IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TODD R. ELWARDT, Appellant, vs. TRACY E. ELWARDT, Respondent.	No. 88886-COA

ORDER AFFIRMING IN PART, VACATING IN PART AND REMANDING

Todd R. Elwardt appeals from a decree of divorce awarding alimony and dividing community property. Eighth Judicial District Court, Family Division, Clark County; Charles J. Hoskin, Judge.

Todd and respondent Tracy E. Elwardt were married in 2013. In October 2023, Tracy filed for divorce requesting division of property, periodic alimony, and rehabilitative alimony. Todd filed an answer and counterclaim to which Tracy replied. The district court conducted a trial during which the parties testified and introduced exhibits related to properties the parties owned, Todd's payroll records, and the parties' texts. Among the property distributions made, the district court awarded the following property to Tracy: four dogs valued at $2,000; half of the equity in the marital residence; and half of Todd's unpaid commissions earned during the marriage, valued at approximately $400,000. The district court also awarded Tracy $4,000 per month for four years in periodic alimony and $24,000 over two years in rehabilitative alimony. This appeal followed.

On appeal, Todd first argues that the district court erred in awarding two of the four dogs to Tracy. Todd insists that the record shows that two dogs, Fiona and Enzo, were gifts to him and thus constituted his

separate property. Alternatively, he contends that the district court did not correctly value the dogs.

We review a district court's property determinations for an abuse of discretion. *Eivazi v. Eivazi*, 139 Nev. 408, 411, 537 P.3d 476, 482 (Ct. App. 2023). We will uphold the district court's property characterizations, so long as those characterizations are supported by substantial evidence. *Lopez v. Lopez*, 139 Nev. 533, 541, 541 P.3d 117, 125 (Ct. App. 2023); *Waldman v. Maini*, 124 Nev. 1121, 1128, 195 P.3d 850, 855 (2008). 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). However, "deference is not owed to legal error, or to findings so conclusory they may mask legal error." *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (internal citations omitted).

Generally, property "acquired during marriage [is] presumed to be community property, and this presumption can be overcome only by clear and convincing evidence." *Lopez*, 139 Nev. at 542, 541 P.3d at 125; *see also* NRS 123.220. The presumption may be overcome by showing that the property was a gift to either spouse. Property that a spouse acquires by gift during marriage is separate property pursuant to NRS 123.130 and therefore is not community property pursuant to NRS 123.220.

Testimony established that Fiona and Enzo were acquired during the marriage and therefore the district court properly presumed the dogs to be community property. The decree acknowledged that Fiona "was intended as a gift to Todd," but it did not find that Todd accepted Fiona as a gift and made no express finding regarding Enzo. *See* 38 Am. Jur. 2d *Gifts* § 17 (2026) ("As a general rule, both gifts inter vivos and causa mortis must

be fully and completely executed by (1) the donor's complete and unconditional delivery of the property that is the subject of the gift, and (2) the donee's acceptance of the gift."). The court, in concluding the dogs constituted community property, necessarily concluded that Todd failed to overcome the presumption that the dogs constituted community property by clear and convincing evidence. Notably, the court observed that Tracy had taken responsibility for the dogs' care, feeding, and maintenance since filing for divorce. Todd's own testimony demonstrated limited contact with and care of the dogs. Considering the evidence supporting the court's decision, Todd does not demonstrate that the district court abused its discretion in determining the dogs were community property and awarding them to Tracy.[1]

Next, Todd challenges the district court's periodic alimony award and findings concerning his income and the related pre-divorce commissions, arguing that if reviewed in conjunction, the court's decisions amount to an abuse of discretion. Todd contends that the court abused its discretion in granting Tracy half of the $400,000 in commissions Todd earned during their marriage, which have yet to be paid, without accounting for his reduction in income that results from paying Tracy that share of the commissions. He insists that he was generally uncertain of when the

