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Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS KOGOD,

Appellant,

vs.

GABRIELLE CIOFFI-KOGOD,

Respondent.
_____/

Case No. 71147
71994

Appeal from the Eighth Judicial District Court- Family Division

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APPELLANT'S OPENING BRIEF

Docket 71147 Document 2017-11681

I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Parent Corporations and/or any publically-held company that owns 10% or more of the party's stock

   NONE

2. Law Firms that have represented Appellant Dennis Kogod (hereinafter "Dennis")

   a. Jimmerson Law Firm, P.C., James J. Jimmerson, Esq., and Michael C. Flaxman, Esq.

   b. Law Office of Daniel Marks, Daniel Marks, Esq., and Nicole M. Young, Esq.

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IV. JURISDICTIONAL STATEMENT

A. Basis of Jurisdiction

There are two appeals consolidated. Case 71147 is an appeal from a trial and original decree of divorce, which is appealed pursuant to NRAP 3A(b)(1). (Appellant's Appendix (hereinafter "AA") 44:8474-8587 & 44:8588-8589.) Case 71994 is an appeal from an order granting post-judgment expert witness fees and is appealed pursuant to NRAP 3A(b)(1) and/or NRAP 3A(b)(8). (AA 47:9276-9279 & 47:9280-9287.)

B. Timeliness of Appeal

The appeal in case 71147 was filed August 23, 2016, appealing an order entered on August 22, 2016. (AA 44:8474-8589.) The appeal in case 71994 was appealed December 13, 2016, from an order entered on December 5, 2016. (AA 47:9276-9287.)

C. Appeal from Final Order or Judgment

Case 71147 is an appeal from a final order containing Findings of Fact, Conclusions of Law and Decree of Divorce. (AA 44:8474-8589.) Case 71994 is an appeal from a post-judgment order awarding expert witness fees in the amount of $75,650.00. (AA 47:9276-9287.)

/ / /

V. ROUTING STATEMENT

Pursuant to NRAP 17(a)(13), this matter should remain with the Supreme Court as it raises two principle issues of first impression under the statutory and common law of the State of Nevada:

1) May a district court award more than $1.6 million in lump sum alimony when the district court concedes Respondent Gabrielle Cioffi-Kogod (hereinafter "Gabrielle") has no financial need? The prior 130-year history of court decisions in Nevada relating to alimony identify "need" as the most significant consideration in any alimony award.

2) May the district court award an unequal division of $2,043,931.50 in Gabrielle's favor when the marital estate grew tenfold during the period of alleged waste and there was no diminution of the value of the estate? Prior Nevada law identified diminution of value of the estate as the controlling legal basis for making an unequal distribution of community property.

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VI. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in awarding lump sum spousal support to Gabrielle when she had no financial need for alimony? (AA 44:8556-8569.)

2. Did the district court err in awarding an unequal division of community property in Gabrielle's favor based on Dennis' marital misconduct when there was no diminution in the value of the estate and the estate actually grew tenfold during the period of the alleged waste? (AA 44:8513-8554.)

3. Did the district court err in awarding expert fees to Gabrielle in the amount of $75,650 without specific findings required by *Frazier v. Drake*, 131 Nev. Adv. Op. 64, 357 P.3d 365 (Nev. App. 2015) and *Khoury v. Seastrad*, 132 Nev. Adv. Op. 52, 377 P.3d 81 (2016), and when the court specifically found there was no prevailing party? (AA 47:9276-9279.)

4. Did the district court err in awarding sanctions to Gabrielle based on alleged violations of the Joint Preliminary Injunction when the order in question was not signed by a judge, the order was vague, and Dennis was never served with the JPI? (AA 44:8554-8556.)

VII. STATEMENT OF THE CASE

The parties permanently separated in July 2010. (AA 44:8528.) The parties participated in marriage counseling until March 2012. (AA 6:1121.) Gabrielle waited until December 13, 2013, to file her Complaint for Divorce that initiated this action. (AA 1:1-6.) After Gabrielle filed her complaint, the parties attempted to settle this case. (AA 1:7-13.) As a result, Dennis did not file his Answer to Complaint for Divorce and Counterclaim until November 24, 2014. (AA 1:19-24.) The Reply to Counterclaim for Divorce was filed on December 5, 2014. (AA 1:25-27.)

The trial began on February 23, 2016, and concluded on February 26, 2016. (AA 5:861 – 10:1875.) The district court orally divorced the parties and terminated the accrual of community property on February 26, 2016. (AA 44:8508.) On May 4, 2016, an evidentiary hearing took place regarding the value of real property. (AA 44:8476.)

The district court issued its Findings of Fact, Conclusions of Law and Decree of Divorce (hereinafter "Decree of Divorce") on August 22, 2016. (AA 44:8474-8587). In that decree, the district court unequally divided the community property with Gabrielle receiving $2,043,931.50 from Dennis' share of the community property. (AA 44:8576.) The district court also awarded Gabrielle

$1,944,000 in alimony, which was discounted to a lump sum present value of $1,630,292 to be paid from Dennis' share of the community property. (AA 44:8569.) Gabrielle was also awarded $19,500 in sanctions for alleged violations by Dennis of the JPI. (AA 44:8576.)

A post-judgment hearing was held on October 18, 2016, regarding attorney's fees and costs. (AA 47:9187-9271.) Gabrielle was awarded expert witness fees of $75,650 at that hearing. (AA 47:9276-9279.)

VIII. STATEMENT OF FACTS

The parties were married on July 20, 1991, in New York City. (AA 1:1-6.) Despite the fact that both parties worked in the healthcare industry, it became clear during the marriage that these parties would live separate lives. Early in the marriage, Dennis began going on medical missions. (AA 8:1493.He had no formal medical training. Gabrielle, who was a registered nurse with a Masters degree in Public Health, never went with Dennis. (AA 8:1493.) This was an early, telling sign the parties had separate interests and would ultimately live separate lives. Dennis traveled extensively for his career, while Gabrielle pursued her career. In 2003, the parties moved to Lake Las Vegas. (AA 6:1044.) At that time, Dennis' office was based in Southern California where he lived during the week, and returned to Las Vegas on weekends. (8:1529.)

The parties grew apart after moving to Las Vegas. Dennis spent less time at the marital residence. Dennis started dating someone else beginning in 2004. (AA 44:8496.) By 2005, the parties were no longer sexually intimate. (AA 7:1341.) Dennis stopped spending Christmas with Gabrielle after 2008. (AA 6:1164.) The parties stopped exchanging gifts and celebrating birthdays together. (AA 6:1163-65.) There was no physical or emotional intimacy. In July 2010, after Gabrielle found out Dennis had filed for divorce, the parties separated. (AA 44:8484.) Dennis never set foot in the marital residence after their separation. (AA 6:1163.) The parties never lived together, had sex, or exchanged gifts after July 2010. (AA 6:1163.) The district court found the marriage suffered an irretrievable or irrevocable breakdown in 2004, six (6) years prior to separation. (AA 44:8496.) However, there was no dispute the parties lived separately and had separate lives after July 2010, and the marriage was irretrievably broken at that time.

Gabrielle is a highly intelligent woman with an advanced degree in public health. (AA 7:1304-05.) She worked as a nurse investigator bringing charges before the North Carolina Nursing Board. (AA 7:1314-15.) She currently works as a nurse consultant. (AA 6:1173-74 & 7:1345.) She reviews malpractice claims and is familiar with medical-legal matters. (AA 8:1456.) She interacts with attorneys on a regular basis and is familiar with legal concepts, such as proximate cause and

standard of care. (AA 1456.)

Despite having only a part-time job from 2003 through the date of the trial, Gabrielle never travelled to California to visit Dennis. (AA 7:1234-35.) What wife would not visit her husband while he was working full-time in California or try to go with him on one of his many business trips? She also made no attempts to go on any weekend trips or other vacations with him. (AA 6:1165.) This is strong evidence of a physical and emotional separation of the parties.

It is not believable that a couple who stopped spending Valentine's Day, Christmas, New Year's Eve, or birthdays together were still in a relationship. Gabrielle worked 24 hours per week while living at Lake Las Vegas for the past thirteen (13) years with no minor children or aged parents to care for and no coherent explanation of how she spent her time.

By July 2010, and continuing over the next six (6) years, three (3) of which were before Gabrielle filed for divorce and the other three (3) were after Gabrielle filed, the parties lived totally separate lives.

During this period, from 2010 through the date of divorce, Gabrielle had no limits on her spending. (AA 7:1259-60.) Based on her testimony and her Financial Disclosure Form (hereinafter "FDF"), she spent at least $180,000.00 per year over a six (6) year period. (AA 7:1258.) Gabrielle's bills were paid out of the joint Bank

of America account ending 6446. (AA 7:1259-60.) She testified that while she liked to save, she spent $2,000.00 per month on food and spent $1,500.00 - $2,000.00 per month on clothes, all without any questions from Dennis. (AA 8:1477.) She had a golf membership and a country club membership. Dennis never questioned any of her spending. (AA 6:1172.) Gabrielle was able to do whatever she wanted, whenever she wanted, with money not being an issue. (AA 8:1453.) She admitted she was never on a budget or questioned about her spending. (AA 8:1453.)

While Dennis was out of the marital home, Gabrielle had over $1 million in a bank account and lived in a home the parties purchased for $2.2 million. (AA 6:1173.) While Gabrielle claims she did not want to give up on the marriage because of her "vows," she consulted with legal counsel after July 2010 to find out her rights. (AA 8:1508-09.) She obviously was aware that community property continued until the divorce of the parties. She made the business decision to stay married to Dennis because Dennis had just entered the most financially lucrative part of his career. He had just become the Chief Operating Officer (hereinafter "COO") for DaVita, a Fortune 300 company, in 2009. (AA 6:1149.) As a COO, he was a Section 16 officer, meaning he is a person who directly or indirectly is a beneficial owner of more than 10% of the company. *See* 17 CFR 240.16a-1.

