IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

EDWIN ALVIN EPSTEIN,	)	
	)	
Appellant,	)	Case No: 28590
	)	
vs.	)	
	)	
URSULA ALWINE EPSTEIN,	)	
	)	
Respondent.	)	

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

This is an appeal from denial of Motion for Relief from Judgment requesting that the Decree of Divorce obtained by default judgment be set aside; Hon. Michael P. Gibbons, Ninth Judicial District Court, Douglas County, Nevada. Plaintiff, Respondent Ursula Alwine Epstein ("Ursula") filed for divorce, on December 19, 1994. I ROA 1. Appellant, Edwin Alvin Epstein retained The Law Office of Marshal S. Willick in Las Vegas, Nevada to represent him in May, 1995 and Mr. Willick advised counsel for Ursula by telephone that he would be representing Edwin. I ROA 113. Additionally, from January 17, 1995 to October 3, 1995, counsel for both parties communicated in writing and engaged in settlement negotiations. I ROA 113 through 118; I ROA 122.

Then, on September 14, 1995, Ursula, mailed from Lake Tahoe, a Praecipe for Default and Affidavit in Support of Divorce by Default addressed to Edwin himself and to Mr. Willick. I ROA 12, 13. Both Edwin and his counsel were located in Las Vegas, Nevada. The next day, September 15, 1995, Ursula took Default. I ROA 16.

A Decree of Divorce was entered on October 3, 1995. I ROA 18. A Qualified Domestic Relations Order was also entered on October 3, 1995. I ROA 24.

Edwin filed a Motion for Relief from Judgment on December 1, 1995. I ROA 46. Ursula filed a response on January 29, 1996. I ROA 74. The Court entered its Order denying Edwin's Motion for Relief from Judgment on March 13, 1996. I ROA 189. Edwin filed Notice of Appeal on April 16, 1996. I ROA 205.

STATEMENT OF THE FACTS

Edwin and Ursula were married for twenty-nine years. The Decree of Divorcee Ursula obtained by default does not accurately address the community property obtained during the 29 year marriage. Edwin's affidavit in support of his Motion for Relief from Judgment states that while he was hospitalized in southern Nevada, "Ursula set up her household in South Lake Tahoe, California knowing full well that I could not live there. After taking what she wanted, she sent belongings to southern Nevada for me..." I ROA 58. Additionally, in his Affidavit in Support of Reply to Plaintiff's Response to Motion for Relief From Judgment, Edwin states, "...I believe that she set her plan in motion in March of 1994. Prior to that, Ursula made sure to gather everything in the way of personal possessions, both community and my separate property, and I was left with no choice at all as to these items. In short, Ursula took everything that she could fit into her present house..." I ROA 131. Edwin was precluded from conducting discovery and would offer that an approximated breakdown of the community property each of the parties had upon divorce would indicate that Ursula obtained some 70% and Defendant Edwin received about 30%.

Edwin is 67 years old, in poor health, suffers from diabetes and arthritis, has undergone four eye surgeries and has had a toe amputated. I ROA 57, paragraph 6; I ROA 132, paragraph 5; I ROA 135-188. Due to leg surgery he was hospitalized and unavailable to assist counsel for periods during negotiation of a settlement in this matter. I ROA 57, paragraph 6. Further, Ursula knew that Edwin would be in Germany in September and October 1995. I ROA 57, lines 26-28.

As set out below, Ursula prevented Edwin from presenting the merits of his case to the court when Edwin could not be coerced into settlement on Ursula's terms.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT THE DEFAULT JUDGMENT WAS ENTERED WITH SUFFICIENT AND FAIR NOTICE

Not only did Ursula obtain a default and a division of property in a manner which circumvented the procedural requirements of NRCP 60(b), she further failed to provide Edwin with the mandatory three days notice of intent to take default as required by NRCP 55(b)(2).

The procedures for obtaining entry of default and a default judgment are provided for under NRCP 55. Two steps must be taken: (1) entry of default by the clerk; and (2) subsequent entry of judgment by default. *See* NRCP 55; *See also* 6 Moore, *Federal Practice* Sec. 55.02[3] at p. 55-9.

