SUPREME COURT OF THE STATE OF NEVADA

TODD A. LOFINK,

Appellant,

vs.

BARBARA J. LOFINK

Respondent.

CASE NO: 34132
D.C. CASE: D165167

RESPONDENT'S ANSWERING BRIEF

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STATEMENT OF THE CASE

INTRODUCTION

This is an appeal from two District Court orders finalizing a divorce, one determining custody of minor children and the other determining economic orders, including attorney's fees. Both orders were issued by the Hon. Steven E. Jones, Eighth Judicial District Court, Clark County.

The *Opening Brief* ("OB") of Appellant Todd Lofink ("Todd") states at page 1 that Todd has abandoned his appeal of the custody orders. ***Accordingly, the only matters to be addressed on appeal originate from the Order signed by Judge Jones on June 1, 1999, concerning financial matters.*** II App. 20199.[1]

NRAP 28(b) provides that Respondent may provide a Statement of the Case if "dissatisfied" with that of the Appellant. There ***is*** no actual "Statement of the Case" in the *Opening Brief*; the section so labeled is an eight-page discussion containing some procedural information that should be in such a section, along with partial factual background and argument, plus commentary as to the motives of the parties, counsel, Judge, and apparently accidental references to altogether different cases.[2] Accordingly, Todd's Statement of the Case is deficient, and the Court is asked to refer to this recital pursuant to NRAP 28(b).

BARBARA'S STATEMENT OF THE CASE

On June 21, 1993, Barbara filed her *Complaint for Divorce.* I App. 10001. On April 30, 1996, Barbara filed an *Amended Complaint For Divorce*. I App. 10005. Todd filed his *Answer and Counterclaim* on July 31, 1996. I App. 10009.

After various proceedings discussed below, the lower court (Judge Fine) entered a document entitled *Findings and Order* on May 8, 1997, which provided that as of January 16, 1997, "temporary primary physical custody" was changed from Barbara to Todd. I App. 10025.

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[1] References to Todd's Appendix will be referred to with a "I" or "II" to indicate the volume, plus "App." and the page number. References to Respondent's Appendix will be referred to as "R. App.," and the page number.

[2] For example, the facts on page 3, at lines 19-21, apparently refer to some case in which District Judge Porter made some kind of ruling pertaining to a "Ms. Star." Neither that Judge nor that party are believed to have anything at all to do with this case.

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At the May 22, 1997, hearing the District Court declared the parties divorced, but stated that custody was "still at issue" and also expressly bifurcated and left unresolved all issues of spousal support, debt, and property. The *Decree* was filed September 3, 1997. I App. 10204-207. Barbara timely appealed from the Decree. I App. 10210.

The lower court issued its *Decision* on October 10, 1997, still refusing to issue a final order as to custody, but addressing alimony, property, and debt issues. I App. 10216.

On October 24, 1997, Todd filed a *Motion to Alter or Amend Decision of October 10, 1997*. I App. 10228. Barbara timely appealed from the *Decision* on November 3, 1997,[3] R. App. 95, and filed an *Opposition* to Todd's motion, putting the lower court on notice of the pending appeal, and notifying her that she lacked jurisdiction to enter further orders relating to that *Decision*.

Notwithstanding the pending appeal, the motion was heard December 2, 1997, at which time Judge Fine announced revisions to her written *Decision* of October 10, 1997, and directed Todd's counsel (Mr. Shapiro) to draft an *Amended Decision.* HT 12/4/97 at 17-18.[4] Mr. Shapiro never drafted the *Amended Decision* as requested.[5]

The appeals from the *Decree of Divorce*, and the October 10, 1997, *Decision*, were dismissed by this Court on April 10, 1998, on the basis that the orders had not been made "final" and thus were not ripe for appeal. II App. 20018. Specifically, this Court noted that neither order resolved the central issue of child custody, and that, as to the *Decision*, no order resolving Mr. Shapiro's tolling motion had ever been entered.

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[3] The undersigned is an appellate attorney who reviewed the rules – and consulted with other appellate counsel – before filing the two notices of appeal for Barbara. In this peculiar procedural context, it was believed that filing separate notices of appeal within the allowed time was the only way to preserve claims of error from the various portions of Judge Fine's rulings.

[4] References to transcripts from hearings shall be referred to as "HT" followed by the appropriate date and page number.

[5] As discussed below, the successor judge (Judge Jones) would later ask undersigned counsel to prepare the order that Mr. Shapiro never submitted; we did so, and it was ultimately filed on February 16, 1999. II App. 20177-78.

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On remand, on April 3, 1998, the case was reassigned to the Hon. Judge Steven E. Jones in Department C.[6] On June 9, 1998, Barbara filed a motion seeking a final determination of those matters that this Court had identified as not yet final. II App. 20021. Todd opposed the motion, which was heard on August 10, 1998,[7] and scheduled for further proceedings on August 24.

On September 29, 1998, Judge Jones issued an order from the two August hearings, acknowledging that no final determination as to custody had yet been made, noting that the lack of finality of the earlier orders was the cause of this Court's dismissal of Barbara's appeals, stating that he would not be relying on any findings previously made by Judge Fine, temporarily restoring custody of the children to Barbara, and setting an evidentiary hearing so that a final custody order could be made. R. App. 101.[8]

Between January 11, 1999, and January 15, 1999, Judge Jones conducted a five-day evidentiary hearing for the primary purpose of getting to a final custody determination; the testimony went to all issues of custody, support, and property.[9] On January 20, 1999, Judge Jones issued a *Minute Order* in which he found that it was in the best interests of the children to remain in Wyoming with Barbara as the primary physical care giver, and made a permanent custody award

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[6] In June, 1997, based on Judge Fine's actions in this case (and a few others), counsel had submitted a complaint to the Nevada Commission on Judicial Discipline. Their investigation was confidential under the rules, but was revealed to Judge Fine in late 1997, eventually resulting in a disqualification order and reassignment of several cases. The Commission ultimately found the complaints valid and substantiated, and removed Judge Fine from office. *See In re Fine*, 116 Nev. ___, 13 P.3d 400 (Adv. Op. No. 108, Nov. 30, 2000).

[7] Our opponents have not had that hearing transcribed.

[8] Counsel finds it disturbing that Appellant has chosen to omit from his Appendix certain obviously-relevant court orders and other papers, in violation of NRAP 30(b)(2)(iii). If this Court concludes that this was part of a deliberate effort by Appellant to mislead this Court by selective omission, we ask for a formal finding of that fact, and consideration of monetary sanctions pursuant to NRAP 30(g)(2).

[9] Todd has elected not to provide any transcripts from the five day evidentiary hearings that gave rise to the orders from which he has appealed, instead transcribing only a small portion of one argument and evidence hearing conducted years earlier in front of Judge Fine, on which Judge Jones expressly did ***not*** rely in making the final rulings. R. App. 101-102. The only transcripts Todd has provided from the proceedings in front of Judge Jones are of the argument on the temporary custody motion of August 24, 1998 (as to which Todd has dropped all claims), an irrelevant one-minute snippet from January 15, 1999, and the argument (but no evidence) on financial issues (April 8, 1999). Of these, only the April 8 hearing has any relevance to this case, and it contains only counsel's comments on the evidence, not the evidence given at the evidentiary hearing.

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accordingly. R. App. 106. The formal written Order was filed on March 29, 1999. II App. 20192-96. Notice of entry was made by mail on March 31, 1999. II App. 20183-84, 20197-98.[10]

Noting that Mr. Shapiro had never prepared the final Order as to property, debts, and alimony, Judge Jones directed this office to do so, and we did. II App. 20177-78. The Court's January 20, 1999, *Minute Order* directed counsel to supplement their prior submissions with briefings as to "all financial matters" (including alimony, property, and debt division, as to which an order, and a motion for reconsideration, were before the court).[11] We filed the requested supplement to the motion for reconsideration, as to child support, spousal support, restitution owed to Barbara by Todd, and property division (mainly, as to the pension interests), on April 7, 1999. R. App. 108.

Upon reviewing the pleadings, papers, trial exhibits, argument, and testimony, Judge Jones made findings as to all financial and other remaining issues in a *Minute Order* on April 19, 1999. R. App. 136.

On April 27, 1999, Todd filed his *Notice of Appeal*, appealing the custody *Order* entered on March 29, 1999. II App. 20190.[12]

A formal *Order* based on the April 19 Minute Order was filed on June 2, 1999, and Notice of Entry was filed June 22, 1999. II App. 20199.

On July 21, 1999, Todd filed his *Notice of Appeal* from the financial *Order* entered on June 2, 1999. R. App. 138.[13]

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[10] Todd's Appendix includes two copies of this Notice of Entry. The earlier one was apparently submitted in error for the notice of entry relating to the *Amended Decision* filed February 16 (I App. 20177 to 20182).

[11] The *Amended Decision* and the *Motion for Reconsideration* were completed and delivered to the lower court on the same day. Administratively, it took the court several weeks to sign and file and *Amended Decision*, so technically, the motion addressing the order was filed prior to the file stamp on the order itself. This was discussed on the record, briefly (HT 4/8/99 at 23-24). At some point, we offered to refile the motion for reconsideration entirely after the *Amended Decision* was filed, and were instructed that it would not be necessary to do so. *See* EDCR 2.24(b).

[12] Todd did not copy this office with pages 20185 to 20191 of his appendix; his index indicates that this should be the notice of appeal of the custody order.

[13] Todd did not include this Notice of Appeal in his Appendix. He did not attach to it a copy of the order appealed from (although the notice says that he did), and as far as we know, he never filed a Docketing Statement as to that appeal.

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This Court is already familiar with the subsequent proceedings, in which Todd did not prosecute this appeal for an extended period, his attorney (Mr. Gamble) was suspended from practice, we eventually moved for dismissal of the appeal and this Court ultimately permitted Todd's most recent counsel (Mr. Kent) to go forward with his appeal. Litigation has continued with intensity in the district court during the past couple of years as well, primarily concerned with enforcement of the underlying orders; those proceedings are not directly before the Court, but counsel would be happy to supplement this procedural history if the Court deems those matters relevant.

