the marriage were not community property. Julie does not disagree. Furthermore, Nevada law supports the parties' conclusion that the unvested stock options earned by a spouse during a marriage are community property. *See generally* NRS 123.220 ("All property . . . acquired after marriage by either spouse . . . is community property . . . ."); *cf. Forrest v. Forrest*, 99 Nev. 602, 607-08, 668 P.2d 275, 279 (1983) (holding that retirement benefits based on services performed during the marriage, whether or not they are presently payable, are divisible as community property). Accordingly, we reverse the district court's decision on this issue and remand to the district court to identify and divide the unvested stock options Julie earned during the marriage and possessed as of the date of the divorce trial. *See Lofgren v. Lofgren*, 112 Nev. 1282, 1283, 926 P.2d 296, 297 (1996) (noting that NRS 125.150 requires an equal division of community property).

The proceeds from Julie's sale of community stock options

During the divorce litigation, Julie sold a number of vested stock options for $20,393.48. Eric protested that this sale violated the parties' joint preliminary injunction, which prohibited, *inter alia*, selling any community property without written consent of the parties or permission of the court, except in the usual course of business or for the necessities of life.

Eric sought half the value of those proceeds as his community share. The district court denied Eric any portion of these proceeds based on its finding that Julie used the proceeds to pay community obligations.

On appeal, Eric argues that the district court's finding was not supported by substantial evidence. We disagree.

"This court reviews a district court's decisions made in a divorce decree for an abuse of discretion." *Devries v. Gallio*, 128 Nev. 706, 708, 290 P.3d 260, 263 (2012). "Those decisions supported by substantial evidence will be affirmed." *Id.* Substantial evidence is evidence that "a sensible person may accept as adequate to sustain a judgment." *Id.* (quoting *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004)). This court will not weigh conflicting evidence or assess witness credibility on appeal. *See Smith v. Timm*, 96 Nev. 197, 202, 606 P.2d 530, 532 (1980) ("Where there is conflicting evidence, this court is not free to weigh the evidence, and all inferences must be drawn in favor of the prevailing party."); *Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007) ("[W]e leave witness credibility determinations to the district court and will not reweigh credibility on appeal.").

Although Julie did not receive consent from Eric or permission of the district court before liquidating the asset and spending the proceeds, the district court made its finding based upon substantial evidence that Julie

used these funds to pay community obligations and impliedly found she did not violate the joint preliminary injunction. The district court heard testimony from Julie and Eric regarding this sale of stock and received promissory notes accounting for Julie's use of the proceeds from this sale, as well as two detailed financial disclosure forms from Julie. Because substantial evidence was presented on this issue, we will not disturb the district court's finding here by reweighing this evidence on appeal. *See Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 919 (1996) ("This court's rationale for not substituting its own judgment for that of the district court, absent an abuse of discretion, is that the district court has a better opportunity to observe parties and evaluate the situation.").

The district court did not abuse its discretion in denying Eric child support

This court reviews an award of child support for abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019-20, 922 P.2d 541, 543 (1996). When parents share joint physical custody of their children, the formula established by *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998), controls which parent, if any, receives child support and the amount received. *Wesley v. Foster*, 119 Nev. 110, 112, 65 P.3d 251, 253 (2003).

NRS 125B.080(8) (effective 2015)[2] provides that "[i]f a parent who has an obligation for support is willfully underemployed or unemployed to avoid an obligation for support of a child, that obligation must be based upon the parent's true potential earning capacity." "[W]here evidence of willful underemployment preponderates, a presumption will arise that such underemployment is for the purpose of avoiding support." *Minnear v.*

[2]NRS 125B.080 was amended, effective June 4, 2017, following the proceedings pertinent to this appeal.

Minnear, 107 Nev. 495, 498, 814 P.2d 85, 86 (1991). "Once this presumption arises, the burden of proving willful underemployment for reasons other than the avoidance of a support obligation will shift to the supporting parent." *Id.* at 498, 814 P.2d at 86-87.

Here, the district court concluded that Eric was willfully underemployed or unemployed to avoid child support based on his claim that he had no income in light of its findings that he was highly educated, he possessed significant business knowledge and experience, his acknowledgment that he and Julie had equal earning capacities, and his promise to pay his current girlfriend $12,800 per month starting in 2016.[3] Eric's sworn affidavit, trial testimony, trial exhibits, and Julie's trial testimony support each of these findings. Further, the district court heard extensive testimony about Eric's evolving financial situation, including his decision to end his baby furniture business the year before it ultimately closed and his receipt of tens of thousands of dollars in profits from a baby furniture business formed by his girlfriend shortly after that closure. Thus, the district court did not abuse its discretion in determining that substantial evidence of willful underemployment preponderated such that the *Minnear* presumption arose here and in concluding that Eric failed to rebut the presumption. *See Minnear*, 107 Nev. at 498, 814 P.2d at 86.

