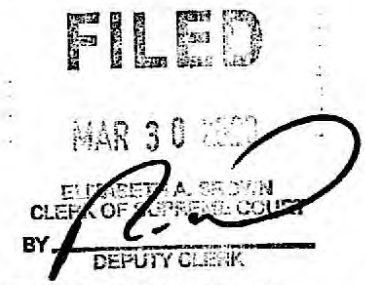
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEXIN FRANK LIN,
Appellant/Cross-Respondent,
vs.
ANNA LIN,
Respondent/Cross-Appellant.

No. 77351-COA



ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Dexin Frank Lin appeals and Anna Lin cross-appeals from a decree of divorce. Eighth Judicial District Court, Family Court Division, Clark County; Charles J. Hoskin, Judge.

In the proceedings below, the parties were divorced by way of a decree of divorce entered in October 2018 following a trial. Prior to trial beginning, the parties stipulated to the division of most of their assets and debts. Accordingly, following trial, the district court resolved the remaining issues and advised the parties to submit their memorandum of understanding (MOU), delineating their stipulation, to the court. At trial, both parties asserted claims of marital waste. In the decree, the district court concluded that Anna's actions did not constitute marital waste while Dexin's conduct did, and the court awarded Anna $4,900 as her share of the community property that was wasted. Additionally, pursuant to the decree, Dexin was awarded the marital residence, which he purchased prior to the marriage, but was resided in by the community during the marriage, as his sole and separate property and the district court concluded that the community was not entitled to any portion of the residence.

Each party was also awarded various assets and debts pursuant to the MOU, which was attached as an exhibit to the decree and was incorporated therein. The parties also agreed in the MOU to divide Dexin's Nevada Public Employees Retirement (PERS) account via a qualified domestic relations order (QDRO) "pursuant to *Gemma/Fondi*," but noted that the account was not yet divided and therefore the valuation was not included in the total request for division. These appeals followed.

On appeal, Dexin challenges the district court's determinations regarding marital waste, division of debt, and the division of his PERS account. In her cross-appeal, Anna challenges the district court's award of the marital residence as Dexin's sole and separate property without awarding Anna any credit for the portion of the mortgage paid by the community during the marriage.[1] 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.*

First, Dexin asserts that the district court abused its discretion in concluding that he committed marital waste and in concluding that Anna

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[1]In her brief, Anna also challenges the district court's denial of her post-judgment motion to correct the decree, but to the extent that order is substantively appealable, it is not properly before this court on appeal and will not be considered. *See* NRAP 4(a)(1) (requiring a notice of appeal to be filed after entry of a written judgment or order); *see also* NRAP 3(c) (providing that the notice of appeal shall designate the order being appealed).

did not commit marital waste. The district court "[s]hall, to the extent practicable, make an equal disposition of the community property." NRS 125.150(1)(b). 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.* The Nevada Supreme Court has recognized that unauthorized gifts of community property may constitute a compelling reason for an unequal disposition. *Putterman v. Putterman*, 113 Nev. 606, 608, 939 P.2d 1047, 1048 (1997).

Here, the district court found that Dexin committed marital waste by sending money to another woman in another country during the marriage, without Anna's knowledge. Additionally, the court found that Dexin committed marital waste by paying for another woman to vacation with him, without Anna. However, the court found that Anna did not commit marital waste when she lost money in stock trading when both parties were investing in the stock market and knew that the other was investing. The court also found that Anna did not commit marital waste by sending gifts to her friends and family, and sending money to her family when a parent was ill, particularly when Dexin knew the money was being sent. Based on this court's review of the record, substantial evidence supports these findings.[2] Accordingly, we cannot conclude that the district court abused its discretion in concluding that Dexin committed marital

[2]To the extent Dexin challenges the weight of the evidence presented or the credibility of the witnesses, we do not reweigh the same on appeal. *See Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007) (refusing to reweigh credibility determinations on appeal); *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (refusing to reweigh evidence on appeal).

waste, while Anna did not. *See Schwartz*, 126 Nev. at 90, 225 P.3d at 1275; *Putterman*, 113 Nev. at 608, 939 P.2d at 1048.

Next, Dexin asserts that the district court abused its discretion in concluding that certain debt was Dexin's separate debt, rather than community debt to be equally divided. As noted, the district court must make an equal disposition of community property to the extent practicable and may only divide separate property in limited circumstances. *See* NRS 125.150. Additionally, the court may make an unequal distribution of community property if it finds, and states in writing, compelling reasons for doing so. NRS 125.150(1)(b).

In this case, the decree contains no findings as to which assets and debts were considered the parties' separate property, if any, and which were considered community property, prior to division. Thus, it is impossible for this court to determine whether the district court improperly characterized the parties' assets and debts as separate or community property before dividing the same.

Additionally, based on the values provided in the decree, it appears that the district court made an unequal distribution of the community property. Pursuant to the decree, Anna was awarded community property with a net value of $139,077.88 ($139,594.57 in assets less $516.69 in debts), while Dexin was awarded community property with a net value of $174,138.53 ($230,441.71 in assets less $56,303.18 in debts).[3] Although the district court found that Dexin committed marital waste, the

[3]We note that the net value of Dexin's share of the community property might be $100,258.41 if the debt titled "Naqvi Injury Law Loan" is included in the calculation, but the decree notes Dexin was assigned $56,303.18 in debt, "not including the debt owed to Naqvi Injury Law," without further explanation.

decree awards Anna $4,900 as her share of the community interest of the amount wasted and reduced that amount to judgment. Thus, the finding of community waste cannot account for the difference in the distribution of community property. And there are no other findings to explain the difference in values of the division of community property. Moreover, there are no findings as to the value of some of the assets and debts. Therefore, it is likewise impossible for this court to determine whether the decree divides the community property equally or whether there was a basis for dividing the property unequally. Accordingly, we necessarily reverse and remand this matter to the district court for additional findings.[4] NRS 125.150; *Schwartz*, 126 Nev. at 90, 225 P.3d at 1275.

