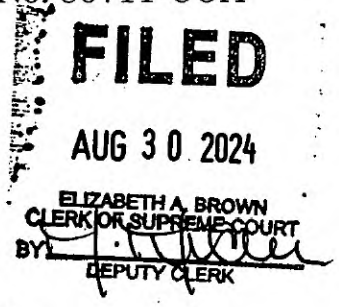
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHERELYN HARRIS-BEY,
Appellant,
vs.
TIMOTHY HARRIS-BEY,
Respondent.

No. 86711-COA



ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Cherelyn Harris-Bey appeals from a district court decree of divorce. Eighth Judicial District Court, Family Division, Clark County; Heidi Almase, Judge.

Having previously been married and divorced, Cherelyn and respondent Timothy Harris-Bey were remarried in December 2019. In June 2021, Cherelyn commenced the underlying divorce proceeding against Timothy, and the disputes that subsequently arose between the parties focused on how their separate and community property should be distributed and whether Cherelyn was entitled to alimony. Following a trial, the district court entered a decree of divorce in May 2023. The divorce decree awarded Timothy the parties' marital residence, provided for each party to receive any bank accounts in his or her name, and required Timothy to pay Cherelyn $350 per month in alimony for six months. This appeal followed.

On appeal, Cherelyn challenges the divorce decree's distribution of the parties' separate and community property and its alimony award. Moreover, Cherelyn contends that the district court was

biased against her, such that this case should be reassigned on remand. We address each issue in turn.

Property distribution

In challenging the divorce decree's distribution of the parties' separate and community property, Cherelyn first contends that the district court improperly awarded Timothy the parties' marital residence because such relief did not conform to his answer and counterclaim. "Pleadings should be such that findings thereon will support a final judgment in the affirmative or negative." *Edmonds v. Perry*, 62 Nev. 41, 67, 140 P.2d 566, 578 (1943). When considering whether the relief granted by the district court was conformable to the case presented by the parties, "we must look to the issues joined by the pleadings, and not to the allegations of the complaint alone." *Buaas v. Buaas*, 62 Nev. 232, 234, 147 P.2d 495, 496 (1944). A plaintiff who relies on only a general prayer for relief in his or her complaint "will be entitled to such relief as is conformable to the case established by him [or her]," which is relief that "follows legitimately and logically from the pleadings and the proof" and that is not "of such a character as to take the defendant by surprise." *Id.* at 235, 147 P.2d at 496 (internal quotation marks omitted).

In attempting to demonstrate that the award of the marital residence to Timothy did not conform to the pleadings, Cherelyn relies on paragraph 4 of his counterclaim, wherein he specified that the district court should distribute the parties' community property by awarding Cherelyn the marital residence and a motor vehicle and awarding him four firearms with their respective ammunition. However, the question of how the parties' community property should be distributed remained in controversy following the pleading stage because, in her reply, Cherelyn denied

paragraph 4 of Timothy's counterclaim in its entirety along with paragraph 5, which specified how Timothy believed the parties' community debts should be divided as part of his proposed property distribution. *See id.* at 234, 147 P.2d at 496. Moreover, at a hearing approximately one year before the trial in this case, Timothy indicated that he was no longer willing to surrender the marital residence to Cherelyn, such that he effectively abandoned the proposed property distribution in his counterclaim.

As a result, insofar as this case concerned the distribution of separate and community property, it proceeded based on Cherelyn's complaint and Timothy's answer. In her complaint, Cherelyn alleged that the parties had separate and community property that needed to be distributed, but rather than specifying how she believed the property should be distributed and asserting a corresponding special prayer for relief, she relied on a general prayer for relief. In his answer, Timothy agreed that the parties had separate and community property that needed to be distributed and likewise relied on a general prayer for relief. Taking these pleadings together, we conclude that their assertion of the existence of separate and community property to be divided and general prayers for relief were sufficient to empower the district court to distribute the parties' separate and community property in accordance with their respective interests. *Id.* at 234-35, 147 P.2d at 496. (concluding that the district court was authorized to determine the parties' property rights under a general prayer for relief). With this in mind, we now turn to Cherelyn's specific arguments concerning how she believes the district court should have distributed certain of the parties' community property.