During the next six (6) years of the parties' separation, Dennis was the COO for DaVita. (AA 5:987 & 6:1182.) In 2014, he became the President of Health Care Partners and the CEO of the International division. (AA 5:990.)

For most of their marriage, the parties had been middle to upper-middle class. With the DaVita acquisition of Gambro in 2005, and Dennis' subsequent promotion to COO, Dennis moved into that elite group of "C" suite corporate executives, that through stock options and bonuses, make millions of dollars per year. Because this elite group of executives earn so much money through options and other grants of stock, they must file public forms with the Securities and Exchange Commission regarding their income. The amount of money Dennis earned during that period was public record and has been since he was promoted into his current position in 2009. (AA 6:1167.) Through these public filings, Gabrielle had access to Dennis' financial situation and was even told by Dennis his earnings were public record. (AA 6:1167)

Normally a spouse would have some interest in their spouse's earnings, where he worked and lived. Gabrielle claims her only attempt to find out about Dennis' lifestyle was when she made a trip to California in 2011 looking for Dennis' parents. (AA 8:1496.) Gabrielle did not even call Dennis when she drove to California looking for Dennis' parents. (AA 7:1234-35.) During the seven (7)

years prior to that trip, Gabrielle did not make any trips to see where Dennis lived in California or even to visit him. (AA 7:1234-35.) While Dennis was earning tens of millions of dollars a year and the parties had no relationship physically or emotionally, Gabrielle had an obsession with where Dennis' parents lived and whether he was giving them money. She claims she did not have any interest in what Dennis was doing or spending. (AA 8:1500.) However, she did check the bank account statements after Dennis filed for divorce in 2010. (AA 8:1446.)

After 2010, Dennis and Gabrielle lived separate lives and had separate living arrangements, houses, cars, etc. Gabrielle did not see or talk to Dennis for extended periods of time. (AA 8:1520.) While there was testimony they went to counseling, those sessions were minimal. (AA 8:1535.) Even the text messages and/or emails discussed at trial highlight that the parties had no relationship. (AA 14:2629 – 15:3061.) In those messages, Gabrielle constantly confronts Dennis for not making an effort in the relationship, but Gabrielle's actions show she was doing nothing regarding the assets in light of Dennis' conduct. (AA 14:2629 – 15:3061.) Despite her consultation with legal counsel after July 2010, she claims she did nothing to verify, investigate or protect her assets even though she had the ability and records to do so. (AA 8:1503-04.) Gabrielle was content to spend what she wanted and only minimally questioned Dennis' actions because he invested

and/or saved approximately 90% of what he earned during his high income years. (AA 33:6200)

This is not a case of parties living together with the husband secreting money to diminish the marital estate at the time of divorce. By July 2010, Gabrielle knew Dennis was on his own, living out of state, and she knew Dennis was living his own life and spending money. (AA 8:1530-31.)

There is no dispute that at the time of the separation in 2010, the parties' net worth was approximately $4 million. (AA 6:1144 & 1149.) If the parties followed through with the divorce at that time, the amount divided would have been a fraction of the $47 million the district court unequally divided in 2016. In the six (6) years of separation, the marital estate exponentially increased. Gabrielle sat out the separation period and wound up with an estate that in 2016 was over $47 million. Dennis did not contest that one-half of the community property should be awarded to Gabrielle at the 2016 trial. Dennis objected to the unequal community property division proposed by Gabrielle for Dennis' actions during the six (6) year separation period. (AA 43:8415-8473.)

For Gabrielle to contend she gets the benefit of the staggering growth of the community property plus waste and alimony, defies Nevada law. She knew or should have known Dennis was living his own life, including spending a

reasonable amount of money based on his earnings.[1] (AA 8:1530-31.) Gabrielle never made an issue with how Dennis spent money from 2004 through 2009. In 2010, when Gabrielle discovered Dennis wanted a divorce, she reviewed their bank accounts, including cancelled checks. (AA 8:1446.) Gabrielle then continued to allow Dennis' spending habits to continue through February 2016 when the district court ended community property.

In total, the district court divided $47,921,117 of community property. (AA 44:8580.) During the pendency of the divorce, the parties each received $3,615,061, which each party used to purchase real property. (AA 1:201-06.) After the trial, each party received $3 million each. (AA 42:8068-71.) Accordingly, only $34,690,995 needed to be divided in the Decree of Divorce. (AA 44:8581.) The district court awarded Gabrielle $19,183,067, which is 55% of the remaining community property. (AA 44:8581.) Dennis was only awarded $15,507,928, which is 45%. (AA 44:8581.) Then, on top of its unequal division, the district court awarded Gabrielle $1,630,292 in lump sum alimony, payable from Dennis' share of community property. (AA 44:8586) That award leaves Gabrielle with $20,813,359, or 60% of community property and Dennis with $13,907,928, which

[1] Richard Teichner, Dennis' expert CPA, testified Dennis spent 9% of his net disposal income and saved or invested 91% during the period Gabrielle claimed Dennis spent $1,681,178.14 on his girlfriend and children. Gabrielle spent $180,000.00 per year or $1,080,000.00 during the six (6) year period, without any questions from Dennis. (AA 33:6200.)

is 40% of the community property. (AA 44:8581.)

This result violates Nevada law. The result is erroneous considering Dennis earned virtually all of the parties' money, most of it during the six (6) year separation period when the parties lived separate lives.

IX. SUMMARY OF THE ARGUMENT

A. Alimony

The district court violated 130 years of Nevada precedent when it awarded approximately $1.6 million in alimony to a spouse receiving over $25 million of community property assets. (AA 44:8576 & 8581.) No Nevada statute or case allows alimony without a spouse having a financial need.

In addition, the district court violated well-settled Nevada precedent when it awarded lump sum alimony because Dennis is only 58 years old and is in good health. No Nevada case has awarded lump sum alimony when a party was not aged or in poor health. In the two cases approving lump sum alimony, the payor spouses died while the appeals were pending.

B. Community Waste

The district court erred and violated Nevada law when it found Dennis wasted $4,087,863 based on a retrospective audit of expenditures by the parties down to the $1.00 parking fees. The court based its unequal division of property on

Dennis' marital fault during the marriage. Just because a husband cheats on his wife does not mean a "compelling reason" exists to justify an unequal division of community property. There was no diminution of the marital estate. In fact, the marital estate grew ten-fold during the period of alleged community waste.

C. Expert Witness Fees

The district court violated three (3) statutes when it awarded Gabrielle expert fees. First, the district court erred in awarding expert fees when there was no prevailing party. NRS 18.020. Second, the district court erred when it awarded expert witness fees even though Gabrielle failed to file a timely verified Memorandum of Fees in Costs. NRS 18.110(1). Finally, the district court erred when it awarded $75,650.00 in expert witness fees without the analysis required by *Frazier v. Drake*, 131 Nev. Adv. Op. 64, 357 P.3d 365 (Nev. App. 2015) and *Khoury v. Seastrad*, 132 Nev. Adv. Op. 52, 377 P.3d 81 (2016). NRS 18.005.

D. Violation of the Joint Preliminary Injunction (JPI)

The district court erred when it sanctioned Dennis the sum of $19,500.00 for violating the JPI when the court already gave Gabrielle credit for alleged waste in its unequal division of community property. This award is in error because the district court denied Gabrielle's request to hold Dennis in contempt. Even though that motion was denied, the court still sanctioned Dennis based on EDCR 7.60.

The court has no basis to sanction Dennis under EDCR 7.60 because there was no clear and unambiguous court order to base an award of sanctions. Dennis' spending during the divorce was in the normal course of his living and commensurate with his wealth. The court's sanction effectively pays Gabrielle twice for the same transaction.

X. LEGAL ARGUMENT

A. The district court committed an error of law when it awarded Gabrielle over $1.6 million in lump sum spousal support.

When a court makes an award of spousal support, the award must be "just and equitable, having regard to the conditions in which the parties will be left by the divorce." *Sprenger v. Sprenger*, 110 Nev. 855, 859, 878, P.2d 284 (1994). The district court ignored Nevada statutory and case law when it awarded $1.6 million lump sum alimony to Gabrielle. While the court's error in awarding lump sum alimony is described in section A(3) below, the district court erred in awarding any alimony in this case.

NRS 125.150(5) sets forth the factors that are considered when awarding alimony. It is undisputed that alimony is never mandated merely because one party is a high-income earner or to equalize post-divorce income. *Shydler v. Shydler*, 114 Nev. 192, 199, 954 P.2d 37, 41 (1998).

While alimony is reviewed under an abuse of discretion standard, there are

limits to the trial court's discretion in awarding or refusing to award alimony. *Johnson v. Steel Inc.*, 94 Nev. 483, 489, 581 P.2d 860, 862 (1978). If the district court fails to correctly apply the law to the facts of the case, then alimony must be reviewed *de novo*. *Jones v. Nevaa, State Bd. Of Med. Exam'rs*, 131 Nev. Adv. Op. 4, 342 P.3d 50, 52 (2015). In this case, the district court awarded Gabrielle alimony even though she had no "need." The court based this award on the economic loss theory of alimony, which has not been adopted in Nevada. Then, the court ordered Dennis pay Gabrielle alimony in a lump sum, even though he is in good health and not aged. Each of these three (3) issues are discussed below.

