

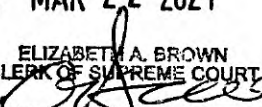
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TARIK HACHAM,
Appellant,
vs.
DOUNIA SEBAI,
Respondent.

No. 86819 COA

FILED

MAR 22 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court's findings of fact, conclusions of law, and order following a trial in a family law matter. Eighth Judicial District Court, Family Division, Clark County; Charles J. Hoskin, Judge.

Tarik Hacham and Dounia Sebai met in Morocco and moved to Las Vegas in October 2011.¹ The parties were married in November 2011 and have two minor children: A.H., born in 2012 and L.H., born in 2015.

Both Tarik and Dounia work in the timeshare industry, but Dounia quit her job in 2018 to focus on taking care of the children. Once Dounia stopped working, Dounia alleged that Tarik began having substance abuse issues. This caused a rift in the marriage that continued into September 2020, when the parties decided to take an "extended trip" with their children.² This trip was meant to last months and encompassed travel both domestically and abroad. The parties planned to return to the United States for the 2021-22 school year after visiting family in Morocco. Dounia

¹We recount the facts only as necessary for our disposition.

²By September 2020, the Clark County School District had announced that the 2020-21 school year would not be in-person, so the children had the flexibility to learn remotely while traveling.

surmised that this trip would afford the parties a chance to repair their marriage.

The parties arrived in Morocco in April 2021. Dounia and the children stayed with her family in the city of Kenitra, while Tarik stayed with his parents in Rabat. In May, while visiting Tarik in Rabat with the children, Tarik and Dounia got into a heated argument wherein Dounia alleged a physical confrontation occurred. Tarik then took Dounia's and the children's passports and did not return them.

Tarik commenced divorce proceedings in a Moroccan court in June 2021. In the Moroccan proceeding, Tarik requested that the court (1) close the borders to the children in order to prevent them from leaving Morocco and (2) grant him permission to enroll the children in a Moroccan school. The court denied both requests in July 2021 and also ordered Tarik to return the passports to Dounia or face a fine of 1,000 dirhams (approximately \$270) for each day he failed to do so. Tarik neither returned the passports nor paid the fine, and instead informed Dounia that he would return the passports only if she signed the Moroccan divorce papers.

Simultaneous with the Moroccan divorce proceedings, in July 2021, Dounia filed in Nevada both a complaint for divorce and an ex parte application for sole legal custody to obtain replacement passports. In early September 2021, the district court granted Dounia sole legal custody with respect to the passport issue, and Dounia was able to obtain one-time, temporary use passports for the children from the U.S. consulate in Morocco. She returned with the children to Las Vegas shortly thereafter.

The Moroccan court issued a Decree of Divorce (the Moroccan decree) in January 2022. The Moroccan decree awarded Dounia primary custody of the children, with Tarik entitled to parenting time every Sunday

from 10:00 a.m. to 6:00 p.m. and on the “second day of Ei al-Adha and of Eid al-Fitr.” Tarik did not exercise this parenting time, presumably because the children were back in Las Vegas with Dounia. Tarik remained in Morocco for the next eight months and returned the United States in June 2022. During that time, he did not visit the children once, despite Dounia’s requests for him to come to Las Vegas.

Tarik did not initially move to Las Vegas and instead moved to Sedona, Arizona. While in Arizona, the parties informally agreed that Tarik would have parenting time each Friday from 4:00 p.m. to 8:00 p.m. and Saturday from 10:00 a.m. to 4:00 p.m. Between June and September 2022, Tarik either exercised less than his full timeshare or did not exercise his allotted parenting time at all. Tarik moved to Las Vegas in September 2022, apparently to be closer to the children.

In December 2022, the parties stipulated to an order establishing a temporary custody arrangement that granted Tarik a date night with the children each Tuesday, regular parenting time every Friday, and additional parenting time on Christmas. The district court entered another temporary custody order in February 2023 that granted Dounia primary physical custody, with Tarik to have parenting time from Thursday afternoons until Saturday at 6:00 p.m. The district court declined to award joint physical custody, finding that it was not in the children’s best interest.