STATEMENT OF FACTS

INTRODUCTION

There is no titled "Statement of Facts" in the *Opening Brief*. The "fact" recitations set out in Todd's "Statement of the Case" section are not complete or accurate, and fail to acknowledge conflicting testimony and evidence. In fact, Todd has elected not to have transcribed any portion of the five days of testimony (January 11 through 15, 1999) during which much of the factual testimony as to economic matters was presented, along with matters relating to custody. The recitation in the *Opening Brief* hopelessly mixes fact, argument, and conjecture. Several sections are devoid of references to the Appendix, in violation of NRAP 28(a)(3) & (e). OB at 2-5.

It is respectfully submitted that, given these deficiencies, Todd's recitation of the facts is unreliable and insufficient to allow to this Court a meaningful review of this case. The Court is asked to refer to this recital of the facts, pursuant to NRAP 28(b).

BARBARA'S STATEMENT OF FACTS

Todd was employed by Kerr-McGee Corporation starting in 1980. He applied to begin participating in his company's defined contribution retirement plan on July 24, 1984. II App. 20142. Barbara had a number of jobs over the years, including some time as a cocktail waitress.

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The parties were married on July 7, 1988, in North Las Vegas. I App. 10001; HR 9/4/97 at 53. They had two children: Austin Todd Lofink, born May 13, 1989, and Clinton Richard Lofink, born January 28, 1991.[14] I App. 10002.

Kerr-McGee started a company stock ownership plan (ESOP) on January 1, 1990, and Todd began participating in it thereafter.[15] R. App. 160.

Throughout the marriage, Todd withdrew from and borrowed against the retirement plans to the maximum amount possible. In 1991, he withdrew $5,000.00 cash; starting in at least 1989, he took out a series of loans against the accounts. II App. 20154; II App. 20146. In 1993, he withdrew 100% of his vested account balances. II App. 20159-165. Despite multiple demands in discovery and at hearings, Todd was never able to establish what he did with the money withdrawn or borrowed, although some $12,000.00 of the money (taken after the parties separated) was eventually traced in part to deposits Todd made to an account in a friend's name. I App. 10042, 10086-10094; II App. 20133-34; R. App. 117. That money was never recovered.

Todd used drugs, abused alcohol, and was highly violent in the marriage as far back as at least 1989, during which he physically attacked his children and Barbara, in addition to assaults upon his former spouse, siblings, and others.[16] Todd was eventually compelled to submit to assessment by the "Options" program, which revealed that

> the issues of control, drugs, and violence are all maxed out on the medium approaching the -- the problem in the max area, and I think there are some issues that need to be addressed or, at least, brought out at the evidentiary hearing to make a determination as to which way we're going to go.

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[14] At the time of the marriage, Todd had two five year old children from a prior marriage. Barbara also acted as the primary caretaker of Amber and Aaron Lofink, both born December 14, 1980; while those children appear throughout the facts of the case, they were not directly a subject of this litigation.

[15] During the marriage, Todd accrued benefits in three known retirement accounts: a Defined Benefit Plan ("DBP"); a Savings Investment Plan ("SIP"); and an Employee Stock Option Plan ("ESOP"). The proceedings to actually divide and distribute the retirement benefits took place in Department C during 2000 and 2001, and involved a lengthy and detailed investigation into every aspect of the retirement benefits. Those proceedings are largely outside of this record, and neither party has appealed from the orders establishing QDROs, etc. If, in its consideration of this appeal, the Court wants any supplemental information regarding the retirement interests, counsel would be happy to supply it.

[16] Even though it is Judge Jones' rulings that are on appeal in this case, Todd has elected to not provide transcripts of the direct and cross-examination testimony of the victims and witnesses before the lower court in 1999, leaving this Court with mostly only reflections of that evidence, and the orders resulting from those hearings.

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HR 8/24/98 at 26 (Judge Jones, reviewing the results). After the five-day evidentiary hearing before Judge Jones, testimony of all the witnesses, and submission of all documentary evidence, the lower court concluded that

> 1. [Todd] has a lengthy history of engaging in acts of violence, intimidation, or otherwise acting inappropriately, whether it is with animals, other people, his children, or [Barbara] herself.
> 2. [Todd] has committed more than one act of domestic violence.
> 3. Despite his attendance at programs for assistance, whether voluntary or court ordered, given his subsequent course of conduct, coupled with his testimony, [Todd] continues to minimize his inappropriate behavior and fails to comprehend the full magnitude of his problems.

II App. 20193.

On June 16, 1993, Barbara and the four children tried to escape the ongoing abuse by moving from the marital residence. She filed her initial *Complaint* and a motion seeking custody five days later. I App. 10001. The case was randomly assigned to Department E. The *Complaint* and *Motion* were never served because Todd succeeded in convincing Barbara to reconcile, promising her that he would enter drug rehabilitation and psychological therapy. II App. 20023-24.

Unfortunately, Todd resumed his physical and emotional abuse of Barbara and the children. In November, 1994, Todd physically battered Barbara so severely that she was forced to seek medical attention, including diagnostic scans for internal injuries. II App. 20024. The parties separated in January, 1995, but again Todd convinced Barbara to return to him.[17] They separated again, permanently, on September 12, 1995, after further incidents.

In October, 1995, Barbara filed a request for a *Temporary Protective Order Against Domestic Violence*, which was issued. II App. 20058. The hearing for an *Extended Protective Order* was ultimately set for November 28, 1995, before Hearing Master Jack H. Fields. Todd received "red cards" at work and at home informing him that the Sheriff was attempting to serve him, but he ignored them and was never "tagged" by the Sheriff, and did not show up at the hearing. II App. 20024; R. App. 4, 41. The Hearing Master recommended that the *Protective Order* be extended, and

[17] This type of behavior by the victim is not uncommon as the net result of such abuse is a loss of esteem and helplessness. As this is not the focal point of the appeal, we will not delve further into the "battered women's syndrome," other than to note that training in this area is mandatory for judges of the Family Court, and that this Court has recently commented upon some of the standard references in *Boykins v. State*, 116 Nev. ___, 995 P.2d 474 (Adv. Opn. No. 17, Feb. 4, 2000); *see also* NRS 3.028; NRS 48.061.

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explicitly gave Barbara permission to relocate to Wyoming with the younger children, but told her that he had no jurisdiction to allow Barbara to remove the older children, since Barbara had not adopted them.

After another six months, on April 30, 1996, Barbara filed her *Amended Complaint* in order to proceed with the divorce, and filed a motion to formalize the status quo regarding custody, etc. I App. 10005. Although Todd showed up at the May 29, 1996, hearing, he claimed that he had not received the *Amended Complaint, JPI*, and *Summons*, and so was re-served in open court by the courtroom bailiff.

At the hearing, Judge Fine directed the parties to what was then known as the Family Mediation and Assessment Center ("FMAC"); the parties eventually agreed that Todd would have summer visitation with the children in Nevada. Judge Fine set a status check for August 29, 1996, and a possible evidentiary hearing for September 12, 1996. I App. 10020-24. Judge Fine deferred the issues of child support, support arrearages, spousal support, attorney's fees, costs, and designation of primary physical custody.

After the May, 1996, hearing Todd retained counsel and filed an *Opposition* to Barbara's motion, in which he argued that the Domestic Violence Commissioner did not have the authority to have given Barbara permission to relocate to Wyoming. I App. 10026.

Barbara's *Reply* noted that she and the younger children had lived apart from Todd for about a year, without protest, and argued that her retention of primary custody would maintain the status quo established throughout the marriage and since separation. Barbara noted, and documented, that over the years Todd typically threatened suicide to get his way, and that he had made such threats to his children Amber and Austin (in 1995) and Clinton (in 1996). R. App. 9, 39, 45.

No evidence, or testimony, or even any allegation, was ever submitted by anyone that Barbara, the long-term custodial mother, had ever done ***anything*** wrong relating to these children, by abuse, neglect, or anything else. Judge Fine made it clear, however, at the very beginning of

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proceedings,[18] that she intended to change custody to the father unless the mother could prove him unfit to the judge's satisfaction.[19]

At some unknown point believed to be in 1996, Todd began representing to his employer that he was divorced. This is what apparently allowed him to borrow a final $11,975.00 in 1996 without notice to or approval by Barbara (discussed in greater detail below); by April, 1997, he had filed false papers with Kerr-McGee claiming to be single, and switched even his insurance benefits to third parties. II App. 20175 (including an "unmarried participants' certification").

Judge Fine conducted a series of evidentiary hearings on the issues of child custody between September 12 and December 17, 1996. Afterward, Todd's counsel drafted and filed the *Findings and Order* on May 8, 1997, which provided that as of January 16, 1997, "temporary primary physical custody" was changed from Barbara to Todd. I App. 10025.

The order was largely based on the finding that the Domestic Violence Hearing Master "should not have awarded Barbara permission to relocate with the minor children to Wyoming," because the application for Temporary Protective Order ("TPO") contained no allegations of physical

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[18] At the beginning of the hearing held August 29, 1996, and based on a never-clarified *ex parte* communication, Judge Fine had so obviously made up her mind to turn custody over to the father that counsel noted that fact on the record, and noted that Todd's counsel had made the same observation. Our opponents have not had that hearing transcribed.

[19] Judge Fine's conduct in this case, at this point and thereafter, was so egregious and beyond any permissible scope of judicial action that it led counsel in June, 1997, to file the complaint with the Nevada Commission on Judicial Discipline that led to the result reviewed and affirmed by this Court in *In re Fine*, *supra*.

Pages 7 through 13 of the complaint – more than half its length – detailed the observed misconduct by Judge Fine in this case, including violations of due process, multiple *ex parte* communications with witnesses and at least one party, shielding a drug abuser seeking custody from being drug tested, physical contact and a possible personal relationship with a party, refusing to listen to witnesses adverse to that party while they were testifying (and actually walking out of the room during some of that testimony), refusing to acknowledge copious evidence of physical violence by the abusing party, turning off recording equipment during witness interviews to prevent a record from being made as to what was said, relying upon the unrecorded *ex parte* communications as the foundation of custody rulings, directing witnesses during *ex parte* sessions in advance of their appearance how to testify, manipulation of child witnesses, and making up new procedures and legal standards to serve the interest of the abusing party.

