IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF DARREL D. SMITH, DECEASED.

SUN H. HOLDEN,
Appellant,
vs.
GERRARD COX LARSEN,
Respondent.

No. 83093-COA

FILED

OCT 31 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Sun H. Holden appeals from a district court order adjudicating an attorney lien and compelling partial distribution of estate. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

In June 2019, Darrel R. Smith (decedent) passed away. Prior to his passing, decedent executed a handwritten last will and testament.[1] The will provided that Holden, a friend of the decedent, would be the residuary beneficiary of the estate and entitled to all amounts remaining in the estate after four bequests of $100,000 had been made to the decedent's beneficiaries. Holden located the will while reviewing and discarding several boxes of the decedent's old paperwork. During this process, Holden initially did not realize what the document was and tore the original will in half while discarding other records. Holden, after realizing a will existed, retained the law firm of respondent Gerrard Cox Larsen (GCL) to initiate probate proceedings, after firing her prior counsel. Holden and GCL initially agreed, through a written fee agreement, that GCL would be compensated for its services on an hourly basis. GCL filed a petition to compel the return of

[1]We do not recount the facts except as necessary for our disposition.

estate property and for award of damages; and petition for proof of will, for appointment of personal representative, and for issuance of letters testamentary in August of 2019. In November 2019, the probate commissioner held a hearing on the matter and entered a report and recommendation dislodging the torn will and recommending that it could not be admitted to probate as it was presumptively invalid. GCL objected to the probate commissioner's report and recommendation to the district court.

In March 2020, the district court entered an order granting the objection to the probate commissioner's report and recommendation and ordered the matter set for an evidentiary hearing to resolve the issues regarding the validity of the will. One of the beneficiaries, Charles Smith, filed a petition seeking to have his wife appointed as special administrator of the estate and initiating a will contest. The will contest was to determine whether the will was already torn when Holden found it, which would render the will invalid, or whether the will was mistakenly torn by Holden. At or near the time a formal will contest was initiated, Holden owed GCL $47,233.06 for attorney fees the firm had incurred to date. GCL informed Holden that it was unwilling to continue to represent her in the will contest unless she paid her outstanding bill, among other requirements. GCL contended that it agreed to represent Holden on a contingency fee basis, which would relieve her of paying the fees and costs she already owed to GCL and would novate their initial fee agreement based on hourly billing into a contingency fee agreement. Further, that ample time was provided for Holden to retain new counsel. Holden claimed that GCL talked her into signing a contingency fee agreement without being fully informed. Nevertheless, Holden eventually agreed to a 40-percent contingency fee and both parties executed a Second Fee Agreement (contingency fee agreement)

memorializing the agreement. Section 3 of the contingency fee agreement provided as follows:

> 3. LEGAL FEES AND COMPENSATION. The total amount of the legal fees for services rendered by [GCL] in the [m]atter as described in Paragraph 1 above, and charged to [Holden], shall be calculated as follows:
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> [(a)] If [Holden] is appointed as administrator or special administrator of the [decedent's estate], [40-percent] of the total amount of any and all assets, funds, or monies recovered or received on behalf of the [decedent's estate] by validating the will submitted by [Holden] to probate, if any; OR
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> [(b)] If [Holden] is not appointed as administrator of the [decedent's estate], [40-percent] of the total amount of any and all assets, funds or monies [Holden] receives as her share of the Estate or is otherwise awarded to [Holden] in the [m]atter, if any.

GCL eventually secured a settlement on Holden's behalf resolving the will contest, in which she and Smith agreed to admit the will to probate as the decedent's last will and testament in exchange for a one-time payment to Smith of $35,000 apparently for attorney fees he incurred as a result of the will contest out of her share of the estate, and appoint Holden as the personal representative of the estate.[2] In October 2020, the

[2]We note that while the contingency fee agreement uses the terminology of administrator or special administrator of the estate, the parties and the district court appear to use personal representative of the estate or the administrator of the estate interchangeably. NRS 132.265 defines a personal representative of the estate as including "an executor, an administrator, a successor personal representative, a special administrator and persons who perform substantially the same function under the law governing their status."