[1]Todd alternatively challenges the valuation of the four dogs in the decree. Trial testimony established that Fiona cost $2,000 to acquire, but no additional evidence was introduced concerning the cost of the remaining dogs. Thus, the valuation in the decree is supported by substantial evidence. However, we cannot discern from the decree if Todd was awarded community property to compensate him for his community interest in the dogs. Because we vacate for further proceedings as discussed below, the district court should ensure that Todd's award includes compensation for his portion of the community interest in the dogs.

commissions might be paid out and notes that commissions are not guaranteed to be paid out in full. He also contends that the court abused its discretion in granting Tracy periodic alimony in the amount of $4,000 per month for four years, insisting that the court erred in imputing less than minimum wage income to Tracy and failing to adequately appreciate Todd's financial condition. Because both these issues hinge on how Todd is compensated for his work, we address these issues together.

"Alimony is financial support paid from one spouse to the other whenever justice and equity require it." *Rodriguez v. Rodriguez*, 116 Nev. 993, 999, 13 P.3d 415, 419 (2000); *see also* NRS 125.150(1)(a) (providing that the alimony award must be "just and equitable"). NRS 125.150 instructs that courts "*shall consider*" 11 factors in awarding alimony. NRS 125.150(9) (emphasis added); *see also* 24A Am. Jur. 2d *Divorce and Separation* § 668 (2026) ("One of the primary factors to be considered in determining the amount of an alimony award is the financial condition of the parties, particularly the recipient spouse's financial need and the payor spouse 's ability to pay . . . ."). A party's "financial condition" encompasses their income, assets, expenses, and general financial need. *Id.* at § 668. The supreme court has affirmed that "[a]limony, in its most elementary form, is based on the receiving spouse's need and the paying spouse 's ability to pay." *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 68, 439 P.3d 397, 401 (2019). Alternatively, alimony may "be awarded to compensate for economic loss as the result of a marriage and subsequent divorce, particularly one spouse's loss in standard of living or earning capacity." *Id.* at 70, 439 P.3d at 403. A district court has broad discretion in deciding whether to award alimony. *Buchanan v. Buchanan*, 90 Nev. 209, 215, 523 P.2d 1, 5 (1974).

The district court found that Todd, a sales engineer who sold mechanical products, had earned approximately $400,000 in commissions during the marriage that would be "paid over time, post-divorce." It characterized these commissions as community property and found Tracy was entitled to her community share. It ordered Todd to pay Tracy half of any commissions earned during the marriage as he received them from his employer and provide an accounting of the commissions in each months' paycheck. The district court also awarded Tracy alimony in the amount of $4,000 per month for four years. It noted that the parties had enjoyed a relatively comfortable lifestyle and the economic loss that resulted to Tracy subordinating her career to be homemaker.

The record supports the district court's findings that commissions were earned during the marriage and thus were presumed to be community property. *See Lopez*, 139 Nev. at 542, 541 P.3d at 125; *see also* NRS 123.220. We acknowledge that the commission structure described at trial differs from the more routine compensation structures courts typically deal with in these types of cases. Nevertheless, "[i]f the work is performed during the marriage, compensation for that work belongs to the community." *Kilgore v. Kilgore*, 135 Nev. 357, 365, 449 P.3d 843, 850 (2019) (holding that vacation and sick pay accrued during a marriage belongs to the community); *see McNabney v. McNabney*, 105 Nev. 652, 654, 782 P.2d 1291, 1292 (1989) (recognizing that a fee earned during a marriage and received through an annuity that is paid in installments after divorce constituted community property). Moreover, Todd did not attempt to demonstrate that the commissions constituted separate property at trial, nor do the appendices filed on appeal suggest he did so in a supplemental briefing. Instead, he asserted that it was not possible to determine which

sales accounts were the source of any given paycheck and that the commissions could be reduced based on charge-backs or fluctuations in labor costs. The district court concluded that Todd was not credible regarding the ability to trace the funds he was paid —based in part on records from Todd's employer—and this court is not at liberty to reweigh that determination. *See Grosjean v. Imperial Palace, Inc.* , 125 Nev. 349, 366, 212 P.3d 1068, 1080 (2009).

