

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LISA JEANNE CUNNING, N/K/A LISA
MESSING,
Appellant,
vs.
CHARLES CHRIS CUNNING,
Respondent.

No. 84255-COA

FILED

MAY 03 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

Lisa Messing appeals from a decree of divorce, award of attorney fees, and post judgment orders in a family law matter. Eighth Judicial District Court, Family Division, Clark County; Amy Mastin, Judge.

Lisa and respondent Charles Chris Cunning (Chris) were married in 2000 and have two children who are the issue of the marriage, one of whom was a minor at the time of the divorce proceedings. During the marriage, Lisa, a former educator, homeschooled the parties' children and took care of the home while Chris—a commercial real estate agent and licensed stockbroker—took care of the family's finances, including investments. Although the parties were initially successful in the stock market, Lisa alleges that Chris began trading in futures without her knowledge in 2013, and by 2018, had purportedly lost all of the community savings. However, both parties had inherited separate property funds which were held in different accounts that remained intact during the marriage.

In January 2020, Lisa filed a complaint for divorce, requesting—in pertinent part—that the court award alimony, adjudicate community property and debts, and reimburse her for Chris's marital waste

resulting from “wasted, hidd[en] and/or dissipated marital assets.” Following Chris’s answer, Lisa engaged in significant discovery efforts surrounding his investments in the stock market and potential hidden accounts regarding his real estate commissions, hiring an expert in forensic accounting, reportedly subpoenaing over 27 financial institutions, and generating over 10,000 pages of discovery responses.

Because Lisa had no income of her own, the court ordered Chris to pay temporary spousal support in the amount of \$2,000 a month and directed Chris to continue paying all of the community expenses. However, the court recognized that nearly all of the community assets were depleted, and consequently found that “[i]f [Chris] is utilizing his separate property to cover community expenses, the issue of reimbursement shall be a trial issue.” Later, after the parties’ minor child had completed high school, the district court directed Lisa to begin a job search to prepare for financial independence, and also directed her to pay some of her own personal expenses. Eventually, Lisa’s first trial counsel withdrew and filed an attorney lien, and separate counsel represented Lisa at trial.

During the trial on this case, Lisa called the parties during her case in chief but did not call her own expert witness or appear to use any of the discovery obtained during the beginning of her case to support her marital waste claim. Indeed, despite presenting allegations in her pre-trial and trial memorandums that would appear to support a marital waste claim, Lisa represented to the court that she was no longer pursuing the marital waste claim at trial, but instead sought to enforce an oral agreement with Chris in which he purportedly promised to give her his interest in the marital residence to make up for the lost community property from the joint account. Accordingly, Lisa’s only evidence to that effect was

based on her testimony. Chris, on the other hand, not only called the parties but also called his rebuttal expert, who presented limited testimony as to the time and expense required to respond to Lisa's discovery requests. Following trial, the district court entered its findings of fact, conclusions of law and decree of divorce. In that decree, the district court divided the community assets and debts, reimbursed Chris for his separate property contributions during the marriage in the amount of \$115,620, awarded alimony to Lisa in the amount of \$3,000 per month for 84 months, imputing annual income of \$130,000 to Chris and \$45,000 to Lisa, and determined that attorney fees were warranted to both Chris and Lisa and directed their respective counsel to submit *Brunzell*¹ memorandums and supporting documents.

Shortly thereafter, Lisa's counsel filed a motion for adjudication of attorney lien, which Lisa did not oppose, seeking \$115,324.15 for services rendered during the case. Chris's counsel also submitted a memorandum of fees and costs, which Lisa did oppose, asking the district court to have Lisa pay Chris's attorney fees and costs in the amount of \$120,427.41 due to Lisa's pursuit of the arguably frivolous marital waste claim.

Eventually, Chris filed, and Lisa opposed, a motion to enforce and/or alter or amend the decree of divorce which led to entry of the district court's supplemental decree of divorce on November 10, 2021. In that order, the court updated the division of property, amending the current payoff amount for Lisa's Porsche, finding that Chris's separate property reimbursement should be \$119,120 to account for his two Honda XRs that

¹*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

were purportedly missing from the original decree, and also clarified the division of assets and debts from the initial divorce.

Overall, the court equally divided the community assets, but determined that Lisa should be required to pay for her remaining counsel's fees out of her share of the community property: \$70,000 for the remainder of an attorney lien from her previous counsel, and \$115,324.15 for the current attorney lien, and pay \$25,000 plus \$13,585.41 of Chris' attorney and expert witness fees for the efforts he made in combating her marital waste claims. Ultimately, after these additions and deductions, Chris received \$751,190.75 while Lisa received \$322,377.16, with additional funds to be distributed pending the closing of the sale of the marital residence.