It took the investigators for the Commission many months to complete their investigation into this case and others, and the above matters were inquired into during the disciplinary proceedings. Ultimately, the Commission elected to proceed to formal discipline under the charges relating to other cases, which were less egregious, but more easily documented and proven. *See In re Fine*, *supra*.

The rules relating to the confidentiality of judicial disciplinary complaints are unclear as to the need to maintain secrecy after the conclusion of those proceedings. Accordingly, none of the underlying paperwork has been included in our Appendix. If the Court believes it relevant and permissible, I would of course be willing to supply whatever documentation relating to those proceedings as the Court believes might bear on this appeal.

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abuse but only listed allegations of harassment and threatening actions by Todd and that "the proper course of action would have been for [Barbara] to file a motion to relocate and for the Court to conduct a noticed hearing on the issue of custody and [Barbara's] request." I App. 10026.

On May 5, 1997, just before Todd's counsel filed the order quoted from above, Barbara learned that Todd had again badly beaten one of his older children (Aaron). Todd was arrested.[20] The arresting officer's report indicated that he had to enter Todd's residence through the garage when Todd refused to answer the front door after the officers repeatedly knocked and continuously rang the doorbell. The report also indicated that Todd both lied to the officers and tried to conceal the injured child from them.

Barbara filed a motion seeking primary physical custody of the two younger children. R. App. 71. Despite requests to shorten the time because of the emergency nature of the motion, Judge Fine would not convene a hearing until May 22. At the hearing, Judge Fine refused to consider the police reports.[21] Without hearing from Aaron (the child who was beaten), Judge Fine "found" that Aaron was angry at his father because he would not buy him a car, concluding either that the child had made up the incident (despite the photographs of his injuries, and the eyewitness police reports) or that whatever injuries he had suffered, the child "had it coming."[22] She denied the requested change of custody and left the younger children with Todd, claiming that they were more at risk from the victim of the beating (who went to live with his mother) than from Todd, and stating that she would not want to "make a rash and irresponsible decision." R. App. 93-94.

At that hearing, Judge Fine stated that custody was "still at issue" and would be re-evaluated four months later; she directed Todd to take a parenting class. I App. 10208. Judge Fine directed sale of the former marital residence, and that some of the money go to pay Todd's attorney. *Id*. Finally, she bifurcated all other issues and granted a divorce. R. App. 94; I App. 10204-209.

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[20] The criminal trial was set for February 5, 1998. There were photographs of the injuries to the child, one of which was printed on the front page of the Las Vegas Sun, accompanied by the headline "Nobody Listens."

[21] We note that this is one of the hearings that our opponents have chosen not to have transcribed.

[22] This comment did not make it into the court Minutes, and our opponents have not elected to have this hearing transcribed.

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The *Decree of Divorce* was filed September 3, 1997. I App. 10204. It dealt primarily with temporary child custody, and the few other matters noted immediately above. As to the retirement accounts, it deferred all matters to later order, stating on page 5:

> IT IS FURTHER ORDERED that the Court shall retain jurisdiction to enter such further orders, including a Qualified Domestic Relations Order, as are necessary to enforce any and all proper property, debt and retirement benefits adjudication, or to make an award of alimony.

I App. 10208. All of the orders relating to the actual division of the accounts occurred later.

The younger children were left with Todd for another four months. On September 4, 1997, Judge Fine heard arguments relating to financial matters. By that time, Todd had revealed the existence of two of the retirement benefits (the SIP, called a 401k during the hearing, and a defined benefit plan). HT 9/4/97 at 20. The ESOP was not disclosed.

After the September 4, 1997, "trial," Judge Fine issued a *Decision* on October 10, 1997, but still refused to issue a final order as to custody, this time blaming this Court and undersigned counsel:

> Pursuant to the pending criminal case against Mr. Lofink and *McDermott v. McDermott*, Supreme Court Case No. 29003 (October 1, 1997),[23] and due to Mr. Willick's filing a *Notice of Appeal* on October 3, 1997, any issues regarding child custody and child support are not included in this decision.

I App. 10216-17.

By December, 1997, the judicial discipline investigation had been ongoing for some months, and Judge Fine was believed to have been informed of it; she had not yet, however, formally recused from cases involving this office, and this case was not formally reassigned until April 1, 1998. On December 2, 1997, Judge Fine entertained Todd's motion to alter or amend the *Decision* filed on October 10, ignoring the notice in the *Opposition* of a lack of jurisdiction due to the pending appeal. I App. 10228; R. App. 97. Due to the obvious conflict relating to the judicial discipline proceedings, undersigned counsel did not attend the hearing, but had an associate attend to prevent any appearance of default.

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[23] *McDermott v. McDermott*, 113 Nev. 1134, 946 P.2d 177 (1997), in which this Court reversed Judge Fine's decision to turn child custody over to a man convicted of domestic violence. In the Lofink case, she inexplicably used that decision to justify leaving the children in the hands of a man found guilty of domestic violence. *McDermott* is just one of a number of similar cases decided by Judge Fine. *See Russo v. Gardner*, 114 Nev. 283, 956 P.2d 98 (1998).

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At the hearing, Judge Fine orally revised her *Decision* of October 10, 1997, and ordered: 1) that Barbara pay Todd $200 per month in child support[24]; 2) that Barbara pay half of the cost of medical insurance on the children, or $31.25 per month; 3) that the community portion of Todd's 401k plan[25] be divided pursuant to *Gemma* and *Fondi*; 4) that all of the "community debts totaling $35,000.00 would be divided in half,"[26] and that "Todd is responsible for paying the community debts which totals $400.00 per month for approximately 3½ years instead of paying Alimony to Barbara for 4½ years"; 5) that Barbara's Culinary Union pension "shall be divided the same as Todd's 401k"; and 6) that the parties BMW "be sold at a reasonable commercial sale and proceeds to be divided equally" between the parties. Judge Fine directed Todd's counsel to draft the *Amended Decision* from the December 2, 1997, hearing (HT 12/2/97 at 17-18), but Mr. Shapiro never did so.

Todd never went to trial on the criminal charges for beating Aaron because the case was submitted "on the record" to Municipal Court Judge Valorie Vega, who sentenced Todd to 120 days in jail, but suspended the sentence and ordered him to attend "Level II Domestic Violence Counseling." *See* HT 8/24/98 at 15-16. Under this arrangement, if Todd did not "stay out of trouble" for the next year, he would be found "guilty" of the charges and have to serve the jail time; however, if he stayed out of trouble for the next year he would be found guilty of only a lesser offense. *Id*. This is apparently standard treatment of like matters in the Municipal Court when the victim is not hospitalized by the injuries inflicted.

Our filing of appeals from Judge Fine's rulings, and this Court's dismissal of them on April 10, 1998, on the basis that the orders had not been made "final" and thus were not ripe for appeal, are addressed above in the Statement of the Case.

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[24] Barbara earned less than $800 per month; $700 for caring for her elderly grandmother and approximately $97.50 working part-time at a travel agency in Worland, Wyoming.

[25] In actuality, there was no "401k plan" *per se*. The intended reference was to the "SIP plan," which is commonly, and mistakenly, referred to as a 401k. The terminology was corrected after the case was transferred to Department C, although the terminology error appears in submissions by all parties. Judge Fine did not make any provision regarding the ESOP or the Defined Benefit Plan through Kerr-McGee. Disposition of the retirement benefits are addressed below.

[26] To reach this conclusion, Judge Fine was required to ignore all evidence that Todd ran up the debts post-separation and entirely for his own benefit, and that a large part of them were the loan balances for the sums he withdrew or borrowed from the pensions post-separation, and secreted. *See*, *e.g.*, I App. 10042.

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On remand, the case was reassigned to Department C (Judge Jones) on April 3, 1998; after Remittitur issued from the dismissed appeals, Judge Jones dealt with matters relating to the withdrawal of Mr. Shapiro, and then Barbara's June 9, 1998, motion seeking a final determination as to the custody and financial matters that this Court had ruled were not yet final. II App. 20021.[27]

On August 10, 1998, Judge Jones ordered Todd to undergo an impulse control evaluation with the "Options" program, required Todd to provide an accounting of the proceeds of the sale of the BMW and the boat, and to provide a retirement benefits transaction history. R. App. 100.[28]

Proceedings were continued to August 24. Todd failed to produce any of the accountings or retirement transaction information that he was ordered to produce. HR 8/24/98 at 5. In a colloquy with Todd's counsel, Judge Jones discussed the lack of any final determination by Judge Fine, HR 8/24/98 at 23-25, and then ruled:

> But let me just give a historical perspective of where I'm from, and that is: I don't know why Judge Fine did not make a permanent ruling. It probably would have made this Court's role [de minimus]. But, needless to say, it wasn't ruled. A final order wasn't made. And if there is one thing that I can't do or not willing to do based upon testimony and evidence that I have received, and that is make a custodial determination based upon what somebody else heard. I'm not going to do it.
>
> And so as -- as displeasureable (sic) or distasteful as it sounds to both of you, if I'm going to make a custody ruling, I'm going to make it based upon the facts and the evidence that are presented to me, which means we'll go back to when the -- the case started. Anything that you think is relevant you'll bring to my attention. Anything that is relevant I will consider. I don't view isolated incidences. I look at the totality of the picture, and I make a determination as to what I think is in the best interest of the minor children, and that is what's going to control the orders of this Court.
>
> I . . . agree that what we have is a lot of evidence to present. I think that we have track records that, obviously, are going to be presented both by you -- I mean, the children have, obviously, been with [Todd] for -- for a period of time. We will have whatever's happened during that period of time by way of progress reports, testimony, evidence, witnesses, whatever you have, and whatever you deem relevant, then that would be considered by this Court. The same with [Barbara]. I mean, whatever you think is relevant, bring it up, I will consider it.
>
> I do have the -- the option's evaluation. And even though this happened quite sometime ago, the -- the issues of control, drugs, and violence are all maxed out on the medium approaching the -- the problem in the max area, and I think there are some issues that need to be addressed or, at least, brought out at the evidentiary hearing to make a determination as to which way we're going to go.

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[27] The copy supplied in Todd's appendix does not include all pages of the motion.

[28] Mr. Gamble had never countersigned and returned the order from the August 10 hearing. He was reminded to do so at the August 24 hearing, and agreed to do so (HT 8/24/98 at 34-35), but never did. Apparently, no one ever noticed, so there was no formal order from the August 10 hearing, only the court minutes.

