IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIAN HO, Appellant, vs. BRYANNA JANE HO, Respondent.	No. 86775-COA

FILED

SEP 19 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Brian Ho appeals from a decree of divorce. Eighth Judicial District Court, Family Division, Clark County; Charles J. Hoskin, Judge.

Brian and Bryanna Jane Ho were married for nearly seven years before both parties simultaneously filed for divorce in October 2022; their complaints were subsequently consolidated. Although Bryanna had worked as a medical assistant, during their marriage Bryanna stayed home and cared for the parties' two minor children while Brian, the primary earner, worked as a registered nurse.[1] The parties resolved their child custody arrangements by stipulation and the district court granted them joint legal and physical custody in the divorce decree. As relevant here, Brian exercised parenting time from Monday through Thursday on week one and Monday through Friday on week two. Custody of the parties' children as well as child support are not issues in this appeal.

In advance of trial, both parties submitted general financial disclosure forms (FDF). In his most recent FDF filed in April 2023, Brian stated that his gross monthly income (GMI) was $7,271.16, including

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

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$128.40 in overtime incurred every one to two weeks. Brian also testified that his monthly expenses, including expenses related to the marital residence, for which he continued to be responsible, as well as rent for his separate residence, were $8,546.70. Bryanna, who started working after the complaint was filed, filed her most recent FDF in May 2023 and disclosed a GMI of $3,986.67, and her monthly expenses, which did not include any costs related to the marital residence, were $1,755.

In addressing the division of the parties' community property, Brian testified that he withdrew approximately $24,000 in funds from a Fidelity retirement account (the Fidelity account) during the marriage that were transferred into the parties' joint Wells Fargo account. Brian further testified that he initially told Bryanna these funds would be used to purchase a vehicle but instead he used them to pay off community credit card debt, which Bryanna did not dispute.[2] Brian provided statements from the Fidelity account which showed approximately when the funds were removed, and statements from a joint Wells Fargo account, where the funds were deposited by Fidelity. Prior to the withdrawals, the Fidelity account's balance was $34,304.24. Brian made two withdrawals—$12,500 in May 2022, and $17,500 in August 2022. The latest account statement in the

[2]On appeal, Bryanna argues that it is unknown where Brian deposited the withdrawals from the Fidelity account, but her argument is belied by the record as documents support that the Fidelity funds were transferred to the parties' joint Wells Fargo account, and she did not offer testimony or other evidence to refute Brian's position that the funds were used to pay off community debt.

record on appeal shows the Fidelity account value after the withdrawals was $2,486.31.[3]

In addressing her request for alimony, Bryanna testified that during their marriage Brian had the ability to make $4,000-$5,000 every two weeks plus overtime, and that overtime pay is common in the medical field. Additionally, Bryanna testified that while she previously earned an associate's degree, she did not pursue a bachelor's degree during the marriage because she and Brian agreed she would be a stay-at-home mom. Bryanna testified that following the divorce she wanted to finish her education but required alimony to do so and requested alimony approximately in the amount of $1,800-$2,000 per month for three years.

Brian testified that he previously worked overtime but stopped in early 2023 because overtime bonuses related to the COVID-19 pandemic ceased, his employer hired several new nurses and developed a resource pool to reduce the availability of overtime, and his schedule no longer permitted overtime due to having joint custody of the children. Based on his income and expenses, Brian requested to pay $500-$600 per month in alimony for three years.

Following the trial, the district court entered its findings of fact, conclusions of law, and decree of divorce. In determining the community assets and debts, the district court considered Brian's two withdrawals from

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[3]At trial, Brian testified that he withdrew approximately $24,000 from the Fidelity account, which was deposited into the joint Wells Fargo account. He testified that Fidelity retained a portion of the withdrawn funds as a penalty. Further, we note that the Fidelity account's value appears to have changed monthly based on its investment portfolio and was subject to fees, which may also account for the discrepancy between the amounts withdrawn and the latest balance in the record on appeal.

the Fidelity account. The court found that, because there was "no proof" of where the withdrawals were deposited or spent, Brian's withdrawals should be considered "unilateral and unsupported." Therefore, the district court found that the value of the Fidelity account was the value "prior to" the two withdrawals, which the court valued at $30,000, and that the account would be treated as an asset as part of Brian's community property distribution. However, the district court also declined to find marital waste on the part of either party and planned to divide the community assets and debts equally. Nevertheless, "in order to balance the equities," the district court awarded Bryanna $10,686 from Brian's share of the community property so that Brian and Bryanna would each be awarded approximately $108,470 in community assets.[4] The equalizing payment to Bryanna was necessitated because the Fidelity account was valued at $30,000.

