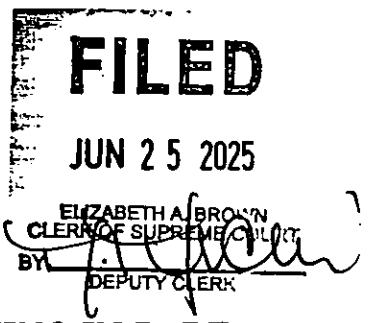
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEVEN A. FISHER,
Appellant/Cross-Respondent,
vs.
BEATRIZ M. WING,
Respondent/Cross-Appellant.

No. 87698-COA



ORDER AFFIRMING IN PART, VACATING IN PART, REVERSING IN PART, AND REMANDING

Steven A. Fisher appeals and Beatriz M. Wing cross-appeals from a district court amended decree of divorce. Eleventh Judicial District Court, Lander County; Jim C. Shirley, Judge.

Fisher and Wing were married in March 2011 and were subsequently divorced by way of a decree of divorce in October 2023. Wing moved for reconsideration, asserting that the district court failed to divide several community assets and did not address multiple instances of alleged marital waste by Fisher. Fisher opposed the motion, arguing that several of the omitted assets were his separate property and not subject to division, and further contended that no marital waste had occurred. Ultimately, the district court entered an amended divorce decree, which made an unequal distribution of the community property based on the court's finding that Fisher committed marital waste in two instances and awarded alimony and attorney fees to Wing. This appeal and cross-appeal followed.

Standards of review

This court reviews a district court's disposition of community property, including any underlying marital waste determinations,

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deferentially and for an abuse of discretion. *See Eivazi v. Eivazi*, 139 Nev., Adv. Op. 44, 537 P.3d 476, 482 (Ct. App. 2023) (citing *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 75, 439 P.3d 397, 406 (2019)). Likewise, this court reviews the district court's award of alimony and attorney fees for an abuse of discretion. *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996); *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005). "An abuse of discretion occurs when a district court's decision is not supported by substantial evidence or is clearly erroneous." *Bautista v. Picone*, 134 Nev. 334, 336, 419 P.3d 157, 159 (2018). Substantial evidence "is evidence that a reasonable person may accept as adequate to sustain a judgment." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007).

Determination of separate and community property interests

Fisher presents challenges to the district court's determinations regarding the parties' separate and community property interests. In particular, Fisher argues that a New York Life Premier II IRA is his separate property, asserting that it was fully funded prior to the marriage and that no additional contributions were made to the account during the marriage. Wing responds that the New York Life Premier II IRA was commingled with community funds during the marriage and, as a result, did not retain its character as Fisher's separate property.

At trial, Fisher and Wing agreed that Fisher initially funded the New York Life Premier II IRA before the marriage, but they disputed whether any monthly payments were made into the account during the marriage using community funds. Wing testified that the community had made monthly premium payments of approximately $303 toward the New York Life Premier II IRA throughout the marriage. Fisher, however, testified that Wing was mistaken, explaining that the $303 payments were actually directed toward their New York Life Custom Whole Life Insurance

policy, and that the New York Life Premier II IRA had been fully funded prior to the marriage. Supporting Fisher's testimony, a subpoenaed document from New York Life Insurance Company showed an invoice reflecting payments of $303.44 made in June and July 2022 toward premiums on the New York Life Custom Whole Life Insurance policy, rather than the New York Life Premier II IRA. Nevertheless, the amended divorce decree treated the New York Life Premier II IRA as community property without making any findings regarding the conflicting testimony and evidence or whether community funds had been commingled into the account.[1]

Under these facts and circumstances, we cannot defer to the district court's classification of the New York Life Premier II IRA as community property. The conflicting testimony, along with documentary evidence showing that the $303 payments were made to the New York Life Custom Whole Life Insurance policy rather than the New York Life Premier II IRA, raises questions as to whether the New York Life Premier II IRA is separate or community property. The district court made no findings explaining why the New York Life Premier II IRA was treated as community property or whether community funds were commingled into the account. Without findings on these issues, the basis for the district court's decision is unclear, and deference is not owed to findings that are "so conclusory that they may mask legal error." *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015). Accordingly, we reverse and remand for

