

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE OSCAR SALAZAR,
Appellant,
vs.
AGUSTINA CERVANTES LANDA,
Respondent.

No. 83111-COA

FILED

MAR 23 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Jose Oscar Salazar appeals from a district court decree of divorce and an order granting in part and denying in part a motion to reconsider. Eighth Judicial District Court, Family Court Division, Clark County; Dawn Throne, Judge.¹

Jose and Agustina Cervantes Landa were married in March 2001 in Las Vegas, Nevada.² In 1999, Jose purchased a house located at 1600 Ardmore Street in Las Vegas (the Ardmore property). After a few months of being married and living together, Agustina was deported to Mexico. After being deported, Agustina purportedly began to live with another man in Mexico. During the eleven years Agustina resided in Mexico, Jose would visit once a year for approximately one week. The parties had three children during the time Agustina lived in Mexico.³ In

¹We note that Judge Lisa Brown presided over the trial and issued a minute order on December 1, 2020, containing the court's findings of fact and conclusions of law, which were incorporated into the decree of divorce signed by Judge Dawn Throne.

²We do not recount the facts except as necessary for our disposition.

³We note that neither paternity nor custody are issues on appeal.

2012, Agustina returned to Las Vegas and the parties resumed residing together at the Ardmore property. In 2014, the parties purchased a second residence, located at 3127 Panocha Street (the Panocha property), and began residing there while renting the Ardmore property. In 2019, Jose filed a complaint for divorce in a Nevada district court.

The district court conducted a trial to resolve the issues of child custody, child support, alimony, and division of the assets, and subsequently issued findings of fact and conclusions of law. The district court granted Jose primary physical custody of the minor children, awarded Jose child support from Agustina in the amount of \$144 per month, commencing January 1, 2021, and ordered Jose to pay \$600 per month in alimony for ten years. In awarding child support, the district court determined that Agustina's gross monthly income was \$800 per month based on her testimony at trial. The district court also determined, based on the parties' respective financial disclosures, that the Ardmore property was valued at \$142,951 with approximately \$98,000 owed, and the Panocha property was valued at \$277,950 with approximately \$155,000 owed. The district court awarded Jose the Panocha property as his sole and separate property and awarded Agustina the Ardmore property as her sole and separate property. The district court also determined that Agustina was entitled to \$60,000 as her share of the equity in the Panocha property in order to equalize the value between the two properties. The decree did not make any further findings regarding the debts associated with the properties, including how the outstanding mortgage payments would be apportioned between Jose and Agustina.

Subsequently, Jose filed a motion to reconsider. Jose argued that when evaluating his financial status, the court relied on his 2018

income for his gross monthly income without considering the losses to his business due to the COVID-19 pandemic and a destructive fire to his work truck, arguing that this led to incorrect calculations for child support and alimony. He also contested the division of the real properties. In her opposition to the motion to reconsider, Agustina generally contended that the district court made detailed findings in support of its initial decision and reconsideration was unwarranted.

Upon review, the district court denied the motion to reconsider the alimony award, but it granted reconsideration as to the equity owed to Agustina from the Panocha property due to a mathematical error. The court reduced the equity award that Jose was obligated to pay Agustina from \$60,000 to \$38,999.50. The district court also required Agustina to be financially responsible for the Ardmore property. Specifically, Agustina was required to refinance the mortgage into her own name within 120 days.⁴ Alternatively, Agustina had the option of selling the property. If Agustina did not refinance or sell, Jose would then be permitted to sell the Ardmore property. Jose was required to “continue to make the mortgage payments on the Ardmore property until the house [was] either refinanced or sold” by Agustina. However, as a result of its order, the district court allowed Jose a credit of \$456 per month toward the alimony payment and a credit of \$381 per month toward the amount of \$38,999.50 he owed Agustina for her share of the equity in the Panocha property, for as long as he was still making mortgage payments on the Ardmore property. Finally, the district court relieved Jose from paying alimony arrears since he was still making the mortgage payments on the Ardmore property.

⁴Jose was required to “sign a quitclaim deed as needed” to allow Agustina to refinance.