The district court also awarded Bryanna alimony and in doing so imputed income to Brian of approximately $5,000 per month based in part on Bryanna's testimony at trial and Brian's most recent tax returns. In calculating alimony, the district court considered Brian's GMI to be $12,680 a month, which was the monthly average of his yearly income based

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[4]In calculating the numbers, the district court granted Brian $119,159 in community assets and debts, including the community asset of the Fidelity account, at its "pre-withdrawal value" of $30,000. The district court also awarded Bryanna $97,786 in assets and debts. To equalize the award, the district court ordered that Brian's entitlement to the equity of the marital residence—which was to be sold or refinanced—be reduced by $10,686 so that Brian and Bryanna would each be awarded approximately $108,470.

on his 2022 tax returns.[5] The district court also found that Brian's testimony regarding his "reasoning" for not working overtime or more hours lacked credibility and, even though Brian now had joint physical custody of the children, the court found he was capable of earning $12,680 per month under the "agreed-upon visitation schedule" based on his earnings reflected in his 2022 W-2.[6] Thus, after analyzing the NRS 125.150(9) alimony factors, the district court awarded Bryanna alimony of $1,650 per month for three years.[7] Finally, the district court also ordered Brian to pay a portion of Bryanna's attorney fees in the amount of $4,245. This appeal followed.

We consider two of Brian's arguments in this appeal. First, Brian argues that the district court abused its discretion in valuing the Fidelity account at $30,000, despite expressly finding that Brian did not commit marital waste when he made two withdrawals from the account. Second, Brian argues that the district court abused its discretion by finding that he could pay $1,650 in alimony per month for three years as there was not substantial evidence to support imputing income to him based on his

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[5]We note that, according to the tax returns contained in the record, which do not identify overtime pay, Brian's GMI would have been approximately $6,164 in 2020, $10,784 in 2021, and $12,680 in 2022.

[6]In its calculation of child support, the district court agreed that Brian's GMI was $7,400 based on his most recent FDF filed in 2023. Although Brian argues that the GMI should have been the same when calculating child support and alimony, we summarily reject this argument because imputing income for the purpose of determining child support is *permissive*. *See* NAC 425.125(1). Therefore, a district court is not bound to use the same GMI for both calculations, and Brian presents no legal authority to the contrary.

[7]The district court did not award rehabilitative alimony pursuant to NRS 125.150(10).

ability to work overtime or more hours. He again asserts that, because of his joint custody arrangement, which essentially went into effect in December 2022 as temporary joint legal and physical custody, he could no longer regularly work extra hours. Bryanna responds that the district court properly valued the Fidelity account based on its value before the two withdrawals because Brian failed to provide evidence showing where the funds were deposited or how they were used. And she argues that the district court properly found Brian's testimony regarding his inability to work overtime or more hours not credible, and correctly awarded alimony based on the monthly income he was capable of earning.

The district court abused its discretion by awarding Brian the value of the Fidelity account prior to his two withdrawals, thereby effectively finding that Brian had committed waste without making the requisite findings

We first consider Brian's argument concerning the district court's valuation of the Fidelity account in distributing the community property. We review the distribution of community property for an abuse of discretion. *Kilgore v. Kilgore*, 135 Nev. 357, 359, 449 P.3d 843, 846 (2019). Under Nevada law, all property acquired after marriage is community property, including retirement benefits. NRS 123.220; *Kilgore*, 135 Nev. at 360, 449 P.3d at 846. In granting a divorce, the district court shall "make an equal disposition of the community property." NRS 125.150(1)(b). When determining the valuation of an asset, the district court determines the value of the asset at the time it enters the written decree of divorce, *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 79, 439 P.3d 397, 409 (2019), and abuses its discretion when it fails to set forth "specific findings of fact sufficient to indicate the basis for its ultimate conclusions," *Wilford v. Wilford*, 101 Nev. 212, 215, 699 P.2d 105, 107 (1985).

