

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE ISAI MALDONADO,
Appellant,
vs.
ARLIN DELGADO,
Respondent.

No. 82718-COA

FILED

DEC 21 2021

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

ORDER OF AFFIRMANCE

Jose Isai Maldonado appeals from a decree of divorce. Eighth Judicial District Court, Clark County; Vincent Ochoa, Judge.

In the proceedings below, Jose filed his complaint for divorce in December 2019 and respondent Arlin Delgado subsequently filed her answer and counterclaim. The district court then entered a temporary order granting Arlin exclusive possession of the parties' marital residence, ordering Jose to continue making the monthly mortgage payments, granting the parties a physical custody arrangement, and ordering Jose to pay child support.

Following a trial, the district court entered a decree of divorce in March 2021. Pursuant to the terms of the decree, as relevant here, the parties were granted joint legal custody and Arlin was granted primary physical custody of the parties' two minor children. Additionally, the district court ordered Jose to pay Arlin child support, alimony in a lump sum payment of \$12,600, and \$11,430 for failure to make 10 mortgage payments as previously ordered by the court in the temporary order. The district court also awarded the parties equal portions of the equity in the marital residence, except that Jose's lump sum payments (for alimony and

the mortgage payment arrears) were to be paid from his portion of the equity in the home. Finally, the district court ordered that the parties would divide Jose's culinary pension based on the number of years the parties were married pursuant to *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989), and *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990). This appeal followed.

On appeal, Jose challenges the district court's primary physical custody award, alimony, the mortgage payment arrears, and the division of Jose's pension. This court reviews the district court's decisions in divorce proceedings for an abuse of discretion. *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004). Similarly, this court reviews the district court's division of property and alimony awards for an abuse of discretion. *Schwartz v. Schwartz*, 126 Nev. 87, 90, 225 P.3d 1273, 1275 (2010). And this court will not disturb a district court's decision that is supported by substantial evidence. *Williams*, 120 Nev. at 566, 97 P.3d at 1129. Additionally, this court reviews a child custody decision for an abuse of discretion, and we likewise will affirm the district court's factual findings in child custody matters if they are supported by substantial evidence. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-42 (2007). Substantial evidence is that which a reasonable person may accept as adequate to sustain a judgment. *Id.* at 149, 161 P.3d at 242; *Williams*, 120 Nev. at 566, 97 P.3d at 1129.

First, as to Jose's challenge to the district court's award of primary physical custody to Arlin, Jose contends there was no basis to preclude him from a joint physical custody award, there were no findings to support the award, and the district court failed to make any best interest findings pursuant to NRS 125C.0035(4). When making a custody

determination, the district court must make express findings regarding the best interest of the child supporting its decision. NRS 125C.0035(4) (providing that the district court must consider and set forth specific findings concerning the best interest factors, and enumerating several factors for the court's consideration); *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015) (explaining that "express findings as to the best interest of the child in custody and visitation matters" are required).

Here, contrary to Jose's assertion, the district court cited NRS 125C.0035 and made specific best interest findings in support of its custody award. Indeed, the district court specifically found that Arlin demonstrated that she was likely to allow frequent associations, that she demonstrated she could cooperate with Jose for the benefit of the children, that she cares for the youngest child's developmental and educational needs, that neither party seems to have any health concerns, that both parties have a good relationship with the children, and that the eldest child indicated a preference to reside primarily with Arlin, amongst other things. See NRS 125C.0035(4). Thus, because the district court considered the best interest of the children and made specific findings related thereto, we cannot conclude that the district court abused its discretion in awarding Arlin primary physical custody of the parties' two minor children.¹ See *Rivero v.*

¹As to Jose's assertion that the district court abused its discretion in finding that the parties were exercising a de facto primary physical custody arrangement, Jose contends the parties were only exercising that timeshare because the district court ordered the same in its temporary order. But in making the custody determination set forth in the decree, the district court also found that the parties agreed to modify Jose's timeshare to accommodate their schedules, such that they were not practicing the timeshare provided by the temporary order, and Jose does not challenge that finding on appeal. And although Jose asserted the parties were

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Rivero, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009); *Ellis*, 123 Nev. at 149, 161 P.3d at 241.

Next, Jose challenges the district court's order regarding alimony, asserting that the district court failed to consider the factors enumerated in NRS 125.150, failed to make findings, and failed to consider Arlin's underemployment. The district court may award either party alimony as appears just and equitable. NRS 125.150(1)(a). When determining whether to award alimony, the district court must consider a variety of factors as enumerated in NRS 125.150(9). Here, the district court made a number of findings as to the relevant factors. Specifically, the district court considered the relative incomes of the parties, the duration of the marriage, that historically Jose was the primary bread-winner, that the parties relied on Jose's income to maintain their standard of living during the marriage, that Arlin had only worked part-time during the parties'

exercising a joint physical custody arrangement prior to the court's temporary order, he has failed to provide this court with the transcripts of the proceedings or otherwise point to any evidence in the record, aside from his own arguments, demonstrating that the parties were not exercising a primary physical custody arrangement at the time the district court made its finding. See *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (explaining that when an appellant "fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision"). Thus, we cannot conclude that the district court abused its discretion in this regard. See *Ellis*, 123 Nev. at 149, 161 P.3d at 241. Moreover, even if the district court erred in finding the parties were already exercising a primary physical custody arrangement, such error was harmless as the district court made numerous other findings demonstrating it was in the children's best interest to award Arlin primary physical custody. See *id.* (explaining that the district court has "broad discretionary powers" in determining child custody); cf. NRCP 61 (providing that "the court must disregard all errors and defects that do not affect any party's substantial rights").

marriage, and that she primarily cared for the children during the marriage. See NRS 125.150(9). Based on these findings, we cannot conclude that the district court abused its discretion in awarding Arlin alimony or in determining an amount it deemed just and equitable.² See *Schwartz*, 126 Nev. at 90, 225 P.3d at 1275.