district court entered an order approving the settlement agreement, admitting the will to probate, and appointing Holden as personal representative of the estate. GCL continued to represent Holden in her capacity as personal representative, preparing and sending out notices to potential creditors of the estate. The time to file creditors' claims expired with no claims being filed against the estate. As beneficiary of the residual estate, Holden was entitled to receive funds and property of the estate with a value of $803,421. Holden asked GCL to reduce the 40-percent contingency fee to 33.3-percent of her personal share. GCL refused. Due to the dispute over the amount of GCL's attorney fees, on approximately January 22, 2021, Holden terminated the firm.[3]

In February 2021, GCL filed a notice of attorney's charging lien, asserting a lien in the amount of $327,110 against Holden's share of the estate, which GCL stated represented 40-percent of her recovery, consistent with the contingency fee agreement. The same month, GCL filed a motion to have the district court adjudicate and enforce the lien and compel a partial distribution of the estate in accordance with the terms of the will and the settlement agreement. GCL's motion did not specifically state whether it was seeking fees under section 3(a) or 3(b) of the contingency fee agreement but indicated that it was only seeking fees from Holden's share.[4]

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[3]We are mindful of the amount of time spent and legal work performed by GCL. While we recognize that a dispute may arise between a client and firm regarding the reasonable amount of fees the client owes, this does not mean that a client is free to simply walk away from an obligation to pay attorney fees due and owing by contract, statute, rule, or other law.

[4]Notwithstanding the plain language of section 3(a) we conclude that the parties appear to agree that GCL's attorney fees will be paid out of Holden's share of the estate.

The district court granted the partial distribution and found that Holden signed an enforceable contingency fee agreement with GCL and was bound by its terms to pay GCL 40-percent in attorney fees from her share of the estate. GCL made it clear that it was not seeking compensation against the entire estate, and that the contingency fee was for its attorney fees incurred in the will contest that predated Holden's appointment as personal representative.[5] After deducting $74,442 in settlement funds related to asbestos litigation, which came into the estate after Holden terminated GCL, the court determined that Holden's share of the estate totaled $728,979. The court further determined that 40-percent of $728,979 was $291,591.60. The court did not specify in its order whether it was applying section 3(a) or 3(b) of the contingency fee agreement to determine the amount of fees but noted at a hearing on the motion that "the reasonable interpretation is that it's her share" of the estate from which GCL's attorney fees would be awarded. The district court then found that GCL was entitled to $291,591.60 in attorney fees related to the will contest.

Holden filed a motion for reconsideration arguing that section 3(a) applied and therefore NRS 150.060—a statute the district court failed

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[5]Based on the record, it appears that GCL may have incurred fees for the benefit of the estate as well as Holden after the district court appointed Holden as personal representative. GCL in its answering brief emphasizes, however, that its "entire contingency fee had been earned at the conclusion of the Will Contest, which occurred prior to [Holden] being appointed as the personal representative." Holden failed to file a reply brief. Therefore, we treat this failure as a confession of error, *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious), and conclude that GCL's contingency fee was for the attorney fees the firm incurred up to the conclusion of the will contest.

to consider—controlled the amount of fees that GCL could receive. In opposition to the motion, GCL argued that NRS 150.060 only applies to attorney fees incurred for the personal representative of the estate when the fees are being sought from the estate itself. GCL argued that the entire contingency fee had been earned at the conclusion of the will contest, which was for Holden's benefit, and which occurred prior to Holden being appointed as the personal representative. GCL further argued that even if NRS 150.060 were applicable, its attorney fees were still reasonable and permissible under NRS 150.060(2)(c), which authorizes fees pursuant to a written agreement as set forth in NRS 150.061(4). In July 2021, the district court denied the motion for reconsideration, stating that "[t]he Court does not believe NRS 150.060 applies because the work performed by [GCL] under the contingency fee agreement was performed prior to the Will being admitted to probate and prior to her appointment as the [personal representative of the decedent's estate] on October 1, 2020."[6] The court also noted that by the time Holden was appointed as personal representative of the estate, GCL had already completed the will contest and earned its contingency fee. The court further found that even if NRS 150.060 applied,

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[6]Although Holden filed her notice of appeal in this case prior to the entry of the district court's order denying her motion for reconsideration, we consider this appeal to be timely filed under NRAP 4(a)(6) (stating that if "a written order or judgment, or a written disposition of the last-remaining [tolling motion] is entered before dismissal of the premature appeal, the notice of appeal shall be considered filed on the date of and after entry of the order, judgment or written disposition of the last-remaining timely motion"). Here, the order denying reconsideration was filed before the appeal was dismissed. Accordingly, we consider the arguments contained in Holden's motion for reconsideration and the findings in the district court's order as properly before us on appeal. *See Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007) (establishing when arguments included in a motion for reconsideration may be considered on appeal).

the contingency fee agreement satisfied NRS 150.060(2)(c) and NRS 150.061(4). This appeal followed.

