IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS KOGOD, Appellant/Cross-Respondent, v. GABRIELLE CIOFFI-KOGOD. Respondent/Cross-Appellant.	S.C. Docket No. 71147 71994 (Dist. Ct. No. D-13-488423-D)

Appeal from the Eighth Judicial District Court

RESPONDENT/CROSS-APPELLANT'S AMENDED ANSWERING BRIEF AND AMENDED OPENING BRIEF ON CROSS-APPEAL

RADFORD J. SMITH, ESQ.
Nevada Bar No. 2791
GARIMA VARSHNEY, ESQ.
Nevada Bar No. 011878
Radford J. Smith, Chartered
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
(702)990-6448
Attorneys for Respondent/Cross Appellant

NRAP 26.1 DISCLOSURE

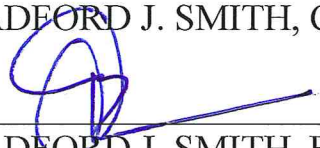
The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 (a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. During the proceedings leading up to this appeal, Respondent/Cross-Appellant has been represented by the following attorneys:

a. Radford J. Smith, Esq., Garima Varshney, Esq. and, Kimberly Medina, Esq., for Radford J. Smith, Chartered, attorney of record for Plaintiff/Respondent/Cross-Appellant.

b. Denise Gentile, Esq., as an attorney in the district court only. Judge Gentile was elected to the Family Division of the Eighth Judicial District Court in November 2014, after which time she withdrew from the representation.

Dated this 17th day of August, 2017.

RADFORD J. SMITH, CHARTERED



RADFORD J. SMITH, ESQ.
Nevada State Bar No. 002791
GARIMA VARSHNEY, ESQ.
Nevada State Bar No. 011878
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
Attorney for Respondent/Cross-Appellant

II.

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

Treatises and Law Journals:

I. JURISDICTIONAL STATEMENT

This is an appeal and cross-appeal from a final order in a divorce action, and a post-trial regarding attorney's fees and costs. The district court entered its Findings of Fact, Conclusions of Law, and Decree on August 22, 2016 ("Decree"), and its Notice of Entry of Order from October 18, 2016 hearing on December 5, 2016. Pursuant to NRAP 4(a)(2), Respondent / Cross Appellant Gabrielle Cioffi-Kogod ("Gabrielle") timely filed her Cross-Appeal on September 21, 2016, and her Cross-Appeal regarding the district court's Order filed December 5, 2016 on December 23, 2016. Gabrielle submits this Respondent's Answering Brief on Appeal and Opening Brief on Cross-Appeal under NRAP 28.1.

II. ROUTING STATEMENT

Under NRAP 17(5), family division matters are presumptively heard by the Court of Appeals. Because this case, however, raises issue of statewide public importance, the Supreme Court of Nevada should hear it. NRAP 17(a)(14).

This case involves an area regularly litigated in divorce actions: the misuse and improper transfer of community property and funds, or "community waste." On appeal, Respondent requests a substantial change to the definition of the "compelling reason" standard for deviation from an equal division of community property under NRS 125.150(1).

The issues raised by the cross appeal regarding "community waste" permit this Court provide needed additional guidance regarding the application of the "compelling reason" standard.

III. STATEMENT OF ISSUES ON CROSS-APPEAL

1. Whether the district court erred in only considering a fraction of the income of Appellant / Cross Respondent Dennis Kogod ("Dennis") earned when the Court determined his obligation of alimony to Gabrielle;

2. Whether the district court erred in finding that the parties' accrual of community property and income ended February 26, 2016, prior to the completion of trial, and before the entry of a Decree of Divorce on August 22, 2016;

3. Whether the district court erred by ordering that a spouse's improper transfer, use or gifting of community funds could only occur after a marriage was "irretrievably broken";

4. Whether the district court erred in failing to cause Dennis to reimburse from his portion of the community property or his post-trial earnings, the normal investment return the community would have earned on money and property that the district court found Dennis transferred or gifted in violation of NRS 123.230;

5. Whether the Court erred by failing to compensate the community for expenditures of community funds for the maintenance, operation, depreciation and use of two yachts Dennis hid through fraudulent concealment during the marriage;

6. Whether the court's calculation of $500 per violation as a sanction for Dennis's 39 violations of the Joint Preliminary Injunction was an abuse of discretion because of Dennis's wealth and income; and,

7. Whether the district court erred in failing to require Dennis to pay from his portion of the community property, or from his post-divorce income, all the attorney's fees Gabrielle incurred during her prosecution of the divorce case.

IV. STATEMENT OF FACTS[1]

Under NRAP 28.1(c)(2), Gabrielle may submit a statement of facts if she is dissatisfied with Dennis' statement. Dennis's statement is incomplete.

1. Marriage and Employment.

The parties married July 21, 1991, and divorced August 22, 2016. AA.44.8474-8587. Gabrielle is a nurse consultant for Dignity Health in Las Vegas. She earns approximately $55,000 per year. AA.44.08563. During marriage, Dennis rose from a manager at a surgical equipment sales company to the President of a multi-billion-dollar corporation, DaVita, Inc., AA.44.08482. His average earnings over the five years preceding trial were $12,629,873.00 per year ($1,057,739.00 per month). AA.44.08562.

---

[1] In the 18 pages of section I of his Decree (AA.44.8478-8496), Judge Duckworth detailed his findings. Those findings are summarized here with citation to the trial record and exhibits supporting the findings.

Both parties received college degrees prior to marriage, but Dennis owned no appreciable property when the parties married. AA.5.933. The parties used a loan from Gabrielle's 401(K) plan to purchase their first home. AA.44.08479. Dennis had been married once before, and had two children, Joshua and Makisha. AA.5.0920. Gabrielle had never been married, and had no children. AA.7.1330. She was a staunch Catholic who did not believe in divorce. AA.8.1567.

After marriage, the parties lived in various locations in the eastern United States (New York, Florida, Pennsylvania, North Carolina) to follow Dennis's career; all their moves were based upon Dennis gaining new positions at work. AA.5.934, AA.5.936, AA.5.942. Though Dennis argues on appeal that Gabrielle "pursued her career," (AOB p.2) after each move, Gabrielle had to change jobs. AA.5.936, AA.5.942-943. The parties jointly agreed to follow Dennis's career path. AA.5. 962. Gabrielle's career path was defined by whatever job she could get in the places Dennis needed to move to. AA.45.08480; AA.45.08482.

Dennis claims upon appeal that and Gabrielle lived "separate lives" throughout their marriage. AOB p.2. That claim is not supported by the record. For the first fourteen years of their marriage they lived together in various homes in the locations where Dennis worked. AA.5.934-942. Their only separation during those 14 years was due to Dennis traveling to advance his career.

Dennis's traveling for work was the norm throughout the parties' marriage. He worked in the mid-90s as a Vice President at Pilling, a medical product sales company, and travelled on average 2 to 3 days per week. AA.5.947. After a job change in 1996, travel increased to domestic trips of three to five days, and international trips from 7 to 14 days. AA.5.952. Despite that travel, the district court found that the parties' marriage remained "relatively harmonious." AA.44.08480. Traveling for work is not leading "separate lives."

Dennis's career was marked with growth in knowledge, marketing, contractual negotiation, understanding of the market and establishing vital business relationships. AA.5.929-990. It was one of those relationships that led to a significant move in his career. AA.5.976-977.

In 2000, Dennis, through a business contact, took a position with Gambro, Inc. ("Gambro) in its regional office located in southern California. AA.5.962-963; AA.5.968. Gambro's primary business was dialysis services. AA.5.965. Gambro's business was yet another opportunity for Dennis to learn more in his field; his previous employer Teleflex was product based, Gambro was service based. AA.5.968–970.

Again, based upon Dennis's change in position, the parties moved. In 2000, they purchased a home in California. AA.5.972. They then sold that home, and

purchased a larger home in the same community. AA.5.973. Dennis continued to travel 3 to 5 days per week at Gambro. AA.5.979.

In 2003, Dennis suddenly advised Gabrielle that he wanted to move to the Lake at Las Vegas community in Nevada. AA.5.0973. Gabrielle was surprised by the request because they had just finished extensively remodeling and furnishing their second California home. AA.7.1324. Dennis researched a home at Lake at Las Vegas and encouraged Gabrielle to move there. AA.5.974. Dennis represented to Gabrielle that they would retire there. AA.7.1380.

In December 2003, the parties sold their California home, and moved to a home they purchased at Lake at Las Vegas. AA.7.1301. Through 2010 (the first 19 years of the parties' marriage) Dennis spent much of his time travelling away from Las Vegas, but would spend most of his weekends in Las Vegas. AA.5.979.

Gabrielle was again required to change jobs. AA.7.1339. She took a position as a nurse consultant with Dignity Health, and remained in that position through and after trial. AA.44.08563. Gabrielle remained in the Lake at Las Vegas home through trial as well.

In 2004, Dennis's took a more senior position at Gambro. AA.5.977. In October 2005, DaVita, Inc. (DaVita) a large purveyor of dialysis services, acquired Gambro. DaVita retained Dennis as senior management after the takeover.

AA.5.977. His job at DaVita required the same travel as his position at Gambro. AA.5.986. His office remained in California. AA.5.987.

Throughout the marriage, Dennis obtained relatively broad-based experience in medical sales and marketing. AA.5.929-990. He acknowledged that his employment experience played a key role in "getting me to DaVita." AA.5.1016. He testified that his ability to remain with DaVita was something he "earned" through hard work and "getting results." AA.5.1017. In other words, his advancement at DaVita was due to his labor during the time of the parties' marriage.

Effective January 1, 2009, Dennis became Chief Operating Officer at DaVita. In 2010 Dennis' earnings were $2,485,526, and in 2011, $15,512,261. A.A.44.08561; AA.5.1011. In late 2010, DaVita opened an international division. AA.5.988. Dennis began to travel extensively to Europe and overseas markets. AA.5.952.

Dennis's management position provided him participation in bonus programs through DaVita. AA.5.1011. His base income at DaVita for the years 2011 through 2015 averaged $800,000. AA.44.08564. His bonus income, however, caused his average income from 2011 through 2015 to be $13,975,268.90. AA.44.08564. On January 1, 2015, Dennis became President of Health Care Partners and the CEO of DaVita's International Division. His 2015 income was $10,132,746.52. AA.44.8562.

2. The Basis for the Court's Unequal Division of Property

In November 2004, Dennis met and began an affair with Nadya Khapsalis ("Nadya") (a/k/a Nadya Khapsalis Kogod, Nadejda, and Nadine Kievsky), a restaurant hostess born in the Ukraine living in the United States on a work visa. AA.6.1046.

In June 2005, he and Nadya engaged in a "wedding ceremony" in Mexico, after which Dennis decided to reveal to Nadya that he was already married. AA.6.1050. Undeterred by that detail, Nadya moved with Dennis into a condominium in Los Angeles, California that Dennis purchased without Gabrielle's knowledge or consent. AA.6.1052. Khapsalis did not own any assets of material value when she moved in with Dennis. AA.44.08490-08492.

After they began residing together in June 2005, and through the time of trial, Nadya did not have gainful employment, and did not contribute to any expenses. AA.44.08490-08492. Dennis paid for all her expenses including food, clothing (shopping at various stores), cars (a Porsche, Cadillac, a Mercedes, and finally, during the divorce action, a 2015 Bentley GTC), a maid, spa services, a nanny, and cash for her expenses. AA.44.08490-08492. She initially used one of Dennis's credit cards to pay her expenses and later Dennis provided her debit and credit cards through Wells Fargo, and paid for her expenditures on those cards. AA.44.08490. He paid for her to take college classes, and for an investment in Moe, LLC, about

which she testified ("he was trying to help me to get in the business with those people, and it didn't work"). AA.44.08490. He paid her dental and medical expenses (including cosmetic surgery), provided money to her to send her family in the Ukraine, and all travel expenses for trips to Las Vegas, San Francisco, New York, Arizona, Paris, Amsterdam, Portugal, Laguna Beach, Palm Springs, Newport Beach and San Diego. AA.44.08491. Dennis also provided her money for shopping on the trips. AA.6.1061-1119. Dennis's spending on Nadya and his children with her was the largest component of Gabrielle's community waste analysis, and the district court's award.[2]

Dennis actively hid his relationship with Nadya from Gabrielle, and continued to return on weekends to the Las Vegas home. AA.6.1119. During the first few years of his relationship with Nadya, Dennis told Gabrielle that he was required to live in California, that his firm was providing a condominium for him, and that his adult son from a previous marriage was living with him; none of that was true. AA.6.1052-1066. Dennis admitted that he deliberately misrepresented to Gabrielle that the Los Angeles condominium he purchased was owned by another person in Dennis's company. AA.6.1052.

