IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

HENRY E. SCHRAEDER,	)	
	)	
Appellant,	)	**S.C. CASE NO. 28341**
	)	D.C. CASE NO. 92-D-151454-S
vs.	)	
	)	
CALLEEN MAE SCHRAEDER,	)	
	)	
Respondent.	)	

RESPONDENT'S ANSWERING BRIEF

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STATEMENT OF THE CASE

Appeal from property and debt distribution, and alimony terms, of a final decree of divorce; Hon. Terrance P. Marren, Eighth Judicial District Court, Clark County, Nevada.

Respondent Calleen Mae Schraeder ("Calleen") filed a Complaint for Separate Maintenance on June 11, 1992, in Case No. D 151454. 1 ROA 1. Appellant Henry Eugene Schraeder ("Henry") answered the Complaint through his first attorney, but soon thereafter filed a counterclaim for divorce through the second of what would become a parade of counsel. 1 ROA 21, 40.

The only real issues ever litigated in this case were the division of property and debts, alimony, and the costs of medical insurance if a divorce, rather than separate maintenance, was granted. The case was tried on August 13, 1993, September 9, 1993, December 20, 1993, February 8, 1994, February 9, 1994, and February 23, 1994.

The district court took the case under submission, reviewed the parties' post-trial briefs, and issued a Minute Order dated July 7, 1994. The minute order provided, among other things, that "Defendant [Henry] pay Plaintiff [Calleen] the sum of $1,500.00 per month in rehabilitative alimony for a period of six (6) years." Counsel for Calleen was directed to prepare Findings of Fact, Conclusions of Law, and a Decree of Divorce consistent with the provisions of the Minute Order.

Before that decree was even filed, however, Henry (in proper person at the time) fired off a "motion for reconsideration" of the court's Minute Order. It was entitled "Motion for Reconsideration, Order Compelling Signature on Quit-Claim Deed, Designation of Spousal Support Payments as Taxable Income, and Order Shortening Time" and was filed July 20, 1994. III ROA 414.

A round of motions, oppositions, and countermotions ensued, which is recounted here because the procedural history bears upon Henry's assertion that the divorce decree is "void."

Calleen filed an "Opposition to Defendant's Motion; Countermotion for Attorney's Fees" on August 3, 1994, which asserted that since Henry's motion contained no citation to any legal

authority and did not state with particularity the grounds for reconsideration, it was defective both for reconsideration and as any sort of tolling motion. III ROA 428, 429. Henry filed an "Opposition to Plaintiff's Countermotion for Attorney's Fees" on September 1, 1994. III ROA 433.

Calleen filed a "Countermotion for Additional Relief" on September 12, 1994, asking the lower court to recognize that Henry had complied with none of the orders in the July 7, 1994, Minute Order, and that as of September 1, 1994, Henry was already in arrears on military retirement, alimony, and attorney's fees, and the military arrears alone were increasing by $1,346.24 each month since he was keeping all the money coming in. III ROA 443, 448.

The Decree of Divorce was entered September 16, 1994. III ROA 450. Notice of Entry was served, and filed September 20, 1994. III ROA 470.

The same day, Henry filed an "Opposition to Plaintiff's Countermotion for Additional Relief." III ROA 466. Counsel had to reschedule the hearing date due to a conflict with an order of this Court in another matter. III ROA 488.

On October 5, 1994, Henry filed a "Motion to Alter or Amend a Judgement, and Motion for Relief from Judgment" challenging the decree filed September 15, 1994, and citing NRCP 12(g), 59(e), and 60. III ROA 492. That motion was set to be heard on October 28, 1994. III ROA 493. Henry alleged that his request for relief

> centers on the alimony and legal fee judgments against me that threaten my financial stability for years into the future. Since I am without counsel (because I have to pay for my ex-wife's representation), I can only assume that the provisions of the decree are based on the Findings of Fact and Conclusions of Law. . . .

III ROA 495. Unable to accept that he was actually ordered to pay alimony, Henry alleged that the Minute Order setting support at $1,500.00 was a typographical error and that the court must have

really intended to set the amount at $15.00 per month to "keep the door open for possible deterioration" in Calleen's carpal tunnel condition. III ROA 501.[1]

Henry also argued that since he had kept and spent the military retirement benefits while he stalled entry of the decree, the court could not order him to turn over to Calleen her portion of the benefits:

> I also qualified for my home loan based on the full Air Force paycheck, and used a portion of it for down payments and closing costs. Until the date of divorce, my Air Force pay remained a portion of my normal income and should not be considered community property retroactively.

III ROA 504-505.

On October 17, 1994 Calleen filed her opposition to Henry's motions, and requested an award of fees. III ROA 513. Calleen noted that Henry's "Motion to Alter or Amend" was not timely filed, and that the lower court should not even entertain it. III ROA 514.

On October 24, 1994, Henry filed both a "Motion for Order Compelling Discovery and for Attorney's Fees, and for Order Shortening Time" and a "Reply to Opposition." III ROA 542, 555.

Henry's "Reply to Opposition" claimed that "Service was performed on October 3rd to the Court. The Court received the Motion and considered the Motion for Order Shortening Time for two days before releasing it to me on October 5th, after which it was filed immediately." III ROA 556. In other words, he admitted that his motion was not timely filed, but sought to excuse his non-compliance with the rule by blaming the judge for considering his motion to shorten the time for the hearing.[2]

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[1] Henry even called the court's secretary and tried to convince her to change the Minute Order. *See* III ROA 517, footnote 3.

[2] Proper procedure, of course, would have been to file the substantive motion within the time allowed, and then submit the motion and order to shorten the time of hearing to the judge for consideration.

On December 6, 1994, the court addressed the issue of alimony via a Minute Order:

> The Court has reviewed all of the papers filed recently and it is clear that the Defendant has filed some frivolous papers with the Court. However, he has pointed out to the Court that a clerical error was made of some significance . . . . The Court did not mean to order $1,500.00 per month in rehabilitative alimony. The correct amount was $500.00 per month. . . . The Court will address the other issues raised by the parties in their papers in a more formal way in the future. There is no reason for a hearing concerning the matter disposed of by these papers.

IX ROA (unpaginated).[3]

Per the lower court's directions, counsel prepared and submitted an amended decree changing the award of rehabilitative alimony to Calleen from $1,500.00 per month to $500.00 per month. Other decree provisions were unaffected. The Amended Decree was filed December 14, 1994, and Notice of Entry was served and filed December 21, 1994. III ROA 591; IV ROA 607.

On January 3, 1995, Henry filed yet another "Motion to Alter or Amend a Judgment, and Motion for Relief from Judgment," again citing NRCP 59(e). IV ROA 625. This one was set for hearing on April 4, 1995.

On January 4, 1995, the court concluded its consideration of Henry's October 5, 1994, "Motion to Alter or Amend" in a Minute Order providing as follows:

> This case was last addressed by the Court by Minute Order on December 6, 1994. At that time, the Court indicated it would address other issues raised by the parties in their papers in a more formal way in the future.
>
> The Court has reviewed the papers and considered the arguments of counsel for Plaintiff and Defendant in Proper Person. All remaining requests now before the Court by the parties are denied. The parties will bear their own attorney's fees and costs.
>
> A copy of this Minute Order is to be placed in the folder of counsel for Plaintiff and mailed to Defendant in Proper Person. Defendant in Proper Person is directed to prepare an Order containing the items in this Minute Order.

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[3] The Minute Orders were not paginated in the Clerk's index. For clarity's sake, the Court is asked to refer to the apparently complete set of Minutes and Minute Orders recently provided by the Clerk at the back of volume IX of the record.

IX ROA (unpaginated). Twenty days later, on January 24, 1995, the lower court addressed Henry's *second* "Motion to Alter or Amend" (the one filed January 3, 1995) in another Minute Order:

> [Henry's] Motion to Alter or Amend a Judgment, and Motion for Relief from Judgment was reviewed in accordance with a policy adopted by the Family Division District Judges, a copy of which is attached to this minute order. This motion has been found defective for the following reason(s):
>
> 1. There must be an affidavit of counsel; or, if in proper person, the movant, of compliance with EDCR 5.11(a). NFDMP 3
>
> 2. Motion and/or countermotion must include a factual affidavit from the client. EDCR 5.26
>
> Accordingly the hearing set for this matter on April 4, 1995 at 10:00 am is vacated. The movant may re-notice the motion for hearing by the Court, after the deficiencies have been remedied. At which time a new ordinary course date and time will be set by the Clerk of the Court.

IX ROA (unpaginated), Minute Order of January 24, 1995.

Henry then filed a "Supplemental Brief and Re-Notice of Motion" on March 15, 1995, and a hearing was set for June 5, 1995. IV ROA 640.

On April 12, 1995, Calleen filed an "Opposition to Defendant's Motion for Reconsideration; Countermotion to Reduce Arrearages to Judgment, Requests for Medical Expenses and in the Alternative for Reconsideration of the Minute Order Dismissing Plaintiff's Countermotion for Additional Relief." IV ROA 645.

All of the remaining motions and countermotions were argued in a lengthy hearing on July 27, 1995. Henry unsuccessfully attempted to retry the divorce, and raised most of the same issues at that hearing that he now presents on appeal. Most matters were resolved at the hearing — the lower court denied most of Henry's requests and found him in contempt for failure to pay previously awarded alimony and attorney's fees; the Order was filed January 23, 1996, and Notice of Entry was filed on January 31. V ROA 835; V ROA 840. The Order kept three issues under advisement: credit cards, COBRA insurance premiums, and Calleen's request to reduce additional arrears to judgment.

On January 12, 1996, the district court issued a further Minute Order resolving those three issues: (1) the credit card issues had been resolved at trial; (2) since Henry precipitated Calleen's lack of insurance by his early retirement, he should pay one-half Calleen's COBRA premiums (also to be characterized as alimony) from April, 1995, for the same period as her alimony award; and granting Calleen's request to reduce additional arrears to judgment. IX ROA (unpaginated). The formal Order was entered February 5, 1996. V ROA 856. Notice of Entry was filed February 9, 1996. V ROA 858.

Since Henry had been found in contempt of court for failure to pay alimony and failure to pay attorney's fees as ordered in the decree, the district court judge sentenced him to twenty-five (25) days in the Clark County jail on each of those two contempt findings. However, the sentences were suspended so long as Henry made future payments pursuant to the decree of divorce. Henry refused to make those payments, instead filing a notice of appeal from the Order holding him in contempt. V ROA 862.

There have been further enforcement efforts in the court below during the pendency of this appeal, some of which are documented in the later-produced volumes of the record, and which will be noted below if relevant to the issues presented in this appeal. As noted in motions previously filed, Henry still refuses to obey the payment orders, has remained defiant of all enforcement efforts, a warrant for his arrest is outstanding, and while this appeal continues he is in hiding outside the State of Nevada.

STATEMENT OF FACTS

The "Statement of Facts" in the Opening Brief is inaccurate, fails to acknowledge conflicting testimony submitted below, and in some areas the referenced pages do not contain the subject matter referenced.[4] Henry's testimony is offered as "fact" (mixing in procedural notes that belong in the statement of the case), often citing only Henry's unsupported opinions and arguments below as the "reference." Most of the "facts" set out at pages 6 through 18 of the Opening Brief are just Henry's rationalizations and explanations (most of which was rejected by the court below as not credible) and Henry largely ignores what is contained in the rest of the (nine volume) record.

In short, Henry'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 and the case, pursuant to NRAP 28(b).