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HT 8/24/98 at 25-26.

Turning to the financial matters, it was noted that the retirement information and accountings had not been produced. The lower court again directed Todd to provide the necessary financial information, giving him another thirty days, and noted that

> If it's not provided within the next thirty days, then I will address the -- the noncompliance, any sanctions, or contempt at the January hearing. He's already on notice that if it's not provided, then we'll address it in January.

Id. at 32; R. App. 104.

Judge Jones temporarily restored custody of the children to Barbara, set discovery, established a briefing schedule and set an evidentiary hearing at which "any evidence," including that previously put before Judge Fine, could be introduced, so that final orders could be entered. The formal Order was filed on September 29, 1998. R. App. 101.

Todd refused to provide the financial information he was ordered to provide, and ignored the discovery propounded on him during the months between August, 1998, and January, 1999.[29]

On January 11, counsel delivered to the Court an actual *Amended Decision* encompassing Judge Fine's orally rendered decision from 1997, and a simultaneous *Motion for Reconsideration* of that order, noting that Judge Fine's results were mathematically incorrect, neglected to even address two of Todd's three retirement plans, that Judge Fine had ignored child support arrearages in contravention of law, and that her alimony ruling was in derogation of every case that has issued from this Court on the subject. II App. 20127-176. As noted above, the motion was filed on January 11, but Judge Jones did not sign the *Amended Decision* until February 12; it was filed February 16, 1999. II App. 20127.

The evidentiary hearing was conducted from morning until the evening for five days between January 11 and 15, 1999; every relevant witness was subpoenaed, and the examination of the party witnesses delved into every aspect of custody, visitation, alimony, property, debts, payments, transfers of funds, and retirement matters.

[29] As our opponents have not transcribed the evidentiary hearing of January, 1999, this Court does not have before it any of the arguments or witness examinations relating to the financial matters, but only the resulting rulings.

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On January 20, Judge Jones issued a *Minute Order* resolving the issue of primary physical custody by making a permanent award of custody to Barbara. In light of the conclusive evidence presented regarding Todd's widespread violence targeting his two former wives (including Barbara), his children, others, and even animals, and his drug use, alcohol abuse, and assorted other "inappropriate behaviors," Judge Jones directed Todd to long-term counseling, conditioning his future visitation on compliance with that directive.[30] R. App. 106; II App. 20183-84.

Having dealt with custody, Judge Jones turned back to the financial orders that had been left unfinalized by Todd's tolling motion, the appeal, and the *Motion for Reconsideration*, directing the parties to submit further briefing, and setting the matter for argument. Todd refused to submit any financial information, and did not submit a substantive brief on financial matters. The hearing was reset to April 8.

On that date, Todd had ***still*** not supplied the accounting and transactional history ordered from him in September, 1998, December, 1998, and January, 1999, on pain of contempt sanctions. HT 4/8/99 at 12-13. Both parties' counsel conceded that all prior efforts to deal with the retirement benefits had been in error to one degree or another, but counsel for Todd asserted that it was too late to fix the errors no matter what they were. *Id*. at 14-15, 27.

Counsel noted that a large part of the problem in coming up with accurate figures was Todd's failure to produce any useful information, along with difficulties in getting his employer to respond to discovery. *Id*. at 15-16. Barbara dropped her claim for reimbursement of Todd's pre-separation withdrawals and loans against the retirement plans, leaving at issue only $11,975.00 that Todd borrowed from the accounts post-separation, and another $8,000.00 that was missing from the account balance for no reason that we could determine. *Id*. at 16-18. We noted that discovery had revealed the existence of the ESOP that Todd had not disclosed previously. *Id*. at 18-19.

The trial court quietly confirmed its understanding and agreement that, for time rule purposes, the numerator is to be the number of months in service while contributing to the plan. *Id*. at 19; *see also* pages 37-38. We reminded Judge Jones that he still had pending the question of

[30] Todd refused to ever attend the ordered counseling, and instead simply terminated his contact with the children; he has never attempted any form of visitation or other contact.

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discovery sanctions against Todd that had been deferred at earlier hearings. *Id*. at 23. Todd's counsel admitted that he still owed Barbara for the boat and car, and suggested payment to her of additional sums from Todd's SIP retirement to pay it, but disputed the valuations submitted during the five-day evidentiary hearing. *Id*. at 32-33.

Attorney's fees were discussed, and about ninety pages of detailed billing entries were proffered to Judge Jones and opposing counsel, following up on the testimony and exhibits at the evidentiary hearing in January. *Id*. at 21-22. Counsel noted that in the many years the case had gone on, Barbara's fees had exceeded $87,000.00, and that, of that sum, about $38,000.00 had been incurred during the proceedings in Department C. Counsel requested full reimbursement of the sums expended, at the evidentiary hearing and otherwise, proving matters that Todd had denied. *Id*. at 21-23.

With the evidentiary hearing exhibits and testimony before him, along with the documents and arguments from the hearing of April 8, 1999, Judge Jones took the matter under advisement and issued a *Minute Order* on April 19, 1999, resolving all remaining issues. R. App. 136.

The *Minute Order* directed a time rule division of all three of Todd's retirement plans, using as a numerator the number of months that he participated in the plan while married, and as the denominator the total number of months that he participated in the plan. R. App. 136-37. The order directed Barbara's counsel to conduct discovery to find out how much Todd had withdrawn from the plans and not repaid at the time of trial, which were to be included in determining the total value of the plan for purposes of community property division. *Id*.

It also reduced to judgment $12,232.65 in arrearages Todd owed to Barbara for child support and child medical expenses he had not paid, plus the car and boat he had liquidated and for which he had kept the proceeds, using Todd's valuations for those amounts. *Id*. Prospective child support was set, granting Todd a travel offset for exercising visitation.

The *Minute Order* further granted a portion of the fees requested, in the amount of $25,000.00, citing "the papers and pleadings presented to this Court so far, coupled with the additional discovery requests that will be necessary as a result of the Defendant's conduct." *Id*. Turning to alimony, the lower court listed the cases containing the factors it considered relevant,

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determined that "a lump sum of alimony would be most appropriate in this matter," and awarded to Barbara as lump sum alimony the sum remaining in the SIP account after payment to Barbara of the amount to which she was entitled as a property distribution.

After all necessary information had been provided, Barbara's counsel was to prepare an accounting and submit the required information and QDROs for distribution of the retirement benefits. The formal *Order* containing these terms was filed June 2, 1999. II App. 20199.

The discovery and accounting proved far more difficult than anticipated. Despite multiple and extended efforts, it took counsel until 2001 to obtain reasonably accurate information from Todd's employer (Kerr-McGee) and its record-keeper (Putnam Investments). Both had been advised of the court orders and pending QDROs, and Kerr-McGee had issued a standard hold on the accounts accordingly. *See* R. App. 140-219. Todd quit or was fired from Kerr-McGee on May 23, 2000, however, and (despite his receipt of the court orders awarding the money in those accounts to Barbara) Todd applied for payment directly to him of the entire cash value of whatever accounts could be liquidated. *Id*. at 171-72.

Unfortunately, in spite of the hold directive on the accounts, Todd managed to withdraw all funds from the SIP and ESOP, netting about $90,000.00 after tax withholdings. *Id*. at 169-172, 230-33. Since Kerr-McGee and Putnam had distributed the funds in error, however, they restored the fund balances with other funds, and the QDROs were ultimately filed, submitted, approved, and have been honored. R. App. 230-33.

Beyond a few hundred dollars, Todd never voluntarily paid any of the sums ordered – including child support. The continuing legal proceedings throughout 2001 concerned efforts to recover the money Todd took, which were largely unsuccessful, and reduce further arrearages to judgment. No appeals have issued from any of the orders issued during the 2001 enforcement proceedings below. R. App. 220, 228, 230, 244. This appeal, however, from the order of June 2, 1999, remains pending, and is the last piece believed necessary to resolve in order to put to rest divorce litigation that has been ongoing for nearly a decade.

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ARGUMENT

I. THE STANDARD OF REVIEW IS ABUSE OF DISCRETION

The *Opening Brief* fails to adequately state the standard of review applicable to this case. First, he states "There are really two standards to be looked at." OB at 10. Poor grammar notwithstanding, he is wrong. His citation is to a case dealing with this Court's standards for determining the construction of ***statutes***. No such question is presented by this case. Apparently, by "statute," he means to reference the court rules and rules of civil procedure regarding finality and motion practice.

Todd fails to describe and review of the abuse of discretion standard. Generally, a court abuses its discretion when it makes a factual finding which is not supported by substantial evidence and is clearly erroneous. *Real Estate Division v. Jones*, 98 Nev. 260, 645 P.2d 1371 (1982). An error of law can also be an abuse of discretion, *Franklin v. Bartsas Realty, Inc.,* 95 Nev. 559, 598 P.2d 1147 (1979), as can a court's failure to exercise discretion when required to do so. *Massey v. Sunrise Hospital,* 102 Nev. 367, 724 P.2d 208 (1986). Also, a court can err in the exercise of personal judgment and does so to a level meriting appellate intervention when no reasonable judge could reach such a conclusion under the particular circumstances. *Delno v. Market Street Railway*, 124 F.2d 965, 967 (9th Cir. 1942).

However, a court does ***not*** abuse its discretion when it reaches a result which could be found by a reasonable judge. *Goodman v. Goodman*, 68 Nev. 484, 236 P.2d 305 (1951).

There are no hard and fast rules, but some of the factors for consideration may include: jeopardizing the fairness of the proceeding as a whole; if the error has a substantial impact upon the outcome; if the court failed to undertake a factual inquiry or ignored a deficiency in the record; the exercise of discretion the court does not have; a decision supported by improper reasons, no record, or contravening policies of the court, etc. *Johnson v. United States*, 398 A. 2d 354, 366-67 (D.C. App. 1979). However, simply being wrong is ***not*** an abuse of discretion, the "right to be wrong without incurring reversal," *Johnson*, (citing Rosenberg, *Judicial Discretion* at 637.) The court inquires whether the exercise of discretion was in error, and if so, whether the impact requires

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reversal. If the answer to both of these questions is not "yes," then there has been no abuse of discretion.