---

[2] Dennis later had a second mistress, Jennifer Steiner, who was part of the district court's waste analysis, but his spending on that affair was small compared to the millions he spent on Nadya and his children. (AA.44.08542)

For years Dennis represented to Gabrielle that he was traveling extensively, and could not come more frequently to their Nevada home. AA.7.01318-01385. He discouraged her from coming to California. AA.8.1406. During that period, Dennis paid for and participated with Nadya in a few in-vitro fertilization. AA.6.1059. Even when Dennis was undergoing in-vitro fertilization with Nadya, he was continuing to come home to Gabrielle. AA.6.1062. Nadya gave birth to twin daughters Denise and Nika on December 28, 2007. AA.5.920. In 2010, Dennis moved Nadya and the children into a home on Edinburgh Ave. in California that he purchased without Gabrielle's knowledge or consent. AA.6.1090-1091. Predictably, Dennis did not reveal any of these facts to Gabrielle. AA.7.1397.

Dennis continued to travel on weekends to Las Vegas through 2010. AA.6.1055. Dennis's claim on appeal that they were not emotionally intimate (AOB p.3) is not supported by the record. Dennis testified that prior to July 1, 2010, he and Gabrielle spoke every day, and on some days, he called her multiple times. AA.6.1080-1081. [3]

---

[3] Dennis's arguments about the quality of the parties' marriage are both misleading and, as discussed below, irrelevant to any factor relevant to the financial issues presented to the district court.

3. While Misleading Gabrielle about their Marriage, Dennis Hid his Income, Real Estate Purchases, and Millions of Dollars of Expenditures from Gabrielle

While she thought Dennis was away from the home working hard to save for their retirement, Gabrielle maintained the expenses for the Nevada home out of a checking account at Merrill Lynch/Bank of America where she and Dennis deposited his paychecks. AA.7.1351; AA.7.1380. The parties had another account at Bank of America that Gabrielle understood was a trust account that held their retirement savings, but she did not look at those statements. AA.7.1352. Instead, she placed them unopened in Dennis's office in their Las Vegas home, and he reviewed them on weekends when he was there. AA.7.1352.

In July 2010, Gabrielle received a notice from the Clark County Family Court regarding Dennis' filing for divorce through his attorney, James J. Jimmerson, Esq. AA.7.1356. Gabrielle confronted Dennis; and at first he tried to mislead her. AA.7.1358; AA.6.1085. Three days later, Dennis wrote to Gabrielle:

> First of all I am not ready to throw in the towel. Despite the fact that my behavior last week has been despicable in every way, totally selfish, I am not ready to give up, where are you?
>
> I don't know what happened to us over the years. We drifted apart, I drifted more than you, and yes, you hung in there and gave me everything I wanted, never really complained about how much time I spent traveling/working, etc. you gave me your support and were always there for me, I did not do the same for you, I put too many things in front of our marriage.
>
> In most ways, you were the perfect wife.

> ... Sending you a letter instead of talking to you. A chicken approach, but it kills me that we are not talking.
>
> ... If you believe one thing I am telling you, please know I never intended to hurt you the way I am hurting you now. I do love you, have always loved you and always will. Somewhere along the line I lost the ability to show you in any way at all. And I felt so self-conscious about that, it was easier to stay away...

AA.6.1084; AA.15.2963-3040. Dennis dismissed the Nevada divorce action. AA.6.1086.

Dennis argues that Gabrielle consulted with legal counsel after July 2010 to find out her rights. AOB p.5. Gabrielle only discussed her case with her friends who happened to be attorneys. AA.8.1509. She did not consult with divorce counsel until she retained Ms. Denise Gentile, Esq., three years later. AA.8.1509. Gabrielle did not, as Dennis suggests on appeal, stay in a marriage with Dennis for his income. After 2010, little of the parties' communication addressed money. Most of it addressed Gabrielle's desire to fix her marriage. AA.14.2629-2813; AA.15.2814-3061.

The evidence demonstrated it was Dennis, not Gabrielle, who stayed married for money. Dennis testified that he did not divorce Gabrielle in 2010 because he was afraid that she would go to DaVita. AA.6.1051. He admitted that he had misled DaVita personnel by claiming that his children with Nadya were his grandchildren. AA.6.1078.

Thus, to protect his position at DaVita and the enormous sums he earned after 2010 (an average of over $1,000,000 per month), Dennis engaged in an elaborate hoax. He deceived Gabrielle by making her believe that he wanted to work on the marriage. AA.6.1087. He invented a scheme of excuses to justify his behavior and his not coming back to Nevada. He told her something was wrong with him that he needed to "fix." AA.6.1087; AA.15.2963-3040. He claimed that he had "questions about his sexuality," and that he was gay. AA 8:1447; AA 8:1519; AA 7:1361-1365. He told Gabrielle that he suffered from Asperger's syndrome. AA 8:1444; AA 8:1515; AA 8:1521; AA 8:1560; AA 7:1364-1365; AA 7:1384. He told Gabrielle that he was bipolar. AA 8:1560; AA 7:1387; AA 7:1329; AA 7:1340-1344. He blamed their lack of intimacy on medication for his bipolar condition. AA.8.1046. He told Gabrielle that he was drinking excessively. AA 8:1560; AA.8.1365-1366; AA.8.1386-1394. He called Gabrielle and claimed he was in a treatment program in Oregon (he was not) to deal with his numerous issues. AA.6.1123; AA 8:1408; AA 8:2963-3040.

Gabrielle's response to Dennis' "coming clean" was only that she wanted both Dennis and her to make decisions together. AA.15.2963-3040. Gabrielle testified that after she received the divorce pleadings in 2010, she opened the Trust account statements (Bank of America 6446). AA.7.1352. Though she thought the account was only for retirement savings, she learned that Dennis was spending money from

that account. AA.8.1447. When Gabrielle noticed expenses related to the Edinburg home and questioned Dennis about them, Dennis claimed he had invested in the home with the "Russian mafia." AA.6.1091. When Gabrielle saw payments on the to "Nadine Kievski," (who turned out to be Nadya), Dennis told her that "Kievski" was associated with individual who Dennis had partnered with to buy the Edinburgh home. AA.6.1090. Gabrielle saw a bill associated with a Mercedes and she asked Dennis about it. He claimed that his parents were driving the Mercedes, but the truth was that Nadya was driving it. AA.6.1095.

After Gabrielle questioned his expenditures from the 6446 account, Dennis opened accounts at UBS in his sole name. Dennis testified that he hid those accounts from Gabrielle because he did not want her to know that he was spending money on Nadya. AA.5.1011-1013. Dennis continued to deposit his paycheck's in the joint account, but directed tens of millions in bonus income to the undisclosed UBS accounts. AA.5.1011. Dennis began spending money wildly on his lifestyle with Nadya out of those accounts without Gabrielle's knowledge or consent. AA.44.0847, FN26.

Dennis purchased real estate with community funds without Gabrielle's knowledge or consent. In early 2010, Gabrielle received a notice in the mail from Bank of America regarding Dennis trying to change the mailing address for the bank's statements to a condominium in Colorado. AA.7.1393. When she confronted

him about the Colorado residence he claimed the owner was another Dennis Kogod, not him. AA.7.01394. Dennis's statement was false. Dennis purchased and sold the condominium in Colorado. AA.7.1393

Dennis moved his parents, his brother and his brother's family to California from Florida. AA.10.1852. He purchased condominiums for them in Los Angeles. AA.10.1852. In June 2013, Dennis sold the Edinburgh home and purchased for $5,100,000 a mansion Beverly Hills, California (the Oak Pass house) in which he and Nadya resided with their children. AA.44.08492.

Further, Dennis spent community funds indiscriminately from his secret accounts at UBS. In 2012, he purchased a yacht that he harbored in Marina Del Ray, California at great expense. He later sold that yacht and purchased another. AA.44.08542. He spent approximately $626,658 maintaining those yachts. AA.44.08542.

To hide his spending, Dennis placed real property, yachts and other assets into a trust, naming his father as trustee. AA.44.08491 FN26. In his deposition in 2015, his father testified that he knew nothing about the trust. AA.29.05614-05615.

Dennis argues that Gabrielle did not have any limits to her spending after 2010. AOB p.4. In reality, Gabrielle used her income and money to pay the expenses associated with the parties' Lake at Las Vegas home. AA.7.1310-1351. Dennis benefitted from all the payments, upkeep and maintenance of the home when

the parties sold it in 2016 and he received and equal portion of the sales proceeds. AA.8.1477. Gabrielle did not know about Dennis's lifestyle of exotic cars, houses, maintenance of a mistress and children, yachts, private jet travel, etc. Gabrielle's view of spending was best characterized by her text in October 2011 asking Dennis if she could give away an old washer. AA.8.1409. Dennis never had to question her spending.

Dennis misled Gabrielle about their marriage for years. In 2011 and 2012, the parties attended counseling with Michelle Gravely, Ph.D. in Las Vegas. AA.6.1102. Gabrielle dutifully and faithfully waited for Dennis to again spend more time with her, and she wanted counseling to save their marriage. AA.8.1411. Even when Dennis claimed various ailments that kept him from coming back to Las Vegas, Gabrielle was supportive. AA.6.1102-1108.

Dennis testified that he wanted Gabrielle to attend marriage counseling because he wanted it to prompt her to seek divorce. AA.6.1109. Yet, in his emails to Gabrielle, Dennis professed his love for her and assured her that he wanted to do everything he could to repair their relationship by having the counselor set goals for their progress. AA.6.1109-1117; AA.15.3049-3061. The parties continued that counseling until March 2012. AA.8.1538. Until approximately August 2013, Dennis continued to tell Gabrielle that he loved her. AA.6.1101.

In late 2013, Gabrielle received a second notice from Bank of America regarding Dennis' attempts to change the mailing address for the bank's statements, this time to the Oak Pass residence. AA.7.1394. Around that same time, she inadvertently learned about the trust that Dennis had set up to hide assets. AA.7.1396. Gabrielle filed for divorce on December 13, 2013, and served Dennis with the Complaint for Divorce and Joint Preliminary Injunction ("JPI") on April 24, 2014.

Dennis claims that he did not file an Answer until November 24, 2014 because the parties were negotiating. (AOB p.2), but in truth he continued to deceive her. While Dennis was "negotiating" with Gabrielle, he never informed her of his relationship with Nadya, or his children with her. AA.8.1532. in September 2014, someone alerted Gabrielle to an online video in which during a speech at a DaVita Shareholder's meeting, Dennis commented about the challenges of "raising small children." AA.8.1532. Gabrielle pushed the divorce action forward.

V. A SUMMARY OF THE ARGUMENT

A. Alimony: A district court may order alimony in a long-term marriage to greater equalize large gaps in post-divorce income, and maintain the recipient spouse's history of savings, even where the recipient spouse does not demonstrate "need." A district court may exercise its discretion to award lump sum alimony in cases that do not involve an ill payor and younger recipient, and the district court

properly exercised its discretion based upon Dennis's history of failing to follow the court's orders.

B. Unequal Division of Property: Unauthorized gifting of community property to a mistress and children with her during marriage is a compelling reason for an unequal division of community property. Such gifting or transfer is prohibited under Nevada law. That prohibition is not affected by the amount of the offending spouse's income, is not contingent on the quality of the marriage, and is not limited to when the marriage is "irretrievably broken." Once a spouse shows a *prima facie* case of improper gifting, destruction or transfer of community property or funds, the offending spouse has a duty to account and show by clear and convincing evidence that the use of the property or funds was for a community purpose. Supporting mistresses and illegitimate children is not a community purpose.

C. Sanctions and Attorney's Fees: The district court erred by not ordering Dennis to reimburse Gabrielle for attorney's fees she incurred to provide an accounting of Dennis's improper gifting, transfer and loss of community property and income. A district court may base sanctions under EDCR 7.60 upon a parties' violation of a JPI, and properly did so in this case. The district court's sanctions of $500 for each of Dennis's **39** violations of its Joint Preliminary Injunction, however, was clearly erroneous, and not supported by substantial evidence in light of Dennis's

income of approximately $1,000,000 per month, and improper transfers of approximately $1,400,000.

D. Lost Opportunity Cost: Further, where a party has hidden purchases of community property and use of community income, and converted that property and income for his sole use, it is error not to reimburse the community for all losses associated with the improper transfers or use, including maintenance costs associated with the purchased asset, and the loss of interest income on the property or income converted or used.

VI. ARGUMENT REGARDING ALIMONY

1. The District Court's Grant of Lump Sum Alimony to Greater Equalize the Post Divorce Earnings of the Parties is Supported By Nevada Law and Substantial Evidence

The district court awarded Gabrielle $1,630,292 lump sum alimony based upon a present value calculation of a periodic alimony of $18,000 per month for nine years. AA.44.08569. The district court found that Dennis's average annual income from 2011 to 2015 was $13,975,268.90 per year, but it limited its calculation alimony to Dennis's base salary, $800,000 per year.

To put the Court's award into perspective, at the time of trial, Dennis's average income was 252 times Gabrielle's 2015 earnings of $55,491.60. During the five previous years, Dennis earned the entirety of Gabrielle's yearly earnings

every 34.78 hours, and the amount necessary to satisfy the Court's alimony award in 43 days.