1. *The factors set forth in NRS 125.150(5) do not support an award of alimony in this case.*

An analysis of alimony awards in Nevada, going back 132 years, shows that the "need" of one spouse is always the overriding consideration for alimony awards. *Lake v. Bender*, 18 Nev. 361, 7 P. 74 (1885). In *Lake*, the Court acknowledged that one spouse's need must be balanced against the other spouse's ability to pay and condition of life. In *Rodriguez v. Rodriguez*, this Court rejected the "[r]espective merits of the parties" basis for alimony, which had been the previous standard in *Heim v. Heim,* 104 Nev. 605, 763 P.2d 678 (1988). 116 Nev. 993, 995,13 P.3d 415, 416 (2000). In other words, this court rejected the idea that fault is a basis for an award of alimony because

> Alimony is not a sword to level the wrongdoer. Alimony is not a prize to reward virtue. Alimony is financial support paid from one spouse to the other wherever justice and equity require it.

Id. at 999.

The district court erred in its analysis of the NRS 125.150 factors. Each factor is discussed below and support an award of no alimony.

(a) *The financial condition of each spouse.*

Based on the property division of the court, Gabrielle received over $25 million of community property without lump sum alimony. (AA 44:8576 & 8581.) Even if the district court divided the community property equally, Gabrielle would receive over $23 million. (AA 44:8581.) The testimony at trial showed Gabrielle would have passive income of $500,000 - $800,000 per year plus her salary of $60,000 per year. (AA 44:8566.) Her expenses were $180,000 per year. (AA 44:8566.) Since Dennis received real estate rather than income producing assets, he will have limited passive income compared to the passive income Gabrielle's property will produce. (AA 44:8578-8581.)

Any future income Dennis earns would be based on post-divorce efforts. Dennis is an at-will employee, without any guaranteed employment contract. (AA 6:1198.) No asset created during the marriage provides Dennis a guaranteed future income. Gabrielle's post-divorce passive income places her in the top 1% of

Americans without any income from her job or selling any community property. 2014 U.S. Census Bureau.

(b) *The nature and extent of the award to each spouse.*

As stated above, Gabrielle has over $25 million, and Dennis has $22 million based on the court's unequal division. An equal division of community property would be almost $24 million each.

(c) *The contribution of each spouse to any property held by the spouse's pursuant to NRS 123.030.*

The separate property at issue in this case was minimal. There was almost $48 million of community property at issue in this divorce. When the parties separated in July 2010, their marital estate was only worth $4 million. The additional $44 million is based solely on Dennis' efforts and contribution during the parties' separation. (AA 6:1149.) Unlike other cases, the parties had no children. (AA 1:1-6.) Gabrielle never was a homemaker, caregiver, or stay at home mother. (AA 44:8568-69.)

(d) *The duration of the marriage.*

The marriage lasted 25 years. (AA 44:8567.)

(e) *The income, earning capacity age and health of each spouse.*

At the time of trial, Dennis was 57 years old, and Gabrielle was 58 years old. (AA 44:8561.) Both parties are left with large estates; they do not have to

work to support themselves. (AA 44:8578-8581.) Gabrielle has passive income of $500,000 - $800,000 because she received most of the parties' stock/investment accounts. (AA 44:8566.) Neither party has health problems. Both have the ability to work. (AA 44:8560.)

(f) *The standard of living during the marriage.*

The parties had an upscale standard of living during the marriage. (AA 44:8567-68.)

(g) *The career before the marriage of the party who would receive alimony.*

Prior to marriage, Gabrielle was a registered nurse who had obtained a masters degree in public health. (AA 8:1453.) She consistently worked in the nursing/healthcare field throughout the marriage and continuous in that career. (AA 8:1453-61.) Prior to marriage, Dennis only had a bachelor's degree and worked in medical sales. (AA 5:922 & 925.)

(h) *The existence of specialized education or training on the level of marketable skills attained by each spouse during the marriage.*

As stated above, both parties received their education prior to marriage. Gabrielle has more education than Dennis because she has a master's degree. (AA 44:8560.) Both parties had marketable skills at the time of marriage and still have marketable skills today. (AA 44:8560-61.)

Dennis moved up the corporate ladder to eventually become the COO of DaVita, a medical corporation, where he received salary, bonuses, and stock options. (AA 5:987-90.) The majority of the money earned through DaVita, over $44 million, was earned during the parties' separation and was part of the parties' community estate. (AA 6:1149.) At trial, Dennis testified that his career with DaVita would be ending due to changes at his company and dissatisfaction of his boss. (AA 6:1198.)

Throughout the marriage, Gabrielle worked in the nursing field. (AA 8:1453-61.) After the move to Lake Las Vegas in 2003, Gabrielle worked within her field on a part-time basis. (AA 44:8563.) At one point she expressed a desire to go to law school, which Dennis supported, but Gabrielle ultimately decided to not go to law school and continue working part-time for Dignity Health in the claims department. (AA 6:1179; 8:1462-63; & 8:1455.)

(i) *The contribution of either spouse as homemaker.*

Neither party was a homemaker. Both parties worked throughout the duration of the marriage.

(j) *The award of property.*

As pointed out above, Gabrielle received over $25 million of community property, which will allow her to earn $500,000 to $800,000 in passive income per

year. (AA 44:8566, 8576 & 8581.)

(k) *The physical and mental condition of each party.*

Both parties are physically and mentally able to work. Gabrielle never claimed that she could not work.

An analysis of the above factors, show that Gabrielle has no "need" for alimony.

2. *The district court violated Nevada law when it relied on an economic loss theory instead of the NRS 125.150 factors to award Gabrielle alimony.*

The district court relied on a law review article written be Judge Hardy. David A. Hardy, *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 Nev. L.J. 325 (Winter 2009). Judge Hardy surveyed all the alimony cases in the 132 years of court decisions on alimony. No case in Nevada legal history supports an award of alimony without a spouse having an economic need for support.

The district court recognized Gabrielle had no economic need and cited no Nevada authority for application of the economic loss theory that Judge Hardy admitted was not Nevada law. (AA 44:8565.)

The court erred in adopting an economic loss theory never approved by the Nevada legislature or the Nevada Supreme Court. The adoption of the economic

loss theory to award Gabrielle alimony was a thinly veiled award based on marital fault, namely, Dennis' cheating.

The district court acknowledged the overriding historical significance in Nevada that one spouse has "need" and the other spouse has an ability to pay when awarding alimony. (AA 44:8558.)This category of traditional alimony was recognized in a law review article relied on by the district court. Hardy, 9 Nev. L.J. 325.

The district court misread the article when it adopted the economic loss theory of alimony. Judge Hardy admitted economic loss alimony. has not been adopted by the Nevada Legislature or the Supreme Court of Nevada. The purpose of Judge Hardy's article was to persuade Nevada legislators to amend the alimony law in Nevada. As Judge Hardy said:

> Although economic loss is identified in Nevada Law as a sustainable rationale, this article does not join the surfeit of national scholarship examining the intellectual and philosophical underpinnings of alimony. Rather this article synthesizes existing Nevada Law and urges a re-examination of why and how courts should award alimony. Without policy maker assistance, trial courts will continue entering disparate alimony awards and litigants will continue to benefit or suffer from the vagaries of 'Judicial Personalities.'

Hardy, 9 Nev. L.J. at 347. Judge Hardy is clear that the legislature, and not the court, must consider the viability of the economic loss theory.

The Nevada Legislature determines the standards for awarding alimony in Nevada because alimony is a creature of statute. The district court specifically found that Gabrielle had no economic need for alimony, yet it still awarded her $1,944,000 in alimony because of Dennis' high earning capacity during the separation. (AA 44:8569.)

During the separation and through the end of the trial, Dennis was an at-will employee with no employment contract. (AA 6:1198.)There was no testimony regarding Dennis' future income other than Dennis' comment that his future employment at DaVita was shaky due to problems with his boss. (AA 6:1198.)

There was no career asset obtained during the marriage. Dennis did not attain a profession during marriage; he was already a regional sales manager of a national medical device company at the time the parties married. (AA 6:930.) Further, Dennis did not acquire or own any business during the marriage that would guarantee income post-divorce. There is no reason to award alimony except to take Dennis' share of the already unequally divided community property and give those assets to Gabrielle to punish Dennis. *See Rodriguez*, 104 Nev. at 999. There was no career asset obtained during the marriage. The court's decision to award alimony, in violation of NRS 125.150, on a theory not adopted by the court or legislature shows that the court's intent was to penalize Dennis for marital

misconduct. Such an award does not serve the policies behind alimony in Nevada.

Instead of relying on the NRS 125.150 factors and Nevada case law, the district court incorrectly relied on the economic loss theory even though the Judge Hardy recognized that theory has **not** been adopted in Nevada. (AA 44:8558.) Hardy, 9 Nev. L.J. at 347. The analysis of the district court is clearly concerned with the disparity of potential future earning capacity, but such post-divorce equalization is barred under *Shydler*.

In addition to an unequal division, where she received over $25 million of community property, Gabrielle argued that she should receive $100,000 per month in alimony, but she never provides an explanation why she needs alimony, let alone $100,000 per month in alimony. (AA 43:8261.)

At trial, Gabrielle testified she was content with her career and would continue to work even though she was a multi-millionaire. (AA 8:1450 & 44:8563.) The evidence did show that her quality of life would actually increase post-divorce. (AA 44:8566-67.) During the divorce she purchased a 7,000 square foot home in Southern Highlands for $2,375,000 with her share of community property. (AA 8:1471.)