The marital residence

Cherelyn contends that the evidence and testimony presented at trial did not support the award of the marital residence to Timothy, but instead, required the district court to apportion it between the parties. Timothy contends that the district court properly awarded him the marital residence because Cherelyn did not contribute any funds to its initial purchase or the subsequent mortgage payments and related expenses. However, it is undisputed that Timothy used his income earned during the marriage to make mortgage payments during the marriage.

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). We will not disturb the district court's decision if it is supported by substantial evidence, which is evidence that "a sensible person may accept as adequate to sustain a judgment." *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004).

Property acquired before marriage is separate property. NRS 123.130. With limited exceptions, property, including income, acquired during marriage is community property unless otherwise specified in a written agreement or court order. NRS 123.220. Additionally, it is presumed that all property acquired during marriage is community property, and that presumption may only be overcome by clear and convincing evidence. *Pryor v. Pryor*, 103 Nev. 148, 150, 734 P.2d 718, 719 (1987). When community funds are used to help acquire property, the community is entitled to a pro rata ownership share in the property, and the formula for determining the community's interest is set forth in *Malmquist v. Malmquist*, 106 Nev. 231, 238-44, 792 P.2d 372, 376-81 (1990).

Here, the district court essentially found that Timothy purchased the marital residence as his separate property in June 2019 shortly after the parties' first divorce and before they remarried in December 2019. That finding is supported by substantial evidence, including Timothy's testimony that he purchased the marital residence in June 2019 following the parties' first divorce, that title to the property was in his name, that the mortgage on the property was in his name, and that he paid the mortgage during the interlude between the parties' marriages. *See Williams*, 120 Nev. at 566, 97 P.3d at 1129. Nevertheless, Cherelyn maintains that the district court should have determined that the parties acquired the property as community property from the outset under the doctrine of community property by analogy based on her testimony that she furnished an earnest money deposit in connection with the purchase of the marital residence. *See Hay v. Hay*, 100 Nev. 196, 199, 678 P.2d 672, 674 (1984) (providing that community property laws will apply by analogy upon proof that unmarried parties agreed to acquire property as if they were married). However, the district court determined that Cherelyn was not a credible witness, and this court does not reweigh evidence or witness credibility. *See Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007) (refusing to reweigh credibility determinations on appeal); *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (refusing to reweigh evidence on appeal). Because Cherelyn has therefore failed to demonstrate that the district court incorrectly determined that Timothy acquired the marital residence as his separate property, we turn to the question of whether the community acquired an interest in the property during the parties' second marriage.

At trial, Timothy's undisputed testimony was that he paid the mortgage on the marital residence during the parties' second marriage with his earnings from employment. Because no evidence was introduced of an agreement between the parties or court order providing for those earnings to be treated as separate property, the presumption that they were community property applied. *See Pryor*, 103 Nev. at 150, 734 P.2d at 719. Since community funds were used to make payments on separate property, "the community is entitled to a *pro rata* ownership share in [the] property," which must be divided as community property. *See Malmquist*, 106 Nev. at 238, 792 P.2d at 376 (citing *Robison v. Robison*, 100 Nev. 668, 670, 691 P.2d 451, 454 (1984)). But the district court did not apply the formula set forth in *Malmquist*, 106 Nev. at 238-44, 792 P.2d at 376-81, to determine the community's ownership share in the marital residence, or otherwise make adequate findings to support an unequal distribution of the parties' community property, *see* NRS 125.150(1)(b)[1] (providing that the court must make an equal disposition of community property unless it finds a compelling reason to make an unequal disposition and sets forth in writing the reasons for doing so).[2] Instead, the district court indicated that

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[1]In 2023, the Nevada Legislature amended NRS 125.150(1)(b), effective July 1, 2023. We apply the pre-amendment version of the statute, which was the version in effect when the divorce decree was entered. 2023 Nev. Stat., ch. 413, § 2.5, at 2460-2463.