As to the alimony award, the record suggests that the district court considered most of the factors set forth in NRS 125.150(9). The court considered the duration of the marriage, the parties' standard of living, and Tracy's career before marriage, and its findings concerning these factors are supported by substantial evidence. Specifically, it noted that the parties were married for 11 years and that during that time they agreed Tracy would not work so she could be available for travel and to care for th e parties' kids. The court noted that, although they struggled at some points, they were relatively comfortable due to "choices which brought them to the income stream that Todd is now enjoying." Tracy also made substantial improvements to the parties' homes. Given Tracy's extended absence from the workforce, the district court did not abuse its discretion in determining her career before the marriage was not substantially relevant.

The district court also considered the difference between the parties' imputed incomes, stating that it needed to "focus[ ] on Tracy's need and Todd's ability to pay." *See Kogod*, 135 Nev. at 68, 439 P.3d at 401. In so doing, it considered the financial information submitted and the parties' testimony and imputed a monthly income of $20,069 to Todd and $1,800 to Tracy. The court further concluded that, once Todd's monthly deductions and expenses were accounted for, he had $10,091 in disposable income per

month. Although Tracy alleged she made less than one thousand dollars in the time she drove for Uber, the district court imputed $1,800 per month earnings, seemingly representing full-time, minimum wage employment at the time. *See Barry v. Lindner*, 119 Nev. 661, 670, 81 P.3d 537, 543 (2003) (affirming the district court's imputation of income when supported by substantial evidence).

However, the divorce decree does not demonstrate that the district court considered that it awarded Tracy a community share in Todd's commissions, *see* NRS 125.150(9)(j), or appreciated the effect that distribution of property would have on Tracy's need for alimony and Todd's ability to pay alimony, *see* NRS 125.150(9)(a). Evidence showed that Todd was paid entirely on commission and his income was prone to fluctuation. More importantly, Todd's commissions were not paid to him until the client paid the underlying sales contract, which may not occur until up to three years after Todd has earned it. The necessary implication of this testimony is that Todd's monthly income for the years immediately after the divorce could consist primarily of compensation earned during the marriage of which the district court already determined Tracy was entitled to a community share.

For instance, the decree imputed $20,069 average monthly earnings to Todd from which it estimated he had approximately $10,000 in disposable income to pay $4,000 per month in alimony. The district court did not make findings acknowledging this income could potentially be halved and Todd's disposable income consumed by the community property distribution. The decree similarly does not recognize that Tracy's financial position becomes several magnitudes stronger—potentially on par with Todd before even considering the additional alimony—when that

community share of Todd's pre-divorce commissions is provided to her each month. Thus, in months when Todd's compensation stems primarily from pre-divorce earnings, the combination of the property settlement and alimony award appear to substantially hinder Todd's economic situation to the point where he would unlikely be able to afford his monthly obligations while at the same time subsidizing Tracy beyond what the court determined would address her needs. *Cf. Shydler v. Shydler*, 114 Nev. 192, 198, 954 P.2d 37, 40 (1998) (providing that principal reasons for awarding alimony are to narrow large gaps in the parties' earning capacities and allow recipient to maintain, as close as possible, the pre-divorce standard of living).

While the district court indicated it considered the value of the community property awarded to each spouse in reaching its decision concerning the periodic alimony award, it did not make specific findings related to the same. Given the specific facts before the court, its failure to meaningfully address the applicable statutory factors, *see* NRS 125.150(9)(a), (j), and those factors' predominant relevance to the facts of this case, we cannot say that the court adequately exercised its discretion determining the appropriate periodic alimony award given the division of property. *See Buchanan*, 90 Nev. at 215, 523 P.2d at 5; *Kogod*, 135 Nev. at 66, 439 P.3d at 400; *see also Davis*, 131 Nev. at 450, 352 P.3d at 1142 (noting that, although we deferentially review the district court's discretionary determinations, "deference is not owed to legal error, or to findings so conclusory they may mask legal error" (internal citations omitted)); *see Devries v. Gallio*, 128 Nev. 706, 712, 290 P.3d 260, 264 (2012) (providing that when "the trial court does not indicate in its judgment or decree that it gave adequate consideration" to the appropriate alimony factors, "this

[c]ourt shall remand for reconsideration of the issue" (quotation marks omitted)).