Finally, Dexin asserts that the district court abused its discretion in finding that his PERS account was community property and not his separate property. In particular, Dexin asserts that the majority of his PERS account was funded prior to the marriage, while Anna asserts that the PERS account was established during the marriage. Retirement benefits, including PERS benefits, earned during the marriage are community property, subject to division upon divorce. *Kilgore v. Kilgore*, 135 Nev., Adv. Op. 47, 449 P.3d 843, 846 (2019); *Gemma v. Gemma*, 105 Nev. 458, 461, 778 P.2d 429, 430 (1989). 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 v. Fondi*, 106 Nev. 856, 702 P.2d

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[4]We note that although the parties agreed to the distribution of property in the MOU, because the agreement was merged into the decree, the parties' rights stem from the decree and are subject to the provisions of NRS Chapter 125. *See Day v. Day*, 80 Nev. 386, 389-90, 395 P.2d 321, 322-23 (1964).

1264 (1990). Here, the decree provides that, pursuant to the parties' agreement, Dexin's PERS account will be divided via QDRO pursuant to *Gemma* and *Fondi*. Because the decree provides that the PERS account will be divided as required by law, the district court did not abuse its discretion in dividing the PERS account. *See Schwartz*, 126 Nev. at 90, 225 P.3d at 1275.

In her cross-appeal, Anna asserts that the district court abused its discretion in awarding Dexin the marital home, which Dexin purchased prior to the marriage, without awarding Anna any portion for her share of the community interest in the property. The community is entitled to a pro rata ownership share in a property that community funds helped acquire. *Malmquist v. Malmquist*, 106 Nev. 231, 238, 792 P.2d 372, 376 (1990) (citing *Robison v. Robison*, 100 Nev. 668, 670, 691 P.2d 451, 454 (1984)). Here, the district court found that the parties agreed that Dexin purchased the residence prior to marriage, but that some mortgage payments were made with community funds during the marriage. Thus, Anna is correct that the community is entitled to a pro rata share in the residence, which should then be divided as community property. *See Malmquist*, 106 Nev. at 238-244, 792 P.2d at 376-381 (explaining that the community is entitled to a pro rata ownership share in property that the community helps acquire and adopting a formula for calculating the community property share in such a residence). Despite citing to *Malmquist*, the district court incorrectly concluded that the community share of the residence was $0 because there was no appreciation in the value of the home during the marriage.

Notably, the district court incorrectly cited the *Malmquist* formula for calculating the community share of the residence. The district

court cited the formula as: CP = (PD + (PD + OL) / PP) x A.[5] Applying this formula, the court did not make findings as to the PD, OL, or PP, but found that because there was no appreciation in the residence, the "A" was $0 and any number multiplied by zero is zero. Therefore, the court determined that there was no community property interest in the residence and awarded the entire residence to Dexin as his sole and separate property.

Contrary to the district court's conclusion, the formula set out in *Malmquist* is: CP = PD + [((PD + OL) / PP) x A]. Using this correctly stated equation, it is true that if the appreciation is $0, as the district court found here, the percentage of the appreciation that belongs to the community is also zero (because multiplying the figure determined by calculating the pay down plus the outstanding loan divided by the purchase price by the appreciation would equal zero). But based on the properly stated equation, after determining the portion of the appreciation that belongs to the community (defined by the equation as: [((PD + OL) / PP) x A]), the remainder of the equation requires then adding the pay down to calculate the total community property share (defined by the equation as the "PD +" appearing outside of the brackets). Thus, with zero appreciation, the community was entitled to the amount the community paid down the mortgage balance. Because the district court incorrectly applied the

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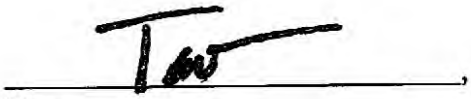
[5]Where CP is community property; PD is pay down attributable to community property (or principal reduction based on payments made with community property); OL is that portion of the outstanding loan to be credited to the community; PP is the purchase price of the residence; and A is the appreciation. We note that *Malmquist* also defines the equation for calculating the outstanding loan portion attributable to the community, but that equation is not recited here as it does not affect our analysis in this case. *See* 106 Nev. at 242, 792 P.2d at 379-80.

Malmquist formula, we must reverse and remand this matter to the district court for the appropriate application of the rule. *See Malmquist*, 106 Nev. at 238-244, 792 P.2d at 376-381.

Based on the foregoing, 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.[6]

_____, C.J.
Gibbons



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cc: Hon. Charles J. Hoskin, District Judge, Family Court Division
Dexin Frank Lin
The Law Offices of Frank J. Toti, Esq.
Eighth District Court Clerk

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[6]Insofar 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. Additionally, in light of this order, no action is required regarding the November 20, 2019, filing entitled "Notice of Unavailability."