

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

2 **LUCY BRASWELL, as Personal**
3 **Representative of the Estate of**
4 **Modesto Sanchez,**

5 Plaintiff/Counterdefendant-Appellee,

6 v.

7 **SUSAN WHITEFEATHER,**

8 Defendant/Counterplaintiff-Appellant.

9 **APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY**

10 **Ellen R. Jessen, District Court Judge**

11 John D. Wheeler & Associates
12 John D. Wheeler
13 Elizabeth K. Watson
14 Alamogordo, NM

15 for Appellee

16 Courvoisier Law LLC
17 Rebekah A. Scott Courvoisier
18 Alamogordo, NM

19 Lorenz Law
20 Alice T. Lorenz
21 Albuquerque, NM

22 for Appellant

Court of Appeals of New Mexico
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Mark Reynolds

No. A-1-CA-39517

1 **MEMORANDUM OPINION**

2 **DUFFY, Judge.**

3 {1} Plaintiff Lucy Braswell filed suit to set aside a deed naming her sister,
4 Defendant Susan Whitefeather, and Modesto Sanchez, their father, as joint tenants
5 of Sanchez’s property. Defendant had executed the deed as attorney in fact for
6 Sanchez. Concluding that Defendant was not authorized to use her power of attorney
7 in this manner, the district court granted partial summary judgment in favor of
8 Plaintiff and quieted title of the property in favor of Sanchez’s estate. On appeal,
9 Defendant claims the district court erred by (1) granting partial summary judgment
10 against her, (2) denying her motion to reconsider, and (3) granting an improper
11 remedy. We affirm.

12 **BACKGROUND**

13 {2} Modesto Sanchez died intestate in June 2018; he was survived by his two
14 children—Plaintiff and Defendant. Approximately two years before his death,
15 Sanchez gave power of attorney to Defendant. Shortly thereafter, Defendant used
16 the power of attorney to execute a special warranty deed (the Deed) that ostensibly
17 conveyed Sanchez’s property to Sanchez and Defendant as joint tenants. After
18 Sanchez’s death, Plaintiff filed suit to set aside the Deed on the basis that Defendant
19 lacked authority to convey the property under the New Mexico Uniform Power of

1 Attorney Act (UPAA), NMSA 1978, §§ 45-5B-101 to -403 (2007, as amended
2 through 2011).

3 {3} Defendant filed a verified answer and counterclaim in response. She stated
4 that Sanchez had disclosed “his interest in getting his affairs in order and for making
5 arrangements for the distribution of his property at the time of his passing.”
6 According to Defendant, Sanchez had learned of a way “to transfer property to a
7 child without the need for probate [by putting] the child’s name on the deed for the
8 real property.” Sanchez allegedly instructed Defendant to use the power of attorney
9 “to make and record deeds for his Real Property, adding her name as a grantee, for
10 the purpose of ensuring that the property would be [Defendant]’s when he died.”
11 Notably, Defendant argued that both she and Sanchez had intended to create a
12 transfer on death deed (TODD)—she requested the court to reform the Deed to make
13 it so.

14 {4} Plaintiff filed a motion for partial summary judgment asserting that “an
15 attorney-in-fact cannot make[] gifts on behalf of a principal unless the power to gift
16 is specifically set forth in the power of attorney.” *See* NMSA 1978, § 45-5B-
17 201(A)(2) (2011). Plaintiff argued that the conveyance constituted a gift because
18 Sanchez had not received consideration.

19 {5} In Defendant’s response to the motion for partial summary judgment, she first
20 claimed that Plaintiff had failed to make a prima facie showing because she had not

1 presented evidence that the transfer lacked consideration. On the merits, Defendant
2 argued that the Deed carried a legal presumption of consideration and that Sanchez
3 lacked the donative intent to give a present interest, evidenced by his continued
4 exercise of dominion and control over the property. Beyond the invoking
5 presumption, Defendant relied on denials in her own verified answer as evidence.
6 Defendant reserved the right to present further evidence of consideration at trial, but
7 did not offer any additional proof in her response.

8 {6} Plaintiff made two important points in her reply. First, she noted that
9 Defendant could not rely on the presumption of consideration because she was a
10 fiduciary, and in cases involving transactions that create a facial presumption of self-
11 dealing, the burden is on the fiduciary to show proper dealings. *See McMinn v. MBF*
12 *Operating Acquisition Corp.*, 2007-NMSC-040, ¶ 21, 142 N.M. 160, 164 P.3d 41.
13 Plaintiff also noted that “[n]ot only can a power of attorney not be used to make a
14 gift, it also cannot be used to create a right of survivorship either—unless such power
15 is specifically stated in the power of attorney itself.” *See* § 45-5B-201(A)(3).