Henry and Calleen met on a school bus while in junior high in Kansas City, Missouri. VII ROA 1069-70. They dated for a short while that summer before Calleen moved to Columbia, Missouri. There, one week before her fifteenth birthday, Calleen conceived a daughter, Laura, who was born December 23, 1970.[5] VI ROA (unpaginated), partial trial transcript of December 20, 1993, pages 4-5. Calleen had completed the eighth grade. *Id.*

The parties were reunited after Calleen moved back to Kansas City, Missouri with her family; Henry was a 17 year old motorcycle mechanic in training. *Id.* at 6. Laura was three months old, and Calleen's family maintained a story that the child was Calleen's sister rather than her

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[4] For example, fixated on his idea that Calleen has a "common law marriage" Henry incorrectly states that Calleen listed Mr. Charles Bolding as a "cohabitant." Actually, Calleen's "Domestic Relations Affidavit of Financial Condition" filed April 22, 1993, states that she lived with her son, Curtis W. Schraeder, and paid rent in the amount of $450.00 per month, and that Charles Bolding owned the house (I ROA 78, 81).

[5] The details of the sexual assault that led to this conception are set out at VII ROA 1070-71, but are not relevant to any issue to be decided here, except as to one of Henry's blackmail efforts.

daughter. *Id*. In December, 1971, Henry and Calleen decided to marry. Henry knew that Laura was Calleen's daughter, and he expressed his wish to adopt the child, insisting over Calleen's objection that the child was "never to be told" that Henry was not her father.[6] *Id.* at 7-8; VII ROA 1072-1073.

The parties married in El Paso, Texas on April 4, 1972. I ROA 1; VII ROA 1070. Calleen was 17 years old and Henry was 18 years old. Neither had graduated from high school. VI ROA (unpaginated), partial trial transcript of December 20, 1993, pages 8-9. Calleen moved from her parents' home in El Paso to live with Henry in his mother's home in Kansas City, Missouri, where they lived until August, 1972. VII ROA 1074. The parties then moved back to El Paso, Texas, and moved in with Calleen's parents. *Id.*

In February, 1973, Henry joined the military and went into basic training; Calleen joined him at his first duty station in Biloxi, Mississippi, in April, 1973, where they lived for six months. VII ROA 1075. Like most military couples, they were destined to move several times. From Biloxi, they moved to Sacramento, California (for three years), Stillwater, Oklahoma (for three and one half years), Taylor, Texas (for one summer), Edwards Air Force Base, California (two and one half years), Mountain Home, Idaho (three years), and then to Las Vegas, Nevada. VII ROA 1074-76.

The military lifestyle allowed Henry to acquire the education and training he had previously lacked. Before joining the service, Henry had cleaned tables at a restaurant, received training as a motorcycle mechanic, and worked as a painter and a bricklayer. VI ROA (unpaginated), partial trial transcript of December 20, 1993, pages 6-9; VII ROA 1074. Henry entered college in 1974 when the parties were in Sacramento, California, and after he received an ROTC scholarship, they moved to

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[6] Calleen testified that Henry later tried to blackmail her into settling the divorce case on his terms. VIII ROA 1193-1194. For his part, Henry characterized his blackmail threat (that unless Calleen settled on his terms, he would tell their daughter about the facts surrounding her conception) as a paternal desire to ensure his daughter was "fully informed." IX ROA 1377-78.

Stillwater, Oklahoma where Henry entered ROTC in 1976. VII ROA 1077-78. Henry earned a bachelor's degree in electrical engineering in 1979, and was commissioned as an officer. VII ROA 1077; VII ROA 1080-81.

Like most similarly-situated military spouses, Calleen received little further education or meaningful employment during Henry's military career. Before she married Henry, Calleen's employment had consisted only of babysitting. VI ROA (unpaginated), partial trial transcript of December 20, 1993, page 7. Calleen never returned to high school after Laura was born in 1970. *Id.* Calleen managed to take her "GED" exam in 1977 while the parties were stationed in Stillwater, Oklahoma. VI ROA (unpaginated), partial trial transcript of December 20, 1993, page 27. She took a number of college-level courses over the years as allowed by circumstances, but the multiple change-of-station moves in support of Henry's career, including the final move to Las Vegas, made about half the credits non-transferable and therefore worthless. VI ROA (unpaginated), partial trial transcript of December 20, 1993, page 31-32; VIII ROA 1196; VIII 1344-46. Despite these limitations, Calleen managed to earn an Associates of Arts degree in December, 1990. VI ROA (unpaginated), partial trial transcript of December 20, 1993, page 39.

At the time of the marriage, Calleen did not work outside the home, but took care of the house and the baby. VII ROA 1070-71; 1077. Eventually, Calleen worked at a day care center in Mississippi, but after the parties' son, Curtis, was born in May, 1974, she did not work outside the home until finding a job at a nursing home when the family lived in Sacramento, California. VII ROA 1078. When Henry was in ROTC and going to school in Oklahoma in 1976, Calleen continued full responsibility for care of the children, and also worked as a carhop during the day and as a carhop at a pizza parlor at night; subsequently, she worked at Wal-Mart during the day and at the pizza parlor at night. VII ROA 1079-80.

Calleen testified that the parties made a deal, growing out of a choice that they had to make when Henry was offered the ROTC scholarship. The very same day, Calleen was offered a scholarship to medical secretarial school, but both could not be pursued. VII ROA 1081. Calleen testified that they agreed she would give up her scholarship so he could go to school, that she would work to pay the bills and take care of the family while he was in school and that "once he graduated and got back into the Air Force as a commissioned officer, I would be able to go back to school." VII ROA 1081-82. She claimed that the latter half of the deal was never consummated because there "always seemed to some reason for me to have to work outside of the home. There was always a bill to be paid off or — there was always something that needed to be paid off that required me to continue working." *Id.* Henry also forbade Calleen from obtaining a student loan. *Id.*

While there was "never any money" for college for Calleen,[7] VII ROA 1104-05; IX ROA 1507, Henry went on to earn a master's degree in business. VII ROA 1121.

By the time of trial, Calleen was employed as a histological trainee. There was conflicting testimony as to both Calleen's past and future medical condition, and about her past and future educational and job opportunities. Calleen testified that she had spent twenty years working dead-end jobs while caring for two children, and in the course of those jobs suffered permanent injuries to her back, neck,[8] shoulders, and hands, and also had recurrent, painful, and progressive carpal tunnel problems. VII ROA 1128-1138; 1147-48; VIII ROA 1173-77; VIII ROA 1339-1343.

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[7] Though Henry testified on direct examination that he wanted to sell the marital residence to provide for Calleen's education, Calleen testified that Henry had told her if she wanted to get her education she would have to find a way to pay for it herself. IX ROA 1507.

[8] Convincing Calleen that lawyers were "unnecessary," Henry settled her claim from a car accident in 1976 for a paltry $1,700.00, despite the hairline fracture in her neck which has bothered Calleen ever since and is expected to cause some pain for life. VIII ROA 1171-72.

Calleen's doctor, Jeffrey Moore, testified that he had performed surgery on Calleen, and considered it "a partial success." IX ROA 1442. He also testified that repetitive hand movements were harmful to Calleen and that she could not be reasonably expected to continue such movements indefinitely. IX ROA 1440-44. Dr. Moore had treated bursitis and related conditions in Calleen's shoulders, and during her last visit injected cortisone into her shoulder in an effort to control inflammation and pain. IX ROA 1447-56. He recommended continuing physical therapy and drugs as "conservative" treatments in an effort to forestall further surgery because a second carpal tunnel surgery was less likely to be successful, and more likely to cause collateral damage to other tissues, and greater scarring. IX ROA 1442-43; IX ROA 1453. Dr. Moore had no doubts from his own observation and testing that Calleen's symptoms were authentic, and testified that there was no possibility that she was malingering or "faking it." IX ROA 1448; IX ROA 1455-56.

Calleen testified that at the time of trial she still required four years of college to attain the level of education that Henry obtained during the marriage so that she could enter a field in which she could work without further physical injury. VIII ROA 1196; VIII 1343-45.

Henry claimed that Calleen's employer would pay for most of her future educational expenses, but Calleen testified that the only assistance available was that if she paid up front for tuition and books, she could apply for reimbursement of up to $200.00 of the tuition cost for completed courses. VIII ROA 1337.

Calleen testified about physical and other abuse at Henry's hands throughout the marriage, detailing that he physically abused her as early as 1974, throughout the 1970s and into the 1980s — the incidents she remembered included his kicking her in the ribs, pushing and shoving her, and once picking her up and throwing her (she sustained a concussion). VII ROA 1086-90. Calleen testified that the abuse escalated from pushing and shoving to using closed fists in 1984, at which time he beat Calleen on the back and neck.

By about 1977, Henry's drinking had become a problem and in addition to what he described as his "job-related" late night drinking,[9] he was drunk quite often, including on the weekends. VII ROA 1083; VII ROA 1096-97. Calleen also learned that Henry had "at least 27 affairs that I know of." VII ROA 1098-99.

Calleen testified that the pattern of excessive alcohol consumption and abuse culminated in February of 1988, when Calleen asked Henry to leave the house.[10] VII ROA 1091. Calleen wanted to try marriage counseling, but Henry refused, declaring he would not go to a female counselor. VII ROA 1100. Henry offered to reconcile, claiming that he recognized he was an alcoholic, promising to drink only beer, and asking that Calleen agree to him having one affair a year; she refused. VII ROA 1102.

Calleen testified that the parties nevertheless did reconcile in June or July of 1988, and began living together again in mid-September, but that by late 1989 or early 1990, Henry began threatening Calleen, and he eventually grabbed her by the throat and choked her into unconsciousness. VII ROA 1092-93.

Henry's response to all this was denial; he claimed he did not beat his wife and that he "only" grabbed her by the throat once. IX ROA 1378.

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[9] Calleen found out that on Friday nights, when Henry claimed he had to work late, he actually went to the Crazy Horse strip club. VII ROA 1097-98. Henry called as a witness Charles McCallion, Henry's friend and co-worker, who testified about the bars on base and around town, and gave a full account of the science, art, and business of $20 "table dancing" at the Crazy Horse; of "beer calls"; of drinking to unconsciousness and being "picked up and carried off"; how Henry was a hard-drinking regular at various topless clubs where this ritual was repeated with some frequency; that the new Commander at Nellis frowned on Henry's violations of the UCMJ and, specifically, that the Commander hated public drunkenness and adultery; and ultimately, how the Commander "asked Mr. Schraeder to find a new job." VII ROA 1049-1058.

[10] Henry told Calleen that he thought she "made him" react with physical violence and that it was her fault. VII ROA 1091-92.

Money had been a continuing source of conflict during the marriage. Calleen testified that "there was never any money left over . . . I don't know where it went. It just disappeared." VII ROA 1104. She generally had not questioned Henry about finances until the eight month separation starting in February 1988. During the marriage, Henry made Calleen account for every penny she spent, and had created a monthly cash flow chart to keep track of monthly bills, but only Calleen had to completely fill it out. VII ROA 1108-18; Plaintiff's Exhibit 30. Calleen never had access to the savings account, which was solely in Henry's name. IX ROA 1501-02.

During their lengthy 1988 separation, Calleen received $800.00 per month from Henry to supplement the $2,000.00 per month income she then had, from which she paid all child expenses, plus her expenses and those of the marital household. VII ROA 1114. She realized that she, the children, and the household had long been receiving the benefit of only ***half*** of Henry's income. Calleen did not know where the other half of their income went, nor did she know where Henry's travel money went. VII ROA 1108-18. This caused her to review the checkbook, where she discovered large amounts of cash being withdrawn and large payments being made to Henry's MasterCard and Visa (his personal credit cards). *Id.*

Calleen learned that Henry was charging the majority of his military travel expenses, pocketing the cash the government provided for those expenses, and then paying the charges off out of his regular monthly paycheck. VII ROA 1112. At trial, Marlene Acosta, Calleen's financial witness, testified that the majority of charges on the charge cards were for Henry's TDY expenses and that her evaluation of Henry's finances showed a consistent pattern of money flow from checking, to savings, to withdrawal from ATM machines, with TDY expenses on credit cards being paid from Henry's regular salary and (when she was working) Calleen's salary. IX ROA 1540-1545. In other words, a large percentage of the family income ended up in the form of cash in Henry's pocket.

