IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SCOTT GAFFORINI,
Appellant,
vs.
AMY GAFFORINI,
Respondent.

No. 79436-COA

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Scott Gafforini appeals from a decree of divorce. Eighth Judicial District Court, Clark County; David S. Gibson, Jr., Judge.

Scott and Amy Gafforini met and started dating in or around 2000 or 2001 when Scott was 33 years old and Amy[1] was 15 years old.[2] The couple married in December 2005 after Amy became pregnant with their first child. Their daughter was born in April 2006, and their son was born in August 2013. During the marriage, Scott worked full-time at a car dealership while also earning money racing cars at the speedway, completing side jobs as a mechanic, and renting out his large garage. Amy worked as a homemaker, cooking, cleaning, taking care of the children, and handling the family's finances.

After the parties were married, Scott took out a second mortgage on his premarital residence and used the funds from the second mortgage as a down payment on the marital residence. Scott then used prize money earned as a race car driver after the marriage to expand the garage to the marital residence. Scott also owned a cabin located in Utah

[1]We refer to the parties by their first names for clarity.

[2]We recount the facts only as necessary to our disposition.

that he acquired before the marriage. The cabin was encumbered by a $30,000 loan. Scott paid about $2,000 of the loan before the marriage. After the marriage, the community paid the remaining $28,000.

Amy did not complete high school. She later earned an online, unaccredited General Education Diploma (GED). Amy received some education toward a real estate license during the marriage, but she did not pass the exam for licensure. In 2013, Amy earned a mixology certificate. In 2017, Amy learned how to tend bar and obtained her first regular bartending job in January 2018. Scott lost his full-time job at the dealership in January 2018. Amy then filed for divorce in June 2018.

As pertinent here, in the divorce decree the district court (1) imputed income to Scott for the purposes of calculating child support and awarding alimony, (2) determined Amy's gross monthly income was just over $2,000 per month, (3) awarded Amy alimony, and (4) distributed the marital residence and the Utah cabin as community property. Scott appeals.

We first consider the district court's imputation of income to Scott for the purposes of calculating child support. Scott argues that the district court abused its discretion by imputing income to reach an annual income of $75,000. Scott argues that the district court's determination was based on prior extraordinary efforts which are no longer possible now that he has joint custody of his children. Amy responds that the district court's findings are supported by substantial evidence.

We review child support matters for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). When the district court determines a child support obligation under the *Wright v.*

Osburn[3] framework, the court may impute income to one party when that party "purposefully earns less than his reasonable capabilities permit." *Rosenbaum v. Rosenbaum*, 86 Nev. 550, 554, 471 P.2d 254, 256-57 (1970). "If 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." NRS 125B.080(8) (2019).[4]

In that case, "where evidence of willful underemployment preponderates, a presumption will arise that such underemployment is for the purpose of avoiding support." *Minnear v. Minnear*, 107 Nev. 495, 498, 814 P.2d 85, 86 (1991). Then, the burden of proof shifts to the parent with a support obligation to prove that his or her underemployment is not for avoiding a support obligation. *Id.* at 498, 814 P.2d at 86-87. The district court abuses its discretion when it imputes income to a parent for the purpose of calculating child support without also making the necessary findings that the parent is underemployed or unemployed for the purpose of avoiding a support obligation or that the parent failed to overcome the *Minnear* presumption. *See Slezak v. Slezak*, Docket No. 69518-COA (Order Affirming in Part, Reversing in Part, and Remanding, April 28, 2017); *see*

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[3]*See Wright*, 114 Nev. 1367, 970 P.2d 1071 (1998).

[4]NRS 125B.080 was amended in 2017, effective February 1, 2020. *See* 2017 Nev. Stat., ch. 371, § 2, at 2284-85; Approved Regulation of the Adm'r of the Div. of Welfare & Supportive Servs. of the Dep't of Health & Human Servs., LCB File No. R183-18 (2019) (amending NAC Chapter 425 and making the amendments to NRS 125B.080 effective). Because this case was decided before the amendments became effective, we cite to the prior version of the statute.

also Byrd v. Byrd, Docket No. 76460-COA (Order Affirming in Part, Reversing in Part and Remanding, Feb. 5, 2020).

