IN THE SUPREME COURT OF THE STATE OF NEVADA

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ALICIA MARGARITA SHYDLER, APPELLANT, vs. THOMAS J. SHYDLER, Respondent.	)	S.C. CASE 25444 D.C. CASE D148619

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

Appeal from property distribution and alimony terms of Decree of Divorce; Hon. Frances-Ann Fine Starmer, Eighth Judicial District Court, Clark County, Nevada. Plaintiff, Respondent Thomas J. Shydler ("Tom") filed for divorce, and filed motions for interim relief, on March 17, 1992. I ROA 1, 8. He amended his Complaint to request primary physical custody of the children after the parties became embroiled in visitation and financial disputes. II ROA 318. Appellant Alicia Margaret Shydler ("Margaret") Answered, opposed Tom's motions, and made various requests of her own. I ROA 9; II ROA 350.

Various preliminary motions were heard and decided, discovery was conducted, primarily in the Referee's courts. After establishment of the Family Court, the case was reassigned to Department E (Judge Fine). Judge Fine recused from the case on February 2, 1993, "to avoid the appearance of impropriety and implied bias," but reconsidered and ordered the case to remain in her department the next day. XI ROA 1983.

Trial was held on May 20, May 21, May 22, May 25, May 28, May 29, June 8, June 9, and June 10. ROA volumes 12-20.

After trial, the parties were divorced by decree entered on June 24, 1993. VIII ROA 1448. Findings of Fact and Conclusions of Law were entered the same day. VIII ROA 1433. Notice of Entry was served by mail on June 24, 1993. VIII ROA 1459. Apparently, Margaret filed a Motion for New Trial on July 6, 1993. The parties and the trial court made reference to the motion, but it does not seem to be included in the Record On Appeal. See VIII ROA 1538, 1571. Notice of Appeal was filed October 15, 1993.

An Order granting the Motion for New Trial, etc. in part, denying it in part, and continuing other matters for further hearing, was filed November 5, 1993. Notice of Entry of that Order was served on November 11, 1993, by mail, and an Amended Notice of Appeal was filed on December 3, 1993. VIII ROA 1612, 1610.

Still more post-judgment motions were filed and heard, resulting in further orders regarding collection of personal property, and denial of further attorney's fees to Tom's counsel on January 3, 1994, January 27, 1994, and February 14, 1994. XI ROA 1932, 1944, 1949.

Notice of Entry as to that order was filed March 17, 1994, but no appeal was taken from that order. XI ROA 1953.

This appeal followed.

STATEMENT OF FACTS

This is another case in which a massive factual record addresses a handful of relatively straightforward legal issues, primarily going to characterization of community and separate property, and abuse of discretion regarding alimony. The record is further complicated by the Byzantine procedures so common to heavy motion practice before the Referees prior to establishment of the Family Courts.

Tom and Margaret had known each other for a couple of years when they married on June 9, 1976. I ROA 1, II ROA 350, XVIII ROA 9.[1] Tom was a 23-year old student at UNLV, and Margaret was an insurance underwriter. XII ROA 66, XVIII ROA 9. Neither owned any property of any significant value when they married. XII ROA 79.

The parties' first child, Alex, was born May 30, 1979. Jennifer was born to them July 31, 1981. Margaret was their primary caretaker. I ROA 2; II ROA 350-51; XVIII ROA 29; XI ROA 1967, 1975; Trial Exhibit 1.

After graduation from college, Tom began working for his father, Hal Shydler, in a construction company called Crestmont. XVIII ROA 9; XII ROA 31. He eventually obtained a general contractor's license, and in 1979 founded a construction company of his own called Aztec Enterprises with the assistance of his father. XII ROA 32. It became active in 1980 or 1981. XIII ROA 204.

This business was very successful. At trial, historical information on Aztec back to at least 1988 was taken from Michael Kern, a court-appointed expert assigned to valuation of the two businesses at issue. Generally, Aztec's profits exceeded industry averages. XIV ROA 396. In 1991, net profits were over $793,000.00, and were some 10% lower in 1992. XIV ROA 399-400. In addition to his $100,000.00 annual salary, Tom received an additional $43,000.00, after taxes, in distributions from Aztec. XIV ROA 415.

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[1] Volumes 12-20 of the record have not been sequentially paginated by the Clerk. Transcript references will therefore be to the page numbers of the transcripts in the particular volumes.

Hal Shydler, Tom's father, kept the Aztec company books and assisted with the "office end" of its operations, a part-time job for which he received compensation of $2,000.00 per month. XII ROA 39, 163; XIV ROA 498, 501.

At trial, Hal protested that the divorce litigation was harming Aztec's business. XV ROA 36-61. On cross examination, however, Hal conceded that despite the company's "desperate financial straits," Tom drew a salary of $100,000.00, leased Tom a 1992 Lexus for $40,000.00 to add to the two trucks he already had, provided Tom a house rent-free for some months, reimbursed Tom $11,500.00 for community expenses Tom had paid out of his salary, and Aztec still made a profit of $155,000.00. XVI ROA 25, 27, 39; XV ROA 14.

Hal claimed that even after diverting the source of all funds for support of Margaret and the children from Tom to Aztec, he still needed $143,000.00 per year "to live on." XVI ROA 37.

Margaret founded Alamo insurance company in 1982, with a partner. XVIII ROA 22. She and Tom bought out the partner's interest in 1984 or 1985. XVIII ROA 22-23. Alamo was not so successful. Again reviewing history, Mr. Kern was able to track the profitability of the company, as measured by total commissions earned, from 1986 to 1991. XIV ROA 450-55. It showed profitability increasing from 1986 through 1987, and then steadily decreasing to less than a third of that figure by 1991. XIV ROA 455. The largest profit Alamo ever made, in 1991, was $21,000.00.

According to Tom's recollection, the parties enjoyed income from Alamo by way of salary and bonuses through 1988. XII ROA 98. Margaret testified that Tom and his father kept the books, or directed those that did so, and that both of them reported that the company was losing money after 1987. XVIII ROA 26, 36.

Alamo's substantial decline began in 1989. XIV ROA 472. By 1992, and through the time of trial in mid-1993, Alamo required large cash infusions to remain in operation at all. It lost money for several years. XIV ROA 464-65; XII ROA 98-99; XVIII ROA 35-37. Aztec transferred some $61,000.00 to Alamo to meet its expenses. XIV ROA 402.

In 1986 or 1987, Tom purchased a 25% interest in Crestmont (his father's construction company) for $30,000.00, and became its president. XII ROA 33-34; XIV ROA 508.

The parties experienced marital difficulties for several years. Margaret blamed the worsening marital situation on Tom's alcoholism and related behaviors. She had to wait up for him on many occasions; some nights he did not come home at all, and on others the police would call her to transport Tom from wherever he had been stopped in lieu of his arrest. XVIII ROA 10. Between 1986 and 1990, Tom acquired three DUI convictions and lost his driver's license. XVIII ROA 11, 31. Margaret complained that the drinking made him withdraw from the family, and that he frequented disreputable businesses, got into fights, got sick, urinated on himself, and required care for hang-overs. XVIII ROA 13-15.

