Henry's argument is unpersuasive because the authorities cited are inapposite to her proposition that the Commission was not created with the intent to have jurisdiction over hearing masters.

CONCLUSION

Henry makes a similar argument, regarding NRS 1.428, as the municipal court judge in *Davis*. However, we reject her argument and hold that NRS 1.428 is constitutional. Accordingly, the Commission is not acting outside of its jurisdiction here because it has the authority, by way of statute, to discipline Henry. Thus, we deny Henry's petition for a writ of prohibition.[2]

TEDDIE C. CRAIG, Appellant, *v*. DR. DONNELLY; NURSE BALLANTYNE; NURSE NANCY; NURSE DONNELLY; and SGT. CHAPPY, Respondents.

No. 75050-COA

February 28, 2019 439 P.3d 413

Appeal from a district court order dismissing a civil rights and torts action. Eleventh Judicial District Court, Pershing County; Jim C. Shirley, Judge.

Affirmed in part, reversed in part, and remanded.

Teddie C. Craig, Carson City, in Pro Se.

Aaron Ford, Attorney General, and *Frank A. Toddre II*, Senior Deputy Attorney General, Carson City, for Respondents.

Before the Court of Appeals, Douglas, A.C.J., Tao and Gibbons, JJ.

OPINION

Per Curiam:

In this appeal, we consider whether a plaintiff must comply with the jurisdictional naming requirement set forth in NRS 41.031 and NRS 41.0337 in order to properly proceed with civil rights claims brought pursuant to 42 U.S.C. § 1983. NRS 41.031 and NRS 41.0337

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[2]In light of this opinion, we vacate the stay of proceedings entered on May 24, 2018.

require plaintiffs bringing state tort claims against the State of Nevada and state employees to comply with certain requirements—particularly, naming the State as a party to the action—in order to properly invoke the State's waiver of sovereign immunity. Under 42 U.S.C. § 1983, plaintiffs may bring claims for damages against any person who, under color of state law, deprives the plaintiff of his or her civil rights. And it is well established that the State is not considered a "person" for the purposes of bringing a § 1983 claim; thus, such claims cannot be maintained against the State.

At issue here is how NRS 41.031 and NRS 41.0337's requirement that the State be named as a party to invoke a waiver of Nevada's sovereign immunity operates when a plaintiff brings an action against state employees pursuant to both NRS Chapter 41 and 42 U.S.C. § 1983. We hold that, while a plaintiff must name the State as a party to any state tort claims in order to comply with NRS 41.031 and NRS 41.0337, this statutory requirement does not apply to 42 U.S.C. § 1983 claims, even when brought in the same complaint as a plaintiff's state tort claims. Indeed, the State cannot be named as a party to a plaintiff's § 1983 civil rights claims.

In this case, plaintiff's complaint arguably asserted both state tort claims and 42 U.S.C. § 1983 claims against the respondent state employees, but did not name the State of Nevada as a party to any of these claims. Accordingly, we affirm the district court's order dismissing the complaint to the extent plaintiff asserted state tort claims under NRS 41.031 and NRS 41.0337, but reverse and remand the district court's dismissal as to those claims made pursuant to 42 U.S.C. § 1983.

BACKGROUND

Plaintiff Teddie Craig is an inmate at the Lovelock Correctional Center. Craig filed a civil rights and torts complaint pursuant to 42 U.S.C. § 1983 and NRS 41.031 naming respondents, who are employees of the Nevada Department of Corrections, as defendants in their individual capacities and alleging that these parties violated his First, Eighth, and Fourteenth Amendment rights under the United States Constitution.

Respondents subsequently moved to dismiss the complaint, arguing that Craig failed to properly name the State of Nevada as required by NRS 41.031 and NRS 41.0337, and therefore, failed to invoke the State's waiver of sovereign immunity such that the district court lacked jurisdiction over the matter. Craig opposed the motion, arguing that the prison, as an arm of the State, is not a person for purposes of 42 U.S.C. § 1983, and asserting that, as a result, he was withdrawing his reliance on NRS 41.031 as a basis for the action. Craig also moved to strike any reference to NRS 41.031 as a basis for his complaint for the purpose of giving the district court jurisdiction over his § 1983 claims.

The district court granted respondents' motion to dismiss, concluding that Craig failed to name the State of Nevada in his complaint, as required by NRS 41.031, and that he therefore failed to properly invoke the State's waiver of sovereign immunity. Based on this determination, the district court held that it lacked subject matter jurisdiction over the case, noting that Craig could not plead around this jurisdictional defect by attempting to strike the reference to the relevant statute.

Craig now appeals, contending that the district court erred in dismissing his case because he brought federal civil rights claims under 42 U.S.C. § 1983. Respondents disagree, arguing that dismissal was proper because Craig failed to properly invoke the State's waiver of sovereign immunity under NRS 41.031, and therefore, the district court did not have jurisdiction over the case.

ANALYSIS

The district court may properly dismiss a complaint when a lack of subject matter jurisdiction is apparent on the face of the complaint. *Rosequist v. Int'l Ass'n of Firefighters Local 1908*, 118 Nev. 444, 448, 49 P.3d 651, 653 (2002), *overruled on other grounds by Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 573 n.22, 170 P.3d 989, 995 n.22 (2007); *see* NRCP 12(h)(3). This court reviews a district court's order granting a motion to dismiss for lack of subject matter jurisdiction de novo. *See Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015) (reviewing a district court order dismissing a case for lack of subject matter jurisdiction de novo).

By statute, the State of Nevada has waived its sovereign immunity from civil liability in limited circumstances. *See* NRS 41.031. NRS 41.031 provides that, to properly invoke the State's waiver of immunity and pursue a civil action against the State, a plaintiff must name "the State of Nevada on relation of the particular department, commission, board or other agency of the State whose actions are the basis for the suit." Additionally, NRS 41.0337 requires that, to pursue a tort claim against a state employee, the complaint must name the State as a party pursuant to NRS 41.031. Thus, NRS 41.031 and NRS 41.0337 require that, to pursue a claim against the State or a state employee acting within the scope of his or her employment, a plaintiff must name the State of Nevada as a defendant.

Here, Craig's complaint set forth 42 U.S.C. § 1983 claims while also providing that jurisdiction for his claims existed under NRS 41.031. And the district court dismissed the complaint, in its entirety, for failure to name the State of Nevada as a party pursuant to NRS 41.031.

Insofar as Craig's complaint can be read to have asserted state tort claims against the respondent state employees pursuant to

NRS 41.031, dismissal as to those claims was required.[1] As detailed above, NRS 41.031 and NRS 41.0337 require that the State, on relation of the particular department, be named as a party to any complaint setting forth tort claims against state employees. And here, it is undisputed that Craig failed to name the State as a party to the action. Accordingly, the district court was required to dismiss any state tort claims that Craig brought against respondents for lack of subject matter jurisdiction. *See* NRS 41.031; NRS 41.0337; *Rosequist*, 118 Nev. at 448, 49 P.3d at 653.

This does not end our analysis, however, as the district court went on to determine that NRS 41.031 and NRS 41.0337 also required dismissal of Craig's 42 U.S.C. § 1983 claims for failing to name the State as a party. The Nevada appellate courts have not addressed whether NRS 41.031 and NRS 41.0337 require a plaintiff to name the State as a party to § 1983 claims brought against state employees in their individual capacities, and we take this opportunity to provide guidance on this issue.

42 U.S.C. § 1983 allows a plaintiff to bring civil rights claims against any person who, under color of any statute, deprives the plaintiff of any rights, privileges, or immunities secured by the United States Constitution. 42 U.S.C. § 1983. Importantly, states are not "persons" for purposes of 42 U.S.C. § 1983 actions, and thus, a plaintiff cannot bring a § 1983 action against a state. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64-70 (1989).

Similarly, when state officials or employees are sued in their official capacities, such actions are truly against the office, not the individual, such that the action is effectively against the state itself. *Id.* at 71; *see also N. Nev. Ass'n of Injured Workers v. Nev. State Indus. Ins. Sys.*, 107 Nev. 108, 114-15, 807 P.2d 728, 732 (1991) (applying *Will* to determine that § 1983 claims could not be maintained against a Nevada state agency or state officials and employees in their official capacities). Therefore, state officials and employees are likewise not "persons" for purposes of § 1983 actions when sued in their official capacities and such claims cannot be brought against them in this capacity. *Will*, 491 U.S. at 71; *N. Nev. Ass'n of Injured Workers*, 107 Nev. at 114-15, 807 P.2d at 732.

Because neither the State nor state employees in their official capacities can be proper defendants to 42 U.S.C. § 1983 claims, NRS

[1]It is not clear that Craig actually asserted any state tort claims in his complaint, as he appears to only assert constitutional violations as causes of action. Indeed, Craig's complaint was filed using a standard form entitled, "Civil Rights Complaint pursuant to 42 U.S.C. § 1983" and Craig merely included NRS 41.031 as an additional statute providing jurisdiction. Nonetheless, to the extent his complaint could be read as including state tort claims, Craig waived them in his opposition to the motion to dismiss.

41.031 and NRS 41.0337 necessarily do not apply to such claims. As a result, the respondent state employees, in their individual capacities, were the proper defendants to Craig's § 1983 claims, not the State. *See Hafer v. Melo*, 502 U.S. 21, 27-28 (1991) (holding that state officials may be sued in their personal or individual capacities under § 1983, even if their actions were taken as part of their official duties).

Beyond the fact that 42 U.S.C. § 1983 claims cannot be maintained against the State, to the extent that dismissal of Craig's § 1983 claims based on a failure to invoke Nevada's sovereign immunity under NRS 41.031 and NRS 41.0337 would provide immunity over and above what is already provided by § 1983, such an application of Nevada's statutes would violate the Supremacy Clause of the United States Constitution. *See Howlett v. Rose*, 496 U.S. 356, 375 (1990) (explaining that § 1983 claims may be brought in state courts and are not subject to state sovereign immunity defenses because allowing "immunity over and above those already provided in § 1983 . . . directly violates federal law"); *Martinez v. Cal.*, 444 U.S. 277, 284 n.8 (1980) (explaining that "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immunized by state law" because it would violate the supremacy clause (internal quotation marks omitted)). As a result, NRS 41.031 and NRS 41.0337 cannot bar Craig from pursuing his 42 U.S.C. § 1983 claims against the respondent state employees, in their individual capacities, on sovereign immunity grounds.[2]

Thus, when a plaintiff seeks to bring both state tort claims and 42 U.S.C. § 1983 claims against state employees, the claims should be structured as follows. Any state tort claims must name not only the state employees, but must also include the State, on relation of the particular department, as a party to those particular claims in order to comply with NRS 41.031 and NRS 41.0337 and perfect a waiver of Nevada's sovereign immunity. Any claims brought pursuant to § 1983, however, need only name the state employees, in their individual capacities, as parties to the § 1983 claims. The plaintiff need not—and indeed cannot—name the State as a party to the 42 U.S.C. § 1983 claims.

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[2]We note that our conclusion on this point is in line with those reached by several of our sister states who have addressed similar questions. *See, e.g.*, *Besser v. Dexter*, 589 N.E.2d 77, 79 (Ohio Ct. App. 1990) ("The procedure set forth in [Ohio's waiver of sovereign immunity statute] applies to state law claims against the state of Ohio and/or its employees. It has no application to federal claims whether brought in federal or state court. . . ."); *Watkins v. Pa. Dep't of Corr.*, 196 A.3d 272, 274 (Pa. Commw. Ct. 2018) ("Section 1983 claims may be brought in the courts of this Commonwealth and are not subject to state sovereign immunity defenses.").

CONCLUSION

Based on the foregoing analysis, we conclude that, while the district court properly dismissed any state tort claims brought against the respondent state employees for failing to name the State as a party as required by NRS 41.031 and NRS 41.0337, it erred in applying these statutes to dismiss Craig's 42 U.S.C. § 1983 claims. With regard to the § 1983 claims, Craig's complaint properly named the state employees, in their individual capacities, as parties and not the State, as required to bring claims under § 1983. Accordingly, we affirm the dismissal of any state tort claims in Craig's complaint, but reverse and remand the dismissal of Craig's complaint as to his 42 U.S.C. § 1983-based causes of action.[3]

BANK OF AMERICA, N.A.; THE BANK OF NEW YORK MELLON, FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2005-17; AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., APPELLANTS, *v.* THOMAS JESSUP, LLC SERIES VII; FOXFIELD COMMUNITY ASSOCIATION; AND ABSOLUTE COLLECTION SERVICES, LLC, RESPONDENTS.

No. 73785

March 7, 2019 435 P.3d 1217

Appeal from a district court final judgment following a bench trial in a quiet title action. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Reversed and remanded.

[Rehearing denied April 25, 2019]

[En banc reconsideration granted September 24, 2019][*]

Akerman LLP and *Darren T. Brenner* and *William S. Habdas*, Las Vegas, for Appellants.

Shane D. Cox, Las Vegas, for Respondents Foxfield Community Association and Absolute Collection Services.

Law Office of Richard L. Tobler, Ltd., and *Richard L. Tobler*, Las Vegas, for Respondent Thomas Jessup, LLC Series VII.

Before the Supreme Court, HARDESTY, STIGLICH and SILVER, JJ.

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[3]In light of our resolution of this case, we deny all other requests for relief currently pending in this matter.

[*]**Reporter's Note:** En banc reconsideration was granted September 24, 2019. An order filed March 7, 2020, vacated this panel opinion and was issued in its place.

OPINION

Per Curiam:

In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), this court held that NRS 116.3116(2) provides a homeowners' association (HOA) with a "superpriority" lien that, when properly foreclosed, extinguishes a first deed of trust. This court subsequently held in *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018), that a deed of trust beneficiary can preserve its deed of trust by tendering the superpriority portion of the HOA's lien before the foreclosure sale is held.

In this appeal, we address two issues. First, we consider whether an offer to pay the superpriority amount in the future, when that amount is determined, constitutes a tender sufficient to preserve the first deed of trust under *Bank of America*. We conclude that such an offer is not sufficient to constitute a tender. Second, we address whether a formal tender is excused when the party entitled to payment represents that if a tender is made, it will be rejected. We conclude that such a representation excuses the requirement of making a formal tender. Here, the HOA's agent told the deed of trust beneficiary's agent that it would reject a superpriority tender if made. The deed of trust beneficiary's agent was therefore excused from making a formal tender, such that under *Bank of America*, the ensuing foreclosure sale did not extinguish the first deed of trust. As the district court's judgment determining otherwise was erroneous, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

The subject property is located in a neighborhood governed by respondent Foxfield Community Association, which is an HOA. The former homeowner had obtained a loan to purchase the property, which was secured by a deed of trust listing appellant Mortgage Electronic Registration Systems, Inc., as the nominal beneficiary. In 2011, beneficial interest in the deed of trust was assigned to appellant Bank of New York Mellon, and at some point, appellant Bank of America started servicing the loan on Bank of New York Mellon's behalf.[1]

Also by 2011, the former homeowner had become delinquent on her monthly HOA assessments, and Foxfield's agent, respondent Absolute Collection Services (ACS), instituted foreclosure proceedings by recording and mailing a Notice of Delinquent Assessment Lien and then a Notice of Default. Upon receiving the Notice of

[1]This opinion refers collectively to all three appellants as "the Bank."