Ms. Acosta testified that standard practice from Henry made it impossible to determine with certainty what happened to the cash once it was withdrawn; the only certainty was that the bulk of it went to Henry in the form of cash. IX ROA 1540-56. During 1991, some $18,000 in cash went to Henry; Ms. Acosta was unable to track any benefit to the community from those cash withdrawals. IX ROA 1543-1547, 1558-59. She was sure that the TDY cash that Henry took did not get applied to the TDY expenses that he charged on the cards. IX ROA 1551.

Henry's pre-trial memorandum claimed that large sums of cash went into maintenance of the former community home, but realtor Catherine Park testified that Henry did not made any home improvements, despite his claims that he spent weekends working on repairs and that a great deal of the cash from the TDY conversions had been put into home improvements. I ROA 162 and 167; VII ROA 968-972.

Henry claimed that he had been "supporting" two adults and two children. IX ROA 1394. Calleen testified, however, that he limited the children to a $400.00 per year clothing allowance each, and told them they had to go to work at the age of fourteen if they wanted anything more. IX ROA 1523. The family rarely ate out together, and when they did it was almost always at cheap "fast food" places. IX ROA 1499-1500.

Calleen testified that Henry had long complained that he was "wasting" the money that was spent on his wife, children, and family home, and that he wanted to move the family to a mobile home in a remote area so that he could spend more money on "toys" for himself, including a boat, motorcycles, jet skis, and a Corvette.[11] IX ROA 1506-07.

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[11] One of the toys Henry bought for himself after the divorce decree was filed was, in fact, a Corvette; it was one of the assets against which counsel has (unsuccessfully, to date) tried to collect the now-massive arrearages produced by Henry's contemptuous disregard for the payment orders. *See* IX ROA (unpaginated), Minute Order filed January 22, 1997, verifying Henry's property not exempt from execution; Minutes of July 16, 1997, showing unsuccessful execution against Corvette.

The marriage effectively ended on April 4, 1992 (the parties' anniversary), when Henry put his fist in Calleen's face and threatened to pull the car over to the side of the road and "leave [her] there for dead." VII ROA 1093-94. Calleen then moved out of the house and the parties began rotating occupation of the residence until June of 1992 when Henry began showing up unexpectedly and dictating who she could enter the house. VII ROA 1094-1096.

Henry personally consumed the overwhelming majority of the parties' combined income during the separation before the divorce. Just between February, 1992, and July, 1993, Henry received about $95,580.00, while Calleen's total income during that period was $18,452.00. IX ROA 1539. Henry also admitted taking out some 6 new credit cards *after separation* without Calleen's knowledge or consent, and incurring charges totaling over $10,000.00 between the time of separation and trial. VII ROA 956-957.

On direct examination, Henry admitted he spent over $500.00 per month on dancing, bars, restaurants & vacations[12]; admitted being falling-down drunk at times, and that sometimes he never left the bars at all but just slept there; admitted that he had voluntarily diverted his income to pay for his then most recent girlfriend's expenses which included mortgage,[13] food, and — in the first month they were together — over $200.00 in additional clothing and cosmetics, plus accessories for her car, flowers, entertainment, trips, etc.; admitted to vacation travel from the moment of separation onward

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[12] Deliberately or otherwise, it is pretty clear from the financial and eye-witness testimony that Henry greatly underestimated his expenditures on booze and topless dancers. Gary Kirk verified that in 1991-92, while Henry told Calleen he was "working," Mr. Kirk saw Henry at the Crazy Horse Saloon drinking "copious quantities of alcohol, spending money — giving money to the dancers and the cocktail waitresses continuously" and buying drinks for people and that Henry spent twenty to thirty-five dollars during the fifteen to twenty minutes Mr. Kirk was present. VII ROA 981-983. Given how often Henry frequented such clubs, the expenditure rate of about $100.00 per hour would account for most of the missing cash and outstanding charges.

[13] From November, 1992, to June, 1993, when he paid rent for his girlfriend, Henry claimed to have to have paid only half the rent of $630.00 — i.e., $315.00 — rather than the $882.00 shown on his AFC. VII ROA 950; I ROA 27.

that took him to at least two other countries and all over the U.S.; and he admitted he took his girl-friend with him when he chose. VII ROA 950-961.

During trial on December 20, 1993, Calleen testified that Henry had threatened to resign from the service and flee the country for the purpose of destroying the military retirement so that Calleen would not get anything out of it.[14] VIII ROA 1191. At that moment, in open court, Henry claimed that any threats were "moot" and revealed for the first time that he had taken an "early out" retirement from the Air Force in October, 1993, effective February 1, 1994. VIII ROA 1192.

Henry's unilateral decision to take an "early out" and his insistence on divorce, rather than separate maintenance, eliminated Calleen's otherwise-free continued medical coverage.[15] Since the creation of those expenses were solely in Henry's hands, Calleen requested that Henry pay the costs he created. VIII ROA 1199.

There were several other witnesses, on various collateral and incidental issues that went into the lower court's evaluation of the credibility of the parties and the validity of the positions they asserted. A brief recap of those witnesses, and their testimony, was presented by counsel at the invitation of the court below. II ROA 320-332.

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[14] This was just one of Henry's several threats and attempts at emotional or financial blackmail during the course of litigation. Calleen testified that Henry had threatened during the trial to "stop" his retirement so that she would end up with nothing. IX ROA 1526-27; VIII ROA 1191-92 (prior threat from Henry that should Calleen be awarded anything by the court, he would resign his commission, get out of the Air Force and leave the country to keep her from being paid anything); VIII ROA 1193-1194 (testimony of Calleen that Henry called her in May, 1993, and told her that unless she settled on his terms he would tell their daughter Laura he was not her biological father); VII ROA 966 (testimony of Henry that disposing of his property and taking himself outside the reach of the court was "one of the options"); IX ROA 1490-1493 (cross-examination testimony of Henry initially denying, then admitting to writing letter threatening resignation from the military unless his settlement terms were accepted).

[15] Because the health problems she accrued during the marriage made her effectively uninsurable, Calleen's initial request was for a decree of separate maintenance, to be maintained until Henry completed twenty years of active duty. I ROA 1.

One notable witness was James Breeze, the parties' son-in-law, who testified that Henry made drunken confessions to him, first of a plan to hire, and later that he had already hired, a third party to assault Calleen and/or her attorney while Henry was out of town, and that Mr. Breeze did not want to be involved so he alerted the intended victims of the plot. VII ROA 1019-1020, 1023-1025.

On cross examination, Mr. Breeze was asked if he remembered Henry telling him that the conversations about the hit man were a "test of loyalty." VII ROA 1025-1027. Mr. Breeze recalled that such was suggested "after the fact," but that he thought Henry was completely serious in making the threats. *Id*. Mr. Breeze also noted his belief that Henry had been out to cheat him with regard to funds from a personal injury claim that Henry handled for him. VII ROA 1026-1027, 1033-1035. On February 9, 1993, Henry for the first time denied having attempted to hire a hit man. IX ROA 1376.

On the basis of the testimony at trial, the lower court entered several pages of findings and conclusions. III ROA 592-97. Among them was that Henry voluntarily chose to leave military service early, and that he "took the early retirement in part to defeat [Calleen's] otherwise-automatic entitlement to free lifelong medical care under the CHAMPUS program, and he knew that his choice would have that effect when he made it." III ROA 593. The court reserved jurisdiction to order Henry to contribute to the cost of Calleen's insurance in the event she lost her job for a medical reason and thus had insurance costs. III ROA 594.

On the basis of "public policy," the lower court denied Calleen's request for a decree of separate maintenance, and granted Henry's request for a divorce. III ROA 592.

The lower court found that rehabilitative alimony can be for the purpose of returning "the lesser-employed spouse back into the job market with an opportunity to earn greater income," to "balance the financial positions of the parties," or to "balance the property distribution." *Id*. The court further found that the parties had disparate incomes, that Henry's ability to earn income accrued

during the marriage, and that Calleen was entitled to rehabilitative alimony, and ordered $500.00 per month alimony for six consecutive years, with a reservation of jurisdiction during that term as to the amount and duration. III ROA 594-95. The court denied Calleen's request for permanent alimony because she "has been employed for a considerable time." *Id*.

Balancing equities, the lower court awarded Calleen a portion of the attorney's fees incurred in litigating the divorce, expressly finding Henry's actual payment of those sums relevant to the amount and duration of alimony. III ROA 596-97. The court ordered the parties to each bear the debts they had incurred from the time of their separation in 1992. *Id*. The court split the retirement benefits earned during marriage equally, over Henry's objection. III ROA 593.

ARGUMENT

A. THE DECREE OF DIVORCE AND AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE OF DIVORCE ARE NOT "VOID"

Without citing to any supporting legal authority, Henry argues that the Decree of Divorce as well as the Amended Decree of Divorce are "void," apparently because the date of divorce in the decree is the date that trial was concluded and the parties were declared divorced, rather than the date the decree was finally filed. AOB at 19. He argues that if any date is used other than the date the decree is filed, "then any arbitrary date could be chosen . . . going all the way back to the date of marriage." *Id*.

Henry's proposition should be disregarded by the Court for several reasons. First, it is utterly unsupported. *See State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984); *Carson v. Sheriff*, 87 Nev. 357, 487 P.2d 334 (1971) (contentions not supported by relevant authority need not be considered). Henry has not asserted that the district court lacked jurisdiction, so the basis for his assertion that the judgement is "void" is unclear.

Turning to the "merits" of his argument, these parties were *declared* divorced by the trial court at the conclusion of trial, as is the norm in divorce trials. IX ROA (unpaginated), Court Minutes of February 23, 1994. No one can ever prepare a decree in advance of a contested trial, since no one knows what the conclusion will be, and either party can easily extend the time until a decree to be filed simply by barraging the trial court with frivolous post-trial motions, as Henry did here. No public policy could be served by permitting a party who does so to "extend the marriage" by delaying entry of the paperwork.

The general rule is that judgments entered by courts of general jurisdiction are presumed to have been entered with jurisdiction and to be valid. *Conforte v. Hanna*, 76 Nev. 239, 351 P.2d 612 (1960). At most, a judgment entered with jurisdiction is "voidable," *Smith v. Smith*, 82 Nev. 384, 419

P.2d 295 (1966), and here not even that has been plausibly argued. It was within the jurisdiction of the family court district judge to order that the parties' marriage was dissolved at the conclusion of trial, on February 23, 1994.

Henry's motivation is set out in his final sentence, where he proposes that a divorce date of September 15, 1994, "would have the effect" of allowing him to keep Calleen's share of the military retirement that he pocketed between February and September. Of course, that position is ridiculous on its face — if Henry ***was*** correct as to the date of divorce, then all sums he was paid would have been community property received during the marriage, and the district court could and did order that all military pension payments be divided as of the date the pay center began sending payments to Henry. VI ROA (unpaginated), Transcript of July 27, 1995, page 29.

In other words, whether Henry is in wrongful possession of Calleen's half of community property or (pursuant to the lower court's orders) in wrongful possession of Calleen's separate property, no conceivable resolution of his first issue will allow Henry to steal Calleen's property. Henry's first issue is meritless.