A district court may award an unequal disposition of community property if it finds "compelling reason[s] to do so and sets forth [those reasons] in writing." NRS 125.150(1)(b). "Dissipation, or waste, can provide a compelling reason for the unequal disposition of community property." *Kogod*, 135 Nev. at 75, 439 P.3d at 406. Expenses that appear typical of the marriage "do not provide a compelling reason for an unequal disposition of community property." *Id.* at 78, 439 P.3d at 408.

In this case, neither party disputes that the Fidelity account was community property. *See Kilgore*, 135 Nev. at 360, 449 P.3d at 846. And Bryanna did not provide evidence to contradict that the Fidelity funds were used to pay off community debt. Further, the district court found that the parties presented "no credible evidence of community waste." It therefore follows that—in the absence of dissipation or waste—the funds withdrawn and spent from the Fidelity account were necessarily spent in furtherance of the community. *See* NRS 123.230 (stating that, with certain exceptions, "either spouse, acting alone, may manage and control community property with the same power of disposition as the acting spouse has over his or her separate property"). We also note that the district court order specifically found that "[a]ll assets and debts presented are community in nature." Thus, as a community asset, the Fidelity account should have been valued at the time of the entry of the decree of divorce. *See Kogod*, 135 Nev. at 79, 439 P.3d at 409.

Because the Fidelity account was a community asset, and the district court did not find marital waste, we conclude that the district court abused its discretion when it valued the Fidelity account at $30,000 instead of valuing the account at the time of the divorce decree (approximately $2,486.31, or the current value of the account after the withdrawals). *See*

Kilgore, 135 Nev. at 360, 449 P.3d at 846 (providing that retirement benefits earned during the marriage are community property); *Kogod*, 135 Nev. at 79, 439 P.3d at 409 (valuing community property at the time of entry of the written decree of divorce). For these reasons, we reverse the district court's order distributing the Fidelity account with a value of $30,000 to Brian, and remand for further proceedings concerning the proper valuation of the account and recalculation of the division of community assets and debts between the parties as necessary.

The district court's alimony award based on Brian being willfully underemployed is not supported by substantial evidence

This court reviews a district court's award of alimony for an abuse of discretion. *Kogod*, 135 Nev. at 75, 439 P.3d at 406. "In granting a divorce, the [district] court may award such alimony to either spouse . . . as appears just and equitable." NRS 125.150(1)(a). "The decision of whether to award alimony is within the discretion of the district court," but in doing so, the court "must consider the eleven factors listed in NRS 125.150(9)." *Kogod*, 135 Nev. at 66-67, 439 P.3d at 400-01. The district court's factual findings related to these factors must be "supported by substantial evidence, and the court need[s] to explain why those findings support[ ] its alimony award in both amount and duration." *Eivazi v. Eivazi*, 139 Nev., Adv. Op. 44, 537 P.3d 476, 492 (2023). When considering the amount of alimony to award, the district court may "analyze any factors the court considers relevant, including changes to the income of the spouse who is ordered to pay alimony." *Davittian-Kostanian v. Kostanian*, 139 Nev., Adv. Op. 27, 534 P.3d 700, 705 (2023).

As a preliminary matter, we agree that the district court did not abuse its discretion in awarding alimony to Bryanna. The court properly made explicit findings regarding the alimony factors as outlined in NRS

125.150(9)[8], to support an award. The problem is not with the court's decision to award alimony, which was within the court's discretion, but rather with the *amount* of alimony awarded based on the district court imputing income to Brian.

We agree that a district court may impute income in determining an alimony award when a spouse "purposefully earns less than his reasonable capabilities permit." *Rosenbaum v. Rosenbaum*, 86 Nev. 550, 554, 471 P.2d 254, 257 (1970). However, if the spouse, "through circumstances beyond his control cannot in good faith . . . earn more money, the [alimony] award should be in keeping with his ability to pay." *Id.* Such circumstances may include where overtime is not at the employee's discretion. *Mason v. Mason*, No. A-02-1255, 2004 WL 1440535, at *3 (Neb. Ct. App. June 29, 2004) (Opinion) (finding insufficient evidence in the record to impute prior overtime wages where the availability of overtime "is determined by management and is not at [the employee's] discretion").