Default, the Bank retained the law firm of Miles, Bauer, Bergstrom & Winters, LLP (Miles Bauer) to address the matter. An attorney with Miles Bauer, Rock Jung, wrote a letter to ACS in August 2011 stating in relevant part that

> a portion of your HOA lien is arguably senior to [the Bank's] first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment . . . . It is unclear, based upon the information known to date, what amount the nine months' of common assessments . . . actually are. *That amount, whatever it is, is the amount [the Bank] should be required to rightfully pay* to fully discharge its obligations to the HOA . . . and my client hereby offers to pay that sum *upon presentation of adequate proof of the same by the HOA*.

(Emphases added.) In response, an employee of ACS, Kelly Mitchell, sent a fax to Miles Bauer in September 2011 explaining in relevant part that

> in conversations past, you had stated your client[']s position of paying for 9 months of assessments . . . all occurring ***before*** foreclosure by your client.
>
> I am making you aware that it is our view that without the action of foreclosure [by the Bank], *a 9 month Statement of Account is not valid*. At this time, I respectfully request that you submit the Trustees Deed Upon Sale showing your client's possession of the property and the date that it occurred. *At that time, we will provide a 9 month super priority lien Statement of Account*. . . .
>
> *We recognize your client's position as the first mortgage company as the senior lien holder*. Should you provide us with a recorded Notice of Default or Notice of Sale, we will hold our action so your client may proceed.

(Last three emphases added.) The letter went on to explain that Miles Bauer could pay $50 if it still wanted a statement of account.

Following receipt of ACS's fax, neither Miles Bauer nor the Bank took any additional actions to protect the first deed of trust, and ACS eventually sold the property at a foreclosure sale in June 2012 to CSC Investment Group, which later conveyed its interest in the property to Thomas Jessup, LLC, which subsequently conveyed its interest in the property to respondent Thomas Jessup, LLC Series VII.[2]

In 2013, the Purchaser instituted the underlying quiet title action, seeking a determination that the foreclosure sale had extinguished

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[2]This opinion refers collectively to CSC Investment Group, LLC; Thomas Jessup, LLC; and Thomas Jessup, LLC Series VII as "the Purchaser."

the Bank's deed of trust. In response, the Bank sought a determination that the deed of trust was not extinguished, and alternatively, it asserted claims against ACS and Foxfield seeking to hold them accountable in the event that it was determined the deed of trust had been extinguished. The district court denied the parties' competing summary judgment motions, and a bench trial was eventually held in April 2017. As relevant here, Mr. Jung and Ms. Mitchell both testified regarding their impressions of the above-described correspondence. Mr. Jung testified that he interpreted ACS's fax as a representation that "there was no superpriority lien amount that was due and owing" and that ACS "[was] waiving any right to demand such an amount at that time." Ms. Mitchell testified it was ACS's position that there was no superpriority portion of the HOA's lien that was owed until after the Bank held its own foreclosure sale. She further testified that ACS's policy would be to reject any superpriority tender if it was accompanied by a condition explaining that the Bank's obligations had been "paid in full."

Following the trial, the district court ruled in favor of the Purchaser and held that the foreclosure sale extinguished the Bank's deed of trust. The district court concluded that Miles Bauer's letter offering to pay the yet-to-be-determined superpriority amount was insufficient to constitute a tender. Although the district court observed that "Mr. Jung understood that failure to pay the superpriority portion of the lien would result in the loss of his client's interest in the property," the court did not explicitly address Mr. Jung's testimony regarding his interpretation of the fax. With respect to the Bank's claims against ACS and Foxfield, the district court determined that those claims failed.

Following entry of the district court's judgment, the Bank filed this appeal. We review the district court's factual findings for substantial evidence and its legal conclusions de novo. *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012).

DISCUSSION

The Bank first contends that Miles Bauer's letter offering to pay the superpriority portion of the HOA's lien, once that amount was determined, was sufficient to constitute a valid tender such that the first deed of trust was not extinguished by the foreclosure sale. The Purchaser counters that an offer to make a payment at some point in the future cannot constitute a valid tender. We agree with the Purchaser, as it is the generally accepted rule that a promise to make a payment at a later date or once a certain condition has been satisfied cannot constitute a valid tender. *See Southfork Invs. Grp., Inc. v. Williams*, 706 So. 2d 75, 79 (Fla. Dist. Ct. App. 1998) ("To make an effective tender, the debtor must actually attempt to pay the sums due; mere offers to pay, or declarations that the debtor is willing to pay, are not enough."); *Cochran v. Griffith Energy Serv., Inc.*, 993

A.2d 153, 166 (Md. Ct. Spec. App. 2010) ("A tender is an offer to perform a condition or obligation, coupled with the present ability of immediate performance, so that if it were not for the refusal of cooperation by the party to whom tender is made, the condition or obligation would be immediately satisfied." (internal quotation marks omitted)); *Graff v. Burnett*, 414 N.W.2d 271, 276 (Neb. 1987) ("To determine whether a proper tender of payment has been made, we have stated that a tender is more than a mere offer to pay. A tender of payment is an offer to perform, coupled with the present ability of immediate performance, which, were it not for the refusal of cooperation by the party to whom tender is made, would immediately satisfy the condition or obligation for which the tender is made."); *McDowell Welding & Pipefitting, Inc. v. U.S. Gypsum Co.*, 320 P.3d 579, 585 (Or. Ct. App. 2014) ("In order to serve the same function as the production of money, a written offer of payment must communicate a present offer of timely payment. The prospect that payment might occur at some point in the future is not sufficient for a court to conclude that there has been a tender . . . ." (internal quotations, citations, and alterations omitted)); *cf.* 74 Am. Jur. 2d *Tender* § 1 (2012) (recognizing the general rule that an offer to pay without actual payment is not a valid tender); 86 C.J.S. *Tender* § 24 (2017) (same). Accordingly, we conclude that Miles Bauer's offer to pay the yet-to-be-determined superpriority amount was not sufficient to constitute a valid tender.

Alternatively, the Bank contends that its obligation to tender the superpriority amount was excused because ACS stated in its fax that it would reject any such tender if attempted. We agree with the Bank, as this is a generally accepted exception to the abovementioned rule. *Guthrie v. Curnutt*, 417 F.2d 764, 765-66 (10th Cir. 1969) ("[W]hen a party, able and willing to do so, offers to pay another a sum of money and is told that it will not be accepted, the offer is a tender without the money being produced."); *In re Pickel*, 493 B.R. 258, 271 (Bankr. D.N.M. 2013) ("Tender is unnecessary if the other party has stated that the amount due would not be accepted."); *Mark Turner Props., Inc. v. Evans*, 554 S.E.2d 492, 495 (Ga. 2001) ("Tender of an amount due is waived when the party entitled to payment, by declaration *or by conduct,* proclaims that, if tender of the amount due is made, an acceptance of it will be refused." (internal quotation marks and alterations omitted)); 74 Am. Jur. 2d *Tender* § 4 (2012) ("A tender of an amount due is waived when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, it will not be accepted."); 86 C.J.S. *Tender* § 5 (2017) (same); *cf. Cladianos v. Friedhoff*, 69 Nev. 41, 45, 240 P.2d 208, 210 (1952) ("The law is clear . . . that any affirmative tender of performance is excused when performance has in effect been prevented by the other party to the contract.").

Although ACS's fax did not explicitly state that it would reject a superpriority tender, we believe this is the only reasonable construc-

tion of the fax, which stated that "a 9 month Statement of Account is not valid" and refuted Miles Bauer's "position of paying for 9 months of assessments . . . all occurring ***before*** foreclosure by [the Bank]." Moreover, Mr. Jung testified at trial that he interpreted the letter as ACS having waived Foxfield's entitlement to a superpriority tender, and Ms. Mitchell's trial testimony confirmed that ACS would indeed have rejected a superpriority tender if Miles Bauer included a "paid in full" condition with the tender.[3]

Accordingly, we conclude that Miles Bauer's offer to pay the superpriority portion of Foxfield's lien, combined with ACS's rejection of that offer, operated to cure the default as to that portion of the lien such that the ensuing foreclosure sale did not extinguish the first deed of trust. *Cf. Bank of America*, 134 Nev. at 607-11, 427 P.3d at 118-21 (holding that a tender of the defaulted superpriority portion of an HOA's lien preserves the first deed of trust). The district court therefore committed legal error in concluding otherwise. *Weddell*, 128 Nev. at 101, 271 P.3d at 748. Although the district court observed that "Mr. Jung understood that failure to pay the superpriority portion of the lien would result in the loss of his client's interest in the property," we are unwilling to characterize this observation as a factual finding entitled to deference in light of the district court having failed to address the above-mentioned language in the fax and Mr. Jung's interpretation of that fax.[4]

In light of the foregoing, we reverse the district court's judgment insofar as it determined that the foreclosure sale extinguished the Bank's deed of trust, and we remand this matter for the district court to enter a judgment consistent with this opinion.[5]

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[3]This court held in *Bank of America* that Miles Bauer had a right to impose such a condition on behalf of its clients. 134 Nev. at 607-08, 427 P.3d at 118. To clarify, however, the "paid in full" condition in *Bank of America* pertained solely to the default referenced in Miles Bauer's letter and did not purport to absolve the deed of trust beneficiary of any future obligation to cure a subsequent superpriority default. By law, the HOA can initiate foreclosure proceedings for any future defaults, at which point the first deed of trust beneficiary would be responsible for again curing the superpriority default. *See Prop. Plus Invs., LLC v. Mortg. Elec. Registration Sys.*, 133 Nev. 462, 466-67, 401 P.3d 728, 731-32 (2017) (observing that an HOA can enforce a second superpriority default by restarting the foreclosure process).

[4]We also are not persuaded by the Purchaser's argument that the Bank should be estopped from arguing that tender was excused.

[5]As the Bank's deed of trust was not extinguished, we need not address the viability of the Bank's claims against ACS and Foxfield. Similarly, we need not address the Bank's remaining arguments in support of its deed of trust remaining intact, as neither the Bank nor the Purchaser have expressed whether they would prefer to have the sale set aside or have the Purchaser take title to the property subject to the first deed of trust.

RESOURCES GROUP, LLC, as Trustee of the EAST SUNSET ROAD TRUST, Appellant, *v.* NEVADA ASSOCIATION SERVICES, INC.; and HYDR-O-DYNAMIC CORPORATION, a Revoked Nevada Corporation, Respondents.

No. 71268

March 14, 2019 437 P.3d 154

Appeal from a district court judgment in an action to quiet title to real property. Eighth Judicial District Court, Clark County; Nancy Becker, Senior Judge.

Reversed and remanded.

Gibbons, C.J., dissented in part. Pickering, J., dissented.

Law Offices of Michael F. Bohn, Ltd., and *Michael F. Bohn*, Las Vegas, for Appellant.

Goold Patterson and *Jeffrey D. Patterson*, Las Vegas, for Respondent Hydr-O-Dynamic Corporation.

Christopher V. Yergensen, Las Vegas, for Respondent Nevada Association Services, Inc.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Hardesty, J.:

This case presents us with an opportunity to clarify whether a person conducting a sale under NRS Chapter 116, governing nonjudicial foreclosure sales by a unit-owners' association (UOA), has the discretion to refuse to issue a foreclosure deed to the highest bidder at a foreclosure sale after payment has been made, when it is later determined that the delinquency amount may have been paid by the property owner before the sale.[2] We first hold that each party in a quiet title action has the burden of demonstrating superior title in himself or herself. We further hold that once a bid is accepted and

[1]The Honorable Elissa F. Cadish and The Honorable Abbi Silver did not participate in the decision of this matter. The Honorable Michael L. Douglas, Senior Justice, was appointed by the court to participate in the decision of this matter.

[2]The 2015 Legislature substantially revised NRS Chapter 116. *See Shadow Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 56 n.2, 366 P.3d 1105, 1109 n.2 (2016). The references in this opinion to NRS Chapter 116 statutes are to the version of the statutes in effect when the events in this case occurred, which was before the effective date of the 2015 amendments.

payment is made, the foreclosure sale is complete and title vests in the purchaser, and the person conducting the sale has no discretion to refuse to issue the foreclosure deed. Lastly, we reaffirm our prior holdings that the correct standard for determining whether to set aside a sale on equitable grounds is whether there has been some showing of fraud, unfairness, or oppression affecting the sale.

Here, the purchaser demonstrated superior title by showing that it paid the sales price following a valid foreclosure sale. The burden of demonstrating that the delinquency was cured presale, rendering the sale void, was on the party challenging the foreclosure, who failed to meet its burden. Because we also conclude that the district court correctly found that there was no showing that fraud, unfairness, or oppression affected the sale, we hold that title vested in the purchaser's name and that the district court abused its discretion by setting aside the sale.

FACTS AND PROCEDURAL HISTORY

Respondent Hydr-O-Dynamic Corporation (HODC) was the legal owner and titleholder of real property located at 571 East Sunset Road in Henderson (the Property). The Property was located within a common-interest community comprised of commercial buildings overseen by Sunpac, a UOA formed under NRS Chapter 116. HODC became delinquent on the periodic assessments it was required to pay to the UOA, and respondent Nevada Association Services, Inc. (NAS), as the UOA's foreclosure agent, complied with all statutory presale requirements for a nonjudicial foreclosure sale of the Property pursuant to NRS 116.3116, including mailing default and sale notices certified with return receipt requested to HODC. The foreclosure sale was scheduled to take place on February 13, 2015, at 10 a.m.

