IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

GERTRUDE A. CARLSON,	)	
	)	
Appellant,	)	Case No: 22510
	)	
vs.	)	
	)	
AUSTIN W. CARLSON,	)	
	)	
Respondent.	)	

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

I. WHETHER THE REFEREE'S FINDINGS WERE SO CLEARLY ERRONEOUS THAT THE DISTRICT COURT JUDGE COULD SUMMARILY VACATE THOSE FINDINGS.

II. WHETHER THE DISTRICT COURT'S VACATING OF THE REFEREE'S FINDINGS COULD BE JUSTIFIED ON THE BASIS OF LACK OF JURISDICTION.

III. WHETHER THE REFEREE'S FINDINGS SHOULD HAVE BEEN AFFIRMED BECAUSE THOSE FINDINGS SET ASIDE AN UNCONSCIONABLY UNFAIR AND INEQUITABLE PROPERTY DISTRIBUTION, WHICH WAS BASED ON EITHER MISREPRESENTATION AND FRAUD OR MUTUAL MISTAKE.

STATEMENT OF THE CASE

Appeal from the Order entered June 19, 1991, summarily vacating Findings of Domestic Relations Referee; Eighth Judicial District Court, Clark County; Addeliar D. Guy, Judge.

Respondent Austin W. Carlson ("Austin") filed a complaint for divorce from Appellant Gertrude A. Carlson ("Trudy") in the Eighth Judicial District Court on May 1, 1990. ROA 1-6. Trudy Answered on May 29, 1990. ROA 9-11. The matter came on regularly for prove-up on August 17, 1990, and the Decree of Divorce issued the same day.

On February 13, 1991, Trudy brought her Motion for Relief from Judgment pursuant to NRCP 60(b), requesting that the property distribution in the Decree of Divorce entered August 17, 1990, be set aside. ROA 33-57. Austin filed his Opposition on February 15, 1991. ROA 58-83. On February 27, 1991, Frances-Ann Fine, Esq., Trudy's attorney during the original divorce proceedings, submitted her Affidavit to the Court. ROA 96-98.

After extensive briefing and argument, Domestic Relations Referee Steven E. Jones took the matter under submission on March 4, 1991. On April 23, 1991, the Referee issued Findings and Recommendations granting Trudy's motion, and directing Trudy's counsel to prepare the formal Referee's Report. It was submitted and was signed by the Referee on May 10, 1991. ROA 114-16.

Austin objected to the Referee's Report on May 17, 1991. ROA 103. Trudy responded. ROA 117-123. On June 19, 1991, the

Honorable Addeliar D. Guy summarily vacated the Referee's Findings and Recommendations. ROA 129-130. This appeal followed.

Notice of Entry of the Order was served by mail on June 26, 1991. ROA 131-34. The Notice of Appeal from the Order was timely filed on July 26, 1991. ROA 135-36.

STATEMENT OF FACTS

Austin and Trudy were married in San Francisco on January 19, 1965, and remained married for twenty-five years. Austin was employed by Kaiser Steel Corporation for twenty of those, and retired in June of 1984.

Trudy was not employed outside the home for the first twenty years of the marriage; she was responsible for raising the parties' children and maintenance of the residence. ROA 42. Trudy has a high school education; she attempted to re-enter the work force in 1986. Due to the twenty-year lapse in her employment history and lack of a higher education, she has little hope of accruing any significant wages or any retirement or pension rights in her own name. ROA 44.

Long before the divorce, the parties jointly elected as the form of pension benefit from Kaiser a "joint and survivor" annuity; the option was irrevocable. ROA 45. There is no way, by divorce or otherwise, that Austin can increase his monthly payments under the Plan to compensate for the survivor's annuity.[1] ROA 46.

Throughout their twenty-five year marriage, Trudy was subjected to fits of physical violence and psychological damage by Austin, who is an abusive alcoholic. ROA 42-44. Austin's own counsellor advised Trudy to seek a divorce because Austin was remorseless about the injuries inflicted by his violence, and the violence against Trudy could only be expected to escalate. ROA 43.

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[1] Plaintiff signed and filed with Kaiser an election naming Defendant as the beneficiary of the survivor's benefits payable upon his death.