Throughout 2021 and 2022, the parties intensely litigated jurisdiction. Specifically, the parties contested the district court’s jurisdiction to divide the parties’ assets and enter custody orders, considering the litigation in Morocco. The district court ultimately concluded that it had personal jurisdiction over the parties, subject matter

jurisdiction over the parties' assets and debts, and jurisdiction over the minor children pursuant to the UCCJEA.

Simultaneous with litigating jurisdiction, the parties also engaged in discovery surrounding the merits of their divorce. In September 2022, Dounia moved to compel discovery, arguing that Tarik's responses to her discovery requests were inadequate, and that he had not filed an updated Financial Disclosure Form (FDF), as required by NRCP 16.2. Notable to this appeal, when questioned about separate property, Tarik stated only that he "bought a condo in 2008 prior to the marriage." Tarik was also exceedingly vague in his answers regarding financial accounts and did not disclose relevant statements.

At a discovery commissioner hearing in October 2022, the commissioner determined that the majority of Tarik's responses and disclosures were inadequate, and that Tarik had not acted in good faith. In his report and recommendations, the commissioner, with few exceptions, directed Tarik to fully comply with Dounia's discovery requests or face a negative inference penalty. Pursuant to this penalty, a negative inference would automatically issue to any information Tarik withheld as of October 12, 2022, such that the withheld information would support Dounia's position.

In November 2022, the district court issued an order affirming and adopting the discovery commissioner's report and recommendations (DCRR), as neither party had objected. The court also scheduled an evidentiary hearing (trial) for April 2023 on the remaining custody, asset, and debt issues. Notable to this appeal, Dounia requested at the trial that: she remain the primary custodial parent; the parties' two Las Vegas properties, as well as the Moroccan apartment, be listed for sale, with each

party entitled to one-half of the net sale proceeds; and she be awarded one-half of the funds Tarik purportedly improperly liquidated (approximately \$160,000) from his 401(k) retirement account.³

As to custody, Dounia testified that Tarik had already impliedly nominated her as the children's primary custodial parent when he agreed to the previous arrangements; she has historically been the only parent to tend to the children's day-to-day needs, including coordinating the children's schooling, extracurricular activities, and medical appoints; she actively attempted to nurture the children's relationship with Tarik while he was in Morocco; Tarik is more willing to engage in violence than she is, as evidenced by a recent altercation that occurred during his parenting time in which he screamed at both children and threw L.H.'s phone across the room; and Tarik functionally abducted the children by holding their passports hostage in Morocco.

Regarding all real property, Dounia testified that the Las Vegas properties had been purchased and financed with community funds, and that Tarik improperly removed the community 401(k) funds and transferred them to his separate bank accounts in direct violation of a joint preliminary injunction. Moreover, in her closing argument, Dounia stated that the mortgage on the Moroccan property was paid down during the parties' marriage with community income. Dounia also pointed out that, by failing to provide updated financial and property information and comply

³Neither party disputes that the 401(k) retirement funds accrued during the parties' marriage, and that the funds are part of the community's assets. The issue at trial, and the issue we now review on appeal, was whether Tarik could properly trace his use of the 401(k) funds back to the community (i.e., whether Tarik's tracing evidence adequately demonstrated that he used the liquidated funds to pay community expenses).

with all of her discovery requests, Tarik had willfully violated both NRCP 16.2 and the order flowing from the DCRR. Of particular note, Tarik provided no documentation associated with the Moroccan property, including the property's value, mortgage, purchase history, or title. He also provided no information as to the source of the property's purchasing funds or the funds used to maintain the property throughout the marriage. As such, Dounia maintained that the district court was obligated to issue a negative inference as to, among other things: the values and nature of both the Nevada and Moroccan properties; Tarik's bank and credit card accounts; and Tarik's retirement and investment accounts.

As to the liquidated 401(k) funds, Dounia was adamant that she neither knew Tarik withdrew \$160,000 from the 401(k) in January 2022 nor consented to using those funds to pay back credit card debt incurred during their 2020 trip. On cross examination, Dounia acknowledged that Tarik withdrew approximately \$47,000 from the 401(k) in 2020 *prior* to their trip, and while she knew about that withdrawal, she neither knew about nor consented to the \$160,000 withdrawal in January 2022.

