Additionally, Stewart argues that the warning only advised him that he had the right to an attorney but not that he could actively consult with that attorney throughout the questioning. We conclude this argument is without merit. Indeed, the right to an attorney *is* the right to consult with that attorney, and the argument to the contrary relies on an absurd interpretation of the *Miranda* warning. *See Powell*, 559 U.S. at 62-63. Thus, we conclude Stewart's second *Miranda* argument fails.

Therefore, we hold that the district court did not err in determining Stewart received an adequate *Miranda* warning prior to making statements to police and, thus, did not err in denying Stewart's motions to suppress those statements.

CONCLUSION

We conclude that there was sufficient evidence to support Stewart's convictions for kidnapping and robbery and that the *Miranda* warning was legally sufficient. Accordingly, we affirm the district court's judgment of conviction.

DOUGLAS and PICKERING, JJ., concur.

IN THE MATTER OF THE PARENTAL RIGHTS AS TO M.M.L., JR., A MINOR.

MISTIE P., APPELLANT, *v.* STATE OF NEVADA DEPARTMENT OF FAMILY SERVICES, RESPONDENT.

No. 69210

May 11, 2017 393 P.3d 1079

Appeal from a district court order terminating parental rights. Eighth Judicial District Court, Family Court Division, Clark County; Frank P. Sullivan, Judge.

Affirmed.

The Grigsby Law Group and *Aaron Grigsby*, Las Vegas, for Appellant.

Steven B. Wolfson, District Attorney, and *Stephanie Richter*, Deputy District Attorney, Clark County, for Respondent.

Before the Court EN BANC.

OPINION

By the Court, CHERRY, C.J.:

In this appeal, we address whether a petition for termination of parental rights can proceed when the parent is incompetent by criminal trial standards. The Nevada Rules of Civil Procedure provide that a "court shall appoint a guardian ad litem for an . . . incompetent person not otherwise represented in" a civil action "or shall make such other order as it deems proper for the protection of the . . . incompetent person." NRCP 17(c). The rules of civil procedure apply in termination of parental rights cases. *See* NRS 128.090(2). Unlike criminal proceedings, there is no rule or statute requiring a district court to indefinitely continue an action to terminate one's parental rights in the hope that a party may one day regain competence. Moreover, Nevada's termination statutes allow mental illness to be used as a factor in finding parental fault. *See* NRS 128.106(1)(a).

The instant case involves a mother whose parental rights were terminated without her presence and ability to assist in her defense. The mother believes that her due process rights were violated when the district court proceeded without her. The district court (1) appointed a guardian ad litem pursuant to NRCP 17(c), (2) granted numerous continuances so that the mother could regain an ability to assist in her defense, and (3) considered the interests of all of the necessary parties before reluctantly proceeding with the trial. Accordingly, the district court did not violate any rules and complied with due process requirements, and we affirm its decision to proceed with the trial.

FACTS AND PROCEDURAL HISTORY

At the time of the child's birth, the hospital staff alerted the Department of Family Services (DFS) of concerns regarding the mother's mental health because she insisted that the child was not hers and instead tried to take another child from the hospital. The mother told the hospital staff that she had been diagnosed with schizoaffective bipolar disorder.

When the child was two months old, the mother brought him to the hospital, claiming that her son had complained (in complete sentences) that he had an earache. The child was placed into protective custody due to concerns regarding the mother's mental health. The State filed an abuse and neglect petition, alleging that the mother's mental health adversely affected her ability to parent the child. The district court adjudicated the child as a neglected child, made the child a ward of the court, and placed the child into DFS's legal custody.

The mother received a case plan that primarily focused on her mental health. After that time, DFS observed numerous indicators that the mother's mental health was not improving.

The State filed a petition to terminate the mother's parental rights in May 2014. Soon after, the mother was arrested and taken into custody on charges of kidnapping after she allegedly boarded a bus and attempted to take a child that she erroneously believed to be hers. However, because the State's family division attorneys claimed they could not determine the mother's whereabouts before filing the petition,[1] the State sought and received permission to serve the mother by publication.[2]

On August 13, 2014, the mother's counsel requested that the case be set for trial and that a guardian ad litem be appointed due to the mother's incompetency in her criminal proceedings. Counsel did not, however, object to the State's method of service when requesting a guardian ad litem. Between December 2014 and July 2015, the district court continued the trial numerous times due to the mother's inability to regain competence to stand trial in her criminal case.

On September 10, 2015, the district court conducted the trial in the parental rights case. Although the mother remained incompetent, her court-appointed guardian ad litem was present. On September 21, 2015, the district court granted the State's petition to terminate the mother's parental rights. The mother now appeals from the district court's decision.[3]

DISCUSSION

Nevada law does not require that a parent be deemed competent before a district court may proceed in a termination of parental rights matter

The mother claims that the district court violated her due process rights when it terminated her parental rights because the court failed to conduct a balancing test pursuant to *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), prior to declining her latest request for a continuance. We disagree.

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[1]In the State's affidavit for service by publication, it attested that its due diligence search for the mother included a search of the local detention centers, Nevada Department of Corrections, and Federal Bureau of Prisons without any success.

[2]At oral argument before this court, counsel for the State indicated that it regularly seeks permission to serve notice by publication for petitions to terminate parental rights.

[3]On appeal, the mother does not challenge the district court's findings regarding parental fault or whether the termination was in the child's best interest.

Whether to grant or deny a continuance lies within the district court's discretion. *S. Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 243, 577 P.2d 1234, 1235 (1978). We will not reverse a district court's decision to grant or deny a motion for a continuance "except for the most potent reasons." *Neven v. Neven*, 38 Nev. 541, 546, 148 P. 354, 356 (1915).

No state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; *see also* Nev. Const. art. 1, § 8(5). Parents have a fundamental liberty interest "in the care, custody, and management of their child [that] does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981).

To determine whether due process rights require the continuance of a termination trial until the parent is deemed competent, the district court must apply the *Mathews* balancing test. *Id*. The test requires that the court consider and balance (1) the parent's interest and (2) the risk of erroneous deprivation against (3) the government's interest. *Id.*

Both parties agree that competency to stand trial is a required finding in criminal cases. The issue is whether competency is a required finding before the district court may proceed in a termination-of-parental-rights trial. The Nevada Rules of Civil Procedure apply in parental rights cases, NRS 128.090(2), and there is no binding authority requiring a district court to wait for a litigant in a civil action to gain competence before proceeding to trial. The only binding authority on competency in civil cases is that the court must either appoint a guardian ad litem for the incompetent party or issue any other order it deems appropriate. NRCP 17(c).

In Nevada, "[t]he continuing needs of a child for proper physical, mental and emotional growth and development are the decisive considerations in proceedings for termination of parental rights." NRS 128.005(2)(c). This generally means that the child's permanency and stability are of the utmost importance, and the child should not be denied stability while waiting for the parent to address the issues that led to the child's removal. *See* NRS 128.107(4) (requiring the court to consider if additional services would enable the return of the child to the parent "within a predictable period"); NRS 128.109(2) (requiring the court to presume that if a child has resided outside of the parent's care for 14 of any 20 consecutive months, termination of the parental rights is in the child's best interest); *Bush v. State, Dep't of Human Res.*, 112 Nev. 1298, 1304, 929 P.2d 940, 944 (1996) ("[T]he rights of the children to a stable future with a loving family must be paramount. Otherwise, the children's development is

compromised for the sake of the parents."); *In re Parental Rights as to Weinper*, 112 Nev. 710, 716, 918 P.2d 325, 330 (1996) (recognizing that "it would be a grave injustice to force [the child] to remain in limbo indefinitely until" the father chose to address his substance abuse issues and criminal activity), *overruled on other grounds by In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 8 P.3d 126 (2000).

Other jurisdictions have specifically considered whether competency to stand trial is a prerequisite before a termination hearing may occur. *See* Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 Hastings L.J. 929, 949 (2014). Courts in Georgia, Illinois, Missouri, and Texas have found that awaiting competency prejudices the best interests of the child. *See, e.g.*, *In re N.S.E.*, 666 S.E.2d 587, 589 (Ga. Ct. App. 2008); *In re Charles A.*, 856 N.E.2d 569, 573 (Ill. App. Ct. 2006); *In re W.J.S.M.*, 231 S.W.3d 278, 283 (Mo. Ct. App. 2007); *In re R.M.T.*, 352 S.W.3d 12, 23 (Tex. App. 2011). On the other hand, some courts have held that district courts violate due process when they fail to continue a trial when a parent has recently been deemed incompetent. *See, e.g.*, *State ex rel. Juvenile Dep't v. Evjen*, 813 P.2d 1092, 1094 (Or. Ct. App. 1991). The Connecticut Supreme Court has found that a district court violates a parent's due process rights when it fails to hold a pretrial competency hearing upon request. *See In re Alexander V.*, 613 A.2d 780, 785 (Conn. 1992); *but see In re Kaleb H.*, 48 A.3d 631, 640 (Conn. 2012) (holding that a competency hearing was not necessary when the record did not contain any facts to demonstrate the parent would be incompetent to stand trial).

Here, there is no dispute that the mother was incompetent to stand trial in her criminal proceeding on September 10, 2015, when the district court commenced the termination trial. In fact, the mother was committed to Lake's Crossing, released, and deemed competent before being recommitted and reclassified as incompetent to stand trial in her criminal case. Unlike in *Evjen*, where the district court denied the parent's initial continuance request after being recently deemed incompetent, *see* 813 P.2d at 1094, the incompetency determination regarding the mother in this case was not recent, and the district court allowed the mother multiple opportunities to regain competence before reluctantly proceeding with the termination trial. Furthermore, although the district court did not explicitly reference the *Mathews* test, the record indicates that the district court considered all of the necessary factors: (1) the mother's interest; (2) the State's interest both in obtaining a speedy resolution and, more importantly, in protecting the child's best interests, including obtaining a permanent home for the child; and (3) the risk of erroneous deprivation of the mother's and the State's interests when it proffered that this case could be perpetually continued until the child reached the age of 18 if it did not proceed.

Finally, Nevada's termination statutes expressly allow mental illness to be used as a factor in finding parental fault to terminate a parent's rights. NRS 128.106(1)(a). This fact distinguishes the instant case from the Connecticut rule requiring a pretrial competency hearing upon request, as mental illness is not a statutory ground to terminate parental rights in Connecticut. *See* Conn. Gen. Stat. § 45a-717(d) (2015). Therefore, it would be a legal and logical inconsistency in Nevada if the parent's mental illness is both grounds to terminate the parent's rights and to indefinitely delay that very same termination.

The district court did not abuse its discretion in denying the mother's request for another continuance because the record indicates that the district court appointed a guardian ad litem pursuant to NRCP 17(c), no binding authority requires a finding of competence before proceeding, the district court considered the necessary interests for due process purposes, and a rule requiring competency would conflict with the substantive grounds to find parental fault. Accordingly, we conclude that the district court properly proceeded with the parental rights trial despite the mother's incompetence to stand trial in her criminal case.

The district court had personal jurisdiction over the mother despite allegations of insufficient service because she failed to object below and thus has waived the issue

The mother argues that the State fraudulently obtained permission to serve her by publication because it was aware of her whereabouts when it filed its petition to terminate her parental rights; therefore, she contends that the district court did not have personal jurisdiction over her. The State, however, argues that the mother waived any challenge to service or personal jurisdiction because she did not object to service or personal jurisdiction during her initial pleading, her initial appearance, or at any other time in the district court. Although the mother's allegations, if true, are indeed troubling, we agree with the State that the mother has waived this argument.