The court concluded, without explanation or analysis, that Dennis should pay spousal support to Gabrielle in the sum of $18,000 per month for a period of

108 months, which totals $1,944,000. (AA 44:8569.) The court then determined that Dennis should pay that amount in a lump sum, discounted at 4%, to total $1,630,292. (AA 44:8569.)There was no evidentiary basis for the 4% discounted rate. The court merely concluded it was a rate of return commonly referenced without citation to the record. (AA 44:8569.)The district court cited no binding legal authority for applying the economic loss theory or the discount rate.

While the court says it weighed the statutory factors, the court's analysis of the statutory factors does not support the court's conclusion. (AA 44:8569.) The district court awarded nine (9) years alimony. Dennis was 57 at the time of the decree. (AA 44:8561.) Dennis testified he believed his career as a COO was ending. (AA 6:198.) He had made his money, and the DaVita compensation structure was changing. (AA 7:1230.) There was no evidence Dennis would work until age 67 at the job he had at the time of trial. There is also no support for the $18,000 a month figure used by the court. (AA 44:8569.) After concluding there was no need for rehabilitative alimony, the court just picked a figure of $18,000 a month without any analysis or evidence to support that figure. (AA 44:8569.)

Gabrielle testified she spent $15,000 a month and earned approximately $4,000 per month. (AA 44:8563 & 8566.)The court failed to include any interest or passive income that she would receive as a result of the division of community

property in its analysis.

Nothing in Judge Hardy's law review article suggests a methodology for valuing alimony under an economic loss theory. Hardy 9 Nev. L.J. at 345-47. Nothing in that law review article suggests economic loss alimony could be made lump sum alimony and taken from one spouse's share of the community property. *Id.* The cumulative effect of the decision to award lump sum alimony is to further penalize Dennis for cheating on Gabrielle and unequally divide the community property 60-40 in Gabrielle's favor instead of equally.

The length and amount of alimony is not reasonably related to anything in the record and is based on the court's speculative assumption that Dennis will continue to earn substantial money as the COO of a Fortune 500 company. There was no evidence these high income years will continue. The district court is taking future post-divorce earnings and efforts and making Dennis pay Gabrielle with his share of the community property, depriving him of $1.6 million today. The court gave Gabrielle 60% of the community property and Dennis 40% of the community property. (AA 44:8578-81.) This is a grossly erroneous decision based on current Nevada law, and penalizes Dennis who diligently built a $47 million estate through his hard work, saving, and investing. The district court's use of the economic loss theory to award Gabrielle alimony in substitution of weighing the NRS 125.150

factors, should be reversed, and this Court should order no alimony as a matter of law.

3. *The district court erred in awarding lump sum alimony.*

Upon divorce, the district court may make an award of alimony, including a lump sum award, "as appears just and equitable." NRS 125.150(1)(a); *Schwartz v. Schwartz*, 126 Nev. 87, 225 P.3d 1273 (2010). The same eleven (11) factors discussed in this brief earlier for monthly alimony apply to lump sum alimony. *Sprenger,* 110 Nev. at 859.

Lump sum alimony has previously only been approved when a party's age, health and/or life expectancy make normal alimony infeasible. *Schwartz*, 126 Nev. 87.; *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990). In *Schwartz*, this Court held the district court erred when it did not take the husband's poor health into account when determining whether lump sum alimony was proper. The husband, who was 85 years old with end stage kidney disease, died after entry of the decree, which was appealed by the wife after his death.

In *Daniel*, this Court found a lump sum award of alimony was proper based on the age and heath of the parties and the assets at issue. In that case, the husband was 20 years older than the wife, had substantial health problems, and was a multi-millionaire. The wife, on the other hand, had few assets or hopes of employment

after divorce. The Court concluded that lump sum alimony was appropriate because it would not deplete the husband's assets, and the wife needed alimony. Lump sum alimony was necessary in that case because the husband was aged and in poor health. He died during the appeals process. 106 Nev. 412.

The key to those two lump sum cases is whether the alimony award is illusory because of the age and health of the payor. The district court, in the instant case, made no analysis of the *Schwartz* or *Daniel* factors. Both parties in the instant case are in their 50s, not 80s. The district court made absolutely no findings of health or life expectancy. Neither party is in poor health. No evidence of poor health or life expectancy was ever entered into the record.

Instead, the court found, "Considering the length of the parties' separation and recognition that the support is not need based, this court further concludes and finds that the support should be paid in a specified or lump sum amount so as to disentangle the parties." NRS 125.150 (1)(a) and (5).

Those statutes cited by the court do not support an award of lump sum alimony. This court has never used lump sum alimony as a tool to "disentangle" the parties.

While the district court has discretion to determine the length and amount of alimony, it abuses that discretion when it fails to properly analyze the factors.

Unlike in *Daniel,* where the wife had few assets and her husband died during the appeal, these parties have community property in excess of $47 million.

Even if Gabrielle is awarded one-half of the community property and not the $25 million actually awarded to her, she has no need for lump sum alimony. She would still have over $23 million of community property. The district court erred when it awarded lump sum alimony without any analysis of the lump sum alimony factors contained in Nevada case law. That decision should be reversed. Additionally, any award of alimony should be reversed because the award of alimony in this case violates well-established Nevada law.

B. Community Waste

The district court ruled that Dennis wasted $4,087,863 from March 2008 to February 2016, despite the fact that he exponentially expanded the size of the marital estate ten-fold during the parties six (6) year separation. (AA 44:8489.) Based on that finding, the district court unequally divided the community's property under NRS 125.150 (1)(b), which states:

> Shall, to the extent practicable, make an equal disposition of the community property of the parties, except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a **compelling reason** to do so and sets forth in writing the reasons for making the unequal disposition.

(emphasis added).

Typically, an appellate court's review of a district court's division of community property is for an abuse of discretion. *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916 (1996). However, questions of law, such as statutory interpretation, are reviewed *de novo*. *Jones v. Nevada, State Bd. Of Med. Exam'rs*, 131 Nev. Adv. Op. 4, 342 P.3d 50, 52 (2015). A *de novo* review of the district court's unequal division of community property in this case is warranted because the district court improperly applied the law.

In its decision, the district court frequently references Dennis' cheating/marital fault. (AA 44:8489-96, 8522, 8525-29, 8540-42, 8546-47, 8552, 8555, 8565 & 8569.) Those references should lead this Court to conclude that the district court used Dennis' fault as the "compelling reason" for the unequal division. The legislative intent behind NRS 125.150(1)b) and the district court's unequal division of community property based on that statute are discussed below.

1. *The term "compelling reasons" in NRS 125.150(1)(b) has never been adequately defined.*

The controlling factor when interpreting a statute is the legislative intent. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226 (2011). To determine the legislative intent, the statute's plain meaning is first analyzed. *Id.* The Court does not go beyond the statute's plain meaning if the statute is clear on its face. *Id.* The statute is ambiguous when "the statutory language lends itself to two or more

reasonable interpretations." *Id.* At that point, the Court may "look beyond the statute to determine legislative intent." *Id.* The interpretation of an ambiguous statute is based on the legislative history construed "in a manner that is consistent with reason and public policy." *Id.*

The statutory language at issue in this case is the meaning of "compelling reason" as stated in NRS 125.150(1)(b), *supra*. The limited Nevada cases that have analyzed unequal divisions under NRS 125.150(1)(b) have not provided any test to determine when such a "compelling reason" exists in support of an unequal division.

Historically, the "compelling reason" standard is used when attempting to overturn *stare decisis*. *Adam v. State*, 127 Nev. 601, 604, 261 P.3d 1063, 1065 (2011). *Stare decisis* is only overturned if the reason is "weighty and conclusive." *Id.* It is unknown what constitutes "weighty and conclusive" in the context of an unequal division of community property in fact patterns outside of those discussed in *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996) and *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997).

The plain meaning of "compelling reason" is ambiguous because it fails to provide clear direction of how this standard is applied. As such, this Court should look to the legislative history of NRS 125.150(1)(b) when it was adopted in 1993.

The "compelling reason" language was added to NRS 125.150(1)(b) on April 7, 1993, because of fears within the Nevada legal community that "fault" would be interjected into the equal division analysis. After the decisions in *Heim*, 104 Nev. 605, *McNabney v. McNabney*, 105 Nev. 652, 782 P.2d 1291 (1989), and *Rutar v. Rutar*, 198 Nev. 203, 827 P.2d 829 (1992), domestic lawyers began assuming that the Nevada Supreme Court "brought the fault concept back into Nevada law." Nev. Assembly Jud. Comm. *McNabney Bill: Hearings on A.B. 347*, at 1977.

The phrase "the respective merits of the parties" was eliminated in 1993 from NRS 125.150(1)(b) so that divorce courts in Nevada would **NOT "be a forum for every single recrimination in the breakdown of a relationship."** *Id.* (emphasis added). At that time, attorneys in the field "felt compelled by law under [those] decisions to argue all of the fault issues because of the effect it might have on the court's decision on how to divide community property and debts." *Id.* at 1977-78. Prior to the amendment, "fault issues were interjected into what used to be considered a straight-up question of equity and equal division." *Id.* at 1978. Specifically, Mr. Porter testified:

> [T]his legislature needs to send a message in community property law [that] fault does not have place in terms of economic distribution of property. It would seem to me that only in the words we are here choosing 'is

> compelling', and we do not define that, but **compelling has long been defined in terms of constitutional challenges to guarantee fundamental rights.** As a compelling state enters that is the highest interest that the state can require. Using that same analysis to the word 'compelling' on line 18 of this bill, I would presume and I would hope that the courts would have to find a **very, very substantial reason** for injecting fault into the equation in awarding property.

Id. at 1980-81.