For his part, regarding custody, Tarik testified that he was in good physical health and took the children to all of their activities when given the chance; had already demonstrated a willingness to cooperate with Dounia when the two were deciding where to send A.H. to school; and that, while the children have "more emotional attachment" to Dounia, he provided discipline and structure in a way that Dounia did not. In his closing argument, Tarik also declared that he never nominated Dounia as the primary custodial parent, despite the fact that he agreed to Dounia taking on the primary custodial role in every formal and informal custody arrangement the parties had previously entered; did not kidnap the

children merely because he withheld their passports; and there was only one incident of domestic violence that occurred over 12 years ago, and Dounia remained with him after the incident for almost a decade.

As to the parties' Las Vegas properties, Tarik testified that, although the parties purchased the two homes with community funds, each party deeded one of the homes to the other via quitclaim deed, thereby making one home Tarik's separate property and the other Dounia's.⁴ Tarik offered to pay Dounia the difference in equity between the two homes, but he did not want to sell the home he lived in because he lived there with his elderly parents. As to the Moroccan apartment, Tarik argued in his pretrial memo and on appeal that he purchased the apartment prior to marriage such that a presumption arose that the apartment was his separate property, but he did not testify as to the Moroccan apartment at trial and also provided no documentation to support his claims during discovery.

Regarding the January 2022 withdrawal of 401(k) funds, Tarik testified that he used approximately \$120,000 of those funds to finance the parties' extended trip and pay back the parties' community credit card debt.⁵ He testified that he deposited the other \$40,000 into a Moroccan bank in Dounia's name in order to finance Dounia's portion of the Moroccan court fees. In other words, he argued that he used the community funds for community purposes, and that the credit card and bank statements he

⁴Dounia avers that (1) neither of these quitclaim deeds were ever recorded in Clark County for either residence, and (2) regardless of the deeds, the parties used community funds to make mortgage payments on both properties.

⁵Tarik acknowledged that the trip occurred between September 2020 and May 2021. He provided no explanation as to why he waited eight months to withdraw the funds and pay back the debt.

produced sufficiently traced those funds back to the community. Consequently, he maintained that the funds were used for community purposes, and that Dounia was therefore not entitled to half of the liquidated funds.

Yet, Tarik did not dispute that he moved \$120,000 of the funds into at least three separate bank accounts titled in either his name alone, his name with his father's, or his name with his mother's. Tarik's mother and father had debit cards associated with these accounts and could both deposit money and make withdrawals, and Dounia had no access to these accounts. As to the remaining \$40,000, the bank statements supported that Tarik deposited \$40,000 of the liquidated 401(k) funds into a Moroccan bank. This amount aligned with the Moroccan decree of divorce, which stated that Dounia owed approximately \$40,000 in court fees.

Throughout the entire course of the parties' divorce, the district court explicitly questioned Tarik's credibility, as he often made contradictory statements or statements that were belied by records admitted into evidence. For example, at trial, Tarik testified that he had "never taken a dime" from his Robinhood investment account, despite account statements showing multiple withdrawals that were subsequently transferred into his separate bank account. At one point, the district court attempted to ask Tarik questions about the 401(k) funds, and Tarik went on a tirade, to which the district court responded, "So it's not just counsel you don't answer questions to, it's me as well"

In its findings of fact, conclusions of law, and order, the district court found that, relevant to determining child custody: Tarik has exercised his full parenting time since moving back to Las Vegas, but spending time with the children was not Tarik's priority, and Tarik did not adequately

explain why he sought the “drastic change” from his current arrangement to joint physical custody. Regarding the liquidated 401(k) funds, the district court found that sufficient evidence existed to support that Tarik paid \$40,000 to a Moroccan court as part of the divorce proceedings; in January 2022, Tarik made approximately \$57,000 worth of community credit card payments, which is substantially less than the \$120,000 Tarik claims he paid; and that approximately \$102,000⁶ in community funds remained unaccounted for. As to those unaccounted funds, the court determined that a negative inference would issue. The district court again noted that “Tarik’s credibility [wa]s in question.”