16 {7} The district court granted partial summary judgment in favor of Plaintiff on
17 two bases. The district court first concluded that there was no presumption of
18 consideration under the circumstances, noting that “[t]he general rule is that one
19 acting in a fiduciary capacity for another has the burden of proving that a transaction
20 with himself was advantageous for the person for whom he was acting.” *McMinn*,

1 2007-NMSC-040, ¶ 21 (internal quotation marks and citation omitted). The court
2 concluded that Defendant’s “interest in the Property constituted a gift for which no
3 consideration was paid,” and that the “Power of Attorney did not specifically bestow
4 a power to make gifts.” *See* § 45-5B-201(A)(2). The district court also concluded
5 that even if Sanchez had intended to create a TODD, “the Power of Attorney did not
6 expressly grant [Defendant] authority to create a right of survivorship in the
7 Property” either, and therefore, whether a gift or a TODD, the Deed was
8 unauthorized as a matter of law. *See* § 45-5B-201(A)(3). As a result, the district court
9 voided the Deed and quieted title to the property in favor of Sanchez’s estate.

10 {8} Defendant filed a motion to reconsider the order granting partial summary
11 judgment. She attached numerous documents as alleged evidence of consideration.
12 The district court denied the motion. Following trial on a separate issue, Defendant
13 appealed.

14 **DISCUSSION**

15 {9} Defendant argues that the district court made various errors in applying the
16 standard for summary judgment and interpreting the UPAA. Defendant further
17 contends that the district court erred in denying her motion to reconsider and granted
18 Plaintiff an improper remedy by quieting title to the property in favor of Sanchez’s
19 estate. We address each argument in turn.

1 **I. The District Court Did Not Err in Granting Partial Summary Judgment**

2 {10} We review a grant of summary judgment de novo. *Zamora v. St. Vincent*
3 *Hosp.*, 2014-NMSC-035, ¶ 9, 335 P.3d 1243. “Summary judgment is appropriate in
4 the absence of any genuine issues of material fact and where the movant is entitled
5 to judgment as a matter of law.” *Id.* “In reviewing an order on summary judgment,
6 we examine the whole record on review, considering the facts in a light most
7 favorable to the nonmoving party and drawing all reasonable inferences in support
8 of a trial on the merits.” *Id.*

9 {11} On appeal, Defendant asserts that Plaintiff failed to make a prima facie case
10 for summary judgment and attacks the district court’s determination that the “interest
11 in the Property constituted a gift for which no consideration was paid.” Defendant
12 argues that Plaintiff “provided no evidence supporting these ‘facts’ or her claim that
13 the real estate conveyance had been made without consideration.” In making this
14 argument, Defendant misconstrues the burdens of moving and nonmoving parties on
15 summary judgment. Contrary to Defendant’s assertion, Plaintiff bore no burden to
16 present specific evidence to make a prima facie case under the standard for summary
17 judgment. *See* Rule 1-056(A) NMRA (“A party seeking to recover upon a claim,
18 counterclaim or cross-claim or to obtain a declaratory judgment may move *with or*
19 *without* supporting affidavits for a summary judgment in his favor upon all or any
20 part thereof.” (emphasis added)); *Blauwkamp v. Univ. of N.M. Hosp.*, 1992-NMCA-

1 048, ¶ 15, 114 N.M. 228, 836 P.2d 1249 (“In order to satisfy the threshold
2 requirement of making a prima facie showing of entitlement to summary judgment,
3 [Rule] 1-056(C) does not require a moving party to support its motion with
4 affidavits . . . or other sworn testimony affirmatively disproving [the nonmoving
5 party]’s claims.”).

6 {12} The district court concluded that “Plaintiff made a prima facie case that
7 [Defendant] did not pay consideration for a joint tenancy interest in the Property.”
8 We agree with this conclusion. By asserting that Defendant lacked evidence of
9 consideration, Plaintiff’s motion made a prima facie showing that Defendant could
10 not establish the consideration necessary to prove the Deed was not a gift. *E.g.*, 38A
11 C.J.S. *Gifts* § 8, Westlaw (database updated March 2023) (“A gift is, or imports, a
12 transfer without consideration, while a sale imports a transfer for a consideration.”).