The "compelling reason" standard has also been applied to other areas of Nevada law. When attempting to obtain a psychological evaluation of a sexual assault victim, a defendant must set forth "compelling reasons" to justify the evaluation. *Koerschner v. State*, 116 Nev. 1111, 1116, 13 P.3d 451, 455 (2000). To determine if a "compelling reason" exists to evaluate a sexual assault victim, the court must weigh the following three factors:

> (1) whether the State benefits from a psychological or psychiatric expert; (2) whether there is corroborating evidence beyond the testimony of the victim; and (3) whether there is a reasonable basis for believing that the victim's mental or emotional state affected the victim's veracity.

Id. at 1116-17.

The "compelling reason" standard is also used in termination of parental rights and permanency cases. NRS 432B.553; NAC 432B.261; NAC 432B.262. This is because "the parent-child relationship is a fundamental liberty interest"

protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *In re Parental Rights of J.L.N.*, 118 Nev. 621, 624, 55 P.3d 955, 958 (2002). "Statutes that infringe upon this interest are [] subject to strict scrutiny and must be narrowly tailored to serve a compelling interest." *Id.*

Since NRS 125.150(1)(b) was amended in 1993, this Court has upheld the unequal disposition of community property in limited circumstances. *Lofgren*, 112 Nev. 1282; *Putterman*, 113 Nev. 606; *Shydler*, 114 Nev. 192; *Wheeler v. Upton-Wheeler*, 113 Nev. 1185, 1190, 946 P.2d 200 (1999). In these decisions, this Court has provided no definition or guidance to the district courts regarding what conduct meets the "compelling reason" test. Instead, this Court provided narrow examples of what potential compelling reasons could include, such as financial misconduct by one of the parties, including, negligent loss or destruction of community property, hiding or wasting of community assets or misappropriating community assets for personal gain. *Putterman*, 113 Nev. at 608-09. This Court has also held that marital misconduct, on its own, does not amount to a compelling reason. *Wheeler*, 113 Nev. at 1190. Waste may only lie where a spouse's marital misconduct causes an **"adverse economic impact"** on the other party. *Id.*

Despite the fact that this Court has acknowledged that a district court may unequally divide community property when a spouse has engaged in financial

misconduct and/or waste, the law in Nevada on what constitutes financial misconduct and/or waste is sparse. Waste, or as it is sometimes called, "dissipation," has not been defined by Nevada law. The Nevada cases supporting an unequal division have only occurred when the marital estate is actually lessened by the actions of one the parties. *Lofgren*, 112 Nev. 1282; *Putterman*, 113 Nev. 606; *Shydler*, 114 Nev. 192. The actual dissipation of community property assets "[must] be distinguished from under-contributing or over-consuming of community assets during marriage." *Putterman*, 113 Nev. at 609.

The legislative history of NRS 125.150(1)(b), does not support an unequal division of property in this case. At the time that statute was amended in 1993, the legislature was aware of all the "fault" issues that may lead to divorce, including situations where one spouse cheats on the other. The legislature could have specifically stated in the statute that any money spent on an extramarital affair during the marriage is waste requiring an unequal division. However, the legislature did not include such language. Instead, the legislature required a "compelling reason" for an unequal division. NRS 125.150(1)(b). As this Court pointed out in *Wheeler*, marital misconduct, such as cheating, only amounts to a "compelling reason" if it has an **"adverse economic impact"** on the other spouse. 113 Nev. at 1190 (emphasis added).

In this case, the district court failed to properly apply NRS 125.150(1)(b) when it used Dennis' marital misconduct as its sole compelling reason in support of the unequal division of community property.

2. *Dennis' conduct during the marriage had a positive economic impact on Gabrielle.*

In order to find a "compelling reason" justifying an unequal division of community property, the district court must consider the size of the marital estate and how much each spouse contributed to the existing community property. *See Kittredge v. Kittredge*, 441 Mass. 28, 39, 803 N.E.2d 306, 315 (Mass. 2004). This consideration must then be balanced against the alleged waste. *Id.*

The district court erred, as a matter of law, when it failed to consider Dennis' contribution to the marital estate. A spouse's financial contribution to the marital estate may offset excessive drinking or gambling, or negligent or intentional destruction of property. *Anstutz v. Anstutz*, 112 Wis.2d 10, 12, 331 N.W.2d 844, 846 (Wis. 1983). In Washington, courts look at "each parties' responsibility for creating or dissipating marital assets" as relevant to a division of property upon divorce. *In re Marriage of Williams*, 84 Wash.App. 263, 270, 927 P.2d 679, 683 (Wash. 1996). This factor is important because it deals directly with whether a spouse has the requisite intent required for a claim of dissipation. *Putterman* found waste because the husband was attempting to obtain a financial

benefit to the detriment of his wife during the divorce. 113 Nev. at 608-09. *Wheeler* held that a "compelling reason" only exists in cases of marital misconduct when the other spouse suffers an "adverse economic impact." 113 Nev. at 1190.

In this case, Dennis exponentially increased the value of the community property from $4 million to over $47 million in the six (6) years the parties were separated. (AA 44:8489.) Dennis' expansive contribution to this marriage is of utmost importance in this case. That contribution shows he did not have the requisite intent to deprive Gabrielle of her share of community property because she did not suffer an adverse economic impact based on his marital misconduct. Without an adverse economic impact, a "compelling reason" does not exist to unequally divide their community property.

The parties permanently separated in July 2010, and the district court found that community property terminated in February 2016. (AA 44:8508.) In 2011, Dennis' taxable income was $15,485,110. (AA 13:2382.) In 2012, his taxable income was $21,535,200, and in 2013, when Gabrielle filed her Complaint for Divorce, his taxable income was $7,746,799. (AA 11:1988 & 12:2245.) If Dennis had pursued the divorce in 2010, the community property at issue would have been considerably less. The amount of community property Gabrielle received by staying married during the six (6) year separation is staggering.

In cases involving waste, such as *Lofgren* and *Putterman*, there is a significant decrease in the net worth of the community. That did not happen in this case. The value of the community exponentially increased after 2010. Based on this exponential increase, this Court should find that no compelling reason exists to unequally divide community property because Gabrielle did not suffer an adverse economic impact. That is the standard set forth in *Wheeler*.

The district court erred in not looking at this case as a whole. It ignored the amount Dennis contributed and only looked at how much he spent. Both his contribution and his expenditures must be examined together in order for this Court to understand the dynamic of this community. *Anstuz,* 112 Wis. 2d at 12. For example, a party spending $100,000.00 and only contributing $50,000.00 is very different from a party spending $100,000.00 and contributing $500,000.00. The expenditures and contributions must be viewed together.

Instead, the district court based its unequal division on wanting Dennis to save more than the $47 million of assets acquired during the parties' separation. There is no legal authority for a district court to penalize a spouse for not saving enough money. Such a rule would inundate the family court with these types of claims because every spouse would argue the other spouse did not save enough money to try to get an unequal division. This would be an absurd result.

This Court should find a "compelling reason" does not exist in support of an unequal division of community property because Dennis' conduct had a positive economic impact on Gabrielle's share of the community property. Such a positive economic impact affirmatively proves that he did not have the requisite intent to deprive Gabrielle of her share of the community.

3. *The evidence presented at trial and Nevada law do not support a finding of $4,087,863 of waste in this case.*

The Nevada Supreme Court has not yet defined "waste" or as it is also called "dissipation." The law from other states regarding dissipation is persuasive for this Court's consideration of whether a "compelling reason" exists to unequally divide community property.

Dissipation "generally involves the use or diminution of the marital estate for a purpose unrelated to the marriage and does not include the use of marital property to meet routine financial obligations." *In Re Marriage of Coyle*, 671 N.E.2d 938, 943 (Ind. 1996). It includes expenditures of a spouse, at a time when the marriage is coming to an end, for the sole purpose of depriving the other spouse of his or her share of the marital estate. *Kittredge*, 441 Mass. at 36 (citing *Herron v. Johnson*, 714 A.2d 783, 786 (D.C. 1998). These definitions explain how the Nevada Supreme Court decided *Putterman* and *Lofgren* looking at dissipation of community property. The issue is whether the community is lessened to such a

point where each spouse receiving 50% would be unfair because the intentional acts of a spouse significantly depleted the value of the community.

The district court erred when it misapplied the law regarding each party's burden and standard of proof. Both the burden and standard of proof lead to whether a compelling reason exists to justify an unequal division.

"The party alleging dissipation has the initial burden of production and burden of persuasion." *Simonds v. Simonds*, 165 Md.App. 591, 614, 886 A.2d 158, 172 (MD 2005) (internal citations omitted); *see Clements v. Clements*, 10 Va.App. 580, 586, 397 S.E.2d 257, 261 (Va.App. 1990); and *see Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky. 1998). After the alleging party establishes his/her *prima facie* case, the burden then shifts to the other spouse to show that the money at issue was spent on living expenses or for a proper purpose. *Clements*, 10 Va.App. at 586. The standard of proof to rebut the *prima facie* case is **preponderance of the evidence**. *Id.* at 587. The court in *Clements* adopted that standard of proof because it is the **majority view** that has been adopted by a number of states. *Id.*

In this case, the district court erred when it found that Gabrielle established a *prima facie* case of dissipation. The court also erred when it applied the wrong standard of proof, clear and convincing evidence, for Dennis to rebut the *prima facie* case.

The burden required to establish a *prima facie* case of dissipation is not met by simply performing an audit of all expenditures made during the marriage. *Coyle*, 671 N.E.2d at 942 (emphasis added). "The institution of marriage would be ill-served if spouses were encouraged to maintain a continuous record of expenditures and transactions during the marriage for use in the event they are ever divorced." *Id.* In addition, the district court even found that in making a *prima facie* case "[i]t is essential to establish the value of the dissipated property because the court 'cannot determine the amount of the remedy without undue speculation.'" (AA 44:8524.)