Despite some years of arrests, counselling, therapy, and marital difficulties involving alcohol abuse, Tom refused to concede that he was an alcoholic, and would not even admit discussions of the concept of denial. XIII ROA 214-16. When asked about alcoholic blackouts, however, he conceded that they occurred "on occasion," and while he could not put a number on the blackouts, he claimed they occurred "infrequently." XIII ROA 217. Tom admitted that his drinking affected the marriage and "I could definitely assess a certain amount of responsibility to my side." XIII ROA 219.

Tom, for his part, criticized Margaret for gambling. XIII ROA 219-220. He claimed to have given her money with which to go gambling only about a dozen times in five years, but that she usually seemed to have her own money. XIII ROA 221-23. Tom also asserted that Margaret's gambling was not a "make or break issue" with him once he got her to sign a deed over to him for a very valuable parcel of land in exchange for allowing her to keep her gambling winnings.[2] XIII ROA 222, 225.

Margaret claimed that Tom started giving her money and telling her to go out in an effort to get her to stop complaining about his alcohol consumption. XVIII ROA 15. She

[2] This parcel, addressed at length below, is referred to throughout the record interchangeably as the "Boseck property," "Lot 54," or the "Durango property."

testified that he gave her money with which to gamble, and that she turned over to him any money that she won. XVII ROA 263; XVIII ROA 16.

Margaret claimed that since 1987, Tom's drinking caused her to neglect her own business to take care of him and cover for problems created by his drinking. XVIII ROA 29, 31. She claimed that from the time of Tom's third DUI until the parties separated in 1992, Tom's need for a driver and assistant basically kept her busy virtually all day, every day, often requiring her to drive from Las Vegas to Henderson and back three or four times per day. XVIII ROA 29, 31-35, 148.

Tom denied that his schedule required Margaret to be his full-time driver after the third DUI conviction, but conceded that after separating from Margaret, he hired a full-time "driver and a laborer and gopher-kind of person." XII ROA 39, 130-31; XVIII ROA 44.

Despite their problems, the parties attained and enjoyed a high standard of living during the marriage. By 1991, Margaret estimated that "household expenses" totalled some $200,000.00, with more than $123,000.00 going to mortgage, utilities, rental property, investments, the children's schooling, vehicles, clothing, recreation, and hobbies. I ROA 43; XVIII ROA 83. She claimed at trial that she needed $9,000.00 per month ($108,000.00 per year) to maintain herself and the children at the pre-divorce standard of living.

Hal, for Tom, estimated that about $57,000.00 per year was required to maintain expenses necessary to the household in terms of mortgage, utilities, health insurance and car payments, before consideration of child support or spousal support. By Hal's analysis, however, all sums expended on the community property house, or insurance for the children, or their tuition or clothes, were for Margaret's benefit. XVI ROA 15. By his reckoning, Margaret received for herself and the children $89,752.39 in 1992. XVI ROA 15; Trial Exhibit FF.

Typically, in addition to the salary directly taken from Aztec, Tom had the company pay many expenses normally paid by wage-earners from post-tax income. I ROA 37; XV ROA 14; XVI ROA 5-8. Hal testified at trial that in 1992, despite Aztec being the source of funds for

Margaret and the children, Tom needed $143,000.00 to meet his own personal living expenses. XVI ROA 37.

Between January and March, 1992, specifically in anticipation of divorce, Tom sold back to his father, Hal, the 25% interest Tom held in Crestmont. XII ROA 34, XIII ROA 258. Tom testified that Hal did not want Crestmont involved in the divorce, and so requested that Tom sell back the interest. Tom did so, for $43,000.00, a price determined by Hal. XII ROA 34-35. Margaret was not consulted on this sale, or given any notice of it.

In February, 1992, Tom took an unannounced trip to California. XVIII ROA 37-38. When Margaret could not reach him by phone for several days, she accessed his voice mail, which revealed Tom's ongoing affair with a Ms. Nancy Osborne. XVIII ROA 43-44.

Margaret confronted Tom at Ms. Osborne's apartment upon his return, and after a hostile confrontation, the parties attempted reconciliation. XVIII ROA 44-49. Tom was going to give up drinking, and Margaret was going to give up gambling; Tom bought Margaret a new car. I ROA 45; XVIII ROA 49-51. The attempt lasted less than a month; Tom went on a drinking binge after buying the car, moved out of the marital residence to his girlfriend's apartment, and the parties separated permanently. XVIII ROA 51-52.

Litigation of this case began with Tom's filing of a Complaint for Divorce and simultaneous motion for preliminary orders on March 17, 1992. I ROA 1, 6. Tom's motion conceded primary physical custody of the children, and sought specified visitation and turn over of certain personal property. Margaret's Opposition and Countermotion sought primary physical custody, child support, spousal support, and temporary exclusive possession of the former marital residence. I ROA 9-146.

Margaret's countermotion noted that Tom's 1991 W-2 showed regular wages of $200,000.00, and included the allegation that Tom had spent about $35,000.00 in 1991 on his hobbies, including his library, military uniforms, etc., and toy soldiers. I ROA 18, 41, 56. She complained that Tom had instructed all of the accountants, mortgage companies, and brokers to stone-wall her attempts at discovering what assets the couple actually had, and she requested that the collections be inventoried to avoid dissipation. I ROA 19, 31.

Margaret claimed that she had no income, and that about $13,000.00 in monthly expenses were necessary to maintain the household, inclusive of about $3,000.00 to service installment credit debt. I ROA 133. Margaret filed Les Pendens as to the realty known to exist within the ownership of either party or their companies. I ROA 148-201; II ROA 202-225.

Tom filed an Opposition to Margaret's Countermotion, changing his request to one for primary physical custody. He also sought to disqualify Margaret's attorney, Les Stovall, on the ground that Mr. Stovall had been the attorney that got Tom out of jail after one of his arrests for driving under the influence, and that Tom had gone out drinking with Mr. Stovall. I ROA 226, 244.

On April 13, Tom filed an affidavit claiming that he only earned $102,000.00 per year, and denying that he had any interest in Crestmont (without disclosing that he had just sold that interest to his father for $43,000.00). II ROA 238-248. Tom also claimed that Margaret was capable of earning $30,000.00 per year and complained that Margaret "literally "drove [Tom] to drink,'" but denied that he any longer had a drinking problem. II ROA 24-41. Tom valued the toy soldiers, books, and military uniforms at $40-45,000.00. II ROA 242.

Tom's Affidavit of Financial Condition listed only his $8,500.00 per month draw and $1,500.00 in rental income, and claimed that after paying the mortgage on the marital home and other expenses, he was $1,000.00 per month in the whole before payment of any child support or spousal support.

The Domestic Relations Referee (Terrance Marren) heard the motions on April 13-14, 1992. He referred the child visitation matters to Family Mediation and Assessment Center, set an interim schedule of visitation by Tom with the children (who remained primarily with Margaret), and set a return date for July. I ROA 147; XI ROA 1967. The Referee dealt with disputes relating to discovery and personal property, and took under submission the disputes as to temporary child and spousal support, and other financial matters. XI ROA 1968-69.

On April 16, Margaret filed a supplemental exhibit centering around a letter from Tom's CPA, which indicated that "based on the information you have provided us," Tom had received

$200,000.00 in wages from Aztec, and other distributions and income totalling over one million dollars. II ROA 310, 316.