In a proceeding to terminate a parent's rights, the State must serve the parent with a notice of hearing if the State knows his or her place of residence. NRS 128.060(2)(a). If his or her place of residence is unknown, then the State must serve notice on the nearest known relative if the State knows that relative's residence and relationship. *Id.* If the parent's whereabouts are unknown and due diligence does not reveal them, the State may petition the district court by affidavit for permission to make service by publication. NRS 128.070(1). "Objections to personal jurisdiction, process, or service of process are waived, however, if not made in a timely motion or not included in a responsive pleading such as an answer." *Hansen v. Eighth*

Judicial Dist. Court, 116 Nev. 650, 656, 6 P.3d 982, 986 (2000); *see also* NRCP 12(h)(1) ("A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof . . . .").

Here, the record shows that the mother's counsel repeatedly objected to the scheduling of the trial on the grounds of incompetence to stand trial in her criminal case, asked for a guardian ad litem to be appointed, and requested numerous continuances, but did not object to the State's method of service or challenge the court's personal jurisdiction over her. Because the mother failed to object to jurisdiction or service at any time in the district court, we must conclude that she has waived this issue and the district court had personal jurisdiction over her.

CONCLUSION

There is currently no statutory authority requiring a district court to continue a parental rights termination trial so that a parent may regain competence. In fact, to require all proceedings halted until a parent regains competence conflicts with potential grounds to terminate the parent's rights. Moreover, the district court considered all of the necessary due process interests before proceeding with the trial and appointed a guardian ad litem pursuant to NRCP 17(c). Therefore, the district court did not err by proceeding to trial without a competent mother to defend herself. Further, because the mother's counsel failed to object to the State's method of service in her initial pleading or at any time in the district court, she waived her challenge to the service of the parental rights termination petition by publication. Accordingly, we affirm the district court's order.

Douglas, Gibbons, Pickering, Hardesty, Parraguirre, and Stiglich, JJ., concur.

In the Matter of Discipline of
TIMOTHY R. TREFFINGER, Bar No. 12877.

No. 70143

May 11, 2017 393 P.3d 1084

Petition under SCR 111 to suspend and refer Nevada lawyer for discipline based on conditional guilty plea under NRS 453.3363 to felony possession of a controlled substance; motion to set aside interim suspension under SCR 111(7).

Petition granted; interim suspension stayed.

C. Stanley Hunterton, Bar Counsel, and *Stephanie A. Tucker Barker*, Assistant Bar Counsel, Las Vegas, for the State Bar of Nevada.

Timothy R. Treffinger, Las Vegas, in Pro Se.

Before the Court EN BANC.

OPINION

By the Court, PICKERING, J.:

Timothy Treffinger is a Nevada-licensed lawyer who pleaded guilty to one count of possession of a controlled substance (heroin), a class E felony under NRS 453.336. The district judge who accepted Treffinger's plea placed him on probation for three years and in the diversion program NRS 453.3363 creates for first-time offenders. If Treffinger succeeds in the diversion program, the criminal charges against him will be dismissed, and he will avoid a final judgment of conviction.

Treffinger notified the State Bar of Nevada of his plea, as SCR 111(2) requires. Sometime later, bar counsel filed a petition under SCR 111(4), advising this court of Treffinger's felony possession plea. The State Bar seeks Treffinger's interim suspension and referral for formal bar discipline, as SCR 111 directs when a lawyer is convicted of a felony. Treffinger disputes whether a conditional guilty plea under NRS 453.3363 is a "conviction" that triggers automatic suspension under SCR 111(7). He also urges that, assuming his plea does constitute a conviction for purposes of SCR 111, "good cause" exists to "set aside" or stay his suspension.

I.

A.

Nevada's diversion program for first-time narcotics offenders is modeled on section 414 of the Uniform Controlled Substances Act, 9 pt. IV U.L.A. 787-88 (2007) (UCSA). *See* NRS 453.011 (adopting the UCSA, with amendments, in Nevada and codifying it at NRS 453.011 to NRS 453.348). Under NRS 453.3363(1), a court may place a first-time offender on probation and into a diversion program "without entering a judgment of conviction." *See* UCSA § 414(a). Provided the offender fulfills all the terms and conditions of probation and the program's education and rehabilitation requirements, "the court shall discharge the accused and dismiss the proceedings against him or her." NRS 453.3363(3); *see* UCSA § 414(b). Dismissal allows the offender to avoid a final judgment of conviction:

> Except as otherwise provided in subsection 5, *discharge and dismissal under [NRS 453.3363(3)]* is without adjudication of guilt and *is not a conviction for purposes of this section or for purposes of employment, civil rights or any statute or regulation or license or questionnaire or for any other public or private purpose* . . . .

NRS 453.3363(4) (emphasis added); UCSA § 414(c); *see also Hohenstein v. Nev. Emp't Sec. Div.*, 131 Nev. 132, 134, 346 P.3d 365, 366-67 (2015) (reversing adverse unemployment benefits decision that treated an employee's guilty plea under NRS 453.3363 as establishing a felony conviction, though he was midway toward successfully completing probation and his diversion program).

NRS 453.3363(4) differs from UCSA section 414(c) in its lead-in language, "[E]xcept as otherwise provided in subsection 5." Where the counterpart UCSA provision has no exceptions, subsection 5 of NRS 453.3363 creates a Nevada-specific exception to the rule against treating diversion-program proceedings as convictions. The exception allows a professional licensing board such as the State Bar of Nevada (and, by extension, this court) to consider proceedings under NRS 453.3363 in assessing suitability for licensing or imposing discipline on a licensee for professional misconduct:

> A professional licensing board may consider a proceeding under this section in determining suitability for a license or liability to discipline for misconduct.

NRS 453.3363(5). Unlike *Hohenstein*, 131 Nev. at 134, 346 P.3d at 366, where we held that a plea pursuant to NRS 453.3363 does not establish a felony conviction justifying denial of unemployment compensation, *see* NRS 453.3363(4), this case involves professional discipline, to which the professional misconduct exception in NRS 453.3363(5) squarely applies. The Supreme Court Rules and Model Rules of Professional Conduct, as adopted in Nevada, thus determine the effect of Treffinger's guilty plea on his suspension and discipline, not NRS 453.3363.

B.

SCR 111 provides for the interim suspension and referral for discipline of a lawyer who has been convicted of a serious crime. Subsection (1) of SCR 111 defines "conviction" broadly to include not only final judgments of conviction but also conditional guilty pleas and deferred sentencing arrangements like Treffinger's:

> *"Conviction" defined.* For purposes of this rule . . . *a "conviction" shall include a plea of guilty or nolo contendere,* [or an *Alford* plea], . . . *regardless of whether a sentence is sus-*

> *pended or deferred or whether a final judgment of conviction has been entered*, and regardless of any pending appeals.

(Emphasis added.) Under SCR 111(7), interim suspension follows automatically on proof the lawyer has been convicted of a "serious crime":

> *Suspension on Certification*. *Upon the filing* with the supreme court of a petition with a certified copy *of proof of the conviction, demonstrating that an attorney has been convicted of a serious crime, the court shall enter an order suspending the attorney*, regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding, which shall be commenced by the appropriate disciplinary board upon referral by the supreme court. *For good cause, the court may set aside its order suspending the attorney from the practice of law*.

(Emphasis added.) And, SCR 111(6) defines "serious crime" categorically: "The term 'serious crime' means . . . a felony."

SCR 111 parallels Rule 19 of the Model Rules for Lawyer Disciplinary Enforcement (Am. Bar Ass'n 2007) (MRLDE). MRLDE 19 similarly provides for automatic suspension pending final discipline when a lawyer has been found guilty of a "serious crime," even though the conviction is not final. *See also Standards for Imposing Lawyer Sanctions* Standard 2.4 (Am. Bar Ass'n 1992), *reprinted in Annotated Standards for Imposing Lawyer Sanctions* 63 (Am. Bar Ass'n 2015) (providing for interim or temporary suspension of a lawyer "upon conviction of a 'serious crime'"). Automatic pre-discipline suspension can produce anomalous results for a lawyer whose criminal conviction is later reversed or whose final discipline, after hearing, merits a lesser sanction than the interim suspension already served. *Compare* Nev. R. Prof. Cond. 8.4(b) (defining misconduct as the commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," rather than conviction of a crime), *with* 2 Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, *The Law of Lawyering* § 69.02, at 69-4 (4th ed. 2017) (noting that "the point of Rule 8.4(b) is to define, necessarily in general terms, the relationship between criminal law violation and violation of *professional* norms—a category of crimes, the commission of which *does* reflect a deficiency in the qualities that should characterize a lawyer," and suggesting that "[t]he commission of a crime outside this category should not subject a lawyer to professional discipline"). Despite its potential for overinclusiveness, SCR 111 and its cognates, MRLDE 19 and ABA Standard 2.4, deem automatic suspension of a lawyer convicted of a felony justified "because of the often-significant delay between entry of the finding of guilt of a serious crime and entry of the ultimate judgment of conviction," *Annotated Standards*, at 64, and the need "in such cases both to protect members of the pub-

lic and to maintain public confidence in the legal profession pending final determination of the appropriate discipline to be imposed," *id.* at 63.

In sum, SCR 111 requires Treffinger's interim suspension and referral for formal discipline. Treffinger pleaded guilty to a felony, which SCR 111(6) deems a "serious crime." Under SCR 111(1), a guilty plea establishes a "conviction" even though a final judgment of conviction has not been entered and the sentence is suspended or deferred. From his guilty plea, Treffinger's interim suspension and referral for formal discipline follow automatically under SCR 111(7).

II.

The final sentence of SCR 111(7) creates a "good cause" exception to its automatic suspension mandate: "For good cause, the court may set aside its order suspending the attorney from the practice of law." *See also* MRLDE 19 (providing a court may terminate a lawyer's automatic interim suspension "[i]n the interest of justice . . . at any time upon a showing of extraordinary circumstances"). Treffinger argues that, even if his plea constitutes conviction of a "serious crime" that triggers suspension, "good cause" exists to "set aside" or stay his suspension.

At this court's request, the parties filed supplemental briefs and the State Bar supplied a status report on Treffinger's progress following entry of his diversion order. The report appends a memo from Treffinger's probation officer confirming Treffinger's representations that he is on track in the diversion program and, so far, has complied with all the terms and conditions of probation. The State Bar also reports that it has received no grievances or complaints against Treffinger since filing its SCR 111 petition. Treffinger has no other disciplinary record.

SCR 111(7) does not define what constitutes "good cause" to "set aside" an interim suspension order, and MRLDE 19 is similarly silent. As discussed above, automatically suspending a lawyer upon conviction of a serious crime serves two principal purposes: (1) it protects clients and the public from the risk of harm by a potentially unfit attorney until the disciplinary board can convene and conduct a hearing to determine the final discipline appropriate, *see State Bar of Nev. v. Claiborne*, 104 Nev. 115, 124, 756 P.2d 464, 469 (1988); and (2) it "serves to protect the profession and the administration of justice from the specter created where an individual found guilty of a 'serious crime' continues to serve as an officer of the court in good standing." MRLDE 19 cmt.

Consistent with these goals, we hold that "good cause" to relieve a lawyer from automatic interim suspension depends, first and foremost, on the danger the lawyer's crime and other established misconduct suggest he or she poses to clients, the courts, and the public.

Cf. SCR 102(4)(b) (providing for temporary suspension of a lawyer where, although not convicted of a crime, the lawyer "appears to be posing a substantial threat of serious harm to the public"). A related but secondary concern is "whether there is a substantial likelihood, based on all the available evidence, that a significant sanction will be imposed on the [lawyer] at the conclusion of any pending disciplinary proceedings." *In re Discipline of Trujillo*, 24 P.3d 972, 979 (Utah 2001). Additional factors suggested by this case include the harm interim suspension will cause the lawyer and the lawyer's existing clients, and the mechanisms available for monitoring the lawyer's conduct so suspension can be stayed and conditions imposed, rather than set aside outright.