Here, while calculating child support under *Wright v. Osburn*, the district court imputed income to Scott to reach an annual income of $75,000, when he was making $45,760 per year at his full-time job. The district court based this imputation on Scott's previous tax returns which demonstrated his ability to hold a position that paid approximately $75,000 per year, as well as on Scott's historical ability to make additional funds by renting out his garage and taking side jobs as a mechanic. The district court failed to find that Scott was underemployed for the purposes of avoiding child support before imputing income to him. Therefore, the district court abused its discretion, and we reverse and remand for the district court to make the proper findings under *Minnear*. Because we reverse and remand for the district court to reconsider Scott's imputed income for the purposes of child support, there is a possibility Scott's imputed income could change. In that event, we give leave to the district court to reconsider child support should it become necessary.

In light of our decision here, we must also reverse and remand the district court's award of alimony to Amy. We recognize that the district court's review of the evidence under *Minnear* may not cause it to modify the alimony award in this case. However, because there is a possibility that the court may reach a different conclusion, depending on whether the district court finds Scott's underemployment to be willful and for the purpose of avoiding child support or due to circumstances beyond his control, we reverse and remand for the district court to also reconsider the alimony

award, if the district court changes Scott's income in light of its findings under *Minnear*.[5] *See Rosenbaum*, 86 Nev. at 554-55, 471 P.2d at 256-57.

We next consider the district court's determination of Amy's gross monthly income for the purposes of calculating child support. Scott argues that Amy's income is higher than that found by the district court. Based on our review of the record, we conclude that the district court's determination of Amy's gross monthly income was based on substantial evidence and we affirm as it relates to the award of child support. *Kelly v. Kelly*, 86 Nev. 301, 307, 468 P.2d 359, 363 (1970) ("[I]n cases adjudicating marital rights[,] . . . if there is substantial evidence to support the lower court's findings, we will not reverse that determination upon appeal.").

We next consider the district court's distribution of real property. At issue here are the marital residence and a cabin located in Utah. Scott argues that the district court abused its discretion by distributing the marital residence and the cabin as community property. Scott also argues that the district court should have used the formula from *Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990), to determine the community and separate property interests in the two properties. Amy disagrees, arguing that the district court properly distributed the two properties and that *Malmquist* does not apply here.

We review a district court's distribution of property in a divorce proceeding for an abuse of discretion. *See Wolff v. Wolff*, 112 Nev. 1355,

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[5]Because we reverse and remand for the district court to reconsider the alimony award, the district court will necessarily also reconsider Scott's income and Amy's income for the purposes of alimony. *See* NRS 125.150(9)(e) (providing that when determining whether to award alimony, the district court shall consider each spouse's income). Therefore, we need not further address Scott's arguments regarding alimony.

1359, 929 P.2d 916, 918-919 (1996). We 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.* "However, in reaching a determination, the district court must apply the correct legal standard." *Kerley v. Kerley*, 111 Nev. 462, 465, 893 P.2d 358, 360 (1995).

"In *Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990), [the supreme] court addressed the issue of separate and community property improvements to real property and developed formulae for reimbursement for those improvements." *Kerley*, 111 Nev. at 465, 893 P.2d at 360. "The [*Malmquist*] formulae are potentially applicable to any property which undergoes significant appreciation and is purchased on credit. . . . [T]he formulae should apply both to community contributions to separate property residences and to separate property contributions to community property residences." *Malmquist*, 106 Nev. at 240 n.1, 792 P.2d at 378 n.1. "The district court cannot perform a *Malmquist* apportionment unless either separate property has increased in value through community efforts, or conversely, community property value has been enhanced by separate property contributions." *Kerley*, 111 Nev. at 466, 893 P.2d at 360.

We address the marital residence first. The district court distributed the marital residence as community property because it found that the interests in the property were too convoluted. Scott argues that because he took out a loan against his premarital residence for the down payment on the marital residence, he should have been awarded the value of the down payment as his separate property. Amy disagrees and argues that the court's classification of the property as part of the community is in

keeping with it having been acquired during the marriage. "All property acquired after marriage is presumed to be community property. This presumption may be rebutted with clear and convincing evidence." *Forrest v. Forrest*, 99 Nev. 602, 604-05, 668 P.2d 275, 277 (1983). Here, the marital residence was acquired after marriage, so it is presumed to be community property.