B. THE DISTRICT COURT WAS WITHIN THE BOUNDS OF DISCRETION IN AWARDING REHABILITATIVE ALIMONY TO RESPONDENT AND SUBSEQUENT ALIMONY FOR MEDICAL INSURANCE

Henry consumes the majority of his brief, from pages 19 to 27, with an argument that Calleen should not have been awarded alimony, claiming that the decree is deficient for lack of a time in which Calleen must complete re-education, and (primarily) because she is believed by Henry to be "cohabiting" with a man. All of his arguments are meritless, if not fatuous.

In granting a divorce, the district court has the discretion to award alimony to a husband or wife in a specified sum or in periodic payments as appears just and equitable under the circumstances.

NRS 125.150(1)(a). In addition, the court can enter an award of rehabilitative support under NRS 125.150(8)-(9).

This Court has repeatedly held that "In determining whether to grant alimony, as well as the amount thereof, the district courts enjoy wide discretion." *Kerley v. Kerley*, 111 Nev. 462, 893 P.2d 358 (1995); *Alba v. Alba*, 111 Nev. 426, 892 P.2d 574 (1995); *Fick v. Fick*, 109 Nev. 458, 464, 851 P.2d 445, 450 (1993); *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994); *Gardner v. Gardner*, 110 Nev.1053, 881 P.2d 645 (1994); *Rutar v. Rutar*, 108 Nev. 203, 827 P.2d 829 (1992); *Heim v. Heim*, 104 Nev. 605, 763 P.2d 606 (1988). A court must award such alimony as appears "just and equitable," having regard to the conditions in which the parties will be left by the divorce. *Sprenger v. Sprenger*, 110 Nev. 855, 859, 878 P.2d 284, 287 (1994); NRS 125.150(1)(a).

Further, this Court "will not disturb the district court's grant or denial of permanent or lump sum alimony absent an abuse of discretion." *Kerley*, *supra*; *Daniel v. Baker*, 106 Nev. 412, 414, 794 P.2d 345, 346 (1990). Decisions supported by substantial evidence will not be disturbed on appeal. *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 617 (1992).

Before examining the law of this jurisdiction relating to alimony awards that ***should have been*** raised in the Opening Brief, we turn to the specific allegations that Henry ***does*** raise. Henry first asserts that since one of the Conclusions of Law in the Decree state that Calleen should be permitted to enhance her educational and income producing skills, the decree is fatally flawed for not setting fixed dates for her to do so. AOB at 19-21.

As noted above, making a further education possible to Calleen was just one of several alternate grounds referenced by the lower court, which also included the fact that the parties had disparate income, the fact that Henry's ability to earn was substantially achieved during the marriage,

and the fact that Calleen had substantiated her carpal tunnel medical condition. IX ROA (unpaginated), Minute Order, July 7, 1994.

Called upon during post-trial motions in July, 1995, to explain the award yet again, the district court judge stated:

> I absolutely noted in my minute order that I did not find that this was an alimony award to be made based on the re-training of [Calleen]. I felt it was an equalization award. . . . I did not apply this as a job re-training statute . . . . [W]hether the spouse who would pay alimony has obtained greater job skills or education during the marriage [] was very apparent. . . . So, it was not based on her getting new skills.

IV ROA (unpaginated), Transcript of July 27, 1995, page 55. Calleen never had a "career" and the district court noted only that she "*may* indeed choose to change vocations or attend college full time to enhance her education . . . ." III ROA 595; VI ROA (unpaginated), partial trial transcript of December 20, 1993, pages 15, 20, 27; IX ROA (unpaginated), Minute Order, July 7, 1994.[16]

In short, Calleen's alimony award was not made pursuant to NRS 125.150(8), but instead, under NRS 125.150(1) primarily to balance the financial position of the parties.[17]

Next, in unsupported throwaway arguments, Henry complains that an award of alimony was in error since the lower court found him to be "retired" from the military, and because Calleen obtained some education during the marriage. AOB at 21. In addition to failing under *Weber*, *supra*,

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[16] Of course, even if the district court ***had*** mandated a schedule for Calleen to begin some kind of mandatory training or schooling, Henry's contempt of the lower court's orders and refusal to pay alimony, arrears in alimony, military retirement benefits, and attorney's fees, would have made it impossible for her to do so. Calleen has had no money with which to meet her most basic living expenses, and could not hope to undertake further education until Henry pays what he owes.

[17] In 1995, this Court examined the requirement of NRS 125.150(8), and noted that the lower courts are free to reference "any other factors the court considers relevant" in fashioning an award under that subsection. *Alba v. Alba*, 111 Nev. 426, 892 P.2d 574 (1995). A month later, the Court used the label "rehabilitative alimony" in describing a general temporary alimony award granted under NRS 125.150(1). *Kerley v. Kerley*, 111 Nev. 462, 893 P.2d 358 (1995). Thus, the label of "rehabilitative alimony" clearly can be used for an award under either subsection, depending upon the context.

Henry fails to even suggest any plausible reason why the lower court should ***not*** have considered ***his*** education, obtained entirely during the marriage, and which gave him the ability to earn the very comfortable living he will enjoy for decades.

The actual focus of Henry's argument is set out at pages 21-26, where he essentially argues that Calleen should receive nothing because he thinks that she is cohabitating with another man. Before addressing the law, it should be noted that his "facts" are wrong.

Henry argues that Calleen "stated that she was still cohabiting with Mr. Charles Bolding. . . ." AOB at 8. Actually, the record shows that Mr. Bolding was Calleen's landlord. I ROA 145. Henry's "proof" that Calleen has a "common law marriage" are based chiefly on his own testimony below.[18] Calleen has expressed no intent to marry Mr. Bolding, and has always maintained that she is not "remarried." I ROA 142, 193.

He argues that "nowhere in any pleading or trial evidence does she *deny* that she is living with Mr. Bolding in a common law marriage relationship." AOB page 22. In fact, Calleen has denied she is "remarried" on each of her several Affidavits of Financial Condition. I ROA 11, 78, 142, 193. Of course, her "admission" or "denial" of an irrelevancy would not increase its relevance.

Henry pays lip service to the fact that Nevada does not recognize common law marriages, but nevertheless goes to great lengths to argue that Calleen has a "common law marriage" with Mr. Bolding. AOB at 22. In doing so, Henry finally manages to present some authority, although it is

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[18] Henry states that he "claimed and presented that any award of alimony to Calleen was unjust when considering that she had been living continuously with Mr. Charles Bolding since before filing for separation on June 11, 1992." AOB at page 9. Rather than introducing proof of any "injustice" or grounds why he was not able to provide alimony or why Calleen was not entitled to alimony, Henry has only demonstrated a perverse preoccupation with Calleen's relationship with Mr. Bolding. VI ROA (unpaginated), partial trial transcript, February 23, 1994, page 26; IV ROA (unpaginated), Transcript of July 27, 1995, page 47. Calleen testified that Mr. Bolding played no role in the break up of her marriage and that she and Mr. Bolding did not begin a personal involvement until March, 1993, about ten months after she and Henry separated. VIII ROA 1336.

all irrelevant to this case. In *Shank v. Shank*, 100 Nev. 695, 691 P.2d 872 (Nev. 1984) the wife intended to remarry and went through a marriage ceremony, which this Court held terminated her alimony award. In Calleen's case there is no record of a "remarriage ceremony" or "solemnizing" ceremony, or any ***other*** evidence of intent to remarry existing outside of Henry's mind.

Henry's citation of *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984) and *Spector v. Spector*, 112 Nev. ___, 929 P.2d 964 (1996) are likewise inapplicable. The former is apparently cited for the "public policy" of encouraging remarriage, which is not implicated in this case; in the latter, the parties' ***agreement*** to terminate alimony upon cohabitation was found valid by this Court. There is no "agreement to terminate alimony based on cohabitation" in the Decree of Divorce or the Amended Decree of Divorce between Calleen and Henry.

It should be noted that this Court in *Hay* "hasten[ed] to point out that Nevada does not recognize common law marriage." 100 Nev. at 199. Henry has not demonstrated any record of evidence of an agreement to pool income or any contract to hold property jointly between Calleen and anyone else, which could conceivably have been raised as implicating the doctrines set out in *Hay* and *Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220 (1992).

Important factors in those cases were an agreement between the parties to hold property jointly, as well as the parties' actions of holding themselves out as spouses during cohabitation. The record here does not show that Calleen had such a property agreement with Mr. Bolding nor that she publicly held herself out as Mr. Bolding's wife.

Henry largely ignores the only Nevada authority that is directly on point. In *Watson v. Watson*, 95 Nev. 495, 596 P.2d 507 (1979), the appellant former husband stopped making payments as agreed in the parties' property settlement agreement; he tried to argue that his ex-spouse had "remarried" since she was cohabitating with another man outside of wedlock. This Court found that a cohabitational relationship did not constitute "remarriage" under the plain meaning of NRS

122.010(1) and the former husband's allegations of "de facto marriage" were not compelling in a state which does not recognize common law marriages. *Watson* at 496. The Court held that even if such a relationship exists, it is no defense to the ex-wife's action to collect the money due her.[19]

Quite recently, this Court has re-affirmed and further explained the *Watson* holding[20] in *Gilman v. Gilman* & *Callahan v. Callahan*, 114 Nev. ___, 956 P.2d 761 (1998). In that consolidated case, where there was an admitted romantic relationship and the former wife shared living expenses with a boyfriend, alimony was not modified. In the first footnote, this Court rejected as "without merit" any contention that long-term relationships or cohabitation could constitute a "de facto marriage" for the purpose of terminating alimony, noting that Nevada does not recognize common law marriage, and that "remarriage" requires a solemnization ceremony, citing *Watson*, *supra*. The Court refused to find a rebuttable presumption of changed circumstances, deferring to the legislature.

It is worth noting that in this case there has ***been*** no "change of circumstances" or any "modification motions" under NRS 125.150(7). Calleen's circumstances are essentially identical now to what they were when the alimony award was made. As Henry himself points out, whatever substance there is to his allegations was contained in his trial exhibits and presented at the time of trial.[21] A trial court ***could***, of course, choose to make an alimony award, based on a balancing of financial concerns, that would even survive an *actual* remarriage. *See*, *e.g.*, *Waltz v. Waltz*, 110 Nev.

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[19] As an aside, we note the absolutely breathtaking hypocrisy Henry has displayed throughout this case; he tried to exploit his own cohabitation with a woman before entry of the decree, and the debts for that other woman he allegedly took on as a result of his cohabitation, as a basis for his purported reduced ability to pay Calleen and *his* greater need for funds. IX ROA 1488-89.

[20] Henry asserts, without cogent argument or relevant citation, that "It is time for Watson to be overturned." AOB at 23.

[21] It is primarily for this reason that Henry's request for remand for an evidentiary hearing on cohabitation "to determine if it exists, if it is long-term, and if alimony should therefor [*sic*] be terminated," AOB at 23, makes no sense. That evidentiary hearing — the trial — has already taken place.

605, 877 P.2d 501 (1994). It would be illogical to argue, as Henry does here, that trial courts are precluded from awarding compensatory alimony to a spouse because her ex-husband alleges that she is "cohabiting" with another man.

Indeed, on the facts of ***this*** case, the trial court would have been justified in awarding such alimony irrespective of Calleen's living circumstances. The trial evidence established that Henry was abusive, greedy, and incredibly selfish, having consumed most of the income of a family of four strictly for his own pleasure, for much of the marriage, and having provided for his immediate and future welfare at great cost to his wife. Any safe haven that Calleen could have come up with would have been acceptable under such facts.

Having addressed what Henry ***did*** raise in his brief, we turn to what ***should have been*** examined. In *Sprenger v. Sprenger*, this Court articulated seven factors in determining whether an alimony award in a divorce case is "fair and just" under the law. They are:

(1) the wife's career prior to marriage;
(2) the length of the marriage;
(3) the husband's education during the marriage;
(4) the wife's marketability;
(5) the wife's ability to support herself;
(6) whether the wife stayed home with the children; and
(7) the wife's award, besides child support and alimony.