[2]We recognize that the district court found Cherelyn rented out a room in the marital residence to a third person for $600 per month while the parties' were separated and Timothy was deployed in South Korea; however, the court did not specifically find that this circumstance was a compelling reason for an unequal distribution or otherwise connect its findings to its decision to award Timothy the marital residence in its entirety. *See Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142

it awarded the marital residence to Timothy based on "the time and status in which [it] was purchased [and] the short term nature of the parties' marriage." But neither of these circumstances negates the fact that community funds were used to pay down the mortgage on the marital residence during the marriage, such that the community was entitled to an ownership interest. *See Malmquist*, 106 Nev. at 238, 792 P.2d at 376. Thus, because the district court failed to apply the proper legal framework to determine and allocate the community's interest in the marital residence, we reverse the portion of the divorce decree awarding Timothy the marital residence and remand for the district court to determine the parties' respective interests in the property.

Undisclosed financial accounts

Cherelyn further challenges the divorce decree's property distribution by arguing that the district court abused its discretion because it failed to equally divide certain financial accounts in Timothy's name that he did not disclose—specifically, a cryptocurrency account, a thrift savings plan (TSP) account, and an account attached to a Mastercard credit card. However, the district court found that Timothy presented credible testimony concerning these accounts, including that he never funded the cryptocurrency account, that he emptied the TSP account before the parties remarried to satisfy certain debts in order to qualify for the loan he used to purchase the marital residence, and that he did not open or have knowledge of the account attached to the Mastercard credit card. Although Cherelyn contends that the district court should not have relied solely on Timothy's testimony as a basis to award him these accounts, her contention is

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(2015) (explaining that deference is not owed to findings so conclusory they may mask legal error).

unavailing because testimony is evidence. *See In re Dish Network Derivative Litig.*, 133 Nev. 438, 445 n.3, 401 P.3d 1081, 1089 n.3 (2017) ("[T]estimony is evidence whether it is given in court or a deposition.").

Moreover, while Cherelyn attempts to demonstrate that the district court should not have found that Timothy credibly testified concerning these accounts in light of his failure to disclose them, the district court was in the best position to evaluate Timothy's testimony, including his explanation that it did not occur to him to disclose the TSP account since it had a zero balance, and we do not reweigh witness credibility.[3] *See Ellis*, 123 Nev. at 152, 161 P.3d at 244; *In re Parental Rights as to C.J.M.*, 118 Nev. 724, 732, 58 P.3d 188, 194 (2002) (recognizing that a district court is in the best position to observe the parties' demeanor and assess their credibility). Cherelyn's efforts to demonstrate that the district court overlooked relevant evidence that she presented does not otherwise establish a basis for relief, as the evidence merely established the existence of these accounts and did not contradict Timothy's testimony. Thus, because the district court's decision to award these accounts to Timothy was

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[3]Insofar as Cherelyn's arguments concerning Timothy's credibility are also directed at establishing that he should have been sanctioned for violating NRCP 16.2's rules concerning the disclosure of a party's financial account statements and recent paycheck stubs, she waived the issue by failing to meaningfully raise it below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal."). Indeed, Cherlyn failed to argue below that Timothy did not disclose paycheck stubs in accordance with the applicable rules. And although Cherelyn did address Timothy's failure to disclose statements for his financial accounts, she never moved to compel discovery or for sanctions, but instead, indicated at trial that the relief she sought was "[j]ust an order that the accounts be divided."

supported by substantial evidence, we discern no abuse of discretion, and, therefore, affirm that decision. *See Schwartz*, 126 Nev. at 90, 225 P.3d at 1275; *Williams*, 120 Nev. at 566, 97 P.3d at 1129.