Entry of judgment by default can occur in either of two ways. Judgment can be entered by the clerk of the court where the claim against the defendant is for a "sum certain or for a sum which can by computation be made certain." *See* NRCP 55(b)(1). In all other cases, such as the instant divorce matter where the property division is not set forth in the complaint (I ROA 2, paragraph V), judgment by default must be entered by the court following an application therefor. *See* NRCP 55(b)(2). Where, as in Edwin's case, a default judgment requires an application to the court, the provisions of NRCP 55(b)(2) further mandate that the plaintiff serve upon the defendant at least three (3) days notice of the application for default judgment.

Moreover, when a defendant has made an appearance in an action, the failure to give the notice mandated by NRCP 55(b)(2) renders a subsequent default judgment void. *Gazin v. Hoy,* 102 Nev. 621, 624, 730 P. 2d 436 (1986); *Christy v. Carlisle,* 94 Nev. 651, 654, 584 P. 2d 687 (1978); *McNair v. Rivera,* 110 Nev. 463, 469, 874 P. 2d 1240 (1994). The district court erred in finding that no appearance by counsel was entered.

In this regard, in *Gazin v. Hoy, supra,* this Court reversed the order of the district court insofar as it refused to set aside the default judgment and held:

> A plaintiff must give written notice of an application for a default judgment to any defendant that has appeared in the action. *See* NRCP 55(b)(2). An appearance for purposes of NRCP 55(b)(2) does not require a presentation or submission to the court; indeed, a course of negotiation between attorneys is sufficient to constitute an appearance for purposes of NRCP 55(b)(2) where the defendant has indicated a clear purpose to defend the suit. *See Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 598 P.2d 1147 (1979); *Christy v. Carlisle,* 94 Nev. 651, 584 P.2d 687 (1987). When the defendant has made an appearance in an action, the failure to give the notice preseribed by NRCP 55(b)(2) renders a subsequent default judgment void. *See Christy,* 94 Nev. at 654, 584 P.2d at 689; *See also Reno Raceway, Inc. v. Sierra Paving,* 87 Nev. 619, 620, 492 P.2d 127, 127 (1971).

Likewise, in *McNair v. Rivera, supra*, the defendant moved to set aside a default judgment on grounds that the plaintiff failed to give the requisite notice under NRCP 55(b)(2). This Court held:

> We conclude that Rivera violated the statute by not providing McNair with three (3) days notice of the prove up hearing, thus rendering the default judgment void. [citation omitted] and subject to a motion for relief under NRCP 60(b)(3).

McNair, 110 Nev. at 469.

Furthermore, Section 1019 of the *Nevada Civil Practice Manual* (Third Edition 1993) entitled "The Notice of Hearing" states:

> Where there has been an appearance, the hearing must be conducted with written notice to the defaulting party. The notice must be given at least three (3) days before the hearing. NRCP 55(b)(2)... To give the defaulting party sufficient opportunity to appear, the notice should contain the date, time and place of the hearing, identify the department and (if possible) the judge who will here it.

Section 1019 at p. 158. The *Manual* further states:

> The failure to give notice and provide a hearing is a fatal procedural error because without proper notice the judgement is void and will be set aside.

Id. at 158.

Upon review of the Record on Appeal, it is undeniable that Edwin communicated with counsel for Ursula before he retained counsel and that he intended to defend this action. I ROA 112. On May 11, 1995 Edwin's counsel, Mr. Willick, spoke with counsel for Ursula and advised that he would be representing Edwin. I ROA 113. Also evident from the Record, is the impatience and petulance of Ursula in that her counsel was not satisfied with having to speak with a "law assistant" who indicated she would try to get an Answer on file within the next week, and in direct response, Mr. Hambsch clearly stated that, " ***This is not acceptable."*** I ROA 113. Mr. Hambsch in his June 7, 1996 letter admits that he was told that Mr. Willick would be representing Edwin. Further, Mr. Hambsch was told that an Answer would be forthcoming within the next week. Nevertheless, Mr. Hambsch requested the "courtesy" of a return call regarding representation of counsel, despite already knowing that Mr. Willick represented Edwin. As such, the district court abused its discretion in finding that no appearance by Edwin's counsel was ever entered. I ROA 189.

Mr. Hambsch acknowledged that he was told an Answer would be filed, yet his correspondence substantially belied his client's intentions to obtain a formal, filed Answer. This June 1995 letter illustrates that, from the beginning, Ursula and her counsel stated they wanted something and when advised they would receive it, they would in turn state they wanted something different. Ursula was told she would receive a filed Answer which was "not acceptable" as she really wanted telephone communication from Edwin's counsel.