On May 28, Referee Marren issued a "Referee's Note" (Minutes) stating that based on the documents supplied and the arguments of counsel, he recommended that the $120,000.00 IRA be split, with the parties sharing responsibilities for any tax consequences. IX ROA 1691. The Referee further recommended that Tom pay Margaret $500.00 per month per child in child support, directly pay the children's school tuition and the mortgage and utilities on the marital residence and the car in Margaret's possession until trial or further order, and pay to Margaret $5,000.00 per month in temporary spousal support.

On June 3, Referee Marren recommended lifting the lis pendens as to the homes being sold by Aztec construction, with the proceeds necessary to pay off the lenders and for normal operating expenses for Aztec being paid, and any profit held for further distribution. XI ROA 1971. Tom's attorney provided a Referee's Report that released all funds held in escrow to Tom. II ROA 355-56.

On June 30, 1992, a Referee's Report was filed making formal recommendations on the support issues ruled on by Referee's Note on May 28. II ROA 394-98. Tom filed an Objection on June 24, complaining that the award was "totally unreasonable." II ROA 384. He submitted an affidavit from a CPA claiming that the cash in Aztec was tied up for obligations and reserves for future work, and that only about $66,000.00 "excess cash" remained in Aztec's accounts. II ROA 387. He filed an "Amended Objection" the next day. II ROA 389. Margaret responded, noting that Tom had paid nothing toward spousal or child support since her April request, but that he had in the meantime bought a new Lexus automobile and obtained auto insurance for his girlfriend and her brother, while deleting Margaret from coverage. III ROA 467-68.

Judge Bonaventure took the support issues under advisement, and directed that all les pendens be released, and that half the money from 18 lots being sold be used to maintain Aztec, while the other half was to be placed in a trust account. XI ROA 1972. The Order for this holding was filed July 2. III ROA 505, 507. Judge Bonaventure followed up with an Order

affirming the Referee's Report as to spousal support and child support on July 10, 1992, overruling Tom's Objection and affirming the Referee's Report of June 10. III ROA 533-34; II ROA 394-98.

Tom filed a motion for reconsideration of the Referee's Recommendation as to spousal support on the ground that "he cannot afford to make the Court ordered payments." III ROA 535-36, 546-48. The new motion protested that Judge Bonaventure's ruling hampered Tom's ability to run his business. III ROA 547. He also filed a motion to "clarify" and to "alter or amend" the June 10 Referee's Report. III ROA 556.

Margaret opposed Tom's Motions for Reconsideration, and requested reconsideration of the orders requiring release of the lis pendens. III ROA 479, 549-556. Margaret's counsel demanded payment of spousal and child support in accordance with the affirmed Referee's Report throughout July and August, but payment was not made. IX ROA 1714, 1715-16.

Referee Marren was unavailable to hear Tom's motion to disqualify Mr. Stovall from representing Margaret on August 4. The issue was heard before Judge Bonaventure by request of counsel; the judge took it under advisement. XI ROA 1973. On August 13, the Order denying Tom's motion to disqualify Mr. Stovall was filed. III ROA 583.

Tom filed two additional exhibits on August 17. III ROA 584. The first was an explanatory letter from Tom's CPA explaining that the $200,000.00 annual income shown was an artifact of Aztec's conversion from a "C" to an "S" corporation and not a true measure of Tom's income. III ROA 586-87. The letter also noted that Aztec would have had "only" $548,000.00 if regular corporate taxes were paid, which taxes were avoided by the conversion. III ROA 586-87. The second exhibit was an accounting purporting to show that Tom was directly paying about $5,500.00 per month to maintain necessary mortgage, utilities, car payments, child support, and school tuition costs. III ROA 588.

Margaret opposed Tom's motion to "clarify," protesting that both the Referee and the reviewing judge had fully reviewed and decided the matter, but that after more than four months (from April through August 26), Tom had still paid none of the spousal support ordered. IV ROA 601-602.

Tom's motion to "clarify" came back before Referee Marren on August 27. Referee Marren granted the continuance requested by Tom's counsel, over Margaret's objection, but put him on notice that "if this case keeps going on as it has been Attorney Fees will be forthcoming and awarded to Mr. Stovall." XI ROA 1974. Tom's counsel took the remaining motions for reconsideration (that were to be heard September 3) off calendar by means of a letter to Judge Bonaventure. IX ROA 1717.

Next, Tom filed a countermotion seeking Margaret's turn over to him of various items in the marital home, specifically including the toy soldier, library, and military artifact collections, on August 20. III ROA 593-600. He alleged that Margaret had already damaged these collections to the extent of "10,000.00 to $15,000.00." Tom also filed yet another motion seeking reduction or elimination of the spousal support award that he was not paying. IV ROA 615-634. Margaret opposed the motion on September 21, noting that Tom had still paid none of the spousal support. IV ROA 639-640.

These matters were raised during a return to court on child-related issues on September 21, 1992. XI ROA 1975-76. The Referee proposed a means for Tom to get certain personal property, but it appears that the procedures recommended were not implemented.

Tom filed an affidavit, letter, and accounting from another CPA (Zerga), this time indicating that Aztec had (if accumulated depreciation, etc., were totalled) a "net loss of $5,270 for the eight months ended August 31, 1992." IV ROA 642, 646. It also showed, however, $80,000.00 in "stockholder salary," direct payment of "legal and professional" expenses of over $16,000.00, and "dividend distribution" of $328,385.00, all over a period of eight months. Mr. Stovall estimated spousal support arrears at $28,000.00 at the hearing. XI ROA 1976.

On September 25, Referee Marren issued a "Referee's Note (minute entry). IV ROA 678-79. Addressing Tom's assertion that the spousal support award was made in error, the Referee noted

> [Tom] has not paid that amount [the $5,000.00 per month] to [Margaret]. The Referee did not err in making that recommendation. The Referee stands by that recommendation and as a result, there is an arrearage in those payments of approximately $28,000.00 pursuant to the representation of counsel for [Margaret].

IV ROA 678. The Note went on to recommend that $50,000.00 of the funds held in trust should be released to Tom, and that at the same time Tom should pay Margaret "her arrearages under the spousal support determination which may be $28,000.00 or whatever was not paid by [Tom] through September, 1992." IV ROA 679.

Reflecting on the voluminous filings and accountings, the Referee's Note stated that Referee Marren

> determined that the standard of living of the parties was significantly greater than represented by [Tom]. A major factor in this determination was the history of the community in purchasing toy soldiers at a rate of at least $1,250.00 per month for a considerable period of time. In fact, [Margaret] alleges that [Tom] spent $60,000.00 on toy soldiers in calendar year 1991. That would be $5,000.00 per month if proved correct.

IV ROA 679; XI ROA 1976. The formal Referee's Report was not signed by the Referee, however, until October 21. V ROA 817, 821.

In the meantime, Margaret again demanded payment of spousal support arrears, on September 29, 1992. IX ROA 1726. She also protested that only $3,000.00 in child support had been paid to date out of the six months that the parties had been separated. These demands were repeated by phone from Margaret's counsel. IX ROA 1626.