Following entry of the supplemental decree, Lisa filed two post-judgment motions in which she challenged the entry of the attorney's lien against her, and the supplemental divorce decree, primarily on the basis of the parties' relative incomes and her understanding that her pursuit of the marital waste claim was not frivolous. The district court denied both motions, finding that Lisa failed to present a proper basis for relief, and that the court had considered the relative incomes of the parties, noting that the award of attorney fees to Chris would have been substantially higher had the court not taken the parties' financial positions into account. Lisa now appeals.

On appeal, Lisa argues that the district court abused its discretion when (1) dividing the parties' community property, including reimbursing Chris for community expenses paid with his separate property during the divorce; (2) calculating the alimony award; and (3) allowing Pecos Law Group to file a lien against her and by requiring her to pay attorney fees.

Reimbursement for Separate Property/Division of Community Property

Lisa presents several challenges to the district court's division of community and separate property and debts, namely that the district court abused its discretion when dividing the community debt, reimbursing Chris' separate property out of the community—including reimbursing Chris for temporary spousal support—and several other challenges to the court's property division, including that the court failed to unequally divide the community property under her marital waste and hidden asset claims.

This court reviews the district court's division of property 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 v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004). Substantial evidence is that which a reasonable person may accept as adequate to sustain a judgment. *Id.*

Turning first to Lisa's challenges to the district court's division of community debt, Lisa argues that the district court abused its discretion by allowing the community to pay off Chris' credit card debts while simultaneously deeming her credit card debts to be frivolous expenses. However, our review of the initial decree of divorce (which contains the majority of the district court's findings) as well as the supplemental decree of divorce (which contains additional findings as well as the final division of the community property), reveals that although the district court repeated Chris' arguments that Lisa's expenditures were frivolous, the court ultimately determined that because Lisa was not pursuing her marital waste claim and because both parties "spent considerably more than they earned and incurred debt as a result" this was not a compelling reason to unequally divide the community property. Accordingly, the court split the

community debts, except for attorney fees (addressed separately by the district court), equally between both Chris and Lisa.

Because the court equally divided the community assets as required under NRS 125.150(1)(b), and because disproportionate consumption of community property during the marriage does not present a compelling reason for an unequal disposition of community property, we cannot conclude that the district court abused its discretion here, and therefore affirm the district court's allocation of community debts in this case. *See Putterman v. Putterman*, 113 Nev. 606, 609, 939 P.2d 1047, 1048-49 (1997) ("Almost all marriages involve some disproportion in contribution or consumption of community property. Such retrospective considerations are not and should not be relevant to community property allocation and do not present 'compelling reasons' for an unequal disposition"); *see also Schwartz*, 126 Nev. at 90, 225 P.3d at 1275.

Turning to Lisa's challenges to the reimbursement of Chris's separate property, Lisa argues that Chris should not be entitled to reimbursement of the separate property, as he put their mortgage and home equity line of credit loans into forbearance without permission and prioritized his own debts over her credit card debts when paying community expenses, leading to additional community expenses. Accordingly, Lisa argues that she should not be required to reimburse him for these expenses out of her portion of the community. Additionally, Lisa argues that the district court abused its discretion by granting Chris's request for reimbursement of temporary spousal support paid during the divorce.

In the proceedings below, Chris received a reimbursement of \$119,120 (divided equally into \$59,560 from each parties' share) for separate property used to pay for community expenses and temporary

spousal support paid to Lisa. Under Nevada law, if separate property is used to pay community expenses “when community assets are exhausted,” a spouse’s separate estate is entitled to reimbursement from the community. *Cord v. Cord*, 98 Nev. 210, 214, 644 P.2d 1026, 1029 (1982). Conversely, “where a spouse makes a conscious choice to use his or her separate property, rather than available community property, to pay community expenses, the use of the separate property constitutes a gift to the community.” *Robison v. Robison*, 100 Nev. 668, 671, 691 P.2d 451, 454 (1984). Moreover, “a spouse must support his or her spouse out of his or her separate property when the spouse has no separate property and they have no community property and the spouse, from infirmity, is not able or competent to support himself or herself.” NRS 123.110.

Here, the evidence presented during the trial and in the record before this court supports the district court’s finding that the parties had depleted all (or nearly all) of their community assets before divorce, and that Chris’s commission-based income, if any, would be insufficient to support the parties’ continuing expenses, requiring Chris to expend funds from his separate property account to support the community. We likewise see no abuse of discretion in the district court’s decision to refund the temporary spousal support paid to Lisa during the divorce. *See Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996) (explaining that this court reviews the district court’s spousal support order for an abuse of discretion).