On March 23, 1990, Austin and Trudy saw attorney Robert W. Lueck, Esq., together, to discuss a joint petition for divorce.[2] When they met again with Mr. Lueck on April 6, Trudy refused to sign the papers prepared by Mr. Lueck when she discovered she was expected to waive all rights to Austin's pension. ROA 43.

Although she specifically requested information regarding the value of the pension and her entitlement to it, neither Austin nor Mr. Lueck would secure it from New York Life pension department or provide her with it. On May 11, Trudy was served a summons and complaint for divorce, and sought counsel with Frances-Ann Fine, Esq. ROA 43, 96.

During the time she represented Trudy, Ms. Fine also sought information concerning the value of pension benefits available to Austin from Kaiser, and pension or other benefits which would be available to a divorced surviving spouse directly from New York Life Insurance.[3] Even though Austin eventually signed an authorization for release of his records to Ms. Fine, they did not cooperate. ROA 46, 96-97. The only document provided by Mr. Lueck as a result of discovery, a copy of the Kaiser Steel Pension booklet, simply described the plan in general terms. ROA 15.

As a result of the lack of information, Ms. Fine "relied upon representations by Austin W. Carlson and his counsel [Mr. Lueck] for the value of the pension; they represented that the division

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[2] Mr Lueck now represents Respondent in this appeal.

[3] Apparently, Kaiser's financial difficulties have resulted in New York Life administering much of their pension and other benefit plans.

arrived at constituted an essentially equal, and an equitable and fair division of assets." ROA 97.

The Decree of Divorce had awarded to Austin all rights in the Kaiser pension, along with most of the other community assets, and also gave him $10,000.00 for his interest in the community residence (the only major asset with which Trudy left the marriage), to be paid within 5 years, and secured by a Promissory Note and Second Deed of Trust in Austin's favor. ROA 27-28.

After the divorce, Trudy discovered that the survivor's benefits she thought she had were not secure since they were not restated in the Decree, and that the pension plan was far more valuable than had been represented by Austin and his attorney. ROA 43-44. As Ms. Fine described the situation by sworn affidavit:

> At the time of the Decree, with the information then available, I could not determine that the pension alone represented approximately three-fifths (3/5) of the marital assets which were accumulated during the parties' twenty-five year marriage. Certainly, a settlement giving Mr. Carlson 75% of the parties' community property was neither "fair and equitable" nor "essentially equal," as represented to me.

ROA 97.

On February 13, 1991, after discovering these facts, Trudy filed her Motion for Relief from Judgment. The motion listed the property received by its spouse and its value, noting that Austin received about 75% of the community property. ROA 35-38, 49-50. The motion was based on the alternative theories of mutual mistake or Austin's fraudulent misrepresentation, and requested that the property terms be set aside and a more equitable division be made. ROA 37-41. The motion also asked that the Decree be modified to

give effect to the survivor's benefits terms that the parties had elected in 1984.[4] ROA 38.

Austin opposed the motion, arguing that Trudy had not proven *extrinsic* fraud, and that Trudy's retention of counsel absolved Austin and his attorney of any responsibility for the accuracy of their representations since the divorce terms, however inequitable, were arrived at by "arm's length" agreement. ROA 58-67.

Trudy filed a Reply, refuting Austin's factual assertions and noting that Trudy's prior counsel had allowed the divorce on the terms put together by Mr. Lueck only in misplaced reliance on his representations of fact. ROA 89, 87-97. Austin subsequently filed another affidavit as to factual matters; it did not refute the claims of abuse, but stated that he never "threatened or bullied [Trudy] in an effort to coerce her into settling the divorce." ROA 100-102.

After submission of the written arguments and affidavits, counsel for the parties orally argued the matter at length before the Referee on March 4, at which time it was taken under submission.

During the pendency of the decision, the long-awaited statement of value from New York Life was sent to Trudy's former counsel. ROA 112. It corroborated Trudy's assertion that the pension was much more valuable than Austin had claimed. ROA 109-113.

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[4] It was learned that even before the divorce, Austin was trying to "cash in" Trudy's survivor's benefits. ROA 45.

