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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **DEBRA GONZALES,**

3 Petitioner-Appellee,

4 **v.**

No. 33,609

5 **DAVID WARNER,**

6 Respondent-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY**

8 **James Waylon Counts, District Judge**

9 Lori Gibson, P.C.

10 Lori Gibson

11 Ruidoso, NM

12 for Appellee

13 David Warner

14 Roswell, NM

15 Pro Se Appellant

16 **MEMORANDUM OPINION**

17 **FRY, Judge.**

18 {1} Husband appeals the district court's division of community property and debt

19 in this divorce case. We issued a notice of proposed disposition proposing to find that

20 we have jurisdiction over this appeal, and to affirm in part and reverse in part.

1 Husband and Wife have both filed memoranda that agree in part with the proposed
2 disposition but oppose it in part. We have carefully considered the submissions of the
3 parties. However, for the reasons stated below, we continue to believe the proposed
4 disposition correctly analyzed the issues and should be followed. We therefore affirm
5 in part and reverse in part for the reasons stated below as well as those stated in the
6 notice of proposed disposition.

7 **Jurisdiction**

8 {2} In the notice we proposed to hold that the district court's refusal to rule on the
9 last of Husband's several motions for reconsideration did not destroy the finality of
10 the underlying judgment, dated April 25, 2013. Husband argues against this result,
11 contending that he is appealing not only that judgment but also the district court's
12 February 10, 2014 order denying his motion to reconsider the April 25, 2013
13 judgment. [MIO 1] According to Husband, the pendency of his last motion to
14 reconsider, filed on February 11, 2014, does affect finality because he filed that
15 motion within thirty days of the February 10 order, and the district court must
16 therefore rule on it. We disagree. The point of our discussion in the notice of proposed
17 disposition is that any motion directed at the underlying judgment must be filed within
18 thirty days of that judgment; otherwise finality is not affected. In this case, therefore,
19 when the district court filed its order of February 10, 2014, the underlying judgment

1 became final, and Husband’s new motion to reconsider was of no effect as far as
2 finality is concerned. Husband then filed his amended notice of appeal, on February
3 20, 2014, and thereby transferred jurisdiction to this Court and deprived the district
4 court of jurisdiction to rule on his last motion for reconsideration. The bottom line is,
5 a litigant cannot extend the time for appeal or continually prevent a judgment from
6 becoming final by serially filing motions to reconsider. For the reasons stated in the
7 notice of proposed disposition, we hold that we have jurisdiction to consider this
8 appeal.

9 **Issues Affirmed**

10 {3} Husband has not presented any argument in opposition to our discussion of the
11 issues concerning the following: (1) the district court’s failure to sanction Wife for her
12 allegedly numerous violations of the temporary domestic order; and (2) the issue
13 concerning the district court’s finding regarding Husband’s lack of resources to pay
14 for Wife’s attorney fees, except as discussed below. For the reasons stated in the
15 notice of proposed disposition, we affirm on these issues. *See State v. Ibarra*, 1993-
16 NMCA-040, ¶ 11, 116 N.M. 486, 864 P.2d 302 (holding that “[a] party opposing
17 summary disposition is required to come forward and specifically point out errors in
18 fact and/or law”).

1 {4} In our notice of proposed disposition we proposed to find that Wife stopped
2 working at Furr’s Supermarket and adding funds to her retirement account prior to the
3 parties’ marriage, and to hold that earnings accrued on that retirement account during
4 the marriage remain separate property. Husband criticizes this Court for making an
5 “assumption” about the facts, but he does not claim the substance of our assumption
6 is incorrect. [MIO 2-3] Furthermore, he has not responded to our analysis of the
7 earnings question. We therefore affirm on this issue for the reasons stated in the notice
8 of proposed disposition. *See id.*

9 {5} Husband contends that Wife violated the fiduciary duty she owed to Husband
10 by using some of the funds from a community asset, the insurance money for a
11 wrecked vehicle, to pay for her attorney fees. [MIO 5] This argument was not made
12 in Husband’s docketing statement and there is no indication it was raised below, as
13 we pointed out in the notice of proposed disposition. Instead, Husband’s only
14 argument was the one we addressed in the notice of proposed disposition: that a
15 portion of the attorney fees paid by Wife should be granted to him as a community
16 asset, because she used community funds to pay those fees. As we discussed in the
17 notice, the fees were not properly assigned as an asset because they were paid prior
18 to the divorce and the funds no longer existed as a community asset. *See Irwin v.*
19 *Irwin*, 1996-NMCA-007, ¶ 13, 121 N.M. 266, 910 P.2d 342. Since Husband did not