In its findings, the district court also determined that it was in the children’s best interest to award the parties joint legal custody but Dounia primary physical custody. Specifically, as to physical custody, the court comprehensively analyzed NRS 125C.0035(4)’s best interest factors, connected each factor to specific evidence in the record, and found that factors (c), (g), and (h) favored Dounia, while no factors favored Tarik. Notably, in the “*other things*” provision, the court considered the parties’ acquiescence to Dounia’s historical role as the primary caretaker, the terms of the Moroccan decree that granted Dounia primary physical custody, and Tarik’s “inconsistent testimony regarding his custodial request.”

⁶In finding that \$102,000 of the community funds remain unaccounted, the district court referenced an additional payment Tarik alleged he made on the community’s behalf. This payment was apparently mentioned in Exhibit T, but Exhibit T was not admitted into evidence. However, Exhibit K, which *was* admitted, referenced the payment in Exhibit T. Thus, the court reduced the amount of unaccounted-for funds to reflect this additional payment.

Regarding property and the liquidated 401(k) funds, the district court ordered that each party be awarded the home they currently reside in as their sole and separate property, in addition to their cars, bank accounts, and credit card debts. However, as to the Moroccan apartment, the district court ordered that the parties “shall sell their interest in the Morocco property and equally divide any net proceeds.” Finally, the district court ordered Tarik to pay Dounia an equalization payment of approximately \$51,000 to compensate her for “the community portion of the unaccounted withdrawals from the community assets [including the 401(k)].”

On appeal, Tarik raises three issues. Specifically, Tarik argues that the district court erred when it: (1) awarded Dounia primary physical custody; (2) ordered the parties to sell the Moroccan property and equally divide the proceeds; and (3) awarded Dounia half of the “untraceable” 401(k) funds.⁷ We disagree with Tarik and conclude that he has not established a basis for reversal.

The district court did not abuse its discretion when it awarded Dounia primary physical custody

Tarik argues that the district court erred when it awarded Dounia primary physical custody because it considered the Moroccan decree in issuing its determination. To that end, Tarik alleges that the Moroccan court awarded Dounia primary physical custody solely due to her status as

⁷Tarik also argues that the district court erred when it did not consider the tax consequences associated with his early 401(k) withdrawal. However, Tarik did not raise, argue, or even mention tax consequences associated with the 401(k) withdrawal at trial. We therefore conclude that Tarik waived the issue by not properly preserving it. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are “deemed to have been waived and will not be considered on appeal.”).

the children's mother under Moroccan law, which is an equal protection violation and conflicts with Nevada law.⁸ Dounia responds that the Moroccan decree was one of multiple factors the court considered before issuing its determination, and that the district court's decision reflected a comprehensive best interest analysis. Moreover, even considering the Moroccan decree in isolation, the Moroccan court held "extensive proceedings" on the child custody matter and had the authority to depart from the maternal custody presumption for good cause, which it declined to do. We conclude that (1) Tarik forfeited his equal protection argument and failed to cogently argue equal protection on appeal and (2) the district court did not abuse its discretion when it awarded Dounia primary physical custody because its decision was supported by substantial evidence, and it considered the Moroccan decree as only one factor in its comprehensive best interest analysis.

We review a district court's child custody determinations deferentially and will not disturb them absent a clear abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (1999); *see also Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (explaining that district courts have broad discretion in making child custody determinations). In reviewing a district court's child custody determinations, we focus on whether the district court "reached its conclusions for the appropriate [legal] reasons" and whether its factual findings were "supported by substantial evidence." *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42; *see also Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.3d

⁸See NRS 125C.0035(2) ("Preference must not be given to either parent for the sole reason that the parent is the mother or the father of the child.").

328, 330 (1993) (stating that we “must be satisfied that the [district] court’s determination was made for the appropriate reasons”). Deference is not, however, owed to findings “so conclusory they mask legal error,” *Davis*, 131 Nev. at 450, 352 P.3d at 1142, and we have routinely vacated custody orders where the findings of fact consist of “mere conclusory statements,” *id.* at 452, 352 P.3d at 1143 (quoting *Dixon v. Dixon*, 312 S.E.2d 669, 672 (N.C. Ct. App. 1984)).