Dennis argues that the district court erred when it granted Gabrielle ***any*** alimony. Though Dennis's argument spans 14 pages (AOB 12-26), it repeats versions of three basic arguments. Dennis contends:

a. Under Nevada law, a court cannot award alimony to a spouse that does not have financial need, and Gabrielle does not have financial need;

b. The district court erred by utilizing an economic loss theory of alimony that has not been adopted in Nevada; and,

c. District courts in Nevada can only award lump sum alimony when the payor is ill, or there is a large gap in age, and the recipient will not likely be able to realize the benefit of periodic payments. Thus, the district court erred when it awarded alimony under the facts of this case.

A review of Nevada statutes and precedent reveals that Dennis is wrong on all counts.

a. A Nevada District Court May Award Alimony After a Long-Term Marriage to Greater Equalize the Post-Divorce Earnings of the Parties

A Nevada district court's right to grant alimony is defined in NRS 125.150. NRS 125.150(1) states that in granting a divorce, the court "[m]ay award such alimony to the wife or to the husband, in a specified principal sum or as specified

periodic payments, as appears just and equitable." NRS 125.150(5) reads in pertinent part:

> In granting a divorce, the court may also set apart such portion of the husband's separate property for the wife's support [. . .] as is deemed just and equitable.

The appellate court will not interfere with the trial judge's disposition of an alimony award unless it appears on the entire record in the case that the discretion of the trial judge has been abused. *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-919 (1996). The appellate court's rationale for not substituting its own judgment for that of the district court, absent an abuse of discretion, is that the district court has a better opportunity to observe parties and evaluate the situation. *Id.* An award of alimony based upon substantial evidence will not be disturbed on appeal. *Shydler v. Shydler,* 114 Nev. 192, 196, 954 P.2d 37, 39 (1998).

Under NRS 125.150(9), the district court must consider certain statutory guidelines when entering its order, and must make written findings regarding those guidelines. The guidelines provide no direction as to the relative weight to be applied to each. The district court made extensive written findings regarding each of the guidelines. AA.44.08556-08569. It focused its review and decision on the vast difference in the income and earning capacities of the parties. AA.44.08556-08569.

Dennis does not challenge the district court's findings supporting its award of alimony. The findings regarding the parties' relative income and earning capacities were based primarily on historical earning information in the parties' tax returns and the Form 10-K disclosures of DaVita, all of which were introduced into evidence at trial. AA.19.3732-3807-AA.23.4433-4526. Instead, Dennis argues that this Court should read Nevada statutes and precedent as prohibiting a district court granting alimony to any spouse that has enough property to meet her needs, even if the divorce leaves the parties with grossly disproportionate earning capacities. Dennis's argument fails because Nevada law does not contain that prohibition.

Noticeably absent from the NRS 125.150(9) factors is the criteria of "need." That absence is significant. There is no common law of alimony, it is "wholly a creature of statute." *Rodriguez v. Rodriquez,* 116 Nev. 993, 998, 13 P.3d 415, 418 (2000). Other states have specifically included the concept of need in their statutory factors for an award of alimony. *See, e.g.,* Illinois, 750 Ill. Comp. Stat. Ann. 5/504, listing "the needs of each party"; Pennsylvania 23 Pa. Cons. Stat. Ann. § 3701, listing "the relative needs of the parties." Nevada has not included "need" as a factor. Nevada's law contains no prohibition on an award based upon any of the factors contained in its list of guidelines, including the earning capacity of the parties.

In *Gardner v. Gardner,* 110 Nev. 1053, 881 P.2d 645 (1994), the court found that alimony in a long-term marriage was not contingent on a showing of need, but instead could be based upon a spouse's long-term commitment to the career of the other spouse, and unequal earning capacities. In *Gardner,* the parties had been married for 27 years at the time of divorce. The wife had worked while the husband received his education during which he obtained two degrees. The husband received military training as a pilot during the marriage, and then went to work for an airline as a commercial airline pilot. The wife worked as a teacher during the marriage, and at the time of divorce she was earning $43,000.00 per year. During the marriage, the wife followed the husband when he moved to advance his career. At the time of divorce, he was earning $75,000.00 per year. *Id.* at 1055, 881 P.2d at 646.

The district court awarded the wife alimony for two years, $1300.00 per month in the first year, and $1,000.00 per month in the second year to achieve "parity" in the two incomes by permitting the wife to pursue additional education. Both parties appealed the findings. *Id.* at 1056, 881 P.2d at 647.

Upon appeal, the husband argued that the court had abused its discretion in equalizing the incomes of the parties by the support, and that the wife was "tenured and comfortable" in her career, and did not "need" his support. *Id.* at 1057, 881 P.2d at 648. The wife sought a longer period of support due to the parties' disparate

earning capacities (she earned $43,000, and her husband $75,000), her support of her husband's career, and the sacrifices to her career. *Id.* The *Gardner* court rejected the husband's "need" argument, and ordered that the alimony would remain at $1000.00 per month for an additional ten years beyond the district court's order. *Id.* at 1059, 881 P.2d at 650.

At the center of the *Gardner* court's decision was its distinction between the concept of rehabilitative alimony and equitable alimony. The *Gardner* court observed that the alimony awarded by the district court was designed to provide additional education to the wife to bring her closer to economic parity. *Id.* at 1057-1058, 881 P.2d at 647-648. The court observed, however, that such support was "in addition" to equitable support, and thus did not address the economic disparity that had been brought about by the wife's subordination of her career to that of her husband. *Id.*

In *Shydler v. Shydler,* 114 Nev. 192, 954 P.2d 37 (1998), the Nevada Supreme court continued its focus on the divergent incomes and earning capacities of the parties as a basis for alimony. In *Shydler,* the husband built a business during the parties 17-year marriage that paid him a salary of approximately $100,000 per year; the evidence showed that the wife could earn between $25,000 to $59,000 per year. The district court denied the wife's alimony request based, in part, upon her receipt post-divorce periodic payments of property equalization, and the fact that the wife

would have access to "other substantial assets awarded to her in the division of community property." 114 Nev. at 197, 954 P.2d at 40 The appellate court reversed and remanded.

In its analysis, the *Shydler* court recognized that under Nevada law, a party is entitled to a division of property as a matter of right. *Id.* By contrast it held:

> Alimony is an equitable award serving to meet the post-divorce needs ***and*** rights of the former spouse. It follows from our decisions in this area that two of the primary purposes of alimony, at least in marriages of significant length, are to narrow any large gaps between the post-divorce earning capacities of the parties, ***and*** to allow the recipient spouse to live as nearly as fairly possible to the station in life enjoyed before the divorce.

Id. at 198, 954 P.2d at 40 [citations omitted; emphasis supplied]. The court did not pose those goals as mutually exclusive; it presented them, using the conjunction "and," as equally important purposes of alimony.

Here, Dennis's arguments mirror the arguments rejected in *Gardner* and *Shydler.* Dennis argues that even though the parties gap in post-divorce income is approximately $1,000,000 per ***month***, he should not pay alimony because the income from, or use of, Gabrielle's property is sufficient to meet her "needs." The district courts in both *Gardner* and *Shydler* held that the wife in those cases did not need alimony, and in *Shydler* the district court found that the wife support her lifestyle through property equalization payment, but the Nevada Supreme Court reversed. In both instances, the appellate court focused on the significant difference

in income capacity that was based upon education, skill, or business acumen gained during marriage. While Dennis has focused his argument on "need," the Nevada Supreme Court defined alimony as an "equitable award serving to meet the post-divorce needs and **rights** of a former spouse." *Shydler,* 114 Nev. at 198, 954 P.2d at 40. [emphasis supplied]. It defined those rights as maintenance of lifestyle, and narrowing large gaps in earning capacities. Here, the district court's order was grounded in those principles, and supported by Nevada precedent.

b. The District Court did not Adopt a New Theory of Alimony, but Instead Based its Decision on the Factors Identified by Nevada Statute and Precedent.

The focus of the equitable alimony in *Gardner* and *Shydler* can be fairly characterized as a return on a spouse's investment into the career and earning capacity of the higher earning spouse. The Nevada Supreme Court's recognition of that principle places it firmly in the camp of the contract theorists of alimony:

> [Alimony] is a method of repaying the wife (in the traditional marriage) her share of the marital partnership's assets. Often the principal asset to which the wife will have contributed by her labor in the household or in the market ... [such as when a wife supports her husband while he is in graduate school] is the husband's earning capacity. This is an asset against which it is difficult to borrow [...]. So it might be infeasible for the husband to raise the money necessary to buy back from the wife, in a lump sum, as much of the asset as she can fairly claim is hers by virtue of her contributions; instead he must pay her over time out of the stream of earnings that the asset generates.

Richard A. Posner, *Economic Analysis of the Law,* 151 (7th Ed. 2007).

The economic theory ostensibly espoused in the *Shydler* and *Gardner* decisions is in direct contrast to the "needs" based alimony decisions that preceded them. Judge David Hardy's analysis of those "need based" decisions, which he numbers at 28 spanning 114 years, ends with his conclusion that the prior decisions are of "little contemporary value because none explain why one spouse must support a former spouse after the marriage has ended." *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose,* 9 Nev. L.J. 325, 339-340. (Winter 2009). Judge Hardy presents an analysis of several economic theories supporting a grant of alimony, one of which mirrors the holdings in *Shydler* and *Gardner* and the facts of this case.

> Marriages of long duration are particularly susceptible to alimony because of lost economic opportunities. The "reliance theory" rationale is grounded in economic loss, but expanded by the passage of time. Spouses make certain investments and decisions in reliance upon the continuation of marriage. They make decisions they would not otherwise make if they were unmarried. The longer the marriage, the greater the spouses rely upon the continuation of marriage - with its attendant economic benefits. The longer a spouse relies upon marriage, the greater her risks of economic injustice upon divorce. As explained by two scholars:
>
> First, the longer the marriage, the more likely the parties are to have foregone opportunities to enter into other favorable marriages. Second, in cases where career sacrifices are involved, the longer the marriage, the less likely the sacrificing spouse will be able to resume the interrupted career. Third, the longer the marriage and the greater the disparity in income, the more likely an increase in earning capacity occurred during the marriage, due (at least to some degree) to the contributions of the supporting spouse.

Hardy, 9 Nev. L.J. 325, 331-332 (citations omitted). In his analysis, Judge Hardy does not promote economic theory as a purely academic exercise – he identifies that in various decisions, including *Gardner* and *Shydler,* the Nevada Supreme Court has adopted the principles of modern economic approaches to alimony. 9 Nev. L.J. 341-342,. Judge Hardy's article ends with a call to the legislature and courts for a more defined framework for alimony.

Though the Nevada legislature has not heeded Judge Hardy's request for guidance, Nevada appellate courts continue to cite *Shydler,* and its holding that one of the two purposes of alimony in a lengthy marriage is to "narrow any large gaps between the post-divorce earning capacities of the parties." *See, e.g., Devries v. Gallio,* 128 Nev. Adv. Rep. 63, 290 P.3d 260, 264 (2012).

Modern theorists for reform of alimony laws have argued for guidelines to grant more consistency, fairness and predictability in alimony awards. While the proposals are divergent, all contain a move away from needs based alimony awards to the recognition of marriage as an economic partnership, and include a formula to calculate alimony based primarily upon the divergent earning capacities of the parties. For example, the American Law Institute (ALI) proposed guidelines for alimony are generally based upon the application of a percentage, driven by the length of marriage, applied to the difference in earning capacity of the parties at divorce. *See,* Principles of the Law of Family Dissolution: Analysis and

Recommendations ch. 5, at 874-1009 (Am. Law Inst. 2002); *see also* analysis of the ALI's proposal in Cynthia Lee Starnes, *The Marriage Buyout: The Troubled Trajectory of U.S. Alimony Law*, New York University Press, p. 142-151 (2014) [4]

In 2007, the American Academy of Matrimonial Lawyers (AAML) proposed guidelines based approach that was also based upon a percentage of the disparity in the parties' earning capacity, *See,* Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. Am. Acad. Matrim. Law. 61, 78-81 (2008). Further, numerous commentators have offered their own suggestions for reform that begin with consideration of the ALI or AAML guidelines. *See,* Marshal Willick, *A Universal Approach to Alimony: How Alimony Should be Calculated and Why,* 27 Am. Acad. Matrim. Law 147 (2014)[5], Jill C. Engle, *Promoting the General Welfare: Legal Reform to Lift Women and Children in the United States Out of Poverty,* 16 J. Gender Race & Just. 1, 39-

---

[4] Professor Starnes criticizes the "economic loss" language the ALI applies to the outline of its approach. She notes that language of "loss" places spouses, usually women, in the roles of hapless victims who are entitled to compensation for the role they play in marriage, include the raising of children and subjugating their own careers to those of their spouses: "Cast as casualties of marriage, caregivers may deserve pity and even compensation, but they are denied the status of equal partners and full stakeholders in marriage entitled to dignity and a share of marital gain." *See also,* Starnes, Victims, Breeders, Joy, and Math: First Thoughts on Compensatory Spousal Payments Under the Principles, 8 Duke J. Gender L. & Pol'y 137 (2011).