1 raise the fiduciary-duty argument in his docketing statement and does not indicate
2 how he preserved it below, we decline to address it. *See* Rule 12-216 NMRA
3 (requiring that a ruling or decision by the district court must be invoked in order to
4 preserve an issue for appeal). Furthermore, for the reasons stated above and in our
5 notice, we affirm the district court on the issue that Husband did raise in his docketing
6 statement.

7 {6} Husband argues that if the attorney fees are not going to count against Wife,
8 because the funds no longer existed at the time of the divorce, the same reasoning
9 should apply to the value of the property in Torreon, which according to Husband also
10 did not exist as a community asset at the time of the divorce. [MIO 3] This is because,
11 according to Husband, any equity in the property was destroyed when the property
12 was foreclosed upon prior to the divorce, and thus that \$10,000 in equity should not
13 have counted against him as an asset awarded to him by the district court.

14 {7} There are two significant differences between the Torreon equity and the money
15 spent on attorney fees, either of which independently justifies the district court's
16 varied treatment of the items. First, the district court's findings indicate that Husband
17 did not sufficiently prove that the Torreon property had indeed been lost to the
18 community at the time of divorce. The district court accurately found that Husband
19 presented no proof that a forfeiture had actually occurred. [RP 202] At one point in

1 the proceedings below Husband submitted to the district court a demand letter
2 concerning the Torreon property. [RP 129] He did not, however, submit a notice of
3 foreclosure and he testified at trial that he did not have such a notice. [RP 154] The
4 district court was therefore entitled to disbelieve Husband's mere assertion that the
5 property had been lost to foreclosure prior to the court's order dividing the community
6 assets and debts. Furthermore, the district court made an alternative finding to the
7 effect that if the property had been lost, it was due to Husband's failure to make the
8 payments on the property or to warn Wife or Wife's attorney that foreclosure was
9 imminent. [RP 202] Thus, while Wife spent community funds to pay a legitimate debt
10 in the form of attorney fees, Husband's actions dissipated a community asset without
11 any return at all to the community. As a result, the district court could reasonably
12 assess that asset against Husband. *See Martinez v. Martinez*,
13 2004-NMCA-007, ¶ 11, 135 N.M. 11, 83 P.3d 298 (discussing fact that spouses owe
14 a fiduciary duty toward each other in managing community property).

15 {8} Husband next argues that Wife's gift of the Pontiac to the parties' daughter
16 should be counted against Wife because it was a gift of a substantial community asset
17 and violated Wife's fiduciary duty toward Husband. It is true that absent intervening
18 equities, one spouse may not deprive the other of a substantial community asset by
19 giving that asset to a third party. *See Fernandez v. Fernandez*, 1991-NMCA-001,

1 ¶¶ 18-19, 111 N.M. 442, 806 P.2d 582. However, Husband did not make this
2 argument in his docketing statement and there is no indication he made it below.
3 Instead, he argued only that the Pontiac was not in fact given to the daughter and
4 should therefore still be considered a community asset. We therefore will not address
5 this argument, raised for the first time on appeal. *See* Rule 12-216. We also note that
6 in this case intervening equities existed—the daughter testified that she had driven the
7 vehicle for three or four years, had helped make the payments on it, and considered
8 it to be hers. [RP 195] We affirm the district court’s decision as to this issue.

9 {9} Husband appears to concede the issue concerning the number of Chevrolet
10 vehicles he owns, stating that he cannot prove a negative, that the third Malibu did not
11 exist. [MIO 4-5] We agree that it was up to the district court, as the fact finder, to
12 decide whether Husband or Wife was more accurately testifying as to the number of
13 Malibus that were in Husband’s possession. The district court found against Husband
14 on that point, and we may not disturb that factual determination on appeal. *See El*
15 *Paso Natural Gas Co. v. Kysar Ins. Agency, Inc.*, 1982-NMSC-046, ¶ 20, 98 N.M. 86,
16 645 P.2d 442.