Any crime by a lawyer reflects adversely on the profession. But Treffinger's crime—first-time possession not for purposes of sale of a controlled substance—does not inherently involve dishonesty, theft, or serious interference with the administration of justice. We recognize, as the Texas Supreme Court did in *In re Lock*, 54 S.W.3d 305, 309 (2001), a case involving similar facts, that "possession of a controlled substance may adversely affect a lawyer's ability to practice honestly and effectively." But "looking solely to the elements of the offense, we cannot say that the elements of [Treffinger's] offense mandate the legal conclusion that every attorney guilty of that offense is categorically unfit to practice law." *Id.* The risk in allowing a lawyer who has entered a conditional guilty plea to possession of a controlled substance to continue to practice pending formal disciplinary proceedings is not *per se* intolerable, as it would be, for example, where a lawyer has victimized his clients by stealing from them. This view finds support in the Nevada Lawyers' Assistance Program and Lawyers Concerned for Lawyers, both of which proceed from the premise that education and treatment, with proper monitoring, can allow a lawyer to continue to practice despite an addictive disorder. *See* SCR 105.5 & 106.5; *Lock*, 54 S.W.3d at 312 (citing the Texas Lawyers' Assistance Program as support for its holding that a lawyer's conditional guilty plea to felony first-time possession of a controlled substance should be evaluated through the standard grievance process, which considers the circumstances of the crime and aggravation and mitigation, rather than categorically).

By his plea, Treffinger has admitted committing the crime of possession of a controlled substance—heroin—as serious a possessory offense as exists. We thus are not prepared to "set aside" his suspension as he asks. But by virtue of his plea, Treffinger has subjected himself to stringent probation conditions, with which he has thus far complied. These conditions include being subject to search at any time of day or night without prior notice or a warrant, successfully completing any counseling deemed necessary by the Division of Parole and Probation, having no contact with his codefendants (oth-

er than his fiancée), performing 300 hours of community service, completing substance abuse evaluation, and being subjected to and complying with random drug tests.

Courts hesitate to fashion stayed suspension orders not imposed as part of stipulated final discipline because of the difficulty and expense associated with adequate compliance monitoring. *See In re Conduct of Obert*, 89 P.3d 1173, 1181 (Or. 2004). But here, Treffinger already is on probation and in a diversion program addressing the criminal act giving rise to the referred disciplinary charge. This court can stay Treffinger's interim suspension and require, as a condition of the stay, that he provide the office of bar counsel quarterly compliance reports from his probation officer and that he immediately advise the State Bar of any violations without unduly imposing on the office of bar counsel. These conditions cabin the risk associated with allowing him to continue to practice despite his plea.

The professional discipline to be imposed on Treffinger remains undecided. If Treffinger successfully completes his diversion program, he will not be a convicted felon. His admitted act of possessing a controlled substance remains a violation of law for which bar discipline is appropriate, *see* Nev. R. Prof. Cond. 8.4(b), but the felony conviction will not exist. Courts elsewhere have imposed suspensions ranging from ninety days to two years for first-time possession of a controlled substance, depending on the circumstances of the offense and evidence of any mitigation or aggravation. *Lock*, 54 S.W.3d at 311-12; *cf*. 2 Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, *supra*, at 69-14 to 15 (pointing out that "a pattern of conduct might yield an assessment of unfitness [to practice] that would not follow from an isolated incident," such that "a lawyer repeatedly convicted of driving while intoxicated . . . might be subject to professional discipline on that basis, whereas a lawyer guilty of just one such incident—even a serious one—ought not to be disciplined"). Staying automatic suspension averts the possibility of pre-discipline suspension exacting a stiffer price than the sanction that is ultimately imposed.

Finally, staying Treffinger's interim suspension so long as he continues to adhere to his conditions of probation avoids harm to existing clients whose representation would be disrupted were he to be suspended; it also facilitates Treffinger's diversion program progress by allowing him to continue to work while completing probation.

For these reasons, we grant the State Bar's petition under SCR 111(1) and (7), suspend Treffinger from the practice of law, and refer this matter to the Southern Nevada Disciplinary Board for formal disciplinary proceedings. We stay the suspension conditioned on Treffinger's continued adherence to the terms and conditions of his probation, his successful participation in his diversion program,

and the absence of any further disciplinary offenses. Treffinger shall provide the office of bar counsel with quarterly compliance reports from his probation officer and shall immediately notify the State Bar of any probation violations, so the office of bar counsel can timely apply to this court to dissolve the stay in that event.

CHERRY, C.J., and DOUGLAS, GIBBONS, HARDESTY, PARRAGUIRRE, and STIGLICH, JJ., concur.

IN THE MATTER OF D.T., A MINOR.

D.R.T., APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 62009

May 25, 2017 394 P.3d 936

Appeal from a juvenile court order certifying appellant to stand trial as an adult on charges of sexual assault, battery with intent to commit a crime (sexual assault), burglary, second-degree kidnapping, and battery constituting domestic violence. Eighth Judicial District Court, Family Court Division, Clark County; William O. Voy, Judge.

Affirmed.

Philip J. Kohn, Public Defender, and *Kerri J. Maxey*, Deputy Public Defender, Clark County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens* and *Jonathan VanBoskerck*, Chief Deputy District Attorneys, and *Cynthia L. Herren*, Deputy District Attorney, Clark County, for Respondent.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we consider whether a juvenile court order certifying appellant to stand trial as an adult violated his right to procedural due process and whether the certification of cognitively impaired juveniles is unconstitutional under the Eighth Amendment. We reject both claims and affirm.

FACTS AND PROCEDURAL HISTORY

Appellant D.T.'s minor girlfriend, S.B., broke up with him through a text message. Later, while at the park in her apartment

complex, D.T. approached S.B., bit her on the hand and chin, and then grabbed her by the arm and pulled her toward her apartment building. The two then went to S.B.'s apartment to retrieve D.T.'s property, but S.B. did not return D.T.'s cell phone to him.

Twenty-two days later, D.T. returned to S.B.'s apartment to retrieve his cell phone. D.T. entered the second-story apartment through an open window. Upon finding S.B. sleeping in the room with her two brothers, D.T. woke her up, asked for his phone, and after discussing the missing phone, laid down next to her. He then removed her shorts and had sex with her against her will. D.T. was taken into custody, and after being advised of his rights, agreed to talk to detectives. Based on the interview with detectives, D.T. was transferred to Las Vegas Juvenile Hall and booked accordingly.

The State filed a certification petition against D.T. on five counts: sexual assault, battery with intent to commit a crime, burglary, kidnapping, and battery constituting domestic violence. D.T.'s counsel argued that D.T. suffered cognitive impairment and requested a court-ordered competency evaluation. After D.T. was found competent, counsel requested a continuance to seek a second opinion. D.T. was again found competent.

Following argument from the parties, the juvenile court certified D.T. to adult status, noting that discretionary certification was warranted because the subjective factors in *Seven Minors* did not outweigh the nature and seriousness of the offenses or D.T.'s prior adjudicated offenses. The court further found that public safety was best served by transferring D.T. to the adult system. This appeal followed.

DISCUSSION

Appellant first contends that the juvenile court's ruling and written order are not sufficiently specific to satisfy procedural due process. Relying on *Kent v. United States*, 383 U.S. 541 (1966), appellant asserts that the juvenile court's order does not demonstrate that a full investigation was performed prior to the certification hearing. He also contends that because the juvenile court merely listed the subjective factors without explaining how each factor impacted public safety, the record is insufficient to demonstrate that the juvenile court meaningfully reviewed his case or provided a basis for appellate review. *See id.* at 561 (requiring juvenile court, when making a decision to transfer a child to adult status, to make a statement of reasons for the transfer).

Although we acknowledge that the juvenile court's oral ruling and written order lack detail, we conclude they meet the minimum requirements of due process. It is clear from the record that the juvenile court conducted a full investigation into appellant's background before the certification hearing. The record indicates that the court considered the information obtained as a result of that

investigation, as well as information from appellant's psychological evaluation and defense counsel's opposition to the certification petition, when rendering its decision. *See Lewis v. State*, 86 Nev. 889, 894, 478 P.2d 168, 171 (1970) (looking to court's oral decision to determine compliance with *Kent*). Further, there is no requirement that the juvenile court explain how each subjective factor impacts public safety. *But cf. In re Glenda Kay S.*, 103 Nev. 53, 59, 732 P.2d 1356, 1360 (1987) (requiring the juvenile court to state the reasons for selecting a disposition of commitment in delinquency proceedings and why that disposition serves the interests of the child and/or the State). To the extent appellant requests that we impose such a requirement in certification proceedings, we decline to do so at this time.

Relatedly, appellant asserts that the juvenile court's order is not sufficiently specific to allow for meaningful review because it is unclear whether the court concluded that certification was warranted based on the nature and seriousness of the offenses, or appellant's history of prior adjudications alone, or, alternatively, whether the court considered personal, subjective factors impacting the juvenile. *See In re William S.*, 122 Nev. 432, 440-41, 132 P.3d 1015, 1021 (2006) (certification may be based on either the seriousness of the offenses or a juvenile's past adjudications alone; alternatively, in close cases, the court may consider a juvenile's personal, subjective factors, in conjunction with the other factors).

He also asserts that because a certification hearing is akin to a sentencing hearing and juveniles are entitled to individualized sentencing determinations, the juvenile court's failure to consider his subjective factors violated his due process right to an individualized certification determination. *See Miller v. Alabama*, 567 U.S. 460, 479 (2012) (mandatory sentences of life without the possibility of parole for juvenile offenders convicted of homicide violates the Eighth Amendment). We disagree. The juvenile court's written order indicates that the court considered all three factors, including appellant's subjective factors. And the fact that the court considered the subjective factors indicates that it did not base its certification decision on either of the first two factors alone. *See In re Eric A.L.*, 123 Nev. 26, 33, 153 P.3d 32, 36 (2007) (the juvenile court may consider the subjective factors in close cases where neither of the first two factors compels certification). Thus, appellant fails to demonstrate error.

Next, appellant contends that the juvenile court abused its discretion by certifying him for adult criminal proceedings. We disagree. The juvenile court determined that appellant was charged with committing serious crimes and noted his history of prior adjudications. The court also considered appellant's subjective factors, including his cognitive impairments. The court then "reluctantly" concluded that public safety warranted certification. As

noted above, the record indicates that the juvenile court adequately considered the relevant factors, and we cannot conclude that its decision to grant the State's certification petition was an abuse of discretion.[1] *See id.* at 33, 153 P.3d at 36-37 (stating that the juvenile court's decision to certify is reviewed for an abuse of discretion and defining "abuse of discretion").

Finally, relying on *Graham v. Florida*, 560 U.S. 48, (2010), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Atkins v. Virginia*, 536 U.S. 304 (2002), appellant appears to contend that certification of cognitively impaired juveniles for adult proceedings is unconstitutional. When considering the constitutionality of a statute, de novo review applies. *In re William M.*, 124 Nev. 1150, 1157, 196 P.3d 456, 460 (2008). A statute is presumed valid, and it is the challenger's burden to demonstrate that it is unconstitutional. *Id*.

The cases cited by appellant focus on the decreased culpability of juveniles and the cognitively impaired in the context of the Eighth Amendment's proscription against cruel and unusual punishment. Although the United States Supreme Court has compared the significance of the certification decision with the sentencing hearing, *Kent*, 383 U.S. at 557, certification is not a punishment, *People v. Salas*, 961 N.E.2d 831, 846 (Ill. App. Ct. 2011) (rejecting claim that mandatory certification of certain juvenile offenders constituted cruel and unusual punishment because certification does not impose a punishment); *cf. State v. Rice*, 737 S.E.2d 485, 487 (S.C. 2013) (rejecting claim that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to transfer proceedings because those proceedings do not determine punishment, and collecting cases). *But see William M.*, 124 Nev. at 1161, 196 P.3d at 463 (noting that the California Supreme Court recognized certification "as the worst punishment the juvenile system is empowered to inflict" (internal quotation marks omitted)). Thus, appellant fails to demonstrate that the statute violates the Eighth Amendment. *See, e.g.*, *People ex rel. Birkett v. Konetski*, 909 N.E.2d 783, 799 (Ill. 2009) (rejecting cruel and unusual punishment claim where statutory scheme did not impose a punishment).