The Referee "reviewed at great length" the written submissions of the parties and the oral arguments made, and found as a matter of fact that the pension was "a very substantial and valuable percentage of the total of the community assets," that Trudy had been unaware of the value of that asset when the property terms were arrived at, and that based upon the value of the asset and the parties' long-term marriage, Trudy had an entitlement to a fair and equitable portion of the community property pension. ROA 114-15.

The Referee therefore recommended that the property terms of the decree be set aside, and the parties attempt to settle the property terms, with a trial on the issue to be held if they were unable to do so. ROA 115.

Austin objected on four grounds. First, he asserted the court lacked jurisdiction to "modify a property settlement agreement voluntarily entered into." Next, he asserted that the Referee lacked jurisdiction to set the property terms aside on the basis that it was unfair and inequitable. Third, he asserted that Nevada law did not require an equal division of property. Fourth, he asserted that no "basis for relief" was shown under NRCP 60(b). ROA 104-108.

Trudy responded, noting that Austin had not shown that the Referee's Findings were arbitrary or capricious, that the court had authority under the very terms of NRCP 60(b) based upon *either* fraud or mistake, and that an adequate basis for relief had been set out. ROA 117-123. Austin filed a reply. ROA 125-28.

On the motion calendar of June 5, 1991, the District Court Judge summarily vacated the Referee's Findings. ROA 129-130. This appeal followed.

ARGUMENT

I. THE REFEREE'S FINDINGS WERE NOT "CLEARLY ERRONEOUS" AND THE DISTRICT COURT JUDGE SHOULD NOT HAVE SUMMARILY VACATED THOSE FINDINGS.

This Court has approved rules for the Eighth Judicial District Court requiring a Domestic Relations Referee to hear most post-trial motions related to domestic relations matters. *See* EDCR 5.81.

This court has recently held that a Domestic Relations Referee presented with conflicting evidence is to use his discretion in making findings and recommendations. *See Minnear v. Minnear*, 107 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 81, Jul. 12, 1991). This court found no abuse of discretion in the Referee's Recommendation, or the District Court's adoption thereof.

This court has previously noted that the applicable rules require that the District Court shall "accept the master's findings of fact unless clearly erroneous." *See Russell v. Thompson*, 96 Nev. 830, 834, 619 P.2d 537, 539 (1980); NRCP 53(e)(2).[5]

In the accompanying footnote, this court set out the instances that would permit the District Court to disregard such findings:

> the findings are based upon material errors in the proceedings or a mistake in law; or are unsupported by any substantial evidence; or are against the clear weight of the evidence.

96 Nev. at 834, 619 P.2d at 539-540, n.2 (citations omitted). In this case, the District Court made no ruling on any of these

[5] The *Russell* decision also stands for the general proposition that the District Courts should not delegate most divorce matters. Of course, that decision was prior to this court's adoption of rules setting up the Referee system in southern Nevada.

grounds, but simply, summarily, vacated the Referee's Findings and Recommendation.

The *Russell* court noted that our NRCP 53 is virtually identical to Rule 53 of the Colorado Rules of Civil Procedure. 96 Nev. at 834, 619 P.2d 539. The Colorado courts have held the trial courts to a similar standard. In *State, ex rel. Reynolds v. Niccum*, 695 P.2d 480 (N.M. 1985), the court recited the identical language of its version of NRCP 53, and held:

> Only when there is total lack of substantial evidence to support the special master's findings, is the court warranted in rejecting the master's report. . . . When there is substantial evidence the special master's findings are binding upon the trial court. . . . The special master's findings are presumed to be correct and when there is any testimony consistent with the findings, they must be treated as unassailable.

695 P.2d at 482 (citations omitted).

In this case, Referee Jones had before him extensive documentary evidence, several sworn affidavits, and the appearances of counsel in extended argument. The Referee conducted independent research after taking the matter under advisement. The Referee's Findings were entitled to greater deference than they received. *See Diversified Capital v. City N. Las Vegas*, 95 Nev. 15, 23, 590 P.2d 146 (1979) (noting standard at District Court level and holding that "on appeal, the question is whether the master's findings are clearly erroneous as a matter of law"); *Schmidt v. Colonial Terrace Associates*, 694 P.2d 1340, 1344 (Mont. 1985) (same rule in that state).