Finally, Jose challenges the distribution of community property, asserting that the district court abused its discretion in ordering Jose to pay arrears for the mortgage payments he failed to pay and in dividing Jose's pension. Pursuant to NRS 125.150(1)(b), the district court "[s]hall, to the extent practicable, make an equal disposition of the community property." However, the district court may divide the community property unequally "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.*

As to the mortgage payments, Jose argues that the district court abused its discretion in ordering Jose to pay \$11,430 as arrears for

²To the extent Jose asserts that the district court abused its discretion in awarding Arlin a lump sum of \$12,600, Jose has failed to offer any argument or point to anything in the record demonstrating this amount was unjust or inequitable. See NRS 125.150(1)(a); *Heim v. Heim*, 104 Nev. 605, 613, 763 P.2d 678, 683 (1988) (concluding that the appellate courts "will not invade the province of the trial court by determining what is the minimum amount which should be considered as a just and equitable alimony award"), *superseded by statute on other grounds as stated in Rodriguez v. Rodriguez*, 116 Nev. 993, 994-1000, 13 P.3d 415, 416-20 (2000). Thus, based on the record before us, we cannot conclude that the district court abused its discretion in making the alimony award. See *Cuzze*, 123 Nev. at 603, 172 P.3d at 135; *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider claims that are not cogently argued); *Williams*, 120 Nev. at 566, 97 P.3d at 1129.

those mortgage payments because the mortgage was in forbearance and because he should have only been obligated to pay half of the mortgage payment, as the mortgage was a community obligation. Here, the district court previously ordered Jose, in its temporary order issued at the outset of litigation, to continue to pay the mortgage payment for the marital residence and Jose failed to do so. Although Jose contends the mortgage was in forbearance, such that he should not be required to make payments as no payments were owed to the mortgage lender, Jose was not at liberty to willfully disobey the court's order absent a stay of the order or further order of the court. *See Truesdell v. State*, 129 Nev. 194, 200, 304 P.3d 396, 400 (2013) (explaining that a court order must be obeyed so long as it remains in effect and disobedience of an order results in a violation of that order); *see also Maness v. Meyers*, 419 U.S. 449, 458-59 (1974) (explaining that court orders must be complied with; if a party believes the order is incorrect, the remedy is to appeal, but the party must comply with the order pending an appeal, absent a stay, and a party's refusal to comply with an order subjects him or her to contempt even if the order is ultimately ruled incorrect).

Here, nothing in the record indicates that the court's order requiring Jose to continue making the mortgage payments during the pendency of the litigation was ever stayed or otherwise deemed ineffective. *See Truesdell*, 129 Nev. at 200, 304 P.3d at 400. And because Jose has failed to provide this court with the transcripts of the proceedings or otherwise point to any evidence in the record demonstrating that he challenged the court's temporary decision requiring him to continue making the mortgage payments below, he has waived any such argument on appeal. *See Cuzze*, 123 Nev. at 603, 172 P.3d at 135; *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49,

52, 623 P.2d 981, 983 (1981) (explaining that points not urged in the trial court are waived and will not be considered on appeal). Moreover, the evidence that Jose points to as demonstrating there was a forbearance on the mortgage indicates that the payments were not waived and would still be due at a later date. And as to Jose's assertion that he should have only been required to pay one-half of the mortgage payment because it constituted a community debt, under the circumstances presented in this case, we see no abuse of discretion in the district court directing Jose to make these payments in its initial temporary order as the district court is permitted to order a party to pay temporary maintenance for the other party during the pendency of the action. See NRS 125.040(1)(a). Thus, we cannot conclude that the district court abused its discretion in concluding that Jose owed arrears for the mortgage payments he failed to pay despite the court's prior order requiring him to do so. See *Williams*, 120 Nev. at 566, 97 P.3d at 1129.


Regarding the division of Jose's pension, Jose argues that the district court abused its discretion in dividing his pension because the district court failed to provide an end date for the pension. Retirement benefits earned during the marriage are community property, subject to division upon divorce. *Kilgore v. Kilgore*, 135 Nev. 357, 360, 449 P.3d 843, 846 (2019); *Gemma*, 105 Nev. at 461, 778 P.2d at 430. When dividing a retirement benefit, the court is to apportion the community interest in the retirement plan pursuant to the "time rule" and "wait and see" approach as adopted in *Gemma* and further explained in *Fondi*, 106 Nev. 856, 802 P.2d 1264. Here, the decree of divorce provides that Jose's pension will be divided pursuant to *Gemma* and *Fondi*, and that the parties will have a Qualified Domestic Relations Order prepared to divide the same.

As an initial matter, we note that based on our review of the record, it seems Jose argued below that the district court should divide the pension pursuant to *Gemma* and *Fondi*, such that he is not aggrieved by the district court's order dividing the pension that way, thereby granting Jose's requested relief. See NRAP 3A(a) (providing that only an aggrieved party may appeal from a judgment); *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994) ("A party is aggrieved within the meaning of NRAP 3A(a) when either a personal right or right of property is adversely and substantially affected by a district court's ruling." (internal quotation marks omitted)). Regardless, because the decree provides that the pension will be divided as required by law, the district court did not abuse its discretion in dividing Jose's pension. See *Schwartz*, 126 Nev. at 90, 225 P.3d at 1275.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

³Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Vincent Ochoa, District Judge
Jose Isai Maldonado
Jennifer Gastelum Law PLLC
Eighth District Court Clerk