On October 6, Margaret moved to hold Tom in contempt for non-payment of spousal support since the parties' separation in March. IV ROA 665. She set out that if arrears were calculated from separation, arrears totalled $38,666.00, and if calculated from her first motion for support, arrears totalled $33,833.00. IV ROA 669-670. She alleged that only three $1,000.00 payments of child support had been made out of over $7,000.00 owed, and that arrears in child support were either $4,733.00 or $3,733.00, depending on what starting date was used. IV ROA 670-71. Margaret noted that Tom's repeated filing of several essentially identical motions seeking to undo the spousal support award had cost her thousands of dollars in attorney's fees. IV ROA 671-72.

The motion was set down in ordinary course for December 7, 1992. IV ROA 666. Margaret also filed an "Ex Parte Application for Order Releasing Funds," claiming that she was in desperate need of the arrears. IV ROA 692-95. Instead of signing an order, Judge

Bonaventure set the matter on calendar for the next morning and directed Mr. Stovall to notify Mr. Marks that it would be heard. IX ROA 1626. Mr. Stovall did so. IX ROA 1626, 1738.

The same day, Tom signed a "substitution of attorneys" purporting to substitute himself in proper person for Mr. Marks, and had it faxed to Mr. Stovall at about 4:45 p.m. IV ROA 714; IX ROA 1626.

The next morning, October 9, 1992, neither Mr. Marks nor Tom appeared. Judge Bonaventure ordered immediate release of $43,399.00 to Margaret from the funds held in trust at the title company pursuant to his earlier order, and continued all other matters. XI ROA 1977; IV ROA 691; IX ROA 1627.

At about this time, Tom consulted with Judge Fine, at that time an attorney in private practice, about taking over the case from Mr. Marks. Apparently, due to the time-pressures of the pending matters and the ongoing judicial election, Judge Fine did not take the case as a lawyer, but instead referred Tom to Mr. Wirth and Ms. Stryker, and perhaps to alternative counsel as well. X ROA 1866, 1869-1881.

On October 19, Margaret moved to strike the purported substitution of Tom in proper person. IV ROA 745. On October 21, Tom filed another "substitution of attorneys," purporting to substitute Jolly, Urga, Wirth & Woodbury in place of himself in proper person. IV ROA 756. The same day, Referee Marren signed the Referee's Report from the September 21, confirming that spousal support arrears were due and owing. V ROA 817, 821.

On November 3, Tom's new counsel filed a motion seeking to undo the order releasing the $43,000.00 to Margaret, on the ground that he had not received proper notice, and that Tom did not owe Margaret $43,000.00, but only $28,000.00. IV ROA 762. By Tom's reasoning, since it took the court system several months from Margaret's motion for support to enter a final order saying Tom owed it to her, she could collect only sums accruing after the order was entered, or $18,000.00. IV ROA 767. Tom submitted an affidavit saying that he paid four months of child support, starting in July, rather than the three months claimed by Margaret. IV ROA 774.

On November 4, Tom filed an Objection to the Referee's Report signed by the Referee on October 21, which stated that "in the alternative," it was a motion for relief from the Referee's Report of the prior June 10. IV ROA 779. This motion once again argued the matters regarding the change from a "C" corporation to an "S" corporation, claiming that Tom's actual salary was much smaller than indicated, etc. IV ROA 779-785. Tom's "Motion for Relief from Order Entered October 9, 1992," repeated much of the other motion, word for word. IV ROA 786-799. Tom also filed a motion seeking to have a receiver appointed for Alamo insurance, recycling the Zerga affidavit that had been filed by Mr. Marks two months earlier. V ROA 807.

Apparently not being informed of Tom's Objection the previous day, Judge Bonaventure signed the Referee's Report and it was filed on November 5, 1992. V ROA 817-822. Margaret responded to Tom's Objection, recounting the four separate (but largely duplicative) attacks by Tom on the spousal support award and terming the latter ones "frivolous." V ROA 836-842. Tom filed a Reply. V ROA 844.

It was at about this time that personal animosity between counsel started manifesting itself in the form of both counsel laying paper trails attesting to the unreasonableness of their opponent regarding discovery, etc. See V ROA 846 (affidavit of Mr. Stovall); V ROA 888 & VIII ROA 1487 (affidavits of Ms. Stryker); V ROA 861 (affidavit of Mr. Wirth). On November 23, Margaret filed a motion for protective order as to her deposition, based on a scheduling conflict. V ROA 850-54.

The transition to Family Court caused the court system to continue various pending motions. V ROA 855.

Judge Bonaventure overruled Tom's Objection to the Referee's Report confirming that spousal support was owed to Margaret, on December 1, 1992. V ROA 856. The Order also overruled the portion of Tom's motions seeking relief under NRCP 60(b), and ordered Tom to pay Margaret $500.00 attorneys fees. V ROA 856-57. That penalty was apparently never paid by Tom. IX ROA 1629.

The very next day, however, Tom filed an Opposition to Margaret's October 8 motion to hold him in contempt for non-payment of spousal support, arguing that it was moot, and again requesting relief from the October 9 Order releasing the arrears from trust to Margaret. V ROA 858.

Two days later, December 4, 1992, Tom opposed Margaret's request for protective order and brought a countermotion for contempt based on the failure of Margaret and other witnesses to attend certain depositions. V ROA 861, 877. Margaret opposed the countermotion to hold her in contempt. V ROA 901, 905. On December 8, Discovery Commissioner Biggar found that Margaret appeared to not be cooperating with discovery, and that had not properly requested a stay prior to the date of the deposition, and recommended a $500.00 discovery sanction against her. XI ROA 1978-79. Margaret did not file an Objection to the Recommendation, which became an Order on January 6, 1993. V ROA 933.

All pending motions came before Referee Marren on December 11. XI ROA 1980. The Referee noted that Judge Bonaventure had already affirmed the Referee's prior Recommendation for spousal support, and that he "has never taken the position of acting as a Supreme Court for the District Court Judge" and so would not entertain more requests to alter the alimony award without changed circumstances. XI ROA 1981. Referee Marren noted that there is no statute for retroactive spousal support, so normally it is awarded only from the month it is requested; he reaffirmed his prior recommendation, and directed Tom to pay child support and spousal support as ordered in January. XI ROA 1982.

Referee Marren was reluctant to remove the lis pendens except to finance Aztec's ongoing operations, but he recommended $63,000.00 be released to pay a lender. XI ROA 1981. On other matters, he required reporting to Mr. Stovall of ongoing land sales, and directed Tom's counsel to comply with the earlier recommendation to do a video inventory of the personal property Tom sought. XI ROA 1981-82.

Tom's counsel immediately prepared a Referee's Report releasing funds from the title company trust account to Aztec. V ROA 907. On December 17, the parties managed to

complete a Parenting Plan confirming primary physical custody to Margaret, with visitation by Tom. V ROA 917.

A month later, Referee Jones signed for Referee Marren a "supplemental report" drafted by Tom's counsel purporting to contain the rest of the recommendations from the December 11 hearing. V ROA 939, 945. It deferred Tom's request for a receiver for Alamo while providing that his nominated expert could access the company's records. V ROA 940.