On the other hand, property acquired before marriage is the owner spouse's separate property. *See* NRS 123.130. Here, Scott owned a premarital residence that was his separate property. Scott took out a loan against his premarital residence, the money from which would also be separate property. *See Cord v. Neuhoff*, 94 Nev. 21, 25, 573 P.2d 1170, 1173 (1978) ("[P]rofits from a spouse's separate property is separate property.").

However, "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) (citing *Cord v. Cord*, 98 Nev. 210, 644 P.2d 1026 (1982)). And, "[t]he earnings of either spouse during the marriage are considered to be community funds." *Robison*, 100 Nev. at 670, 691 P.2d at 453.

Here, Scott and Amy were married in 2005. Scott testified that in 2006 he was employed as a race car driver, and he won money from a racing championship. These winnings were Scott's earnings during the marriage and, therefore, were community property. Scott took out the second mortgage on his premarital residence in 2007. Scott testified that in 2007 he used the second mortgage money to purchase the marital residence and the championship money to expand the garage. The down

payment including earnest money was $73,937, and the garage improvements cost $60,000.

This demonstrates that Scott consciously chose to use funds obtained from his separate property residence for the down payment on the marital residence even though he already possessed community property funds from the prize money. Under *Robison* and *Cord*, the down payment on the marital residence was a gift to the community and, therefore, Scott did not retain a separate property interest in the marital residence. Therefore, the marital residence was entirely community property, and the *Malmquist* formula was not applicable. Accordingly, the district court properly declined to apply the *Malmquist* formula and treated the marital residence as community property. However, the district court arrived at these conclusions because it found that the interests in the marital residence were too convoluted, not because Scott failed to retain a separate property interest in the marital residence. Nevertheless, we affirm. *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

We now address the distribution of the cabin. Scott argues that although the community paid a majority of the loan encumbering the cabin, because he acquired the cabin before marriage, the district court should have used *Malmquist* to determine the separate and community interests in the cabin. Amy responds that the district court properly distributed the cabin as community property because the community paid almost the entire loan on the property, thereby significantly increasing its value for resale. Amy also argues that the district court properly declined to apply *Malmquist* because Scott failed to provide evidence of the cabin's value.

Property acquired before the marriage is the owner-spouse's separate property. NRS 123.130. Here, Scott acquired the cabin through a business deal before the marriage. Therefore, the cabin is presumed Scott's separate property until direct evidence proves otherwise. *Barrett v. Franke*, 46 Nev. 170, 176, 208 P. 435, 437 (1922).

Nevertheless, where community funds are used to make payments on separate property, "the community is entitled to a *pro tanto* interest in such property in the ratio that the community payments bear to the payments made with separate funds." *Robison*, 100 Nev. at 670, 691 P.2d at 453. Here, Scott acquired the cabin with a $30,000 loan against it. He paid approximately $2,000 of the loan before the marriage. The community paid off the remaining $28,000, and the cabin is currently unencumbered. The district court treated the cabin as community property because Scott failed to provide evidence of the cabin's value. However, under NRS 123.130 and *Robison*, the cabin was separate property and the community would be entitled to the $28,000 it paid on the separate property loan.

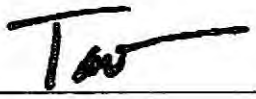
In addition to the community's contributions to the loan, under *Malmquist* the community is also entitled to any appreciation in the value of the cabin that can be attributed to community efforts. *Malmquist*, 106 Nev. at 239-40 n.1, 792 P.2d at 377-78 n.1. Here, although the cabin is separate property, the community paid off the majority of the loan leaving it unencumbered. Therefore, we conclude that the district court should have applied *Malmquist* to determine the separate and community property interests and any appreciation in value in the cabin due to community efforts instead of distributing the cabin as community property. Thus, we

reverse and remand for the district court to reconsider the distribution of the cabin in light of this order.

In conclusion, we affirm the district court's calculation of Amy's gross monthly income for the purpose of child support and the distribution of the marital residence as community property, but we reverse and remand for proceedings in keeping with this order the imputation of income to Scott for the purposes of calculating child support, the alimony award, and the distribution of the cabin. 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.

_____, C.J.
Gibbons



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cc: Hon. David S. Gibson, Jr., District Judge
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