110 Nev. at 878, 878 P.2d 287 (*citing Fondi v. Fondi*, 106 Nev. 856, 862-64, 802 P.2d 1264, 1267-69 (1990)).

Applying the factors listed in *Sprenger* to the facts of this case shows that an award of alimony to Calleen was virtually required; if there was any kind of "abuse of discretion" here, it was in the small amount and short duration of alimony, although jurisdiction was reserved.

(1) The wife's career prior to marriage

Calleen did not have one. Prior to Calleen's marriage to Henry, the only work she had done was babysitting. VI ROA (unpaginated), partial trial transcript of December 20, 1993, page 7. She

had completed only the eighth grade and had not graduated from high school at the time. VI ROA (unpaginated), partial trial transcript of December 20, 1993, page 5 and page 7. At the time of marriage, Calleen was not working. VI ROA (unpaginated), partial trial transcript of September 9, 1993, page 31.

(2) The length of the marriage; and (3) the husband's education during the marriage

This marriage was long term — 1972 to 1994. There were two children. Henry obtained extensive education and career-enhancing training during the marriage. Refusing to recognize that his efforts during the marriage gave rise to a community interest for Calleen, Henry admitted that he joined the Air Force to support his family and, during the marriage, passed a GED exam, got an Associates degree in mathematics, a Bachelor's degree in electrical engineering, and a Master's degree in Business. I ROA 159-60. He had also taken real estate classes and passed the real estate exam. I ROA 161.

Henry was a Major in the Air Force at the time of the divorce, and left that job mainly to curtail Calleen's retirement and medical benefit. II ROA 264. He leaves the marriage with the valuable career asset created by community effort.

(4) The wife's marketability; and (5) the wife's ability to support herself

The record establishes that compared to Henry, Calleen is at a marked disadvantage in the area of "marketability." Calleen showed at trial that during the marriage she worked in low paying, "dead end" jobs to support the family and Henry's career choices. As detailed above, the parties moved to at least eight separate military installations after they married in 1972, during Henry's

ascension up the career ladder, along the way sacrificing all opportunities offered to Calleen for either long-term employment or significant educational improvements.[22]

Calleen testified that the 1974 move to Sacramento, California did not influence her "career plans" because working at a day care center was not a "career." VI ROA (unpaginated), partial trial transcript of December 20, 1993, page 15. Neither did she consider working in the stationary department at a Wal-mart a "career." *Id.* at 27. While at Edwards Air Force Base, Calleen ran a day care center and sold Tupperware. VI ROA (unpaginated), partial trial transcript of December 20, 1993, page 29; VI ROA (unpaginated), partial trial transcript of September 9, 1993, pages 88-99. Calleen earned the minimum wage at most of the jobs she has ever held. VII ROA 1129.

The most Calleen ever earned in a year was $26,000.00, a decade ago as a real estate agent. VI ROA (unpaginated), partial trial transcript of December 20, 1993, page 35. She worked in the industry for three years, but never made any money as an agent. *Id*. Rather, in 1988, she earned $2,000.00 per month from February, 1988, to April, 1989, doing "referral calling," and then $1,000.00 per month from April, 1989, until September, 1989, when she was released by her employer. *Id.*; VII ROA 1137-1142.

At the time of the divorce, Calleen was a histologist trainee earning $1,475.00 per month, but whose job was endangered because the repetitive motion required was exacerbating her carpal tunnel problem. I ROA 193, 195; IX ROA 1452-53. Henry was a Major in the Air Force earning $4,600.00 per month. ROA 135, 137.

While it is true, as the judge found, that Calleen had been employed at a variety of jobs during the marriage, she had no "career," her "marketability" was questionable in light of her various

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[22] Henry declares that Calleen did not lack a high paying job due to "career subordination" to her military husband, but his quoted "authority" for that proposition is merely his own pre-trial memorandum making the same unsubstantiated argument, which was rejected below. AOB at 10.

medical conditions[23] and uncertain prognosis, and any conclusion that she had the "ability to support herself" would have been only hopeful conjecture. It is for this reason that the trial court reserved jurisdiction to make further adjustments to extend or increase the alimony award.

(6) Whether the wife stayed home with the children; and (7) the wife's award, besides child support and alimony

Calleen stayed home with her infant daughter, Laura, from the time of the marriage until she was able to take the first of the minimum-wage jobs she held during the marriage. When the parties moved to Sacramento, California Calleen was pregnant with their son, Curtis, who was born in May, 1974. VI ROA (unpaginated), partial trial transcript of December 20, 1993, pages 16-17 and page 20. Calleen took a job as a nurse's aide a few months after Curtis was born. *Id*. at 20. Calleen testified that she always had children and a home to take care of, on top of working. *Id*. at 36; VII ROA 1124-1127. Henry never contested that Calleen was almost solely responsible for the children and household, in addition to whatever jobs she was able to hold down.

The "wife's award, besides child support and alimony" consisted of nothing more than a few personal possessions, the most valuable of which was a ten year old used car valued by Henry at $1,000.00. II ROA 308. In short, she got virtually nothing else, as Henry had consumed virtually all community income.

In summary, all of the *Sprenger* factors militate toward an award, and it is only the fact of the reservation of jurisdiction to extend the order that prevents the necessity of a cross-appeal based on the meagerness of the minimal award that was made. Of course, this Court could choose, as it did in *Gardner*, *supra*, to extend and expand the minimal award entered below.

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[23] The trial court found that while the carpal tunnel condition was proven, Calleen's testimony did not "adequately substantiate" the substantial variety of other ailments from which she suffered. III ROA 594. Unfortunately, there were no funds available for other medical experts.

The district court was within the bounds of its discretion in finding that Calleen demonstrated grounds for alimony, at least for some time. She had minimal education before marriage, and acquired little of use during the marriage,[24] and there has been no credible showing that she is capable of self-support even if she could regain employment in the field in which she was working at the time of trial. Calleen substantiated to the district court through her own testimony, medical records, and testimony from her surgeon that she has carpal tunnel syndrome. IX ROA (unpaginated), Minute Order dated July 7, 1994.

No evidence was introduced contradicting Calleen's testimony that her educational and occupational opportunities were always subordinate to Henry's — because of the moves, because she had to care for the children and the home, and because she had to give up opportunities to service his (such as the scholarship to medial secretarial school she had to forego so that he could attend ROTC).

Especially after a long-term marriage involving the raising of children, this Court has expressed willingness to modify a divorce decree that leaves one party at a drastically lower economic level than the other. *See Heim*, *supra*, 104 Nev. at 605; *cf. Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990). There was a large disparity in earning capacity during the marriage and at the time of divorce, and during the period of pre-divorce separation Henry had some five times Calleen's income; just between February, 1992, and July, 1993, Henry received about $95,580.00, while Calleen's total income during that period was $18,452.00. IX ROA 1539. Without even counting his income for

[24] Henry's numerous transfers from duty station to duty station have rendered what educational credits Calleen had ever earned worthless as not all were transferrable from institution to institution. In order to attain the level of education that Henry has, Calleen needs four more years of college to get her bachelor's degree and her master's degree. VI ROA (unpaginated), partial trial transcript of December 20, 1993, page 31; VIII ROA 1196; VIII 1343-45.

the following several months, he kept $60,000.00 more in community property wages during separation than did Calleen. IX ROA 1483.[25]

Most recently, in *Shydler v. Shydler*, 114 Nev. ___, 954 P.2d 37 (1998), this Court held that "two of the primary purposes of alimony, at least in marriages of significant length, are to narrow any large gaps between the post-divorce earning capacities of the parties . . . and to allow the recipient spouse to live as nearly as fairly possible to the station in life enjoyed before the divorce." The amount and length of alimony are to be determined by "the individual circumstances of each case." *Id*.

Here, the ***entirety*** of the alimony award will only restore to Calleen the imbalance in community property wages that accrued during the pendency of the divorce ***trial***.[26] In other words, even if Calleen eventually receives all sums due her under the current "equalization" order, she will receive nothing more than her half of the community property wages that accrued during the marriage — nothing for the differential in income capacities, nothing for the career asset Henry has, and nothing for "the condition in which the parties will be left by the divorce." On these facts, in light of this post-trial authority, the Court may choose to remand for an increase in the minimal alimony to be paid.

In *Shydler*, this Court cited *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996), for the principle that "property and alimony awards differ in effect," so that the property equalization payments "do not serve" as a substitute for alimony. Here, where there is no other property of any significance, and the existing order would only allow the spouse to break even on division of wages

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[25] At the time of the divorce trial, Calleen testified that she considered herself "impoverished." IX ROA 1525-26

[26] If Henry had paid the money he did not pay, and Calleen received all money due under the current order, she would eventually receive $36,000.00 ($500.00 x 12 months x 6 years), which is about half the amount of wages that Henry got in excess of what Calleen received during separation.

earned during marriage, there is certainly no reason to set that award aside, except to increase and lengthen it as a matter of general equity. Otherwise, under the alimony cases decided by this Court in the past 10 years, Calleen has shown a need and that she is deserving of alimony, no abuse of the lower court's discretion is evident, and the judgment below should be affirmed.

Henry's final attack on the alimony award concerned the lower court's order that if Calleen lost insurance because of his choices to (1) seek early retirement for the purpose of eliminating her medical coverage,[27] and (2) insist on divorce rather than separate maintenance, then she could ask that he be made to help pay for the resulting cost through an additional alimony award. III ROA 593-94; *see* AOB at 27-28. Those very circumstances occurred, and Henry was ordered to split the resulting COBRA insurance premium, although he has both failed and refused to do so to date. V ROA 856-57.

Vaguely alluding to internal SIIS documents that were later reversed, but otherwise without citation to anything of conceivable relevance, Henry claims that the order should somehow be reversed because he had a "right" to retire whenever he wished.[28] AOB at 27-28. Without even addressing the merits of that claim, it should be necessary to go no further than to point out this Court's guidance to the lower courts to adjust alimony based on the condition in which parties will be left by the divorce. *See*, *e.g.*, *Heim v. Heim*, 104 Nev. 605, 763 P.2d 606 (1988).

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[27] At some point during the months of trial, Henry admitted leaving service for the purpose of denying his wife the free medical benefits she would otherwise enjoy for life. This was an act so badly-motivated that it was picked up by everyone present, was commented upon in later proceedings (VI ROA (unpaginated), Transcript of July 27, 1995, at 70, 73-74), and noted in the Decree. III ROA 593.

[28] Henry's bizarre claim that this Court's opinion in *Gemma* is somehow unclear, or that the existing court orders are "a Constitutional violation of HENRY's right to work," AOB 28, lack anything resembling authority or cogent argument, and will therefore be disregarded. *See Weber*, *supra*.

C. THE DISTRICT COURT WAS WITHIN THE BOUNDS OF DISCRETION IN AWARDING ATTORNEY'S FEES TO RESPONDENT

Henry claims that the lower court's award of fees to Calleen's counsel must be reversed because (1) the fees he was ordered to pay were excessive; (2) he was unrepresented by counsel; and (3) he was "forced" to file necessary motions. All his arguments are meritless, and some border on deliberate lies to this Court.

First, as to the law. Under NRS 125.150(3), the award of attorney's fees to either party is within the sound discretion of the trial court. The award will not be overturned absent an abuse of discretion. *Carrell v. Carrell*, 108 Nev. 670, 836 P.2d 1243 (1992); *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991) (attorney's fees upheld where party charged with paying was responsible for creating them by making false accusations and failing to comply with support orders).