Jose now appeals, arguing that (1) the district court abused its discretion in awarding alimony; (2) the district court erroneously calculated Agustina's child support obligation; and (3) the district court abused its discretion in awarding the Ardmore property to Agustina as her sole and separate property. On appeal, Agustina argues that the district court made detailed findings in support of the decree, specifically contending that the alimony awarded should be continued and that the Ardmore property should be her sole and separate property.⁵ We agree with Jose in part and address each of his arguments below.

First, Jose contends that the district court abused its discretion in awarding alimony to Agustina, by making erroneous findings in support of the award. Jose also argues that the district court erroneously calculated the parties' gross monthly incomes, thereby incorrectly determining the monthly amount of alimony he owed Agustina. Conversely, Agustina contends that Jose should be required to pay her alimony, given that he had historically supported her during their marriage.

This court reviews a district court's alimony determination for an abuse of discretion. *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 66, 439 P.3d 397, 400 (2019). This court will not reverse a district court's determination if its findings are supported by substantial evidence. *Kelly v. Kelly*, 86 Nev. 301, 307, 468 P.2d 359, 363 (1970). "Substantial evidence is that which a sensible person may accept as adequate to sustain a judgment." *Williams*

⁵In her answering brief, Agustina also requests that Jose pay the current sewer and trash utilities and requests reimbursement for her attorney fees. However, these issues are not properly before us, as she did not file a cross-appeal. See *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994) ("[A] respondent who seeks to alter the rights of the parties under a judgment must file a notice of cross-appeal.").

v. Williams, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004). This court will not reweigh witness credibility or the weight of evidence on appeal. *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.”); *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (“This court has stated that it is not at liberty to weigh the evidence anew, and where conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party.” (internal quotation marks omitted)).

“Alimony is financial support paid from one spouse to the other whenever justice and equity require it.” *Rodriguez v. Rodriguez*, 116 Nev. 993, 999, 13 P.3d 415, 419 (2000); *see also* NRS 125.150(1)(a) (the alimony award must be “just and equitable”). In a divorce suit, the district court may award alimony for a specified period of time or in a lump sum. NRS 125.150(1)(a). When awarding alimony, district courts must consider, *inter alia*, the following factors: (1) “[t]he duration of the marriage”; (2) “[t]he income, earning capacity, age and health of each spouse”; (3) “[t]he standard of living during the marriage”; (4) “[t]he career before the marriage of the spouse who would receive the alimony”; (5) any specialized training the spouses obtained during the marriage; and (6) “[t]he contribution of either spouse as homemaker.” NRS 125.150(9)(d)-(i). “After considering these factors, and any other relevant circumstance, a district court may award alimony under NRS 125.150(1)(a) to compensate a spouse for non-monetary contributions to the marriage and economic losses from the early termination of the marriage, such as lost income-earning potential or a decreased standard of living.” *Kogod*, 135 Nev. at 71, 439 P.3d at 404. The district court may also consider any other relevant factor, but it must not

consider the marital fault or misconduct, or lack thereof, of the spouses. *Rodriguez*, 116 Nev. at 998-99, 13 P.3d at 418-19 (“Alimony is not a sword to level the wrongdoer. Alimony is not a prize to reward virtue.”).

Here, the district court evaluated and made findings as to each of the factors provided in NRS 125.150(9) to determine if alimony was warranted, including Jose’s and Agustina’s respective financial positions, ages, health, educations, training, and earning capacities. The district court further found that Agustina primarily was a homemaker and raised the children, and pursuant to NRS 125.150(9)(d) affirmed that the parties were married for 19 years. To the extent that Jose contends alimony should not have been awarded because the parties were residing in separate countries during the time Agustina was deported, cohabitation is not a required factor for the district court’s analysis under NRS 125.150(9). Additionally, Jose’s attempts to argue that Agustina was residing with another man appears to be an argument based on marital misconduct or fault, which is not a consideration in setting alimony, as discussed above. *See Rodriguez*, 116 Nev. at 998, 13 P.3d at 418 (“[A] judge is not permitted to consider the fault or misconduct of either of the parties when considering an award of alimony.”). To the extent it is not an argument based upon fault, Jose fails to show how this one circumstance or consideration outweighs the other factors as found by the district court. Therefore, Jose fails to demonstrate that the district court abused its discretion in awarding Agustina alimony, given the detailed findings of the district court.