13 {13} Other than her attack on whether Plaintiff made a prima facie showing,
14 Defendant argues that the district court erred in concluding that the transfer of
15 property constituted a gift as a matter of law. She asserts that she established a
16 genuine issue for trial by relying on the presumption of consideration and the sworn
17 allegations in her verified answer regarding Sanchez’s lack of donative intent. As to
18 the presumption of consideration, however, Defendant’s brief in chief wholly failed
19 to address, much less controvert, the district court’s legal conclusion that Defendant

1 could not rely on the presumption of consideration because she was a fiduciary
2 engaged in a self-dealing transaction. *See McMinn*, 2007-NMSC-040, ¶ 21.

3 {14} Nevertheless, we need not explore Defendant’s gift-related arguments further
4 because even if we were to accept Defendant’s position that the transfer was not a
5 gift, she has not demonstrated that the district court erred in granting summary
6 judgment on the alternative basis—i.e., that “the Power of Attorney did not expressly
7 grant [Defendant] authority to create a right of survivorship in the Property” either.
8 Defendant’s only argument addressing this ruling is that the district court should not
9 have considered the matter because Plaintiff raised the point for the first time in her
10 reply to her motion for summary judgment. But Plaintiff’s reply was specifically
11 directed to the arguments and authorities presented in Defendant’s response to the
12 motion for summary judgment, where Defendant argued that the Deed was not a gift
13 but was, instead, an estate planning device intended to transfer the property on
14 Sanchez’s death. Accordingly, the issue was properly raised under the
15 circumstances. *E.g., Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶ 29, 127 N.M.
16 282, 980 P.2d 65 (noting that a party may address in his or her reply brief new
17 arguments or authorities presented in the answer brief). Moreover, Defendant had a
18 full and fair opportunity to address Plaintiff’s arguments at the hearing on the motion
19 for summary judgment along with more than two months to prepare. At the hearing,
20 Plaintiff renewed her argument that regardless of whether the Deed was a gift or

1 intended as an estate planning device, Defendant was not authorized to use her power
2 of attorney to execute the Deed under the UPAA. In response, Defendant stated only
3 that given the opportunity, she would have provided a “treatise on what the
4 difference is between creating a right of survivorship and an outright transfer, a
5 transfer of a fee interest as would occur when someone creates a joint tenancy as
6 opposed to when somebody makes a survivorship designation or a beneficiary
7 designation because there is a lot of case law on that.” Defendant appears to have
8 misunderstood that the hearing *was* her opportunity to do so. Regardless, Defendant
9 did not provide any case law during the hearing or on appeal demonstrating that she
10 was legally authorized to use her power of attorney to execute the Deed.

11 {15} Defendant now argues that “a [TODD] is by statutory definition non-
12 testamentary. Thus, one does not unlawfully create a testamentary right of
13 survivorship through execution of a [TODD].” *See* NMSA 1978, § 45-6-407 (2013)
14 (stating that a TODD is nontestamentary). We reject this argument for the simple
15 reason that the UPAA forbids an attorney in fact to create *any* right of survivorship
16 unless the power of attorney expressly grants that authority. *See* § 45-5B-201(A)(3).
17 We emphasize that the Deed, on its face, was not a TODD—it was a garden variety
18 special warranty deed naming Defendant and Sanchez as joint tenants. And by
19 naming Defendant and Sanchez as joint tenants, the Deed created an impermissible
20 right of survivorship. *See Edwin Smith, L.L.C. v. Synergy Operating, L.L.C.*, 2012-

1 NMSC-034, ¶ 15, 285 P.3d 656 (“[D]escribing the right of survivorship as the
2 leading characteristic of joint tenancy.” (alteration, internal quotation marks, and
3 citation omitted)). But even if the Deed was a TODD, it was *still* unauthorized. The
4 Uniform Real Property Transfer on Death Act refers to the “person that receives
5 property under a [TODD]” as a “beneficiary.” NMSA 1978, § 45-6-402(A) (2013).
6 As with rights of survivorship, the UPAA prohibits a power of attorney from creating
7 or changing a beneficiary designation unless expressly granted the authority to do
8 so. *See* § 45-5B-201(A)(4). Consequently, even if the Deed had in fact been a
9 TODD, it was still unauthorized as a matter of law.

10 {16} For all of these reasons, we affirm the district court’s grant of partial summary
11 judgment against Defendant.