The first assessment of fees was during the pendency of pre-trial procedures, for $5,000.00, in the Order filed June 24, 1993. I ROA 150. By the time this Order was entered, Henry was already on his third attorney, had already threatened to flee the country and destroy the primary marital asset (the retirement), had blocked discovery, and had engaged in a good deal of the threats, attempted extortion, etc., detailed above. *See* I ROA 85-94, 96-109. These original fees were actually paid, but only because counsel was able to draw them directly out of escrow funds from sale of the former marital residence.

After trial, about a year later, Calleen was awarded $7,500.00. III ROA 603. By that time, counsel had incurred many times that sum dealing with Henry's pre-trial threats and maneuvering and his in-court antics. In the midst of Henry's barrage of frivolous post-trial motions that preceded this appeal, Calleen was awarded an additional $5,000.00 in attorney's fees in partial compensation for her expenses "as a result of the actions of [Henry] since the prior award of fees was made." V ROA

837. The transcript reveals the judge's comment as "the frivolous activities of Mr. Schraeder." VI ROA (unpaginated), transcript of July 27, 1995, at 119.

Without revisiting Henry's multiple and repeated contemptuous acts, it should suffice to note that the court below gave Henry every opportunity to behave decently and minimize expenses. The total charges actually incurred was significantly higher than Henry was ordered to pay, for all three fee awards.[29] The awards were certainly not "excessive."

This Court sometimes examines the record to determine if the district court has abused its discretion, when it concludes that a lower court's findings are not adequate. *See*, *e.g.*, *Schouweiler v. Yancy Co.*, 101 Nev. 827, 712 P.2d 786 (1985). It is submitted that the lower court's findings are sufficient, but if this Court has any doubts, the Court is asked to review the record to verify that the partial compensation to Calleen for the financial damage that Henry has caused her in the six years counsel has been working on this case was well justified, if not miserly, under these facts.[30] *Cf. Mack v. Ashlock*, 112 Nev. 1062, 921 P.2d 1258 (1996) (attorney's fee award reversed where district court failed to mention the basis for awarding fees).

Henry's statement that he "was not represented by counsel during the divorce trial," AOB 29, is a deliberate false statement, which was known to be false when made. Henry went through two

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[29] When counsel filed his Motion to Dismiss Henry's appeal on November 3, 1997, accrued attorney's fees already exceeded $43,000.00. They are now about $60,000.00. Given Calleen's situation, counsel has no realistic hope of ever actually collecting these sums unless Henry is made responsible for them.

[30] Judge Marren observed that this case had been "over-litigated to the max," and that given Henry's actions, his award of fees could be seen as "stingy, given all the work that was required." VI ROA (unpaginated), Transcript of July 27, 1995, at 56, 66, 113. He observed that Henry appeared "to be obsessed with [Calleen] and her continuing situation in life. . . . It's time to disengage yourself now from her personal life . . . . It is costing you on many fronts, emotional, financial, etc. . . ." *Id.* at 118.

attorneys during his pre-trial gambits,[31] fired his third one in the middle of trial[32] and continued in proper person during the remainder; since then he has gone through the two additional lawyers through this point in the appeal.[33] I ROA 38; I ROA 115; II ROA 254-56.

Henry never clearly says why the pre-trial award, or the award of fees at the close of trial, might not be proper. Indeed, it would be difficult to do so, since he commanded virtually all the community income and credit when the award was made. *See*, *e.g.*, *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972). After trial, the lower court found that Henry had not "unreasonably protracted" the trial, and had done a "fairly competent job in representing himself," although he "wasted a lot of time." III ROA 595; VI ROA (unpaginated), transcript of July 27, 1995, at 56, 66. The court further found that Calleen lacked the capacity to pay the fees she was required to incur, and held that Henry's

> actual payment of this sum [is] a factor in the Court's decision as to the amount and duration of alimony, as the Court has found that the responsibility for fees is equitable in light of the rehabilitative alimony award, and vice versa.

III ROA 597. In other words, if that fee award had not been made, the lower court would have granted a greater sum in alimony. Of course, Calleen has received neither, which is why Henry has repeatedly been held in contempt, and why the proceedings were held at which the third fee award was made.

Without ***any*** citations to the record whatsoever, Henry attacks the lower court's assessment of that third fee award, claiming that he was being "punished" because he was "required" to bring motions. Specifically, Henry attempts to talk this Court into reversing the $5,000.00 additional

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[31] David T. Spurlock, Esq., of William R. Phillips & Associates, and Nancy Nies Sloan, Esq.

[32] Benson Lee, Esq.

[33] Lynn Shoen, Esq., and Robert O. Kurth, Jr., Esq.

attorney's fees awarded at the July 27, 1995, hearing and justify his further frivolous waste of judicial resources by stating that his first two motions were "required" to call the Court's attention to "clerical errors" in the alimony amount. AOB at 30-31.

He is wrong, of course, as detailed in the Statement of Facts. *See also* VI ROA (unpaginated), transcript of July 27, 1995, pages 65-70. The single clerical error was corrected once the error was brought to the Court's attention and had little to do with Henry's mountain of filings, or with the fee award. V ROA 835-39. That third fee award (which will pay only a fraction of the attorney's fees Henry caused to be incurred, and which he has not paid) was justified at the hearing on several grounds, starting with a large and accruing arrearage in three different categories of payments (spousal support, military retirement benefits, attorney's fees). *Id*.

Henry correctly cites *Duff v. Foster*, 110 Nev. 1306, 885 P.2d 589 (1994), for the principle that fees are warranted where a filing is frivolous. AOB at 30. He neglects to mention, however, that the lower court has already ***held*** that Henry's motions were frivolous when filed.[34] *See*, *e.g.*, IX ROA (unpaginated), Minute Order of December 6, 1994; *Barozzi v. Benna*, 112 Nev. 635, 918 P.2d 301 (1996) (focus is the time of initiation of the action, not the time of trial). Thus, *Duff* supports the validity of the fee awards.

No abuse of discretion played any part in any of the attorney's fees awards in this case. We note that this Court has recently reaffirmed that under NRS 18.010(2)(b) and NRS 125.150(3), a district court can award fees in a post-judgment motion in a divorce case. *See Love v. Love*, 115 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 64, May 19, 1998), *citing Leeming v. Leeming*, 87 Nev. 530, 490

[34] Henry does not even address the additional attorney's fees award to Calleen of $500.00 by Judge Marren for the necessity of having Henry appear at an Order to Show Cause hearing (IX ROA (unpaginated), Minutes of November 13, 1996) and the additional $1,000.00 he was sanctioned by Judge Redmon on March 11, 1997, for forcing Calleen to "respond to [Henry's] frivolous motions." IX ROA (unpaginated), Minutes of March 11, 1997.

P.2d 342 (1971), *Korbel v. Korbel*, 101 Nev. 140, 696 P.2d 993 (1985), and *Fletcher v. Fletcher*, 89 Nev. 540, 516 P.2d 103 (1973). *See also Burr v. Burr*, 96 Nev. 480, 611 P.2d 623 (1980) (the necessity of specificity for grant or denial of attorney's fees is found in NRS 18.010, not NRS 125.150).

In this case, Henry took every opportunity to maximize the cost of divorce to Calleen and it is a matter of simple justice that Henry should pay at least some part of the costs that have been — and continue to be — caused by his own misbehavior during the six years he has refused to comply with the rules that apply to everyone else. *See Dralus v. Dralus*, 2 Fla. L. Weekly Supp. 583 (Cir. Ct. 1994), *on remand from*, *Dralus v. Dralus*, 627 So. 2d 505 (Fla. Ct. App. 1993) ($20,000.00 attorney's fee deemed reasonable, despite low total value of the marital assets, and praising wife's attorney, the reasonableness of whose fee was at issue, for representing an impecunious spouse without expectation of full compensation, preventing the husband from leaving the marriage without financial responsibility or economic provision for the wife); *cf. Cathcart v. Robison, Lyle, Etc.*, 106 Nev. 477, 795 P.2d 986 (1990) ($90,000.00 jury award for fees award overturned where trial only 1 and a half days long, preparation took less than a week, and original fee sought was about one-third of that sum).

The Court is asked to review the Opening Brief. It is respectfully submitted that it is so defective, in content, citations, and meritorious argument, that Calleen has — *again* — been forced to incur more in attorney's fees than she should have, just to respond. The "Statement of Facts" is a deficient overview, and missing most important references to what actually happened in this case. The arguments in the brief have virtually no supporting factual citations, and the legal references are incomplete and inaccurate, when they are present at all. This increased the work required of Respondent's counsel, and by this Court. The "merits" of the appeal are so meager as to constitute a frivolous appeal, despite its length.

This Court is respectfully asked to find the intention and execution of this appeal to be frivolous and a misuse of the appellate processes, and accordingly to award to Calleen "as costs on appeal, such attorney fees as it deems appropriate to discourage like conduct in the future." NRAP 38; *see Works v. Kuhn*, 103 Nev. 65, 732 P.2d 1373 (1987).

The total actual cost to Calleen for assembly of the nine-volume record, preparation of a statement of facts because Henry did not accurately do so, and completion the remainder of this brief, exceeded $10,000.00. Because Calleen has no money (in part because Henry is on the lam and not paying what has been ordered), these costs have, to date, been borne by counsel, personally. Accordingly, Calleen requests that this Court award that sum to her.

D. THE DISTRICT COURT WAS WITHIN THE BOUNDS OF DISCRETION IN ASSIGNING COMMUNITY DEBT TO APPELLANT

Henry alleges that (1) "all community debt" was assigned to him, and (2) the lower court erred in its allocation. He is wrong on both counts, and the kindest thing that can be said of this argument is that it attempts to engage this Court's assistance in the perpetration of a fraud. Before turning to specifics, we note the absence (again) of any authority whatsoever addressing the division of debts, and again invoke *Weber*.

Henry complains about two debts — the "$8000.00 capital gains debt" and "an approximate $6000 credit card debt." AOB at 32. These will be addressed separately.

First, Henry complains about being assigned responsibility for the *potential* capital gains tax burden from the 1992 sale of the marital residence. AOB at 32. The lower court found that only Henry had the financial capacity (and the V.A. eligibility) to buy another home and defer the capital gains, and that since Henry had already declared that he was going to obtain another home, the tax could be deferred indefinitely and then avoided completely in the one time over age 55 exclusion.

III ROA 595; *see Ford v. Ford*, 105 Nev. 672, 782 P.2d 1304 (1989) (court is allowed to make orders regarding "immediate and specific" tax liability).

It is worth noting that the lower court specifically found that it considered the distribution of this potential liability when it determined the amount of alimony to be awarded, stating that "if the burdens were distributed differently, the Court's alimony order would be likewise different." III ROA 595.

Further, there is no record that Henry ever suffered ***any*** tax on this potential debt; it appears that, as expected, the potential gain has been indefinitely deferred. And, of course, changes in the tax code since the time of trial indicate that no tax need ***ever*** be paid by either party. *See* Internal Revenue Code § 121 (1997); James Dam, *Divorce Lawyers' Strategies "Totally Changed" by New Law*, Lawyers Weekly USA, October 20, 1997, at 1, 18.

In other words, this is a non-issue over a non-liability.

Henry's disingenuousness is even more apparent on the second half of his argument, as to the alleged $6,000.00 in credit card debt. The alleged "community" debts were addressed in Calleen's "Supplement to Points and Authorities," filed May 20, 1993 (I ROA 117-125), the "Affidavit" of Henry Schraeder executed May 21, 1993 (I ROA 122-124), and the "Response and Opposition to Motion for Exclusive Possession, Temporary Support, to Hold Any Early Retirement and For Temporary Fees and Allowances," filed May 24, 1993, by one of Henry's former attorneys.[35] I ROA 127-134.