[1]The amended divorce decree incorrectly refers to the account as the New York Life Premier III IRA. We refer to it as the New York Life Premier II IRA, consistent with the labeling in the New York Life Insurance Company documents admitted into evidence.

the district court to make findings about the character of the New York Life Premier II IRA and whether community funds were commingled with it. *See Robison v. Robison*, 100 Nev. 668, 673, 691 P.2d 451, 455 (1984) ("[F]indings must be sufficient to indicate the factual basis for the court's ultimate conclusions."); *Com. Cabinet Co. v. Mort Wallin of Lake Tahoe, Inc.*, 103 Nev. 238, 240, 737 P.2d 515, 517 (1987) (remanding a judgment following a bench trial because the district court's failure to make specific findings prevented effective review of the propriety of part of the damages award).

As for Fisher's other arguments regarding the distribution of separate and community property, we are not persuaded that they provide a basis for relief. While Fisher contends that the district court improperly classified a 2007 Harley Davidson and a New York Life IAC Protector 2005 Universal Life policy as community property, he conceded at trial that the motorcycle could be sold as community property and made no attempt to refute Wing's testimony that community funds were paid into the life insurance policy during the marriage. And he again failed to challenge the classification of either asset during post-judgment proceedings. Likewise, although Fisher argues that community property was improperly omitted from the amended divorce decree, including a purported retirement account Wing contributed to while working at Disney as well as $90,000 in miscellaneous personal property, he failed to file a post-judgment motion to adjudicate omitted assets under NRS 125.150(3) or otherwise raise these issues before the district court. As a result, Fisher failed to preserve any of these issues for appellate review, *see Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal"),

and we therefore affirm the district court's characterization and distribution of these assets.

Marital waste

We next turn to the parties' arguments concerning marital waste. Fisher challenges the district court's findings on marital waste, arguing that they were not supported by substantial evidence. Wing responds that the findings were proper and, on cross-appeal, argues that the marital waste award should be increased by $9,500 based on Fisher's withdrawal of funds from a community life insurance policy to pay for his criminal defense attorney fees.

In the amended decree of divorce, the district court determined that Fisher's use of $25,559 in community funds to pay his divorce attorneys constituted marital waste, as the money was spent for a selfish purpose unrelated to the marriage, and, therefore, the court required Fisher to reimburse Wing for one-half of the funds expended, which was $12,279.50.[2] The court further found that Fisher's withdrawal of $7,825.62 from the New York Life IAC Protector 2005 Universal Life policy discussed above, which the court classified as community property, after the issuance of a mutual financial restraining order, constituted marital waste. It thus ordered reimbursement of $3,912.82 to Wing, representing half of the withdrawn funds. Finally, the court found that Fisher's use of community funds to pay a criminal defense attorney did not constitute marital waste. To account for its marital waste determinations, when dividing the community property, the district court awarded Wing possession of real property in

[2]We note that no question arose below as to whether Wing committed marital waste by paying her divorce attorney because it was undisputed that she paid her attorney fees using a separate loan from her family.

Austin, Nevada, and granted Fisher a lien reflecting his interest in half the property's equity, but reduced the lien by $16,192.31, which was the total of the marital waste amounts found by the district court.

A district court must make an equal disposition of community assets and debt in a divorce unless there is a "compelling reason" to make an unequal disposition. NRS 125.150(1)(b); *see also Kogod*, 135 Nev. at 75, 439 P.3d at 406. "Dissipation," also known as "waste," can constitute a compelling reason for an unequal disposition of community property. *Kogod*, 135 Nev. at 75, 439 P.3d at 406; *see also Lofgren v. Lofgren*, 112 Nev. 1282, 1283, 926 P.2d 296, 297 (1996) ("[I]f community property is lost, expended or destroyed through the intentional misconduct of one spouse, the court may consider such misconduct as a compelling reason for making an unequal disposition of community property and may appropriately augment the other spouse's share of the remaining community property."). "Generally, the dissipation [or waste] which a court may consider refers to one spouse's use of marital property for a selfish purpose unrelated to the marriage in contemplation of divorce or at a time when the marriage is in serious jeopardy or is undergoing an irretrievable breakdown." *Kogod*, 135 Nev. at 75-76, 439 P.3d at 406-07 (quoting 24 Am. Jur. 2d *Divorce and Separation* § 524 (2018)); *see also Dissipation*, *Black's Law Dictionary* (12th ed. 2024) (defining "dissipation" as "[t]he use of an asset for an illegal or inequitable purpose, such as a spouse's use of community property for personal benefit when a divorce is imminent").