Gabrielle was required to set forth substantial evidence of the time period at issue and the transactions in dispute to establish her *prima facie* case. Both the time period and transactions established by Gabrielle in her *prima facie* case are discussed below.

a. Gabrielle proved in her *prima facie* case that her marriage to Dennis underwent an irreconcilable breakdown from July of 2010 to April of 2012.

The first step to establish a *prima facie* case of dissipation is defining the time period at issue. Dennis agrees with the district court that the time frame is measured beginning "when the marriage is **undergoing** an irreconcilable breakdown." *Herron*, 714 A.2d at 785 (emphasis added); *see Clements*, 10 Va.App. at 586. This breakdown may coincide with the parties' separation. *Id.*

Determining when such a breakdown occurs is essential because spouses should not be allowed to use the family court to do a retrospective accounting of every expense incurred by each party during the marriage. After all, the legislature specifically amended NRS 125.150(1)(b) because it did not want family court to "be a forum for every single recrimination in the breakdown of a relationship." Nev. Assembly Jud. Comm. *McNabney Bill: Hearings on A.B. 347*, at 1977. If the legislature did not want that type of scrutiny during the breakdown, then it certainly does not want that level of scrutiny for a period of time outside of the breakdown. By limiting the time frame of waste to the breakdown, the courts are giving each spouse the freedom and responsibility to manage their marital assets. It is expected that if the parties are together, they accept each other's expenditures.

The district court erred when it stated that the time period ended upon divorce. (AA 44:8522.) This error of law is important because this marriage was no longer "undergoing an irreconcilable breakdown" when they stopped participating in marriage counseling in April of 2012. Gabrielle had reviewed bank statements, including cancelled checks to Nadya, and knew that her marriage to Dennis was over when they stopped counselling. (AA 8:1535.) She should have immediately filed for divorce and filed a motion to put Dennis on a budget in order to properly protect her interest in the marital estate. She did not do that. Instead, she waited from April 2012 to December 2013 to file for divorce. (AA 1:1-6 & 8:1535.) She

then waited an additional year to serve Dennis with her complaint. (AA 1:14.) The district court's footnote stating that nine pre-trial hearings took place in this case does not alleviate Gabrielle from her duty to protect her rights. (AA 44:8522.)

Issues related to spending during the divorce must be brought to the district court's attention via motion practice. NRS 125.050. The district court allowed potential waste to continue to accrue without taking any steps to limit the issue at trial. If Gabrielle had immediately filed for divorce in April 2012 and filed a motion to put Dennis on a budget, then the issue of waste would have been limited. Motion practice is the proper remedy for alleged waste, via spending, during the pendency of the divorce because it strikes a balance between both Gabrielle and Dennis' due process rights.

The evidence presented by Gabrielle showed that the marriage began undergoing an irreconcilable breakdown in July 2010 when she found out that Dennis filed for divorce. (AA 14:2629 – 15:3061.) Gabrielle spent an excessive amount of time at trial going through the text messages and emails between July 2010, when Dennis officially moved out of the marital residence, and April 2012, when the parties' stopped participating in marriage counseling. (AA 14:2629 – 15:3061.) Those text messages and emails show that the parties were going through the breakdown of their relationship at that time. (AA 14:2629 – 15:3061.)

Gabrielle would like this Court to go back to 2004 when Dennis began seeing Nadya. (AA 9:1628.) The problem with going back twelve (12) years is two-fold. First, there is an issue of proof. The banks do not keep account history dating back that far. The parties only had statements from 2008. (AA 8:1655-56 & 44:8533.) The second issue is that the legislature specifically amended NRS 125.150 because it did not want family court to become "a forum for every single recrimination in the breakdown of a relationship." Nev. Assembly Jud. Comm. *McNabney Bill: Hearings on A.B. 347*, at 1977. Going back twelve (12) years would do exactly what the legislature was trying to avoid. Gabrielle could have gone forward with the divorce in 2010, but she decided not to.

In 2010, Gabrielle had access to bank statements that she reviewed, which showed checks written to Nadya and the children's preschool. (AA 8:1536-37.) Since she decided to stay married an additional six (6) years after discovering that information, this Court should find that she cannot seek reimbursement for alleged waste prior to 2010, as a matter of law.

No where under Nevada law is such an extensive examination of expenses even imagined. The Nevada cases dealing with waste only consider the issue based on specific transactions that diminish the value of community property as a whole. *Lofgren*, 112 Nev. 1282; *Putterman*, 113 Nev. 606; *Shydler*, 114 Nev. 192.

The legislature specifically stated that it did not want a spouse to go back through the entire marriage and *ex post facto* contest the validity of every transaction throughout the duration of the marriage. Nev. Assembly Jud. Comm. *McNabney Bill: Hearings on A.B. 347*, at 1977. Just because parties are getting divorced does not mean they get to recast the finances of the entire marriage. The fact they stayed together for such a long time shows they accepted the other spouse and that spouse's expenditures.

It is undisputed that Dennis officially moved out of the marital residence in July 2010 and that the parties stopped going to counseling in April 2012. (AA 6:1088 & 8:1535.) Despite the fact that their marriage was over, Gabrielle still waited more than 20 months to file her complaint for divorce, which was filed in December 2013. (AA 1:1-6.) When Gabrielle filed the complaint that initiated this divorce, these parties were no longer undergoing an irreconcilable breakdown. At that point the marriage was broken, and any further claim for waste was cut off because Gabrielle was able to seek judicial intervention if she had any issues with Dennis' spending.

It is important to note that Dennis is not saying that it is impossible for waste to occur during the pendency of a divorce. *Lofgren* and *Putterman* state that waste can occur during the divorce. However, the waste complained of by Gabrielle is not comparable to the waste found in *Lofgren* and *Putterman*. In those cases, an

asset literally disappeared from the marital balance sheet. In this case, Gabrielle's claim is directly related to Dennis' spending habits. No asset disappeared from the marital balance sheet.

Because Gabrielle's evidence at trial showed that the marriage began to undergo an irreconcilable breakdown in 2010, this Court should narrow the time period from July 2010, when Dennis officially moved out of the marital residence, to April 2012, when the parties stopped going to marriage counseling.

b. Gabrielle did not fulfill her burden of production or persuasion in support of a finding of $4,087,863 of waste.

After the time period is established, Gabrielle must then set forth sufficient evidence showing the "use or diminution of the marital estate for a purpose unrelated to the marriage." *Coyle*, 671 N.E.2d at 943. Gabrielle must do more than an audit of the expenditures to fulfill this burden. *Id.* This requirement directly relates to the legislature's purpose when it amended NRS 125.150(1)(b). The legislature did not want the family court to analyze every expenditure during the breakdown of the marriage, both big and small. In fact, the legislature specifically found that the family courts should not "be a forum for every single recrimination in the breakdown of a relationship." Nev. Assembly Jud. Comm. *McNabney Bill: Hearings on A.B. 347*, at 1977. The holdings in *Lofgren* and *Putterman* both walk

that line. In those cases, the Court limited its analysis to the big ticket items relative to the size/value of the marital estate.

In *Cord v. Neuhoff*, the Court rejected the idea that the community's total expenses through the duration of the marriage be balanced against the total income during the marriage. 94 Nev. 21, 27, 573 P.2d 1170, 1174 (1978). Such an analysis "would transform a wife's interest in the community property from a present, existing and equal interest . . . into an inchoate expectancy to be realized only if upon termination of the marriage the community income fortuitously exceeded community expenditures." *Id.* (internal quotations omitted). That is exactly what Gabrielle did in this case. She took every single transaction that was not hers and forced Dennis to state who that expenditure was for, beginning with the $1.00 parking meter fees. (AA 17:3233-68 & 36:6707-6906.) Then, after Dennis explained who the charges were for, Gabrielle took all of the transactions that Dennis could not remember and put them into a "potential community waste" category. (AA 17:3247-48.) This is a case where the "community income fortuitously exceeded community expenditures." Each category of waste found by the district court is discussed below.

i. ***Nadya and the Children***

The district court found Dennis wasted $1,808,112 on Nadya and the children. (AA 44:8537.) At trial, Gabrielle alleged that Dennis spent $1,681,178.14

on Nadya and their children, and gave Nadya $279,000.00 in cash. (AA 17:3244 & 3281-3320.) These amounts include transactions from March 2008 through November 2015. (17:3281-3320.) In reviewing these numbers, it is important for this Court to review how Anthem calculated the $1,681,178.17. Anthem included expenses related to groceries/food, shopping for personal necessities, and payments related to Dennis' investment into a start-up fashion design company. (AA 17:3281-3320.) Even though Anthem states that it did not include grocery/living expense costs in this section, a review of the expenses included shows that those types of expenses were included in the calculation. (AA 17:3281-3320.) It is undisputed that Dennis was with Nadya, and not Gabrielle, from July 2010 to November 2015. As such, any grocery, food, and/or living expenses should not be included in the calculation because those expenses would have gone to Dennis' benefit.

Furthermore, in Teichner's report, Dennis went through and accounted for $584,718.34 of those expenses as relating to his living expenses. (AA 33:6176-92.) It is unknown how the district court wanted Dennis to account for and/or rebut these expenses. The majority of the individual expenses at issuE are under $250.00 and include retailers such as Trader Joe's, Chevron, and Rite Aid. (AA 17:3281-3320.) From a practical sense, how is Dennis supposed to rebut the allegation that an expense from Rite Aid is for him and not Nadya? It would not be practical or

feasible to force spouses to catalog every receipt for every purchase during the marriage. It further would be extremely expensive to subpoena store surveillance to provide proof regarding who actually purchased the items at issue. What is known is that Dennis earned over $47 million from July 2010 through the date of divorce. (AA 44:8489 & 8578-81.) He had a highly demanding career, and if he had Nadya put gas in his car or pick-up his prescriptions so that he could focus on earning more money for the community, this Court should not penalize him for that decision.