12 **II. The District Court Did Not Abuse Its Discretion in Denying Defendant’s**
13 **Motion to Reconsider**

14 {17} “We review the denial of a motion for reconsideration for abuse of discretion.”
15 *Unified Contractor, Inc. v. Albuquerque Hous. Auth.*, 2017-NMCA-060, ¶ 77, 400
16 P.3d 290. “We cannot say the district court abused its discretion by its ruling unless
17 we can characterize it as clearly untenable or not justified by reason.” *Wilde v.*
18 *Westland Dev. Co.*, 2010-NMCA-085, ¶ 30, 148 N.M. 627, 241 P.3d 628 (internal
19 quotation marks and citation omitted).

20 {18} Here, Defendant filed the motion to reconsider, attaching alleged evidence of
21 consideration to show the district court had erroneously concluded that the Deed was

1 a gift. On appeal, Defendant claims that the motion to reconsider alerted the district
2 court that “it had misapplied or failed to adhere to the law governing motions for
3 summary judgment, and misunderstood or misapplied the law regarding deeds, gifts,
4 and the UPAA.” We have already concluded that the district court did not misapply
5 the law regarding this Deed and the UPAA. As for the exhibits attached to
6 Defendant’s motion to reconsider, we note that she has not argued that any of the
7 exhibits were unavailable before summary judgment was granted. Consequently, the
8 district court acted well within its discretion in refusing to consider untimely
9 materials purporting to create a fact issue after summary judgment had been granted.
10 *See Deaton v. Gutierrez*, 2004-NMCA-043, ¶ 9, 135 N.M. 423, 89 P.3d 672
11 (concluding that the district court did not abuse its discretion in refusing to consider
12 materials filed with a motion for reconsideration of summary judgment); *Rivera v.*
13 *Trujillo*, 1999-NMCA-129, ¶ 19, 128 N.M. 106, 990 P.2d 219 (holding that the
14 district court did not abuse its discretion in declining to consider untimely presented
15 deposition testimony where “[t]he only apparent reason for the untimely filing was
16 counsel’s failure to do so”). Defendant has not demonstrated any error requiring
17 reversal, and we therefore affirm the district court’s discretionary ruling.

18 **III. The District Court Did Not Grant an Improper Remedy**

19 {19} Finally, Defendant claims that the district court granted Plaintiff an improper
20 remedy by allowing Sanchez’s property to revert to his estate after the Deed was set

1 aside. On appeal, Defendant argues that “[t]he district court’s conclusion that the
2 property belonged to the estate is erroneous as a matter of law. NMSA 1978[,
3 Section] 45-3-101(B)(3) [(2011)] provides that, in the absence of a testamentary
4 disposition, real property devolves *directly* to the decedent’s heirs. *Conley v. Wikle*,
5 1960-NMSC-009, ¶ 7[, 66 N.M. 366, 348 P.2d 485].” Defendant fails to accurately
6 characterize the law. Section 45-3-101 does not state that the real property devolves
7 “directly” to the decedent’s heirs and the probate statute cited in *Conley* was repealed
8 in 1975. *See In re Estate of Baca*, 1980-NMSC-135, ¶ 8, 95 N.M. 294, 621 P.2d 511.
9 Contrary to Defendant’s position, our current probate code dictates that a decedent’s
10 real property must generally pass through probate (unless it is subject to a TODD,
11 right of survivorship, or other nontestamentary disposition). *See* § 45-3-101(C)
12 (stating that the devolution of the decedent’s separate property and share of the
13 community property is “subject to administration” provided in Article 3 of the
14 Uniform Probate Code); NMSA 1978, § 45-1-201(A)(40) (2011) (defining
15 “property” for purposes of the Uniform Probate Code to include both real and
16 personal property). Defendant has not provided any other authority to demonstrate
17 that the district court erred in quieting title in favor of Sanchez’s estate. *See In re*
18 *Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (“We have
19 long held that to present an issue on appeal for review, an appellant must submit
20 argument and authority as required by rule. We assume where arguments in briefs

1 are unsupported by cited authority, counsel after diligent search, was unable to find
2 any supporting authority.” (emphasis and citations omitted)). We accordingly
3 perceive no basis for reversal of the district court’s disposition of the property.

4 **CONCLUSION**

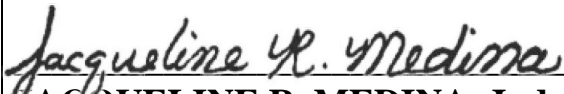
5 {20} For the forgoing reasons, we affirm.

6 {21} **IT IS SO ORDERED.**

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8 _____
MEGAN P. DUFFY, Judge

9 **WE CONCUR:**

10 
11 _____
KRISTINA BOGARDUS, Judge

12 
13 _____
JACQUELINE R. MEDINA, Judge