Whether the use of community funds to pay a divorce attorney constitutes marital waste remains an open question under Nevada law. We acknowledge that some jurisdictions have held that, in certain situations, using community funds for divorce attorney fees may be considered waste or dissipation of marital assets. *See, e.g.*, *Jerry B. v. Sally B.*, 377 P.3d 916,

932 (Alaska 2016) ("[A]ttorney's fees to fund a divorce case qualify as neither a marital nor living expense absent a finding that they are necessary to level the playing field." (internal quotation marks omitted)); *In re Marriage of DeLarco*, 728 N.E.2d 1278, 1284 (Ill. App. Ct. 2000) ("Expenditures for attorney's fees out of marital assets are a dissipation of marital assets."). However, other jurisdictions recognize that using community funds to pay divorce attorney fees is generally viewed as a legitimate marital expense and does not ordinarily constitute waste. *See, e.g.*, *Allison v. Allison*, 864 A.2d 191, 195 (Md. Ct. Spec. App. 2004) ("As a policy matter, attorney's fees should generally be viewed as a legitimate expenditure of marital funds. Since the law permits divorce, the law should permit spouses to spend the funds necessary to pay for legal services in divorce proceedings." (internal quotation marks omitted)); *Thomas v. Thomas*, 580 S.E.2d 503, 506 (Va. Ct. App. 2003) (holding that postseparation expenditure of marital funds for items such as attorney fees constitutes a valid marital purpose, not dissipation).

In this case, although Fisher admitted at trial to paying his divorce attorneys from community funds, we conclude that it does not constitute marital waste under these set of facts given the concerning policy implications of holding otherwise. Because divorce is permitted by law, the law must also permit spouses to use community funds to secure legal representation during the process. *See Allison*, 864 A.2d at 195-96. Divorcing spouses often lack separate funds to pay for counsel, and a rule that prohibits the use of marital funds for this purpose is impractical. *See id.* Moreover, requiring spouses to seek court approval before using marital funds for legal representation would be an inefficient use of the district court's resources. *See id.*

Here, Fisher used the subject funds as a necessary expenditure to facilitate the dissolution of the marriage, rather than for a selfish purpose unrelated to the marriage. Consequently, we conclude that the classification of Fisher's use of community funds as marital waste must be reversed, and we remand with directions for the district court to increase Fisher's lien interest in the real property awarded to Wing by $12,279.50, which was the amount the court deducted from the lien based on its determination that Fisher committed marital waste by using community funds to pay his divorce attorneys.[3]

With respect to the $7,825.62 Fisher withdrew from the New York Life IAC Protector 2005 Universal Life policy,[4] Nevada law recognizes that violating a preliminary injunction, such as a mutual financial restraining order, may constitute a compelling reason for an unequal distribution of community property under certain circumstances. *See, e.g.*, *Lofgren*, 112 Nev. at 1284-85, 926 P.2d at 297-98; *Kogod*, 135 Nev. at 77, 439 P.3d at 407-08. Here, the mutual financial restraining order, which the district court concluded Fisher violated by withdrawing the subject funds, prohibited both parties from borrowing against any insurance coverage. However, the record shows that Fisher withdrew the $7,825.62 loan from the New York Life IAC Protector 2005 Universal Life policy in June 2022, which was approximately one month before he was served with the mutual financial restraining order in July 2022. Thus, Fisher did not violate the

[3]Wing makes no challenge to the amount of fees sought and we therefore do not address the issue.

[4]As discussed in detail above, Fisher has failed to establish a basis to reverse the district court's classification of this policy as community property.

mutual financial restraining order by taking the loan because, by its terms, the order was not effective until it was served. *See generally* DCR 15(3) (stating that the time to comply with a court's decision "shall commence to run from the time service is made in the manner required by the N.R.C.P."). Therefore, the district court's finding of marital waste, based only on Fisher's alleged violation of the mutual financial restraining order, is not supported by substantial evidence, and we reverse that decision and remand for the district court to increase the value of Fisher's lien on the real property awarded to Wing by $3,912.82. This amount corresponds to the amount the district court deducted from the Wing based on its determination that Fisher committed waste by violating the mutual financial restraining order.