The district court abused its discretion and violated Nevada law when it did not give any weight to Dennis' testimony and accepted an audit of expenditures that totaled $1,681,178.14. This is exactly what the legislature wanted to avoid when it stated that it did not want the family courts to "be a forum for every single recrimination in the breakdown of a relationship." Nev. Assembly Jud. Comm. *McNabney Bill: Hearings on A.B. 347*, at 1977.

Dennis is not saying that he did not spend money on Nadya and their children. At trial, Dennis conceded that he spent $1.5 million on Nadya and their children from March 2008 to November 2015. (AA 10:1828.) That amount included cash he gave to Nadya. (AA 10:1828.)

Finally, the district court further abused its discretion, in violation of Nevada law, when it included $54,934 of expenses that were added in Anthem's Rebuttal

Report. (AA 44:8538.) That amount was not properly set forth in Gabrielle's *prima facie* case, and Dennis was not given a reasonable opportunity to rebut. In addition, that amount was accrued during the divorce proceedings and should not be included because Gabrielle failed to put Dennis on a budget.

By conceding $1.5 million, Dennis is saying that he spent $187,500.00 per year, or $15,625 per month on Nadya and their children. For the time period at issue, July 2010 to April 2012, Dennis only spent $343,750 on Nadya and their children during those 22 months. This amount is comparable to the amount of money spent by Gabrielle for her personal expenses. (AA 10:1896-1912.) A finding that $1,808,112 was diverted from the community is clearly erroneous when that amount includes Dennis' living expenses and business investment. It further is clearly erroneous when Dennis contributed over $47 million during the parties six (6) year separation.

ii. ***Jennifer Steiner***

At trial, Gabrielle alleged that Dennis spent $45,099.31 on the girlfriend he had during the pendency of the divorce, Jennifer Steiner. (AA 17:3339-42.) Since the parties had been separated for a significant period of time before the complaint to this action was even filed and Gabrielle did not attempt to put Dennis on a budget, this Court should reverse the district court's finding of $45,100 of waste in this category. The marital relationship was long over before Dennis began a

relationship with Ms. Steiner. He earned over $47 million during his separation from Gabrielle. A finding that $45,100 was spent on a girlfriend is the type of claim the legislature and court wanted to avoid.

iii. ***Dennis' Family***

At trial, Gabrielle alleged that Dennis spent $396,963.78 on his family members from March 2008 to September 2015. (AA 17:3352-60.) The district court limited its finding of waste in this category to $72,200. (AA 44:8543.) That amount included (1) $15,000 to his aunt during the pendency of the divorce, (2) two payments of $3,600 to his father during the pendency of the divorce, and (3) a $50,000 gift to his father for a campaign contribution. (AA 44:8547-48.)

These amounts should not be included in a waste calculation because Dennis earned over $47 million during the parties' separation. He did not give the above money to his family to keep the money from Gabrielle. In a marital estate worth over $47 million, $72,200 is quite small. Unlike in *Lofgren* and *Putterman*, Dennis did not have the requisite intent for a finding of waste. The district court's finding of waste in this category is clearly erroneous because there is no evidence that Dennis gave his family members the above money for the purpose of making the value of the community smaller. Further, if Gabrielle was truly concerned with the amount of money Dennis spent on his family, then she should have filed a motion to limit that spending.

iv. *"Potential Community Waste"*

At trial, Gabrielle alleged $3,611,035.84 in "potential community waste." (AA 17:3349-50.) This category does not meet Gabrielle's burden of production or persuasion to set forth a *prima facie* case of dissipation. First, the items included in this calculation are transactions where Dennis could not remember what the expense was for. (AA 17:3247-48.) Gabrielle does not get to go through every transaction and force Dennis to provide an explanation. That type of audit is not feasible and was rejected by the legislature when it amended NRS 125.150(1)(b). The legislature did not want the family court inundated with these types of claims.

Gabrielle relied on an FDF from 2015 to determine Dennis' **allowable** living expenses from March 2008 to November 2015. (AA 17:3247-48.) This does not meet Gabrielle's burden of production or persuasion. In addition, Gabrielle did not provide any evidence of what time period this category should be limited to. Despite Gabrielle's failure to establish a *prima facie* case of dissipation in this category, the district court allowed the burden the shift to Dennis.

The district court limited the time period for this category from 2010 through the date of divorce. (AA 44:8550.) The court then found that Dennis adequately rebutted $1,135,612.92. (AA 44:8550.) It further took off $312,971 in expenses that pre-dated 2010. (AA 44:8551.) The waste number for this category was reduced by the district court to $2,162,451. (AA 44:8551.) Even though

Gabrielle failed to show how this money could be considered waste, the district court wanted Dennis to affirmatively prove with clear and convincing evidence, that he did not waste this money. (AA 44:8552.) This is exactly what this Court did not want to happen in *Cord* and what the legislature wanted to avoid.

During the trial, Dennis testified that he enjoyed cars. (AA 6:1179-80.) Gabrielle even corroborated that Dennis loved luxury cars since the early days of their marriage. (AA 8:1410.) The $466,694.86 in luxury automobile expenses (line 9) cannot be considered waste when Dennis has a love of cars and earned over $47 million during the same six (6) year period he spent $466,694.86 on luxury automobiles. (AA 17:3349-50 & 44:8552.) On the same token, for an estate of this size, insurance of $172,191.52 (line 60), jewelry of $90,017.78 (line 62), legal fees of $38,597.69 (line 64), and shopping of $168,783.96 (line 104), are comparable to the cost of expenses for this large of an estate. (AA 17:3349-50 & 44:8552.) It is reasonable for an estate of this size to spend the above amounts of money on those types of expenses.

Dennis further testified at trial that he travelled internationally extensively during his career. (AA 5:988-89.) He was CEO of the international division of his company. (AA 5:990.) As a result, to get money out of the country he would have to do wire transfers. It is, thus, not unreasonable to have $50,140.15 in wire

transfers (line 122) and cash withdrawals of $259,902.25 over a six (6) year period. (AA 17:3349-50 & 44:8552.) He did earn over $47 million during that time.

The district court also included everyday living expenses in this category. (AA 17:3349-50 & 44:8552.) It included fitness dues of $18,766.46 (line 43), gas of $2,413.46, and groceries of $8,367.32. (AA 17:3349-50 & 44:8552.) It is unknown what type of evidence the district court wanted to rebut these expenses. This is why Anthem's use of Dennis' 2015 FDF should not have been used to determine how much money Dennis was **allowed** to spend on gas, groceries, and fitness. It creates an absurd result where Dennis has to prove that the extra few thousand dollars he spent for gas, groceries, and fitness was allowable and solely used by him. Gabrielle is arguing that, even though he earned over $47 million during their separation, he spent $2,000 too much on gas over that six (6) year period. This is absurd.

The district court also included credit card payments ranging from $164.24 to $24,681.20 for a total of $26,841.57 in credit card payments (lines 24, 25, 28 and 30). (AA 17:3349-50 & 44:8552.) It is unknown how Dennis is supposed to account for credit card payments. During discovery he produced all of the credit card statements available. (AA 10:1829.) How is he supposed to remember what was charged on a specific credit card over a six (6) year period to determine if there was waste. Gabrielle already went through each transaction in each credit

card statement. (AA 36:6707-6906.) These are just the ones left over from her audit. Gabrielle did not want a single penny to go unturned.

The final grouping of expenses includes a loan payment of $2,327.12 (line 67), payments to individuals of $61,799.97 (line 82), and uncategorized of $47,083.31. (AA 17:3349-50 & 44:8552.) Each of these is problematic. Loan payments should never be considered waste because a default on a loan could harm the community. Dennis testified at trial that he did not know what the "payments to individuals category included. (AA 10:1860.) For a man that earned over $47 million during the six (6) years at issue, $61,799.97 is not a large amount to pay individuals for services, especially when he needed to devote his time and energy to his career to earn money for the community.

This Court can attribute the $66,538 that was spent on artwork for Dennis' Wilshire condo as an asset to Dennis.

4. *This Court should reverse the district court's finding of waste in this case.*

A finding that Dennis wasted $2,162,451 of potential community waste is clearly erroneous because it fails to meet the compelling reason standard under NRS 125.150(1)(b). Such a finding is erroneous because Dennis did not have the requisite intent to deprive Gabrielle of her share of the community. While he spent money on a girlfriend, he made significantly more money that actually went to Gabrielle's benefit. This is not a case where Dennis's marital misconduct had an

"adverse economic impact" on Gabrielle's share of the community. In fact, his conduct had the opposite effect to the tune of over $47 million in community property.

C. The district court made an error of law when it awarded $75,650.00 in expert fees to Gabrielle.

The district court may order one party to "pay moneys necessary . . . [t]o enable the other party to carry on or defend" a suit for divorce." NRS 125.040(1)(c); *see Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972). The district court may also award attorney's fees and taxable costs if an offer of judgment is rejected and a more favorable judgment is made. NRS 125.141.(4). Finally, "a reasonable attorney's fee" may be awarded by the district court if "those fees are in issue under the pleadings." NRS 125.150(3). These are the three (3) situations where a district court may award attorney's fees and costs in a divorce.