Although the district court initially found that Lisa was entitled to temporary spousal support of \$2,000 a month during the divorce, the court later ordered Lisa to apply for jobs to obtain financial independence, and Lisa failed to do so. Moreover, evidence presented at trial revealed that,

in addition to her failure to seek gainful employment, Lisa had separate property funds that she could have utilized to pay her personal expenses during the divorce. Accordingly, the district court found that because Lisa was capable of self-support, the provisions of NRS 123.110, requiring a spouse to support “his or her spouse out of his or her separate property when the spouse has no separate property and they have no community property and the spouse, from infirmity, is not able or competent to support himself or herself,” did not apply. Because the district court’s findings related to the community debt and Lisa’s ability to support herself are supported by substantial evidence, we conclude that the district court did not abuse its discretion when it determined that Chris was entitled to a reimbursement for separate property paid during the divorce and for temporary spousal support paid to Lisa and affirm that portion of the district court’s order. *See Schwartz*, 126 Nev. at 90, 225 P.3d at 1275.

However, although we conclude that Chris is entitled to reimbursement, Lisa correctly points out that the district court awarded him two 2000 Honda XR’s as his physical separate property in the divorce decree, and awarded him an additional \$3,500 separate property reimbursement for those same Honda XR’s in the supplemental divorce decree. Because the district court awarded Chris both the physical items and monetary compensation for these items—without any supporting evidence in the record that those items had been lost or sold off as part of Chris’s efforts to pay community expenses—we reverse this portion of the supplemental decree of divorce, and in its place, reinstate the original \$115,620 awarded in the initial divorce decree. *See id.; Williams*, 120 Nev. at 566, 97 P.3d at 1129.

Finally, to the extent that Lisa seeks to resurrect her marital waste and hidden asset claims on appeal, we need not address them, as Lisa represented to the district court during the trial that she was no longer pursuing those claims. *See Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010) (“[P]arties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below.” (internal quotation marks omitted)).² Similarly, Lisa also presents several arguments on appeal related to Chris’s alleged failure to obey court orders, timely disclose assets, pay child support and medical premiums, as well as his purported failure to pay temporary spousal support for August 2021 that either were not presented before the district court below, or do not contain sufficient support in the record to evaluate those claims on appeal. We conclude that these arguments do not present a basis for reversal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”); *Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding that the court need not consider claims that are not cogently argued).

²To the extent that Lisa is instead challenging that the district court did not award her the value of Chris’s equity in the marital residence, we conclude that the district court’s evaluation of the conflicting testimony of the parties in Chris’s favor was not an abuse of discretion. *See Dieleman v. Sendlein*, 99 Nev. 768, 770, 670 P.2d 578, 579 (1983) (holding that where the parties present conflicting evidence, it is for the trier of fact to resolve the conflicts and judge witness credibility).

Alimony

Next, Lisa contends that the district court abused its discretion when awarding her alimony in the amount of \$3,000 a month for seven years, and imputing income of \$130,000 to Chris and \$45,000 to Lisa for purposes of future modification. Specifically, Lisa argues that the district court abused its discretion in the length and amount of alimony by failing to consider her economic circumstances, including that she is close to retirement age without a retirement fund, had not worked in 21 years, and that the alimony award does not cover her monthly expenses, and also abused its discretion by failing to consider her testimony that Chris is hiding his actual income.

When reviewing awards of alimony, “this court extends deference to the discretionary determination of the district court and withholds its appellate power to modify or reverse except in instances where an abuse of the trial court’s discretion is evident from a review of the entire record.” *Gardner v. Gardner*, 110 Nev. 1053, 1055-56, 881 P.2d 645, 646 (1994). In deciding the amount and duration of an alimony award, the court should consider what is “just and equitable” based on the circumstances of each case. *Shydler v. Shydler*, 114 Nev. 192, 199, 954 P.2d 37, 41 (1998).

When determining if alimony is just and equitable, a district court must consider the eleven factors listed in NRS 125.150(9). In the divorce decree, the district court weighed and evaluated the relevant factors and found (among other things), that the parties had lived above their means for several years and would not be able to maintain the standard of living following divorce, that both parties have a roughly equal amount of monthly expenses, that, while Lisa has not worked in 21 years, she is highly educated, did not present evidence that she is unhealthy or unable to work,

and failed to comply with the court's order that she prepare for financial independence by finding a job, and that Chris's commission-based income fluctuates but has been relatively stable. Moreover, the court also considered that both parties have separate and community property awards from the divorce with which they can support themselves. Finally, the court found that while Lisa had requested rehabilitative alimony under NRS 125.150(10), she failed to support this request with any relevant evidence.

Our review of the record in this case reveals that substantial evidence supports the district court's findings relevant to alimony. In light of these supported findings, we cannot conclude that "an abuse of the trial court's discretion is evident from a review of the entire record," and therefore affirm the district court's alimony award in this case. *Gardner*, 110 Nev. at 1055-56, 881 P.2d at 646.