On February 6, 2015, HODC's president mailed a check for the full amount of the delinquency ($6,554.09) to NAS via regular mail. At 10 a.m. on February 13, NAS, unaware that HODC had mailed a delinquency payment, began its property auctions, which included the subject Property. The auctions concluded at approximately 10:30 a.m. Appellant Resources Group, LLC, was the successful bidder on the Property, paying $350,000 in cashier's checks immediately following the conclusion of the auctions. That same day, at some point between 9:30 a.m. and 11 a.m., NAS received the check from HODC. NAS did not inform its general counsel that it had received the check until February 17, however, due to an intervening three-day weekend. NAS's general counsel then contacted Resources Group, explained the situation, and offered to return Resources Group's cashier's checks, along with interest for the five days that had elapsed since the sale, in exchange for canceling the sale of the Property. Resources Group declined the offer, stating that it

wanted either $1 million or the Property. Resources Group's agent informed NAS that he saw the mailman arrive on February 13 as he was leaving NAS's offices following the foreclosure sale, which would have been about 10:30 a.m., and thus, by the time NAS could have processed the payment, the foreclosure sale would have been completed. Despite this claim, NAS declined to issue a foreclosure deed to Resources Group.

Resources Group then filed a complaint against NAS, the UOA,[3] and HODC regarding title to the Property. After an unsuccessful summary judgment motion, the parties proceeded to trial. Ultimately, the district court entered judgment against Resources Group, finding that although HODC was delinquent in paying its assessments and the UOA's lien was perfected, Resources Group failed to demonstrate that the check curing the delinquency had not arrived before the foreclosure sale. The court discounted the testimony regarding the mailman as the agent had no specific memory distinguishing that day from any other. The court therefore concluded that Resources Group failed to meet its burden of showing that title should vest in its name.

The district court also concluded that the equities weighed in favor of setting aside the sale, reasoning that nothing in this court's recent line of NRS Chapter 116 foreclosure opinions "limit[ed] the exercise of equity to only those instances where there is gross inadequacy of price and fraud, unfairness or oppression that accounts for [an] inadequacy of price," even though that is a more common ground for setting aside a sale than it being deemed void due to sale irregularities. In balancing the equities, the court found that Resources Group tendered payment for the Property not knowing of the possible arrival of HODC's check, such that Resources Group arguably held bona fide purchaser status, but that setting aside the sale would not result in any prejudice to Resources Group as it would only suffer a loss of interest. The court also found that HODC did nothing more than deposit its delinquency-curing check in regular mail without any follow-up that NAS had received the check, but that the statutory scheme evidenced a legislative intent to allow post-sale redemption and that HODC would be severely prejudiced if the sale was not set aside. Based on these facts, the court concluded that the equities weighed in favor of HODC and set the sale aside such that HODC retained title to the Property.

DISCUSSION

I.

Resources Group argues that completion of a foreclosure sale and tender of the bid amount vests title to the property in the bidder,

[3]Resource Group later voluntarily dismissed the UOA without prejudice pursuant to NRCP 41(a)(1)(i).

that the burden then lies on HODC to show that the sale was invalid because it cured the delinquency, and that HODC failed to meet that burden. Thus, Resources Group asserts that title to the Property vested in its name when it delivered the cashier's checks upon conclusion of the foreclosure sale and that there is no basis to set the sale aside.

Conversely, HODC argues that title passes to a successful bidder only at the conclusion of a *valid* foreclosure sale and payment of the bid amount. On this foundation, HODC argues that if its payment of the delinquency was received prior to the sale, the sale was invalid, and Resources Group had the burden to show that the sale was valid by demonstrating that HODC's check arrived after the sale or otherwise failed to cure the delinquency.

A.

While the "burden of proof [in a quiet title action] rests with the plaintiff to prove good title in himself," *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996), *abrogated on other grounds by Delgado v. Am. Family Ins. Grp.*, 125 Nev. 564, 570, 217 P.3d 563, 567 (2009), "a plaintiff's right to relief [ultimately] . . . depends on superiority of title," *W. Sunset 2050 Tr. v. Nationstar Mortg., LLC*, 134 Nev. 352, 354, 420 P.3d 1032, 1034 (2018) (internal quotation marks omitted). And because "[a] plea to quiet title does not require any particular elements, . . . each party must plead and prove his or her own claim to the property in question." *Chapman v. Deutsche Bank Nat'l Tr. Co.*, 129 Nev. 314, 318, 302 P.3d 1103, 1106 (2013) (internal quotation marks omitted). Thus, we analyze the parties' respective claims to the Property.

B.

A foreclosure sale generally terminates a party's legal title to the property. *See Bldg. Energetix Corp. v. EHE, LP*, 129 Nev. 78, 86, 294 P.3d 1228, 1234 (2013); *Charmicor, Inc. v. Bradshaw Fin. Co.*, 92 Nev. 310, 313, 550 P.2d 413, 415 (1976). This general rule is subject to certain limited exceptions, such as where the sale is void. *See Energetix*, 129 Nev. at 86, 294 P.3d at 1234 (noting that a lack of substantial compliance with the relevant statutes and a lack of proper notice are exceptions to the general rule); *see also Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 121, *as amended on denial of reh'g* (2018) (holding that a foreclosure sale on a lien is void where that lien has been satisfied prior to the sale "as the lien is no longer in default"); *Henke v. First S. Props., Inc.*, 586 S.W.2d 617, 619-20 (Tex. Civ. App. 1979) (concluding that the payment of past-due installments cured a loan's default such that the subsequent foreclosure on the property was void); 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* § 7:21 (6th ed. 2014) (noting that a trustee's sale

is void where there is no authorization to foreclose, and that there is no authorization to foreclose when the loan is not in default). To complete a valid foreclosure sale for unpaid assessments in Nevada, a UOA must comply with the provisions set forth in NRS Chapter 116. Relevant to the present case, the UOA must mail and record a notice of delinquent assessment, NRS 116.31162(1)(a), "a notice of default and election to sell," NRS 116.31162(1)(b), and a notice of foreclosure sale, NRS 116.311635(1)(a).[4] Moreover, a foreclosure sale is complete and title vests in the purchaser once payment has been made by the highest bidder. *See Dazet v. Landry*, 21 Nev. 291, 295, 30 P. 1064, 1066 (1892), *overruled on other grounds by Golden v. Tomiyasu*, 79 Nev. 503, 514-15, 387 P.2d 989, 995 (1963). After a sale is completed and payment is made, NRS 116.31164(3)(a) states that "the person conducting the sale *shall* . . . [m]ake, execute and . . . deliver to the purchaser" a deed conveying the property's title to the purchaser. (Emphasis added.)

Here, the district court found that it was uncontested that the sale complied with the statutory requirements, and that Resources Group made payment of the full bid amount in cashier's checks immediately after the auction. The record further suggests that NAS accepted the checks and provided Resources Group with a receipt of funds and instructions. If this constitutes a valid sale, NRS 116.31164(3)(a) mandates that the person conducting the sale execute and deliver a deed of the Property to Resources Group.

II.

HODC argues, however, that it has superior title to the Property—despite the sale being properly conducted and Resources Group tendering payment of its bid—because it cured its default prior to the sale. In considering HODC's argument, we must address whether HODC has the burden of demonstrating that its delinquency-curing check arrived before the foreclosure sale, or whether this would be part of Resources Group's burden to prove that it has superior title to the Property. We conclude that the burden must lie with HODC. Payment of a debt is an affirmative defense, which the party asserting has the burden of proving. *See* NRCP 8(c) (listing payment as an affirmative defense); *Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591 P.2d 1137, 1140 n.2 (1979) ("Since the averments of an affirmative defense are taken as denied or avoided, each element of the defense must be affirmatively proved. The burden of proof clearly rests with the defendant." (citations omitted)). At least one court to address the issue agrees. *See Nguyen v. Calhoun*, 129 Cal. Rptr. 2d 436, 446 (Ct. App. 2003) ("The trustor-mortgagor or the person

[4]The covenants, conditions, and restrictions (CC&Rs) governing the Property imposed the same requirements as those required by statute.

who alleges that a debt has been paid has the burden of proving payment." (internal quotation marks omitted)). Concluding that HODC bears the burden of proof on this issue, we now address whether it met that burden by proving that it paid the delinquency amount in full prior to the sale.[5]

Although HODC does not argue on appeal that it met its burden of proof in this regard because it alleges that the burden was on Resources Group, it is clear from the record that HODC could not meet its burden. The evidence showed that, in its normal course of business, the mail would typically be delivered to NAS between 9:30 a.m. and 11:30 a.m., and that NAS would open and date-stamp its mail on the same day that it was delivered. HODC's check was date-stamped on February 13, 2015, the date of the sale, but no witness could credibly remember when the mail arrived that day.[6] The district court stated, and we agree, that this evidence could only support a finding "that HODC's check arrived between 9:30 a.m. and 11:30 a.m. on February 13, 2015." Because the foreclosure sale ended at 10:30 a.m., this finding does not demonstrate that HODC paid the delinquency before the foreclosure sale. Thus, HODC failed to meet its burden and has therefore failed to demonstrate good title in itself.

III.

NRS 116.31164(3)(a) provides that, once payment has been made, the person that conducted "the sale shall . . . [m]ake, execute and . . . deliver to the purchaser . . . a deed . . . which conveys to the grantee all title" to the purchased property. The use of the word "shall" denotes a lack of discretion. *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 665, 310 P.3d 569, 572 (2013) ("The word 'shall' is generally regarded as mandatory."); *cf. In re Montierth*, 131 Nev. 543, 550, 354 P.3d 648, 652 (2015) ("A ministerial act is an act performed by an individual in a prescribed legal manner in

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[5]Resources Group argues that HODC waived the issue of payment because it did not plead it in its responsive pleadings below. A party waives an affirmative defense where the "party fails to raise the affirmative defense in any pleadings or any other papers filed with the court, including its answer, pretrial statement, or post-trial brief." *City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 755 n.12, 191 P.3d 1175, 1179 n.12 (2008) (internal quotation marks omitted). Nevertheless, we have held "that an affirmative defense can be considered (if not pleaded) if fairness so dictates and prejudice will not follow." *Ivory Ranch, Inc. v. Quinn River Ranch, Inc.*, 101 Nev. 471, 473, 705 P.2d 673, 675 (1985). Here, fairness dictates that we consider HODC's arguments regarding payment, as those arguments are crucial for determining whether the sale was void. In addition, no prejudice would follow because "[o]ne who bids upon property at a foreclosure sale does so at his peril," *Henke*, 586 S.W.2d at 620, and thus, if a sale is void, a purchaser should not be entitled to reap a windfall.

[6]An agent of Resources Group testified he remembered seeing the mail being delivered after the foreclosure sale was completed, but the district court found that testimony not to be credible and we will not reassess witness credibility on appeal. *See Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007).

accordance with the law, without regard to, or the exercise of, the judgment of the individual." (internal quotation marks omitted)); *see also In re Rugroden*, 481 B.R. 69, 78 (Bankr. N.D. Cal. 2012) ("When a statute clearly gives an official no choice but to act, then the act is ministerial."). NAS therefore lacked the discretion to refuse to deliver the deed based on information received after the sale was properly completed and after Resources Group tendered its bid. Having concluded that Resources Group has demonstrated good title and HODC failed to demonstrate it cured its default before the sale, we now address whether the sale should be set aside on equitable grounds.

The district court erred by setting the sale aside on equitable grounds

Resources Group argues that, under *Shadow Wood*, 132 Nev. 49, 366 P.3d 1105, HODC must demonstrate that the sales price was grossly inadequate and that there was fraud, unfairness, or oppression that resulted in the low sales price in order for the foreclosure sale to be set aside on equitable grounds. Resources Group further argues that HODC is not entitled to equitable relief under *Shadow Wood* because the sale was conducted properly, lawfully, and fairly; because the sales price was not grossly inadequate; and because, even if the sales price was grossly inadequate, HODC failed to show that there was fraud, unfairness, or oppression that brought about that low price.[7]

Conversely, HODC contends that *Shadow Wood* should be read broadly to recognize a court's equitable power to set aside a foreclosure sale based on the entirety of the circumstances. HODC argues that the use of the court's equitable powers are warranted under the circumstances presented by this case because the delinquency-curing payment was made on the same day as the foreclosure sale.[8]

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[7]Resources Group also argues that HODC had no right to redemption under the CC&Rs or statutory law because the sale was conducted properly, and the UOA CC&Rs provide that a properly conducted sale vests title in the purchaser without the unit owner's equity or redemption. In *Shadow Wood*, however, this court held that "[h]istory and basic rules of statutory interpretation confirm our view that courts retain the power to grant equitable relief from a defective foreclosure sale when appropriate *despite NRS 116.31166*." 132 Nev. at 57, 366 P.3d at 1110-11 (emphasis added). Courts can also provide equitable relief despite the language in the CC&Rs. *See McKnight Family, LLP v. Adept Mgmt. Servs., Inc.*, 129 Nev. 610, 615, 310 P.3d 555, 558 (2013) (recognizing the contractual nature of CC&Rs); *Wainwright v. Dunseath*, 46 Nev. 361, 366, 211 P. 1104, 1106 (1923) (holding that "courts of equity have the power to order the reformation of deeds [or] contracts").

[8]HODC also argues that it should be granted equitable relief because Resources Group failed to demonstrate it had good title. Having already concluded that Resources Group demonstrated good title in itself, we do not address this argument further.

A district court's decision to set aside a foreclosure sale on equitable grounds is subject to an abuse of discretion standard of review. *See Arsali v. Chase Home Fin. LLC*, 121 So. 3d 511, 519 (Fla. 2013) ("Trial courts' judgments pertaining to set asides of judicial foreclosure sales are now, as they always have been, subject to review by way of an abuse of discretion standard."). The party seeking to set aside the sale on equitable grounds bears the burden to "produce[ ] evidence showing that the sale was affected by fraud, unfairness, or oppression that would justify setting aside the sale." *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 742, 405 P.3d 641, 643 (2017) (internal quotation marks omitted).

In *Shadow Wood* we held that "demonstrating that an association sold a property at its foreclosure sale for an inadequate price is not enough to set aside that sale [on equitable grounds]; there must also be a showing of fraud, unfairness, or oppression." 132 Nev. at 60, 366 P.3d at 1112. *Shadow Wood* also observed, however, that courts sitting in equity are required to analyze the totality of the circumstances when determining whether to set aside an HOA foreclosure sale on equitable grounds. *See id.* at 63, 366 P.3d at 1114 ("When sitting in equity, . . . courts must consider the entirety of the circumstances that bear upon the equities."). HODC interprets "totality of the circumstances" to mean that this court is to look broadly at all of the circumstances surrounding the sale and the parties in determining whether to set aside the sale and not just focus on whether there was a low sales price that was brought about by fraud, oppression, or unfairness.