The formal Referee's Report drafted by Tom's counsel does not match the Minutes. For example, the Referee's Report added a finding that "the Referee relied heavily" on the toy soldier expense allegations in determining standard of living and support. V ROA 941; cf. XI ROA 1981 (expenses on toy soldiers, not challenged by Tom's counsel, was "considered in the recommendation"). The Referee's mention that "the December payment is paid. November is either owed or was covered by the $43,000.00" was set out in the Referee's Report as "the Referee finds that [Tom] is, at a minimum, current in his obligation of support to Margaret." V ROA 941; cf. XI ROA 1982. The statement that "the Referee wants to look at where the $43,399 took us and resolve that issue at that time [trial]" became "the issue of whether the payment of $43,399 . . . constituted an overpayment shall be reserved for consideration at trial or later hearing." XI ROA 1982; cf. V ROA 941.

With establishment of the Family Court in January, 1993, the case was randomly assigned to Judge Fine. Mr. Wirth discovered from his client that Tom had consulted with Judge Fine on this case while she was in private practice, and so informed Judge Marren, but not Judge Fine. X ROA 1866, IX ROA 1637.

The Referee's Report from the December 11 hearing was signed by Judge Becker, reserving the objection period, on January 19, 1993. V ROA 950, 958. Margaret filed an Objection on January 28, objecting to several misstatements in the Referee's Report submitted by Tom. V ROA 961. Tom responded, claiming that Margaret had not presented "evidence" that the Referee's Report was inaccurate. V ROA 970.

On February 2, Judge Fine recused herself from the case "to avoid the appearance of impropriety and implied bias," but reconsidered and ordered the case to remain in her department the next day. XI ROA 1983.

Tom filed "Supplemental Points and Authorities Regarding Modification of Temporary Support Orders" on February 11. V ROA 980. In that submission, Tom specified a list of "reasonable and necessary monthly expenditures" for Margaret of $3,000.00, which notably excluded her car payment and various other expenses complained of on page one of the moving papers. V ROA 980, 982.

Judge Fine conducted an evidentiary hearing on February 11 and 12, 1993. XI ROA 1984. She amended the support terms to require Tom to pay $1,000.00 child support for the two children, plus their private school, and increased spousal support to $6,000.00, but requiring Margaret to pay all other expenses for herself and the children from that amount. VI ROA 1178; XI ROA 1984-85. On February 16, Judge Fine appointed Mike Kern as a court-appointed accountant and Shelli Lowe as a court-appointed appraiser. XI ROA 1985. February and March were largely consumed by discovery by the parties and the court-appointed witnesses. VI ROA 1022-1197; XI ROA 1986.

On March 15, Mr. Stovall wrote Judge Fine a letter requesting her recusal because of a seeming political connection between the judge and Mr. Wirth's law partner. X ROA 1883; IX ROA 1638. Judge Fine declined to recuse. IX ROA 1638. On May 11, Mr. Stovall again asked Judge Fine to recuse, this time on the basis of his discovery of the January 8 letter from Mr. Wirth to Judge Marren, indicating that Judge Fine had consulted with Tom on this case. X ROA 1886, IX ROA 1638.

On May 10, Tom filed a motion in limine seeking to exclude various witnesses from the trial. VII ROA 1225-1346. Margaret opposed it on May 11. VII ROA 1353-1363. Discovery continued. VII ROA 1364-1409. Margaret placed in the record all records pertaining to her psychological care by Dr. Norman Roitman. VII ROA 1410-1430.

Judge Fine met with Mr. Stovall, Mr. Wirth, and Ms. Stryker on May 12; the meeting was transcribed. X ROA 1888. Judge Fine concluded that Margaret had waived any violation

of the Code of Judicial Ethics by not bringing the apparent conflict to her attention upon receipt of Mr. Wirth's letter in January. X ROA 1897. Judge Fine further stated that, if anything, she had only given Tom the names of other attorneys to talk to, and that Margaret had failed to follow proper procedures to disqualify her. She then assured counsel she was not biased or prejudiced, and invited counsel to "take it up on appeal at the end if you feel I have been unfair." X ROA 1900-1901; XI ROA 1987.

Trial commenced May 20, and stretched over nine separate days. XI ROA 1989-1990. Both parties commented about most issues. Tom's father, Hal, also testified at length about multiple issues. The trial court's expert CPA, testified as to the value of Aztec and Alamo, and the court's appraiser, Shelli Lowe, testified as to value of real estate. Tom's CPAs, Chris Wilcox and Michael Dobbins, talked about the values of Aztec and Alamo. Dr. Norman Roitman testified as to Margaret's mental condition and need for therapy. Dr. Terrance Clauretie testified for Margaret as to the value of Aztec and Alamo. Kathy Sonnevilli, notary public, was called by Tom to testify as to the deed from Margaret to him giving him all title to Lot 54. Karla Philippus was called by Tom as to bookkeeping for Aztec and Alamo.

On the last day of trial, after closing arguments, Judge Fine took a recess, and then gave an oral decision. XX ROA 125-133. Findings of Fact, Conclusions of Law, and a Decree of Divorce were filed June 24, 1993. VIII ROA 1433-1458.

As noted above, for unknown reasons the Record On Appeal does not appear to contain Margaret's Motion for New Trial filed July 6, 1994, or her Erratum to Motion for New Trial filed July 7. On September 16, 1993, Tom brought two "countermotions" against Mr. Stovall "and, if the Court determines it is appropriate, also against Defendant." VIII ROA 1475-1537, 1538-1566. Basically, the motions complained about Mr. Stovall's handling of the case, and alleged that he made it more expensive than necessary. Tom claimed that through August 31, 1993, he incurred about $118,000.00 in fees to Ms. Stryker and Mr. Wirth, plus $15,000.00 to Mr. Marks, and over $8,000.00 in costs. VIII ROA 1477.

On November 5, 1993, Judge Fine granted Margaret's Motion for New Trial in part, by providing for the parties to split the costs of the children's education, books, etc., up to a

maximum of $100.00 per month for both children.[3] VIII ROA 1571-72. On November 12, Tom moved to hold Margaret in contempt for not turning over certain personal property. VIII ROA 1574.

On December 2 and December 6, Judge Fine heard proceedings on follow up orders on status checks, relating to attorney's fees and personal property, and resulting in additional post-trial orders. VIII ROA 1602; XI ROA 1932, 1991-92. Pursuant to Tom's motion for Order to Show Cause, Judge Fine noted the turn over of personal property and reserved the possibility of issuing further sanctions. XI ROA 1944-46.

Margaret filed her Opposition to Motion for Attorneys Fees and Sanctions on December 13, 1993. IX ROA 1622. That submission recounted the entire procedural history of the case, attaching copies of the relevant papers, letters, etc. See Volumes IX and X.

On February 14, 1994, Judge Fine issued the final Order in the case, noting that the award of $20,000.00 attorney's fees to Tom compensated him "for those legal fees that this Court believes to have been caused by the actions of [Margaret]. The remaining matters tried before this Court were brought in good faith, accordingly, no additional attorney's fees are warranted." XI ROA 1949-1950. The court found that there had not been adequate proof that Margaret had damaged Tom's collections and library. Id.

This appeal followed.