In making a child custody determination, the district court’s sole consideration is the best interest of the child. NRS 125C.0035(1); *see Davis*, 131 Nev. at 451, 352 P.3d at 1143. In determining the best interest of the child, a district court must consider, and set forth specific findings concerning, the “best interest” custody factors delineated in NRS 125C.0035(4)(a)-(l). Crucially, a district court cannot “simply . . . process[] the case through the [best interest factors]” but must instead “tie the child’s best interest, as informed by specific relevant findings” to the custody determination made. *Davis*, 131 Nev. at 451, 352 P.3d at 1143. The NRS 125C.0035(4) best interest factors are non-exhaustive and should be considered along with any other relevant information the district court deems significant. *See Ellis*, 123 Nev. at 152, 161 P.3d at 243.

With respect to physical custody, there is a statutory presumption that joint physical custody is in the child’s best interest if a parent has demonstrated an intent to establish a meaningful relationship with the child, but the other parent has frustrated their efforts, NRS 125C.0025(1)(b). However, while “[j]oint physical custody is the first [arrangement] a court should consider when deciding custody,” it “may . . . order primary physical custody” if it determines that joint physical

custody is not in the children's best interest. *Roe v. Roe*, 139 Nev., Adv. Op. 21, 535 P.3d 274, 286 (Ct. App. 2023).

Here, we do not consider Tarik's argument that his equal protection rights were violated because Tarik raises it for the first time on appeal. See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal."). Tarik took no issue with the Moroccan decree when it was issued in Morocco and also did not argue that the Moroccan decree violated his equal protection rights either before or during the Nevada trial. Further, on appeal, Tarik fails to explain *how* his equal protection rights were violated, in that he makes mere conclusory statements and cites no authority to support his argument. Therefore, he has not cogently argued his position.⁹ See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (concluding that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Equal protection aside, we conclude that the district court's decision to award Dounia primary physical custody was also within its discretion because it was based on a comprehensive evidentiary hearing in which the Moroccan decree was but one relevant factor. At the evidentiary hearing, the court heard testimony from both parties as to all of the best interest factors; in the court's conclusions, it connected each factor to specific evidence in the record.

⁹Tarik also does not provide additional authority to support an equal protection violation in his reply brief. Instead, his reply addresses child custody only as it pertains to the best interest factors.

After expressing its concerns about Tarik's ability to "adequately care for the children," the court found all of the best interest factors to either be neutral or in Dounia's favor. Specifically, the court concluded that: Dounia was more likely to nurture the children's continued relationship with Tarik because, during Tarik's extended absences, Dounia offered Tarik visits, while Tarik provided no evidence regarding this factor; Dounia was in a better position to care for the children's physical, developmental, and emotional needs because she has historically been the children's primary caretaker; and, stemming from Dounia's role as the children's primary caretaker, Dounia had a stronger relationship with the children than Tarik.

Regarding NRS 125C.0035(4)'s "other things" provision, the district court considered: the parties' acquiescence to Dounia's role as the primary caretaker; the terms of the Moroccan decree; Tarik's "limited requests for contact" with the children during the pendency of the divorce proceedings; and Tarik's "inconsistent testimony" regarding his custodial request. In its findings, the district court also expressed concern that, during the pendency of the action, Tarik had never requested joint physical custody and had previously agreed that Dounia having primary physical custody was in the children's best interest. Together, the court's comprehensive analysis of the best interest factors and specific findings all support its ultimate custody determinations. Accordingly, we conclude that the district court's decision to award Dounia primary physical custody of the minor children was not an abuse of discretion because it reflected a comprehensive best interest analysis based upon substantial evidence in the record. *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42.

The district court did not err when it ordered the parties to sell the Moroccan property and equally divide the proceeds

Tarik argues that the district court erred when it ordered the parties to sell the Moroccan property and equally divide the proceeds because the property was not part of the community, and neither party testified to the issue during the evidentiary hearing. Moreover, Tarik argues that the district court's decision to use the negative inference outlined in the DCRR violated his due process rights. Dounia responds that Tarik failed to provide any evidence that he purchased the property prior to marriage, and that the district court acted within its discretion when it imputed a negative inference to the property because Tarik willfully violated NRCp 16.2 and the DCRR's mandate to provide supporting documentation. We conclude that the district court (1) did not violate Tarik's due process rights when it used the negative inference because Tarik had specific notice and an opportunity to be heard at the hearing before the discovery commissioner and (2) did not abuse its discretion when it ordered the Moroccan property sold and proceeds equally divided because Tarik did not prove that he purchased the property prior to marriage.