In the field of family law, the Court has repeatedly reiterated its intent to give substantial deference to the discretionary decisions of district court judges, particularly as to procedural matters, *see*, *e.g.*, *Kantor v. Kantor*, 116 Nev. ___, 8 P.3d 825 (Adv. Opn. No. 96, Sept. 15, 2000) (denial of motion for leave to amend affirmed); *Hamlett v. Reynolds*, 114 Nev. 863, 963 P.2d 457 (1998) (allowance of amendment to complaint), and even where this Court might have reached a different result. *See Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

In this case, Judge Jones was presented with an *Amended Decision* made under highly questionable circumstances, by a judge who made the ruling during an ethics investigation initiated by the attorney for one of the parties, who thus could not attend the hearing; the ruling itself was erroneous on its face, contained obvious mathematical errors, failed to account for two out of the three retirement accounts at issue, and defied all known case law regarding alimony, attorney's fees, and attribution of property and debt. It might have been an abuse of discretion to ***not*** rehear and decide such an order, but it could not have been an abuse of discretion to rehear the matter, sort it out, account for the actual assets and liabilities, and enter orders accordingly. The specific questions resolved are addressed below.

II. THERE WAS NO ABUSE OF DISCRETION IN THE DISTRIBUTION OF THE RETIREMENT ACCOUNTS

During the time proceedings were conducted before Judge Fine, Todd had not revealed the existence of the ESOP. HT 9/4/97 at 20. He had not revealed that he had plundered the retirement accounts in their entirety during the marriage, and Judge Fine either did not comprehend or did not care that Todd had withdrawn the maximum available after separation and deposited the money into a friend's account. I App. 10042, 10086-10094; II App. 20133-34; R. App. 117.

The divorce decree, on its face, reserved jurisdiction for the "entry of such further orders, including a Qualified Domestic Relations Order, as are necessary to enforce any and all proper property, debt and retirement benefits adjudication, or to make an award of alimony." I App. 10208.

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Even if Judge Fine's *Decision* or *Amended Decision* had ever become a final order, it could be argued that the explicit reservation of jurisdiction gave Judge Jones, when he became the successor judge in the case, full authority to enter further orders as necessary to adjudicate retirement benefits, or award alimony.

That question need not be reached, however, because no final order regarding the financial issues was entered until Judge Jones entered the order filed June 2, 1999. II App. 20199. Verifying that fact requires stepping through the orders entered, and the legal rules applicable to them.

A. The *Decision* of October 10, 1997, Never Became a Final Order

Without any citation of any authority of any kind, Todd asserts that there is "no doubt" that the *Decision* of October 10, 1997, was a "final order." OB at 10. He is wrong.

First, even if Todd's argument had legal merit, he has given this Court no legal basis, in direct defiance of his ***obligation*** to cite legal authority in support of such an argument. *See* NRAP 28(a)(4); *State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984) (advising counsel of sanctions for failure to refer to relevant authority); *Smith v. Timm*, 96 Nev. 197, 606 P.2d 530 (1980) (inadequate "discharge of the appellant's obligation to cite legal authority"); *Carson v. Sheriff*, 87 Nev. 357, 487 P.2d 334 (1971) (contentions not supported by relevant authority need not be considered).

Second, there is some question as to whether the October 10, 1997, *Decision* ***could*** have become a final order; some case law indicates otherwise. *See Farnham v. Farnham*, 80 Nev. 180, 184, 391 P.2d 26 (1964) (an "opinion" issued by a district court is not an appealable judgment).

Again, however, that question need not be reached. Todd's counsel filed a timely tolling motion on October 24, 1997, preventing the *Decision* from ever becoming "final." I App. 10228. The *Motion* asked the lower court to make findings regarding alimony, property, and debt, as the *Decision* was vague on the issues. In the meantime, we appealed from that *Decision*, on November 3, 1997, the impact of which is discussed in the following section. R. App. 95.

On April 10, 1998, this Court issued an order dismissing our appeal, expressly holding that Todd's tolling motion had not been "formally resolved," and that until that happened, the *Decision*

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could not be final. II App. 20019-20020. The tolling motion was not "formally resolved" until Judge Jones had it reduced to writing and then entertained argument and entered an order on reconsideration. II App. 20177, 20199.

In its ODA, this Court ruled that the *Decision* was ***also*** not a final judgment because it failed to resolve the child custody issue, and therefore was not appealable until at least one further order was issued. *Id*. There was no final child custody order until Judge Jones entered one on March 29, 1999. II App. 20192.

Accordingly, the Law of the Case[31] in ***this*** case is that, at least through April 10, 1998, Judge Fine's *Decision* was not a "final order." On remand, Judge Jones did not have the discretion to consider Judge Fine's "decisions" or *Decree*; this Court's order ***compelled*** the successor judge to treat the *Decision* as not final until the two deficiencies identified by this Court were remedied. *See* James & Hazzard, *Civil Procedure* 535-536 (2d ed. 1977).

As the successor judge, Judge Jones was required to make final orders, entertain procedural and substantive motions, conduct such hearings as were necessary to that purpose, and cure the deficiencies noted by this Court. His orders in 1999, and all those that followed relating to custody, alimony, distribution of property and debts (including the retirement benefits), and deciding attorney's fees, were all the natural and inevitable consequences of the Law of the Case created by this Court on April 10, 1998.

B. Judge Fine was not Permitted to Make a Ruling of Any Kind on Todd's Motion on December 2, 1997

It is difficult to discern from Todd's submission, but he appears to be arguing that Judge Fine's oral rendition of a decision on Todd's motion for rehearing was entitled to deference, by Judge Jones in the subsequent proceedings, and by this Court now. He is incorrect for a variety of

[31] Centuries of established English and American common law have established this doctrine, which is easily found in a law dictionary: "The doctrine holding that a decision rendered in a former appeal of a case is binding on a later appeal." Black's Law Dictionary 893, (7th ed. 1999). The doctrine has been cited by this Court as fully applicable in this state. *See Hornwood v. Smith's Food King No. 1*, 107 Nev. 80, 807 P.2d 208 (1991); *Wickliffe v. Sunrise Hospital*, 104 Nev. 777, 766 P.2d 1322 (1988).

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reasons. OB at 10-11. Again, Todd provides no authority of any kind for his assertion. *See Weber*, *supra*.

Ignoring the pending appeal relating of the *Decision*, Judge Fine heard argument on Todd's tolling motion on December 2, 1997, and promptly ruled on it. She orally rendered an *Amended Decision* and directed Todd's counsel to draft a written order. Todd's counsel never did so, but before addressing that fact, it is appropriate to note that the oral rendition of the decision should not have been made.

This Court has repeatedly pointed out the procedures that should be followed in such circumstances. When, during a pending appeal, a party wants to bring a motion for relief from judgment or for new trial under NRCP 59(a) or 60(b), the motion should first be filed and heard in district court. The district court would then deny the motion, or certify to this Court that it is inclined to grant relief; in the latter case, that party could request a remand for purpose of allowing the motion to be granted. *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978); *Smith v. Emery*, 109 Nev. 737, at 740, 856 P.2d 1386 (1993); *Chapman Indus. v. United Ins. Co. of America*, 110 Nev. 454, at 458, 874 P.2d 739 (1994).

In this case, Todd and Judge Fine just ignored the appeal, and any questions as to jurisdiction. A district court's purported entry of orders when it has no jurisdiction to proceed are void *ab initio*. *Dobson v. Dobson*, 108 Nev. 346, 830 P.2d 1336 (1992); *C.H.A. Venture v. G.C. Wallace Consulting Engineers, Inc.* 106 Nev. 381, 794 P.2d 707 (1990); *Misty Management Corp. v. First Judicial District Court*, 83 Nev. 180, 426 P.2d 728 (1967). The lack of jurisdiction which may render a judgment void may be jurisdiction over the subject matter, *Fritchett v. Henley,* 31 Nev. 326, 102 P. 865, 104 P. 1060 (1909). A void judgment may be attacked without regard to the time limits specified in NRCP 60. *Foster v. Lewis*, 78 Nev. 330, 372 P.2d 679 (1962).

In other words, even if Mr. Shapiro ***had*** reduced Judge Fine's orally rendered *Amended Decision* to writing during the pendency of the appeal, it would have been void. As explained below, however, that error may have been harmless in the long run, since the *Amended Decision* was not reduced to writing until after the appeals were dismissed.

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The second reason that Judge Fine's oral rendition of December 2, 1997, is not entitled to any deference is that it was an ***oral decision***. In the Eighth Judicial District Court, the prevailing party must prepare and furnish the proposed order to the court within ten days of the decision, unless additional time is permitted by the court.[32] EDCR 7.21.

An order is not effective "for any purpose" until it is entered. *Tener v. Babcock*, 97 Nev. 369, 632 P.2d 1140 (1981); *Fitzharris v. Phillips*, 74 Nev. 371, 333 P. 2d 721 (1958). Judge Fine's oral pronouncement from the bench, the minute order from the clerk, even an unfiled written order if one had ever existed, was ineffective "for any purpose." *Rust v. Clark Co. School Dist.*, 103 Nev. 686, 747 P.2d 1380 (1987).[33] In short, the case could not proceed and Judge Fine's pronouncements could not be enforced, appealed, or reheard by the district court, until it was written and entered. In short, ***Todd*** caused the delay, not Barbara.[34]

Shortly after the appeal was dismissed and jurisdiction returned to the district court to ***enter*** the *Amended Decision*, so it could either be reheard or validly appealed, Barbara requested and received permission to put it into print, and submitted it. II App. 20178. It was then reheard as provided by the rules, corrected, decided, and entered, in the form of the orders Todd now appeals.

C. Rehearing of the *Amended Decision*, once Entered on February 16, 1999, was Proper

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[32] It is common practice to obtain a countersignature from opposing counsel before submission to the court. Although there is no local rule requiring countersignatures, judges in the Family Division attempt to have countersignatures on all orders. Therefore, there is often a delay exceeding ten days. However, none of Todd's three attorneys ever submitted the order at all.

[33] *See also Musso v. Triplett*, 78 Nev. 355, 372 P.2d 687 (1962) (a minute order is not appealable); *Farnham v. Farnham*, *supra*, 80 Nev. 180, 391 P.2d 26 (1964) (an "opinion" issued by a district court is not an appealable judgment).