As we subsequently clarified in *Nationstar*, this totality-of-the-circumstances analysis is tied to the traditional rule for determining whether to set aside a sale on equitable grounds. 133 Nev. at 750, 405 P.3d at 648-49 ("[I]f the district court closely scrutinizes the circumstances of the sale and finds no evidence that the sale was affected by fraud, unfairness, or oppression, then the sale cannot be set aside, regardless of the inadequacy of price."). That is, if the totality of the circumstances demonstrates that *the sale itself* was affected by "fraud, unfairness, or oppression," then a court may set the sale aside. This has been the rule in Nevada since 1963. *See Golden*, 79 Nev. at 515, 387 P.2d at 995 ("[I]t is universally recognized that inadequacy of price is a circumstance of greater or less weight to be considered in connection with other circumstances impeaching *the fairness of the transaction* as a cause of vacating it . . . ." (emphasis added) (quoting *Odell v. Cox*, 90 P. 194, 196 (Cal. 1907))).

Here, the alleged equities in favor of setting aside the sale include those expressly stated by the district court: (1) "it was not unreasonable to assume that a check deposited in the main Las Vegas post office would be delivered within seven days to another Las Vegas address"; (2) Resources Group was not unduly prejudiced, as

the only prejudice was a loss of interest on the money spent on the bid, "which could have been mitigated"; (3) HODC would suffer "extreme prejudice" if the sale were not set aside; and (4) "the Legislature intended to allow for the payment of community liens post sale by right of redemption."[9] In addition, the record suggests that there are possibly several other equities in favor of setting aside the sale. First, the district court found that, although unlikely, the check could have arrived earlier than February 13, 2015. Second, HODC's president testified that he was a small-business man and lacked the sophistication to know that he should follow up on his delinquency payment. Third, HODC did not have the keys to the mailbox for its property until late 2014, so it was unaware of any prior delinquency notices. Indeed, the first time that HODC allegedly received any notice of the delinquency or prior notices was when HODC's president was personally served with the notice of foreclosure in the parking lot of the Property on February 6, 2015.

The district court and HODC, however, fail to demonstrate that any of these equities constitute "fraud, unfairness, or oppression" that affected the sales price. Indeed, the district court acknowledged that the bid price was not inadequate and that there was no "evidence that the price was infected with unfairness, fraud or oppression." Even if we broadly interpreted the "unfairness" factor to include these additional equities, we conclude that the equities would still weigh against HODC. HODC asserted that it did not have access to its mail to receive the initial delinquent assessment notices regarding the Property,[10] but that was solely within HODC's control.[11] Additionally, with regard to the check, HODC only mailed it in the regular course of mail, one week before the sale. At trial, HODC's president conceded that he failed to pursue other options, such as overnight delivery or certified mail. HODC's president also acknowledged that he could have delivered the check in person or

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[9]As noted earlier, the 2015 Legislature made substantial changes to NRS Chapter 116. As the revised version of NRS 116.3116 did not apply to the present case, and the 2014 version of the statute unambiguously did not allow for a right of redemption, the district court erred by gleaning an intent by the Legislature to provide for a post-sale right of redemption.

[10]HODC does not dispute the sufficiency of the notices.

[11]As HODC received, at least, the notice of foreclosure sale, it was aware that it needed to cure the deficiency *before* the date of the foreclosure sale as the notice provided as follows:

> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE *BEFORE THE SALE DATE*, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE.

(Emphasis added.) *See* NRS 116.311635(3)(b). The notice also provided the date of the sale; thus, HODC was on notice that the Property could be lost if the amount specified was not paid by February 12, 2015, not the date of the foreclosure sale.

called NAS to ensure that the check had arrived, but failed to do so. Based on these facts, we agree with the district court that "HODC did nothing [beyond putting the check in the mail] to ensure the check had arrived and there were certainly a number of alternatives."

The record reflects that HODC's lack of diligence—not "fraud, unfairness, or oppression"—is what led to the foreclosure sale. *See Moeller v. Lien*, 30 Cal. Rptr. 2d 777, 785 (Ct. App. 1994) (holding that a party was not entitled to equity in a foreclosure sale where the party's "delays, negligence and inattention were the sole cause of the sale"); *Chase Fin. Servs., LLC. v. Edelsberg*, 129 So. 3d 1139, 1142 (Fla. Dist. Ct. App. 2013) (holding that a party's lack of diligence is insufficient for setting aside a foreclosure sale on equitable grounds). Accordingly, we conclude that the district court abused its discretion by setting aside the sale on equitable grounds.

CONCLUSION

We hold that Resources Group demonstrated superior title because it made payment of the bid amount upon conclusion of a foreclosure sale that complied with the statutory requirements, and HODC failed to demonstrate that the sale was void due to the deficiency being cured. Thus, NAS did not have the discretion to refuse to issue the foreclosure deed. We further hold that HODC is not entitled to equitable relief, as it has failed to demonstrate "that the sale was affected by fraud, unfairness, or oppression." *Nationstar*, 133 Nev. at 742, 405 P.3d at 643 (internal quotation marks omitted). Accordingly, we reverse the judgment of the district court and conclude that Resources Group is entitled to the foreclosure deed upon remand.

Parraguirre and Stiglich, JJ., and Douglas, Sr. J., concur.

Gibbons, C.J., concurring in part and dissenting in part:

Although I concur with the majority that the burden of proof of payment of the debit is upon HODC, I would remand this case for a new trial. The district court incorrectly concluded that HODC had a right of redemption by payment of this lien post sale. Regardless, further findings of fact must be done so that the district court can determine if HODC can meet its burden of proof.

Pickering, J., dissenting:

There are three reasons I must dissent. First, the appellant waived the burden of proof issue by not raising it until it filed its reply brief in this court. Second, the district court did not rescind the sale or prevent delivery of the trustee's deed, the person charged with conducting the sale did because that person believed that it had conducted the sale in error—a determination the facts and the law support. And third, even accepting for purposes of argument that the owner

had to prove pre-sale payment to win, NRS 47.250(13) presumes "[t]hat a letter duly directed and mailed was received in the regular course of the mail." The parties' stipulations and the evidence established that the owner mailed its cure check 7 days before the scheduled foreclosure sale and that a letter mailed from the main Las Vegas post office to a local address takes fewer than 7 days to arrive "in the regular course of the mail." Under NRS 47.200, this was evidence enough to establish timely payment or, at minimum, to make timely payment a question of fact for the trial court, not of law for this court, to decide.

I.

Appellant Resources Group, LLC was the plaintiff below. Its complaint asked the district court to do two things: (1) to compel the trustee who conducted the foreclosure sale, respondent Nevada Association Services (NAS), to deliver a deed to the commercial warehouse property in dispute (the property); and (2) to quiet title in its name and against respondent Hydr-O-Dynamic Corporation (HODC). HODC owned the property, which it acquired in 2009 for $2,250,000, free and clear. Since NAS rescinded the sale without delivering a trustee's deed to Resources Group, HODC was and remains the record titleholder of the property.

The first conclusion of law the district court stated was that, as the plaintiff seeking to quiet title in itself against the property's record titleholder, "Resources Group has the burden of proof to show title should be vested in its name." This is a correct statement of Nevada law:

> In a quiet title action, the burden of proof rests with the plaintiff to prove good title in himself. *Moreover, there is a presumption in favor of the record titleholder*.

Breliant v. Preferred Equities Corp., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996) (emphasis added) (citations omitted), *abrogated on other grounds by Delgado v. Am. Family Ins. Grp.*, 125 Nev. 564, 570, 217 P.3d 563, 567 (2009); *accord W. Sunset 2050 Tr. v. Nationstar Mortg., LLC*, 134 Nev. 352, 354, 420 P.3d 1032, 1034-35 (2018) (quoting *Breliant*); 65 Am. Jur. 2d *Quieting Title* § 73 (2011) ("In a quiet title action, there is a presumption in favor of the record titleholder, and the evidence to overcome that presumption must be clear and convincing.") (footnotes omitted) (citing *Breliant*).

Against this mainstream law, the majority puts the burden of proof on HODC, the defendant and record titleholder. It does so based on arguments and authority, including NRCP 8, that Resources Group never raised until it filed its reply brief in this court. *Compare* NRAP 28(a)(6) (requiring an appellant to include in its opening brief "a statement of the issues presented for review"), *with Phillips*

v. Mercer, 94 Nev. 279, 283, 579 P.2d 174, 176 (1978) (holding that issues "raised for the first time in appellant's reply brief[ ] will not be considered on appeal"). The rule against considering an issue not raised until an appellant's reply promotes sound decision-making because it ensures that, before weighing in on an issue, this court has input from the district court, the parties, and sometimes, even, amicus curiae. Since the majority's decision depends on assigning HODC the burden of proof, since the law does not clearly assign this burden to HODC, and since Resources Group did not make the burden of proof argument on which the majority relies to decide this appeal until it filed its reply, I would leave the issue for another day and deem it waived.

II.

A foreclosure sale on an NRS Chapter 116 homeowners' association (HOA) lien is void if, before the sale, the owner or deed-of-trust beneficiary cures the default. *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018) ("A foreclosure sale on [an HOA] lien after valid tender satisfies that lien is void, as the lien is no longer in default.").[1] The equitable right to redeem by cure terminates when the foreclosure sale concludes and the person conducting the sale delivers a trustee's deed to a bona fide purchaser for value (BFP). *Compare* Restatement (Third) of Property: Mortgages § 6.4(a) (Am. Law Inst. 1997) (recognizing the equitable right to redeem property from a lien by performing the obligation secured by the lien terminates with foreclosure), *with Nguyen v. Calhoun*, 129 Cal. Rptr. 2d 436, 449 (Ct. App. 2003) (holding that payment that arrived by Federal Express three days after the foreclosure sale occurred and the trustee's deed was delivered came too late to avoid loss of the property). The high bidder does not acquire title—much less the right to a statutory trustee's deed—absent a *valid* foreclosure sale. *Cf. Las Vegas Dev. Grp., LLC v. Blaha*, 134 Nev. 252, 256 n.7, 416 P.3d 233, 237 n.7 (2018) (emphasizing that only "a *valid*

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[1]The foreclosure proceedings in this case predated the effective date of the 2015 amendments to NRS Chapter 116, which created a statutory right of redemption and imposed time limits on pre-sale lien-default cures. *See* NRS 116.31166(1), (3) (2017). The parties stipulated that if HODC's check arrived at the Las Vegas offices of respondent Nevada Association Services (NAS) before NAS proceeded with the foreclosure auction on February 13, 2015, this would void the sale. This stipulation comports with section 6.12 of the governing CC&Rs, which state: "In the event the delinquent assessments . . . are fully paid or otherwise satisfied prior to the completion of any sale held to foreclose the lien provided for in this Declaration, the Association shall record a further notice . . . stating the satisfaction and releasing of such lien." Of note, as a commercial property, the warehouse would not be subject to NRS Chapter 116 except the CC&Rs incorporate NRS 116.3116.

trustee's foreclosure sale terminates [a record title holder's] legal and equitable interests in the property") (internal quotation omitted).

NRS 116.31166(1) (1993) describes the presumptions of validity that attach to a delivered trustee's deed. But those presumptions do not attach until the trustee (or in Chapter 116 parlance, "the person conducting the sale," *see* NRS 116.31164) executes and delivers the trustee's deed. *See Moeller v. Lien*, 30 Cal. Rptr. 2d 777, 783-84 (Ct. App. 1994). Because the statutory presumptions of validity do not attach "if there is a defect in the procedure which is discovered after the bid is accepted but prior to delivery of the trustee's deed, the trustee may abort a sale to a bona fide purchaser, return the purchase price and restart the foreclosure process." *Id.*; *accord Biancalana v. T.D. Serv. Co.*, 300 P.3d 518, 522 (Cal. 2013) (holding that a trustee who discovers a material defect in the foreclosure sale process before delivering the deed may rescind the sale and restart the process; "the statutory foreclosure process aims to ensure that a properly conducted sale is final between the parties" but this "purpose is not served by enforcing the finality of a sale that was conducted improperly"); *Lee v. HSBC Bank, USA*, 218 P.3d 775, 776 (Haw. 2009) (holding that "where a mortgagor cures its default prior to a foreclosure proceeding . . . but an auction inadvertently goes forward, . . . [no] valid agreement [is] created entitling the high bidder at the auction to lost profits"); *Taylor v. Just*, 59 P.3d 308, 310-11 (Idaho 2002) (upholding the foreclosure trustee's authority to rescind the sale and refuse to deliver a deed without exposure to contract damages where the bank's email to the trustee advising it had promised the owner not to proceed with the sale went astray); *Udall v. T.D. Escrow Servs., Inc.*, 154 P.3d 882, 887 (Wash. 2007) (holding that a trustee may withhold a deed where there is a procedural irregularity that renders the sale void); 5 Miller & Starr, Cal. Real Est. § 13:250 (4th ed. 2018) ("[T]he trustee has the authority to rescind the sale upon discovery of an irregularity before the delivery of the deed. Prior to the delivery of the trustee's deed, there are no conclusive presumptions that the sale is valid."); 59A C.J.S. *Mortgages* § 819 (2009) ("Under statutory scheme, if there is a defect in the procedure which is discovered after the bid is accepted but prior to the delivery of the trustee's deed, the trustee may abort the sale to a bona fide purchaser, return the purchase price and restart the foreclosure process.").

Nevada law has long given courts "the power to grant equitable relief from a defective foreclosure sale when appropriate." *Shadow Wood Homeowners Assoc., Inc. v. N.Y. Cmty. Bancorp., Inc.*, 132 Nev. 49, 57-59, 366 P.3d 1105, 1110-11 (2016) (citing *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963), and *Oller v. Sonoma Cty. Land Title Co.*, 290 P.2d 880, 882 (Cal. Ct. App.

1955)). Low price, alone, will not justify invalidating a properly conducted sale; there must also be a showing of irregularities affecting the sale. *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 749, 405 P.3d 641, 647-48 (2017). But the greater the disparity between price and value, the less in the way of unfairness or irregularity need be shown. *Golden*, 79 Nev. at 515-16, 387 P.2d at 995 ("[I]t is universally recognized that inadequacy of price is a circumstance of greater or less weight to be considered in connection with other circumstances impeaching the fairness of the transaction as a cause of vacating it, and that, where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought.") (quoting *Odell v. Cox*, 90 P. 194, 196 (Cal. 1907)), *quoted with approval in Nationstar Mortg.*, 133 Nev. at 749, 405 P.3d at 648.