[3] This appears to be a typographical error, as the lower court had directed that these costs should not exceed $100.00 per child per month. XI ROA 1990.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING ALIMONY TO MARGARET

This Court has twice in the recent past had occasion to note how a trial court should evaluate a claim for alimony. In Sprenger v. Sprenger, 110 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 104, July 26, 1994), the Court specified seven factors to referenced: (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. In this case, analysis of these factors showed that the court below erred.

In this case, the parties married young. Margaret did not have a "career" prior to marriage, but a job as an insurance underwriter. XVIII ROA 9. The parties, at the time of trial, had been married for 17 years.

Like the husband in Sprenger, Tom did not complete a formal education during the marriage, but rather developed the business acumen during that time that allowed him to bring in $100,000.00 to $200,000.00 per year. XVIII ROA 9; XII ROA 31-32. Actually, the facts are clearer in this case, since the money-making business Tom founded was not started until several years after marriage.

Margaret's "marketability" and ability to support herself is a matter of some conjecture. Margaret has had no independent income for over five years. The court below found that Margaret was "young," "capable," "has been in business for herself for ten years," and was "obviously competent." VIII ROA 1435-36. At the time of trial, Margaret was five years younger than the wife in Sprenger. Margaret testified that she had not really attended to the business since 1987, and had not been working at the agency since she began driving Tom around after he lost his license in 1990. XVIII ROA 29-30. She had to borrow money to keep it open. XVIII ROA 36, XVII ROA 130-31.

Tom thought Margaret could earn $25,000.00 "if she wanted," but he conceded that to do so, she would have to do all the work of three existing employees, and Tom admitted that he really was not sure whether Margaret could make a living from running the agency. XIII ROA 266-69, 271. Tom's CPA testified (over objection that he was unqualified to render an opinion on the subject) that from a two-firm survey, he determined that Margaret could earn $44,000.00 to $59,000.00 just going to work as an insurance agent.[4] XVI ROA 127-28.

Everyone that testified indicated that at the time of trial, Alamo was a wreck of a company from which no immediate living could possibly be made. Mr. Kern's opinion was that Alamo was insolvent, and it was "a big if" as to whether the company could be made profitable at all, even with several years' efforts. XIV ROA 465, 475. Mr. Wilcox, for Tom, thought Alamo could reach "break-even" (i.e., stop actively losing money) within six months. XVI ROA 126. Even Mr. Wilcox conceded, however, that the business was losing more and more money each year, and he agreed with Mr. Kern that the current operator, Mr. Fagen, could effectively scuttle the agency by simply walking away with its "book of business." XIV ROA 444; XVI ROA 130; XVII ROA 22-24.

Of course, Margaret's ability to function is also relevant to her "marketability." The only psychological testimony came from Dr. Norman Roitman, who testified that his observation of Margaret was "consistent with a person who would have difficulty attending to her work." XVI ROA 148; see VI ROA 1200-1203 (Initial Assessment). In his opinion, Margaret's condition had worsened over time, and to a reasonable degree of medical certainty she needed three to six months of therapy, free from "specific financial expectations," to become productive. XVI ROA 149, 155-56. He estimated the cost of treatment at $2,700.00 to $5,200.00. XVI ROA 162.

Despite the apparent hostility of the lower court judge to Margaret, and to her alimony claim, the judge recognized that Margaret "happens to be incredibly fragile right now." XVII ROA 104. Throughout the trial, Margaret was so upset that on many occasions she could not

[4] For reasons specified below, Mr. Wilcox's testimony is somewhat suspect.

even bear to be in the courtroom during testimony; on the day she testified, she required valium to stay calm. XII ROA 89; XVII ROA 94.

No direct testimony was elicited as to whether Margaret had stayed home with the children, but the facts show that she and Tom opened Alamo insurance a year after their youngest child was born. XVIII ROA 9-10.

The final factor, the wife's award, besides child support and alimony, is detailed below. In summary, Margaret's position is like that of the wife in Sprenger, in that "the record raises serious doubts regarding the extent to which [she] will actually benefit from the award." Sprenger, supra, Advance Opinion at 4. She was awarded encumbered, highly appreciated real estate with significant tax consequences upon sale, and a half interest in certain retirement accounts with stiff penalties for withdrawal. VIII ROA 1441-44. Tom, like the husband in Sprenger, was given essentially all the cash assets.

The second recent case, Gardner v. Gardner, 110 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 126, Sept. 28, 1994) is also useful since, as here, a review of the entire record makes the district court's abuse of discretion in denying alimony manifest. Unlike Mrs. Gardner, Margaret had not just an "inferior" income, but no income. The lower court in this case did not even attempt to achieve any kind of parity in the parties' incomes and lifestyles after divorce. See also Heim v. Heim, 104 Nev. 605, 763 P.2d 678 (1988); Rutar v. Rutar, 108 Nev. 203, 827 P.2d 829 (1992).

Like Mrs. Gardner, however, Margaret subordinated her own interests and goals to serving those of her husband. She testified that she largely abandoned caring for her business to take care of the children, and Tom and his business. XVIII ROA 28-36, 148. While Tom largely discounted the value of the services she provided, once they broke up he acquired both a girlfriend and a full-time "driver and a laborer and gopher-kind of person." XII ROA 39, 130-31; XVIII ROA 44.

During this marriage, Tom, like the husband in Sprenger, "has developed the business acumen which has provided him with a thriving business and substantial assets." See Sprenger, supra, Advance Opinion at 3. At trial, Margaret made the same request that was granted in

Sprenger, that she be made able to live "as nearly as fairly possible to the station in life she enjoyed before the divorce" for the rest of her life or until she remarries or her financial circumstances substantially improve. Id. at 4; cf. XVIII ROA 132-33; XIX ROA 24.

Instead, the trial court, instead of looking at how both parties would fare after divorce, ignored Tom's income and expenses entirely, and branded Margaret's expenses "unreasonable and outrageous." XX ROA 131.

Unfortunately, this double standard permeated the trial, and was the focus of most discussions of alimony below. The district court found that an award of alimony to Margaret was "neither warranted nor necessary," and made three pages of findings rationalizing that refusal. VIII ROA 1435.

The trial court found that $165,000.00 was expended "for" Margaret and the children over a year and a half. The court did not deem it important to examine how much Tom received in comparison with whatever was received by Margaret for maintenance of herself and the children.[5] By admission of both Tom and Hal, Tom took at least $143,000.00 in just one year just for himself. XIII ROA 363-64; XVI ROA 37. Mr. Kern, the court's expert, testified that Tom received the benefit of some $342,000.00 in distributions from Aztec in 1992 and 1993, as compared with Margaret's $181,000.00. XIV ROA 434-36.

After trial, Tom admitted that he had actually taken an additional $141,000.00 to pay attorney's fees and costs during the litigation,[6] while Margaret, of course, had to use the sums she received both to live on and to finance the litigation. VIII ROA 1477; XV ROA 14

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[5] In other words, by counting funds used to purchase or maintain community property assets as "support," and then to refer to the assets purchased as constituting Margaret's share of property, the court below was engaged in a subtle form of double-dipping. This Court has made it clear that sums may be support, or property, but not both. See, e.g., Carrell v. Carrell, 108 Nev. 670, 836 P.2d 1243 (1992) (wife's share of pension incorrectly labelled "spousal support").