Additionally, we decline to address whether Fisher's withdrawal of a $9,500 loan from another community life insurance policy to pay his criminal defense attorney fees should be treated as marital waste because Wing did not raise this argument before the district court and has therefore waived the issue.[5] *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983.

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[5]Although the district court did not address the $9,500 payment to Fisher's criminal defense attorneys as being waste—presumably since Wing did not raise the issue—it found that Fisher's separate payment of $4,000 to his criminal defense attorneys did not constitute waste. And Wing does not challenge this finding on appeal. We note, however, that Nevada's appellate courts have not yet addressed whether the use of community funds to pay criminal defense attorneys constitutes marital waste. Nevertheless, other jurisdictions have found that the payment of criminal defense attorney fees with community funds does not constitute waste. *See Lesko v. Stanislaw*, 86 A.3d 14, 20 (Me. 2014) (holding that "courts may not consider a party's criminal behavior to establish fault or marital misconduct"); *Budnick v. Budnick*, 595 S.E.2d 50, 58 (Va. Ct. App. 2004)

The award of alimony to Wing

Turning to Fisher's challenge to Wing's alimony award, he argues that the duration of the award is ambiguous because the amended decree included a finding that Wing was entitled to $1,200 per month in alimony for six months, but separately indicated in the portion of the decree setting forth the district court's orders that she was entitled to receive $1,200 per month for five years. Under NRS 125.150(1), a district court may award alimony "as appears just and equitable." In deciding the amount and duration of an alimony award, the court should consider what is "just and equitable" based on the circumstances of each case. *Shydler v. Shydler*, 114 Nev. 192, 199, 954 P.2d 37, 41 (1998). An award of alimony can be considered just and equitable when alimony is necessary to support the economic needs of a spouse, equalize post-divorce earnings, or maintain a spouse's marital standard of living. *Kogod*, 135 Nev. at 68, 439 P.3d at 401. Further, the district court must consider the eleven factors enumerated in NRS 125.150(9) in evaluating requests for alimony along with any other factors the district court considers relevant. *Id.* at 66, 439 P.3d at 400-01.

Here, the district court analyzed the factors set out in NRS 125.150(9) when making its alimony award such as the significant income difference between Fisher and Wing, the twelve-year duration of the parties' marriage, and Wing's reduced earning capacity due to a back injury.[6] The

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(holding that a spouse's "use of marital assets to pay attorney's fees to defend criminal charges . . . were used for a proper marital purpose, because had the spouse prevailed, it clearly would have been of benefit to his family as his incarceration would not have so limited his ability to support the family" (internal quotation marks omitted)).

[6]We observe that several sections of the district court's findings of fact and conclusions of law contain typographical errors, including in its

court also considered each spouse's age, health, work history, and contributions during the marriage. Considering the testimony and evidence presented at trial, the district court's award of alimony is supported by substantial evidence. *See Ellis*, 123 Nev. at 149, 161 P.3d at 242. The district court was in the best position to hear and decide the facts of the case, and its findings support its award of alimony in the order section of the court's decree for a duration of $1,200 per month for five years. *See Schwartz v. Schwartz*, 126 Nev. 87, 91, 225 P.3d 1273, 1276 (2010) (holding that the district court is in the best position to assess the facts and make decisions in matters of alimony).

Insofar as the district court made a contradictory finding in the conclusions of law section that it would be just and equitable to award Wing $1,200 per month in alimony for six months, we conclude this was a clerical error that does not affect our overall alimony analysis. *See Error—clerical error*, *Black's Law Dictionary* (12th ed. 2024) (defining a clerical error as "[a]n error resulting from a minor mistake or inadvertence and not from judicial reasoning or determination; esp[ecially], a drafter's or typist's technical error that can be rectified without serious doubt about the correct reading"); *see also Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010); *cf.* NRCP 61. Therefore, we conclude that Fisher has not shown a

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discussion of the factors listed in NRS 125.150(9). In this case, we conclude that these errors are clerical in nature and do not affect the court's overall analysis. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("An error is harmless when it does not affect a party's substantial rights."); *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.").

basis for relief on this issue, and we affirm the district court's award of alimony to Wing in the amount of $1,200 per month for five years.[7]