[34] In an amazing abuse of logic, Todd asserts (again without authority) that it was somehow incumbent upon Barbara to supply the order he was directed to prepare, when he failed to do it, at whatever time would have done him the most good; without explanation, citation, or reasoning, he asserts "laches and waiver." OB at 11. The argument is specious, and we can perceive no possible application of either doctrine to the facts of this case. *See Erickson v. One Thirty-Three, Inc.*, 104 Nev. 755, 766 P.2d 898 (1988) (laches is delay that works to unfairly disadvantage the other party, causing a change of circumstances which would make a grant of relief to the delaying party inequitable); *Parkinson v. Parkinson*, 106 Nev. 481, 796 P.2d 229 (1990) (waiver requires the intentional relinquishment of a known right, whether express or implied from conduct which is inconsistent with any other intention than to waive a right).

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Since no *Huneycutt* motion was ever pursued, the earliest either party could have properly attempted to file the *Amended Decision* was after remand on April 10, 1998 (and issuance of remittitur). *Buffington v. State*, 110 Nev. 124, 868 P.2d 643 (1994) (district judge does not regain jurisdiction until after remittitur is issued and received). As noted above, we did so, receiving permission to file the written order that Todd had been ordered, but failed, to provide. II App. 20178.

Todd argues, however (still again without any kind of authority) that Barbara's motion for reconsideration was "premature" because it was filed before Judge Jones got around to signing and filing the *Amended Decision* itself. OB at 10. Todd goes so far as to dispute Judge Jones' authority to reconsider any prior orders rendered in the case.[35] The only legal authority Todd suggests is a bare citation to EDCR 5.29, without quotation, case reference, or reasoning. OB at 11-12. As with all of his other unsupported assertions, Todd is incorrect.

As discussed above, Judge Jones received the *Motion for Reconsideration* and the proposed order from Barbara's counsel at the same time. The question is whether the administrative delay by the district court in filing the *Amended Decision* somehow rendered the *Motion for Reconsideration* incapable of being lawfully heard and decided.

Really, Todd's argument boils down to the unsupported assertion that Judge Jones ***could not*** consider the *Motion for Reconsideration* without requiring us to re-file that motion, in ***addition*** to the supplemental material on financial matters (which the judge requested, and which we filed). R. App. 108.

Any such reading of the rules turns them on their head. Starting from the beginning, the Rules of Civil Procedure state that they are to be construed "to secure the just, speedy, and

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[35] Todd's counsel overtly accuses Judge Jones of judicial misconduct on page 11, line 7, by attacking his impartiality:

> Once Barbara got the children back, ***she knew Judge Jones was in her favor***, and thus filed the motion for reconsideration.

(Emphasis added.) We are not aware that Todd, or Mr. Kent or anyone else, has filed a complaint for judicial discipline against Judge Jones for his actions in this case. Nor could they; Judge Jones has bent over backwards for three years to not throw Todd into jail for his ongoing contempt of virtually every court order rendered against him. This is the very first time ever that we have heard this comment about Judge Jones. Aside form being a lie, it is beyond the scope of Todd's appeal.

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inexpensive determination of every action."[36] The specific question was addressed by the district court. Counsel discussed whether there was any kind of "premature filing penalty" in the proceedings below. HT 4/8/99 at 24. Judge Jones ruled that the motion was timely, and did not require counsel to re-file the *Motion for Reconsideration* after he signed the *Amended Decision*. R. App. 136; II App. 20199-20200.

Put another way, the question is whether Judge Jones was ***required*** to direct us to perform the empty gesture of re-filing the *Motion for Reconsideration* before hearing it. Neither the rules themselves or any cases we have uncovered indicate that any such silly procedure is mandatory.

In 1999, the timing of the *Motion for Reconsideration* in the Eighth Judicial District Court was controlled by EDCR 5.29.[37] Of course, subsection (c) of the prior rule was satisfied since the *Amended Decision* failed to account for at least one of the three retirement interests.

The local rule in 1999, and the rule today, make only one substantive limitation – relief must be sought within 10 days after service of written notice of the order or judgment, ***unless time is shortened or lengthened by order***. Here, the lower court did exactly that. There is absolutely no prohibition against the concurrent filing of a motion and submission of the proposed written order (the subject of the motion) to the District Court, as the lower court here ruled was perfectly acceptable.

In short, it was within Judge Jones' discretion to not require the refiling of Barbara's *Motion for Reconsideration*. "[U]nless and until an order is appealed, the district court retains jurisdiction to reconsider the matter." *Gibbs v. Giles*, 97 Nev. 243, 607 P.2d 118 (1980). Barbara's *Motion for Reconsideration* was timely.

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[36] NRCP 1.

[37] Today, EDCR 5.29 has been reduced to one sentence:

Rule 2.24 applies to rehearing of motions in the family division.

The older and now outdated Rule 5.29 is virtually identical to the current Rule 2.24, except for one provision which has now been deleted:

> (c) A motion for reconsideration must be based on allegations that the previous rulings of the court failed to completely dispose of the matters before the court or that there has been an apparent mistake of fact upon which the court based its ruling. The motion may not be brought to reargue matters disposed of by the court, or to introduce new evidence.

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While the focus of Todd's attack is hard to see, it is possible that he is asserting the general proposition that the district court lacked authority to reconsider prior orders in the case. OB at 11-2. That too would be incorrect, since that authority is clear and long established in this State. Essentially, the District Court is permitted to exercise its discretion and reconsider motions, subject to the limitations of substance and time. A court has inherent authority to reconsider its prior motions. *Trail v. Farreto*, 91 Nev. 401, 536 P.2d 1026 (1975) ("a court may, for sufficient cause shown, amend, correct, resettle, modify or vacate, as the case may be, an order previously made and entered on the motion in the progress of the cause of the proceeding.")

Further, rehearings are appropriate where "substantially different evidence is subsequently introduced ***or*** the decision is clearly erroneous." *Masonry & Tile Contractors v. Jolley, Urga & Wirth*, 113 Nev. 737, 941 P. 2d 486 (1997). The trial judge is granted great discretion on the question of rehearing. *Harvey's Wagon Wheel, Inc. v. MacSween,* 96 Nev. 215, 606 P.2d 1095 (1980) (reconsideration of previously denied motion for summary judgment approved; "judge was more familiar with the case by the time the second motion was heard, and he was persuaded by the rationale of the newly cited authority"). We are unfamiliar with any rule of law that required Judge Jones, as successor judge, to give any greater deference to the mathematically inaccurate, legally flawed, and incomplete oral order of Judge Fine than he would have given to one of his own orders.

D. The Pension Division Ruling by Judge Jones was Correct

When Todd's brief is stripped of the unsupported and baseless assaults regarding procedure, addressed above, there is almost nothing left as to substance. Todd's entire analysis of "the 401K" [sic.] is only 13 lines long, is devoid of citation to law or any part of the record, and misstates the

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facts of the case.[38] We do note that he uses the words "Gemma and Fondi," without citation, description, or application of those authorities in violation of NRAP 28(a)(4).

Todd comes closest to a substantive claim of error in the naked claim on page 13 that he is "entitled" to "a separate property in his retirements of 53%."[39] Grammar aside, as nearly as we can tell Todd's claim of error is based on the remarkable idea that because Todd did not supply discovery and "no information was provided" during the 1997 proceedings before Judge Fine, the prior judge's dubiously-motivated oral guesswork should trump the division of retirement benefits two years later that was based on the law as proclaimed by this Court, the evidence acquired by discovery, and the documents and testimony at an evidentiary hearing.

Todd has failed to provide much of the substantive documentation introduced into evidence during the proceedings leading up to the order from which he appealed, or the testimony regarding that documentation that was discussed during the week-long evidentiary hearing, and in the moving papers submitted before and after that date. We have tried to ameliorate that failure, at least in part. R. App. 108-135, 140-219; *also see* I App. 10087-10095; II App. 20127-176; HT 4/8/99 at 14-20.

What Judge Jones ordered was a straight time-rule division of the retirement benefits, divided between the parties in accordance with the degree to which those benefits accrued during marriage, and directing counsel to do additional discovery to provide the information necessary for a time-rule calculation, since Todd had refused on multiple occasions to produce the necessary information. II App. 20200.

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[38] Page 13, lines 20-27, and page 14, lines 1-5. Todd misstates the names of the pension plans throughout the entire *Opening Brief*. Todd never had (to our knowledge) an account under IRC § 401(k) (a qualified employee benefit plan through which employers and employees may contribute to a tax deferred account, salary reduction, cash or deferred, profit-sharing plan). As stated above, Todd earned three pension benefits during his employment with Kerr-McGee: Defined Benefit Plan, Stock Investment Plan, and the Employee Stock Option Plan. Other misstatements of fact include his listing of the date of marriage as July 7, 1998 (making the term of the marriage a negative number). He states the date of divorce as "May, 1997," when the hearing was on May 22, and the Decree was filed September 3, 1997. I App. 10204. Todd correctly states that he began work at Kerr-McGee in 1980, but fails to reveal that he removed 100% of his vested benefits in 1993, during the marriage.

[39] On the next page, Todd claims that he "had to work at Kerr-McGee before being allowed to invest, and that he should be given credit for that." No citation is given. To the best or our knowledge, there is neither any such rule in existence nor any evidence in this record to support the claim.

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Discovery in the intervening time showed that the ESOP (which Todd had not revealed to even exist in 1997) was not even ***started*** until 1990. R. App. 160. We were also, eventually, able to find out just how much Todd had withdrawn from and borrowed against the various accounts. Although it took Todd absconding with all the retirement money, and the employer having to restore it, to prod them into action, Kerr-McGee and Putnam finally submitted a comprehensive account history. R. App. 140-219, 230-33; *see* R. App. 108-135.

The division defined by Judge Jones in the order filed June 2, 1999, and later carried into effect by QDROs, was supported by substantial evidence. This Court has held that where findings are based on substantial evidence, and an appellant fails to provide a full record showing the claimed error, the findings will be affirmed. *See Toigo v. Toigo*, 109 Nev. 350, 849 P.2d 259 (1993) (without the trial transcript, the Supreme Court has no basis for disturbing the findings of the trial court).