[6] The testimony of Tom and Hal was somewhat vague and contradictory as to what was paid directly out of the business. Hal did not consider expenditures from Aztec for Tom's attorneys or accountants to be "for his benefit," and Tom did not consider such expenditures "income" because he "didn't get to enjoy it," whether it was $35,000.00 to $51,000.00, as discussed at trial, or the $140,000.00 asserted by his attorneys after trial. XIII ROA 363-64; XV ROA 20.

(attorney's fees Tom paid were "reimbursed" to him); VII ROA 1380. It thus seems likely that Tom took at least twice as much cash for himself as he complained that he had to waste on his wife and children.

The same double standard appeared whenever "fault" was approached. The court below entertained Tom's complaints about Margaret's behavior on the basis that he "needs his day in court," and largely relied on finding Margaret blameworthy in denying her alimony. VIII ROA 1435-36; XII ROA 76-77. Tom's attorneys argued, successfully, that they should be permitted to go on at length as to Margaret's failings, over Mr. Stovall's objections and pursuant to the trial court judge's assurance that "I can filter and I know what's happening. So, please give me some benefit here." XII ROA 139, 159-160.

Yet when Margaret's counsel attempted to inquire into Tom's abandonment of his wife and children in favor of a girlfriend, and his non-support for most of a year, Judge Fine cut off the inquiry, stating "I know who he was living with and I think its irrelevant . . . . Well its a no fault state. I understand, though. . . ." XV ROA 77. With prescience, Margaret's counsel predicted that Tom would be making the argument on alimony or property based on fault, and was assured by the judge that no such argument would be made. XV ROA 79.

The pervasive double standard on inquiry and evaluation of conduct irreparably tainted the lower court's analysis. The court below thought nothing of Tom's deliberate and secret liquidation of a $43,000.00 asset[7] in a deal with his father in anticipation of divorce, or his purchase of expensive insurance for his girlfriend and her relatives, or Tom's taking the girlfriend on vacations or business trips, but chastised Margaret at some length for incurring tow truck charges instead of using a taxi, and for using rental income for living expenses instead of paying mortgage payments. XX ROA 130-131; cf. VIII ROA 378-79; XIX ROA 31; XIII ROA 239-241.

[7] This is the value Tom arranged with his father, who bought the interest; Hal determined the price. XII ROA 35; XIII ROA 239; XIV ROA 508-510.

The challenges by Margaret's counsel to the court's "stricter view of Defendant and Defendant's conduct" were rebuffed throughout the trial. See, e.g., XII ROA 135; XIII ROA 225; XVII ROA 106; XIX ROA 29-32.

On the facts of this case, Judge Fine abused her discretion in refusing to award alimony of a substantial amount and length of time, from the wage-earning spouse to the essentially unemployed spouse who, in the very best of circumstances, could hope to begin to regain her psychological composure and perhaps reach break-even instead of losing money, in six months.

The court below somehow reasoned that by not even giving Margaret her half of the community property except in payments over several years (without interest), the court was somehow alleviating the need for alimony.[8] That reasoning cannot be considered "just and equitable" within the meaning of NRS 125.150(1)(a). At a bare minimum, even if permanent alimony was not warranted (as it appears to be on these facts), the rough "two to one" approach of Gardner and Rutar indicate that Margaret should have received a substantial alimony award for eight or nine years.

II. THE DISTRICT COURT ERRED BY ASCRIBING NO VALUE TO AZTEC'S GOOD WILL

Mr. Kern valued Aztec, as of April 30, 1993, at about $974,500.00. XIV ROA 426. Although Aztec was a going concern, Mr. Kern included no value for goodwill, because Aztec was a small company with only one or two shareholders, future work would be speculative, and the values provided were therefore for liquidation of the company -- for its assets only. XIV ROA 393-96, 416, 437.

The values provided even included reduction for an entirely hypothetical 6% to 8% sales commission on a hypothetical sale of the company. XIV ROA 428.

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[8] Tom's counsel repeated many times the argument that because the court below is allowing Margaret to eventually receive her half of the community property, she does not need or deserve an award of alimony. See, e.g., VIII ROA 1546. It is worth noting that the property awards to the wives in Sprenger and Rutar were at least as large as in this case, and in every alimony case except Rutar in the past seven years, the alimony-paying husband has earned less than Tom admits to be receiving.

There was no question that, at the time of trial, Aztec was a "going concern." The company already had the land necessary for the next project (phase 11). XII ROA 65. Mr Kern, the court's expert, noted that there were a number of ways in which a business could be appraised. XIV ROA 392. Mr. Kern's explanation for not including good will in the evaluation of Aztec was "two different industry guidelines." XIV ROA 394. He also noted that his evaluation was not an audit, and relied on the accuracy of the data submitted by Tom. XIV ROA 397.

Chris Wilcox, a CPA hired by Tom to give financial evaluations on Alamo, conceded that he included good will in the evaluation of that business because it is proper to do so for any ongoing business. XVII ROA 66.

Dr. Terrance Clauretie, testifying for Margaret, thought that Mr. Kern did an excellent job "as far as measuring this company on a liquidation basis" and would add only that "there might be a small amount of goodwill" because Aztec is ongoing and not, in fact, being liquidated. XVIII ROA 157. Using the IRS method, and other methods, Dr. Clauretie estimated that Aztec had, conservatively, goodwill worth $164,000.00 at the time of the prior appraisal. XVIII ROA 157-163.

When it was suggested that Aztec had suffered "a decline in profitability over the last several months, mainly because of the ability to get some financing and so forth," he estimated that the goodwill value may have declined to as little as $100,000.00 XVIII ROA 163-65.

Michael Dobbins, a CPA called by Tom in rebuttal, testified that he "didn't completely agree" with Dr. Clauretie's testimony that Aztec has a "true ability to earn excess earnings, because if it was sold, the "management team" would not be transferred to the successor company. XIX ROA 108-109. He also thought that Hal was providing more valuable services than he was being paid to provide, and charging less rent for his home office than might otherwise be reasonable, and thus that the "undercompensated manager" actually reduces the excess earnings. XIX ROA 118-19. On cross-examination, he conceded that his valuation was for liquidation, although Aztec was an on-going business. XIX ROA 144-46.

In surrebuttal, Dr. Clauretie testified that from an economic standpoint, Aztec must have a goodwill value if it continues operations, and that he had already reduced the probable value of Aztec's goodwill to compensate for the current operational problems being suffered, without which the number would have been more like $400,000.00. XX ROA 8-12.

At the close of trial, Judge Fine stated that she accepted the value of Aztec found by her appointed expert Mr. Kern. XX ROA 131. From that the lower court deducted an averaged valuation for the Vegas driver property, which she assigned to Margaret, and then further reduced the value by $40,000.00, apparently on the basis of Hal Shydler's remark that on the day of trial Aztec "probably has about $40,000.00 less cash now then it had then [at the time of appraisal]." XVI ROA 58. Judge Fine therefore declared Aztec to have a value of $807,000.00. XX ROA 131. For some reason, Tom's counsel recited Aztec's value in the formal decree as $744,505.00. VIII ROA 1439.