Further, the letter admits that on May 10, 1995, Edwin had been advised to file an answer to avoid default, the answer was not filed and neither was the default taken as of June 7, 1995. As Edwin and his counsel engaged in the negotiation process with Ursula, one thing became apparent: that Ursula's letter representations regarding default could not be relied upon as meaningful or genuine, and therefore, were not sufficient or fair notice of anything other than Ursula's arbitrary negotiation tactics.

Upon further review of the Record on Appeal, it is also undeniable that Ursula never filed or served a three-day notice of her intent to take default or her application for default judgment. In *Gazin v. Hoy, supra,* the respondent never served appellant with the required notice of respondent's intent to obtain the default judgment; indeed, the default judgment was obtained the day after entry of appellant's default and that default was void. *Id.* at 624. Similarly, Ursula mailed the Precipe for Default and then took default the next day. The purpose of the notice requirement is to eliminate unfairness and surprise and the record shows that Edwin was informally by letter informed of an apparently empty intention of Ursula as to default, which was never acted upon until over eight months later. It is respectfully submitted that after nine months of communication and negotiation, a properly served Praecipe for Default would have provided fair and sufficient notice of a valid formal intention to take Default. Simply put, Ursula did not comply with the mandates of NRCP 55(b)(2). Accordingly, the default judgment should be set aside as void.

Additionally, due process requires a judgment taken without any notice to be set aside. The Supreme Court of the United States has held that a meritorious defense need not be shown where a default or default judgment is entered without any notice to the defendant. *See Peralta v. Heights Center, Inc.,* 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988). In the instant matter, by the time

counsel for Edwin received the Praecipe for Default, Affidavit in Support of Divorce by Default and a copy of the "proposed" Default, all had already been taken and entered the day after they were mailed to Las Vegas.

Upon receipt, Edwin prepared his Answer and the undersigned contacted counsel pursuant to NRCP 60(d) for Ursula who advised that the Default had been filed and would not be lifted. Furthermore, the district court erred in finding that counsel for Ursula did not violate SCR 182 by communicating directly with Edwin by mailing him a copy of the Default and then copies of the already entered Decree of Divorce and Qualified Domestic Relations Order. I ROA 34; I ROA 39.

The district court also erred in finding that Ursula's counsel did not violate SCR 175. Counsel for Ursula was informed as to the identity of Edwin's counsel and that Edwin intended to proceed with the lawsuit, and Mr. Hambsch admitted that an impasse had resulted from the respective positions of the parties. I ROA 112; *See* SCR 175; *Gazin v. Hoy,* 102 Nev. 621, 730 P.2d 436 (1986)(a course of negotiation between attorneys is sufficient to constitute an appearance for purpose of written notice requirement); *Rowland v. Lepire*, 95 Nev. 639, 600 P.2d 237 (1979)(judgment annulled and remanded where plaintiff's counsel had default entered and later secured default judgment without notice to defendants' counsel); *Price v. Dunn*, 106 Nev. 100, 787 P.2d 785 (1990)(reversal of order denying motion to set aside default judgment terminating parental rights; judicial policy favoring a decision on the merits heightens in domestic relations matters). Edwin's response had been sufficient to indicate that he wished to proceed and contest this matter. As such, before judgment can properly be entered, Edwin was entitled to notice and hearing. *See* NRCP 55(b)(2).

II. THE DISTRICT COURT ERRED IN RULING THAT THE DIVISION OF COMMUNITY PROPERTY WAS NOT PROCURED BY FRAUD

Ursula committed a fraud upon the court by mischaracterizing Edwin's separate property as community property and otherwise causing the court to divide the community property in an unequal and inequitable way. The district court erred in finding that the decree was not procured by fraud and that there was no coercion on Ursula's part. The court ignored Edwin's affidavits stating he was distressed by Ursula's disregard for his ill health and also stating that Ursula chose to take default when Edwin was in Germany. I ROA 57; I ROA 116. Additionally, Ursula had already made off with the bulk of the parties' assets before the "uncontested" divorce decree was entered on September 29, 1995. I ROA 131, paragraph 3. The issue of fraud is also set out and addressed more fully in section III.