[5] Mr. Willick's article, at pages 183-198, offers detailed explanations of the ALI and AAML guidelines.

43 (2013) Alicia B. Kelly, *Sharing Inequality*, 2013 Mich. St. L. Rev. 967, 973 (2013), Starnes, *The Marriage Buyout*, 149-168.

Nevada has not adopted a formula approach to alimony, and the district court did not use one here. While it cited Judge Hardy's article in its Decree, it did not adopt a new theory of alimony. Instead, it followed the Nevada Supreme Court's stated goal of alimony to narrow the enormous gap in the parties' incomes. Even if this Court were to view the district court's actions as adopting an economic model, that model is consistent with Nevada appellate precedent, and supported by a growing call for a more definite statement of the purpose of alimony.

Moreover, the district court's award was both just and equitable. Under Nevada law, married parties are both fiduciaries and partners. *See, Cook v. Cook,* 112 Nev. 179, 912 P.2d 264 (1996), *Waldman v. Waldman*, 97 Nev. 546, 635 P.2d 289 (1981). NRS 123.230 imposes a series of restrictions on the use of the parties' community property that are consistent with the duties of business partners, and apply regardless of who controls the property. Gabrielle's role in the partnership was to remain faithful, supportive, available, and to move when Dennis required it. Even through Dennis's mountain of deception, neglect, and fraud, Gabrielle attended counseling to save their marriage, remained faithful, and did nothing to violate their marriage partnership. Dennis's role in the partnership was to focus on his career.

> The ideal to which marriage aspires is that of equal partnerships between spouses who share resources, responsibilities, and risks, and thus perhaps some limited duty to sacrifice. This norm encourages commitments between spouses, promotes gender equality, and supports the privatized care of children and elderly dependents. [. . .] The most powerful support for a partnership model thus lies in its egalitarian principles of mutual contribution, reciprocal responsibility, and shared fate – principles that infuse family norms if not all family realities.

Starnes, The Marriage Buyout. at 149.

c. The District Court's Award of Alimony in Lump Sum was Within its Discretion, and was Supported by Substantial Evidence

The district court found that a lump sum alimony was appropriate to "disentangle the parties." AA.44.8569. The parties had spent years and hundreds of thousands of dollars litigating. Dennis had a history of failure to comply with court orders (evidenced by the district court's findings that he had violated the JPI 39 times.) AA.44.08556. Based upon his historical income, Dennis would earn the amount of the lump sum award in approximately 43 days. The amount was a small percentage of Dennis's separate assets, and easily paid without years of Gabrielle chasing him.

Further, the underlying award was extremely favorable to Dennis. The district court ignored Dennis's historical earnings, and instead based its order solely upon his base salary. The court ignored both Dennis's and Gabrielle's potential earnings from their award of property. The district court's order of $18,000 per month, discounted by a four percent annual return, yielded a monthly net of

$15,095.23, an amount that with Gabrielle's employment income would necessarily to meet her annual expenses of $240,000. AA.44.08569. The nine-year metric for alimony was reasonable considering Dennis's age, Gabrielle's age, and the length of marriage, 25 years.

Contrary to Dennis's contention on appeal, Nevada statute does not limit the court's discretion in awarding either lump sum or periodic alimony to particular facts. NRS 125.150(1); *Klabacka v. Nelson,* 133 Nev. Adv. Rep. 24, 394 P.3d 940 (2017). Considering Dennis's history of failing to comply with court orders, and the ease of his payment, the district court's order of lump sum alimony was reasonable. *See, Sargeant v. Sargeant,* 88 Nev. 223,228, 495 P.2d 628, 622 (1972)(affirming a lump sum award of spousal support where the husband's conduct indicated the possibility that he might liquidate or interfere with his assets to avoid paying support).

d. The Court's Award did not allow Gabrielle to live as Nearly as Fairly Possible to her Station in Life Enjoyed Before the Divorce.[6]

In *Shydler,* the Court identified one of the purposes of alimony in a long-term marriage to allow a recipient spouse to "live as nearly as fairly possible to her station

---

[6] Sections VI(1)(d) and VI(1)(e) are arguments in support of Gabrielle's Cross Appeal.

in life enjoyed before marriage." *Shydler v. Shydler*, 114 Nev. 192, 199, 954 P.2d 37, 41 (1998).

Dennis's argument that Gabrielle's acquisition of her portion of community property will meet her "lifestyle" needs presents a myopic view of lifestyle. Here, when judging the parties pre-divorce lifestyle, the court recognized that not only has Dennis's lifestyle been wildly expensive and rich, the parties have managed to save ***millions*** of dollars in investments and cash due to Dennis's large earnings. That savings and investment is part of the established lifestyle of the parties over a period of many years. Without alimony, Gabrielle's approximately $55,000 per year income will not allow savings and investment available to Dennis from his earnings of approximately $13,000,000 per year.

Other states, including California, have a long history of including savings and investment in determining the lifestyle of a party during marriage. For example, in *In re Marriage of Drapeau,* 93 Cal.App.4th 1086 (2001) the trial court apparently ignored historic saving and investment, the appellate court reversed and remanded the spousal support order "to permit the trial court to consider the parties' marital savings history as an element in their marital standard of living." *Id.*

In *Marriage of Wittgrove,* 120 Cal.App.4th 1317 (2004), the California appellate court applied the saving principle to a high-income case. In *Wittgrove,* the husband had earned $2,120,322 per year in 2001 and $1,032,852 in 2002, and the

wife earned $127,845 in the previous year. The parties lived a comfortable lifestyle, and invested $200,000 to $300,000 per year. The Court awarded the wife $13,488 for child support and $30,000 per month for alimony in a temporary support order. The husband appealed, claiming in relevant part that the order was improper because it "exceeded the family's needs." The appellate court found that the husband's argument ignored evidence of the parties "upper class lifestyle, which included substantial amount of money to invest and save each year," and that the trial court was "not limited by a supported spouse's living expense needs when the parties' marital standard of living included savings and investments [.]" *Id.* at 1229.

Dennis testified that savings and investments were, and remain, a large part of the parties' lifestyle. AA.5.1022. Dennis admitted that he purchased several exotic cars, two yachts, a mansion in Beverly Hills, traveled to exotic locations and stayed in the finest hotels, flew in private jets, ordered custom suits, shopped in the finest stores, and yet could save millions of dollars, and will continue to save in the future. AA.5.1024-1028. The district court, however, did not identify savings as a component of lifestyle. Gabrielle submits that savings are a necessary element in the review of a parties "station of life" or lifestyle. Considering only spending and not savings as the metric for lifestyle is neither fair nor equitable.

e. The District Court erred in Failing to Recognize All of Dennis's Income and Earning Capacity when Determining an Amount of Alimony

The district court did not consider Dennis's income or full earning capacity (his five-year historical earnings of $13M per year) when determining alimony. The district court provided, without legal citation, three reasons for ignoring Dennis's historical income. First, the court observed that his "compensations awards" fluctuated, and that Dennis's W-2 income was more predictable. AA.44.08564. Second, the district court noted that Dennis's highest income "came at a time that the marital relationship was broken, and the parties had been permanently separated." AA.44.08565. Third, "the delay in the parties divorcing has resulted in significant growth in the size of the overall marital estate." AA.44.08565. None of those factors are relevant bases for a review of less than Dennis's income when setting alimony.

NRS 125.150(9)(b) requires the district court to review the "income, earning capacity, age and health of each spouse." While income is not specifically defined in the statute, when a statute is facially clear, a court should not go beyond its language in determining its meaning. *McKay v. Board of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). There is no Nevada precedent or statute that suggests that a court can ignore a portion of income because it fluctuates. Fluctuation in income is a common scenario among business owners, commission salesman, and others with non-fixed salaries. It is unreasonable, clearly erroneous

and thus not supported by substantial evidence, to ignore years of average earnings of millions of dollars just because the amount fluctuates. Nevada courts regularly fix alimony based upon a percentage of income, and Nevada rules mandate a hearing on alimony where an obligor demonstrates a "20 percent change" in gross monthly income. NRS 125.150(12).

Further, the district court's determination that a marriage being "broken" and the parties "separation" justifies a failure to include all a party's income when determining alimony is unsupported by Nevada law. No factor under NRS 125.150(9) addresses the quality of the marriage, or the parties' separation as a factor in alimony. Moreover, moral judgments about the quality of the marriage are inherently judgments about the good or bad behavior of the parties. They do not address the economic realities in which the parties find themselves at divorce, and are thus not proper considerations when determining alimony. *Rodriguez v. Rodriquez,* 116 Nev. 993, 13 P.3d 415 (2000)

Finally, the amount of community property acquired during the divorce action prior to the entry of the Decree of Divorce is irrelevant to a consideration of alimony. Dennis was free to pursue a divorce action, but he chose to remain married. In 2010, Dennis filed a Complaint., but withdrew that Complaint based upon his concern that the revelation of his relationship with Nadya, and the misrepresentations about his children, would cause him to lose his position at DaVita. AA.6.1076. Thus, by his

own admission, his continued marriage to Gabrielle was essential to the income he earned from his employment. This was true even in 2016, when he requested that that the trial court enter and order preventing Gabrielle from contacting anyone at DaVita. AA.6.1066. Both parties benefitted from their continued marriage.

Moreover, even during the divorce action, it was Dennis who slowed the process. Though he was served with the Complaint on April 24, 2014, he did not answer until November 24, 2014. After the commencement of discovery, he slowed the process by repeatedly delaying his deposition. After the matter was set for trial in October 2015, he delayed the matter again by firing his then counsel and choosing another. He delayed the matter further by failing to provide an accounting of his unauthorized gifts of community property, requiring Gabrielle, her counsel, and her experts to do essentially all that work. AA.44.8502; AA.10.1821.

The factors the district court utilized to justify not considering all of Dennis's income when setting alimony are not supported by Nevada law, and the court's use of those factors is inequitable.

VII. ARGUMENT REGARDING DIVISION OF PROPERTY

1. The District Court's Finding of a Compelling Reason to Divide the Parties' Community Property Unevenly is Supported by Substantial Evidence and Nevada Precedent

a. Nevada Law Grants a District Court's Discretion to Unequally Divide Community Property

The district court started its review of Gabrielle's claim of community waste with an analysis of law. AA.44.08513-08519. Dennis does not suggest that the district court's citation of Nevada law regarding unequal division of community property is inaccurate. Instead, Dennis argues on appeal that the district court did not properly apply the law, and that its decision should thus be reviewed *de novo.* AOB p.13.

First, Dennis incorrectly argues that the Nevada Supreme Court has not adequately defined the "compelling reasons" justifying an unequal division of property. While only a few cases address the meaning of "compelling reason," the decisions identify the type of acts that are compelling reasons for unequal division.

NRS 125.150 reads in relevant part:

> 1. In granting a divorce, the court:
> [. . .]
> (b) 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.

The Nevada Supreme Court first addressed the "compelling reason" standard in *Lofgren v. Lofgren,* 112 Nev. 1282, 926 P.2d 296 (1996). In *Lofgren*, the court found that the husband had committed "financial misconduct" in violation of the Joint Preliminary Injunction issued in the case. *Lofgren,* 112 Nev. at 1284, 926 P.2d. at 297. Specifically, the trial court found that Mr. Lofgren had committed the following specific acts of actionable financial misconduct:

1. Transfer of $17,000.00 of community funds for the husband's personal use;

2. Use of $11,200.00 of community funds to improve the husband's house;

3. Use of $10,000.00 in community funds to furnish the husband's house;

4. Transfer of $13,000.00 of community funds to his father; and,

5. Misappropriation of $5,000.00 of community funds paid to his children without court consent.

Consequently, the trial court found that the husband violated the JPI, and found that husband's financial misconduct was a compelling reason to grant the wife an unequal division of property. *Lofgren* 112 Nev. at 1284, 926 P.2d at 298.

In *Putterman v. Putterman,* 113 Nev. 606, 939 P.2d 1047 (1997), the court better defined and expanded "financial misconduct" or waste as a "compelling reason" for unequal division. In *Putterman,* the husband had failed to account for earnings and other matters over which he had control, had lied to the court about his income, and had appropriated "several thousand dollars" for his own use after separation. *Id.* at 609, 939 P.2d at 1049. In affirming the trial court's unequal

division of property, the *Putterman* court further clarified what is now commonly referred to as "community waste."

> In *Lofgren,* we defined one species of "compelling reasons" for unequal disposition of community property, namely, financial misconduct in the form of one party's wasting or secreting assets during the divorce process. There are, of course, other possible compelling reasons, such as negligent loss or destruction of community property, unauthorized gifts of community property and even, possibly, compensation for losses occasioned by marriage and its breakup.

