IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

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

APPELLANT'S REPLY BRIEF

MARSHAL S. WILLICK, ESQ.
Attorney for Appellant
330 S. Third St., #960
Las Vegas, NV 89101

ROBERT W. LUECK, ESQ.
Attorney For Respondent
431 S. Sixth St.
Las Vegas, NV 89101

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL STATUTES

MISCELLANEOUS

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

Appellant ("Trudy") refers the Court to the Statement of the Case contained in Appellant's Opening Brief ("AOB") at 2.

STATEMENT OF FACTS

Trudy refers the Court to the Statement of Facts contained in Appellant's Opening Brief at 4. The comments below only address inaccuracies in Respondent's factual submission.

Respondent ("Austin") alleges that the pension plan with Kaiser only provided benefits to Trudy if the parties remained married, and that a divorce would terminate the rights of the surviving spouse. Respondent's Answering Brief ("RAB") at 3.

The assertion is incorrect. The Kaiser plan, like all such plans, conforms to the provisions of the Retirement Equity Act of 1984 ("REA"),[1] and the Employee Retirement Income Security Act ("ERISA").[2] Under the applicable federal acts, the plan provides for payments to a surviving *former* spouse who is to be considered the "surviving spouse" if so named in the Decree of Divorce.

Trudy objects to the extended assertions at pages three through five of Austin's "statement of facts," which is devoid of any citations to the record. The absence of citation is readily explained by the content of the assertions, which are subjective conclusions as to the knowledge of the parties, the state of mind

---

[1] Pub. L. No. 98-397, § 103(a), 98 Stat. 1429 (1984), amending 29 U.S.C. § 1055.

[2] Pub. L. No. 93-406, 88 Stat. 829 (1974); 29 U.S.C. § 1001 *et seq.* (1974).

of their attorneys, and alleged conversations among attorneys and parties.

The entire "statement" is improper and should be disregarded by the Court. *See State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984) (quotation of legal and factual matters without citation, and reference to matters outside the record, may cause sanctions to be imposed by the Court). It is respectfully requested that Respondent's Statement of facts be stricken.

ARGUMENT

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

Austin asserts that the Referee's Findings and Recommendations were "clearly erroneous," without ever defining the meaning of the phrase. RAB at 6-7.

This Court has held that factual findings are to be considered "clearly erroneous" when there is no support in the record to support them, *Hermann v. Varco-Pruden Buildings*, 106 Nev. 564, 796 P.2d 590 (1990), but not when the fact-finder has examined conflicting evidence and made findings compatible with evidence before it. *See Trident Construction v. West Electric*, 105 Nev. 423, 776 P.2d 1239 (1989).

Austin asserts that the Referee's factual and legal findings must be clearly erroneous because Trudy did not raise cognizable issues. RAB at 6. Specifically, he argues that Trudy made only a "vague claim that somehow she had been abused" by Austin during the marriage. RAB at 6. Actually, her claims were quite specific and before the Referee by affidavit, ROA 42-44, and were supported by the statements of therapists and counsellors. ROA 56-57.

Austin also asserts that Trudy did not raise an issue about the fairness and equity of the property split. RAB at 6. Actually, Trudy argued, and the Referee found as a matter of fact, that the omitted asset was "a very substantial and valuable percentage of the total of the community assets" and that the property split made in ignorance of the value of that asset "was not fair and equitable." ROA 115.

Austin concludes that neither of the points raised by Trudy (i.e., physical abuse by Austin or gross inequity in property division) "could support Trudy's Motion," so that the Referee "had no legal basis" to enter his Findings.[3] RAB at 6-7.

The argument and conclusion put forward by Austin are astonishing. First, his argument is devoid of any legal authority whatsoever, and thus need not be considered. *See Weber, supra*; *Carson v. Sheriff*, 87 Nev. 357, 487 P.2d 334 (1971). Second, this Court has clearly stated that a property division may be set aside *either* because the husband acquired it by beating up the wife *or* because it inequitably divides the property. *See Murphy v. Murphy*, 103 Nev. 185, 734 P.2d 738 (1987); *Peterson v. Peterson*, 105 Nev. 133, 771 P.2d 159 (1989). Certainly, it may be set aside when *both* of these factors are present.

There was evidence before the fact-finder establishing physical abuse and an inequitable property division. The Findings and Recommendations of the Referee were not "clearly erroneous" and should not have been summarily vacated. Rather, the District Court was required to accept those findings. *Russell v. Thompson*, 96 Nev. 830, 834, 619 P.2d 537, 539 (1980); NRCP 53(e)(2).

[3] Austin makes a throwaway assertion that there *was* no factual issue before the Referee, but "only a question of law whether or not Trudy was entitled to set aside the Divorce Decree." RAB at 7. This assertion flies in the face of the cases cited above, is unsupported by citation to authority, and borders on the silly.

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

Again, Austin's argument is without authority, and appears intended to misdirect this Court. He asserts that because the parties *can* stipulate to modify a decree of divorce, the courts are unable to modify a decree without both parties' agreement. RAB at 7-8. The argument is nonsense; NRCP 60(b) and NRS 125.150(6) have nothing to do with one another.

Next, Austin appears to argue that Trudy did not adequately claim that there had been mistake or fraud. RAB at 8. When Ms. Fine, an officer of the court, swore that Austin's counsel lied to her (either deliberately or accidentally), she provided evidence that the result of the case was caused by either Austin's fraud or Austin's mistake. ROA 96-97. It is hard to imagine how the claim of mistake or fraud could have been more clearly stated. *See* ROA 37-41.

The remainder of Austin's argument at pages 8-13, under the heading "The Referee Did Lack Jurisdiction to Set Aside the Decree of Divorce," has nothing to do with jurisdiction of the Referee.