In this case, the district court did not award attorney's fees or costs under the above three statutes. Instead, it awarded Gabrielle $75,650 in expert witness fees pursuant to NRS 18.005(5) and *Frazier*, 357 P.3d 365. (AA 44:8477.) NRS 18.005(5) does not provide for the recovery of expert witness fees. It only defines how the recovery of that cost is calculated. The recovery of expert witness fees is limited to

> reasonable fees of not more than five expert witnesses in an amount of not more than $1,500.00 for each witness, unless the court allows a larger fee after determining that the circumstance

> surrounding the expert's testimony were of such necessity as to require the larger fee.

NRS 18.005(5). This Court has held a district court's decision to award more than $1,500.00 in expert fees is reviewed for an abuse of discretion. *Gilman v. State Board of Veterinary Medical Exams.,* 120 Nev. 263, 272-73, 89 P.3d 1000, 1006 (disapproved on other grounds by *Nassri v. Chiropractic Physicians Bd.,* 130 Nev. Adv. Op. 27, 327 P.3d 487, 490-91 (2014)).

In *Frazier,* the Nevada Court of Appeals first weighed in on a party's request for expert fees in excess of $1,500.00. 357 P.3d 365. The Court of Appeals reversed the district court's award of expert witness fees in excess of $1,500 because the district court failed to make findings why a larger fee would be reasonable, and why the testimony at issue was of such necessity to require a larger fee. *Id.* at 378. The Court further held that an award of expert fees in excess of $1,500.00

> must be supported by an express, careful, and preferably written explanation of the court's analysis of factors pertinent to determining the fees and whether 'the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.'

Id. at 377.

In evaluating requests for larger expert fee awards, the district court must evaluate the following *Frazier* factors:

(1) Consider the importance of the expert's testimony

to the party's case.

(2) The degree to which the expert's opinion aided the trier of fact in deciding the case.
(3) Whether the expert's reports or testimony were repetitive of other expert witnesses.
(4) The extent and nature of the work performed by the expert.
(5) Whether the expert had to conduct independent investigations or testify.
(6) The amount of time the expert spent in court preparing a report, and preparing for trial.
(7) The expert's area of expertise.
(8) The expert's education training.
(9) The fee actually charged to the party who retained the expert.
(10) The fee traditionally changed by the expert on related matters.
(11) Comparable expert's fees changed in similar cases.

Id. at 377-78.

The following year, the Supreme Court, in *Khoury*, held that an award of expert fees in excess of $1,500 must be supported by written findings of the district court's basis for such an award. 377 P.3d at 95. In *Khoury*, the Court reversed an expert fee award of $42,750 because the district court failed to make written findings based on the *Frazier* factors. *Id.*

In this case, the district court failed to provide any legal basis to award Gabrielle $75,650 in expert witness fees. It did not award those fees under NRS 125.040, NRS 125.141, or NRS 125.150(3). Further, the court specifically found no prevailing party in this case. (AA 44:8506.) While NRS 18.010, NRS 18.020, and NRS 18.050 do not apply to this case, the court did not even cite these statutes

as a basis for the award. Instead, the court based its award on NRS 18.005(5) and Frazier, but failed to properly apply those laws to this case.

In order to receive costs under NRS 18.005(5), the party seeking costs must file a verified memorandum of costs within five (5) days after entry of the judgment. NRS 18.110(1). The court is then only allowed to award $1,500 per expert witness unless it gives written findings based on the *Frazier* factors. NRS 18.005(5); *see Frazier*, 357 P.3d 365.

In this case, Gabrielle never filed a verified memorandum of costs. Instead, she filed a Motion for Attorney's Fees and Costs on September 13, 2016, which is 22 days after the Decree of Divorce was entered in this case. These procedural issues are fatal to any award of costs.

On top of the procedural failings, the district court provided no analysis of any of the eleven (11) enumerated *Frazier* factors and provided no explanation why expert fees in excess of $1,500 were awarded. The district court did not cite any other factors justifying the award. There were no affidavits offering comparable fees in the community or supporting the above, eleven factors. Pursuant to *Frazier,* the district court must have evidence demonstrating "that the costs were reasonable, necessary, and actually incurred," which goes beyond a Memorandum of Costs. 357 P.3d at 378. Here, Gabrielle failed to even file a Memorandum of Costs, no less any affidavits supporting the *Frazier* factors.

The parties do not dispute that all the attorney fees and expert fees were paid with community funds in an estate that exceeded $47 million. The district court arbitrarily awarded Gabrielle $75,650 in expert fees from Dennis' share of the community property. This award was clearly meant to punish Dennis. There was no finding of need under *Sargeant v. Sargeant*, 88 Nev. 223,495 P.2d 618 (1972), because Gabrielle received over $25 million in assets. There was no finding the matter was litigated vexatiously under EDCR 7.60. Rather, the district court arbitrarily awarded $75,650 in fees even though Gabrielle failed to comply with the time limits of NRS 18.110 or provide evidence as required under *Frazier* in support of a larger fee.

The district court's order from the October 18, 2016, hearing does not state a basis for the award other than the fact the total expert fees were $151,300.00 and paid with community funds. Therefore, one-half of the fees were already paid by Dennis. The court is engaging in a "double dip" by making Dennis pay twice; the second time out of his less than half of the community property. The award of expert fees should be reversed or limited to $1,500.00.

D. The district court erred when it awarded sanctions to Gabrielle that paid her twice for the same transaction.

The district court denied Gabrielle's Motion for contempt because Gabrielle failed to comply with the requirements of *Awad v. Wright*, 106 Nev. 407, 794 P.2d 713 (1990) (abrogated on different grounds by *Pengslly v. Rancho Sante Fe*

Homeowners Ass'n, 116 Nev. 646, 5 P.3d 569 (2000)). (AA 44:8505 & 8554.) Gabrielle never produced documents in the record showing Dennis was actually served with the JPI issued in this case. (AA 1:14.)The district court also denied Gabrielle's motion contending Dennis violated the Stipulation and Order of August 10, 2015. (AA 44:8555.)

Even though the court denied Gabrielle's motion, it still sanctioned Dennis $19,500, pursuant to EDCR 7.60, for alleged violations of the JPI. (AA 44:8554.)

The court justified its sanction under EDCR 7.60(b)(1 &5), which states:

> (b) The court may, after notice and an opportunity to be heard, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause.
>
> (1) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously.
>
> (5) Fails or refuses to comply with any order of a judge of the court.

The district court made no findings that Dennis multiplied the proceeds "to increase costs unreasonably or vexatiously." In addition, there are no findings that Dennis failed or refused to comply with an "order by a judge of the court."

In the Eighth Judicial District Court, the clerk of the court issues a form JPI. On May 15, 2014, the clerk issued the following JPI:

> Transferring, encumbering, concealing, selling or otherwise disposing of any of your joint, common or community property of the parties, or any property which

> is the subject of a claim of community interest, except in the usual course of business or for the necessities of life, without the written consent of the parties or the permission of the court.

(AA 1:15-16.)

First, A JPI is not signed by a judge. A party should not be sanctioned under EDCR 7.60 because a violation of a JPI does not violate a specific court order. Further, Gabrielle never served Dennis with the JPI that was issued in this case. The motion that led to the sanction was a motion for contempt, since the district court denied that motion, there is no basis to sanction Dennis. (AA 4:647-706 &44:8554-55.)

The JPI itself provides no penalties or remedies. It is not a clear and unambiguous order. It does not define what ordinary course of business means. Further, Gabrielle filed no motions during the pendency of the divorce to limit Dennis' spending.

The court erred in awarding $19,500.00 in sanctions to Gabrielle when the court acknowledges the following:

> Although those expenditures have been captured in the Anthem Report and included as part of this Court's analysis of community waste, each transaction violated the terms of the JPI.

(AA 44:8556.)

The court's analysis is flawed. Gabrielle was compensated for any expenditure that violated the JPI through the unequal division of community property. (AA 44:8555-56.) NRS 125.150(1)(b), which requires a "compelling reason" for such a division does not allow for the court to further penalize the "wasting spouse." Dennis did not violate the actual terms of the JPI because he was earning and saving millions of dollars at the same time he made the expenditures at issue. Any expenditure made by Dennis were in the ordinary course of **his business and lifestyle.** The community was never financially harmed. Instead, it exponentially increased. While the court concluded there was no wealth exception to the JPI, a party should not be sanctioned because the court only looked at the spending side of the equation, not the earning and investing side.

Since the JPI is not a court order, there was no specific court order violated. Any alleged expenditures in alleged violation of the JPI should be offset by many millions of dollars of money invested for the community benefit. The district court's award of sanctions against Dennis should be reversed.

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XI. CONCLUSION

Based on the foregoing, this Court should reverse the district court's award of alimony, its unequal division of the community property, the award of expert witness fees, and the award of sanctions. This Court should remand this case back to the district court to divide the community property equally between the parties.

DATED this 7 day of April, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32 (a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,983 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellant Procedure.

DATED this 7 day of April, 2017.

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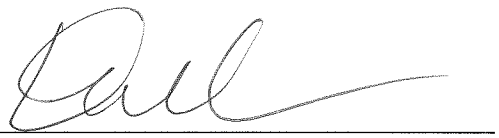

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CERTIFICATE OF SERVICE BY ELECTRONIC FILING

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS, and that on the 7 day of April, 2017, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **APPELLANT'S OPENING BRIEF** on the following:

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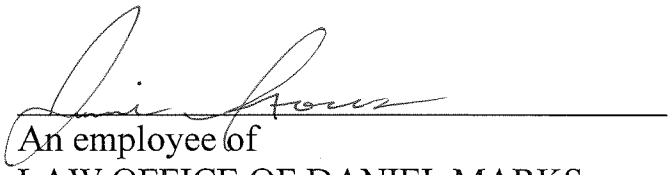

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