The district court did not violate Tarik's due process rights

Tarik claims a due process violation occurred because he had no notice as to "what was being negatively inferred." To that end, Tarik avers that the order adopting the DCRR was vague, and that the court did not indicate during the evidentiary hearing that it would apply the negative inference against the Moroccan property. Dounia responds that the fully adopted DCRR clearly ordered that a negative inference would automatically issue "for any documentation or information" Tarik withheld. We review questions of law, including constitutional challenges, de novo, *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007), and conclude that the district court did not violate Tarik's due process rights by using the

negative inference because Tarik was properly notified that any information he withheld would be construed in Dounia's favor.

The Fourteenth Amendment of the United States Constitution and Article 1, Section 8(5) of the Nevada Constitution guarantee due process of law. *Gordon v. Geiger*, 133 Nev. 542, 545, 402 P.3d 671, 674 (2017). Due process protects certain substantial and fundamental rights and demands that parties receive “notice and an opportunity to be heard” before those rights are affected. *Sw. Gas Corp. v. Pub. Utils. Comm’n of Nev.*, 138 Nev. 37, 46, 504 P.3d 503, 511 (2022) (quoting *Callie*, 123 Nev. at 183, 160 P.3d at 879 (quoting *Maiola v. State*, 120 Nev. 671, 675, 99 P.3d 227, 229 (2004))).

Decisions impacting one's interest in real property implicate due process concerns. See *Malfitano v. Cnty. of Storey By & Through Storey Cnty. Bd. of Cnty. Comm’rs*, 133 Nev. 276, 282, 396 P.3d 815, 819-20 (2017) (recognizing that individuals with “a legitimate claim of entitlement” have a cognizable property interest). Thus, individuals with an interest in real property must be afforded notice and an opportunity to be heard before a district court issues a decision regarding that property. See *Sw. Gas*, 138 Nev. at 46, 504 P.3d at 511. To be proper, notice “must be provided at the appropriate stage” of the proceedings so that the parties “can provide ‘meaningful input in the adjudication of their rights.’” *Id.* (quoting *Eureka Cnty. v. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 280, 417 P.3d 1121, 1125 (2018)).

Here, the district court did not violate Tarik's due process rights by using the negative inference regarding the Moroccan property because Tarik had an opportunity to be heard at the hearing before the discovery commissioner and was on notice that information he withheld, including

information about the Moroccan property, would be construed against him. In its report and recommendations, the discovery commissioner stated,

[A]ll of the information being compelled is required to be provided no later than October 12, 2022 at 5:00 p.m. A negative inference will automatically issue as to any information that is withheld as of that date and time . . . [a]ny information that is withheld thereafter will not support [Tarik's] position in the matter and will in fact, support [Dounia's] position in the matter.

Thus, not only was notice provided at an “appropriate stage” of the proceeding—as Tarik had an opportunity to fully comply with Dounia’s discovery requests regarding the Moroccan property and thereby evade the negative inference altogether—but the notice also adequately conveyed that *any* information Tarik withheld would favor Dounia’s position. The fact that Tarik provided no additional documentation or information regarding the Moroccan property before the deadline does not render notice inadequate.

Accordingly, because Tarik had an opportunity to be heard at the discovery hearing, had specific notice that any information he withheld pursuant to Dounia’s discovery requests would be construed against him, and had time to remedy his inadequate discovery responses before the negative inference vested, we conclude that the district court’s decision to utilize the negative inference did not violate Tarik’s right to due process.

The district court did not abuse its discretion by treating the Moroccan property as a community asset

Tarik argues that the district court abused its discretion when it treated the Moroccan property as a community asset because he purchased the property before he married Dounia, and neither party testified to the property during the evidentiary hearing. Dounia responds

that Tarik's statement that he "bought a condo in 2008 prior to the marriage" was conclusory and inadequate to prove that the property was separate without supporting documentation.