Navy Federal Credit Union bank account

Turning to Cherelyn's remaining challenge to the divorce decree's property distribution, she maintains that the district court abused its discretion by failing to equally divide a Navy Federal Credit Union (NFCU) bank account in Timothy's name because it contained community property. Timothy's undisputed testimony at trial demonstrated that his earnings from employment and Cherelyn's unemployment benefits were deposited into the NFCU bank account during the parties' second marriage.[4] Because no evidence was introduced at trial of an agreement or court order providing for those funds to be treated as separate property, they were community property. *See* NRS 123.220; *Pryor*, 103 Nev. at 150, 734 P.2d at 719. Although it is unclear whether the NFCU account also contained Timothy's separate property funds at some time, a presumption

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[4]Cherelyn also asserts that a federal income tax refund arising from the parties' joint tax return for the 2020 tax year was deposited into the NFCU account and that she did not have access to the funds. During the underlying proceeding, the parties presented conflicting testimony on this point, and the district court did not address whether Cherelyn was entitled to be reimbursed for her interest in the refund in the divorce decree. Because this court does not resolve factual issues in the first instance, *see Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (providing that appellate courts are not apt at addressing factual issues in the first instance), and we are already reversing and remanding for the district court to determine how to distribute the parties' community property interests in the NFCU account, we direct the district court on remand to address the related questions of whether the refund was deposited into the NFCU account and whether Cherelyn is entitled to reimbursement for any of the funds stemming from that refund.

arose once Timothy deposited community property funds into the NFCU account that all the funds in that account were community property, and Timothy offered no evidence or testimony at trial to rebut the presumption. *See Malmquist*, 106 Nev. at 245, 792 P.2d at 381 ("Once an owner of separate property funds commingles these funds with community funds, the owner assumes the burden of rebutting the presumption that all the funds in the account are community property."). Because the district court nevertheless awarded the NFCU account in its entirety to Timothy without identifying any compelling reason for an unequal distribution of community property, we conclude it abused its discretion in so doing. *See* NRS 125.150(1)(b); *see also Schwartz*, 126 Nev. at 90, 225 P.3d at 1275. Our decision in this respect is further supported by Timothy's failure to address Cherelyn's argument concerning the district court's distribution of the NFCU account in his answering brief on appeal. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (concluding that respondents confessed error by failing to respond to appellant's argument); *cf.* NRAP 31(d)(2) (providing that the appellate courts may treat a respondent's failure to file an answering brief as a confession of error). Consequently, we reverse the portion of the divorce decree awarding Timothy the NFCU account and remand for the district court to determine how that asset should be distributed between the parties.[5]

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[5]Cherelyn briefly argues that the district court abused its discretion by failing to require Timothy to reimburse her for her unemployment benefits that were deposited into his NFCU account. However, relief is unwarranted in this respect given that the unemployment benefits were community property, *see* NRS 123.220; *Pryor*, 103 Nev. at 150, 734 P.2d at 719; that Timothy testified the funds were used for community expenses, which constituted substantial evidence to support a decision not to order

Alimony

With respect to alimony, Cherelyn presents myriad arguments concerning why she believes the district court abused its discretion by awarding her only $350 per month in alimony for six months. Timothy contends that the alimony award was proper because Cherelyn is "a relatively young and healthy adult who is fully capable of working and earning her own income." A district court may award alimony to either spouse as appears just and equitable. NRS 125.150(1)(a). To determine whether an alimony award is just and equitable, a district court must consider the 11 factors listed in NRS 125.150(9). *See DeVries v. Gallio*, 128 Nev. 706, 711-13, 290 P.3d 260, 264-65 (2012). This court reviews a district court's decision to award alimony for an abuse of discretion. *Wolff v. Wolff*,

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reimbursement, *see Williams*, 120 Nev. at 566, 97 P.3d at 1129; and that the district court found that Timothy was a credible witness whereas it specifically found that Cherelyn incredibly testified she was unaware that Timothy received the benefits on her behalf, which are determinations we do not reweigh, *see Ellis*, 123 Nev. at 152, 161 P.3d at 244. Cherelyn further contends that there was a community debt associated with the unemployment benefits, which the district court needed to allocate between the parties because Timothy testified at trial that Cherelyn informed him that she received a notice of an overpayment of benefits and showed him a copy of the notice. Although the district court acknowledged Timothy's testimony on this issue in the divorce decree, it did not make any findings concerning the purported debt or otherwise distribute it between the parties—presumably because Timothy's limited testimony was the only evidence presented at trial regarding the overpayment. Because this court does not resolve factual issues in the first instance, *see Round Hill Gen. Imp. Dist.*, 97 Nev. at 604, 637 P.2d at 536, and we are already reversing and remanding for the district court to determine how to distribute the parties' community property interests in the NFCU account, we direct the district court on remand to address the related questions of whether Cherelyn has been held liable for an overpayment of unemployment benefits, and, if so, how the community debt should be distributed.