Thus, while we agree that the district court could properly consider overtime when determining Brian's GMI for the purpose of awarding alimony, it must be substantial and determined accurately. *See Scott v. Scott*, 107 Nev. 837, 841, 822 P.2d 654, 656 (1991) (decided under a prior statute) (providing that "overtime should be included as income, if it is substantial and can be determined accurately"), *abrogated by Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).

Moreover, when imputing income, the district court's findings must be supported by substantial evidence. *Barry v. Lindner*, 119 Nev. 661, 670, 81 P.3d 537, 543 (2003), *superseded by rule on other grounds as stated*

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[8]We note that the district court's order inadvertently refers to these factors as being contained in NRS 125.150(8).

in LaBarbera v. Wynn Las Vegas, LLC, 134 Nev. 393, 395, 422 P.3d 138, 140 (2018). And we review a court's decision to impute income for an abuse of discretion. *Davittian-Kostanian*, 139 Nev., Adv. Op. 27, 534 P.3d at 705; *see also Barry*, 119 Nev. at 661, 81 P.3d at 537.

In determining the amount of alimony in this case, the district court found that—notwithstanding the parties' new joint physical custody arrangement—Brian "is capable of earning $12,680 per month, which he was earning just a few months ago." The court's order specifically referenced Brian's 2022 W-2 statements which demonstrated "his GMI last year was $12,680, more than $5000 per month than he currently represents" in his 2023 FDF. The district court order also noted that Brian's GMI was "$10,748 in 2021."

Although the order did not include a finding that Brian was underemployed without good cause, it found that "Brian's testimony concerning the reasoning behind his recent lack of overtime lacked credibility" and that "[i]t appears Brian is reducing his income during this litigation to lessen his support obligations." While we acknowledge that we generally do not reweigh a court's credibility determinations on appeal, we also do not give deference to "findings so conclusory that they may mask legal error." *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015).

In this case, the district court concluded that Brian was "capable of earning" a GMI of $12,686, which we accept was the GMI the court used in calculating alimony. Thus, the court essentially imputed income of $5,000 per month to Brian's GMI set forth in his 2023 FDF. In doing so, the court did not identify what part of the imputed amount of income constituted overtime versus regular pay, nor does the record provide

any guidance. Further, although Bryanna testified that Brian worked overtime during their marriage, and that overtime was generally available to him in the medical field, she did not testify what amount of his 2022 GMI constituted overtime earnings, how often he worked overtime during any given month, or how much overtime he would currently be able to work despite the end of the pandemic and the new joint physical custody schedule. Therefore, substantial evidence does not support that Brian's overtime pay was substantial and could be accurately determined based on the record before us. *See Scott*, 107 Nev. at 841, 822 P.2d at 656. Thus, we conclude that the district court abused its discretion in imputing income to Brian's GMI in the form of overtime pay without identifying the amount of overtime being imputed and ensuring that it was accurately calculated.[9] *See id.*

In considering whether regular income should have been imputed to Brian based on his ability to earn a greater GMI than reflected in his 2023 FDF, the district court failed to consider the change in Brian's ability to earn income. *See Rosenbaum*, 86 Nev. at 554, 471 P.2d at 257. Specifically, the court failed to consider that Brian was now jointly caring for his children, affecting his ability to earn the same or similar income as he did in 2022 when his spouse cared for their children full-time allowing him to work more hours during the month. *See Davittian-Kostanian*, 139 Nev., Adv. Op. 27, 534 P.3d at 705. Therefore, in deciding the amount of

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[9]Prior to trial, Brian filed an updated FDF setting forth a GMI of $7,271.16, plus overtime of $128.94 one to two times a month, which was supported by a sworn declaration and pay stubs. Overtime earnings of $128.94 once or twice per month is significantly less that the imputed income of $5,000 per month, assuming that the district court intended for the $5,000, or a significant portion thereof, to represent overtime pay.

income to impute to Brian to award alimony, if any, the district court should have considered the change in Brian's circumstances, which potentially affected his ability to earn GMI in the amount of $12,686 in future years—independent of the court's credibility findings related to Brian's testimony.[10]

Specifically, in its order, the district court erroneously found that Brian had a "visitation" schedule, which was flexible and would not prevent him from working additional hours. But Brian was awarded joint physical custody—not merely visitation. This factual error likely constitutes an abuse of discretion. *See MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016) ("An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination . . . ."). Further, the court approved the joint custody arrangement based on the children's best interest. Thus, we conclude that the district court's finding, that Brian was capable of working overtime or additional hours with the agreed upon visitation schedule and it would not affect his time with the children, is not supported by substantial evidence.