While our cases authorize a *court* to set aside a foreclosure sale for invalidity—even after the trustee has delivered its deed—we have not had occasion to consider whether a *trustee* can rescind a sale and refuse to deliver a deed because the trustee discovers facts indicating the sale's invalidity. California law, on which *Golden*, *Shadow Wood*, and *Nationstar* all rely, draws on the courts' equitable authority to set aside a foreclosure sale in recognizing a trustee's authority to rescind a sale for procedural irregularity or unfairness, so long as the trustee does so before delivering the deed. *Biancalana*, 300 P.3d at 522-23 (reciting that "gross inadequacy of price coupled with even slight unfairness or irregularity is a sufficient basis for setting the sale aside" and applying it to a trustee's decision to rescind a sale prior to delivering the deed); *see Residential Capital LLC v. Cal-W. Reconveyance Corp.*, 134 Cal. Rptr. 2d 162, 173 (Ct. App. 2003) ("Only a properly conducted foreclosure sale, free of substantial defects in procedure, creates rights in the high bidder at the sale."). Allowing a trustee to rescind a defective or improperly conducted sale so long as the trustee acts before it issues the deed incentivizes the trustee "to exercise diligence in promptly reviewing the sale and identifying any irregularity." *Biancalana*, 300 P.3d at 527. While this "may create some uncertainty for bidders" and detract from the interest in finality, "if a procedural defect in the sale is detected before the trustee's deed is issued, the successful foreclosure sale bidder has not been seriously prejudiced." *Id.* at 526 (internal quotation omitted).

Applying this law to the record facts, we should affirm, not reverse, the district court. NAS sent the notice of default in 2012 and the notice of sale in 2015. Although the notices were properly mailed, HODC did not learn about the foreclosure proceedings until February 6, 2015—7 days before the scheduled foreclosure

sale—when an NAS agent delivered a copy of the notice of sale to HODC's principal, Juan Guzman. That same day, Guzman went inside the main U.S. Post Office on Sunset Road in Las Vegas and mailed NAS the $6554.09 check needed to cure its default. In Guzman's experience, mail sent from this Post Office to another local address normally takes a day or two to arrive. We know NAS received the check on or before the date of the sale because it stamped the check "received" on February 13, 2015, the date of the sale. (Although the majority suggests otherwise, the district court found it "possible" the check arrived *before* February 13, 2015.)

NAS scheduled and conducted the foreclosure sale at 10 a.m., despite that its mail normally arrived between 9:30 a.m. and 11:30 a.m., and despite not having in place protocols to establish the precise date and time a mailed check arrived. It is at this point that the procedural irregularities that led NAS to rescind the sale emerge: After discovering HODC's check and examining its records, NAS could not verify it had conducted a *valid* foreclosure sale. Given this uncertainty and the ambiguous February 13, 2015 "received" stamp on HODC's cure check, NAS declined to issue a trustee's deed and offered to return Resources Group's bid price payment, with interest. These are not disputed or inferred facts; the parties *stipulated* to them in district court. *See* July 6, 2016 Joint Pretrial Memorandum (*stipulating* that NAS believed "(22) the check for payment in full had crossed paths with the foreclosure sale and that NAS did not have enough time to process the check on February 13, 2015, link it with the foreclosure sale set that morning, and stop the sale"; that NAS believed "(25) the sale was made in error because of the crossing of the owner's payment in full and the sale"; and "(27) that [b]ecause NAS believed the sale was conducted in error, it has never released nor recorded a Foreclosure Deed for the subject property.").

The rule allowing a trustee to rescind a sale when material irregularities emerge before delivery of a deed is consistent with *Golden*, *Shadow Wood*, and *Nationstar*—and with the judgment the district court entered, which denied Resources Group's requests that it direct NAS to deliver the trustee's deed and quiet title in Resources Group and against HODC. But this case does not require the court to adopt *Biancalana*, *Residential Capital*, and *Just*. It can also be resolved under *Golden*, *Shadow Wood*, and *Nationstar*.

The record establishes a substantial disparity between value and bid price. HODC acquired the property in 2009 for $2,250,000 and owned it free and clear, except for the HOA's $6554.09 lien. The property's value had declined substantially by 2015. Even so, the $350,000 bid Resources Group made for the property represented less than a third of what the district court found it was worth. This

price/value disparity, combined with NAS's inability to verify a valid sale (not to mention its determination that it had conducted the sale in error, see Joint Pretrial Memorandum ¶ 27, *supra*) support the district court's judgment against Resources Group and in favor of NAS and HODC under existing Nevada law. As noted in my concurring and dissenting colleague's opinion, we would need to reverse and remand to resolve this case purely under *Golden*, *Shadow Wood*, and *Nationstar*, because the district court may have relied in exercising its equitable authority, on a statutory right of redemption that did not enter NRS Chapter 116 until after the sale in this case was held.

III.

The majority holds, seemingly as a matter of law, that HODC failed to produce evidence from which the finder of fact could find its check arrived at NAS on or before the 10 a.m. February 13, 2015 sale date. This holding does not square with the record facts or with NRS 47.250(13) and NRS 47.200. As noted above, HODC mailed the check from the main U.S. Post Office in Las Vegas on February 6, 2015, to NAS's Las Vegas office. NAS received the check at least by February 13, 2015, when it stamped it received. Guzman testified that letters mailed locally from that post office usually take a day or two to arrive.

NRS 47.250(13) presumes that "a letter duly directed and mailed was received in the regular course of the mail." This presumption, combined with the date stamp and NAS's testimony that the check could have come even earlier than February 13, 2015, constitutes evidence of delivery to NAS on or after February 8, 2015 and before the 10 a.m. February 13, 2015 sale date and time. *See Henderson v. Carbondale Coal & Coke Co.*, 140 U.S. 25, 37 (1891) (noting that the presumption that mail is received within a normal delivery time is "not a presumption of law but one of fact"). The "basic facts" thus established, NRS 47.200 applies. NRS 47.200 does not demand 100% certainty or proof beyond a reasonable doubt. It deals in terms of "reasonable minds" and "probability." Under NRS 47.200, it cannot be said that, as a matter of law, the check did not arrive on or before February 13, 2015 at 10 a.m. On the contrary, NRS 47.200 and NRS 47.250(13) mandate the opposite finding or, at minimum, a determination that the time of delivery is a question of fact for the district court to determine in the first instance.

I therefore respectfully dissent.

DENNIS KOGOD, Appellant/Cross-Respondent, *v.* GABRIELLE CIOFFI-KOGOD, Respondent/Cross-Appellant.

No. 71147

DENNIS KOGOD, Appellant/Cross-Respondent, *v.* GABRIELLE CIOFFI-KOGOD, Respondent/Cross-Appellant.

No. 71994

April 25, 2019 439 P.3d 397

Consolidated appeals and cross-appeals from a divorce decree and post-divorce decree order concerning attorney fees and costs. Eighth Judicial District Court, Family Court Division, Clark County; Bryce C. Duckworth, Judge.

Affirmed in part, reversed in part, and remanded with instructions.

[Rehearing denied July 5, 2019]

Hardesty, J., with whom Stiglich, J., agreed, dissented in part.

Law Office of Daniel Marks and *Daniel Marks* and *Nicole M. Young*, Las Vegas, for Appellant/Cross-Respondent.

Radford J. Smith, Chartered, and *Radford J. Smith* and *Garima Varshney*, Henderson, for Respondent/Cross-Appellant.

Before the Supreme Court, En Banc.

OPINION

By the Court, Pickering, J.:

This is a divorce action with a $47 million community property estate, in which the district court awarded alimony not based on need and also unequally distributed the parties' community property due to one spouse's extramarital affairs, gifts to family, and excess spending. In this opinion, we recognize that alimony can be just and equitable even when not based on financial need, but we reverse the alimony award in this case because the receiving spouse's share of community property will produce passive income sufficient to maintain her marital standard of living. We also hold that community funds spent on extramarital affairs are dissipated such that the district court has a compelling reason to make an unequal disposition of community property. Finally, this opinion addresses whether monetary sanctions were appropriate for expenditures in violation of the automatic joint preliminary injunction ordering the parties not to spend money outside the usual course of business; whether expert

witness and attorney fees were warranted; and when a community property estate properly ends. We affirm in part, reverse in part, and remand.

I.

Dennis Kogod and Gabrielle Cioffi-Kogod married in 1991 in New York City. They lived in various cities throughout their marriage, moving each time to advance Dennis's career in the healthcare industry. In 2003, Dennis and Gabrielle moved to Las Vegas. Dennis worked for a healthcare company based in southern California and Gabrielle worked part-time in Las Vegas as a nurse consultant. Dennis traveled frequently for work and spent his weekdays either traveling or at his office in southern California. He spent most weekends with Gabrielle in Las Vegas.

Dennis and Gabrielle considered themselves upper-middle class until 2004, when Dennis took a more senior role at his company. By 2009, Dennis was promoted to Chief Operating Officer of a Fortune 500 healthcare company. With his new promotion, he earned an average base salary of $800,000 per year, but received bonuses that put his average annual income at almost $14,000,000. Gabrielle, as a part-time nurse consultant, earned approximately $55,000 per year. Dennis describes this time period after he and Gabrielle moved to Las Vegas as one in which they were essentially living separate lives, but Gabrielle disputes Dennis's characterization and claims that they spoke every day, sometimes multiple times a day.

Unknown to Gabrielle, Dennis had started a separate family in southern California. He met Nadya in November 2004 and by June 2005 they participated in a wedding-type ceremony in Mexico. Shortly after, Dennis informed Nadya he was already married. Despite this, Dennis and Nadya remained together and, after participating in in-vitro fertilization, had twin girls in 2007. Dennis paid for all of Nadya's and his daughters' expenses, including a condominium in southern California, luxury cars, shopping trips and vacations, cosmetic surgery, and Nadya's college classes—he even invested in a business on Nadya's behalf. Dennis and Nadya remained together until 2015 when Nadya discovered that Dennis had another girlfriend.

Dennis initially filed for divorce from Gabrielle in 2010, but the action was dismissed and the couple instead became informally separated as of July 2010. Gabrielle then filed this divorce action in December 2013, at which time she still did not know about Dennis's extramarital family. Had Dennis and Gabrielle divorced in 2010 when they informally separated, just one year after Dennis was promoted to COO, the marital estate would have been significantly smaller than the approximately $47 million ultimately divided by the district court.

The district court entered its divorce decree in August 2016. Because the district court previously awarded more than $6 million to each Gabrielle and Dennis as separate property throughout the divorce proceedings, $35 million of community property remained in the marital estate. Due to Dennis's expenditures on extramarital affairs, gifts to his family during the divorce proceedings, and spending in excess of his self-declared expenses, the district court found that Dennis dissipated $4,087,863 in community property and unequally divided the parties' community property on that basis. The district court also awarded Gabrielle alimony in the lump sum of $1,630,292 to compensate for economic losses as a result of the marriage and divorce, but recognized that she did not need alimony to support herself. In total, Gabrielle, 58 years old, received nearly $21 million in the divorce decree and Dennis, 57 years old, received just under $14 million. Gabrielle received mostly cash assets, which she does not contest can passively earn her between $500,000 and $800,000 per year, whereas Dennis's assets largely consist of real property.

In addition to the unequal disposition of community property and the alimony award, the district court sanctioned Dennis $19,500 for purported violations of an automatic joint preliminary injunction and awarded $75,650 in expert witness costs to Gabrielle to pay for the forensic accounting firm that analyzed over 27,200 of her and Dennis's financial transactions from between 2008 and 2016. Dennis appealed from the district court's orders, and Gabrielle cross-appealed.

II.

Dennis first challenges the award of alimony to Gabrielle. Permanent alimony is financial support paid from one spouse to the other for a specified period of time, or in a lump sum, following a divorce. NRS 125.150(1)(a); *Rodriguez v. Rodriguez*, 116 Nev. 993, 999, 13 P.3d 415, 419 (2000) ("Alimony is financial support paid from one spouse to the other whenever justice and equity require it."). When granting a divorce, a district court may award alimony to either spouse "as appears just and equitable." NRS 125.150(1)(a). The decision of whether to award alimony is within the discretion of the district court. *Buchanan v. Buchanan*, 90 Nev. 209, 215, 523 P.2d 1, 5 (1974) ("In determining whether alimony should be paid, as well as the amount thereof, courts are vested with a wide range of discretion.").

When determining if alimony is just and equitable, a district court must consider the eleven factors listed in NRS 125.150(9).[1]

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[1]NRS 125.150(9) provides:

> In addition to any other factors the court considers relevant in determining whether to award alimony and the amount of such an award, the court shall consider:

See DeVries v. Gallio, 128 Nev. 706, 711-13, 290 P.3d 260, 264-65 (2012). The district court may also consider any other relevant factor, but it must not consider the marital fault or misconduct, or lack thereof, of the spouses. *Rodriguez*, 116 Nev. at 999, 13 P.3d at 419 ("Alimony is not a sword to level the wrongdoer. Alimony is not a prize to reward virtue.").

NRS 125.150(9)'s authorization to award alimony as appears just and equitable is amorphous and does not explain the purpose of alimony. *See* David A. Hardy, *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 Nev. L.J. 325, 330 (2009) ("Nevada does not provide a coherent policy rationale for why, when, and how alimony should be awarded."); Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 Harv. Women's L.J. 23, 23 (2001) ("Statutes simply list factors for trial courts to consider without providing any guidance as to how the judge should weigh or apply them."). Leaving the purpose of alimony nebulous makes alimony awards unpredictable for parties and their attorneys, and leaves courts uncertain as to when, and in what amount, alimony should be awarded. Marshal Willick, *In Search of a Coherent Theoretical Model for Alimony*, Nev. Law., Apr. 2007, at 41 (noting that alimony is "the last great crapshoot in family law" because "it is a category of remedy without any substantive underlying theoretical rationale").

The parties' arguments in this case highlight the undefined nature of alimony awards. Dennis argues that a judge's discretion to award alimony is limited to instances of financial need, and that no Nevada case or statute extends alimony beyond financial need. Gabrielle responds that alimony may be awarded to equalize post-divorce earnings or maintain the marital standard of living, regardless of need.

(a) The financial condition of each spouse;

(b) The nature and value of the respective property of each spouse;

(c) The contribution of each spouse to any property held by the spouses pursuant to NRS 123.030;

(d) The duration of the marriage;

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

(f) The standard of living during the marriage;

(g) The career before the marriage of the spouse who would receive the alimony;

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

(i) The contribution of either spouse as homemaker;

(j) The award of property granted by the court in the divorce, other than child support and alimony, to the spouse who would receive the alimony; and

(k) The physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse.

Our previous cases often addressed alimony without discussing its purpose or scope in express terms. But after examining the historical underpinnings of alimony and our prior case law, we now hold that alimony can be "just and equitable" both when necessary to support the economic needs of a spouse and to compensate for a spouse's economic losses from the marriage and divorce, including to equalize post-divorce earnings or help maintain the marital standard of living.