Instead, Austin asserts that what is "fair and equitable" is "a subjective opinion" dependent upon questions of fact and law. RAB at 8. Of course, this unsupported assertion contradicts his earlier unsupported assertion that the Referee did not have a question of fact before him. Apparently, Austin's argument is that if Trudy obtained anything at all out of the divorce, she cannot complain that the property split was inequitable. RAB at 8-9.

Austin inaccurately and incompletely recites a list of property obtained by the parties. RAB at 9. The only evidence

presented below as to the value of assets was presented by Trudy, who showed that Austin received between two-thirds and three-quarters of all the community property. ROA 35-38, 49-50, 109-112.

The only authority presented by Austin that requires discussion is his citation of *Anderson v. Anderson*, 107 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 95, Aug. 28, 1991). Austin represents that the case expresses this Court's approval of his dispossessing Trudy of most of the parties' community property. *See* RAB at 10.

Actually, *Anderson* merely states that in a case in which there *were* offsetting economic factors, the parties were free to compensate by splitting up their cash resources into unequal piles. Here, Austin seeks to make off with virtually all property with *no* offset; *Anderson* has no relevance to this case.

The remainder of Austin's argument is a dissertation on the facts of Nevada extrinsic fraud cases since 1947.[4] RAB at 10-13. He appears to argue that Trudy could not have proven extrinsic fraud if the matter had been tried as the Referee recommended. The question is hypothetical, since trial was not held. As he did in the hearings below, Austin falsely implies that there was some independent property settlement agreement apart from the Decree. *See*, *e.g.*, RAB at 10, 13.

In any event, Austin sets forth neither cases nor statutes which even hint that Nevada's courts lack jurisdiction to set aside a divorce decree procured by either mistake or fraud. The absence of authority is reasonable, since this Court has clearly stated --

[4] Austin's argument is peppered with references to alleged conversations and actions outside the record (*e.g.*, RAB at 11, lines 25-27). These references should be disregarded by the Court.

repeatedly -- that either ground, if established, justifies post-divorce actions to set aside an inequitable property division. The Referee had jurisdiction to find that the decree was inequitable and unfair, and that it should be set aside.

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.

Instead of even addressing this argument, Austin merely incorporates his previous exposition on extrinsic fraud by reference. RAB at 13.

Since Austin has not seen fit to even argue that the valuations supplied by Trudy below were in any way inaccurate, he concedes that he made off with the bulk of the parties' community assets. *See* AOB at 14-16.

Austin has never gone on record to assert whether he and his attorney *knew* they were lying when they asserted that the pension was worth so little that it made the property division "essentially equal." ROA 96-97. Nor does it make much difference how this case might be analyzed by this Court in the *absence* of his mistaken or fraudulent assertion.

In this case, the gross inequity in the property division was directly caused by false statements made by Austin and his counsel. The falsehood of their assertions was discovered within six months of entry of the decree, and brought to the attention of the Referee, who found as a matter of fact that Trudy was ignorant of the facts and that the value of the asset was a very substantial and valuable percentage of the total community assets. ROA 115.

Austin has not seen fit to challenge Trudy's assertion that at a minimum, the record show excusable neglect and mistake on her part, and Austin's misconduct and deceit or (at best) accidental fabrication. *See* AOB at 15-18. He does not even try to show any meaningful distinction between this case and *Peterson, supra*.

Austin has not addressed at all Trudy's belief during the divorce proceedings that she remained the beneficiary of the survivor's benefits for which she had paid for several years, or her request for a technical amendment to the decree to so show, which would cost him nothing. *See* AOB at 19-20.

He has not denied that the document he supplied was intended to mislead Trudy into thinking she remained the beneficiary of those benefits. *See* AOB at 20, n.10. Austin is silent as to the responsibility of the courts to correct such a glaring error when it is brought to their attention within the allowable time.

Austin's silence on these matters speaks volumes. It simply cannot be denied that the property distribution in the decree was grossly weighted in Austin's favor, and that the distribution was caused by either Austin's deliberate fraud, or his "innocent" misrepresentation of the facts. Austin's objection to the Referee's Findings and Recommendations, which corrected this inequity, should have been overruled.

IV. AUSTIN'S REQUEST FOR SANCTIONS SHOULD BE DENIED.

With gall apparently intended to challenge the traditional illustration of chutzpah,[5] Austin asks for sanctions upon appeal despite his failure to cite any relevant authority to support his positions. RAB at 13-14. He actually asserts that where an abusive drunkard beats and otherwise oppresses his wife of thirty-four years, lies about the extent of their assets, and finally cheats her out of the bulk of what little property they have, and then is found out within six months of the date of divorce, there is no basis for setting aside the decree. RAB at 14.

While that may be the rule where wives are chattel, it is not the law of this state, as shown by this Court's holdings in *Peterson, supra*, and *Murphy, supra*. Howsoever this Court decides the legal merits of this case, Austin's request must be denied.

CONCLUSION

The result of the Judge's summary vacating of the Referee's Findings and Recommendations is indefensible.

The Referee's Findings and Recommendations were not "clearly erroneous" and should not have been vacated. The District Court's

[5] Often stated as the argument of a man, who having killed his father and mother, begs mercy from the sentencing court on the ground that he is an orphan. Attributed to Abraham Lincoln, as quoted in D. Shrager and E. Frost, *The Quotable Lawyer* 218 (1986).

summary order vacating those Findings should be reversed, and the matter should be remanded for entry of Judgment in accordance with the Referee's Findings and Recommendations.

Respectfully submitted,
MARSHAL S. WILLICK, ESQ.

By:_____
Marshal S. Willick, Esq.
Attorney for Appellant

411.01