On appeal, Holden contends that GCL's fee award is not reasonable and that a contingency fee agreement fails to comply with NRS 150.060, which governs the award of certain attorney fees in probate matters. Conversely, GCL contends that NRS 150.060 is not applicable as its fees were incurred in conjunction with the will contest and before Holden was made personal representative of the decedent's estate. GCL further argues that even if the probate statutes apply, the contingency fee agreement met the requirements of the statute.[7]

This court will not disturb an award of fees absent a manifest abuse of discretion. *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005). However, we will review the award of fees de novo if the issue involves a legal question. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). Moreover, parties are free to agree to attorney fees by express contractual provisions. *See Musso v. Binick*, 104 Nev. 613, 614, 764 P.2d 477, 477 (1988). Contract interpretation is subject to a de novo standard of review. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). "An interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and

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[7]GCL in its answering brief requests that we affirm that its fees were fair and reasonable under Rule 1.5 of the Nevada Rules of Professional Conduct, in response to Holden's allegations of unethical conduct. However, we need not address this issue in light of our disposition. *See Miller v. Burk*, 124 Nev. 579, 588-89 & n.26, 188 P.3d 1112, 1118-19 & n.26 (2008) (explaining that the appellate court need not address issues that are unnecessary to resolve the case at bar). Nevertheless, we point out that attorneys and clients may ethically enter into contingency fee arrangements, even in probate matters, as discussed herein.

unreasonable contract." *Dickenson v. State, Dep't of Wildlife*, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994); *see also Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 325, 182 P.2d 1011, 1017 (1947) (providing that "[a] contract should not be construed so as to lead to an absurd result").

In this case, the district court found GCL's contingency fee agreement enforceable under either NRS 18.015 or NRS 150.061(4). To the extent that Holden is arguing that applying the probate statutes would have resulted in a lesser fee award for GCL, we need not address this issue as Holden has failed to present any legal authority or offer a cogent argument to support her position that the fee limitations in NRS 150.060 apply to contingency fee agreements, which are permitted in probate matters. *See 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). Moreover, on appeal the parties agree that the fee award was only from Holden's share of the estate and Holden has conceded that it was for legal work performed during the will contest on her behalf, and not in her capacity as personal representative on behalf of the estate.[8]

Thus, any legal work performed by GCL for the estate is not controlling in determining the amount of attorney fees to be awarded. Nevertheless, the district court specifically found that the parties' contingency fee agreement complied with the probate statutes governing such arrangements. Further, notwithstanding Holden's references to the probate statutes, she has provided no legal authority or cogent argument as

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[8]We note that in our review of the record, it appears that as part of the settlement agreement resolving the will contest and allowing probate of the will, each party was to bear their own attorney fees and costs, suggesting that Holden would pay for her fees and costs personally and not from the estate. *See also*, footnote 5 above.

to why the court erred in making its determination that the contingency fee agreement satisfied the probate statute that applies to such agreements.[9] *See id.* Therefore, we need not resolve under which statutory provision the contingency fee agreement is valid in order to the address the reasonableness of the fee award. Under the circumstances presented here, we cannot conclude that the district court abused its discretion in awarding GCL its attorney fees pursuant to a valid contingency fee agreement. *See Kahn*, 121 Nev. at 479, 117 P.3d at 238.