Id. at 608, 939 P.2d at 1048. The broad definition of waste envisioned by the *Putterman* court was necessary to address the various and inventive ways in which spouses cause an equal division of community property to be not equal at all.

The *Putterman* court, however, put reasonable limits on its broad interpretation of compelling reasons. It distinguished between financial misconduct and a failure to contribute to community earnings, or "overconsuming" community assets during the marriage.

> All marriages involve some disproportion in contribution or consumption of community property. Such retrospective considerations are not and should not be relevant to community property allocations, and do not represent "compelling reasons" for an unequal disposition; whereas, hiding or wasting of community assets or misappropriating community assets for personal gain may indeed provide compelling reasons for unequal disposition of community property.

Id. at 608, 939 P.2d at 1048. This oft-quoted language in *Putterman* requires the district court to differentiate those financial activities that constitute common disproportionate spending among married individuals, and those that constitute the

"wasting of community assets or the misappropriating community assets for personal gain." Logically, the implied consent that arises from openly engaging in a greater pattern of spending during marriage with the knowledge of the other spouse is not community waste. In contrast, the negligent or willful dissipation of community funds by one of the spouses, or the surreptitious and personal use of community property or funds without the other parties' knowledge, is waste.

The Nevada Supreme Court again addressed the "compelling reason" standard in *Wheeler v. Upton-Wheeler,* 113 Nev. 1185, 946 P.2d 200 (1997), finding that because Nevada is a "no fault" state, the relevance of fault or misconduct of a party is limited to instances where, because of the financial impact on one of the parties, fault or misconduct constitutes a compelling reason to deviate from an equal division of the community estate. 113 Nev. at 1190, 946 P.2d at 203.

The findings in *Lofgren, Putterman* and *Wheeler* are consistent with Nevada statute limiting a spouse's rights regarding the transfer of community property or real estate. NRS 123.225 states, "[t]he respective interests of husband and wife in the community property during continuance of the marital relation are present, existing and equal interests, subject to the provisions of NRS 123.230." NRS 123.220(2) states, neither spouse may make a gift of community property without the express or implied consent of the other. Thus, because both spouses own an equal

interest, neither can unilaterally, without the consent of the other party, cause that interest to be removed from the community.

There are no Nevada decisions specifically addressing a violation of the prohibitions in NRS 123.230, or proposing remedies for violation. *Putterman,* however, recognizes that the "unauthorized gifts of community property" could constitute a compelling reason for unequal division of property. *Putterman v. Putterman*, 113 Nev. 606, 608, 939 P.2d 1047, 1048 (1997).

The language of NRS 123.230 prohibiting the non-consensual gifting of community property logically suggests that the party that has improperly gifted the property must cause the property to be returned, or must return equal value to the community. That remedy would be consistent with the treatment of transfers prohibited by the Joint Preliminary Injunction ("JPI")[7]. Both *Lofgren* and *Putterman* held that conduct in violation of the JPI can constitute community waste, and can

---

[7] The JPI served on Dennis on April 24, 2014 contained the language from former EDCR 5.80 (since repealed and replaced) that prohibited Dennis from:

> Transferring, encumbering, concealing, selling or otherwise disposing of any of the 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.

justify a finding of "compelling reason" for an unequal division of community assets.

Lofgren, Putterman, Wheeler and NRS 123.230 identify the most common methods that spouses use to deprive the other spouse of property: selling, transferring, secreting, gifting and destroying community assets. The Nevada Supreme Court has identified those acts as compelling reasons for an unequal division. NRS 125.150(1) grants district courts the ability to equitably and mathematically accomplish the "equitable means equal" division prescribed in the statute. The meaning and intent of the "compelling reason" for unequal division is adequately defined by the Nevada Supreme Court in its decisions.

b. NRS 125.150(1) is Not Ambiguous, and Should be Interpreted by its Plain Language.

Dennis ignores the definitions and guidance provided by the decisions and statutes cited above, and argues on appeal that the term "compelling reason" has "never been adequately defined." AOB p.27. He concludes that NRS 125.150 is ambiguous because the interpretation of "compelling reason" is subject to different interpretations. AOB p.28. Dennis's arguments are meritless.

To determine legislative intent, the Nevada appellate courts will not go beyond a statute's plain language if the statute is facially clear. *Bacher v. State Engineer,* 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006). An ambiguous statute is

one that is capable of more than one reasonable interpretation. *Id.* at 1117-18, 146 P.3d at 798.

The plain words of NRS 125.150(1) are not ambiguous. Under the plain language of the statute, a district court is limited to dividing property equally unless it finds a "compelling reason" to divide it unevenly, and it must provide written findings to support any unequal division. The dictionary definition of "compelling" is "irresistibly or keenly interesting, attractive, etc.; captivating." Collins English Dictionary, Harper and Collins Publishing (2017)[8]; "Forceful; demanding attention; convincing." Mirriam-Webster Dictionary (2017). Those definitions provide guidance regarding the gravity of the reason that the court must identify to justify a division contrary to the norm of equal.

Contrary to Dennis's argument, the fact that the statute does not specifically outline what determinations are "compelling" does not render the statute ambiguous. Generally, courts do not find a statute ambiguous only because it uses broad language. *See, e.g., IUE-CWA v. Visteon Corp. (In re Visteon Corp.),* 612 F.3d 210, 221 (3d Cir. 2010) ("[A] statute is not ambiguous simply because it is broad. In employing intentionally broad language, Congress avoids the necessity of spelling out in advance every contingency to which a statute could apply."); Many Nevada

---

[8] www.collinsdictionary.com/us/dictionary/english/compelling

statutes use terms that are subject to broad interpretation. *See, e.g.* "just and equitable," NRS 125.150(7), "best interest," NRS 125C.0035; and, "financial condition of each spouse" NRS 125.150(9). Those terms are necessarily broad because of the varied factors that shape the court's discretion; they do not render the statutes ambiguous.

Other states have not found the use of the broad terms "compelling" or "compelling reason" to render a statute ambiguous, and have defined those terms by their plain meaning. *See, e.g., State ex rel. Dep't of Human Services. v. M.A. (In re C.A.)*, 205 P.3d 36, 41 n.9 (Or. App. 2009)("[c]ompelling reason' means a convincing and persuasive reason."); *Does v. Mills*, 2005 U.S. Dist. LEXIS 6603, at *33, 2005 WL 900620 (S.D.N.Y. Apr. 18, 2005)("To the extent that the terms 'day' and 'compelling reason' are not defined by the regulations themselves, they are to be read according to their plain-language meanings".)

c. The Legislative History of the 1993 Amendment to NRS 125.150(1) Does not Reflect Intent to Apply a Higher Standard of Proof to a Finding of "Compelling Reason."

Dennis selectively cites statements made by assemblymen during presentation of the bill containing the 1993 amendment to NRS 125.150(1) in the Nevada House Judiciary Committee as evidence that the "compelling reason" standard should be limited to circumstances of "adverse economic impact." AOB p.32. Though NRS

125.150(1) is not ambiguous, a review of its legislative history would not compel Dennis's proposed change in the standard of review associated with the statute.

When a statute is ambiguous, the court must determine the Legislature's intent by evaluating the legislative history and construing the statute in a manner that conforms to reason and public policy. *Attorney General v. Nevada Tax Comm'n,* 124 Nev. 232, 240, 181 P.3d 675, 681 (2008). The court "avoids statutory interpretation that renders language meaningless or superfluous." *Karcher Firestopping v. Meadow Valley Contr.,* 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009). Whenever possible, the Nevada Supreme Court will interpret "statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result." *Allstate Insurance Co. v. Fackett,* 125 Nev. 132, 138, 206 P.3d 572, 576 (2009). *Great Basin Water Network v. Taylor*, 234 P.3d 912, 918 (Nev. 2010)

Dennis's account of the legislative history of NRS 125.150(1) is based upon an inaccurate reading of the purpose and language of the bill. Thomas Standish, Esq. provided the explanation of the bill to the Senate Judiciary committee. The minutes of the hearing before that committee on April 30, 1993 outlined Mr. Standish's presentation of the bill – AB 347 – and his explanation of its intent.

> [Mr. Standish] advised the decision in *McNabney* [*v. Mcnabney,* 105 Nev. 652, 782 P.2d 1291 (1989)] has been somewhat distorted and taken advantage of by counsel in divorce litigation, to the point where the decision is used in every case. He stated the argument usually takes the form that there is no need to make an equal division of community property because the *McNabney* case allows the distribution to be made

> equitably in any way the court sees fit, as long as there are reasons to do so. He advised this creates much confusion with the basic tenets of community property law.
>
> He stated these tenets call for community property to be divided equally between the parties as a starting point. The law and the statutes then provide for the judge's discretion to make equitable considerations and to not make an exact 50/50 division. He stated A.B. 347 simply makes the statute clearer for the application of community property law and the division of property. He stated his belief that this will cause the arguments between counsel to cease and will clarify the process of dividing community property.

Nev. Senate Jud. Comm. *McNabney Bill: Hearings on A.B. 347,* April 30, 1997. Nothing in Mr. Standish's presentation to the Committee suggests that the authors of the bill envisioned a higher standard of proof for "compelling reason." Instead, the standard was designed to "provide for the judge's discretion to make equitable consideration and not make an exact 50/50 division." Mr. Standish's statement to the Assembly Judiciary committee on April 7, 1993 contained the same notions.

Dennis's quote of Assemblyman Porter's comments (AOB p.30) is taken out of context. The April 7, 2003 minutes reflect that Assemblyman Porter wanted to eliminate any discretion to divide property any way but evenly. Assemblyman Porter's proposals to eliminate the language "compelling reason," or include in the statute a laundry list of items that would outline the meaning of "compelling reason" were not added to the bill because other assemblymen, and Mr. Standish, disagreed with Mr. Porter's proposals. Nev. Assembly Jud. Comm., *McNabney Bill: Hearings on A.B. 347*, April 7, 2003.

The legislative history of A.B. 374, and its "compelling reason" language is consistent with the Nevada Supreme Court's view in *Lofgren* that compelling reasons are those that in equity justify something other than an equal division.

d. Substantial Earnings do not Justify Financial Misconduct, the Improper Gifting of Community Property, or Waste.

Dennis argues that party's acts of community waste should be balanced against his contributions to the estate (earnings) and the size of the estate. AOB 33. In support of that proposition, Dennis cites *Kitteredge v. Kitteredge,* 803 N.E.2d 306, 315 (Mass. 2004). *Kitteredge* involved a claim of waste in an equitable property state that was based upon the husband's gambling. *Id.* Dennis's reliance on *Kitteredge* is misplaced.

Gambling is a not necessarily waste, and is often an activity that is tacitly approved by a spouse. Gambling can require consideration of degree, particularly in Nevada, where gambling is a legal recreational activity. These are not issues in this case; none of the financial misconduct in the present case involves gambling.

Here, the district court's unequal division was based primarily upon Dennis's unauthorized gifts of community property (including community income), in violation of NRS 123.230(2). The prohibition is absolute – a spouse many not gift community property without the express or implied consent of the other spouse.

The law in equitable property states, like Massachusetts, regarding the division of property is not applicable to community property states. As indicated

above, in Nevada, a party has a right to an equal ownership of community property as a right. Equitable property states permit courts to divide equitable property as they see fit, and grant more to one spouse based upon a laundry list of factors that usually includes a parties' financial contribution to the marriage. In Nevada, a community property state, a party is not rewarded with an additional portion of the community property because he or she earned it. In *Putterman,* the court held that historical "disproportion in contribution or consumption of community property" should not be a consideration in distribution, but that "hiding or wasting of community assets or misappropriating community assets for personal gain may indeed provide compelling reasons for unequal disposition." 113 Nev. 606, at 608, 939 P.2d at 1048.

Dennis's citation to *Ansutz v. Ansutz,* 331 N.W.2d 844, 846 (Wis. 1983) and *In Re Marriage of Williams,* 927 P.2d 697, 683 (Wash. 1996) are equally flawed. The Wisconsin court in *Ansutz* based its decision on a statute in Wisconsin that required trial courts to take in consideration the contribution to the property when weighing division of property under its scheme of equitable distribution. *Ansutz v. Ansutz,* 331 N.W.2d 844, 846 (Wis. 1983). The court in *In Re Marriage of Williams* was addressing Washington's equitable division law that requires a consideration of the contribution of assets when dividing property under Washington's scheme. *In Re Marriage of Williams,* 927 P.2d 697, 683 (Wash. 1996).

Nevada, on the other hand, does not have an equitable property scheme. The court need not weigh factors to determine whether a party has a right to an equal share of the community property. Dennis's proposition that the court should ignore his gifting of community funds as a basis for an unequal division because of his wealth is a request that he receive a larger portion of the community property. Under Nevada law, Gabrielle is entitled to an equal division of community property, NRS 125.150(1). Dennis received an equal division of the property that was the subject of Gabrielle's waste claim – he just chose to spend his portion on his girlfriend and family. The court's remedy of requiring Dennis to account for one half of the funds he gifted, transferred or used on his mistresses and their children was simply a return of Gabrielle's equal portion of the community property. Dennis had and enjoyed full use of his portion of that property.