A.

Alimony, in its most elementary form, is based on the receiving spouse's need and the paying spouse's ability to pay. When alimony originated in England, a woman's legal rights, including ownership of property and the ability to work and keep her wages, were subsumed by her husband under the doctrine of coverture. *See* Collins, *The Theory of Marital Residuals*, 24 Harv. Women's L.J. at 28-29 ("[M]arried women were barred by the doctrine of unity from holding certain property, signing contracts, working at many professions, or retaining their own earnings when they did work . . . .") (footnotes omitted). And absolute divorce, where the marital relationship was terminated, was exceedingly difficult to obtain. *See id.* Rather than absolute divorce, spouses could seek a " 'divorce' from bed and board," where the spouses lived apart without actually terminating the marriage or the wife being released from coverture. *Id.* This meant the husband had an ongoing legal and moral obligation to continue to provide for his wife, despite the "divorce," because she could not support herself. *Id.* at 29; *see also Manby v. Scott* (1663) 86 Eng. Rep. 781, 784 (Exch.) ("[T]he law having disabled the wife to bind herself by contract, therefore the burthen shall rest upon the husband, who by law is bound to maintain her . . . ."). Despite finding its origins in the scarcity of absolute divorce and the law of coverture, courts continued to award alimony even after absolute divorce became available, seemingly out of economic necessity. Collins, *The Theory of Marital Residuals*, 24 Harv. Women's L.J. at 30-31.

Alimony to remedy the economic-power imbalance between husband and wife is recognized in Nevada's earliest cases. *See In re application of Phillips*, 43 Nev. 368, 373, 187 P. 311, 311-12 (1920) (recognizing alimony as "a duty which sound public policy sanctions to compel one who is able so to do, possibly as a result of the cooperation (during coverture) of his former wife, to prevent such former wife from becoming a public charge or dependent upon the charity of relatives or friends"); *see also Wilde v. Wilde*, 2 Nev. 306, 307 (1866) (noting that a married woman's "property is generally entirely under the control of the husband"). Indeed, some cases treat the receiving spouse's need and the paying spouse's ability to pay

as the sole alimony determinants. *See, e.g.*, *Applebaum v. Applebaum*, 93 Nev. 382, 386, 566 P.2d 85, 88 (1977) (affirming a denial of alimony where the spouse "had adequate resources with which to support herself"); *Foy v. Estate of Smith*, 58 Nev. 371, 376, 81 P.2d 1065, 1067 (1938) (stating that the right to alimony "is solely that of support"); *Greinstein v. Greinstein*, 44 Nev. 174, 174, 191 P. 1082, 1082 (1920) (affirming an award of alimony where "the wife was without sufficient means, and unable physically to maintain and support herself, and . . . the husband was financially able to pay"); *Lake v. Bender*, 18 Nev. 361, 410, 7 P. 74, 80 (1884), *modified on reh'g* (stating that a court should award alimony based on "the financial conditions of the husband and the requirements of the wife"), *abrogated on other grounds by Johnson v. Johnson*, 89 Nev. 244, 246, 510 P.2d 625, 626 (1973).

NRS 125.150, which authorizes alimony, directs a district court to consider several factors that help the court to understand the spouses' financial needs and abilities to pay. *See* NRS 125.150(9). A district court must consider: "[t]he financial condition of each spouse," NRS 125.150(9)(a); "[t]he nature and value of the respective property of each spouse," (9)(b); "[t]he income, earning capacity, age and health of each spouse," (9)(e); "[t]he award of property granted by the court in the divorce . . . to the spouse who would receive the alimony," (9)(j); and "[t]he physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse," (9)(k). After considering these factors, and any other relevant circumstance, our case law makes clear that a district court may award alimony to ensure that an economically powerless spouse receives sufficient support to meet his or her needs. *See Gilman v. Gilman*, 114 Nev. 416, 423-24, 956 P.2d 761, 765 (1998) ("The Nevada legislature created spousal support awards to, *inter alia*, keep recipient spouses off the welfare rolls.").

If a district court awards alimony to address a spouse's financial need, the basis for an award is clear-cut when one spouse is unable to meet the basic necessities of life such as food, clothing, and habitation. But such an award becomes less certain and predictable when the divorced spouse is able to meet his or her basic needs. A court can "reach very different figures for a spouse's 'needs,' depending on whether those needs are measured at a subsistence level, a level that the court believes to be objectively reasonable, or the actual subjective marital standard of living." Brett. R. Turner, *Spousal Support in Chaos*, 25 Fam. Advoc., Spring 2003, at 14, 17. Alimony based on economic necessity, then, requires a policy decision regarding when a divorced spouse's "needs" are met. *See Principles of the Law of Family Dissolution: Analysis and Recommendations* § 5.02 cmt. a (Am. Law Inst. 2002) (hereinafter *Family Dissolution*) ("Some judicial opinions find the alimony claimant in 'need' only if

unable to provide for her basic necessities, others if the claimant is unable to support himself at a moderate middle-class level, and still others whenever the claimant is unable to sustain the living standard enjoyed during the marriage even if it was lavish."). As it stands, the Legislature has placed that decision-making power in the hands of district courts to award alimony "as appears just and equitable." NRS 125.150(1)(a).

B.

In addition to economic need, alimony may also be awarded to compensate for economic loss as the result of a marriage and subsequent divorce, particularly one spouse's loss in standard of living or earning capacity. *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, 69 (2008) (describing the wave of reform to alimony statutes as compensation "for loss of human capital by virtue of non-market work engaged in by the claimant during the marriage"); *see also* Collins, *The Theory of Marital Residuals*, 24 Harv. Women's L.J. at 49 ("[T]here should be some degree of sharing of post-divorce incomes to reflect the returns flowing from efforts made while the marital joint venture was operational—an equitable sharing of the residual economic benefits from work done during the marriage."). Given the contractual and cooperative undertakings implicit in a marriage, alimony might be seen as a remedy fashioned for the economic losses resulting from splitting one household into two through divorce. *See Family Dissolution* § 5.02 cmt. a (recognizing that divorce creates financial losses for spouses that, "[w]ithout reallocation, . . . are not likely to fall equitably as between them"). Such a loss could come in the form of lower income-earning potential due to forgoing career opportunities for the sake of the marriage, *see* Ira Mark Ellman, *The Theory of Alimony*, 77 Cal. L. Rev. 3, 51 (1989) (describing alimony as compensation for marital investment, i.e., "conduct giving rise to a compensable loss in earning capacity" upon divorce), or a lower standard of living than reasonably expected due to the early termination of the marriage, *see generally* Collins, *The Theory of Marital Residuals*, 24 Harv. Women's L.J. at 49-50 (recognizing that the return from efforts made during the marriage may not materialize until after the divorce). As a remedy, a court can award alimony to make the "spouse whole at the end of the marriage by rewarding efforts in homemaking, childrearing, interruption of a career, or contributions to the success of the other." *Id.* at 39-40.

Our case law's concern for maintaining a spouse's standard of living post-divorce is reflected in this rationale for alimony. Enabling the lower-income-earning spouse to maintain a lifestyle as close as possible to the lifestyle enjoyed during the marriage has

consistently been an important aim of this court. *See, e.g.*, *Wright v. Osburn*, 114 Nev. 1367, 1369, 970 P.2d 1071, 1072 (1998) (deeming the spousal support award insufficient because the wife would not be able to "maintain the lifestyle she enjoyed during the marriage or a lifestyle commensurate with" her former husband); *Sprenger v. Sprenger*, 110 Nev. 855, 860, 878 P.2d 284, 287 (1994) (remanding with instructions to award alimony such that the spouse may "live as nearly as fairly possible to the station in life she enjoyed before the divorce") (internal quotation marks omitted); *Gardner v. Gardner*, 110 Nev. 1053, 1058, 881 P.2d 645, 648 (1994) (increasing alimony by ten years because the wife's "contribution to the community over many years [was] not fairly recognized by the two-year alimony award"); *Rutar v. Rutar*, 108 Nev. 203, 208, 827 P.2d 829, 832 (1992) (increasing the alimony award where the previous award only provided "a standard of living far below that to which [the wife and children] have been accustomed"). This court reaffirmed this goal in *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998), by noting that two of the primary purposes of alimony "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 (alteration in original) (citations omitted) (quoting *Sprenger*, 110 Nev. at 860, 878 P.2d at 287-88).

Like the need-based factors, NRS 125.150(9) codifies some factors to help a district court assess the economic losses caused by the marriage and subsequent divorce. A district court must consider: "[t]he duration of the marriage," NRS 125.150(9)(d); "[t]he income, earning capacity, age and health of each spouse," (9)(e); "[t]he standard of living during the marriage," (9)(f); the spouse's career before the marriage, (9)(g); specialized education or training obtained during the marriage, (9)(h); and "[t]he contribution of either spouse as homemaker," (9)(i). After considering these factors, and any other relevant circumstance, the district court may award alimony under NRS 125.150(1)(a) to compensate a spouse for non-monetary contributions to the marriage and economic losses from the early termination of the marriage, such as lost income-earning potential or a decreased standard of living.

C.

Dennis, then, is incorrect when he asserts that alimony may only be awarded to meet financial need and that the district court abused its discretion by basing its alimony award on an economic loss theory. The district court found that Dennis's income "dwarfed" Gabrielle's; his average net monthly income was $58,000 while hers was only $3,800. As a result, the district court awarded Gabrielle alimony of $18,000 per month for nine years. The district court, howev-

er, ordered payment in a one-time lump sum out of the community property and discounted the award by a four percent average rate of return. This resulted in a $1,630,292 lump-sum alimony award to Gabrielle. Gabrielle asserts that alimony was necessary to narrow the large income gap between her and Dennis and to maintain her marital standard of living.[2] We disagree.

While a district court may generally award alimony to narrow large post-divorce gaps in income and to maintain the parties' marital standard of living, the nature and value of the community property Gabrielle received in the divorce obviated any basis for awarding alimony. Gabrielle can earn between $500,000 and $800,000 in passive annual income from the cash assets she received in the divorce. This passive income from interest and dividends easily covers Gabrielle's monthly expenses and far exceeds the actual alimony award of $18,000 per month that the district court deemed just and equitable. Accordingly, we reject Gabrielle's argument that alimony was necessary to narrow her and Dennis's large post-divorce income gap and to maintain her pre-divorce standard of living.

1.

A large gap in income, alone, does not decide alimony. The award must meet the receiving spouse's economic needs or compensate for economic losses resulting from the marriage and subsequent divorce. *See Family Dissolution* § 5.03 cmt. b ("Disparity in the post-divorce incomes of the spouses does not itself provide the basis of a claim [to share the other spouse's income.]"); *Nousari v. Nousari*, 94 So. 3d 704, 706 (Fla. Dist. Ct. App. 2012) ("The purpose of permanent alimony is not to divide future income to establish financial equality between the parties, so disparity in income alone does not justify an award of permanent alimony.") (internal quotation marks and citation omitted). As *Shydler* recognized, "our case law does not require the district court to award alimony so as to effectively equalize salaries." 114 Nev. at 199, 954 P.2d at 41; *see also Gardner*, 110 Nev. at 1058, 881 P.2d at 648 (increasing alimony but recognizing that it would "still fail to achieve income parity between the [spouses]"). Justice and equity only require alimony to achieve more parity in post-divorce income levels when there is economic need, the marriage and subsequent divorce contributed to the disparate income levels, or one spouse cannot maintain the mar-

[2]These were the only two possible bases for alimony, as Gabrielle was not a homemaker and did not forgo career opportunities as a result of her marriage to Dennis. Gabrielle argues that she contributed to Dennis's success and to the marriage by picking up and moving whenever it was necessary to further Dennis's career, but the district court expressly found that Gabrielle's nursing career allowed her the flexibility to move and that her career did not suffer by moving to different locations for Dennis.

ital standard of living while the other spouse maintains or exceeds the marital standard of living.

For example, in *Shydler*, during a seventeen-year marriage, the husband obtained a general contractor's license and built a successful company. 114 Nev. at 196, 954 P.2d at 39. The wife worked in the insurance industry during the marriage, first as an insurance adjustor then founding her own insurance business. *Id.* But the wife's business shrank over time and the husband's drinking problems interfered with the wife's work, "particularly during a ten-month period of time when [the husband] could not legally drive." *Id.* Upon divorce, the husband earned more than $100,000 per year, while the wife could only earn $25,000 to $59,000 per year. *Id.* at 196-97, 954 P.2d at 40. The parties also had a minor son. *See id.* at 199, 954 P.2d at 41. "In light of the disparate incomes of the parties and the lifestyle enjoyed by [the wife] prior to the divorce," the court held equity favored an alimony award to the wife. *Id.* at 198-99, 954 P.2d at 41.

Similarly, in *Sprenger*, during a marriage of nearly 22 years, the husband "developed the business acumen [to] provide[ ] him with a thriving business and substantial assets." 110 Nev. at 859, 878 P.2d at 287. The wife was a licensed nurse before the marriage, but then "gave up her career in order to take care of the children and household duties." *Id.* The district court awarded the wife alimony of $1,500 per month for up to two years, along with a 25-percent interest in a partnership owned by the husband and his parents, which was valued at $837,408. *Id.* at 858-59, 878 P.2d at 287. But the wife was "at the mercy" of the husband and his parents as to whether she would ever receive any income from the partnership. *Id.* at 859-60, 878 P.2d at 287. This court reversed the district court's alimony award and remanded for the district court "to both increase and extend [the wife's] alimony award such that [the wife] is able to live 'as nearly as fairly possible to the station in life she enjoyed before the divorce' for the rest of her life or until she remarries or her financial circumstances substantially improve." *Id.* at 860, 878 P.2d at 287 (quoting *Heim v. Heim*, 104 Nev. 605, 612-13, 763 P.2d 678, 683 (1988)).

In both cases, an aspect of the marriage contributed to the receiving spouse's lower income-earning potential, which resulted in a post-divorce decrease from the marital living standard. In *Shydler*, the parties shared a child, and the husband's "heavy drinking and related problems caused [the wife] to neglect her insurance business." 114 Nev. at 194, 954 P.2d at 38. And, in *Sprenger*, the wife "gave up her career as a nurse" to take care of the parties' children. 110 Nev. at 857, 878 P.2d at 286. In both cases, the lower-income-earning spouse could not maintain the marital standard of living after the divorce. *See id.* at 860, 878 P.2d at 287; *Shydler*, 114 Nev. at 198-99, 954 P.2d at 41.