Additionally, when evidence on which a district court's judgment rests is not properly included in the record on appeal, it is assumed that the record supports the lower court's findings. *Meakin v. Meakin*, 88 Nev. 25, 492 P.2d 1304 (1972); *Leeming v. Leeming*, 87 Nev. 530, 490 P.2d 342 (1971); *Pfister v. Shelton*, 69 Nev. 309, 250 P.2d 239 (1952). In other words, if Todd was to be allowed to assert that the lower court did not have sufficient evidence at the evidentiary hearing to establish the propriety of dividing the retirement accounts as he did, it was incumbent upon Todd to furnish the transcript showing how the lower court erred.

Substantively, Judge Jones' time-rule division was in accordance with this Court's rulings on the subject. *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995); *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996).

At oral argument, Todd's then counsel (Clarence Gamble) made the same argument Todd makes here through present counsel: that it does not make any difference how wrong Judge Fine's numbers were or how she came up with them; whether right or wrong, they should be applied. *See*

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HT 4/8/99 at 27. This is not true, of course; as was presented below, a mathematical error could be corrected at any time under the rules. *See* NRCP 60(a)[40]; HT 4/8/99 at 37.

For the purpose of ensuring candor to the Court, however, there ***is*** a legal issue presented by this case, although Todd never cogently articulates it. He urges that his entire time in employment at Kerr-McGee be counted in the time-rule denominator, whether or not he participated in a retirement plan during that period. *See* OB at 13, lines 23-24. The facts regarding the ESOP illustrates one of the ways in which Todd's argument is fallacious.

Todd started working for Kerr-McGee in 1980. The ESOP was created in 1990, during the marriage, and the employer starting accruing an account balance. The parties were married from 1988 to 1997. Todd left Kerr-McGee in 2000. Using a time-rule formula as set out by Judge Jones, the numerator would be 7 (the years of marriage during which contributions were made to the plan), and the denominator would be 10 (the years of Todd's participation in the plan), divided by two, yielding a spousal percentage of 35%. II App. 20200.

Using Todd's logic, however, the numerator would be 9 (the years of marriage), and the denominator would be 20 (Todd's total employment period), divided by two, and yielding a spousal percentage of 22.5%. I App. 10236.

It is true that in some of the pension cases, the Court's reference in discussing the time-rule denominator was to the "number of months of time in service." *See Gemma*, *supra*, 105 Nev. at 461. In that case, however, the employee was a policeman, so the period of his employment and the dates during which service accrued for retirement were identical. More applicable terminology is used where time in service may or may not count in the eventual pension to be received. In the military context, for example, the relevant statute refers to "service creditable for retirement." *See* 10 U.S.C. § 1408(d)(2). The Civil Service regulations likewise reference "creditable service." 5 C.F.R. § 838.623(c).

[40] The rule provides that a court may, "at any time of its own initiative or on the motion of any party" correct "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission."

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Reading the four cases cited above, it appears that the only reason this Court has not specified similar language is that the issue has never been presented – in each case, the total service time has been identical to the service time within which the retirement benefits accrued. There does not appear to be ***any*** authority, of any kind, from anywhere, that would permit the counting of time in employment during which ***no*** contributions to the retirement plan were made in deriving a time-rule denominator. Todd has not suggested any such authority, and our research has not revealed any; logic suggests that no such authority exists.

It is worth noting in this discussion that Todd was able to keep the entirety of all the money he withdrew from or borrowed against the plans over the years, including the money he took post-separation without Barbara's consent by apparently misrepresenting his marital status. Todd has never been compelled to return any of those funds, despite the orders requiring him to do so. *See* II App. 20202. Certainly, Judge Jones ***could have*** awarded Barbara more than her time-rule portion of the remaining balances in the accounts, to make up for Todd's looting of them. *See Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997); *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996).

Since Todd has produced no authority of any kind indicating that Judge Jones' time-rule division was out of compliance with any law, rule, case, or logical division, it is respectfully submitted that he has failed to establish any kind of error, nevertheless reversible error, relating to Judge Jones' division of the retirement benefits at issue in this case.

III. THERE WAS NO ABUSE OF DISCRETION IN THE AWARD TO BARBARA OF LUMP SUM ALIMONY

Todd's entire analysis of alimony and distribution of debt (he combines the issues), is less than one page long and completely devoid of citations to or discussion of the law – ***any*** law.[41] Remarkably, it is also devoid of an analysis of the debt, which Todd simply refers to as a "factor" in lump sum alimony awards. Again, Todd is in violation of *Weber*, and again, this Court could

[41] Lines 1-18 on page 13.

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entirely disregard his claims of error accordingly, although we will attempt to address the "merits" of the issue.

Todd complains that Judge Jones "abused his discretion" by awarding lump sum alimony to Barbara because he failed to know the exact value of the "401(k) plan," failed to consider that Todd assumed all community debt, and "provided no basis for his decision." OB at 13. Again without citation to any kind of authority so indicating, Todd asserts that Judge Jones was obliged to finalize and enforce rulings made by Judge Fine, no matter how erroneous and regardless of whether the earlier rulings were in accord with the law, the facts, or the procedural rules regarding district court proceedings during appeals.

As discussed in subsections A, B, and C of the retirement benefits section above, Judge Jones was compelled to continue the case to conclusion by the directives of this Court in its ODA. Todd does not dispute that further hearings occurred before Judge Jones, or that a great deal of testimonial and other evidence was taken prior to the Judge Jones rendering his orders. Todd had counsel and he was allowed to present his case. He just does not like the result of an impartial decision, based on the merits of the case.

The ruling in question is:

> Based upon case law, and the prior financial orders of this Court, a lump sum of alimony would be the most appropriate in this matter. As such, the Court hereby awards Barbara the remaining balance of the Kerr McGee "401(K)" plan that is not otherwise awarded to her as set forth in this Order.

II App. 20204.

At the time this award was made, the lower court had recently heard five days of testimony about the parties' history, relationship, employment, present circumstances, and future plans. Judge Jones had already made the finding that Barbara's relocation to a small town in Wyoming "was not only reasonable, but, given [Todd's] behavior, was the most appropriate course of conduct for her preservation and that of the minor children." II App. 20193. While Todd refused to provide any information that was not years out of date, R. App. 124, HT 4/8/99 at 6-7, he had Barbara's updated financial information. R. App. 108.

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At the time of the award, Barbara was earning about $800.00 per month. R. App. 116. Todd admitted to an income of $3,588.00 per month.[42] HT 4/8/99 at 6. In addition to that base income, Todd had overtime that was regular, predictable, and significant. *Id*. He had previously admitted to an annual income of $53,000.00, which comes out to $4,416.00 per month. I App. 10040. We estimated his income at about $56,771.00. R. App. 111. The lower court had seen our analysis of these parties utilizing the factors recited in *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994), and our mathematical analysis based on the so-called "Tonopah formula,"[43] which provided a starting point for analysis at $16,461.41 in alimony. R. App. 115-16, 133.

While Todd had refused to provide discovery, the Court was able to estimate the approximate value of the account from the testimony of the witnesses.[44] It is submitted that Todd cannot use his own refusal to comply with discovery demands as a point of error in claiming that the lower court did not have a precise number for the account balance.

Todd's other complaints present a conundrum. He mentions "debts" without any kind of reference to any portion of the record. OB at 13. Todd does not reveal any actual "community debts" that he was required to pay, and the only debts recited in the order appealed from are the children's medical expenses that Barbara incurred, which Todd refused to contribute to, and which were reduced to judgment. II App. 20201. All of the testimony regarding the debts in issue that were considered by Judge Jones were gone over during the evidentiary hearing, which Todd has

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[42] $1,656.00 every two weeks, x 26 ÷ 12.

[43] In *Gardner v. Gardner*, 110 Nev.1053, 881 P.2d 645 (1994), this Court decried the Nevada Legislature's failure to set forth an objective standard for determining the appropriate amount of alimony. The Family Law Section of the Nevada State Bar has proposed such a standard, which was created to establish a starting point and "reality check" for divorce courts by means of a formula that gives weight to the factors set out in this Court's prior cases. *See* Roger Wirth, *Alimony in Nevada*, in Eighth Annual Family Law at Tonopah (State Bar of Nevada 1997). It is frequently used by both parties and many judges as a starting point in alimony cases.

[44] Because the SIP was an investment account, the value rose and fell constantly. It took until 2001, but we eventually verified through Kerr-McGee and Putnam that the pre-tax total value of the account at the time of divorce was some $40,200.01. Half of that sum was therefore $20,100.00. Of course, any access to those funds triggers income taxes, so the award had a post-tax value of some $15,000.00, which is the sum at issue here. While the documents establishing this are from recent filings in the district court outside the record now before this Court, counsel would be happy to supplement the record with the additional documents from Kerr-McGee verifying that number, if the Court wishes us to do so.

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chosen to not transcribe; normally, this would preclude them (or us) from mentioning the matter. *See Toigo v. Toigo*, 109 Nev. 350, 849 P.2d 259 (1993), *supra*.

On the presumption that the Court will entertain a response given Todd's raising of the matter, we can say that Todd's "debts" included the loans he took out against the pension plans, from which he alone took the money. The lower court knew, of course, that Todd had been enjoying a yearly income of more than $50,000.00 during the years the parties were separated, while Barbara had a marginal income, and he had provided her none of it; as far back as 1997, we estimated that Todd had enjoyed access to about $123,000.00 during the separation, compared to Barbara's $17,000.00. *See* HT 9/4/97 at 47. The parties had equal rights to the entirety of that income. *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

To the degree that the Court decides that there is an insufficient factual record of the testimony from the evidentiary hearing relating to the award of alimony made in this case, it should affirm the award based on Todd's failure to provide any evidence establishing error. *Meakin v. Meakin*, 88 Nev. 25, 492 P.2d 1304 (1972); *Leeming v. Leeming*, 87 Nev. 530, 490 P.2d 342 (1971); *Pfister v. Shelton*, 69 Nev. 309, 250 P.2d 239 (1952).

Under the statutory and case law, Judge Jones was well within the limits of his discretion in making the relatively modest award made in this case. Unless it is contrary to a premarital agreement between the parties which is enforceable pursuant to chapter NRS 123A, the court in granting a divorce may "award such alimony to the wife or to the husband in a specific principal sum . . . as appears just and equitable." NRS 125.150(1).