Because of this, the district court failed to consider Brian's parenting time schedule when imputing income to his GMI. The record supports that Brian currently works 36 hours a week, Friday night through Sunday night, earning $48 per hour. Pursuant to the parties' joint custody schedule, Brian has the children Monday through Thursday until 3:00 p.m.

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[10]We note that in modifying alimony, the district court must consider the income tax return from the previous year to determine whether the spouse who has been ordered to pay alimony is financially able to pay the amount ordered. *See* NRS 125.150(8). However, at trial the basic financial document is the FDF. *See* NRCP 16.2(c). And under NRCP 16.2(d)(3)(M), tax returns are only required for business valuations, although the court may order them produced where required.

for two weeks out of the month, and Monday through Friday until 3:00 p.m. for the other two weeks, acknowledging that this may vary depending on the month. Typically, however, this leaves every other Thursday available for Brian to pick up another shift, which may also include working overtime. But there is no evidence to support that Brian could in fact work additional shifts on Thursday, or other days based on the availability of such shifts. There is no evidence in the record to support that his employer would be able to offer him additional shifts on Thursdays, nor the amount of additional income that could be imputed to Brian based on those shifts. And there is not substantial evidence to support that income from such shifts would justify imputing $5,000 to Brian's GMI. Indeed, the record lacks substantial evidence to support imputing income to Brian in any given amount based on Brian "purposefully earn[ing] less than his reasonable capabilities permit." *Rosenbaum*, 86 Nev. at 554, 471 P.2d at 257.

Therefore, the district court failed to consider Brian's ability to pay alimony based on his current circumstances. We recognize that the district court indirectly considered Brian's ability to pay by stating in its order, "[o]nce Bryan (sic) is no longer responsible for the mortgage and house related expenses, he has the ability to pay support." Nevertheless, the district court commenced Brian's alimony obligation the month following the entry of the divorce decree. But because the court allowed Bryanna 90 days from Brian signing the necessary documents to either refinance the house in her name or put it up for sale, for some period of time Brian would be responsible for both the mortgage as well as alimony

payments. And substantial evidence does not support he would have the ability to pay alimony in the amount awarded in light of his expenses.[11]

Because there is the possibility that the district court may reach a different decision as to the *amount* of alimony to be awarded based on further consideration of the totality of Brian's current circumstances including the joint custody arrangement, we also reverse and remand for the court to address this limited issue.[12] Accordingly, we also necessarily reverse the attorney fee award in light of our disposition.[13]

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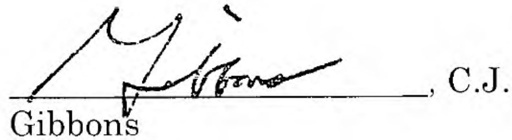
[11]We note that Brian's expenses in his 2023 FDF, which were not challenged by Bryanna, were $8,546.70. Adding the district court's award of alimony to this amount results in monthly expenses of $10,196.70. Therefore, Brian's post-decree expenses exceeded his earned income by $2,925.54.

[12]Insofar 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 further relief.

[13]Insofar as Brian argues the district court improperly awarded Bryanna attorney fees, we note that although Brian did not appeal from the district court's order awarding fees, which is appealable as a separate order, because we reverse the underlying district court's order for the reasons discussed herein, we must necessarily reverse the attorney fee award pending further proceedings. *See Fredric & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. 570, 579, 427 P.3d 104, 112 (2018) (holding that, if the underlying decision of the district court is reversed, this court must necessarily reverse the attorney fees and costs awarded to the prevailing party).

Therefore, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



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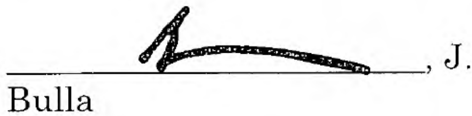

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cc: Hon. Charles J. Hoskin, District Judge, Family Division
Israel Kunin, Settlement Judge
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