Under these cases, alimony to achieve parity in income must further some underlying rationale for alimony such as economic need, the receiving spouse's inability to maintain the marital standard of living, or the receiving spouse's decreased income-earning potential as a result of the marriage. The district court did not have discretion to award alimony solely to achieve income parity between Dennis and Gabrielle following the divorce.

2.

Gabrielle is correct that we have upheld, and sometimes required, alimony to maintain the parties' marital standard of living. But Gabrielle can maintain her standard of living from the marriage without alimony. The passive income from the assets Gabrielle received in the divorce will easily cover her approximately $16,000 in monthly expenses and give her the ability to maintain savings and investment accounts. The district court acknowledged but then disregarded this passive income because the award was not need-based.[3] The district court should have considered the nature and amount of the property disposition, including passive income from the assets awarded to the parties, when determining whether Gabrielle needed alimony to maintain her standard of living. *See* NRS 125.150(9)(j); *Lang v. Lang*, 425 N.W.2d 800, 802 (Mich. Ct. App. 1988) ("It would be the height of absurdity to suggest that a spouse, to whom income-producing property was awarded in a property settlement, would be entitled to have his or her need for alimony, or ability to pay alimony, determined without regard to the income produced by that property."). The substantial cash assets Gabrielle received in the divorce, which Gabrielle will not need to draw on to support herself or maintain her standard of living, negated any basis for alimony to maintain Gabrielle's pre-divorce standard of living in this case.[4] *Cf. Shydler*, 114 Nev. at 198, 954 P.2d at 40-41 (disapproving of the district court's alimony award, which "compelled [the wife] to utilize her community property share for support, while [the husband's] share of the community property was actually providing a

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[3]The dissent takes issue with our characterization that the district court disregarded the passive income Gabrielle would earn from the assets she received. But the district court's order, set forth in relevant part below, did just that:

> Recognizing that this is not a need based spousal support case, this Court similarly (as with Dennis' incentive compensation income) discounts the passive income that Gabrielle will earn from the property that she will receive as part of the property division.

[4]Citing *Shydler*, the dissent argues that Gabrielle should not have to consume her community asset distribution to resolve a post-divorce income disparity. The district court expressly found, however, that "[u]nlike *Shydler*, *supra*, this is not a situation in which Gabrielle will need to deplete or rely on the principle amounts of her property award in the divorce for her support."

substantial income for his support"); *see Italiano v. Italiano*, 873 So. 2d 558, 560 (Fla. Dist. Ct. App. 2004) (reversing when the trial court awarded alimony despite its finding that there was "no current need for alimony because [the spouse's] needs could be completely met from her income-producing assets"); *Billion v. Billion*, 553 N.W.2d 226, 231 (S.D. 1996) (recognizing the "symbiotic relationship between" property division and alimony, and that "the need for post-divorce alimony can be reduced or obviated" by awarding certain income-producing assets to a spouse who might otherwise receive alimony).

The principles underlying permanent alimony do not contemplate an award for a spouse who is, after the community is divided, capable of supporting him or her self, able to maintain the marital standard of living on his or her own, and not economically disadvantaged in his or her earning capacity as a result of the marriage. The lack of a proper basis for alimony in this case is especially concerning given the risk that an alimony award could have been improperly motivated by Dennis's marital indiscretions and role in bringing about the end of the marriage. *See Rodriguez*, 116 Nev. at 998, 13 P.3d at 418 ("[W]hen considering an award of alimony, the court may not consider either party's misconduct or fault."). Accordingly, we hold that the district court abused its discretion by awarding alimony without a proper basis, and reverse the award.[5]

III.

Turning to the division of property, a court must make an equal disposition of community property in a divorce unless there is a "compelling reason" to make an unequal disposition. NRS 125.150(1)(b). An appellate court reviews a district court's disposition of community property deferentially, for an abuse of discretion. *See Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 919 (1996) ("This 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.").

Dissipation, or waste, can provide a compelling reason for the unequal disposition of community property. *Lofgren v. Lofgren*, 112 Nev. 1282, 1283, 926 P.2d 296, 297 (1996) ("[I]f community property is lost, expended or destroyed through the intentional misconduct of one spouse, the court may consider such misconduct as a compelling reason for making an unequal disposition of community property and may appropriately augment the other spouse's share of the remaining community property."). "Generally, the dissipation which a court may consider refers to one spouse's use of marital property for a selfish purpose unrelated to the marriage in contem-

[5]As a result, we also reject Gabrielle's arguments in her cross-appeal that she should have received a larger alimony award.

plation of divorce or at a time when the marriage is in serious jeopardy or is undergoing an irretrievable breakdown." 24 Am. Jur. 2d *Divorce and Separation* § 524 (2018); *see also Dissipation*, Black's Law Dictionary (10th ed. 2014) (defining "dissipation" as "[t]he use of an asset for an illegal or inequitable purpose, such as a spouse's use of community property for personal benefit when a divorce is imminent").

The district court found that Dennis dissipated $4,087,863 in community property. A large portion of the dissipated community property relates to Dennis's extramarital affairs and children, some relates to expenditures on his family, and the other large portion comprises a variety of other expenditures beyond those Dennis claimed in his financial disclosures. Dennis argues that he did not dissipate any community property because the marital estate continued to grow tremendously—from $4 million to $47 million by his reckoning—during the time of alleged dissipation. Gabrielle counters that the district court should have found more dissipation and begun its calculations even before the marriage underwent an irreconcilable breakdown in 2010 when the parties informally separated.

A.

The $1,853,212 Dennis diverted from the community for his extramarital affairs provided a compelling reason for an unequal disposition of community property. *See, e.g.*, *Neely v. Neely*, 563 P.2d 302, 305 (Ariz. Ct. App. 1977) (affirming an unequal property distribution because the husband spent community property on his girlfriend); *Rabbath v. Farid*, 4 So. 3d 778, 780 (Fla. Dist. Ct. App. 2009) (recognizing that "[a]dultery can be considered in fashioning an unequal distribution of assets and liabilities to the extent the marital misconduct depleted marital resources"); *In re Marriage of Meadow*, 628 N.E.2d 702, 704-05 (Ill. App. Ct. 1993) (same); *Omayaka v. Omayaka*, 12 A.3d 96, 101 n.3 (Md. 2011) (noting that "[a]ppellate courts have held that improper expenditures on a paramour . . . constitutes dissipation"); *McNair v. McNair*, 987 S.W.2d 4, 7 (Mo. Ct. App. 1998) (same); *Basile v. Basile*, 605 N.Y.S.2d 133, 135 (App. Div. 1993) (same); *Spruill v. Spruill*, 624 S.W.2d 694, 697-98 (Tex. Ct. App. 1981) (same); *see also* Brett R. Turner, *Unintentional Conduct as Dissipation of Marital Property*, 21 Equitable Distribution J. 13 (2004) ("[F]unds spent on paramours are almost automatically dissipated."). The district court did not abuse its discretion in making an unequal disposition of community property in the amount spent on the extramarital affairs.

Dennis's argument that, because the overall value of the estate grew during the marital misconduct, his spending of community funds had no adverse economic impact on the marital estate is unpersuasive. *Wheeler v. Upton-Wheeler* held that spousal abuse

or marital misconduct is a compelling reason to make an unequal disposition of community assets only when it has an "adverse economic impact" on the spouse. 113 Nev. 1185, 1190, 946 P.2d 200, 203 (1997). But *Wheeler* considered the economic consequences of physical abuse in a marriage, which has a more tenuous connection to community property than Dennis's misconduct in this case, where he admits he spent community funds on extramarital affairs and the support of a family without Gabrielle's knowledge.

B.

The district court found that Dennis also dissipated $72,200 through post-separation, pre-divorce gifts to family members. A gift to a family member that violates a preliminary injunction constitutes dissipation. *Lofgren*, 112 Nev. at 1283, 926 P.2d at 297 (upholding an unequal disposition where the husband transferred funds to his father despite an injunction enjoining such actions). Absent a specific injunction, a gift to a family member is not dissipation if there is an established pattern or history of giving such gifts to family members during the marriage. *See Robinette v. Robinette*, 736 S.W.2d 351, 354 (Ky. Ct. App. 1987) (recognizing that "giving gifts to family members could constitute dissipation" but the evidence "in the instant case indicates that such charity was a marital enterprise"); *Decker v. Decker*, 435 S.E.2d 407, 413 (Va. Ct. App. 1993) (affirming a finding of no dissipation when it was evident that the gifts to family members were part of the couple's pre-separation estate planning). But a gift to a family member is dissipation when there is no previous history of gift giving or the amount of the gift during the divorce is substantially greater than past gifts. *See Kleet v. Kleet*, 264 S.W.3d 610, 618 (Ky. Ct. App. 2007) (deeming as dissipation a husband's gifts to family when divorce was impending because the value of the gifts "far exceeded those given prior to that time").

Dennis routinely gave money to his family throughout the marriage, and often did so without consulting Gabrielle. The district court appropriately found that such "relatively long-standing and regular" expenditures on family members were not dissipation. But Dennis also gave $15,000 to his aunt after the joint preliminary injunction, which he could not establish as regular or routine. Additionally, he made two non-routine payments of $3,600 to his father and gave his father $50,000 for a political campaign contribution. The district court appropriately found that such gifts from Dennis, totaling $72,200, amounted to dissipation and afforded a compelling reason for an unequal disposition of community property.

C.

The final $2,162,451 of alleged waste represents the amount Dennis spent in excess of his self-declared monthly expenses that

he failed to justify to the district court as a marital expense. The district court considered these expenses as potential waste, at least in part, because Dennis failed to provide a forensic accountant to do a waste analysis after promising to do so. Instead, Gabrielle's own forensic accountant analyzed over 27,200 of the parties' financial transactions and categorized expenditures into those for a marital purpose and those that the expert claimed were "potential community waste." The forensic accountant included funds spent on extramarital affairs and yacht purchases among the transactions that were "potential community waste." But the forensic accountant also included expenditures that were in excess of Dennis's self-proclaimed expenses in his financial disclosure forms that were neither clearly for a marital purpose nor clearly for a nonmarital purpose, labeling this category "potential community waste not elsewhere classified." The district court ultimately required Dennis to account for each of these "not elsewhere classified" transactions, beginning in 2010, and to prove that, no matter how large or small the amount, the transactions served a marital purpose, not dissipation.

The district court erred by requiring Dennis to explain everyday expenditures over the course of several years, including before this divorce action began, and finding dissipation when he failed in this task. Dennis was not called to account for these expenditures because Gabrielle raised a reasonable inference that the transactions furthered a purpose inimical to the marriage, that he made them to diminish Gabrielle's community property share, or even that they were unusually large withdrawals from community accounts. *Cf.* 24 Am. Jur. 2d *Divorce and Separation* § 524 (2018) (defining dissipation as the "use of marital property for a selfish purpose unrelated to the marriage in contemplation of divorce or at a time when the marriage is in serious jeopardy or is undergoing an irretrievable breakdown"). Rather, the district court required Dennis to explain these expenditures because they exceeded his self-described monthly expenses and he failed to follow through on providing a forensic accountant after promising to do so.

While Dennis's spending could appear wasteful in the aggregate, his expenditures appear typical of his general overconsumption throughout the marriage, and they do not provide a compelling reason for an unequal disposition of community property. *See Putterman v. Putterman*, 113 Nev. 606, 609, 939 P.2d 1047, 1048-49 (1997) ("Almost all marriages involve some disproportion in contribution or consumption of community property."). A district court must differentiate between ordinary consumption for higher-income earners such as Dennis, which is not necessarily dissipation, and misappropriation of community assets solely for personal gain, which can provide a compelling reason for an unequal disposition of community property when such expenditures redirect assets needed for basic community support. *Id.* at 609, 939 P.2d at 1048 ("It should

be kept in mind that the secreting or wasting of community assets while divorce proceedings are pending is to be distinguished from undercontributing or overconsuming of community assets during the marriage."). We therefore reverse the district court's unequal disposition of community property by the $2,162,451 labeled in the forensic accounting report as "potential community waste not elsewhere classified."[6]

D.

Gabrielle argues the district court erred by cutting off community property before the written divorce decree. We agree under these circumstances. The district court ended its calculations involving community property on February 26, 2016, when it orally pronounced the parties divorced, so that it could issue a written order following the trial. The written divorce decree was not entered until six months later, on August 22, 2016.

Under Nevada law, the district court's oral pronouncement of divorce did not terminate the community. *See* NRS 123.220; *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) ("An oral pronouncement of judgment is not valid for any purpose, NRCP 58(c); therefore, only a written judgment has any effect . . . ."). NRS 123.220 makes all property acquired after the marriage community property, with no exception for an oral pronouncement of divorce. We therefore remand this matter for the district court to consider the accumulation and waste of community property between its oral pronouncement of the termination of community property and the actual termination when the written divorce decree was entered. *See Gojack v. Second Judicial Dist. Court*, 95 Nev. 443, 445, 596 P.2d 237, 239 (1979) (holding that a district court "is without jurisdiction to enter a final decree of divorce without contemporaneously disposing of the community property of the parties").

IV.

The district court sanctioned Dennis $19,500 for making 39 transactions of $10,000 or more during the divorce proceedings—$500 for each transaction—based on the joint preliminary injunction, which prohibited either party from using community property "except in the usual course of business or for the necessities of life."

[6]We reject Gabrielle's cross-appeal for lost opportunity costs from forgone return on investments from the wasted assets, as well as her claim that Dennis's yacht purchase and sale was dissipation. *See Putterman*, 113 Nev. at 609, 939 P.2d at 1048-49 (distinguishing disproportionate consumption from dissipation). Given the speculative nature of lost opportunity costs, and that the marital estate grew exponentially during this time period, the district court appropriately found that lost opportunity cost did not amount to a compelling reason for an unequal disposition of property.

EDCR 7.60(b)(5) allows a district court to sanction a party for failing or refusing to comply with a court order "without just cause" and when the sanction is reasonable under the facts of the case.

What constitutes spending beyond "the usual course of business or for the necessities of life," as stated in the preliminary injunction in this case, is not clear and unambiguous given the parties' wealth. *See* Brett R. Turner, *Entry and Enforcement of Preliminary Injunctions Against Dissipation of Marital Property*, 16 Divorce Litig. 102 (2004) ("[M]ost broad general injunctions must have an exception for transfers in the ordinary course of life or business, and this exception can give many questionable transactions sufficient plausible reasonableness to avoid contempt."); *see also Cunningham v. Eighth Judicial Dist. Court*, 102 Nev. 551, 559-60, 729 P.2d 1328, 1333-34 (1986) ("An order on which a judgment of contempt is based must be clear and unambiguous, and must spell out the details of compliance in clear, specific and unambiguous terms so that the person will readily know exactly what duties or obligations are imposed on him."). Thus, instead of ordering sanctions, the appropriate remedy for violations of the automatic joint preliminary injunction due to overspending would be an unequal disposition of property. To the extent Dennis violated the joint preliminary injunction by making transactions in excess amounts, the appropriate remedy was a finding of waste and an unequal disposition of the community property. Accordingly, we reverse the district court's sanctions and deny Gabrielle's cross-appeal for greater sanctions.[7]

V.