The palpable silence of Ursula's Decree as to property issues allowed her to seize most of the community property and hide that fact from review by the court. The district court abused its discretion in finding that no fraud existed, thus, the judgment should be set aside as to do otherwise would permit Ursula to get away with such outrageous conduct. *See Willick, Res Judicata in Nevada Divorce Law: An Invitation to Fraud,* 4 Nev. Fam. L. Rep., Spr. 1989, at 1. I ROA 62.

Edwin asserts that the division of property awarded in Ursula's Decree flies in the face of NRCP 54(c) which provides:

> Demand for judgment. **A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment,** except that where the prayer is for damages in excess of $10,000 the judgment shall be in such amount as the court shall determine. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(Emphasis added). The district court erred in finding that it was only after the default judgment was entered did Edwin alleged the decree was unfair in substance and achieved by fraud and coercion. This Court has affirmed that Nevada is a notice pleading state and that any issue fairly noticed can be tried. *Langevin v. York,* 11 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 184, Dec. 19, 1995). Here, Edwin was prejudiced by being deprived of a trial on the merits and is being punished for addressing an issue which was fairly noticed in Ursula's complaint--the issue of community property division. I ROA 2, paragraph V. Had discovery taken place allowing a trial to take place, a judgment could have been made as to the precise character and value of the property of Edwin and Ursula. That the "Settlement Agreement" and the complaint, and the decree are all consistently silent as to the precise character and value of the parties' property is no evidence that Ursula did not secret items of property as alleged by Edwin. I ROA 94, paragraph 7, sections A and C; I ROA 132, paragraph 3; I ROA 131, paragraph 6 and 8.

Additionally, in finding lack of coercion, the district court failed to take into account Edwin's ill health. Likewise, Ursula denied the fact of Edwin's poor health and stated in August, 1995 through counsel, that, "...it is our understanding that Mr. Epstein has not been hospitalized over the last several weeks. At most, he has been an out patient for on-going treatment of his diabetes. He has, however, recently returned from a recent vacation in Hawaii with his girlfriend. Is that the reason for your delay in being able to respond to our prior correspondence?" I ROA 116. It is submitted that without direction and authorization from Edwin who was periodically hospitalized and out of the country during the negotiation process (I ROA 57, line 26; I ROA 59, paragraph 15) counsel's ability to respond on Edwin's behalf was directly hindered and the resulting delay was excusable. The issue of excusable neglect is more fully set out and addressed below in section III.

Moreover, the "Settlement Agreement" was twenty-one (21) pages in length and counsel for Ursula admitted that it was understandable that Edwin, a layman, would object. I ROA 116. Furthermore, that " Settlement Agreement" misrepresents that the parties are in "reasonably good health." I ROA 102, paragraph 26. In light of the inherent inequity of the terms of the decree as drafted for Ursula, this Court is urged to remand this matter for trial on the merits.

III. THE DISTRICT COURT ERRED IN RULING THAT APPELLANT'S NEGLECT, IF ANY, WAS INEXCUSABLE

The standard of relief allowing the setting aside of default judgments is governed by NRCP 60(b) which provides in pertinent part:

> **Rule 60. Relief from judgment or order.**
>
> (b) *Mistakes; inadvertence; excusable neglect; fraud, etc.* On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party which would have theretofore justified a court in sustaining a collateral attack upon the judgment; (3) the judgment is void; . . . . This rule does not limit the power of a court to . . . set aside a judgement for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

The standard for setting aside a decree of divorce was met and satisfied in this case. Edwin's motion was timely brought and adjudicated in accordance with the discretion of the district court. *See Petersen v. Petersen,* 105 Nev. 133, 771 P.2d 159 (1989); *Dobson v. Dobson*, 108 Nev. 346, 830 P.2d 1336 (1992)(bringing a motion under NRCP 60(b)(3) is a proper avenue for attacking a void judgement); *Cook v. Cook,* 112 Nev. Adv. Op. 24 (Feb. 29, 1996).