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[3]Eric contended below that the promissory note with Caryn stated repayment would amount to $12,800.00 per quarter, not per month. Eric did not provide this promissory note in the appellate record, despite its admission at trial as Plaintiff's Exhibit 45. Accordingly, we presume the district court's finding that Eric was to repay Caryn each month is accurate. *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.").

This court does not weigh conflicting evidence or assess witness credibility on appeal. *See Timm*, 96 Nev. at 202, 606 P.2d at 532; *Ellis*, 123 Nev. at 152, 161 P.3d at 244. While Eric produced some testimony that his underemployment (or lack of income) was the product of his business' collapse and the unexpected delays of his new venture, other testimony and evidence suggests Eric continued to profit off his shuttered business through his girlfriend's new business, and that Eric expected to "make good money" from his hedge fund business soon.

Because the record contains conflicting evidence and the district court was in the best position to evaluate that evidence as well as witness credibility, we will not disturb the district court's conclusion that Eric failed to rebut the *Minnear* presumption. Accordingly, the district court's use of Eric's earning potential in place of his actual income for calculating child support under NRS 125B.080(8) was appropriate here. *Cf. Barry v. Lindner*, 119 Nev. 661, 670, 81 P.3d 537, 543 (2003) (approving a district court decision to impute an income where the obligor did not produce evidence besides his own testimony that he was destitute).

The district court found that Eric and Julie have "equal earning capacit[ies]" such that, for purposes of calculating child support, they have equal incomes. Applying the *Wright v. Osburn* formula to equal incomes yields no award of child support to either party. *Cf. Wesley*, 119 Nev. at 112-13, 65 P.3d at 253. Accordingly, we affirm the district court's decision to not award child support to either parent.

The district court did not abuse its discretion in denying Eric alimony

This court reviews the district court's disposition of spousal support or alimony for an abuse of discretion. *See Wolff*, 112 Nev. at 1359, 929 P.2d at 918-19. "The district court has wide discretion in determining

whether to grant spousal support . . . ." *Devries*, 128 Nev. at 711, 290 P.3d at 264.

"When considering whether to award spousal support, the district court should consider, among other things, the parties' careers before marriage, the parties' educations during marriage, the parties' marketability, the length of the marriage, and what the parties were awarded in the divorce proceedings besides spousal support." *Id.* at 712, 290 P.3d at 264. Where the district court does not indicate "in its judgment or decree" that it considered the appropriate factors "in failing to award alimony . . ., this [c]ourt shall remand for reconsideration of the issue." *Id.* (quoting *Forrest v. Forrest*, 99 Nev. 602, 606, 668 P.2d 275, 278 (1983)).

Eric concedes the district court considered the appropriate criteria in evaluating his claim for alimony. However, he argues that the evidence does not support the district court's finding that he and Julie had the same earning potential and therefore were in the same financial condition because his business was bankrupt and he claims that he lost "virtually all" of his personal property throughout his separation from Julie. Although he concedes that awarding alimony is discretionary, he contends that the lack of an award in this case is not equitable.

Though one of Eric's businesses may be bankrupt and he may no longer possess some of his personal assets, the district court based its findings concerning his earning potential on other factors supported by substantial evidence such as his education, business experience, his acknowledgment concerning his earning potential, and his promise to repay his girlfriend $12,800 per month. In this way, the district court did not abuse its discretion by determining that Eric and Julie had the same earning potential. Additionally, Eric appears to be asking this court to re-weigh evidence in

making his equitable argument, an action this court is ill-suited to perform. *See Wolff*, 112 Nev. at 1359, 929 P.2d at 919.

Accordingly, we conclude that the district court did not abuse its discretion by denying Eric's request for alimony.