17 {10} Concerning the issue of spousal support, Husband points to evidence supporting
18 his assertion that he is disabled and should have been awarded such support. [MIO 5]
19 As we discussed in the notice of proposed disposition, there was also evidence that

1 Husband is capable of working and the district court credited that evidence, finding
2 that Husband is voluntarily unemployed. [RP 202] Again, we may not disturb that
3 factual finding on appeal. *See id.*

4 {11} Husband continues to point to evidence that Wife forced him to leave the
5 parties' residence and changed all the locks. [MIO 6] In the notice of proposed
6 disposition, however, we discussed the fact that Husband's remedy for such actions
7 should have been pursued prior to the property-division hearing, at the time he was
8 first locked out of the residence. Husband has not responded to that discussion.
9 Therefore, for the reasons stated in the notice, we hold that the issue is moot and that
10 Husband has suggested no possible remedy that could be afforded to him at this late
11 date. *See Ibarra*, 1993-NMCA-040, ¶ 11 (holding that the party opposing summary
12 disposition must point out errors in fact or law in the proposed disposition).

13 {12} Husband again maintains he has suffered manifest injustice due to the district
14 court's rulings, Wife's false testimony, and misrepresentations made by Wife's
15 attorney. It was up to the district court to determine what testimony the court believed,
16 as well as the accuracy of any representations made by counsel. With respect to the
17 issues we have discussed above, we reject Husband's claim of manifest injustice.

18 **Issues Reversed**

1 {13} In our notice of proposed disposition we pointed out that the parties appear to
2 agree that the district court assigned erroneous values to two different trailers that
3 were awarded to Husband, and omitted completely the cash values of three different
4 life insurance policies. Husband agrees with our proposed reversal as to these issues.
5 [MIO 6] Wife agrees that the actual values of the two trailers were ten percent of the
6 assigned amounts—\$3,000 and \$1,500 rather than \$30,000 and \$15,000. [Wife MIO
7 10] Wife also agrees that three insurance policies with cash value were not addressed
8 by the district court’s decision. [Id. 11] However, Wife does not agree that we should
9 reverse to allow the district court to address these issues. Instead, she contends that
10 two of the insurance policies should be assigned to her and one to Husband. [Id.] She
11 also argues that the inflated values assigned to the trailers and the omission of the
12 insurance policies, if corrected, would not change the district court’s decision because
13 Husband would still be awarded a much greater amount of the community assets than
14 Wife. [Id. 12]

15 {14} In essence, Wife asks this Court to correct the district court’s errors and
16 omissions on appeal, rather than reversing to allow the district court to decide how
17 those errors and omissions might or might not affect its division of the parties’
18 community property. This is not something we may do. The district court has
19 considerable discretion in arriving at an equitable division of the parties’ community

1 property. *See Arnold v. Arnold*, 2003–NMCA–114, ¶ 6, 134 N.M. 381, 77 P.3d 285.
2 We cannot predict on appeal how the district court might decide to allocate the cash
3 values of the life insurance policies, or how correction of the trailer values might
4 affect the court’s equitable division of the parties’ community property. In addition,
5 Wife suggests there may be another piece of omitted community property that should
6 be addressed by the district court—a fourth cash-value-bearing life insurance policy
7 that Husband has allegedly failed to disclose up to this point. [Wife MIO 12] The
8 proper course of action here, therefore, is to reverse the district court’s division of
9 property to the extent that it assigned erroneous values to the two trailers and failed
10 to distribute the cash values of the three life insurance policies. Upon remand the
11 district court will also have the authority to determine the existence of any other assets
12 that may have been omitted from the order dividing the parties’ property. *Cf.* NMSA
13 1978, § 40-4-20(A) (1993) (mandating that the failure to divide or distribute property
14 at the time of divorce does not affect the parties’ rights to that property, and that either
15 spouse may at any time initiate an action to divide such omitted property). {15}

16 Based on the foregoing, as well as the discussion in the notice of proposed
17 disposition, we affirm the district court’s decision in part and reverse it in part.

1 {16} **IT IS SO ORDERED.**

2

3

CYNTHIA A. FRY, Judge

4 **WE CONCUR:**

5

6 **TIMOTHY L. GARCIA, Judge**

7

8 **J. MILES HANISEE, Judge**