Edwin satisfied the test set forth in *Hotel Last Frontier Corporation v. Frontier Properties, Inc.*, 79 Nev. 150, 380 P.2d 293 (1963) in that 1) Edwin made prompt application to remove the

default judgment given his ill health and unavailability to assist his counsel; 2)Edwin did not intend to delay the divorce proceeding; 3) The inequity of the property distribution shows a good faith basis for Edwin's request for relief; and 4) There was observable lack of knowledge and by counsel for both parties as to the adequacy of procedural notice with regard to the three day notice requirement. Edwin's Motion for relief was filed on December 1, 1995 and well within the six month time period of NRCP 60. I ROA 6. Edwin's Answer was filed on December 1, 1995. I ROA 40. Edwin prepared his Answer and attempted to begin litigating this matter as soon as reasonable given his recuperation and travel. The inequity of the property distribution is reasonably inferred by the lack of valuation and any inventory in the decree. Finally, counsel for both parties engaged in communication after the action was commenced and Edwin's counsel had reason to believe that default would not be entered. Hence, it is clear that the district court erred in its ruling not to set aside the decree and Edwin's Answer should be accorded the force and effect as if entered at the proper time prior to rendition of the default judgment.

In this regard, default judgments are not favored by the law. As stated by the Nevada Supreme Court in *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 561, 598 P.2d 1147 (1979):

> [It is] the basic policy to have each case decided upon its merits. In the normal course of events, justice is best served by such a policy. Because of this policy, the general observation may be made that an appellate court is more likely to affirm a lower court's ruling <u>setting aside</u> a default judgment than it is to affirm a <u>refusal</u> to do so.

95 Nev. at 563 (Emphasis in original). *See also McNair v. Rivera,* 110 Nev. 463, 471, 874 P.2d 1240 (1994).

Thus, in light of the Nevada Supreme Court's ruling that default divorce decrees should be liberally set aside, the district court should have granted Edwin's Motion for Relief from Judgment

and vacated the Decree of Divorce. The Decree of Divorce obtained by Ursula is void within the meaning of NRCP 60(b)(3) as Ursula did not provide three days notice of her intent to take default as mandated under NRCP 55(b)(2) and the default Decree of Divorce awarded property to Ursula far in excess of what is equal or equitable.

For example, with regard to the parties 1991 tax debt, Ursula refused to contribute to payment of the tax debt and instead pressed her demands for settlement. On a finite budget, Edwin was forced to deduct Ursula's portion of the debt from her support payments as it has always been his position that she was required to pay a portion of the amount specified. Immediately thereafter, Ursula had the default entered. Accordingly, the Decree of Divorce should be amended to recite that Ursula is to share responsibility for the tax debt.

In this case Ursula has also entered a void Qualified Domestic Relations Order which is unenforceable as a matter of law. The Qualified Domestic Relations Order is a void judgment. Nevada adheres to the "pure borrowed law" approach in determining the divisibility of assets according to the law of the state in which those assets accrued. *See Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975). Edwin's teacher's retirement was accrued in Illinois. The Illinois Teacher's Retirement System is prevented from honoring Qualified Domestic Relations Orders (QDRO). *See* 40 ILCS 5/16-190. The courts of Illinois have held in striking down a QDRO directed to the Firefighters' Pension Fund, that a pension plan established or maintained by a political subdivision, agency or instrumentality of a State government is a "governmental plan." *See, In Marriage of Roehn*, 216 Ill. App. 3d 891, 576 N.E.2d 560 (2d Dist. 1991); *Marriage of Johnston*, 206 Ill. App. 3d 262, 562 N.E.2d 1004(1st Dist. 1990)(holding that QDROs issued pursuant to Internal

Revenue Code, sections 410(a)(13) and 414(p)(1)(A) and (B), and the Employment Retirement Income Security Act, section 206(d)(3) do not apply to public pension funds).

With regard to military retirement benefits, the parties were married for almost three years of Edwin's active duty service. In an effort to misappropriate a portion of Edwin's military retirement, the Decree of Divorce recited as follows:

> F. All interest in the Survivor's Benefit Plan (SBP) benefits associated with Defendant's United States Army Retirement benefits, entitled under Social Security No. 33-20-3017, as more particularly described in paragraph 4 of this judgment;

I ROA 31.

Nevada law provides that all forms of retirement, whether or not vested, and whether or not matured, are community property subject to division. *See Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983); *Gemma v. Gemma,* 105 Nev. 458, 778 P.2d 429 (1989); *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990). In this case Ursula is attempting to convert Edwin's retirement to her own use. It is necessary to amend the decree to ensure that Edwin receives his full portion of the converted benefit. Accordingly, the Decree of Divorce previously issued in this case should be amended to more accurately and completely divide the "military retirement benefits," to insure that the spousal interest "tracks" the military percentage. Edwin agrees that Ursula would be entitled one half of the military retirement benefits earned between March 1966 and February 1969. Thus, her share would come to one half of 7.5 or 3.75%. I ROA 70.