In its Decree, the district court recognized that most courts in equal division states and equitable division states approach the remedy for waste in the same way: "the court will deem the wrongfully dissipated assets to have been received by the offending party prior to the distribution." *Brosick v. Brosick,* 974 S.W.2d 498, 501 (1998). Such an order places the non-wasting spouse in the same position she would have been in if the other spouse would not have improperly gifted or wasted the assets.

What Dennis argues is that he should be entitled to use the community property on whatever he sees fit because he earned it, even if it includes granting Gabrielle's equal share to a girlfriend. There is no reasonable justification for his argument. Dennis's contention that Gabrielle suffered no "adverse economic impact" from his actions (AOB 35) ignores the cost of his funneling property to mistresses and their children.

e. The District Court Properly Held that Upon the Presentation of a *Prima Facie* Case of Financial Misconduct, Dennis had a Duty to Account, by Clear and Convincing Evidence, for Community Funds and Property Gifted to Third Parties without Gabrielle's Knowledge or Consent

Dennis admitted at the commencement of the case that he had gifted monies to third parties. AA.44.08497-08498. In numerous previous hearings, the district court expressed its view that it would expect to see an accounting of Dennis's relationships with Nadya, his support of his relatives, his relationship Jennifer Steiner, and his concealed spending of community funds. AA.44.08497-8503. Both Dennis's initial counsel, Mr. Jimmerson, and Gabrielle's current counsel, Mr. Smith, acknowledged that the case required an accounting of Dennis's spending, gifts and transfers of community property. AA.44.08947-8499.

At a hearing held February 3, 2015, Dennis's counsel, with Dennis by his side, pledged that Dennis was going to take the issue of community waste "away from Gabrielle" by "providing an accounting." AA.44.08527. Dennis later hired new counsel, and did not provide an accounting. It its Decree, the district court found:

> Just as he had given Gabrielle false hope that, through marital counseling, their marriage could be saved, he gave this Court false hope that he would provide "an estimate and an offer that will be more than the dollars spent, so that one-half of which will be awarded to Mrs. Kogod to at least remove the financial sting or insult of Dennis' having this relationship."

AA.44.08527.

Gabrielle hired forensic accounting experts Joseph Leauanae and Jennifer Allen of Anthem Forensics (collectively "Anthem"). Anthem Forensics examined more than 27,200 transactions. AA.44.8532. Anthem prepared three extensive written reports outlining the findings of "potential community waste" in excruciating detail, and both Ms. Allen and Mr. Leauanae testified at Trial. AA.8.1570-1593; AA.9.1597-1766; RA.1.00151-RA.1.00171; AA.44.8530-8554; AA.16.2133-3232; AA1.17.3233-3368; AA.18.3551-3578. Gabrielle also presented the deposition testimony of Nadya, Dennis's parents, his brother and sister in law, and Ms. Steiner into the record. AA.27.5171-AA.30.5832. Upon review, the court held that Gabrielle had made a *prima facie* case of community waste. AA.44.8524.

Though Dennis hired an expert, the district court found that Dennis did not provide any accounting. AA.44.8502; AA.10.1821. Instead, Dennis waited until the Anthem reports, then claimed that a mass of the items identified as potential waste in the reports were for Dennis's benefit (not Nadya's or the children's benefit) and thus not waste. AA.10.1835. Dennis failed, however, to provide any

documentation supporting those denials, and his expert admitted that his report accepted those denials as true without independent investigation. AA.10.1807-1808.

The district court held that once Gabrielle demonstrated a *prima facie* case for breach of fiduciary duty in the form of community waste, Dennis had the burden to account for the use of the funds. AA.44.8524. It found that Dennis failed to provide any independent accounting of his spending. AA.10.1807-1810. The district found that Dennis did not meet his burden of proof to account for the expenditures that logically were for the benefit of his mistresses and children.

Dennis, based upon citation to cases from Maryland, Virginia and Kentucky, argues on appeal that it is the party alleging community waste that has the burden to account. Dennis's position is not supported by Nevada law.

The marriage partnership places the parties in the position of fiduciaries. "A fiduciary relationship [. . .] arises from the existence of the marriage itself, thus precipitating a duty to disclose pertinent assets and factors relating to those assets." *Williams v. Waldman,* 108 Nev. 466, 472, 836 P.2d 614, 618 (1992). In addressing the obligations of accounting of a fiduciary in a partnership, the Nevada Supreme Court has held that it is the burden of the fiduciary in control of partnership property to account for that property, and the fiduciary bears the risk of uncertainty arising from the failure to account. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own

wrong has created." *Foley v. Morse & Mowbray,* 109 Nev. 116, 121, 848 P.2d 519, 520 (1993) *quoting*, *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265, 90 L. Ed. 652, 66 S. Ct. 574 (1946).

Dennis further argues that the district court erred when it held that Dennis, as a fiduciary accused of breach, had the duty to account for his acts of improper gifting and dissipation of community assets by clear and convincing evidence. The district court's finding, however, is supported by Nevada law.

The imposition of a "clear and convincing" standard regarding the accounting of waste is analogous to the duty Nevada law places upon a fiduciary that benefits from a questioned transaction with his fiduciary. In *Blanchard v. Montgomery (In Re Estate of Blanchard),* 2016 Nev.App. 258, 2016 WL 3584702 (2016), the court first acknowledged, citing *Waldman, supra,* that parties to a marriage were fiduciaries. Where one of the fiduciaries in a marriage benefits from a questioned transaction, a presumption of undue influence arises that can only be rebutted by clear and convincing evidence that the transaction was voluntarily entered. *Id.* The language of *Blanchard* suggests that the burden of clear and convincing evidence is based upon a spouse's fiduciary obligation to "disclose pertinent assets and factors relating to those assets." *Id.*

That reading of the *Blanchard* standard is consistent with the court's findings in this case. The court found that once Gabrielle established a *prima facie* case that

Dennis engaged in non-community spending and that the community funds were otherwise unaccounted, it was Dennis' burden to provide the court with proof by way of accounting that his expenditures did not constitute waste and that because of his fiduciary relationship towards Gabrielle, such proof must be clear and convincing. AA.44.08526-08527. The court indicated that it was not about challenging lifestyle expenditures – instead it was about giving credit to Dennis for lifestyle expenditures that that he identified. AA.44.08527. With that determination, the court's analysis was twofold, 1) whether expenditures identified constituted waste; and, 2) whether Dennis has provided sufficient evidence to explain "unaccounted for expenditures." AA.44.08527.

The issue of the district court's identification of a "clear and convincing standard" was rendered moot by its finding that "Dennis failed to meet his burden by clear and convincing evidence (or even a preponderance of the evidence)." AA.44.08536. Even if this court was to find the clear and convincing standard to be error, that finding did not affect the district court's determination of waste.

f. Substantial Evidence Supported the District Court's Finding of Community Waste

The district court found that the existence and analysis of waste by Dennis regarding identifiable expenditures on Nadya, Dennis and Nadya's children began in November 2004 when Dennis secretly began spending money in a purpose that was irreconcilable with a harmonious marital relationship and for unaccounted

expenditures that have not been specifically identified as having spent on Nadya, Dennis or children, or Jennifer began in March 2010 when Dennis filed for divorce. AA.44.08528. The court found that remedy must bear some relation to the evidence presented and must be based upon the court's specific findings regarding the value or amount of waste. AA.44.08529.

Gabrielle commenced her analysis of Dennis's spending with two fundamental notions in mind: 1) His gifting of community property and income without Gabrielle's express or implied consent was prohibited by NRS 123.230(2); and, 2) His use of community funds to secretly acquire, maintain and support property for his exclusive use was community waste. Consequently, after consultation with Anthem, she identified the following categories of waste:

1) Unauthorized gifting of community property for the support Nadya and daughters;

2) Unauthorize support of his affair with Jennifer Steiner;

3) Costs of his exclusive use and maintenance of his secretly purchased yachts and real property;

4) And the lost opportunity cost associated with the exclusive use of community funds accounted for in the first three categories.

These were essentially the categories contained in the Anthem reports. AA.44.08533.[9] Consequently, Gabrielle charged Anthem with the daunting task of reviewing the transactional activity of various financial accounts from March 2008 through present and determined who benefitted from those expenses. AA.44.08531. Dennis' expert reviewed and critiqued Anthem's report, did not conduct own independent analysis and accepted at face value Dennis' representations without further investigation or independent verification.

The court found that Dennis argued that there was no diminution in value, therefore, no waste. AA.44.08534. Dennis challenged Anthem's reliance on labels to quantify alleged "waste" and Dennis' expert, Teichner testified that Dennis should have freedom to spend a relatively small percentage of his sizeable annual compensation on discretionary expenditures. AA.44.08534.

The court found that the issue of waste is not necessarily a matter of equalizing or even comparing the amount of expenditures by each part as that would contravene the directives of *Putterman.* AA.44.08535. Anthem accepted as reasonable Dennis' claims on his Financial Disclosure Form (FDF) regarding his expenses. AA.44.08535. The court found such reliance by Anthem reasonable to establish the amount each party spends monthly on their expenditures. AA.44.08536.

---

[9] The Anthem categories included

Court did not acknowledge approximately $2,000,000 Anthem had identified as potential community waste. AA.44.08530. The court concluded that the total amount of waste committed by Dennis was $4,087,863 and Dennis failed to meet his burden by even a preponderance of evidence that this amount was not wasted. AA.44.08536. The court then made additional findings regarding the various "buckets." AA.44.08537-AA.44.08552.

In 48 pages in its Decree, the district court identified and detailed the law and evidence that supported its finding that there was compelling reason to deviate from an equal distribution of community property, as permitted under NRS 125.150(1). AA.44.08513-08554.

2. The District Court Erred when it Ordered the Parties' Accrual of Community Property and Income ended February 26, 2016, prior to the Completion of Trial, and Before the Entry of a Decree of Divorce on August 22, 2016.

The initial trial days in this case were February 24, February 25, and February 26, 2016. The Court held a fourth day of trial on May 4, 2016. On August 22, 2016, the Court filed its Decree of Divorce in which the court restored the parties to "single, unmarried individuals." AA.44.08570. At the February 26, 2016 hearing, however, the district court orally announced that the parties were granted a divorce, and ordered that the accrual of community property would stop on that date. The district court's order directing the end of the accrual of community property was contrary to Nevada Law.

NRS 123.220 reads:

> All property, other than that stated in NRS 123.130, acquired after marriage by either spouse or both spouses, is community property ...

NRS 123.130 states: "All property of a spouse owned by him or her before marriage, and that was acquired by him or her afterwards by gift, bequest, devise, descent or by an award of personal injury damages, with the rents, issues and profits thereof, is his or her sole and separate property." NRS 123.190 provides that a spouse may in writing authorize the other spouse to retain and control his or her earnings as separate property. None of the factors outlined in NRS 123.220 stopped the accrual of community property during marriage. The parties did not enter an agreement to stop the accrual, did not enter a decree of separate maintenance, neither party gave written authorization to the other to retain community income as separate property, and no decree or agreement was entered pursuant to NRS 123.259. Instead, the district court arbitrarily set a date based upon its oral pronouncement.

In *Forrest v. Forrest,* 99 Nev. 602, 668 P.2d 275 (1983), the court, after reviewing NRS 123.220, held that "the statutes clearly mandate that all property acquired by the parties until the formal dissolution of the marriage is community property." *Id.* at 607, 668 P.2d 275, 279 (1983). The "formal dissolution" of a marriage can only be accomplished by the execution and filing of a written Decree of Divorce. A district court's oral pronouncement from the bench, the clerk's

minute order, and even an unfiled written order are ineffective for any purpose. *Rust v. Clark County School District,* 103 Nev. 686, 680, 747 P.2d 1380, 1382 (1987). *See also, Gojack v. District Court*, 95 Nev. 443, 445, 596 P.2d 237, 239 (1979)(A trial court is "without jurisdiction to enter a final decree of divorce without contemporaneously disposing of the community property of the parties.")

Here the district court's cessation of the accrual of community property before the entry of the Decree granting the parties a final divorce, and a disposition of the parties' community property, was prohibited by statute, and is an abuse of discretion. This court should remand the case to the district court for further findings identifying a division of the property accruing after February 26, 2016 and before August 22, 2016.

3. The District Court Erred by Ordering that a Spouse's Improper Transfer, Use or Gifting of Community Funds could only occur after a Marriage was "Irretrievably Broken"

As stated, the foundation for the district court's order was Dennis's improper gifting of community property (including community funds) in violation of NRS 123.230(2), an act recognized in *Putterman* as a compelling reason for an unequal division. NRS 123.230(2) does not limit its application to a time in the marriage; it prohibits ***any*** gifting of community property by a spouse without the express or implied consent of the other spouse.