Decisions from other jurisdictions with similar rule sets have specified that a trial court is not to set aside a master's

findings just to reweigh the evidence; the question for the trial court is whether there was substantial evidence to support the master's findings. *See, e.g., Pena v. Westland Development Co., Inc.*, 761 P.2d 438 (N.M. Ct. App. 1988). Where a trial court's findings are contrary to the factual findings of a master, the appellate court owes no deference to the trial court's findings. *Sloan v. Jefferson*, 758 P.2d 81 (Alaska 1988).

As demonstrated below, there was no jurisdictional defect, and the Referee had substantial evidence before him for each finding in the Referee's Report. Since the Referee's Findings were not "clearly erroneous," the District Court Judge should not have vacated them.

II. THE DISTRICT COURT'S VACATING OF THE REFEREE'S FINDINGS CANNOT BE JUSTIFIED ON THE BASIS OF LACK OF JURISDICTION.

As the District Court did not specify the grounds on which it vacated the Referee's Findings, it appears necessary to show that none of Austin's grounds for attacking those findings are valid.

Austin asserted two jurisdictional grounds: that the court lacked jurisdiction to "modify a property settlement agreement voluntarily entered into" and that the Referee lacked jurisdiction to set the property terms aside on the basis that it was unfair and inequitable.

Austin's first jurisdictional claim was based upon NRS 125.150(6), which states that the court cannot modify a Decree of Divorce unless there is a written stipulation of the parties. That statute has no application to this case, since it merely states

that the court *may* modify a Property settlement at any time upon written stipulation of the parties. The statute does *not* limit the power of the court to modify a Property Settlement Agreement under NRCP 60(b) when there are grounds for such a motion and the motion is timely filed. Thus, Austin's first jurisdictional claim was without merit.

Second, Austin challenged the court's power to set aside the property terms in a Decree of Divorce "just because" they are unfair and inequitable. In *Kramer v. Kramer,* 96 Nev. 759, 762, 616 P.2d 395 (1980), this court held:

> Absent specific authorization for continuing jurisdiction over property rights, NRCP 60(b) *governs* motions to modify property rights established by divorce decrees. In re Marriage of Gallegos, 580 P.2d 838 (Colo. App. 1978).

(Emphasis added). NRCP 60(b)(1)-(2) on its face allows a party to file a motion within six months after a decree issues, seeking to set it aside for mistake, inadvertence, surprise, or excusable neglect, or for fraud, misrepresentation, other misconduct of the adverse party.

As set out in the following section, there was ample evidence before the Referee showing that Austin deliberately defrauded Trudy. The most charitable interpretation of the facts before the Referee indicated that Austin "mistakenly" walked off with about 75% of the parties' property, and was simply wrong rather than deceitful when he and his attorney represented that the assets were being evenly divided.

In either event, since the Referee had evidence of either fraud or mistake in front of him, the Referee had jurisdiction to find that the Decree was inequitable despite being "voluntarily" entered into, and the court had jurisdiction to set aside the property terms of the decree *because* it was inequitable. *See Peterson v. Peterson*, 105 Nev. 133, 771 P.2d 159 (1989).

III. THE REFEREE'S FINDINGS SHOULD HAVE BEEN AFFIRMED BECAUSE THOSE FINDINGS SET ASIDE AN UNCONSCIONABLY UNFAIR AND INEQUITABLE PROPERTY DISTRIBUTION, WHICH WAS BASED ON EITHER MISREPRESENTATION AND FRAUD OR MUTUAL MISTAKE.

Austin had only two other grounds for attacking the Referee's Findings. He asserted that Nevada law did not require an equal division of property, and that no "basis for relief" was shown under NRCP 60(b). ROA 104-108.

A. The Property Division Was Not "Fair and Equitable"

Trudy concedes that Nevada law does not require an equal division of community property assets, but only a fair and equitable division. *See McNabney v. McNabney*, 105 Nev. 652, 782 P.2d 1291 (1989). It does not follow, however, that Austin should have received the bulk of the community property by means of his misrepresentation of its value.

In most cases it would not be proper for the husband to walk out with two-thirds to three-quarters of the parties' marital property while paying no alimony. The facts of this case are closer to those of *Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988), than they are to *McNabney, supra*. The parties had a lengthy

marriage, and Trudy left the marriage with "virtually nothing."[6] It is simply impossible for this property division to satisfy *any* test of being "equitable and fair." With the additional factor of Austin's long-standing abuse of Trudy, there can be no defense of the terms of the divorce decree.