We review a district court's distribution of property in a divorce proceeding for an abuse of discretion, *see Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996), and will uphold a district court's property characterizations as long as they are supported by substantial evidence. *Waldman v. Maini*, 124 Nev. 1121, 1128, 195 P.3d 850, 855 (2008). Substantial evidence is "that which a reasonable person may accept as adequate to sustain a judgment." *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004).

While properties acquired during marriage are presumed to be community property subject to equal division, *Burdick v. Pope*, 90 Nev. 28, 29, 518 P.2d 146, 146 (1974), "all property of a spouse owned by him or her before marriage" remains that spouse's separate property upon divorce, NRS 123.130. Be that as it may, mere conclusory statements, or conjectures, that property is separate in nature are insufficient to support a separate property characterization absent substantiating evidence. *See Burdick*, 90 Nev. at 29, 518 P.2d at 146 (reasoning that "surmise or conjecture" do not constitute supporting evidence from which a district court can support its separate property characterization).

For property purchased jointly during marriage, the party seeking to prove the property's separate nature must do so by clear and certain proof. *See Todkill v. Todkill*, 88 Nev. 231, 235-36, 495 P.2d 629, 631 (1972). When reviewing tracing evidence to support a finding of separate property, function takes precedence over form, and nominal representations of separate property are not, without additional evidence, enough to

overcome the community presumption. *See Peters v. Peters*, 92 Nev. 687, 690, 557 P.2d 713, 715 (1976); *see also Sprenger v. Sprenger*, 110 Nev. 855, 858, 878 P.2d 284, 286-87 (1994) (concluding that the appearance of a signature on a stock transfer is not evidence of transmutation from community to separate property without additional evidence); *Pryor v. Pryor*, 103 Nev. 148, 150, 734 P.2d 718, 719 (1987) (holding that a deed reciting that a husband owned his estate as separate property was not, of itself, enough to overcome the community presumption).

Here, Tarik failed to demonstrate with documentary evidence that he actually purchased the Moroccan property prior to marriage, negating his statement that the property was separate in nature. In response to Dounia's request for information "regarding any assets that [Tarik] contends [to be] his separate property, including how the property was obtained, when the property was obtained, the current value of the asset, and the basis upon which [Tarik] believes the property to be separate in nature," Tarik stated only that he "bought a condo in 2008 prior to the marriage" and provided no supporting documentation, despite Dounia's additional request for any documents "regarding the value of any real property owned by the parties." Indeed, Tarik offered no evidence regarding the source of the property's purchasing funds or the funds used to maintain the property throughout the parties' marriage. Accordingly, even without the negative inference, the district court's determination that the Moroccan apartment was part of the community assets was within its discretion because Tarik failed to sufficiently demonstrate that the property was ever separate. *See Peters*, 92 Nev. at 690, 557 P.2d at 715.

Stemming directly from Tarik's failure to adequately comply with discovery, the district court's decision to ascribe the negative inference

penalty to the Moroccan property was also within its discretion. In its findings of fact, conclusions of law, and order, the court noted that it used the negative inference only to the extent that the DCCR permitted—in other words only to the extent that Tarik willfully withheld Dounia’s requested information.¹⁰ Because Tarik provided no supporting evidence to support the Moroccan property’s separate character during the marriage, the district court was justified in weighing the omitted evidence in Dounia’s favor and distribute the Moroccan property as part of the community. See NRCP 16.2(g) and (h).

Accordingly, we conclude that the district court did not abuse its discretion when it treated the Moroccan property as a community asset and ordered it sold with the proceeds equally divided because the negative inference penalty did not violate Tarik’s due process rights, and Tarik provided no substantiating evidence to support that the property was ever separate.