In its Decree, the district court concluded, based upon its review of the facts of *Lofgren* and *Putterman,* and held that Nevada Supreme Court "implicitly held that waste can occur as early as the date of the parties' separation," and that the language of those decisions was not "intended to preclude an earlier date for a court to consider conduct that constitutes waste." AA.44.08520. The district court then looked to other jurisdictions for instructions "regarding the timing of 'waste' or 'dissipation.'

The district court's analysis should have stopped at Nevada law. The language in *Putterman* defining "other possible compelling reasons," including "unauthorized gifts of community property" placed no time limit on the application of that factor. *Putterman,* 113 Nev. at 609, 939 P.2d at 1048. The *Putterman* court distinguished "overconsuming of community assets during the marriage" from "hiding or wasting community assets of community assets for personal gain." Id., 939 P.2d at 1048-1049. The court put no limitation on the "hiding and wasting" greater than the broad "during the marriage" language in the lines above that phrase.

Nevertheless, the district court in the present case cited *Barriger v. Barriger,* 514 S.W.2d 114 (Ky. Ct. App. 1974) and *In re Marriage of Seversen,* 593 N.E.2d 747 (1992) as the basis for an entirely new notion of the timing of "dissipation." AA.44.08520. The district court held that "dissipation" exists only when the offending spouse's actions come after an "irreconcilable breakdown" in the marriage. AA.44.08520. The court subsequently limited the calculation of

"community waste" committed by Dennis to periods when the district court opined that the marriage was "irretrievably broken." AA.44.08528. Specifically, the court held that the "unaccounted for expenditures that have not been specifically identified as having been spent on [Khapsalis], Dennis and [Khapsalis's children], or [his second mistress] Jennifer, this court concludes that the analysis of waste begins in 2010." AA.44.08528.

First, the district court's application of the "irretrievably broken" standard leads to the absurd result that Gabrielle, without her knowledge or consent, spent her portion of the parties' community property to pay for all expenses for Dennis's mistress between 2005 to 2010, including in vitro fertilization procedures, clothes, vacations, expenses for her illegitimate children, and her romantic dinners with Dennis. Such a rule rewards Dennis's ability to mislead Gabrielle about his mistress and children for five *years*.

The district court's "irretrievably broken" standard has no place in the application of community property law in Nevada. The provisions of NRS 123.230 are absolute limitations designed to protect both spouses against improper transfer or gifting of community property. The goal of the compelling reason standard in NRS 125.150(1) is to allow a court discretion to provide an unequal division when the actions of a spouse have improperly wasted, gifted, or destroyed community

property and thereby have prevented a true equal division without an accounting of the offending spouse's actions.

> Judicial decisions in community property states do not discuss whether conduct resulting in the diminution of assets may be the subject of judicial action where such conduct occurred prior to marital breakdown. Presumably, the dissipation doctrine or its cognate -- to the extent that such a doctrine exists in a community property state -- encompasses any dissipation of community property, whether the conduct occurred before or after marital breakdown, because any such dissipation interferes with a present ownership interest of the other spouse.

Lewis Becker: *Conduct of a Spouse That Dissipates Property Available for Equitable Property Distribution: A Suggested Analysis*, 52 Ohio St. L.J. 95, 123 (Winter 1991).

The district court's adoption of the "irretrievably broken" standard is inconsistent with Nevada law. This court should remand the case to the district court with instructions to consider Dennis's improper use or waste of community assets at any time during the marriage.

VIII. The District Court erred in failing to cause Dennis to Reimburse from his Portion of the Community Property or his Post-trial earnings, the Normal Investment Return the Community Would have Earned on Money and Property that the District Court found Dennis transferred or gifted in violation of NRS 123.230

At trial, Gabrielle provided the court with an analysis of the lost return or "opportunity cost" on the money and property that Dennis improperly gifted to Khapsalis and their children. In the absence of that gifting, the money could have

been invested, and earned interest. Gabrielle's was based upon the rate of return that Dennis earned at UBS. AA.44.08553. The district court, with little explanation, denied Gabrielle's request, finding the determination of the loss to be "speculative." AA.44.08553.

The unlawful gift of community property constitutes a type of conversion. Conversion is defined under Nevada law "as a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title *or* rights therein or in derogation, exclusion, or defiance of such title or rights." *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 910, 193 P.3d 536, 542 (2008) (internal quotations omitted). Dennis's unlawful gifting of Gabrielle's property was tantamount to conversion.

Nevada law has long recognized the application of interest as a damage in a conversion case. *See, e.g., Boylan v. Huguet,* 8 Nev. 35, 1873 LEXIS 29 (1873), in which the court held that the proper measure of damages in a conversion was "the value of the property as of the date of the conversion, with legal interest as damages for the damages for the detention of the property, and, in addition, any special damages that legitimately arose out of matters in existence at the date of the tort."

Here, the damages to the community for the unlawful gift of community property include the lost interest or opportunity cost. The interest value requested

was not speculative; it was based upon the return the parties were receiving on other investments. The court's decision was not supported by substantial evidence.

Moreover, the result of the failure to award interest is tantamount to stating that the only result of the unlawful transfer of community funds will be the requirement to return the value of the amount gifted without any adverse consequence. To deter such actions, the court should award a reasonable rate of interest or appreciation from the time of the unlawful gifting or transfer of community property.

IX. The District Court erred by failing to compensate the community for expenditures of community funds for the maintenance, operation, depreciation and use of two yachts Dennis hid through fraudulent concealment during the marriage

During the marriage, Dennis sold and purchased two yachts. AA.44.08542. First, he purchased a 2007 Cruiser yacht in 2012. He traded the Cruiser yacht for a Marquis yacht in June 2014 (while the divorce proceedings were pending). AA.44.08542. In July 2015, Dennis sold the Marquis yacht for $990,000. AA.44.08542. Anthem Forensics determined that Dennis spent $626,658 more than the sales proceeds on yacht-related expenses. AA.44.08542. Dennis testified that his purchase of the yachts was his pursuit of a hobby that replaced old hobbies that were no longer physically practical. AA.44.08542.

The court found that Dennis' yacht expenditures are the type of "over consumption" referenced in *Putterman*, that does not necessarily constitute a

compelling circumstance for an unequal division of assets. *Putterman*, 939 P.2d at 1048-49. AA.44.08543. That finding took into consideration the size of the marital estate (i.e., lifestyle considerations) and Dennis' argument that his spending on such a hobby did not cause a diminution in value of the marital estate. AA.44.08543. The court found that the yacht related expenditures did not provide the court with a compelling reason to unequally divide the community property. AA.44.08543. Thus, the court did not attribute any amount to Dennis as part of the division of assets. AA.44.08543.

In *Putterman,* the Nevada Supreme Court noted that hiding or wasting of community assets or misappropriating community assets for personal gain may indeed provide compelling reasons for unequal disposition of community property. *Putterman v. Putterman*, 113 Nev. 606, 609, 939 P.2d 1047, 1049 (1997).

Here, it was clear that Dennis was actively hiding the purchase, sale and expenses related to the yacht. Although the Marquis yacht was acquired in the name of Dennis' parents, the court found that it was undisputed that Dennis funded the entire purchase and his parents had no interest in the yacht. AA.44.08542. To hide his spending, Dennis placed property, yachts and other assets into a trust, naming his father as trustee. AA.44.08491 FN26. In his deposition in 2015, his father testified that that he knew nothing about the trust. AA.29.05614-05615.

The district court correctly found that Dennis' newfound "hobby" was not disclosed to Gabrielle. AA.44.08543. The court also found that Gabrielle did not consent to those expenditures. AA.44.08543. Gabrielle testified that Dennis never invited her to either of the yachts that he purchased. AA.8.1431. This was not a case of "over consumption" of community funds by one party. Dennis actively and fraudulently concealed his purchase and use of the yacht and Gabrielle did not benefit from that purchase and use. The district court erred in finding zero waste for the expenses related to the yacht.

X. The District Court's calculation of $500 per violation as a sanction for Dennis's 39 violations of the Joint Preliminary Injunction was an abuse of discretion because of Dennis's wealth and income.

EDCR 5.85[10] states that the joint preliminary injunction will be automatically effective against the party requesting it at the time it is issued and effective upon all other parties upon service. The injunction is enforceable by all remedies provided by law including contempt.

The court found that none of the expenditures listed on Exhibit 73 of the Decree met the JPI criteria of "necessities of life" or "business expenses." AA.44.08555. The district court found that spending, with 39 violations, totaling $1,486,452 not including Dennis' purchase of a yacht and the Wilshire residence

[10] EDCR 5.85 has since then been repealed. EDCR 5.517 is the new rule regarding JPI effective May 1, 2017.

without Gabrielle's knowledge or consent, was in violation of the JPI. AA.45.08555. A district court's factual determinations shall not be set aside unless they are clearly erroneous and not supported by substantial evidence. NRCP 52(a). The court awarded Gabrielle $500 for each of the 39 violations, or $19500 in sanctions.

Dennis misrepresents his testimony and argues that he was never served with the JPI. AOB, p. 59. The JPI was issued on December 16, 2013. AA.1.15-16. Dennis signed an Acceptance of Service accepting service of the JPI on April 24, 2014. AA.1.14. The district court can take judicial notice of the Acceptance of Service of the JPI pursuant to NRS 47.130 in its own discretion pursuant to NRS 47.150. In his testimony, Dennis testified that he had been served with the JPI. AA.6.1140.

Dennis also argues that Gabrielle's Motion for Order To Show Cause was denied. AOB, p.11. That is false. The district court granted Gabrielle's Order to Show Cause and deferred the evidentiary hearing on that issue of sanctions against Dennis for violating the JPI to the date of the trial, February 23, 2016. AA.4.859-860.

Even after accepting service of the JPI, Dennis violated the order despite Gabrielle's repeated requests for him to stop his spending. AA.4.647-706; AA.19.3675. He was keenly aware of those prohibitions as they had been the subject

of letters, discussions before the court, and his agreements to reimburse Gabrielle for property (both real and personal) that he, in gross violation of the JPI, purchased during these proceedings. AA.4.647-706.

Dennis also argues that the monies he expended were not in violation of the JPI because the estate continued to grow during the litigation and because any expenditure made by Dennis was in the ordinary course of his business and lifestyle. AOB, p.60. Dennis' argument that the estate continued to grow during the litigation and therefore, he did not commit waste of monies that did not fall under "necessities of life" or "business expenses," is not supported by Nevada law and is contrary to the facts of this case as the estate would have grown even more if Dennis had complied with the JPI.

Dennis argues that the district court did not make specific findings regarding the violations of the JPI. That is false. The district court made specific findings regarding Dennis' violations of JPI, gave Dennis credit for monies he expended on Nadya, the children and his family members during this litigation. AA.44.08556. The court found that even though those expenses form sufficient basis to impose additional monetary sanctions against Dennis, the court did not consider those expenses in calculating the waste. AA.44.08556. The court awarded Gabrielle sanctions pursuant to EDCR 7.60.

Gabrielle submits that the court's calculation of $500 per violation as a sanction for Dennis' 39 violations of the JPI is an abuse of discretion under the facts of this case because of Dennis's wealth and income of $13 Million per year. The court's sanctions are insufficient to accomplish the goal of a JPI and the monetary sanctions should have an effect otherwise they do not provide any incentive to party to comply with the court's orders. Additionally, sanctions under EDCR 7.60 can include attorney's fees and costs which may be reasonable under the facts. The district court erred in failing to award Gabrielle attorney's fees and costs as part of sanctions against Dennis for his numerous and repeated violations of the JPI.

XI. The District Court made specific findings regarding the award of Expert's Fees to Gabrielle.

In her closing brief filed on August 1, 2016, Gabrielle reserved her right to file a motion for fees and costs. AA.43.8242-8414. Anthem Forensics' billing statements were admitted at Trial. AA.23.4562-4627. In the Decree, the court allowed both parties to file post-adjudicatory paperwork to address expert's fees and attorney's fees. AA.44.08477, FN6. The district court awarded Gabrielle one-half (1/2) of Anthem Forensic's fees, or $75,650. AA.47.9278-9279.

The district court based its findings of waste primarily on Anthem Forensic's report. AA.44.08530-08554. The court also stated, "This Court references in this Decree relevant findings pertaining to statutory claims for attorney's fees. Nevertheless, although not ordered herein, this Court is persuaded that Gabrielle

should be reimbursed for the forensic accounting costs associated with her retention of Anthem Forensics for the work that Dennis had promised and was legally obligated to perform (as discussed throughout this Decree). NRS18.005(5). *See Frazier v. Drake*, 131 Adv. Op. 64, 357 P.3d 365 (2015)" [Emphasis in the decree] AA.44.08477, FN6. Dennis argues that the district court did not make findings as set forth in *Frazier* to award Gabrielle's expert's fees in excess of $1,500. That argument should fail.