Further damning Austin's position is the unrefuted testimony of Ms. Fine that only Austin and his attorney *ever* claimed that the property *was* being equally divided. This court should hold as a matter of law that such a false representation, once shown to be false, is *prima facie* adequate to support a motion under NRCP 60(b) to set aside the property division. Austin must not be given the approval of our courts to both lie and steal.

B. A "Basis for Relief" Under NRCP 60(b) was Adequately Demonstrated

This case is very similar to *Petersen v. Petersen,* 105 Nev. 133, 771 P.2d 159 (1989). In that case, a wife was victimized by an inequitable property settlement. Citing *Nevada Industrial Dev. v. Benedetti,* 103 Nev. 360, 364, 741 P.2d 802, 805 (1987), this court reiterated that "the salutary purpose of Rule 60(b) is to redress any injustices that may have resulted because of excusable neglect or the wrongs of an opposing party. Rule 60 should be liberally construed to effectuate that purpose."

[6] A listing of the assets received by each party, with their estimated values, was presented to the Referee. ROA 49-50. Those valuations were never specifically refuted by Austin.

In this case, as in that one, the wife lacked certain critical information about the value of the community estate at the time of the divorce. In this case, as in that one, the wife secured counsel to rectify the error as soon as she was aware of what had been done to her, and within the six months allowed by NRCP 60(b).

When the motion was filed, it was believed that Austin received some $123,567.00 (about 75% of the total), and that Trudy received approximately $41,200.00 (about 25%). ROA 49. The information later received from the pension plan administrator could require a modest adjustment to those figures. ROA 109-113. While the court has not yet made a precise finding on the value of the assets, it is clear that the division as set out in the decree is unconscionable.[7] ROA 50. As to why the division occurred as it did, there are only two explanations: mistake or fraud.

On the *presumption* that Austin is innocent of concealing facts known to him regarding the value of the benefits, the best that can be said is that the parties were both unaware that Austin's proposed property division effected a three-to-one property split in his favor, although it is clear from the correspondence between counsel that at least Trudy's counsel thought that they were taking steps to divide the property of the parties almost equally.

This mistaken belief alone would justify the relief sought by Trudy under *Petersen*. Austin has maintained throughout this case

[7] Essentially, Trudy received about $8,500.00 more out of the equity in the family home than she would have received under a simple 50/50 split. Austin got all rights to the $100,000.00 in pension rights "in exchange" for that award to her.

that the existence of Ms. Fine as counsel absolves him of responsibility for misrepresentation. In this case, however, the protective function that counsel was meant to serve was subverted by the very misrepresentation at issue. Ms. Fine has explicitly stated that she would never have agreed to the terms proposed if Austin's counsel had not misrepresented the facts to her. ROA 96-97.

In *Petersen*, the court stated that an alternate ground on which a 60(b) motion should be entertained on its merits is to correct any injustice resulting from the wrongs of an opposing party.

It seems quite likely that Austin knew all along that he was getting away with the bulk of the community property.[8] He was certainly in a superior position to acquire that knowledge.

Additionally, Austin's conduct interfered with Trudy's abilities to look out for her own best interests. He physically abused her. In one incident in the fall of 1987, Austin went into a rage after drinking heavily and fractured Trudy's ribs. In November of 1989, he went into another rage which caused Austin to seek professional help. The counselor insisted that Austin move out of the house and that Trudy change the locks on the house. While Austin did move out of the house, he continued to threaten, harass, and abuse Trudy.

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[8] Austin's efforts to cash in Trudy's survivor's benefits indicates that he took a careful, calculating approach to the retirement benefits, and had investigated their attributes and values. ROA 45.

During December of 1989, and the first part of 1990, Austin and Trudy attended counseling sessions together. Don Harris, Austin's counselor, suggested that Austin join AA and advised Trudy that she could expect the violence in their marriage to escalate. He further advised her to seek a divorce as he saw no effort on Austin's part to acknowledge that he had a drinking problem, and no remorse for the physical injuries he had caused Trudy in the past.