The district court did not abuse its discretion when it awarded Dounia half of the unaccounted 401(k) retirement funds

Tarik argues that the district court erred when it found that \$102,000.00 of the liquidated 401(k) funds could not be traced back to the community and then awarded Dounia half of those funds. Specifically, Tarik contends that his evidence showed that he used the funds to either finance the parties’ extended trip, pay the parties’ community credit card

¹⁰Specifically, in its findings of fact, conclusions of law, and order, the district court noted, “this Court is only utilizing the ‘negative inference’ order on information not provided or supported by Tarik. If the information is presented to the Court, that information is being considered. It is only the failure to support Tarik’s position by Tarik that will receive negative inference in this decision.”

debt, or pay the Moroccan court fees associated with the parties' divorce.¹¹ Dounia responds that Tarik was able to trace only around \$57,000 of the liquidated funds back to the community, and that he provided no evidence showing that the remaining funds went towards community expenses. Dounia also argues that she neither knew nor consented to Tarik liquidating the funds in the first place. We conclude that the district court did not err when it awarded Dounia half of the untraced, liquidated 401(k) funds because its decision is supported by substantial evidence.

Retirement benefits earned during the marriage are community property, *Walsh v. Walsh*, 103 Nev. 287, 288, 738 P.2d 117, 117 (1987), even if those benefits have not yet vested at the time of divorce, *Gemma v. Gemma*, 105 Nev. 458, 461, 778 P.2d 429, 430 (1989). We review the district court's community property determinations for an abuse of discretion and will uphold those determinations, so long as they are supported by substantial evidence. *Waldman*, 124 Nev. at 1128, 195 P.3d at 855.

Here, we conclude that the district court's determination that approximately \$102,000 of the \$160,000 Tarik liquidated from his 401(k)

¹¹Tarik also argues that the district court acted arbitrarily when it considered an American Express credit card payment, but not a Discover credit card payment, when calculating the amount of liquidated funds Tarik used to pay community credit card debt. However, the district court stated in its findings of fact, conclusions of law, and order that "Tarik's *Closing Brief* references another payment [presumably, the American Express payment] . . . that . . . was not admitted into evidence. However, [because] there is a reference to that payment in Exhibit K [the court would consider the American Express payment in its calculation]." Thus, far from being arbitrary, we conclude that the district court acted within its discretion when it elected to rely only on payments that Tarik either explicitly produced or referenced in admitted exhibits.

remained unaccounted for and was subject to equal distribution is supported by substantial evidence. It is undisputed that Tarik placed the liquidated 401(k) funds into bank accounts titled in either his name alone, his name and his father's, or his name and his mother's. Dounia did not have access to these accounts and avers that, in January 2022, she had no knowledge that Tarik planned to liquidate the 401(k).

Tarik alleges he used the entire \$160,000 he transferred to those personal accounts to pay community expenses. Yet, Tarik proffered evidence sufficient to show that only around \$57,000 of the \$160,000 could be traced back to community obligations. Specifically, Exhibit M demonstrates that Tarik transferred \$40,000 from his personal bank account to a Moroccan bank account—an amount that correlates with what the Moroccan divorce decree stated the parties' owed in court fees. Trial Exhibits F, G, K, and S support that an additional \$17,000 went towards community credit card payments. The tracing evidence ends there. Tarik failed to supplement his FDF in accordance with the discovery commissioner's directives and offered both conflicting and conclusory testimony during the evidentiary hearing regarding the remaining \$102,000.

In its findings of fact, conclusions of law, and order, after finding that Tarik's credibility was in question, the district court noted that it would enforce a negative inference in Dounia's favor as to the remaining liquidated funds based on Tarik's failure to provide adequate tracing evidence. *See Matter of Parental Rights as to C.J.M.*, 118 Nev. 724, 732, 58 P.3d 188, 194 (2002) (recognizing that a district court is in the best position to observe the parties' demeanor and assess their credibility).

Consequently, because the admitted evidence showed that Tarik used only \$57,000 of the improperly liquidated 401(k) funds to pay community expenses, and because the district court found Tarik to be non-credible and properly construed Tarik's withheld evidence in Dounia's favor, we conclude that the district court did not abuse its discretion when it awarded Dounia half of the unaccounted-for 401(k) funds.

Accordingly, we

ORDER the findings of fact, conclusions of law, and order
AFFIRMED.¹²


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Charles J. Hoskin, District Judge, Family Division
Law Offices of F. Peter James, Esq.
Goldstein Flaxman PLLC
Eighth District Court Clerk

¹²Insofar as Tarik has raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.