Accordingly, we affirm the judgment of the juvenile court.

CHERRY, C.J., and DOUGLAS, GIBBONS, PICKERING, PARRAGUIRRE, and STIGLICH, JJ., concur.

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[1]Appellant suggests that this court should reconsider the juvenile certification matrix we enunciated in *In re Seven Minors*, 99 Nev. 427, 434-35, 664 P.2d 947, 952 (1983), *disapproved of on other grounds by In re William S.*, 122 Nev. 432, 132 P.3d 1015 (2006) (*see* discussion *supra* at 162). Given our disposition, we decline to do so at this time.

MATT KLABACKA, Distribution Trustee of the ERIC L. NELSON NEVADA TRUST DATED MAY 30, 2001, Appellant/Cross-Respondent, *v.* LYNITA SUE NELSON, Individually and in Her Capacity as Investment Trustee of the LSN NEVADA TRUST DATED MAY 30, 2001; and ERIC L. NELSON, Individually and in His Capacity as Investment Trustee of the ERIC L. NELSON NEVADA TRUST DATED MAY 30, 2001, Respondents/Cross-Appellants.

No. 66772

MATT KLABACKA, as Distribution Trustee of the ERIC L. NELSON NEVADA TRUST DATED MAY 30, 2001, Appellant, *v.* ERIC L. NELSON; LYNITA SUE NELSON, Individually; and LSN NEVADA TRUST DATED MAY 30, 2001, Respondents.

No. 68292

May 25, 2017 394 P.3d 940

Consolidated appeal and cross-appeal from a decree of divorce and appeal from findings of fact and conclusions of law modifying a divorce decree. Eighth Judicial District Court, Family Court Division, Clark County; Frank P. Sullivan, Judge.

Affirmed in part, vacated in part, and remanded.

Solomon Dwiggins & Freer, Ltd., and *Jeffrey P. Luszeck* and *Mark A. Solomon*, Las Vegas, for Matt Klabacka, distribution trustee of the Eric L. Nelson Nevada Trust.

Dickerson Law Group and *Josef M. Karacsonyi, Robert P. Dickerson*, and *Katherine L. Provost*, Las Vegas, for Lynita Sue Nelson, individually and in her capacity as investment trustee of the LSN Nevada Trust.

Rhonda K. Forsberg, Chtd., and *Rhonda K. Forsberg*, Henderson, for Eric L. Nelson, individually and in his capacity as investment trustee of the Eric L. Nelson Nevada Trust.

Before the Court En Banc.

OPINION

By the Court, Gibbons, J.:

These appeals involve a divorce and a division of assets held in self-settled spendthrift trusts owned by the former husband and wife. Suffice it to say, the parties have substantial trust issues. Ten years into their marriage, Eric and Lynita Nelson signed a separate

property agreement (the SPA) that transmuted their property into separate property and placed that property into the parties' respective separate property trusts. Later, the parties converted those trusts into self-settled spendthrift trusts (SSSTs) and funded them with their respective separate property. The SSSTs were, respectively, the Eric L. Nelson Nevada Trust (Eric's Trust) and the Lynita S. Nelson Nevada Trust (Lynita's Trust). In 2009, the parties began divorce proceedings and subsequently added the SSSTs as necessary parties. Issues presented within the divorce proceedings bring us to the instant appeals.

We conclude (1) the family court has subject-matter jurisdiction over the trust-related claims in the Nelsons' divorce; (2) the SPA and SSSTs are valid and unambiguous; (3) the district court erred in considering parol evidence to determine the parties' intent behind the SPA and SSSTs; (4) the district court erred in equalizing the trust assets; (5) the district court erred in ordering Eric's personal obligations to be paid by Eric's Trust; (6) the district court did not err in awarding Lynita a lump sum alimony award of $800,000, but erred insofar that the alimony was awarded against Eric's Trust, and not Eric in his personal capacity; (7) the district court erred in making findings of unjust enrichment after the claim was dismissed; (8) the constructive trusts placed over the Russell Road and Lindell properties should be vacated; and (9) the June 8, 2015, order should be vacated to the extent it enforces or implements portions of the divorce decree relating to assets in Eric's Trust and Lynita's Trust and affirmed in all other respects.

Given the complexity of the divorce decree (the decree), we conclude that (1) the dissolution of marital bonds between Eric and Lynita is affirmed, (2) the district court's alimony award is affirmed in part but vacated to the extent it is awarded against Eric's Trust instead of Eric in his personal capacity, (3) the district court's child support award is affirmed in part but vacated to the extent it is awarded against Eric's Trust instead of Eric in his personal capacity, (4) all other portions of the decree are vacated, (5) the June 8, 2015, order, is vacated to the extent it enforces or implements portions of the divorce decree relating to assets in Eric's Trust and Lynita's Trust and affirmed in all other respects, and (6) the case is remanded to the district court for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

The SPA

In 1993, Eric and Lynita entered into the SPA in order to transmute the family's community assets into the parties' respective separate property. The SPA equally divided the parties' assets into two separate property trusts. Both parties consulted counsel prior

to signing the document, and Lynita consulted additional outside counsel prior to her signing.

In relevant part, the SPA states that "the parties hereto desire to split the community estate into the sole and separate property of each spouse in accordance with and for the purposes contained in NRS 123.130 through 123.170, inclusive." Additionally, the SPA provides that "[t]he [p]arties agree that [the SPA] shall be controlling in determining the ownership of each party's property regardless of the manner in which the property was previously held or titled, acquired through capital or personal efforts, or whether the property is real, personal or any variation thereof."

The SSSTs

In 2001, Eric and Lynita converted their separate property trusts into Eric's Trust and Lynita's Trust, respectively, and funded the SSSTs with the separate property contained within the separate property trusts. The trust agreements for Eric's Trust and Lynita's Trust are nearly identical. Both trust agreements are in writing and establish an irrevocable trust. Each trust has a spendthrift provision that provides, in relevant part:

> No property (income or principal) distributable under this Trust Agreement, . . . shall be subject to anticipation or assignment by any beneficiary, or to attachment by or of the interference or control of any creditor or assignee of any beneficiary, or be taken or reached by any legal or equitable process in satisfaction of any debt or liability of any beneficiary, and any attempted transfer or encumbrance of any interest in such property by any beneficiary hereunder shall be absolutely and wholly void.

Both trust agreements named Lana Martin, a Nevada resident, as the initial distribution trustee.[1] The parties' respective trusts give them the right to veto any distribution and require that the distribution trustee provide ten days' notice of any impending distribution.

The parties named themselves as the investment trustee for their respective trusts. Pursuant to Section 11.14 of the trust agreements,

> the "Investment Trustee(s)" shall at all times have the exclusive custody of the entire Trust estate and shall be the legal owner of the Trust estate. The title to Trust properties need not include the name of the Distribution Trustee, and all Trustee powers . . . may be effected under the sole and exclusive con-

[1]There have been several distribution trustees for the trusts since 2001. Appellant Matt Klabacka was acting in that capacity when the first notice of appeal was filed.

> trol of the Investment Trustees, subject to the requirements for authorization of distributions to Trustor . . . .

Many transfers of property occurred between the trusts between 2001 and 2009, most of which were gifts from one trust to the other.

Initial divorce proceeding

Eric filed for divorce in 2009. During the initial stages of trial, Eric testified that the SPA and trust agreements were signed in an effort to protect the parties' assets from creditors and that much of the property contained within the trusts was community property. After six days of trial, the SSSTs were added to the divorce action as necessary parties. Lynita then filed an amended complaint against Eric's Trust and its former distribution trustees alleging various torts. Eric's Trust moved to dismiss Lynita's tort claims. The district court dismissed nearly all of the tort claims, including unjust enrichment and breach of fiduciary duty. Additionally, the district court denied the motion to dismiss as to several of Lynita's other claims against Eric and Eric's Trust, including constructive trust.

During the trial, Eric's Trust retained an expert certified public accountant to analyze the trust accounting for both SSSTs. The expert "found no evidence that any community property was transferred to [Eric's Trust] or that any community property was commingled with the assets of [Eric's Trust]." The district court, noting the expert's financial relationship with Eric and the expert's purportedly unreliable testimony, found the expert's report and testimony to be of little probative value.

Decree of divorce

On June 3, 2013, the district court issued the decree. The district court found that the SPA was valid and the parties' SSSTs were validly established and funded with separate property. The district court kept Eric's Trust and Lynita's Trust intact for creditor-protection purposes. However, the district court noted "the [c]ourt could [have] invalidate[d] both Trusts" under theories of constructive trust or unjust enrichment based on Eric's extensive testimony regarding the community nature of the assets held by each trust, the breaches of Eric's fiduciary duties, and the lack of trust formalities.

Additionally, the district court found "that the testimony of the parties clearly established that the intent of creating the spendthrift trusts was to provide maximum protection from creditors and was not intended to be a property settlement in the event that the parties divorced." The district court based these findings, in large part, on testimony that purportedly established: (1) the parties intended to

occasionally "*level off the trusts*," (2) the trust assets had become community property through Eric's comingling, (3) Lynita had delegated her role as investment trustee to Eric, and (4) an oral transmutation agreement occurred between the parties to transmute the separate property back into community property.

In addition to the dissolution of marriage, the district court ordered: (1) an equalization of $8.7 million in total trust assets to remain in or be transferred into each trust, (2) the Brianhead cabin property to be divided equally between the trusts, (3) the interest in the Russell Road property and its note/deed for rents and taxes be divided equally between the trusts, (4) Eric's Trust to use the distribution of $1.5 million from a previously enjoined trust account to pay Lynita spousal support in a lump sum of $800,000, (5) Eric's Trust to pay Lynita child support arrears; (6) Eric's Trust to pay Lynita's attorney fees, (7) Eric's Trust to pay expert fees, and (8) Eric to pay child support for each child and half of the private school tuition for his daughter.

Constructive trusts: Eric's purported breach of fiduciary duty and unjust enrichment

The district court found that Lynita delegated her role as investment trustee to Eric and that Eric had acted as the de facto investment trustee since the inception of Lynita's Trust. The district court reasoned that, because Eric acted in such a capacity, his actions involving the transfer of property between the trusts and his various corporate entities amounted to a breach of fiduciary duty. Further, the district court reasoned this breach of fiduciary duty resulted in transfers of property that unjustly enriched Eric. This finding of unjust enrichment led to the district court imposing constructive trusts over two properties held within the SSSTs—the Lindell property and the Russell Road property.

Wyoming Downs and the June 8, 2015, order

The decree disposed of all property, with the exception of Wyoming Downs, an asset purchased during the pendency of the divorce.[2] A corporate entity owned by Lynita's Trust loaned Eric's Trust money toward the purchase price of Wyoming Downs, and Eric's Trust subsequently purchased the property. Eric testified this loan was paid back. The district court noted it was "without suffi-

[2]Eric's Trust petitioned this court for writ relief stemming from the decree on June 21, 2013, and July 9, 2013. We ultimately dismissed both petitions, noting that an appeal would be available to all parties upon the disposition of Wyoming Downs. *See Harber v. Eighth Judicial Dist. Court*, Docket Nos. 63432/63545 (Order Denying Petitions for Writs of Prohibition, May 23, 2014).

cient information" to make a determination regarding the disposition of Wyoming Downs at the time it issued the decree, and therefore, did not make any findings or decisions as to the disposition of the property in the decree. On September 22, 2014, the district court disposed of Wyoming Downs, thereby making its judgment final. Eric and Eric's Trust subsequently filed their first notice of appeal.