The district court did not abuse its discretion in dividing the value of the 2012 Mercedes

"'Before the appellate court will interfere with the trial judge's disposition of the community property of the parties . . ., it must appear on the entire record in the case that the discretion of the trial judge has been abused.'" *Wolff*, 112 Nev. at 1359, 929 P.2d at 918-19 (quoting *Shane v. Shane*, 84 Nev. 20, 22, 435 P.2d 753, 755 (1968)). A district court must divide community property equally unless compelling reasons exist to justify an unequal division of community property. *See Lofgren*, 112 Nev. at 1283, 926 P.2d at 297; NRS 123.220 (defining community property).

Eric purchased a 2012 Mercedes Benz S550 (the "2012 Mercedes") in April 2014 for $56,000 using funds from a community property business and a community credit card. Eric and Julie were married at the time Eric made this purchase. Accordingly, this vehicle was community property and the district court was required to divide its value equally between Eric and Julie unless compelling reasons existed to justify an unequal division of its value.[4] *See id.*

Still, Eric argues that the district court improperly divided the value of the 2012 Mercedes in light of an informal bargain he and Julie had

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[4]Eric did not argue below and does not argue on appeal that the 2012 Mercedes was his separate property.

to keep their respective incomes and the purchases they made with their incomes during the divorce proceedings.[5] However, Eric does not argue that this "informal bargain" is a compelling reason justifying an unequal division of the value of the 2012 Mercedes. Therefore, the district court did not abuse its discretion by dividing the value of that vehicle.

Accordingly, we conclude the district court did not abuse its discretion in dividing the value of the 2012 Mercedes equally between Eric and Julie, and affirm conclusion on this issue.[6]

The district court did not abuse its discretion in awarding Julie a portion of her attorney fees and costs

"[A]n award of attorney fees in divorce proceedings will not be overturned on appeal unless there is an abuse of discretion by the district court." *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005). To receive an award of attorney fees, the party seeking such an award must first "identify the legal basis for the award." *Id.* Then, the district court must evaluate the factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), and *Wright v. Osburn*, in determining the appropriate fee to award. *Miller*, 121 Nev. at 623, 119 P.3d at 730. These

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[5]No writing describing or memorializing this informal agreement is present in the record on appeal.

[6]Eric argues for the first time in his reply brief that the district court order requiring Julie to hand over any of Eric's remaining personal separate property if it turned up was "not adequate." ARB 14-15. Accordingly, Eric waived this issue and this court may only address it if its consideration is "in the interests of justice." *See Powell v. Liberty Mut. Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011). We decline to address it.

factors include "the qualities of the advocate, the character and difficulty of the work performed, the work actually performed by the attorney, [] the result obtained . . . [and] the disparity in income of the parties . . . ." *Id.* Parties "seeking attorney fees in family law cases must support their fee request with affidavits or other evidence that meets the factors in *Brunzell* and *Wright*." *Id.* at 623-24, 119 P.3d at 730.

In her pre-trial memorandum, Julie identified NRS 125.150(3) (effective July 2015)[7] and NRS 18.010(2)(b) as the legal bases for awarding her attorney fees and costs. Julie also described the *Brunzell* and *Wright* factors the district court must consider as prescribed in *Miller* and argued the evidence produced at trial would support them.

Our review of the record reveals that the district court identified a legal basis, engaged in the *Brunzell* analysis, and made the required findings to support its decision. Nonetheless, Eric asserts that, because of the district court's "error of law" concerning the characterization of Julie's unvested stock options, the fee award "based in part on that ruling is also erroneous."

While this is a proper statement of the law as far as it goes, *see Hern v. Erhardt*, 113 Nev. 1330, 1338, 948 P.2d 1195, 1200 (1997) (reversing part of an award of attorney fees based on a legal error by the district court), the district court here explicitly awarded attorney fees for Julie's defense of claims, excluding the division of community property. Accordingly, any error

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[7]NRS 125.150 was amended effective June 4, 2017. Subsection (3) no longer refers to a ground for awarding attorney fees. *See* NRS 125.150(3). Julie cited to the prior version's subsection (3), which did provide a basis for awarding attorney fees.

in the district court's findings pertaining to its division of community property is immaterial to its award of attorney fees to Julie.

Therefore, given the thorough analysis conducted by the district court concerning its award of attorney fees to Julie, we affirm the district court's award of a portion of Julie's attorney fees and costs.

Accordingly, 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.

Silver, C.J.
Silver

Tao, J.
Tao

Gibbons, J.
Gibbons

cc: Hon. T. Arthur Ritchie, Jr., District Judge, Family Court Division
Robert E. Gaston, Settlement Judge
Willick Law Group
Radford J. Smith, Chartered
Eighth District Court Clerk