Jose also argues that the district court erroneously calculated the parties’ gross monthly incomes and relied on those calculations when evaluating the parties’ financial conditions for the purpose of awarding alimony to Agustina. This argument is unpersuasive, as the 2018 IRS

Schedule C (Form 1040) contained in the record supports the district court's calculation of Jose's gross monthly income. *See Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) ("The district court's factual findings, however, are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence."). Jose also contends that the district court erroneously calculated the amount of alimony awarded to Agustina because the court accepted her income as \$800 per month without requiring further financial documentation. However, this court has already recognized that testimony is a permissible basis for determining income. *See Rogers v. Rogers*, Docket No. 76173-COA, No. 76758-COA (Order Affirming in Part, Reversing in Part and Remanding, Ct. App., March 26, 2020) (stating that the district court could have reasonably relied on the financial disclosure form or the spouse's testimony to determine spouse's income). Thus, the district court did not abuse its discretion in calculating alimony.

Second, Jose argues that the district court abused its discretion in calculating Agustina's monthly child support obligation because the court failed to include her alimony as income. NAC 425.025(1)(m) specifically provides that alimony is considered income for the purposes of determining a parent's gross income when calculating child support. Here, the district court only relied on Agustina's monthly income of \$800 when calculating child support and failed to include as income the \$600 per month in alimony received from Jose. Therefore, the district court abused its discretion in calculating the amount of child support to be paid by Agustina. On remand, the district court will need to calculate child support based on Agustina's gross monthly income, which must include alimony.

Finally, Jose contends that the district court abused its discretion in awarding the Ardmere property as Agustina's sole and separate property. 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). Community property is "property owned in common by a husband and wife, with each having an undivided one-half interest." *McNabney v. McNabney*, 105 Nev. 652, 659, 782 P.2d 1291, 1295 (1989).

NRS 125.150(1)(b) states that the district court must make, as close as possible, an equal distribution of the community property at divorce. However, the district court is permitted to make an unequal distribution of community property if it sets forth a compelling reason in writing for making such a distribution. *Id.* In contrast, separate property is "[a]ll property of a spouse owned by him or her before marriage." NRS 123.130. 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 v. Robison*, 100 Nev. 668, 670, 691 P.2d 451, 453 (1984). Community funds include income earned by either spouse. *Id.* In addition to the community's contributions, under *Malmquist v. Malmquist* the community is also entitled to any appreciation in the value of the property that can be attributed to community efforts. 106 Nev. 231, 239-40, 240 n.1, 792 P.2d 372, 377-78, 378 n.1 (1990).

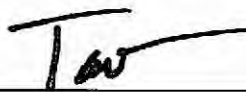
Here, the parties do not dispute that Jose owned the Ardmere property before marriage. Based on the foregoing, we agree that the district court abused its discretion in awarding Agustina the Ardmere home as her sole and separate property without considering Jose's separate interest in

the property. We conclude that the district court should have calculated both the parties' separate interests and the community interests in the Ardmore property and awarded the parties their equitable shares. *See Lin v. Lin*, No. 77351-COA, 2020 WL 1538967 (Nev. Ct. App. Mar. 30, 2020) (Order Affirming in Part, Reversing in Part and Remanding) (concluding that when the residence is purchased prior to marriage, but some mortgage payments were made with community funds, the community is entitled to a share in the residence, and that share should then be divided as community property); *see also Gafforini v. Gafforini*, No. 79436-COA, 2020 WL 4249678 (Nev. Ct. App. July 23, 2020) (Order Affirming in Part, Reversing in Part, and Remanding) (concluding that "the district court should have applied *Malmquist* to determine the separate and community property interests and any appreciation in value in the [property] due to community efforts instead of distributing the [property] as community property").

Therefore, we

AFFIRM the judgment of the district court in part, REVERSE in part, and REMAND for further proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Dawn Throne, District Judge, Family Court Division
Israel Kunin, Settlement Judge
McFarling Law Group
Agustina Cervantes Landa
Eighth District Court Clerk