Following the first notice of appeal, Lynita filed a motion with the district court to enforce the decree. Specifically, Lynita sought a court order mandating Eric or Eric's Trust to disclose certain documents and rent payments for, among other things, the Lindell and Russell Road properties. On June 8, 2015, the district court ordered Eric and Eric's Trust to pay the additional monies to Lynita pursuant to her motion to enforce the decree (the June 8, 2015, order). Eric's Trust also appealed the June 8, 2015, order, filing the second notice of appeal.

DISCUSSION

Subject-matter jurisdiction of district court to hear trust-related claims

As a preliminary matter, Eric's Trust argues the family court in which he initiated the divorce lacked subject-matter jurisdiction over the trust-related claims brought during the divorce. We disagree.

Subject matter jurisdiction is a question of law we review de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). "[I]f the district court lacks subject matter jurisdiction, the judgment is rendered void." *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011).

Eric's Trust contends the family court lacked jurisdiction to hear the trust-related claims in the divorce and that the claims should have instead been heard by a probate judge. Eric's Trust argues that the trust claims were "a proceeding commenced pursuant to" NRS Title 12 (Wills and Estates of Deceased Persons) or Title 13 (Guardianships; Conservatorships; Trusts), which Eric's Trust argues are under the exclusive jurisdiction of the probate court, citing NRS 166.120 and NRS 164.015(1) to support this proposition. NRS 166.120(2) provides in part:

> Any action to enforce [a spendthrift trust] beneficiary's rights, to determine if the beneficiary's rights are subject to execution, to levy an attachment or for any other remedy must be made only in a proceeding commenced pursuant to . . . NRS 164.010, if against a nontestamentary trust. A court has exclusive jurisdiction over any proceeding pursuant to this section.

Additionally, under NRS 164.015(1), "[t]he court has exclusive jurisdiction of proceedings initiated by the petition of an interested

person concerning the internal affairs of a nontestamentary trust." As used in both statutes, "court" is defined as "a district court of this State sitting in probate or otherwise adjudicating matters pursuant to this title." NRS 132.116; *see also* NRS 164.005 (applying NRS 132.116 to trust proceedings under Title 13).

We conclude that this case was not initiated for the purpose of enforcing or determining a spendthrift beneficiary's rights under NRS 164.120(2) or determining the internal affairs of a nontestamentary trust under NRS 164.015(1). Rather, the case was initiated as a divorce proceeding under NRS Chapter 125. Whether a family court has subject-matter jurisdiction in divorce proceedings involving issues outside the scope of NRS 3.223[3] has been firmly decided by this court. In *Landreth*, this court held a "district court judge sitting in the family court division did not lack the power and authority to dispose of [a] case merely because it involved a subject matter outside the scope of NRS 3.223." 127 Nev. at 180-81, 251 P.3d at 167. The claims at issue here are no different. Accordingly, we reach the same result as we did in *Landreth*—we conclude that the family court had subject-matter jurisdiction over all claims brought in the Nelsons' divorce, including those relating to property held within the SSSTs.

Validity of the SPA/SSSTs

Next, we examine the validity of the SPA and the SSST agreements. "When the facts in a case are not in dispute, contract interpretation is a question of law, which this court reviews de novo." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008). Both the SPA and the parties' respective SSSTs were signed, written agreements. We hold the written instruments at issue here are all valid and the terms therein are unambiguous.

The SPA is a valid transmutation agreement

The parties contest the validity of the SPA, and Lynita argues the parties understood and intended the SPA would have no effect in the event of divorce. We conclude the SPA is a valid transmutation agreement, and the plain terms of the SPA indicate it remains in effect during divorce.

NRS 123.220(1) provides that "[a]ll property, other than [separate property outlined] in NRS 123.130, acquired after marriage by either husband or wife, or both, is community property *unless otherwise provided by . . .* [*a*]*n agreement in writing between the spous-*

[3]The powers of family courts are enumerated in NRS 3.223.

es." (Emphasis added.) Additionally, "[w]here a written contract is clear and unambiguous on its face, extraneous evidence cannot be introduced to explain its meaning." *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001) (internal quotation marks omitted). "Extrinsic or parol evidence is not admissible to contradict or vary the terms of an unambiguous written instrument, since all prior negotiations and agreements are deemed to have been merged therein." *Frei v. Goodsell*, 129 Nev. 403, 409, 305 P.3d 70, 73 (2013) (internal quotation marks omitted).

We conclude the SPA is a valid transmutation agreement and that the parties' community property was converted into separate property. The terms of the SPA are clear and unambiguous: the parties agree "to split the community estate into the sole and separate property of each spouse." Lynita argues that, despite these plain terms, the parties intended for the property to remain community property. Lynita's argument fails because, as discussed above, it relies on extraneous evidence—a purported agreement between the parties not contained within the four corners of the SPA—that would contradict the unambiguous language of the SPA. Both parties were apprised of the legal consequences of the agreement by their attorney. Additionally, Lynita had her own outside counsel review the agreement prior to signing and provide additional legal advice regarding the consequences of the SPA. Therefore, we conclude the SPA was valid, and the parties' property was validly separated into their respective separate property trusts at that time.

The parties' respective SSSTs are valid

Lynita argues the district court erred in finding the SSSTs to be validly created under NRS Chapter 166. Lynita contends the trusts should be invalidated because "testimony and evidence presented at trial conclusively established that [Eric's Trust] and [Lynita's Trust] were not valid trusts." We disagree.

For the reasons set forth below, we hold the SSSTs are valid and the trusts were funded with separate property stemming from a valid separate property agreement. Additionally, we conclude the district court had substantial evidence to make its finding of fact and, thus, did not err in finding the parties' SSSTs to be validly created.

Requirements of a valid SSST in Nevada

No specific language is necessary to create a spendthrift trust. NRS 166.050. A spendthrift trust is created "if by the terms of the writing (construed in the light of [NRS Chapter 166] if necessary) the creator manifests an intention to create such a trust." *Id*. In addition to the spendthrift requirements, to create a valid SSST,

NRS 166.015(2)(a) requires the settlor to name as trustee a person who is a Nevada resident. Further, NRS 166.040(1)(b) provides that the SSST must (1) be in writing, (2) be irrevocable, (3) not require that any part of the trust's income or principal be distributed to the settlor, and (4) not be "intended to hinder, delay or defraud known creditors."

Validity of Eric's Trust and Lynita's Trust

To determine the validity of the trusts, one must first look to the words of the trust agreement to determine if the settlor had the intent to create a spendthrift trust. 76 Am. Jur. 2d *Trusts* § 29 (2016). Accordingly, "courts look first and foremost to the language in the trust and interpret that language to effectuate the intent of the settlors." *Id*. If a trust's language is plain and unambiguous, then courts determine intent from this language alone. *Id.* § 30.

On the contrary, if the meaning of the writing is uncertain, incomplete, or ambiguous, parol evidence of the circumstances is admissible to determine the settlor's intent. Restatement (Third) of Trusts § 21 cmt. a (Am. Law Inst. 2003). However, "parol evidence is not admissible to contradict or vary the terms of an unambiguous written instrument." *Frei*, 129 Nev. at 409, 305 P.3d at 73.

A plain reading of the written terms of Eric's Trust agreement reveals the following: Eric's Trust has a spendthrift provision, manifesting a plain and unambiguous intent to create a spendthrift trust, in accordance with NRS 166.050; Eric's Trust names Lana Martin, a Nevada resident, as distribution trustee, satisfying NRS 166.015(2)(a); the trust agreement is in writing, and the trust is irrevocable; and there is no requirement that any part of the trust's income or principal be distributed to the settlor. Finally, there is no evidence that the trust was created to hinder, delay, or defraud known creditors. Thus, we hold Eric's Trust is a valid Nevada SSST.[4]

The validity of the trusts brings into question many of the district court's findings in the decree. As discussed below, the district court found that it could have invalidated the SSSTs based on Eric's purported breach of trust formalities. Breaching trust formalities of an otherwise validly created SSST does not invalidate a spendthrift trust; rather, it creates liability upon the trustee(s) for that breach. Indeed, if, after an SSST is validly formed, the trust formalities are breached by a trustee, the proper remedy is a civil suit against the trustee—not an invalidation of the trust itself. *See* NRS 163.115. Lynita filed such claims against Eric's Trust, and the district court

[4]We note that the parties' respective trust agreements are nearly identical. The analysis here is also applicable to Lynita's Trust, which we also conclude is a valid Nevada SSST.

then dismissed many of those claims. As such, we conclude the district court's findings regarding the potential invalidity of Eric's Trust and Lynita's Trust were made in error.

Tracing trust assets

The parties contest whether the assets within the SSSTs remained separate property or whether, because of the many transfers of property between the trusts, the assets reverted back to community property. In a divorce involving trust assets, the district court must trace those trust assets to determine whether any community property exists within the trusts—as discussed below, the parties' respective separate property in the SSSTs would be afforded the statutory protections against court-ordered distribution, while any community property would be subject to the district court's equal distribution. We conclude the district court did not trace the assets in question.

Eric's Trust retained a certified public accountant to prepare a report tracing the assets within the two trusts. However, as noted by the district court, the certified public accountant maintained a business relationship with Eric and Eric's Trust for more than a decade. Although the certified public accountant's report concluded that there was "no evidence that any community property was transferred to [Eric's Trust] or that any community property was commingled with the assets of [Eric's Trust]," the district court found the report and corresponding testimony to be unreliable and of little probative value. We recognize that the district court is in the best position to weigh the credibility of witnesses, and we will not substitute our judgment for that of the district court here. *See In re Parental Rights as to J.D.N.*, 128 Nev. 462, 477, 283 P.3d 842, 852 (2012). However, the subject of the certified public accountant's report—the tracing of trust assets, specifically any potential commingling of trust assets with personal assets—must still be performed. *See Schmanski v. Schmanski*, 115 Nev. 247, 984 P.2d 752 (1999) (discussing transmutation of separate property and tracing trust assets in divorce). Without proper tracing, the district court is left with only the parties' testimony regarding the characterization of the property, which carries no weight. *See Peters v. Peters*, 92 Nev. 687, 692, 557 P.2d 713, 716 (1976) ("The opinion of either spouse as to whether property is separate or community is of no weight [whatsoever]."). Accordingly, we conclude the district court erred by not tracing the assets contained within the trusts, either through a reliable expert or other available means. Separate property contained within the spendthrift trusts is not subject to attachment or execution, as discussed below. However, if community property exists within the trusts, the district court shall make an equal distribution of that community property. *See* NRS 125.150(1)(b).

Distribution of parties' assets held in trust

Having concluded the district court had subject-matter jurisdiction, the written instruments at issue are valid, and the district court must trace trust assets to determine whether any community property exists within the trusts, we now turn our attention to the district court's various decisions regarding the division of property. Distribution of the parties' assets held in the SSSTs was perhaps the most contested issue in the Nelsons' divorce.

Despite recognizing the validity of the SPA and SSSTs in the decree, the district court made several missteps in fashioning the ultimate distribution of property, namely: (1) considering parol evidence to determine the parties' intent, despite the written instruments at issue being unambiguous; (2) equalizing assets held within the valid SSSTs; and (3) ordering Eric's personal obligations to be paid by a trust for which he is a beneficiary.

The district court erred by using parol evidence to determine the intent of the parties' respective trusts

The district court ordered the trust assets equalized between Eric's Trust and Lynita's Trust, and for Eric's personal obligations to be paid by Eric's Trust. In order to fashion these remedies, the district court improperly considered parol evidence—namely, testimony from Eric and Lynita regarding their purported intent. We hold the district court abused its discretion in doing so.