The district court also awarded $75,650 in costs to Gabrielle, representing half the fee her forensic accountant charged. The district court did not state a basis for awarding costs, and there is no apparent basis for doing so. *See U.S. Design & Constr. Corp. v. Int'l Bhd. of Elec. Workers, Local 357*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002) ("A district court is not permitted to award . . . costs unless authorized to do so by a statute, rule or contract."). There was no offer of judgment that would allow for costs or fees, *see* NRS 125.141 (allowing for attorney fees and costs if a party who rejects an offer of judgment fails to obtain a more favorable judgment), and the court explicitly found that there was no prevailing party, *see* NRS 18.020 (allowing for costs to the prevailing party in certain types of cases). Nor did the court award costs as part of

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[7]To the extent these expenditures over $10,000 were included as expenses "not elsewhere classified" by Gabrielle's forensic accountant, which we reversed as ordinary overconsumption, the district court may reconsider on remand whether specific large expenditures violated the joint preliminary injunction, which could provide a compelling reason for an unequal disposition of community property.

a sanction under EDCR 7.60 for violations of the joint preliminary injunction. Even if Gabrielle was entitled to costs, the district court did not state any basis for awarding expert fees in excess of $1,500. *See* NRS 18.005(5) (allowing a district court to award more than $1,500 for an expert witness's fees only if the court determines "that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee"); *Khoury v. Seastrand*, 132 Nev. 520, 541, 377 P.3d 81, 95 (2016) ("[B]ecause the district court awarded expert fees in excess of $1,500 without stating a basis for its decision, we hold that the district court abused its discretion."). We therefore reverse the district court's award for costs to Gabrielle and deny her cross-appeal for attorney fees.

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We affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We reverse the alimony award, because Gabrielle received income-producing assets as her share of the community property that obviated any arguable basis for alimony. We affirm the district court's unequal disposition of community property due to Dennis's spending on extramarital affairs and gifts to family, but reverse the unequal disposition of property based on Dennis's everyday consumption. We remand for the district court to consider the accumulation and waste of community property between its ineffective oral termination of community property and the actual termination of community property upon the entry of the written divorce decree. Finally, we reverse the sanctions for violations of the joint preliminary injunction and the award of costs to Gabrielle.

Gibbons, C.J., Parraguirre, J., and Douglas, Sr. J., concur.

Hardesty, J., with whom Stiglich, J., agrees, concurring in part and dissenting in part:

While I concur with the majority on all other issues, I must dissent to the reversal of the district court's award of alimony for three reasons. First, the majority disregards our deferential standard of review and the wide discretion vested in the district court to award alimony in the nature of compensation for economic losses as a result of the marriage and divorce, including to equalize post-divorce earnings or maintain the marital standard of living. Second, the majority, after spending considerable time lamenting the absence of a statutorily defined purpose for alimony in our statutes, ultimately summarizes Nevada's jurisprudence: "alimony can be 'just and equitable' both when necessary to support the economic needs of a spouse and to compensate for a spouse's economic losses from the marriage and divorce, including to equalize post-divorce earnings or help maintain the marital standard of living." Majority opinion *ante* at 68. Then, inexplicably and without discussing the district court's

reasoning to support a post-divorce earning disparity, the majority simply declares that Gabrielle's income-producing assets from her share of the community property "obviated any basis for awarding alimony." *Id*. at 72. In effect, in the majority's view, Gabrielle has earned enough. And third, without one citation to the record or the district court's decision, the majority speculates that the district court's award of alimony "could have been improperly motivated by Dennis's marital indiscretions and role in bringing about the end of the marriage." *Id*. at 75.

There is no common law of alimony, it "is wholly a creature of statute." *Rodriguez v. Rodriguez*, 116 Nev. 993, 998, 13 P.3d 415, 418 (2000) (internal quotation marks omitted). When granting a divorce, a district court may award alimony to either spouse "as appears just and equitable." NRS 125.150(1)(a). When determining if alimony is just and equitable, a district court must consider the 11 factors listed in NRS 125.150(9). *See DeVries v. Gallio*, 128 Nev. 706, 711-13, 290 P.3d 260, 264-65 (2012). The district court may also consider any other relevant factor, but it must not consider the marital fault or misconduct, or lack thereof, of the spouses. *Rodriguez*, 116 Nev. at 999, 13 P.3d at 419 ("Alimony is not a sword to level the wrongdoer. Alimony is not a prize to reward virtue."). The decision of whether to award alimony is within the discretion of the district court. *Buchanan v. Buchanan*, 90 Nev. 209, 215, 523 P.2d 1, 5 (1974) ("In determining whether alimony should be paid, as well as the amount thereof, courts are vested with a wide range of discretion."). A district court's decision in a divorce proceeding is reviewed for an abuse of discretion. *Shydler v. Shydler*, 114 Nev. 192, 196, 954 P.2d 37, 39 (1998). "Rulings supported by substantial evidence will not be disturbed on appeal." *Id*.

Against this deferential standard of review, we evaluate the district court's 102 pages of Findings of Fact and Conclusions of Law in this case, 14 pages of which are devoted to the alimony award. After reciting the applicable provisions of NRS 125.150 concerning the district court's statutory authority to award alimony, the district court lists and later analyzes all of the factors in NRS 125.150(9). Before conducting an analysis of the evidence, however, the district court noted the absence of statutory guidelines to provide guidance as to the relative weight to be applied to each factor; discussed the scholarly article by the Honorable David A. Hardy in *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 Nev. L.J. 325 (2009); recognized the difference between alimony based on "need" and support based on compensation for economic losses as a result of the marriage and divorce; and recited our rule in *Shydler*, 114 Nev. at 198, 954 P.2d at 40 (quoting *Shydler* to explain that " '[a]lthough the amount of community property to be divided between the parties may be considered in determining alimony,' a spouse should not be required to deplete his/her share of the com-

munity property for support”). Finally, the district court noted the admonition in *Rodriguez* against awarding alimony to “level the wrongdoer.” *Rodriguez*, 116 Nev. at 999, 13 P.3d at 419.

The district court’s analysis is both thorough and specific. It begins by finding “there is a sufficient factual basis for the Court to consider an award of support that is in the nature of compensation for economic losses as a result of the marriage and divorce.” The district court then supported its finding with a detailed analysis of the factors listed in NRS 125.150(9)(a), (e), and (k), including extensive comparisons of the parties’ pre- and post-divorce earnings. The district court correctly found that “Dennis’[s] income historically has dwarfed Gabrielle’s income throughout their marriage” and projected the difference in the parties’ average monthly net income to be $54,200.

The district court next analyzed Dennis’s argument under NRS 125.150(9)(b) and (j) that Gabrielle will leave the marriage with assets that could earn passive income of between $500,000 and $800,000 annually. However, as the district court recognized, Gabrielle’s standard of living showed annual expenses (between $180,000 and $240,000) substantially in excess of her projected monthly income of $3,800. In this 25-year marriage, the district court found that “Gabrielle relied on the existence of the parties’ marriage to maintain the standard of living achieved as a result of Dennis’[s] income capacity” and awarded spousal support in the amount of $18,000 per month for 108 months. Consistent with the principles in *Sargeant v. Sargeant*, 88 Nev. 223, 228-29, 495 P.2d 618, 621-22 (1972), the district court reduced the award to a lump sum payment of $1,630,292.

The majority’s determinations that the district court “disregarded this passive income because the award was not need-based” and “should have considered the nature and amount of the property disposition, including passive income from the assets awarded to the parties, when determining whether Gabrielle needed alimony to maintain her standard of living,” majority opinion *ante* at 74, are, quite simply, wrong. Neither statement is supported by the record or the district court’s findings. And certainly, neither the record nor the findings shows an abuse of discretion by the district court.

Additionally, the majority’s conclusion that the income-producing assets distributed to Gabrielle completely “obviated any basis for awarding alimony,” *id*. at 72, misapprehends the district court’s reasoning for the award. The district court plainly followed the rule in *Shydler* that the division of community property should be considered, but a spouse should not be required to deplete his or her share of the community property for support. In this, the district court specifically found, consistent with our recognized rule, that alimony can be “just and equitable” to compensate for a spouse’s economic losses from the marriage and divorce, *including to equal-*

ize post-divorce earnings or maintain the marital standard of living. The award in this case had to do with the disparity in the parties' post-divorce earnings, the right to which arose out of Gabrielle's reliance on the existence of the marriage and Dennis's substantial income capacity. Other than the majority's declaration that her income producing assets "obviated any basis for awarding alimony," the majority fails to address or even explain why Gabrielle should consume her assets in order to resolve a post-divorce income disparity.

Finally, the majority resorts to pure speculation when it claims that the district court's alimony award "could have been improperly motivated by Dennis's marital indiscretions and role in bringing about the end of the marriage." Majority opinion *ante* at 75. To the contrary, the district court was careful to recognize the admonition against doing so in its conclusions of law. The district court observed that it "should not consider the respective 'merits' of the parties in adjudicating the issue of spousal support. . . . '[Alimony] is not a sword to level the wrongdoer,' nor is it a 'prize to reward virtue'" (quoting *Rodriguez*, 116 Nev. at 999, 13 P.3d at 419). To suggest that the district court did otherwise impugns the integrity and extraordinary effort of the district court to resolve this issue within the confines of the law.

I would affirm the award of alimony because the district court did not abuse its discretion in making this award.

In the Matter of the FUND FOR THE ENCOURAGEMENT OF SELF RELIANCE, an Irrevocable Trust.

DOAN L. PHUNG, Appellant, *v.* THU-LE DOAN, Respondent.

No.74964

April 25, 2019 440 P.3d 30

Appeal from a district court order denying judicial review, rejecting objections to a probate commissioner's report, and granting a motion to decant trust assets. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Reversed and remanded.

Mushkin Cica Coppedge and *Michael R. Mushkin* and *L. Joe Coppedge*, Las Vegas, for Appellant.

Goldsmith & Guymon, P.C., and *Dara J. Goldsmith* and *Peter Co*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Pickering, J.:

The issue presented by this appeal is whether the district court erred in ordering, under NRS 163.556, half of a wholly charitable trust's property "decanted" (i.e., appointed) into a newly created wholly charitable trust with the same purpose as the original charitable trust, to be administered solely by one trustee of the original trust, against the objection of co-trustees. Because the terms of the trust instrument require the unanimous consent of all trustees to make a distribution of half of the trust's assets, the district court erred by ordering the wholly charitable trust decanted under NRS 163.556.[1]

In relevant part under NRS 163.556(1), "a trustee" who has "discretion or authority to distribute" trust property (income or principal) "to or for" beneficiaries "may" appoint or distribute trust property to a newly created second trust, "unless the terms of . . . [the] irrevocable trust provide otherwise." Respondent Thu-Le Doan argued, and the district court agreed, that this statute authorized the district court to order half of the property of the charitable trust, The Fund for the Encouragement of Self Reliance, decanted into a newly created charitable trust with the same purpose as the original. Appellant Doan L. Phung argues that this was reversible error because "[n]owhere in the Charter is '*a* trustee' allowed to invade the assets without the permission of the Board." (Emphasis added.) We agree with Phung.[2]

"When the language of a statute is plain and unambiguous," we "give that language its ordinary meaning and [do] not go beyond it." *Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n*, 117 Nev. 835, 840, 34 P.3d 546, 550 (2001). However, this court "construe[s] statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation." *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (internal quotation marks omitted).

Although the statute's plain language provides that "a trustee" may decant if he or she has discretionary distribution powers, NRS 163.556(1), "trustee" is a statutorily defined term for trusts gener-

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[1]We grant appellant Doan L. Phung's NRAP 36(f) motion and replace our prior unpublished disposition with this opinion.

[2]As an initial matter, we acknowledge that it is not clear whether NRS 163.556 applies to charitable trusts. We need not reach this issue, however, because even if the statute did apply to the trust at issue, we conclude that, under its terms, the trust did not permit a trustee to unilaterally appoint or distribute property without the consent of his or her co-trustees.

ally and charitable trusts specifically. For charitable trusts, like the one at issue here, "trustee" is not limited to a singular person, but rather includes "a trustee, *trustees*, person *or persons* possessing a power or powers referred to in [the Charitable Trust Act]." NRS 163.500 (emphasis added); *see also* NRS 132.355 (generally, "trustee" "includes an original, *additional* or successor trustee, whether or not appointed or confirmed by a court") (emphasis added). Thus, because the statute's phrase "a trustee" contemplates action by multiple trustees, and because the right under NRS 163.556(1) is subject to the terms of the trust instrument, we must address whether the terms of the trust instrument permit a trustee to make a unilateral distribution.

"We construe trusts in a manner effecting the apparent intent of the settlor." *In re Connell Living Tr.*, 134 Nev. 613, 616, 426 P.3d 599, 602 (2018). Here, the relevant section of the trust instrument provides: "*Trustees* . . . may, in *their* discretion," (emphasis added) manage trust property and income. By its plain language, the trust instrument therefore gives the "trustees" power to manage trust funds only in "their" unanimous discretion; it does *not* give *a trustee* power to manage trust funds in *his or her* unilateral discretion.

"[I]n the absence of statute or contrary direction in the trust instrument[,] [t]he trustees are regarded as a unit." George Gleason Bogert, *Law of Trusts and Trustees* § 554 (2d rev. ed. 1980). "They hold their powers as a group so that their authority can be exercised only by the action of all the trustees." *Id*. Because the trust instrument does not provide that a trustee may unilaterally distribute trust property, unanimous action by the trustees would be required to exercise the decanting right under the statute. *See* NRS 163.556(1) ("a trustee *with discretion or authority to distribute*" may exercise the statutory decanting right) (emphasis added).

The district court erred in ordering a course of action that the trust instrument did not permit and the settlors did not intend.[3] We therefore reverse the district court's order granting Doan's motion to decant the trust and remand the matter for further proceedings consistent with this opinion.

Gibbons, C.J., and Hardesty, Parraguirre, Stiglich, Cadish, and Silver, JJ., concur.

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[3]We have considered the parties' other arguments and have concluded that they lack merit. It is the parties' "responsibility to cogently argue, and present relevant authority, in support of" their arguments. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). We will not consider issues not so presented. *Id.*