In light of the district court's failure to make the necessary and specific findings in support of its decision to award Tracy periodic alimony in the amount of $4,000 per month, we vacate that decision. Consequently, we direct the court to reevaluate Todd's monthly income in light of its determination to award Tracy a community share in his pre-divorce commissions and make specific findings as to how any reduction in Todd's post-divorce income is reduced by the resulting distribution of Tracy's share of those commissions. We further direct the district court to make adequate findings related to these statutory factors under NRS 125.150(9) for periodic alimony and to support its decision related to the same with findings based on Todd's income, taking into account reductions in income due to the distribution of Tracy's interest in the pre-divorce commissions, and based on Tracy's improved financial condition due to her share of the aforementioned commissions.[2]

Next, Todd argues that the district court abused its discretion by awarding Tracy a community share in the equity in the marital residence without compensating Todd for his separate property contribution to the residence. Todd points to evidence that showed that he purchased the Ebony Rock residence in his name before the parties wed; used funds from the sale of Ebony Rock to purchase the Birch Street residence in his name and that Tracy executed a quitclaim deed in his favor; and that he later used funds from the sale of Birch Street to buy the Sixth Street home with Tracy

[2]We note that the district court , in granting Todd's request to stay the community property award, recognized the potential for the property settlement and periodic alimony awards to impose undue hardship on Todd given his compensation structure.

as joint tenants. Todd insists that it was the parties ' intent to keep the Birch Street home as Todd 's separate property, and therefore, the proceeds from the sale of that home, which were used to purchase Sixth Street, should have been considered Todd's separate property.

NRS 123.130 creates a rebuttable presumption that property purchased prior to marriage is separate property. *See Kerley*, 112 Nev. at 37, 910 P.2d at 280; NRS 123.130 ("All property of a spouse owned by him or her before marriage, and that was acquired by him or her afterwards by gift . . . is his or her separate property."). In contrast, property acquired after marriage by either or both spouses is generally considered to be community property. NRS 123.220.

According to the record, the Sixth Street home was purchased during the marriage. Therefore, the district court properly presumed it to be community property and any separate property of Todd's that was used for the purchase constituted a gift to the community. *See id.*; *Todkill v. Todkill*, 88 Nev. 231, 235-36, 495 P.2d 629, 631 (1972).

Once this was established, the burden of proof shifted to Todd to prove by clear and convincing evidence that the property remained separate property, but the common law presumption that he gifted his interest remains if there is conflicting evidence. *Todkill*, 88 Nev. at 237-38, 495 P.2d at 632; *see Kerley*, 112 Nev. at 37, 910 P.2d at 280 (holding, in the context of a gift, that a litigant must rebut NRS 123.120's separate property presumption by clear and convincing evidence). We conclude that the district court did not err in determining that Todd failed to overcome this presumption. *See Graham v. Graham*, 104 Nev. 472, 474, 760 P.2d 772, 773 (1988). In contrast to the parties' prior homes, the Sixth Street residence was purchased in joint tenancy. *See Todkill*, 88 Nev. at 237, 495 P.2d at

632 (stating that "[w]hen a husband transfers title to his separate property from his name into his wife's name, he is presumed to intend a gift to her"). The mortgage payments were made with community funds. And Todd later acknowledged that Tracy had "earned" the right to have her name on the title. *See Schmanski v. Schmanski*, 115 Nev. 247, 249, 984 P.2d 752, 754 (1999) (recognizing that "separate property placed into joint tenancy is presumed to be a gift to the community unless the presumption is overcome by clear and convincing evidence").