Apparently, the parties mutually committed error regarding the Survivor's Benefit Plan benefits, whereby a spouse or former spouse can be awarded an interest to secure the military retirement benefits award that would continue in the event of the member's death prior to that of the former spouse. Edwin's intent in establishing the SBP program was to provide survivor's benefits

for his one minor child and Ursula's two minor children, whom Edwin legally adopted, during their minority. I ROA 57, paragraph 4. After the children emancipated, Ursula became the only beneficiary. Edwin would request to terminate the plan or reduce the benefits from 55% to 35%.

Edwin has asserted that the items noted above were caused by Ursula's fraud. *See Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380(1992) (where wife shows that property distribution was caused by *either* mutual mistake or husband's fraudulent misrepresentation, case remanded for district court to redistribute property in an equitable manner).

It is respectfully submitted that Edwin has demonstrated excusable neglect, and mistake on her part, and misconduct and mistake by Ursula and her counsel, and that Edwin is entitled to relief from the Decree under NRCP 60(b)(1) and (2). The property and debt disposition in the existing Decree should be set aside. This Court is urged to correct an abuse of the divorce process and the mutual mistake of the parties.

In *Petersen v. Petersen,* 105 Nev. 133, 771 P.2d 159 (1989), a wife was victimized by an inequitable property settlement. This Court held in *Petersen* that when a motion such as this one is filed within the six months allowed by NRCP 60(b), alleging fraud or mutual mistake, and seeking for the first time to address the fairness of the decree of divorce, the motion should be considered on its merits. This Court remanded the matter to the district court "to determine whether Wife's allegations of injustice are substantial enough to support her motion to set aside the judgment and decree of divorce." *Id.*

Moreover, this Court has held that when a motion, like Edwin's, is filed within the six months allowed by NRCP 60(b), alleging fraud and seeking for the first time to address the fairness of the divorce, that the matter should be considered on its merits. *Id.*

Public policy demands that this situation be corrected. *See generally Nev. Industrial Dev. v. Benedetti,* 103 Nev. 360, 741 P.2d 802 (1987) (correcting unjust enrichment outweighs policy of res judicata). It is respectfully submitted that Edwin has demonstrated that neglect, if any on his part, was excusable. He has shown coercion, fraud and misconduct by Ursula and her counsel. Accordingly Edwin is entitled to relief from the property distribution under NRCP 60(b)(1) and (2).

IV. CONCLUSION

The district court abused its discretion when it refused to set aside the default decree. The district court did not properly construe the facts of Edwin's case in light of the law of this State regarding the decree obtained by Ursula. The district court's denial of Edwin's request for relief deprived Edwin of the opportunity to have this matter heard on its merits. As such, the court's order placed the parties in inequitable positions after divorce.

The district court judge elected to rule that Ursula was diligent in negotiations with Edwin and then ruled that Edwin was unresponsive when he did not accede to Ursula's unacceptable demands. The district court impermissibly allowed Ursula to obtain most of the community property, much of Edwin's separate property and then, punished Edwin for bringing this unjust enrichment of Ursula to the court's attention.

Upon this record, the decree in this case should be set aside and this matter remanded. Edwin's Answer and Counterclaim should be allowed to stand and this case should be placed on schedule for trial. The parties should be mutually enjoined from disposing of, or encumbering, the community property assets from this long-term marriage. Edwin, should be granted a reasonable time within which to conduct discovery into the value of the assets known to exist, and the extent of assets hidden by Ursula prior to and at the time of divorce.

Further, public policy requires such a holding for unless this Court exercises its jurisdiction, the merits of Edwin's case will never be determined. Accordingly, this case should be remanded and the property of the parties should be equitably divided.

DATED this ___day of August, 1996.

Respectfully submitted,
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ATTORNEY'S CERTIFICATION OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this ____ day of August, 1996.

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CERTIFICATE OF MAILING

I hereby certify that on the ____ day of August, 1996 I deposited a true and correct copy of the foregoing Appellant's Opening Brief, in the U.S. Mail, first class postage, prepaid pursuant to NRCP 5(b), addressed to the following:

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_____

An employee of the Law Office of Marshal S. Willick