On appeal, Holden also argues that the district court did not consider the reasonableness of GCL's attorney fees when granting the firm its fees. We agree. In general, we review the reasonableness of an award of attorney fees for an abuse of discretion. *See Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 350, 455 P.2d 31, 33-34 (1969) (explaining that a district court's determination of the reasonableness of an attorney fee award is reviewed for an abuse of discretion). We reinforce that in analyzing the reasonableness of a fee award, the district court must consider the *Brunzell* factors. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015); *see also O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 558-59, 429 P.3d 664, 670-

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[9]In addition to the attorney fee percentages outlined in NRS 150.060, contingency fee agreements may be enforceable in the probate setting if certain requirements are satisfied under NRS 150.061(4). *See* NRS 150.060(2)(c) (stating that attorney fees "may" be based on "[a]n agreement as set forth in subsection 4 of NRS 150.061"). Whether the parties' contingency fee agreement complied with the probate statutes or is independently enforceable under NRS 18.015 are issues we need not consider in order to resolve this appeal, as the district court found the contingency fee agreement enforceable under either and, as explained in this order, appellant failed to cogently argue any challenge to these determinations. Thus, we limit our focus to addressing the reasonableness of the fees that were awarded. *See Miller*, 124 Nev. at 588-89 & n. 26, 188 P.3d at 1118-19 & n. 26.

71 (Ct. App. 2018) (concluding that the district court must properly weigh the factors enumerated in *Brunzell* in deciding what amount to award for attorney fees, even in contingency fee arrangements); *McDonald Carano Wilson LLP v. Bourassa Law Grp., LLC*, 131 Nev. 904, 908, 362 P.3d 89, 91 (2015) (requiring the district court to determine under *Brunzell* the reasonableness of a law firm's fee agreement when adjudicating an attorney lien under NRS 18.015). The *Brunzell* factors are: (1) the quality of the advocate; (2) the character of the work, e.g., its difficulty, importance, etc.; (3) the work actually performed by the advocate; and (4) the result. *Brunzell*, 85 Nev. at 349, 455 P.2d at 33.[10]

Here, the district court failed to apply the *Brunzell* factors, and summarily concluded that the attorney fee award was appropriate without considering these factors in determining the reasonableness of the attorney fees GCL requested. Although the district court need not explicitly mention each *Brunzell* factor in its order, the court does need to "demonstrate that it considered the required factors, and the award [is] supported by substantial evidence." *Logan*, 131 Nev. at 266, 350 P.3d at 1143; *see id.* (mandating that a district court consider the *Brunzell* factors but explaining that "express findings on each factor are not necessary for a district court to properly exercise its discretion"). *See also Stubbs v. Strickland*, 129 Nev. 146, 152 n.1, 297 P.3d 326, 330 n.1 (2013) (explaining that a district court must "make

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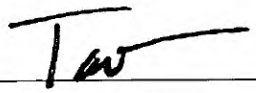
[10]We note that GCL argued in its brief that a firm is not required to keep track of hourly billing when a contingency fee has been agreed to, citing to *O'Connell*. We take this opportunity to clarify that *O'Connell* does not stand for this broad proposition. While billing records may not be required in awarding fees based on a contingency fee agreement, we did not intend to suggest that a firm is automatically relieved of its hourly billing requirements where appropriate, necessary or required. *See O'Connell*, 134 Nev. at 562 n.7, 429 P.3d at 673 n.7.

findings regarding the basis for awarding attorney fees and the reasonableness of an award of attorney fees"). In this case, however, there is no indication at the hearing to adjudicate the lien that the district court considered the *Brunzell* factors, nor is there any language contained in the district court's order supporting that these factors were applied in determining the reasonableness of GCL's fees.[11] Accordingly, the district court abused its discretion in failing to apply the *Brunzell* factors in determining the reasonableness of the fees awarded.[12]

Therefore we,

ORDER the judgment of the district court AFFIRMED IN PART, REVERSED IN PART, and REMAND this matter for further proceedings consistent with this order.[13]

_____, C.J.
Gibbons



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[11]In her opening brief, Holden argues that the district court did not apply the *Brunzell* factors as required in determining the amount of fees to be awarded. GCL does not address this argument in its answering brief. Therefore, we treat this failure as a confession of error. *Ozawa,* 125 Nev. at 563, 216 P.3d at 793.

[12]We are concerned that Holden may not yet have received the uncontested amount of her bequest under the will. We urge the district court to order distribution of her uncontested amount, which of course would not include the total amount of fees previously awarded to GCL that is in dispute.

[13]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 our disposition of this appeal.

cc: Hon. Gloria Sturman, District Judge
Eleissa C. Lavelle, Settlement Judge
Law Office of George E. Cromer
Gerrard Cox Larsen
Eighth District Court Clerk