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[35] Henry also tried, later, to argue that somehow Calleen had to contribute to his separately run-up credit card debts, alleging that much of the debt was attributable to his legal fees. *See* "Notice of Motion, Motion to Alter or Amend A Judgment, and Motion for Relief from Judgment," filed January 3, 1995; III ROA 492-512, Motion to Alter or Amend at page 11. The lower court summarily rejected this hard-to-fathom argument.

At the May 25, 1993, hearing, the district court divided the proceeds from sale of the former marital residence. Prior to the hearing, each party filed two "Affidavits of Financial Condition" indicating their respective credit card obligations. I ROA 135-149. The district court heard argument concerning Henry's accrual of debts before and after separation, and who had access to what credit cards, and for what purposes, along with the TDY reimbursement from the military and how that was converted to cash and retained by Henry. The district court saw several charts, prepared by Henry himself, showing some of what he was doing and how he was doing it.

The district court ordered an equal disbursement of the home escrow account money. I ROA 150-51. The court ordered that funds be paid on the parties' "joint" credit card ($3,133.23 to USAA MasterCard # 5416300001929927), and distributed two $4,000.00 payments — one to the Colonial MasterCard # 5420967676004576 in Calleen's name and one to the First Card Visa # 4673830682498 in Henry's name. I ROA 150-51.

The remainder — some $15,000.00 — was divided equally, but $5,000.00 of the money out of Henry's side of the distribution was distributed to Calleen's counsel under *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972) as the preliminary attorney's fee award discussed above.

A review of the "Order" of June 24, 1993, shows on its face that the court had before it at that time the USAA MasterCard (9927), the First Card Visa (2498), and the Colonial MasterCard (4576). Only the USAA Gold MasterCard (4057) and the Circuit City card were not dealt with on the face of that Order.

As to the Gold MasterCard (4057), the trial exhibits demonstrated that the charges on it were solely Henry's (*see, e.g.*, Plaintiff's Trial Exhibit 20). It is believed that this is one of the multiple accounts of which Calleen had no knowledge during the marriage and to which she had no access. IX ROA 1521. At trial, as recounted above, Ms. Acosta was able to establish that Henry received cash from the government to pay the charges (TDY expenses) that he put on the USAA Gold

MasterCard — he just decided to pocket the cash without paying the bill.[36] VII ROA 1112; IX ROA 1540-1556, 1558-59.

As to the Circuit City card, various of Henry's own trial exhibits showed that there was ***no balance on the card on the date of financial separation that he insisted on***, and that he made all charges after that date. *See* Defendant's Trial Exhibit N-7 & N-8; VIII ROA 1318.

Henry insisted that the parties had "separated" as of June 11, 1992 (the date Calleen filed for separate maintenance — they had physically separated before then); he demanded that the parties be responsible for their own debts after that date. Calleen agreed, and the lower court therefore considered each of the parties responsible for all debts incurred after that date. III ROA 596.

Despite these rulings, Henry wanted, and received, another bite at the apple in 1995, pursuant to the post-trial motions recounted in the Statement of Facts. Judge Marren recalled the testimony regarding Henry's pocketing of the cash for the TDYs, while maintaining the credit card debt. VI ROA (unpaginated), Transcript of July 27, 1995, at 77.

In those papers, and at the hearing, Henry made exactly the same claim about being saddled with an extra $6,076.00 in credit card debt that he argues in this Court. *Id*. at 126. Judge Marren stated that he would be primarily interested in knowing if the debts were raised in the pre-trial memos and therefore were before the court at trial. *Id*. at 129. They were so raised. I ROA 155-176, and incorporated Exhibits D, N, M, P & S. Because no one present at the July 27 hearing could remember which credit card number was which, the trial judge allowed each party to put in writing exactly what was being claimed, accompanied by copies of the credit card statements at issue, and any other relevant evidence. VI ROA (unpaginated), Transcript of July 27, 1995, at 129-131. The order from that hearing stated that

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[36] The few exceptions Henry could demonstrate were trivial. *See* IX ROA 1390.

> any ambiguity on the point is resolved as follows: Prior to trial, the Court directed certain funds toward payment of the joint credit debts of the parties, and other amounts toward the outstanding credit debts of the parties that each had in their individual names; it was and remains the intention of the Court to have each of the parties solely responsible for all debts in their respective names except as specifically set out otherwise in an Order of this Court.

V ROA 838-39.

Since a review of the trial record made it clear that the credit cards were before the court at length at trial, Henry changed tacks, no longer claiming that debts had never been before the court and were therefore "omitted" from prior consideration. Rather, Henry attempted to name four accounts and argue that the court "incorrectly" ruled on them.

The trial judge considered the written submissions of both parties and entered a Minute Order on January 12, 1996, confirming that the court had examined at trial the credit card debts raised by Henry as "omitted":

> The first issue concerns certain credit cards which [Henry] alleges were not resolved by the Court. Counsel for [Calleen] contends that these cards were resolved long ago and may now not be brought back before the Court. The Court agrees with counsel for Plaintiff. These credit card issues have been resolved by the Court. [Henry's] request for relief on this issue is denied.

IX ROA (unpaginated), Minute Order dated January 12, 1996. This was reduced to a formal written order filed February 5, 1996. V ROA 856.

In summary, Henry kept much more than "half" of the community income and was required to pay only the debts and liabilities he created. There is no validity to Henry's assertions that debts were "omitted" or "not considered" or allocated under an abuse of discretion. The district court directed each of the parties to pay their own debts (after paying off the few joint debts with the house sale proceeds), and then let Henry keep the $60,000.00 or so in salary that he had made, but not divided with Calleen, during the pendency of the case. The credit card debts were considered at length by the district court and no abuse of discretion has been shown.

It should be mentioned here that there is no specific authority dictating the manner in which a divorce court should divide debt. While an analogy could be made to the distribution of property under NRS 125.150 (presumptively equal division unless some compelling reason to vary from that distribution is shown), our statutory and case law does not require such a division. In practice, it is fairly common for divorce courts to do what these parties stipulated to do — divide their debts as of the date of separation, while community property continues to accrue through the date of divorce under *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983); *see* M. Willick, *Debt and Community Property in Nevada*, in "Where Will the Money Go?; Proceedings of the 1997 Symposium of the Council of Community Property States (Arizona State Bar Association).

Presuming (without conceding) that there was any merit to any part of Henry's claim that he was required to pay $6,000.00 in community bills (despite his own trial exhibits), the single fact of the disproportionate incomes during trial would have amply justified any such result. Given the variety and extent of Henry's outrageous behavior before, during, and after the trial, the court below ***would have been*** justified in making a disproportionate property distribution in Calleen's favor. *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996). Of course here, by leaving the enormous wage disparity in Henry's pocket, the court below essentially made a property distribution in ***Henry's*** favor. Under these circumstances, the court below was too lenient with Henry; it certainly could not be said that the court abused its discretion in any of its rulings.

In summary, Henry has not demonstrated how the lower court abused its discretion in considering the parties' present and future circumstances, and has shown nothing indicating that the lower court's findings were "clearly erroneous."

E. THE DISTRICT COURT CORRECTLY DETERMINED APPELLANT TO BE RETIRED FROM THE MILITARY

Henry argues that although the Air Force uses the term "retired" and that he is "on the retired list," he is not "retired." AOB at 34. His authority is a fragmentary quote from a 1958 case on a completely different topic, that predates the statutory law in this area by some thirty years.

The district court, displaying infinite patience, found Henry to be "retired" at trial, and again after listening to the same argument Henry now presents on appeal. III ROA 591-96; VI ROA (unpaginated), transcript of July 27, 1995, pages 12-13.

In passing, Henry makes the breathtakingly insipid argument that 10 U.S.C. § 1408, the Uniformed Services Former Spouses Protection Act ("USFSPA"), applies only to enlisted members and reserve officers, and not to "regular officers." He cites no authority for that proposition, and indeed there is none, as every court in the United States, state or federal, that has ***ever*** decided a case under the USFSPA has found it completely applicable to officers as well as enlisted men, as Congress declared the law would when it drafted the legislation. *See*, *e.g.*, *Fern v. United States*, 15 Cl. Ct. 580 (1988), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990); *see generally* Marshal Willick, A LAWYER'S GUIDE TO MILITARY RETIREMENT AND BENEFITS IN DIVORCE (ABA 1998). On its face, the USFSPA applies to "all members" of the uniformed services, and a "member" is any person who is or was appointed or who enlisted in, or who was conscripted into, a uniformed service. 10 U.S.C. § 1408(a)(5); 32 C.F.R. § 63.3(m). The term "member" includes a former member.

It is respectfully submitted that no more need be said on this point.

F. THE DISTRICT COURT WAS WITHIN THE BOUNDS OF DISCRETION IN AWARDING "RETIREMENT" PAY TO RESPONDENT

Henry espouses in his Opening Brief the same strange theory that he put into practice during the marriage: "absent any Order to the contrary, any income received by either party prior to divorce was theirs to use at their discretion." AOB at 35-36. Completely ignoring the law of community

property was a habit of Henry's as it applied to his income (although he forced Calleen to account for every penny she earned, as she testified at trial). II ROA 323. Again, we note in passing the complete absence of legal authority (or cogent argument) for the absurd position taken, and its irrelevance, since Henry has appealed from just such an "order to the contrary."

The district court explained that the minute Henry got retirement money, he began using "their" property exclusively and that Calleen was entitled to compensation. VI ROA (unpaginated), transcript of July 27, 1995, at 29. *See also* NRS 123.220. As noted above, it makes no difference whether the parties were still married or already divorced when Henry got the retirement income. Either Henry was getting, and spending both halves of, community income, or he was getting, and spending, Calleen's sole and separate property. In either event, he has received and kept a great deal of money that does not belong to him, and there is no reason whatsoever why the district court could not, or should not, order him to give it back to her.

G. THE DISTRICT COURT WAS WITHIN THE BOUNDS OF DISCRETION IN MAKING THE DIVISION OF COMMUNITY PROPERTY

Henry complains about some definitional language in the Decree; specifically, an anti-fraud clause which allows the court to enforce its intent to divide the entire pension amount. AOB at 36. *See* VI ROA (unpaginated), transcript of July 27, 1995, page 32.

There is a relevance question here, since Henry testified that no portion of his pay was disability pay and he did not anticipate he would ever receive any disability pay. VI ROA (unpaginated), transcript of July 27, 1995, page 15.

Since it has been raised, however, it should be noted that every known court case in every jurisdiction to date that has ever examined the question has concluded that such an anti-fraud reservation of jurisdiction, setting up a constructive trust, or allowing for imposition of additional

alimony in case the member attempts a fraudulent recharacterization, is perfectly legitimate.[37] Such safeguard clauses and indemnification-for-reduction clauses protect the spouse from the member's unilateral reclassification of benefits. The theory is essentially one of constructive trust; once the divorce goes through, the retirement money is considered no longer the member's property to convert.[38]

Courts have been clearest about protecting the expectations of the parties in those cases in which the divorce decree contained an explicit consideration of the possibility of disability application, and stated the intention to divide the resulting disability benefits as it had the retirement benefits that were replaced.[39] That is exactly what the decree in this case provides. *See*, *e.g.*, *In re*

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[37] *See In re Marriage of McGhee*, 131 Cal. App. 3d 408, 182 Cal. Rptr. 456 (Ct. App. 1982) (compensation by means of alimony, as set out in agreement between parties, used by dissolution court when member halted flow of military retirement benefits to former spouse after *McCarty* decision; court termed use of such "back-up" clauses to be making the property award "supportified"); *In re Marriage of Sheldon*, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (Ct. App. 1981) (noting "close relationship between the amount of a property division and the entitlement, if any, of a spouse to spousal support"); *In re Marriage of Mastropaolo*, 213 Cal. Rptr. 26 (Ct. App. 1985) ("conditionally" reversing an alimony award "on condition" that the court's affirmance of the retirement division became final); *Austin (Scott) v. Austin*, Mich. Ct. App. No. 92-15818 (unpublished intermediate court opinion), *rev. den.*, 546 N.W.2d 255 (Mich. 1996) (alimony, previously reserved, but only until remarriage, instituted for wife in lieu of pension share lost because of member's transfer to VA disability status; court approval given to post-remarriage alimony where the alimony compensates for distribution of a pension earned during marriage, under *Arnholt v. Arnholt*, 343 N.W. 2d 214 (Mich. Ct. App. 1983) (non-military case)).