"Where a written contract is clear and unambiguous on its face, extraneous evidence cannot be introduced to explain its meaning." *Kaldi*, 117 Nev. at 281, 21 P.3d at 21 (internal quotation marks omitted). "Extrinsic or parol evidence is not admissible to contradict or vary the terms of an unambiguous written instrument, since all prior negotiations and agreements are deemed to have been merged therein." *Frei*, 129 Nev. at 409, 305 P.3d at 73 (internal quotation marks omitted). This court "review[s] a district court's decision to admit or exclude evidence for abuse of discretion, and we will not interfere with the district court's exercise of its discretion absent a showing of palpable abuse." *Id.* at 408-09, 305 P.3d at 73.

Here, both Eric's Trust and Lynita's Trust are valid Nevada SSSTs with plain, unambiguous language indicating a clear intent to create a spendthrift trust. Where, as here, a valid SSST agreement is clear and unambiguous, the district court may not consider the parties' testimony regarding their purported intent when fashioning remedies related to that SSST. 76 Am. Jur. 2d *Trusts* § 30 (2016). The parties' inconsistent testimony regarding the purported community or separate property characterization of the trust assets carries no weight and should not have been considered when the district court

fashioned the property division. *See Peters*, 92 Nev. at 692, 557 P.2d at 716. Accordingly, the district court was precluded from considering this extrinsic evidence to discern the parties' intent, and the district court abused its discretion in doing so.

The district court erred in equalizing the trust assets

Eric's Trust argues that, in addition to improperly considering parol evidence, the district court erred by ordering the trust assets to be equalized and Eric's Trust to pay Eric's personal obligations—namely, child support arrears and spousal support. We agree.

This court defers to a district court's findings of fact and will only disturb them if they are not supported by substantial evidence. *Ogawa*, 125 Nev. at 668, 221 P.3d at 704. Questions of law, including statutory interpretation, are reviewed de novo. *Waldman v. Maini*, 124 Nev. 1121, 1136, 195 P.3d 850, 860 (2008).

NRS Chapters 163 and 166 evince a clear intention to protect spendthrift trust assets against court order.[5] NRS 163.417(1)(c)(1) provides that "a court may not order the exercise of . . . [a] trustee's discretion to . . . [d]istribute any discretionary interest." Additionally, NRS 166.120(2) provides in relevant part:

> Payments by the trustee to the beneficiary . . . must be made only to or for the benefit of the beneficiary and not . . . upon any order, written or oral, given by the beneficiary, whether such . . . order . . . be made pursuant to or by virtue of any legal process in judgment, execution, attachment, garnishment, bankruptcy or otherwise, or whether it be in connection with any contract, tort or duty.

Finally, NRS 166.120(3) uses mandatory language indicating the beneficiary lacks the ability to make dispositions of trust property, even in response to a court order. NRS 166.120(3) provides:

> [A spendthrift trust beneficiary] shall have no power or capacity to make any disposition whatever of any of the income . . . whether made upon the order or direction of any court or courts, whether of bankruptcy or otherwise; nor shall the interest of the beneficiary be subject to any process

[5]We note that these protections do not apply if a court order is enforcing a judgment levied against the trust by a creditor able to prove, by clear and convincing evidence, that a "transfer of [trust] property was a fraudulent transfer pursuant to chapter 112 of NRS or that the transfer violates a legal obligation owed to the creditor under a contract or a valid court order that is legally enforceable by that creditor." NRS 166.170(3). The court order at issue here, the decree, is not legally enforceable because it requires Eric or the trustees of Eric's Trust to violate NRS 166.120. We note the record here does not indicate that a fraudulent transfer under NRS 166.170(3) occurred between the SSSTs.

> of attachment issued against the beneficiary, or to be taken in execution under any form of legal process directed against the beneficiary or against the trustee, or the trust estate, or any part of the income thereof, but the whole of the trust estate and the income of the trust estate shall go to and be applied by the trustee solely for the benefit of the beneficiary, free, clear, and discharged of and from any and all obligations of the beneficiary whatsoever and of all responsibility therefor.

We conclude the statutory framework governing SSSTs does not allow a court to equalize spendthrift trust assets between or among different SSSTs. Such an equalization would require the district court to order the exercise of a trustee's discretion to distribute some discretionary interest, in contravention of NRS 163.417(1)(c)(1). Additionally, such a court order would require the trustee to make a distribution outside the scope of the trust agreement and, perhaps more importantly, would run afoul of NRS 166.120(2), which prohibits payments made pursuant to or by virtue of any legal process. Finally, pursuant to NRS 166.120(3), Eric, as the beneficiary of Eric's Trust, has no power to make any disposition of any of Eric's Trust income upon order of the district court. Thus, we conclude the district court erred in ordering trust assets to be equalized between Eric's Trust and Lynita's Trust.

The district court erred in ordering Eric's personal obligations to be paid by Eric's Trust

The district court also ordered Eric's Trust to satisfy Eric's personal obligations—specifically, Eric's child- and spousal-support arrears. In doing so, the district court relied upon SSST statutes from South Dakota and Wyoming, as well as caselaw from Florida, which specifically allow for SSST assets to be reached to satisfy child and spousal support. The statutes and caselaw relied upon by the district court annunciate public policy concerns for allowing spendthrift trusts to be reached for child and spousal support. *See Gilbert v. Gilbert*, 447 So. 2d 299, 301 (Fla. Dist. Ct. App. 1984) ("The cardinal rule of construction in trusts is to determine the intention of the settlor and give effect to his wishes. . . . On the other hand, there is a strong public policy argument which favors subjecting the interest of the beneficiary of a trust to a claim for alimony. . . . [T]he obligation to pay alimony is a duty, not a debt." (internal quotation marks omitted)); *see also* S.D. Codified Laws § 55-16-15(1) (2016) (providing that many of South Dakota's statutory spendthrift trust protections "do[ ] not apply in any respect to any person to whom at the time of transfer the transferor is indebted on account of an agreement or order of court for the payment of support or alimony in favor of the

transferor's spouse, former spouse, or children, or for a division or distribution of property in favor of the transferor's spouse or former spouse, to the extent of the debt"); Wyo. Stat. Ann. § 4-10-503(b) (2015) ("Even if a trust contains a spendthrift provision, a person who has a judgment or court order against the beneficiary for child support or maintenance may obtain from a court an order attaching present or future distributions to, or for the benefit of, the beneficiary."). The district court also cites to the Restatement (Third) of Trusts § 59 (Am. Law Inst. 2003), which provides "[t]he interest of a beneficiary in a valid spendthrift trust can be reached in satisfaction of an enforceable claim against the beneficiary for . . . support of a child, spouse, or former spouse."

We conclude the district court's order runs contrary to Nevada law. Despite the public policy rationale used in the other jurisdictions, Nevada statutes explicitly protect spendthrift trust assets from the personal obligations of beneficiaries. Indeed, "[p]rovision for the [spendthrift trust] beneficiary will be for the support, education, maintenance and benefit of the beneficiary alone, and *without reference to . . . the needs of any other person, whether dependent upon the beneficiary or not.*" NRS 166.090(1) (emphasis added).

The legislative history of SSSTs in Nevada supports this conclusion. It appears that the Legislature enacted the statutory framework allowing SSSTs to make Nevada an attractive place for wealthy individuals to invest their assets, which, in turn, provides Nevada increased estate and inheritance tax revenues. *See* Hearing on A.B. 469 Before the Assembly Judiciary Comm., 70th Leg. (Nev., Mar. 26, 1999) (statement of Assemblyman David Goldwater). When crafting the language to allow SSSTs, the Legislature contemplated a statutory framework that protected trust assets from unknown, future creditors, as opposed to debts known to the settlor at the time the trust was created. *See id.* The legislative history explicitly mentions child support as an example of a debt that would not be free from attachment *if known at the time the trust was created*. *Id.* However, the trust assets would be protected from attachment as to debts unknown at the time the trust was created—presumably, this protection extended to child- and spousal-support obligations unknown at the time the trust was created. Additionally, in 2013, the Legislature proposed changes to NRS Chapter 166 that would have allowed a spouse or child to collect spousal support or child support from otherwise-protected spendthrift trust assets. *See* Hearing on A.B. 378 Before the Senate Judiciary Comm., 77th Leg. (Nev., May 8, 2013) (statement of Assemblywoman Marilyn Dondero Loop). However, the proposed changes to NRS Chapter 166 did not pass, and, as a result, the Nevada spendthrift trust statutes were not

amended to allow for an exception for child- and spousal-support orders of a beneficiary to be enforced against a spendthrift trust.

This rigid scheme makes Nevada's self-settled spendthrift framework unique; indeed, the "key difference" among Nevada's self-settled spendthrift statutes and statutes of other states with SSSTs, including Florida, South Dakota, and Wyoming, "is that Nevada abandoned the interests of child- and spousal-support creditors, as well as involuntary tort creditors," seemingly in an effort to "attract the trust business of those individuals seeking maximum asset protection." Michael Sjuggerud, *Defeating the Self-Settled Spendthrift Trust in Bankruptcy*, 28 Fla. St. U. L. Rev. 977, 986 (2001).

We conclude Nevada SSSTs are protected against the court-ordered child-support or spousal-support obligations of the settlor/beneficiary that are not known at the time the trust is created.[6] Here, Eric's child- and spousal-support obligations were not known at the time the trust was created. Accordingly, the district court abused its discretion in ordering Eric's Trust to pay Eric's child- and spousal-support arrears. We further conclude the child- and spousal-support exception articulated in section 59 of the Third Restatement of Trusts is inconsistent with Nevada's statutory framework and the legislative history of NRS Chapter 166, and we expressly reject that exception here.

The district court did not err in awarding spousal support as a lump sum but erred in ordering it paid by Eric's Trust

In his individual capacity, Eric argues the amount of spousal support awarded to Lynita was inequitable and should not have been awarded in a lump sum. Eric argues that the $800,000 lump sum alimony award was not just and equitable considering the NRS 125.150(9) factors because Lynita can adequately support herself on trust income. We disagree.

The district court "[m]ay award such alimony . . . in a specified principal sum or as specified periodic payments, as appears just and equitable." NRS 125.150(1)(a). Additionally, this court reviews an

[6]We note the possible confusion between our conclusion here protecting spendthrift trust assets from the personal child- and spousal-support obligations of the beneficiary and our conclusion above requiring the court to dispose of community property within the spendthrift trust. To clarify: because the nonbeneficiary spouse retains a property interest in community property contained within the spendthrift trust, the restraints on the court-ordered alienation of spendthrift trust assets would not apply to the nonbeneficiary spouse's community property share of that property. Accordingly, the district court's equal distribution of community property pursuant to the dissolution of marriage does not implicate the protections against a trust being ordered to pay the personal obligations of a beneficiary articulated in NRS Chapters 163 and 166.

award of spousal support for an abuse of the discretion. *Gardner v. Gardner*, 110 Nev. 1053, 1055-56, 881 P.2d 645, 646 (1994); *see also Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 617 (1992) (noting this court generally affirms district courts' rulings in divorce proceedings where supported by substantial evidence and free from appearance of abuse of discretion).

We conclude the district court did not abuse its discretion in awarding spousal support. The district court properly considered the factors under NRS 125.150(9). Additionally, the court has discretion to award spousal support as a lump sum or a periodic payment, and, here, we conclude the district court did not abuse that discretion in awarding a lump sum. *See Sargeant v. Sargeant*, 88 Nev. 223, 228, 495 P.2d 618, 622 (1972) (affirming a lump sum award of spousal support where the husband's conduct indicated the possibility he might liquidate or interfere with his assets to avoid paying support). However, we conclude the only error was in ordering the spousal support to be paid by Eric's Trust instead of by Eric because, as noted above, Nevada's statutory framework explicitly protects spendthrift trust assets from the personal obligations of beneficiaries—in this case, Eric. Accordingly, we vacate the award in order for the district court to reassess that award against Eric in his personal capacity.