112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996). We will not disturb the district court's decision if it is supported by substantial evidence, which is evidence that "a sensible person may accept as adequate to sustain a judgment." *Davitian-Kostanian v. Kostanian*, 139 Nev., Adv. Op. 27, 534 P.3d 700, 705 (2023).

Here, the district court made extensive findings concerning the alimony factors and other considerations the court deemed relevant. *See* NRS 125.150(9) (explaining that, in addition to the statutory factors, the district court may consider "any other factors the court considers relevant" to determining the amount and duration of an alimony award). The district court concluded that an alimony award to Cherelyn of $350 per month for six months was appropriate to account for the financial disparity between the parties, the short-term nature of their marriage, and Cherelyn's failure to maintain viable employment notwithstanding being able to work. Having considered Cherelyn's arguments concerning these determinations, we conclude that they do not establish a basis for reversal, either because Cherelyn failed to preserve her arguments for appellate review,[6] *see Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983, or has not demonstrated that the determinations were unsupported by substantial evidence, *see Davitian-Kostanian*, 139 Nev., Adv. Op. 27, 534 P.3d at 705, based on

[6]For example, insofar as Cherelyn argues that the district court should have considered the length of the parties' two marriages in the aggregate in evaluating her request for alimony rather than considering only the parties' second marriage and awarding her $350 per month for six months based, in part, on the short-term nature of the marriage, she failed to raise that argument below. Instead, Cherelyn argued that, although the parties' marriage was short-term, she was entitled to $2,422 per month for 22 months because Timothy was in a superior financial position, and she lacked marketable skills.

improper considerations, or involved errors that were prejudicial to her, *see Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (providing that a prejudicial error is one that "[a]ffects [a] party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached"); *cf.* NRCP 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). Consequently, we affirm the divorce decree insofar as it concerned alimony.

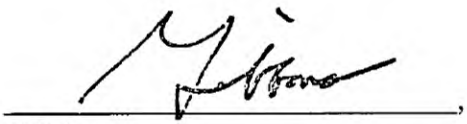
Alleged judicial bias

Cherelyn next contends that the district court exhibited bias against her during the underlying proceeding, such that this case should be reassigned on remand. We presume that judges are unbiased, *Millen v. Eighth Jud. Dist. Ct.*, 122 Nev. 1245, 1254, 148 P.3d 694, 701 (2006), and Cherelyn has not shown bias sufficient to warrant disqualification. In particular, Cherelyn has not demonstrated that the district court's decisions in the underlying case were based on knowledge acquired outside of the proceedings or that its decisions otherwise reflect "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Canarelli v. Eighth Jud. Dist. Ct.*, 138 Nev. 104, 107, 506 P.3d 334, 337 (2022) (internal quotation marks omitted) (explaining that unless an alleged bias has its origins in an extrajudicial source, disqualification is unwarranted absent a showing that the judge formed an opinion based on facts introduced during official judicial proceedings and which reflects deep-seated favoritism or antagonism that would render fair judgment impossible); *see In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988) (providing that rulings made during official judicial proceedings generally "do not establish legally cognizable grounds for disqualification"); *see also*

Rivero v. Rivero, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009) (stating that the burden is on the party asserting bias to establish sufficient factual grounds for disqualification), *overruled on other grounds by Romano v. Romano*, 138 Nev. 1, 6, 501 P.3d 980, 984 (2022), *abrogated in part on other grounds by Killebrew v. State ex rel. Donohue*, 139 Nev., Adv. Op. 43, 535 P.3d 1167, 1171 (2023). Therefore, Cherelyn has failed to demonstrate that reassignment is warranted.

Accordingly, for the reasons set forth above, 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.[7]



_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Heidi Almase, District Judge, Family Division
Leavitt Law Firm
Timothy Harris-Bey
Eighth District Court Clerk

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[7]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.