The award of attorney fees to Wing

Wing's next challenges the portion of the amended divorce decree awarding her attorney fees, arguing that the district court erred by reducing her requested attorney fees from $37,419.25 to $18,730 without properly analyzing the *Brunzell* factors or considering the income disparity between the parties. The district court ordinarily may not award attorney fees absent authority for such an award under a statute, rule, or contract. *U.S. Design & Constr. Corp. v. Int'l Bhd. of Elec. Workers*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). And generally, the district court abuses its discretion when it awards attorney fees without stating a basis for the decision. *Henry Prods. Inc. v. Tarmu*, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998). Moreover, when the district court awards attorney fees, it must consider the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), along with any disparity in the parties' income pursuant to *Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998). *Miller*, 121 Nev. at 623, 119 P.3d at 730.

As a preliminary matter, the district court cited NRS 125.150(4) as the statutory basis for awarding attorney fees, which provides that "the court may award a reasonable attorney's fee to either party to an action for

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[7]Fisher also argued that reversal of the alimony award is appropriate because the district court will need to reconsider the overall property distribution on remand and, consequently, redetermine whether alimony for Wing is warranted. However, since this argument was raised for the first time at oral argument, we decline to consider it. *See State ex rel. Dep't of Highways v. Pinson*, 65 Nev. 510, 530, 199 P.2d 631, 641 (1948) ("The parties, in oral arguments, are confined to issues or matters properly before the court, and we can consider nothing else . . . .").

divorce." When making its conclusions of law, the district court initially considered the factors set forth in *Brunzell* and made relevant findings regarding each factor,[8] while also taking into account the income disparity between the parties as discussed in *Wright*, recognizing that Fisher earned significantly more money per month than Wing. Based on those considerations, the district court initially concluded that Wing was entitled to $37,419.25, which was the full amount of attorney fees she requested.[9] However, in the order section of the amended divorce decree, the court confusingly reduced the attorney fees award from $37,419.25 to $18,730. In doing so, the court indicated that the reduction was made to equalize the parties' assets and account for Fisher's withdrawal of funds from community assets, notwithstanding that the reduction in attorney fees would seem to favor Fisher, despite the district court's earlier findings concerning the *Brunzell* factors to support its $37,419.25 fee award and the disparity in the parties' incomes.

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[8]In its analysis of the *Brunzell* factors, the district court specifically considered Fisher's alleged marital waste; however, because the court abused its discretion in finding that Fisher committed waste, that consideration was improper. We need not resolve this issue, however, as we vacate Wing's attorney fee award on other grounds. *See Miller v. Burk*, 124 Nev. 579, 588-89 & n.26, 188 P.3d 1112, 1118-19 & n.26 (2008) (explaining that this court need not address issues that are unnecessary to resolve the case at bar). Nevertheless, on remand, the district court should not consider the two instances of marital waste identified in the amended divorce decree when addressing the issue of attorney fees.

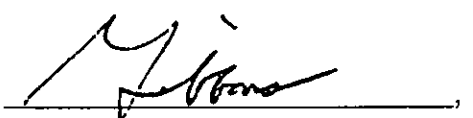
[9]We again acknowledge that the section of the amended divorce decree addressing the income disparity between the parties contains several typographical errors. However, we conclude that these are clerical mistakes that do not affect our overall analysis of the district court's attorney fees award, nor our disposition.

Because the rationale for the district court's conclusion that Wing was entitled to the full amount of attorney fees she sought directly conflicted with its order to reduce her attorney fees award to $18,730, we cannot determine whether the court actually intended the reduction, nor can we fully evaluate the basis for the reduction under these circumstances. *See Las Vegas Rev.-J. v. Clark Cnty. Off. of the Coroner/Med. Exam'r*, 138 Nev. 813, 816, 521 P.3d 1169, 1174 (2022) ("When the district court makes its award, it must explain how it came up with the amount. The explanation need not be elaborate, but it must be comprehensible." (internal quotation marks omitted)). Consequently, we vacate the attorney fees award of $18,730 and remand the matter for further proceedings.

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART, VACATED IN PART, AND REVERSED IN PART, and we REMAND this matter to the district court for proceedings consistent with this order.[10]

_____, C.J.
Bulla



_____, J.
Gibbons

_____, J.
Westbrook

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

cc: Hon. Jim C. Shirley, District Judge
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