[38] *See In re Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995). *See also Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992) (explicit indemnification; husband's subsequent disability retirement and reduction in retired pay to wife required husband to pay subtracted sums to wife and did not violate *Mansell* in any way); *Dexter v. Dexter*, 661 A.2d 171 (Md. App. 1995) (implicit indemnification; wife entitled to benefit of bargain reached at divorce); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993).

[39] *See In re Stone*, 908 P.2d 670 (Mont. 1996) (support award based on total of retirement and disability pay); *Abernethy v. Abernethy*, 670 So. 2d 1027 (Fla. Ct. App. 1996) (property division upheld against disability award), *aff'd*, 699 So. 2d. 235 (Fla. 1997) (overruling the lower court's holding that disability benefits could be assigned by property settlement agreement, but holding that if the final judgment guarantees a stream of payments to the former spouse measured by the military retired pay, and requires the member to indemnify or guarantee those payments to the former spouse,

Kraft, 832 P.2d 871 (Wash. 1992) (citing many other cases); *In re Brown*, 892 P.2d 572 (Mont. 1995); *Hisgen v. Hisgen*, 554 N.W.2d 494 (S.D. 1996). There are many others.

The cases Henry cites have to do with what courts are forced to decide when the underlying decree does ***not*** contain such interpretative guidance, and the reviewing court is left only with the apparent intent of the drafters given the definitions of disposable pay in the federal statute. Given Henry's well-established proclivities, it would be ill-advised to open any route through which he could attempt to cheat Calleen further.

H. THE DISTRICT COURT WAS WITHIN THE BOUNDS OF DISCRETION IN AWARDING RESPONDENT SURVIVOR'S BENEFITS

There is no question that the district court had authority to award the benefits. Under Nevada law divorce courts have authority to issue orders concerning valuable property rights. *See*, *e.g.*, *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983). Federal law since 1986 has specifically permitted state divorce courts to determine whether to require election of the former spouse as the Survivor's Benefit Plan beneficiary. *See* Pub. L. No. 99-661, § 641, 100 Stat. 3885 (Nov. 14, 1986). Specifically, on November 14, 1986, Congress amended the SBP laws, deleting a provision requiring a voluntary written agreement for former spouse protection and inserting the language: "[a] court order may require a person to elect or to enter an agreement to elect . . . under section 1448(b) of this

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any VA disability or other conversion or reduction in disposable retired pay is irrelevant — what is owed to the former spouse is the guaranteed stream of payments, as defined in the underlying court order); *In re Marriage of Stier*, 223 Cal. Rptr. 599 (Ct. App. 1986) (disability irrelevant to attempted equal division of retirement benefits in pre-*McCarty* divorce); *In re Marriage of Briltz*, 189 Cal. Rptr. 893 (Ct. App. 1983) (non-military case); *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *McMahan v. McMahan*, 567 So. 2d 976 (Fla. Ct. App. 1990); *Kramer v. Kramer*, 567 N.W.2d 100 (1997) (discussing rationale of collected cases).

title to provide an annuity to a former spouse . . . ." 10 U.S.C. § 1450(f)(4).[40] *See*, *e.g.*, *MacMillan v. MacMillan*, 751 S.W.2d 302 (Tex. App. 1988).

Accordingly, the district court acted appropriately in taking action to preserve SBP protection for Calleen. In *In Re Payne*, 897 P.2d 888 (Colo. Ct. App. 1995), the appellate court stated that SBP is "an equitable mechanism selected by the trial court to preserve an existing asset — the wife's interest in the military pension." Noting, correctly, that the SBP is ***not*** "life insurance," the appellate court affirmed the trial court's decision to adopt the "default" position and have SBP premiums deducted from gross pay before disposable pay was divided between the parties (this is what happens unless the court specifically makes other provisions regarding the SBP premium). Moreover, the Colorado court rejected the husband's position (identical to that of Henry in this case) that the SBP should be funded solely by the wife because it is "a court-created asset for her benefit alone."

By not specifically providing otherwise, the decree provides that the cost of the premiums be deducted from gross pay before disposable pay is divided between Calleen and Henry, as it was in *Payne*. To Henry's skewed way of thinking this "reduces" his percentage to less than 50% and results in Calleen receiving "more" than 50%. AOB at 39. Henry's contention is meritless. The default provision, that the premium comes off the top, ***balances*** the risks and benefits, although it is still weighted in Henry's favor. If Calleen predeceases Henry, he will instantly gain her entire share of the retirement benefits, doubling what he receives.[41] The premium taken "off the top" ensures that if Henry predeceases Calleen, her one-half share (55% of the base amount) will continue to be paid

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[40] In anticipation of additional complaints that Henry might make, the Court's attention is drawn to the United States Court of Claims' rejection of members' arguments that SBP allocation was the unconstitutional taking of property. *Fern v. United States*, 908 F.2d 955 (Fed. Cir. 1990); *see also Powell v. Powell*, 877 F. Supp. 628 (M.D. Ga. 1995).

[41] Given the history of this case, I hasten to add that this is not so if Henry takes any action having the effect of hastening Calleen's demise.

to her, so that each party to this marriage has his or her interest in the life of the other preserved. In other words, Henry has a potential 50% increase in the future; Calleen has a potential 5% increase.

Of course, the district court ***could have*** ordered Calleen to pay the entire premium, although there is no provision in the federal statutory law permitting direct enforcement of such an order. As Judge Marren made clear, however, if he had done so, he would have given Calleen an additional alimony allocation in compensation.

There are various inaccuracies and misapprehensions in Henry's argument, but they do not seem worth reciting and debunking.[42]

As the trial court noted, Henry's unilateral action created the problems about which he is now complaining. *See*, *e.g.*, VI ROA (unpaginated), transcript of July 27, 1995, page 115 ("your decision to terminate your retirement early was a devastating decision for this community"). By actions solely within his control, Henry reduced or eliminated entirely a certain portion of the military retirement benefits ultimately payable to Calleen. *See Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989). Henry's early retirement accelerated payment on the premiums for both parties.

While it is appreciated that Henry actually has cited some authority for one of his arguments, the cases are irrelevant. He cites *O'Hara v. State ex rel. Pub. Emp. Ret. Bd.*, 104 Nev. 642, 764 P.2d 489 (1988), but that involved a dispute between a surviving widow of an intact marriage and a state agency, and had nothing to do with the rights and responsibilities of spouses to one another upon divorce.

Likewise, Henry's reading of *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992) is erroneous, for the dispute resolved there is irrelevant to the issue here. Undersigned counsel argued

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[42] For example, Henry states three times that the SBP "terminates" if Calleen remarries. This is not so; payments under SBP are *suspended* if a former spouse remarries before age 55, but are restored if the marriage ends for any reason, or after the spouse passes that age. *See* 10 U.S.C. §§ 1447-1448.

that appeal; it involved the valuation of a private retirement, and as a side issue, a QDRO to preserve an irrevocable election for the spouse made years before the marriage broke up. The point was that in that case there was no economic impact to the retiree, although it was neither argued nor decided that the outcome would have been different if that had not been the case.

Here, Henry elected to retire literally in the middle of trial, and the trial court had to fashion an order addressing the full economic consequences to the parties of the action that Henry had taken. Since the 1986 amendments to the act allow state divorce courts to order the SBP be awarded to a former spouse, and state law allows the court to fashion such support terms as are just, there is no reason why the court could not adopt the default built into the law, and have the premium taken off the top; this is the conclusion reached in all of the published opinions on this subject to date.

It is clear that the district court had the authority to order Calleen to be deemed irrevocable beneficiary of the SBP, so as to preserve her asset. The trial court was also within its discretion in ordering that the default position regarding the premiums be adopted in the Decree of Divorce.

I. THE DISTRICT COURT WAS WITHIN THE BOUNDS OF DISCRETION IN ORDERING HENRY INCARCERATED FOR NON-PAYMENT OF ALIMONY AND ATTORNEY'S FEES

Henry alleges that he has a constitutional right to not be locked up for contemptuously refusing to make payments to Calleen as ordered. AOB at 40. He is wrong.

Pursuant to NRS 22.010, NRS 22.100 and the orders of the Court entered December 27, 1996, and January 31, 1997, a Bench Warrant was issued for the arrest and further incarceration of Henry. IX ROA (unpaginated), Minutes of January 21, 1997, and Minutes of July 16, 1997. Henry refused to pay in February, 1996, he refused to pay in July, 1996, he refused to pay in September, 1996, and he refused to pay in February, 1997. Of course, at this time he is out of the state and in hiding, and still not paying as ordered.

Twice in the past few years, this Court has made it clear that there is no constitutional bar on making failure to pay support a felony, subjecting the recalcitrant payor to lengthy imprisonment. *See Sheriff v. Vlasak*, 111 Nev. 59, 888 P.2d 441 (1995); *Epp v. State*, 107 Nev. 510, 814 P.2d 1011 (1991).

Of course, in this case, we are not dealing with criminal contempt, but only coercive civil contempt, in which district courts have far greater latitude. *See*, *e.g.*, *City Council of Reno v. Reno Newspapers*, 105 Nev. 886, 784 P.2d 974 (1989). Henry has not made any showing that paying what he has been ordered to pay is impossible, just that it would cut into his Corvette, dating, vacation, and drinking money. This Court has made it quite clear that the trial courts of this state have inherent authority to compel obedience to their orders, by incarceration if necessary. *See Young v. Johnny Ribiero Building*, 106 Nev. 88, 787 P.2d 777 (1990).

CONCLUSION

In many cases, this Court must resolve issues involving charges of abuse of discretion by the trial court in a divorce action, where the record is vague or incomplete. This is not one of those difficult situations. The record is clear that Henry squandered vast sums of community property, and engaged in a substantial variety of behavior ranging from loutish to criminal during the divorce process. The record is clear that Henry has left Calleen in financial distress during and after the divorce proceedings, that he has absolutely no respect for the authority of the court or anyone but himself, and he considers "void" all court orders with which he does not agree. Henry exhausted the patience of several judicial officers and (to date) four different attorneys, now being on his fifth.

Accordingly, Henry was sanctioned and jailed for his stubbornness and yet is unwavering from his goal of financial annihilation of Calleen. To date nothing curbed his contemptuous

behavior. This divorce litigation has left Calleen with a drastically reduced standard of living and disabling post-divorce debt.

On the total record, and given where the divorce left the parties, the award of alimony and attorney's fees to Calleen was the absolute minimum that might be considered just and fair under the prior holdings of this Court. The trial court, faced with Henry's conversion of community property, made a fair division of what little was left by allocating to Henry at least some of the debts he ran up.

Henry has made no showing, in law, in equity, or on the record, where the court below erred in any whatsoever, much less "abused its discretion." Accordingly, the decree of divorce should be affirmed in its entirety, with costs assessed against Appellant as set forth above.

DATED this _____ day of August, 1998.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

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

DATED this _____ day of August, 1998.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** was forwarded to:

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Attorney for Appellant

by placing same in ordinary United States mail, postage prepaid, on the ____day of August, 1998.

Employee of the Law Office of Marshal S. Willick, P.C.

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