As set out in the incidents above and supported by the letters from the counsellors provided to the Referee, the pattern of abuse Trudy suffered left her "distraught and frightened." ROA 56-57. In these circumstances, Austin's wrongful conduct in creating that condition justified Trudy's post-divorce bringing of a motion to set aside the property terms of the decree.[9] Austin's belated claim that he did not beat her in order to coerce her is irrelevant; that was the result of his actions. ROA 101.

Public policy demands that situations such as this be corrected. *See generally Benedetti, supra,* holding that correcting unjust enrichment outweighs the policy of *res judicata*.

Trudy demonstrated, at minimum, excusable neglect and mistake on her part, and misconduct and mistake by Plaintiff. In the proceedings before the Referee, Trudy established entitlement to

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[9] Our supreme court stated in *Murphy v. Murphy,* 103 Nev. 185, 734 P.2d 738 (1987), that one party's wrongful conduct that causes such fear on the part of the other party can constitute a fraud on the court. If counsel had not been involved, even the six month limit of NRCP 60(b) would not prevent the bringing of this action. *Id*. Presumably, the existence of counsel would cause this court to more strictly apply the six month limit; in this case, of course, the motion was timely filed within six months of the decree.

relief from the property distribution of the Decree under NRCP 60(b)(1) and (2).

Finally, Trudy established that the Decree should be amended to certify that Trudy as the "surviving spouse" she believed herself to be under the federal rules governing survivor's benefits.

Trudy believed until after the divorce that she was already designated irrevocably as the surviving spouse by means of the parties' 1984 election. ROA 45. Despite the parties' pre-divorce payment for survivor's benefit annuity, however, Trudy will not actually receive it unless the court amends the Decree to provide that a Qualified Domestic Relations Order ("QDRO") formally designating Trudy as Austin's "surviving spouse" for purposes of the Retirement Equity Act should be prepared and filed. ROA 35. *See* Retirement Equity Act of 1984 ("REA"), Pub. Law No. 98-397. ROA 35.

The plan that the parties *jointly* selected, and accepted reduced present benefits during marriage in order to receive, is to pay $807.20 per month to Austin; it will continue to do so for the rest of his life. Presuming a QDRO is in place to show Trudy as the "surviving spouse," she would receive the *same* sum for three years, and then *half* that amount for the remainder of *her* life. ROA 45, 47.

Even if nothing else was done, just filing the QDRO to so deem Trudy will provide her with a lifetime of income after Austin's death *at no cost whatsoever to Austin*, with a present value of some

$14,000.00. All of the specific numbers underlying this argument were submitted to the Referee. ROA 37, 52.

Trudy did not know of these requirements when the decree was entered. If the parties were mutually ignorant of the necessity for the drafting of a QDRO and the making of a surviving spouse designation, then it is submitted that there was an adequate mutual mistake of fact to justify setting aside the property settlement and modifying the decree. If Austin knew that Trudy would be deprived of the benefit that she believed she was to receive, of course, his silence when asked for such information would constitute fraud.[10]

CONCLUSION

Put bluntly, this case concerns the economic rape of an abused housewife by her alcoholic husband after a twenty five year marriage. She sought to correct the gross inequity of the property division set out in the decree as soon as she realized what had been done to her, and within the sixth month limit of the rules.

The Referee had before him both parties, the affidavits of those with knowledge, and all relevant economic and other data. He made carefully considered Findings designed to correct the mistake or fraud evident in the decree. Those Findings were certainly

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[10] Ms. Fine asserted a claim for those survivor's (death) benefits and asked for information relating thereto at the joint case conference. ROA 15. Austin's counsel provided a document appearing to state that Trudy had been irrevocably elected as beneficiary. ROA 15, 47-48. If he knew that this was not the case, he had an obligation to say so. *See* SCR 173.

within the range of the Referee's discretion, but were summarily vacated by the District Court Judge.

The Referee's Findings and Recommendations were not arbitrary, capricious, or an abuse of discretion, and were not so "clearly erroneous" that they should have been vacated. The District Court's summary order vacating those Findings should be reversed, and the matter should be remanded for entry of Judgment in accordance with the Referee's Recommendations.

Respectfully submitted,
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