In *Frazier v. Drake*, 357 P.3d 365, 375 (2015), this Court set forth certain findings that the district court should consider in determining the expert fees. *Id.* This Court held that not all of those factors may be pertinent to every request for expert witness fees in excess of $1,500 per expert under NRS 18.005(5), and thus, the resolution of such requests will necessarily require a case-by-case examination of appropriate factors. *Id.* The district court's findings for the factors applicable to this case are set forth below:

(a) The importance of the expert's testimony to the party's case

In the Decree, the district court found that in numerous previous hearings, the district court expressed its view of the evidence it would expect to see at trial from the parties based upon the alleged and admitted facts arising from Dennis's waste. AA.44.08497-8503. Even though Dennis assured that he will provide an accounting, he did not do so. AA.44.08947-8499.

Gabrielle engaged, and had present at all hearings at the direction of the Court, highly regarded forensic accounting experts Joseph Leauanae and Jennifer Allen of Anthem Forensics. The court found that Anthem Forensics examined more than 27,200 transactions. AA.44.8532. Anthem Forensic's Jenny Allen and Joseph Leauanae testified at Trial. AA.8.1570-1593; AA.9.1597-1766; RA.1.00151-RA.1.00171. The court reviewed the testimony of Anthem's experts and their three expert reports that were included at trial. AA.44.8530-8554; AA.16.2133-3232; AA1.17.3233-3368; AA.18.3551-3578.

The court found that Dennis, on the other hand, did not provide any accounting. AA.44.8502; AA.10.1821. Instead, Dennis waited for the Anthem reports, then claimed that a mass of the items identified as potential waste in the reports were for his benefit and thus not waste. AA.10.1835. He failed to provide any documentation supporting those denials, and his expert simply accepted those denials as true. AA.10.1807-1808.

(b) The degree to which the expert's opinion aided the trier of fact in deciding the case

The court analyzed Anthem Forensic's three-part approach to the waste issue and made its determinations of waste based upon those approaches. AA.44.08531. The court set specific detailed findings regarding Anthem's report and their analysis of the waste issue and discussed in detail each of Anthem's "buckets." AA.44.08530-08554.

(c) Whether the expert's reports or testimony were repetitive of other expert witnesses

Anthem's expert reports were not repetitive of any other reports presented at Trial. Dennis's expert, Richard Teichner testified that Dennis committed *no* community waste, even though he gifted or transferred, or spent for other's benefits, ***millions*** of dollars of community funds without Gabrielle's consent. AA.10.1809-1810. The argument was that because Dennis earned so much money over the course of the last several years (approximately $62M in the last five years), spending a few million dollars on girlfriends and illegitimate children is "not material." AA.10.1809-1810.

(d) The fee actually charged to the party who retained the expert

Anthem Forensics' billing statements were admitted at Trial and were part of the Court's records. AA.23.4562-4627.

(e) Whether the expert had to conduct independent investigations or testing

The court found that Anthem Forensics examined more than 27,200 transactions, reviewed the various depositions in the case and prepared their three reports. AA.44.8532; AA.44.8530-8554; AA.16.2133-3232; AA.17.3233-3368; AA.18.3551-3578.

XII. The District Court erred in failing to require Dennis to pay from his portion of the community property, or from his post-divorce income, all expert fees Gabrielle incurred in the divorce action.

The district court awarded Gabrielle only one-half of her expert's fees. Gabrielle submits that the district court erred in not awarding Gabrielle all of her expert's fees and costs because all of those expert fees and costs were incurred due to Dennis' failure to conduct accounting despite district court's repeated indications that he do so. Dennis, being the spouse with the knowledge of the waste should have spearheaded the accounting. Yet, he did not do so. Gabrielle incurred the expert's fees because of Dennis' failure to satisfy his legal burden to provide an accounting. Dennis should reimburse Gabrielle for the entirety of Anthem's fees.

XIII. The District Court erred in failing to require Dennis to pay from his portion of the community property, or from his post-divorce income, all attorney's fees Gabrielle incurred in the divorce action.

Gabrielle countermoves to recover all or a reasonable portion of the fees and costs she has incurred in prosecuting this case. In the Decree, the court held that that the propriety of an award of fees and costs (as evidenced in the attorney's fees billing and expert cost billings admitted into evidence at Trial) may be addressed by post-adjudicatory papers filed with the court. AA.44.08477 FN6. Gabrielle filed a motion for attorney's fees and costs pursuant to NRCP 54(2). AA.44.8607-08703. Gabrielle's fees and costs incurred through her attorneys Radford J. Smith, Chartered updated through August 31, 2016 was $418,511.04. AA.44.8607-08703. The majority of the fees Gabrielle incurred were due to the unusual circumstances underlying this case. Were this simply a matter of dividing the parties' assets, or just

an alimony claim, the parties would have expended a fraction of the fees and costs the community ultimately incurred. It is Dennis's concealment and fraud over many years that resulted in the fees and costs being many multiples of those typically expended in a divorce case. Gabrielle sought an award of attorney's fees and costs from Dennis based upon his bad faith violations of the rules of court, as the prevailing party, and under the criteria set forth in *Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005), including the disparity in the parties' incomes. AA.44.8607-08703. By an order entered on December 5, 2016, the district court denied Gabrielle's requests for attorney's fees. AA.47.9272-9275. Gabrielle appeals that Order.

In its Decree, the court indicated a reluctance to enter an award of fees to either party because neither party filed an offer to allow entry of judgment pursuant to NRS 125.141. AA.44.08477 FN6. This case presented complicated and uncertain issues of facts and law. Neither party could have offered a solution through NRS 125.141 to the alimony issue, and the property and waste issues involved millions of dollars. Neither counsel could provide any level of certainty to their clients. Picking a number for settlement could have been millions of dollars off the court's decision, and each party was confident enough in their position to forego that possibility. Moreover, the parties could not be aware of the value of those issues until each

expert had finished their reports, and had been subject to deposition. AA.17.3223-3402; AA.18.3551-3578.

The fundamental holding of *Sargeant* is that a party need not show "necessitous circumstances" when requesting an award of fees. *Sargeant v. Sargeant*, 88 Nev. 223, 227, 495 P.2d 618, 622 (1972). The wealth of either party is irrelevant; the question before the Court is whether a party can meet their adversary on an equal footing. *Id.* In *Sargeant,* the wife's financial condition would have been "destroyed" by causing her to pay her own fees, but that cannot be the only criteria for an award of fees. *Id.* That criteria would require a party to show "necessitous circumstances" (that their financial condition would be destroyed), the criteria the Court overruled in *Sargeant. Id. Sargeant,* stands for the general proposition that parties should have access to equal resources to support their attorney's fees and costs, and a party need not show necessitous circumstances to justify a distribution of community or separate property to accomplish that equality. *Id.*

Equally important, in *Miller v. Wilfong,* 121 Nev. 619, 119 P.3d 727 (2005), this Court held that in family law matters, the district court must utilize the factors identified in *Brunzell,* in when determining "the appropriate fee" to award in a case. *Wilfong* requires parties seeking attorney fees in family cases to support their fee request with "affidavits or other evidence" that meets the factors in *Brunzell,* and in cases involving a disparity in income, the factors in *Wright v. Osburn,* 114 Nev.

1367, 979 P.2d 1071 (1998). Here, Gabrielle provided affidavits and other evidence that supported her claim for an award of fees. AA.44.8607-8703. The district court erred by failing to perform an analysis of the *Brunzell* factors to find that Gabrielle's fees expended were reasonable.

Under NRCP 7.60, a district court may order a party guilty of such conduct to pay the other party sanctions and attorney's fees. Even though the district court sanctioned Dennis for his violation of the JPI, the court did not award Gabrielle any attorney's fees. AA.44.08556. NRS 18.010 and NRCP 37(b)(4) permit the entry of fees and sanctions for a parties' bad faith claims or discovery failures.

Each of the *Brunzell* factors are applied to the court's findings and decree -

1. *Quality of the Advocate:* This factor addresses the ability, training, education, experience, professional standing and skill of the attorney of the litigant seeking fees. Radford J. Smith, Esq. is A/V rated with Martindale Hubbell, and is a board-certified Nevada family law specialist. Mr. Smith's rate of $450 per hour is reasonable based on his qualifications and the level of experience. Mr. Smith's associate, Ms. Varshney's rates of $350 per hour are also reasonable based on her qualifications, six-year experience in family law matters, and quality of work performed in this matter. The attorneys have litigated almost every aspect of Nevada family law during the course of their respective careers.

2. *The Character of the Work to be Done* – its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation.

There were two primary contested issues in the case: 1) community waste; and 2) alimony. All of the assets that were in issue were acquired by Dennis without Gabrielle's knowledge or consent; all of the "waste" in issue was money expended by Dennis without Gabrielle's knowledge or consent. AA.6.1052; AA.6.1090-1091; AA.44.0847, FN26. In its Decree, the court recognized that the bulk of the work to identify, investigate, clarify and analyze the massive amount of data necessary to present a cogent report fell upon Gabrielle, her counsel, and her experts. AA.44.08530-08554. Gabrielle was required to analyze the data, including her spending data over years of entries to determine whether the spending was known to her. AA.44.08531. Gabrielle's counsel, when faced with the volume of the evidence, worked together with Anthem Forensics to develop a reasonable metric to analyze the data as "community waste." AA.44.08530-08554. The action was made substantially more difficult because of Dennis's failure to perform an accounting of his spending, and his failure to comply with court rules or orders. AA.44.8502; AA.10.1821. It was that method (developed after exploring many other ideas based upon the court definitions of "waste" under Nevada law) that counsel and Anthem

identified for the uncategorized spending section of Anthem's report that the court discussed and adopted in its findings. AA.44.08530-08554.

Gabrielle was required to do a mountain of work that was not typical in a normal divorce case. Gabrielle took a series of depositions all addressing various aspects of the "waste" analysis. AA.27.5171-AA.31.6019. The court read the depositions Gabrielle noticed and took, and she submits that all the depositions advanced or clarified the scope of issues of waste. AA.44.08477. The depositions allowed her counsel and experts to determine those expenditures that became the analysis of potential waste contained in Anthem's reports. AA.44.08530-08554. A representative of Anthem Forensics was present at nearly all of the depositions, and the review of those transcripts reveal the methodology of parsing that was a significant part of the work done. AA.44.08530-08554.

The court awarded Gabrielle one-half of Anthem's fees. AA.47.9276-9279. Gabrielle submits that the bulk of the fees incurred by her in this case were related to gathering the information underlying the Anthem reports, and for that reason, those fees should be held in the same light as the work performed by Anthem. AA.44.8607-8703.

3. *The Work Actually Performed by the Lawyer* – the skill, time and attention given to the work. Gabrielle's billing history was admitted at Trial and included in her post-divorce motion. AA.44.8477; AA.44.8607-8703.

4. *The Result* – in *Brunzell,* result is not synonymous with "prevailing party." The *Brunzell* court described the "result" as "whether the attorney was successful and what benefits were derived." 85 Nev. at 349, 455 P.2d at 33. Here, Gabrielle prevailed. Dennis's position regarding waste was that Gabrielle should receive nothing in reimbursement for waste because his spending, even on secret girlfriends and children he fathered with another while married to Gabrielle, was not sufficiently material to justify a reimbursement for the waste. AA.44.08540. The Court found that Gabrielle had proved $4,087,863 of community waste. AA.44.08530. Dennis argued that Gabrielle was not entitled alimony, but the Court awarded her over $1,600,000 in alimony. AA.44.08569. That was "success," and the benefit she sought from the representation of her attorneys.

Dated this 17th day of August, 2017.

RADFORD J. SMITH, CHARTERED

RADFORD J. SMITH, ESQ.
Nevada State Bar No. 002791
GARIMA VARSHNEY, ESQ.
Nevada State Bar No.011878
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
Attorney for Respondent/CrossAppellant

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 fast Respondent/Cross-Appellant's Answering Brief (Amended) has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Font Size 14, in Times New Roman;

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionally spaced, has a typeface of 14 points or more, and contains 18,369 words.

3. I further certify that I have read the Respondent/Cross-Appellant's Answering 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 be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I 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 Appellate Procedure.

Dated this ...17th... day of August, 2017.

RADFORD J. SMITH, CHARTERED

RADFORD J. SMITH, ESQ.
Nevada State Bar No. 002791
GARIMA VARSHNEY, ESQ.
Nevada State Bar No.011878
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
Attorney for Respondent/CrossAppellant

CERTIFICATE OF MAILING

I hereby certify that I am an employee of Radford J. Smith, Chartered, and that on the 15 day of August 2017, a copy of Respondent/Cross-Appellant's Answering Brief and Opening Brief on Cross-Appeal (Amended) in the above entitled matter was e-mailed and was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list, to the attorney listed below at the address, email address and/or facsimile number indicated below:

Dan Marks, Esq.
Law Office of Daniel Marks
610 South Ninth Street
Las Vegas NV 89101
Attorney for Appellant/Cross-Respondent

An employee of Radford J. Smith, Chartered