Attorney Fees

Related to attorney fees, Lisa argues that the district court abused its discretion in requiring her to pay a portion of her own attorney fees (in the form of liens by her prior counsel), as well as a portion of Chris's attorney fees as a sanction under NRS 18.010(2)(b), arguing that the fee awards are inappropriate due to the financial disparity between the parties and because her pursuit of the marital waste claim was not frivolous and therefore does not warrant an award of fees.

As an initial matter, Lisa has waived any argument as to the amount of fees awarded in the order granting her attorney's motion to adjudicate attorney's lien and reduce fees to judgment, as she failed to oppose that motion below. See *Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983 ("A point not urged in the trial court, unless it goes to the jurisdiction

of that court, is deemed to have been waived and will not be considered on appeal.”).

Turning to the district court’s offset of the attorney fee award against Lisa’s share of the community, we conclude that the district court did not abuse its discretion in apportioning these fees towards Lisa’s share. *See Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005) (holding that a district court’s award or denial of attorney fees is reviewed for an abuse of discretion.). Related to this offset, Lisa argues that the district court abused its discretion in requiring her to pay a portion of Chris’s attorney fees and expert witness fees because her pursuit of the marital waste and hidden asset claims were not frivolous, and further argues that the court abused its discretion by failing to consider the disparity in the parties’ income prior to awarding fees.³

NRS 18.010(2)(b) allows the district court to award attorney fees to a prevailing party “when the court finds that the claim, counterclaim . . . or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party.” “The court shall liberally construe the provisions of [NRS 18.010(2)(b)] in favor of awarding attorney’s fees in all appropriate situations,” and “[i]t is the intent of the Legislature that the court award attorney’s fees pursuant to [NRS 18.010(2)(b)] . . . in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses.” *Id.* “For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible

³In so doing, Lisa failed to challenge the amount and reasonableness of the fee award to Chris. Accordingly, she has waived any such argument on appeal. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived).

evidence to support it.” *Rodriguez v. Primadonna Co.*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009).

In granting Chris’s motion for attorney fees, the district court determined that Lisa’s claims related to marital waste and hidden assets were maintained without reasonable ground, stating that despite Lisa’s claims to the contrary during trial, her pretrial memorandum included her forensic accountant as an expert witness, and her trial memorandum included marital waste arguments. Thus, the court found that “it appears that Lisa pursued these claims up to the time of trial, long after a reasonable investigation by a forensic accountant should have determined they were fruitless. Continuing to allege those claims were viable undoubtedly resulted in both Lisa and Chris incurring unnecessary attorney’s fees.” Accordingly, the court found that Chris should be reimbursed for reasonable attorney fees related to his defense of meritless claims pursued by Lisa but ultimately abandoned during trial, as Lisa did not call her expert to testify, present any documentary evidence related to those claims during trial, or present a marital waste claim to the court in closing arguments.


Given the record supporting the district court’s assessment of the evidence regarding Lisa’s abandonment of these claims and the increased litigation costs for both parties, as well as the Legislature’s mandate that the district court liberally construe the statute in favor of awarding attorney fees, we find no abuse of discretion in the district court’s decision to award Chris attorney fees and expert witness costs.

Further, and contrary to Lisa’s assertions on appeal, the record before us supports that the district court considered the parties’ disparity in income (in particular, Lisa’s ability to pay out of her community property

share) pursuant to *Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998), as well as the appropriate *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), factors when rendering this decision. *See Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (affirming fee award because substantial evidence favored an award, and “the district court demonstrated that it considered the *Brunzell* factors”). Accordingly, we discern no abuse of discretion in the district court’s assessment of attorney fees against Lisa and affirm the award of attorney fees and costs. *See Miller*, 121 Nev. at 622, 119 P.3d at 729.

In conclusion, we reverse the portion of the supplemental decree of divorce providing Chris an additional \$3,500 reimbursement for the two 2000 Honda XRs awarded to him in the divorce decree and affirm the remainder of the district court’s orders.

It is so ORDERED.⁴



C.J.

Gibbons



J.

Bulla



J.

Westbrook

⁴Although this court generally will not grant a pro se appellant relief without first providing the respondent an opportunity to file an answering brief, *see* NRAP 46A(c), based on the record before us, the filing of an answering brief would not aid this court’s resolution of this case, and thus, no such brief has been ordered. Moreover, insofar as Lisa raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

cc: Hon. Amy Mastin, District Judge, Family Division
Lisa Jeanne Messing
Kelleher & Kelleher, LLC
Hutchison & Steffen, LLC/Las Vegas
Eighth District Court Clerk