To the extent Todd contends that the district court erred in failing to find the proceeds realized from the sales of the prior homes constituted his separate property, we discern no abuse of discretion. Evidence showed that the proceeds from the Birch Street home were used as a down payment for the Sixth Street home. The Birch Street home had also been purchased during the marriage and thus could be presumed to constitute community property even though it was purchased in Todd's name. *See Lopez*, 139 Nev. at 542, 541 P.3d at 125 ("[E]ven a deed that places title in one spouse as that spouse's separate property is insufficient to overcome the community presumption if the party cannot also show that the home was purchased with separate funds)." While Todd introduced documents showing funds were transferred from the sale of the Ebony Rock home to the purchase of the Birch Street home, he introduced no evidence describing the source or amount of the down payment for Ebony Rock. Absent this evidence, the court could not account for Todd's separate property through all the property purchases given that the mortgage payments on each property had been paid with community funds. *See Malmquist v. Malmquist*, 106 Nev. 231, 245, 792 P.2d 372, 381 (1990) ("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."). Accordingly, the district court did not abuse its discretion in awarding Tracy a community share of the equity in the Sixth Street home.

Next, Todd argues that the district court 's rehabilitative alimony award was not supported by substantial evidence. Todd insists that the evidence showed Tracy earned her bachelor 's degree and worked toward a master's degree during the marriage and therefore attained more education than Todd during the marriage.

We conclude that the district court's award of rehabilitative alimony is supported by substantial evidence. The amount of $24,000 over two years is supported by Tracy's testimony about the cost and time it would take to complete her master's degree in psychology. *See* NRS 125.150(10), (11) (providing that rehabilitative alimony is designed to provide necessary training or education "relating to a job, career or profession"). She testified that she believed that a master's degree would make her more marketable. Testimony indeed established t hat she completed her bachelor's degree and took some master's classes during the marriage. While this is more education than Todd had achieved during the marriage, the court recognized that Todd gained greater professional skills during the marriage. Further, it attributed some of this professional development to the parties' choices, which involved Tracy foregoing employment to take care of their children and improve their homes. Accordingly, the district court did not abuse its discretion in awarding rehabilitative alimony. *See Buchanan*, 90 Nev. at 215, 523 P.2d at 5.

Lastly, Todd argues that this case must be remanded to a different judge. He asserts the record showed the district court appeared to

form negative opinions of him and punished him during the case. In the decree, the court noted evidence was introduced that showed that Todd failed to refrigerate Tracy's medication resulting in its spoilage; wrote derogatory statements on his temporary support checks to Tracy; and acknowledged reducing the functionality of Tracy's Tesla as the Tesla account holder. Todd points to the court's comments about his inappropriate conduct, arguing that his comments and conduct during the separation and divorce were not relevant to the case.

We presume judges are unbiased, and Todd has not shown bias sufficient to warrant disqualification. *See Millen v. Eighth Jud. Dist. Ct.*, 122 Nev. 1245, 1254-55, 148 P.3d 694, 701 (2006). Specifically, because the judge's comments in this case reflected opinions the judge formed during litigation—and did not originate from an extrajudicial source—Todd has not demonstrated a basis for reassignment. *See In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988) ("The personal bias necessary to disqualify must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." (quotation marks omitted)). Additionally, regarding the judge's opinions, Todd has not established any "deep-seated favoritism or antagonism." *Canarelli v. Eighth Jud. Dist. Ct.*, 138 Nev. 104, 107, 506 P.3d 334, 337 (2022); *see also Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998) (noting that generally, a judge's remarks "made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence").

The challenged statements reflected evidence that was introduced at trial. While the district court may not consider a party's

misconduct when awarding alimony, *see Rodriguez*, 116 Nev. at 998, 13 P.3d at 418, the court did not rely on this evidence in making any determination regarding alimony or the disposition of property. Moreover, Todd fails to demonstrate this is one of the exceedingly rare cases where reassignment is necessary to preserve public confidence and trust in the fairness of a judicial proceeding. *See Williams v. Second Jud. Dist. Ct.* , 142 Nev., Adv. Op. 5, 583 P.3d 223, 226 (2026). Accordingly, this case need not be reassigned to a new judge upon remand.

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

Bulla, C.J.

Gibbons, J.

Westbrook, J.

cc: Hon. Charles J. Hoskin, District Judge, Family Division
Ara H. Shirinian, Settlement Judge
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