There have not been many lump sum alimony cases in Nevada. However, in *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990), this Court found an abuse of discretion in the lower court's ***failure*** to award permanent or lump-sum alimony, noting in passing that authority for lump-sum alimony awards is found in NRS 125.150(4), which allows a court to set aside a portion of one spouse's property for the other's support.

The Court in *Daniel* explicitly relied upon its decision in *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972), in which it affirmed a lump sum award of over $331,000.00 where the husband's net worth was three million dollars, the husband was twenty years older and had a much

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shorter life expectancy than the wife, and a possibility existed that husband might dissolve his assets in recrimination against the wife. *Id.*, 88 Nev. at 228-29, 495 P.2d at 621-22. Generally, this Court has termed the decision as to whether and how long alimony should be paid as a matter of "wide discretion" not to be disturbed absent an abuse of discretion, and to be affirmed where the lower court had evidence of both parties' "capabilities" and income-generating power. *Kerley v. Kerley*, 111 Nev. 462, 893 P.2d 358 (1995).

This Court has expressed the sentiment that there is a need for lump sum or permanent alimony when circumstances indicate that, without it, a party may be left without the ability of self support, or to prevent the possibility of future efforts to frustrate a divorce court's order by the payor spouse. In this case, Todd has stonewalled discovery, had not paid even child support for years at a time, and has generally resisted all court orders to provide for either Barbara or the children. The lower court acted well within its discretion in awarding to Barbara the remaining sums in the SIP account by way of lump-sum alimony.

IV. THERE WAS NO ABUSE OF DISCRETION IN THE AWARD OF ATTORNEY'S FEES

As with every other section of his brief, Todd fails in this section to cite any law, in violation of NRAP 28(a)(4).[45] OB at 14. Again, the Court is entitled to disregard the argument entirely, *see Weber*, *supra*, but again we will address its "merits."

Todd misstates the facts here, as he has done throughout the *Opening Brief*. He begins the first paragraph with a comparison of attorney's fees and the size of the marital estate without any reference to the record, using obviously false numbers in a claim that the marital estate had "a net worth of maybe $60,000." He knows this cannot be true, since when Todd absconded with two of the three pension plans, he grabbed over $112,000.00 from those assets alone. R. App. 231. Todd's other "arguments" are the shedding of crocodile tears for the legal profession ("such a black eye").

[45] In fairness, he uses the word "Sargeant"once, without citation, application, or description, in the odd little sentence (the limit of the legal analysis): "He [Judge Jones] could have based it [the award for attorney's fees] upon Sargeant, but he did not." The case, *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972), stands for the proposition that the requesting party must be able to meet the other party in court on an "equal basis." 88 Nev. at 227.

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All of Todd's commentary in this section is without references to the record, completely irrelevant to the issue of abuse of discretion, and without any pretense of legal authority. The very first semblance of a legal argument is in the claim that Judge Jones provided no basis for his decision "other than it was based upon papers and pleadings, and for discovery caused by Todd." OB at 14.

Todd's failure to provide the transcripts of the evidentiary hearing has deprived this Court of all of the testimony and much of the argument relating to who paid what in attorneys fees. The transcript he did provide, however, includes a recap of some of that testimony, and counsel's observation that under *Love v. Love*, 114 Nev. 572, 959 P.2d 523 (1998), we were required to produce the detailed, lengthy billing summary produced in open court for the trial judge and opposing counsel. HT 4/8/99 at 21-22. The record reflects no objection, then or at any later time, to any of the listed charges, although opposing counsel complained about the total amount incurred, and argued (without authority) that since Barbara was able to borrow the sums incurred, she should not be awarded fees. *Id*. at 32-33.

Todd claims not to understand that when the question of fees arose, Judge Jones still had before him the question of compensation to Barbara for Todd's discovery abuses (the amount of sanctions having been reserved), and the question of appropriate fees for making us prove during a five day evidentiary that Todd was the violent, abusive alcoholic that we had alleged and he had denied, as well as the question of who should bear what fees given the parties' grossly disproportionate earning capabilities. *Id*. at 21-23.

The award in question granted Barbara $25,000.00, out of the $38,000.00 that had been incurred during the proceedings in Department C, and the $87,000.00 incurred during the case in its many years of proceedings. The cited bases were "the papers and pleadings presented to this Court so far, coupled with the additional discovery requests that will be necessary as a result of the Defendant's conduct." *Id*.

Todd claims that the fee award is excessive for just the discovery work mandated by Todd's discovery stonewalling alone. OB at 14. This would be true, if that was the basis. As Todd knows, however, he raised exactly the same complaint during the proceedings below, and was told by the court below, several times, that the fee award had to do with the custodial litigation. *See* R. App.

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231: "The prior award of $25,000 for Attorney's Fees in 1999 was not related in any way to the preparation of the QDROs, but related to the prior Child Custody and Visitation proceedings."[46] In fact, after Todd absconded with the pension funds, his later misbehavior led to a further, modest award of fees. R. App. 229.

Under this Court's established case law, there was no abuse of discretion in the fees awarded in this case. "A district court's award of attorney's fees will not be disturbed on appeal absent a manifest abuse of discretion." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383 (1998); *accord*, *Fletcher v. Fletcher,* 89 Nev. 540, 516 P.2d 103 (1973), *Woodruff v. Woodruff*, 94 Nev. 1, 573, 206 (1978), *Sogge v. Sogge*, 94 Nev. 88, 575 P.2d 590 (1978), *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991), *Carrell v. Carrell*, 108 Nev. 670, 836 P.2d 1243 (1992); *County of Clark v. Blanchard Construction Co.*, 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982); *see Hornwood v. Smith's Food King No. 1*, 107 Nev. 80, 87, 807 P.2d 208 (1991) ($50,000 fee award affirmed despite affidavits and time sheets demonstrating over $130,000 in fees paid).

In domestic matters, this Court has indicated that fees should be awarded to a custodial parent where necessary to ensure that money is provided to pay counsel "without diminishing care for children." *Leeming v. Leeming*, 87 Nev. 530, 532, 490 P.2d 342 (1971). There, this Court reviewed the legislative history of NRS 125.150, and noted that the statute had been amended to:

> enable attorneys to defer fee claims until the end of divorce proceedings when our courts can most fairly evaluate the worth of services and the impact of fees on the situation of the parties. . . unlike the awards of attorney's fees allowed in certain other civil action to the party who prevails, to make him whole when legal assistance has been necessary to vindicate his rights . . .suit money is allowed a wife so that the court may hear her needs and those of the parties' children.

Id. at 534.

This Court has recently reiterated that where an award of attorney's fees is made after review of detailed billing sheets, the award will stand even if the appellate court would not necessarily

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[46] Actually, much ***more*** work has gone into this case than is reflected by the totals shown. Primarily because of the shocking treatment this woman and child received at the hands of the Nevada justice system in the peson of former Judge Fine, counsel has written off more than half the time expended on this matter to date, and has billed the time that was billed at all at a rate less than half of normal. If all work had been billed, at counsel's actual billing rate, the bill would have been expanded by about four times.

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concur with the size of the award. *Kantor v. Kantor*, 116 Nev. ___, 8 P.3d 825 (Adv. Opn. No. 96, Sept. 15, 2000). Such sheets with detailed billing entries were proffered here, without objection as to any entry. It is respectfully submitted that there was no abuse of discretion in Judge Jones' award of a fraction of the fees incurred in establishing the truth of the matters before the court over the opposition of an obstructive, recalcitrant, duplicitous opponent.

CONCLUSION

The Opening Brief is virtually devoid of legal reasoning, citations to the record or to the law,[47] and what is presented is a virtually indecipherable gibberish of fact, opinion, invective, and personal sentiment. The deficiencies in Appellant's appendix and brief have significantly increased the work we have had to do to provide this Court with a reasonable record and explain the issues in a manner sufficient to allow their orderly disposition. Sanctions against Appellant's counsel, including an award of fees, are warranted.

This should have been a fairly simple domestic relations case of a long-term custodial mother escaping a violent, alcoholic abuser, with a modicum of property and a little support. The reason it erupted into a nearly decade-long, excruciating example of how bad family law can get was the never-explained, irrational devotion by Judge Fine to abuse the law, ignore the facts, and stymy justice for the purpose of serving Todd Lofink. Her misbehavior in this case, in order to leave children in the hands of a violent abuser, was similar to, but far worse, then the actions criticized by this Court in *Russo* and *McDermott*, *supra*. If she had made her orders final, then this Court could have dealt with this case as it did with those.

Judge Fine's very actions in refusing to make her orders "final" for the purpose of evading appellate review, however, are what made them susceptible to correction at the district court level. Upon remand and reassignment to Judge Jones, he had no choice but to finalize all proceedings, and

[47] To be technical, Todd's counsel does mention EDCR 5.29three times without ever mentioning the differences between the rule then and today; no legal reasoning is made. He states "Gemma and Fondi" twice without case citations or page numbers; again, no legal reasoning is made. And finally, he refers to "the laws of laches and waiver," without citation, description, or explanation. It would strain credulity to believe that any time or effort was put into the analysis beyond saying words into a dictaphone.

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entertain all related motions and further proceedings. He did so, carefully and accurately, rendering custody to the non-violent long-term primary caretaker, ordering very modest child and spousal support, and dividing the pension interests precisely along this Court's time-rule guidelines. The fees that were awarded were only a fraction of what was incurred by incessant, defiant misbehavior on Todd's part, which greatly increased the cost of every phase of the proceedings.

There was no abuse of discretion in any aspect of Judge Jones' handling of this case from the moment it was assigned to him. The appeal should be dismissed, with costs assessed against Appellant.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that I have read the *Respondent's Answering 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 the 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 a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

DATED this _____ day of February, 2002.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that, in accordance with NRCP 5(b) and EDCR 7.26, service of the foregoing *Respondent's Answering Brief,* was properly accomplished by the end of the 12th day of February, 2002, by depositing a file stamped copy of the foregoing in the United States Mail, proper postage prepaid thereon, addressed to:

James S. Kent, Esq.
Bell, Lukens, Marshall & Kent, Chtd.
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