Unjust enrichment, constructive trusts, and the delegation of Lynita's role as investment trustee of Lynita's Trust

The district court found that Lynita delegated to Eric her role as investment trustee of Lynita's Trust. Based on this delegation, the district court found that Eric had a fiduciary duty to disclose pertinent facts related to the transfer of assets held by Lynita's Trust. The district court found Eric breached this fiduciary duty by not disclosing that information.

The district court erred in relying upon a dismissed claim of unjust enrichment to afford relief

Based on this purported breach, the district court provided relief upon a theory of unjust enrichment when imposing constructive trusts over two contested properties. Eric's Trust contends the district court improperly relied upon a theory of unjust enrichment to fashion its remedies. Eric's Trust argues that, because a claim of unjust enrichment was dismissed without prejudice and never repleaded, the district court could not rely upon that claim to assess damages or provide relief. Additionally, Eric's Trust argues that at no point in the trial transcript is the phrase "unjust enrichment" used—accordingly, there could not have been consent. Lynita argues that a claim of unjust enrichment was tried by express or implied consent

because the pleadings in the case conformed to evidence demonstrating that Eric was being unjustly enriched by way of his power over Lynita's Trust.

This court defers to a district court's findings of fact and will only disturb them if they are not supported by substantial evidence. *Ogawa*, 125 Nev. at 668, 221 P.3d at 704. Questions of law are reviewed de novo. *Waldman*, 124 Nev. at 1136, 195 P.3d at 860.

We conclude the district court erred in relying upon a dismissed claim to afford relief to the parties. We further conclude Eric's Trust did not expressly or impliedly consent to the claim being tried. Indeed, Eric's Trust moved to dismiss the claim of unjust enrichment; this alone evinces the trust's lack of express consent for the claim. Further, the crux of Eric's Trust's entire argument was that trust formalities and property transactions were done legally and in accordance with the trust agreement—in other words, Eric's Trust argues that Eric was justified in his actions, running contrary to any notions of unjust enrichment. We conclude Lynita's claims of express consent for the claims of unjust enrichment fail.

Likewise, we conclude Lynita's argument on implied consent fails. Implied consent is a high threshold. For example, this court has determined that an issue was tried by implied consent where counsel "had raised the issue in his opening argument, [opposing counsel] had specifically referred to the matter as an issue in the case, . . . the factual issue had been explored in discovery, [and] no objection had been raised at trial to the admission of evidence relevant to the issue." *Schwartz v. Schwartz*, 95 Nev. 202, 205, 591 P.2d 1137, 1140 (1979). Lynita's unjust enrichment claim fails to meet this standard. The phrase "unjust enrichment" was not used during trial; it therefore was not specifically referred to as an issue in the case following its dismissal. Eric's Trust moved to dismiss it, which demonstrates an objection was raised to the admission of evidence relevant to the issue. Therefore, we hold the issue of unjust enrichment was not tried by implied consent and, therefore, the district court erred in considering it when fashioning its remedies in the decree.[7]

The district court erred in placing constructive trusts over the Russell Road and Lindell properties

Eric's Trust argues the district court erred in its imposition of a constructive trust over the Russell Road and Lindell properties, while Lynita argues the imposition of the constructive trusts was

[7]This court makes no conclusions regarding the merits of Lynita's trust-related tort claims. However, we conclude the district court exceeded its authority to make findings based upon a dismissed claim.

proper because of Eric's purported breaches of fiduciary duty as a de facto investment trustee of Lynita's Trust. Consistent with our analysis in the above sections, we conclude the constructive trusts should be vacated.

"A constructive trust is a remedial device by which the holder of legal title to property is held to be a trustee of that property for the benefit of another who in good conscience is entitled to it." *Locken v. Locken*, 98 Nev. 369, 372, 650 P.2d 803, 804-05 (1982). Although remedial, a constructive trust is "the result of judicial intervention." Restatement (Third) of Trusts § 1 cmt. e (Am. Law Inst. 2003). Additionally, a constructive trust violates a spendthrift prohibition on assignment or alienation of benefits. *See Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376-77 (1990).

We conclude the district court erred in placing constructive trusts over the Russell Road and Lindell properties because the imposition of a constructive trust violates the statutory protections shielding spendthrift trusts from court order. *See* NRS 166.120; *see also* NRS 163.417(1)(c)(1). Placing a constructive trust over assets in a valid spendthrift trust violates the trust's prohibition on assignment or alienation of assets. *See, e.g.*, *Guidry*, 493 U.S. at 376-77 (holding imposition of a constructive trust over a pensioner's ERISA benefits violated the plan's spendthrift provisions and that statutorily defined spendthrift protections "reflect[ ] a considered . . . policy choice, a decision to safeguard a stream of income for pensioners . . . even if that decision prevents others from securing relief [from the assets protected by spendthrift provision]").[8] Accordingly, we conclude the district court erred in imposing equitable remedies over assets that were held in a valid SSST.

The June 8, 2015, order

Lastly, Eric's Trust and Eric argue the district court lacked subject-matter jurisdiction to enter the June 8, 2015, order because the order was entered after the final order and during the pendency of the first appeal.

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[8]Although we reach a result here that is similar to the result in *Guidry*, we recognize there are several factual distinctions between *Guidry* and the instant appeals. Here, the parties are not arguing over pension benefits, they are arguing over assets held in SSSTs. Here, the trusts are not created by federal statute, they are enacted by state law. Despite these differences, *Guidry* demonstrates that, at least with respect to certain spendthrift provisions, the imposition of equitable remedies runs afoul of the protections afforded by those spendthrift provisions. Additionally, like the congressionally approved ERISA provisions, we conclude the self-settled spendthrift provisions of NRS Chapter 166 reflect a considered legislative policy choice, and if exceptions to the policy are to be made for equitable remedies, it is for the Legislature to undertake that task.

The district court can enforce an order that is pending on appeal and retains jurisdiction over matters that are collateral and independent from the order appealed, such as attorney fees. *See Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 455 (2010). We conclude that although the district court retains jurisdiction to enforce an order during the pendency of an appeal, most of the June 8, 2015, order will nonetheless be vacated because it concerns property distribution that will be vacated pursuant to this opinion. We therefore vacate the June 8, 2015, order to the extent it enforces or implements portions of the divorce decree relating to assets in Eric's Trust and Lynita's Trust, which are being reversed in this opinion. However, we affirm the June 8, 2015, order with respect to the directives regarding health care costs of the son and Lynita's insurance costs, Eric's payment of costs to remove the security gate, and attorney fees for contempt.

CONCLUSION

Accordingly, we affirm in part and vacate in part the district court's decree of divorce, affirm in part and vacate in part the district court's June 8, 2015, order modifying and implementing the divorce decree, and remand this matter for further proceedings consistent with this opinion.[9]

CHERRY, C.J., and DOUGLAS, PICKERING, HARDESTY, PARRAGUIRRE, and STIGLICH, JJ., concur.

JOHN ILIESCU, JR., INDIVIDUALLY; AND JOHN ILIESCU, JR., AND SONNIA ILIESCU, AS TRUSTEES OF THE JOHN ILIESCU, JR., AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT, APPELLANTS, *v.* MARK B. STEPPAN, RESPONDENT.

No. 68346

May 25, 2017 394 P.3d 930

Appeal from a district court order for foreclosure of a mechanic's lien and an order denying a motion for NRCP 60(b) relief. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Reversed and remanded.

[Rehearing denied September 21, 2017]

Albright, Stoddard, Warnick & Albright and *D. Chris Albright* and *G. Mark Albright*, Las Vegas, for Appellants.

[9]We have considered the parties' other arguments and conclude they are without merit.

Hoy Chrissinger Kimmel Vallas, PC, and *Michael D. Hoy*, Reno, for Respondent.

Before the Court En Banc.

OPINION

By the Court, Hardesty, J.:

NRS 108.245(1) requires mechanic's and materialmen's lien claimants to deliver a written notice of right to lien to the owner of the property after they first perform work on or provide material to a project. In *Board of Trustees of the Vacation Trust Carpenters Local No. 1780 v. Durable Developers, Inc.*, 102 Nev. 401, 410, 724 P.2d 736, 743 (1986), this court held that "substantial compliance with the technical requirements of the lien statutes is sufficient to create a lien on the property where . . . the owner of the property receives actual notice of the potential lien claim and is not prejudiced." And we reaffirmed this holding in *Fondren v. K/L Complex Ltd.*, 106 Nev. 705, 710, 800 P.2d 719, 721-22 (1990) ("The failure to serve the pre-lien notice does not invalidate a mechanics' or materialmen's lien where the owner received actual notice."). In this appeal, we are asked to determine whether the actual notice exception should be extended to offsite work and services performed by an architect for a prospective buyer of the property. Because we hold that the actual notice exception does not apply to such offsite work and services when no onsite work has been performed on the property, we reverse.

FACTS AND PROCEDURAL HISTORY

In July 2005, appellants John Iliescu, Jr., individually, and Sonnia Iliescu and John Iliescu, Jr., as trustees of the John Iliescu, Jr., and Sonnia Iliescu 1992 Family Trust Agreement (collectively, Iliescu) entered into a Land Purchase Agreement to sell four unimproved parcels in downtown Reno to Consolidated Pacific Development (CPD) for development of a high-rise, mixed-use project to be known as Wingfield Towers. The original agreement was amended several times and, as finally amended, entitled Iliescu to over $7 million, a condominium in the development, and several other inducements.

During escrow, CPD assigned the Land Purchase Agreement to an affiliate, BSC Investments, LLC (BSC). BSC negotiated with a California architectural firm, Fisher Friedman Associates, to design the Wingfield Towers. Respondent Mark Steppan, a Fisher Friedman employee who is an architect licensed in Nevada, served as the architect of record for Fisher Friedman.

In October 2005, Steppan sent an initial proposal to BSC that outlined design services and compensation equal to 5.75 percent of the total construction costs, which were estimated to be $180 million. In the interest of beginning design work, Steppan and BSC entered into an initial "stop-gap" agreement in November 2005 under which Steppan would bill hourly until an American Institute of Architects (AIA) agreement could be later signed. The AIA agreement between Steppan and BSC was signed in April 2006. The parties agreed that the final design contract would have an effective date of October 31, 2005, when Steppan began work.

The AIA agreement provided for progressive billings based on a percentage of completion of five phases of the design work, including 20 percent of the total fee upon completion of the "schematic design" phase. Steppan completed the schematic design phase, and Wingfield Towers was able to secure the required entitlements and project approval from the Reno Planning Commission and the Reno City Council. BSC did not pay Steppan for his services under the contract, and Steppan recorded a mechanic's lien against Iliescu's property on November 7, 2006. Steppan did not provide Iliescu with a pre-lien notice.

Financing for the Wingfield Towers project was never obtained, escrow never closed, and no onsite improvements were ever performed on the property. When the escrow was canceled, Iliescu's unimproved property was subject to Steppan's multimillion dollar lien claim for the unpaid invoices submitted to BSC.

Iliescu applied to the district court for a release of Steppan's mechanic's lien, alleging that Steppan had failed to provide the required pre-lien notice before recording his lien. Steppan then filed a complaint to foreclose the lien. The two cases were consolidated, and Iliescu filed a motion for partial summary judgment on the pre-lien notice issue. Steppan filed a cross-motion for partial summary judgment, arguing that, although he failed to give the pre-lien notice required under NRS 108.245, such notice was not required under the "actual notice" exception recognized by this court in *Fondren v. K/L Complex Ltd.*, 106 Nev. 705, 710, 800 P.2d 719, 721-22 (1990). Iliescu argued that he did not have the notice required under *Fondren*'s actual notice exception.

The district court denied Iliescu's motion but granted Steppan's motion, finding that no pre-lien notice was required because Iliescu had viewed the architectural drawings and attended meetings where the design team presented the drawings and thus had actual notice of the claim. The court found that even though Iliescu alleged he did not know the identity of the architects who were working on the project, he had actual knowledge that Steppan and Fisher Friedman were performing architectural services on the project.

About 18 months after the district court granted Steppan's motion on the pre-lien notice issue and while the matter was still pending in the district court, this court published its opinion in *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 245 P.3d 1149 (2010). *Hardy* clarified that a lien claimant cannot invoke the actual notice exception to NRS 108.245 unless the property owner (1) has actual notice of the construction on his property, and (2) knows the lien claimant's identity. *Id*. at 542, 245 P.3d at 1158.

Although the parties attempted to once again raise pre-lien notice issues after *Hardy* was published, the district court refused to revisit the issue. Following a bench trial on the consolidated cases, the district court entered its findings of fact, conclusions of law, and decision and, citing to both *Fondren* and *Hardy*, concluded that Steppan was entitled to a mechanic's lien. The district court further concluded that despite Steppan's failure to provide a pre-lien notice, none was required because Iliescu had actual knowledge; and it thus entered an order foreclosing Steppan's mechanic's lien. This appeal followed.

DISCUSSION

On appeal, the parties disagree about whether Steppan substantially complied with the mechanic's lien statutes by showing that Iliescu had actual knowledge of Steppan's work and identity. Iliescu denies having actual knowledge of Steppan's work and identity, and, in advancing his argument, asks this court to clarify whether the actual notice exception to the mechanic's lien statutes we articulated in *Fondren* applies to offsite work. He urges this court to hold that the exception does not apply to offsite work when no work has been performed on the property. Iliescu further argues that even though the district court erred in finding that he had actual knowledge of Steppan's work and identity, the court did not determine exactly when he first had that knowledge; thus, there is no way to tell how much, if any, of Steppan's work would be lienable pursuant to NRS 108.245(6). Steppan argues that the actual notice exception applies equally to onsite and offsite work and that the district court made adequate and supported findings.

Standard of review

"This court reviews . . . the district court's legal conclusions de novo." *I. Cox Constr. Co. v. CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013). "This court will not disturb the district court's factual determinations if substantial evidence supports those determinations." *J.D. Constr., Inc. v. IBEX Int'l Grp., LLC*, 126 Nev. 366, 380, 240 P.3d 1033, 1043 (2010).

Pre-lien notice under NRS 108.245

Under NRS 108.245(1),[1] every lien claimant for a mechanic's or materialmen's lien "shall, at any time after the first delivery of material or performance of work or services under a contract, deliver" a notice of right to lien to the owner of the property. No lien for materials or labor can be perfected or enforced unless the claimant gives the property owner the required notice. NRS 108.245(3). Finally, a lien claimant "who contracts directly with an owner or sells materials directly to an owner is not required to give notice pursuant to" NRS 108.245.[2] NRS 108.245(5).

Despite the mandatory language of NRS Chapter 108, "[t]his court has repeatedly held that the mechanic's lien statutes are remedial in character and should be liberally construed; that substantial compliance with the statutory requirements is sufficient to perfect the lien if the property owner is not prejudiced." *Las Vegas Plywood & Lumber, Inc. v. D & D Enters.*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982). However, "[f]ailure to either fully or substantially comply with the mechanic's lien statute will render a mechanic's lien invalid as a matter of law." *Hardy*, 126 Nev. at 536, 245 P.3d at 1155.

We have previously determined that substantial compliance with NRS 108.245's pre-lien notice requirements has occurred when "the owner of the property receives actual notice of the potential lien claim and is not prejudiced." *Durable Developers*, 102 Nev. at 410, 724 P.2d at 743. This principle was reaffirmed in *Fondren*. 106 Nev. at 709, 800 P.2d at 721 (concluding that substantial compliance with the pre-lien notice requirements occurred because the property owner "had actual knowledge of the construction on her property"); *see also Hardy*, 126 Nev. at 535, 245 P.3d at 1154 (recognizing that "*Fondren* is still good law").

However, we have not previously addressed whether the actual notice exception applies to offsite work and services performed by an architect hired by a prospective buyer when no onsite work has

[1]The United States District Court for the District of Nevada has recently ruled that a 2015 bill amending NRS 108.245, among other statutes unrelated to Nevada's mechanic's lien statutes, was non-severable and preempted. *Bd. of Trs. of the Glazing Health & Welfare Tr. v. Chambers*, 168 F. Supp. 3d 1320, 1325 (D. Nev. 2016); *see* S.B. 223, 78th Leg. (Nev. 2015); *but see Blanton v. N. Las Vegas Mun. Court*, 103 Nev. 623, 633, 748 P.2d 494, 500 (1987) (providing that Nevada courts are not bound by federal district court decisions). However, the mechanic's lien in this case was filed before that bill became effective. 2015 Nev. Stat., ch. 345, § 4, at 1932-33. Thus, this case is decided under the prior version of NRS 108.245 as it existed in 2005.

[2]It is undisputed that Steppan did not contract directly with Iliescu. Thus, our analysis of the actual notice exception to NRS 108.245(1) is limited to situations where, as here, the lien claimant does not contract directly with the owner.

been performed on the property. Steppan argues that because an architect who has not contracted directly with the property owner can lien for offsite work, the actual notice exception must apply. Iliescu argues that the actual notice exception does not apply to such offsite work when that work has not been incorporated into the property. We agree with Iliescu.

The actual notice exception does not extend to offsite work when no onsite work has been performed on the property

In *Fondren*, this court determined that Fondren, the property owner,

> had actual knowledge of the construction *on her property*. It was understood by both Fondren and [the lien claimant] that substantial remodeling would be required when the lease was negotiated. Additionally, Fondren's attorney regularly inspected the progress of the remodeling efforts. These inspections were on behalf of Fondren. Fondren could easily have protected herself by filing a notice of non-responsibility. She had actual knowledge of the work being performed *on her property*.

106 Nev. at 709, 800 P.2d at 721 (citation omitted) (emphasis added). We also made clear that a predominant purpose for the "notice requirement [in NRS 108.245] is to provide the owner with knowledge that work and materials are being *incorporated into the property*." *Id*. at 710, 800 P.2d at 721 (emphasis added).

Similarly, the property owner in *Hardy* "regularly inspected *the project site*." 126 Nev. at 540, 245 P.3d at 1157 (emphasis added). Indeed, we explicitly stated that "[a]ctual knowledge may be found where the owner has supervised work by the third party, reviewed billing statements from the third party, or any other means that would make the owner aware that the third-party claimant was involved with *work performed on its property*." *Id*. at 542, 245 P.3d at 1158 (emphasis added). We further explained that NRS 108.245 "protect[s] owners from hidden claims and . . . [t]his purpose would be frustrated if mere knowledge of construction is sufficient to invoke the actual knowledge exception against an owner by any contractor. Otherwise, the exception would swallow the rule." *Id*. at 542, 245 P.3d at 1159.

This rationale equally pertains to offsite architectural work performed pursuant to an agreement with a prospective buyer when there is no indication that onsite work has begun on the property, and no showing has been made that the offsite architectural work has benefited the owner or improved its property. As this court has consistently held, a lien claimant has not substantially complied with the mechanic's lien statutes when the property owner is prej-

udiced by the absence of strict compliance. *Las Vegas Plywood & Lumber*, 98 Nev. at 380, 649 P.2d at 1368; *Durable Developers*, 102 Nev. at 410, 724 P.2d at 743. As the *Hardy* court recognized, to conclude otherwise would frustrate the purpose of NRS 108.245, and the actual notice exception would swallow the rule. 126 Nev. at 542, 245 P.3d at 1159.

A property owner may be prejudiced by a lien claim from an architect for a prospective buyer who has failed to provide the pre-lien notice in at least two ways under Nevada's statutory scheme. First, without a showing that the architectural work has improved the property, the property owner assumes the risk for payment of a prospective buyer's architectural services for a project that may never be constructed on the property. Other jurisdictions have recognized that mechanics' liens for offsite architectural services when no work has been incorporated into the property pose a substantial risk of prejudice to property owners. *See generally* Kimberly C. Simmons, Annotation, *Architect's Services as Within Mechanics' Lien Statute*, 31 A.L.R.5th 664, Art. II § 4(b) (1995). For example, in *Kenneth D. Collins Agency v. Hagerott*, the Supreme Court of Montana upheld a lower court's decision refusing to allow an architect to foreclose on a mechanic's lien. 684 P.2d 487, 490 (1984). There, the court decided that, notwithstanding Montana law allowing architects to lien for architectural work and services, the architect could not foreclose on his lien because he did not "provide[ ] services that contributed to structural improvement and, thus, enhancement of the property." *Id*.

Second, although NRS 108.234 generally provides that an owner with knowledge of an "improvement constructed, altered or repaired upon property" is responsible for liens on its property, NRS 108.234(1), a disinterested owner may avoid responsibility for a lien if he or she gives a notice of non-responsibility after he or she "first obtains knowledge of the construction, alteration or repair, or the intended construction, alteration or repair," NRS 108.234(2). "Disinterested owner" is defined as a property owner who "[d]oes not personally or through an agent or representative, directly or indirectly, contract for or cause a work of improvement, or any portion thereof, to be constructed, altered or repaired upon the property or an improvement of the owner."[3] NRS 108.234(7)(b). In this case, Iliescu is not a disinterested owner as he indirectly caused architectural work to be performed pursuant to a contract with a prospective buyer.

While we have recognized in a lease context that the "knowledge of . . . intended construction" language is satisfied when the owner leases property with terms requiring the lessee to make all necessary

[3]A "disinterested owner" must also not have recorded a notice of waiver pursuant to NRS 108.2405. NRS 108.234(7)(a).

repairs and improvements, we have only determined as such when the agreement was actually completed. *See Gould v. Wise*, 18 Nev. 253, 259, 3 P. 30, 31 (1884). Unlike a completed lease agreement, the agreement between Iliescu and BSC was contingent upon completion of the purchase of the property. Because Iliescu was not a disinterested owner, and the agreement was contingent upon completion of the purchase of the property, Iliescu was unable to give a notice of non-responsibility to protect himself from mechanics' liens for offsite architectural work performed pursuant to a contract with the prospective buyer. Were we to apply the actual notice exception in these circumstances, a notice of non-responsibility may not protect property owners from costs incurred by prospective buyers when there has been no enhancement or improvement to the property.

In furtherance of the protections for property owners contemplated in NRS 108.245, we decline to extend the actual notice exception to the circumstances in this case. We thus conclude that the actual notice exception does not extend to offsite architectural work performed pursuant to an agreement with a prospective buyer when no onsite work of improvement has been performed on the property.

It does not appear from the record before us that any onsite work had begun on Iliescu's property at the time Steppan recorded his mechanic's lien for the offsite work and services he performed. And the record fails to reveal any benefit or improvement to Iliescu's property resulting from the architectural services Steppan provided. As such, the actual notice exception does not apply. Because the actual notice exception does not apply and there is no dispute that Steppan did not otherwise provide Iliescu with the required pre-lien notice, we conclude that the district court erroneously found that Steppan had substantially complied with NRS 108.245's pre-lien notice requirements.[4]

Accordingly, we reverse the district court's order foreclosing Steppan's mechanic's lien and remand this matter to the district court for it to enter judgment in favor of Iliescu.

CHERRY, C.J., and DOUGLAS, GIBBONS, PICKERING, PARRAGUIRRE, and STIGLICH, JJ., concur.

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[4]Based on our conclusion that the actual notice exception does not apply in this case, we do not reach Iliescu's argument regarding the applicability of NRS 108.245(6) when the actual notice exception does apply. Similarly, as our conclusion on the actual notice issue is dispositive, we decline to reach the parties' remaining arguments on appeal.