The lower court judge indicated that she had reviewed Ford v. Ford, 105 Nev. 672, 782 P.2d 1304 (1989), and therefore that Aztec did have a reputation that should generate future business. XX ROA 127. The court ruled, however, that:

> due to the history of this past year pursuant to the evidence, Plaintiff has been barred from proceeding with that business with the same force and effect it previously enjoyed. . . . goodwill could have been $100,000, but for the fact that this Court finds the reputation to have suffered as a result of the delay in being able to proceed with their day-to-day activities. . . .

XX ROA 128. The lower court then noted the discount rent and reduced management fees being paid to Hal Shydler, and concluded that the goodwill value of Aztec was de minimis.[9] Id.

The lower court's holding was not within the range of possibilities presented by the testimony. Under Ford v. Ford, 105 Nev. 672, 782 P.2d 1304 (1989), the fact that continuing goodwill is dependent upon staying personally in business is not a limitation upon inclusion in valuation for purposes of community property. The testimony of Mr. Kern and Mr.

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[9] This may not have been the trial court judge's actual reasoning. Judge Fine had earlier stated her opinion that unlike Ford or the law practice in Williams v. Waldman, 108 Nev. 466, 472, 836 P.2d 614 (1992), this case did not involve professional services, the judge still could not "attach good will" to the company, and the judge would "Be happy for you to take it up on appeal with respect to this having good will." XIX ROA 64.

Dobbins, that would perform valuation for sale or liquidation (in other words, that there was no goodwill), is simply legally irrelevant.

The only witness that testified as to the value of the goodwill in Aztec was Dr. Clauretie, who testified that he had already taken into account the factors recited by the trial court judge in reducing the goodwill of Aztec from a possible $400,000.00 to a conservative $164,000.00, and possibly as low as $100,000.00. XVIII ROA 157-165.

The district court judge made no finding that Dr. Clauretie was unqualified or had erred in any way, and the lower court overlooked that the professor had already reduced the valuation given to account for the factors recited by the court. In the absence of any other competent evidence in the record as to the value of Aztec's goodwill, the lower court could not choose to simply disregard the evidence presented.

At the very least, this Court is not bound by the "substantial evidence" standard and may make its own review of the record, since there is no conflict in the evidence or question as to credibility. See Matter of Estate of Meredith, 105 Nev. 689, 691, 782 P.2d 1313 (1989) (review of will).

In Malmquist v. Malmquist, 106 Nev. 231, 792 P.2d 372 (1990), this Court affirmed a trial court that had approved a valuation within the range of evidence presented at trial. 106 Nev. at 252. Here, the only valuation of good will presented came from Dr. Clauretie, and "de minimis" was not within the range of possibilities explored.

Accordingly, it is submitted that the district court's finding that there was no good will to Aztec construction was error, and should be reversed and remanded for entry of an order dividing or offsetting that goodwill value.

III. THE DISTRICT COURT'S VALUATION OF ALAMO INSURANCE IS NOT SUPPORTED BY THE RECORD

At the close of trial, without explanation, Judge Fine announced that "Alamo valued at $50,000.00." XX ROA 132. That valuation is unsupportable on the basis of the record. The

court's appointed evaluator, Mr. Kern, looked at the numbers and the history of Alamo and stated:

> the range now changes to $36,530.00 to an upper range of 54,795 if you had a stable insurance company. High profile agency with one or two key employees would not warrant a 1.5 ratio. It would warrant the lower end. Therefore, if we were to render an opinion based upon March 31, 1992, the high end would be 36,530 and the low end, based on tentative cash flow, would be zero.

XIV ROA 445. In other words, the court's expert determined the maximum value of Alamo to be $36,530.00. Mr. Kern noted that given the very substantial losses Alamo had suffered, it probably should have been dissolved just to cut those losses. XIV ROA 464-65. He described Alamo as "an insolvent business. . . . on a downhill slide." XIV ROA 465, 470.

Mr. Kern believed it would take years to make Alamo profitable, if it could be done at all, and that whether it could be done at all was "a big if." XIV ROA 475.

Mr. Wilcox, for Tom, repeatedly stated that he agreed with Mr. Kern's estimate of Alamo's actual value. XVI ROA 92, 97. Per his instructions, however, he also tracked the history of Alamo's growth from 1982 to 1989, and then extrapolated what the company might have been worth if it had the growth enjoyed by two other agencies with which he was familiar, assuming that insurance premiums followed the national cost of living index. XVI ROA 98-111. Over the objection of Margaret's counsel, his calculations as to what Alamo might have been worth was admitted into evidence, although he conceded that it was speculative. XVI ROA 114, 116.

Mr. Wilcox, again speculating, examined the actual numbers from Alamo, and changed them

> and tried to take reasonable operating expenses and find out what the cash flow to the owner should have been had those operating expenses been within the industry norms, and on the high side we came up with a valuation of . . . 55,000 [to] 24,000.

XVI ROA 124. This valuation was based on what costs should have been, not on what they were; Mr. Wilcox noted earlier that Alamo's costs were higher than industry norms. XVI ROA 112. He conceded that it was not "standard evaluation practice" and only for the purpose of

illustration as to what could be. XVII ROA 49-50. He then admitted that his methodology was "not a valid method for appraisals." XVII ROA 59.

It is well established that this Court will not set aside the district court's factual determinations if supported by substantial evidence. Primm v. Lopes, 109 Nev. 502, 853 P.2d 103 (1993). Where, as here, a specific factual finding has no support in the record, it must be set aside. There was no competent evidence before the trial court on the basis of which a valuation of $50,000.00 could be based. Accordingly, that finding should be reversed and remanded for entry of a valuation "within the range of valuations offered at trial." Malmquist, supra, 106 Nev. at 252.

IV. THE DISTRICT COURT ERRED IN ITS CONSIDERATION OF THE TAX CONSEQUENCES RELATING TO THE ASSETS DISTRIBUTED

Under Ford v. Ford, 105 Nev. 672, 782 P.2d 1304 (1989), courts can consider potential tax liability when valuing marital assets "if a taxable event has occurred as a result of the divorce or equitable distribution of property, or is certain to occur with a time frame so that the trial court may reasonably predict the tax liability." Id., 105 Nev. at 681.

Here, the trial court awarded all of the cash, which was located in Aztec, to Tom, and awarded to Margaret a number of parcels of real estate, all of which had appreciated, and therefore had capital gains consequences attached when sold. VIII ROA 1439-1441.

The district court judge rationalized this disparate allocation of actual value (Margaret's assets are essentially worth only 69% of whatever value they are assigned, since there will be a 31% tax bite whenever any of them is ever liquidated) by finding that tax consequence would not be a direct result of the court's distribution, but only of Margaret's sale of any of the assets. XI ROA 1991.

The lower court's ruling can be seen as slipping through the cracks of the Ford decision. In that case, as here, "the tax liability already exists," 105 Nev. at 681, but the assets in this case do not actually have to be liquidated at any particular time, unless Margaret wishes to eat or pay her mortgage in the future.

A comparison is useful. In Ford, the Court was faced with a note with a specific maturity date. Here, taxes will not actually be triggered until sale, but the liability is established by the basis of the assets. The Vegas Drive property, for example, was assigned to Margaret, and given a value of $127,500.00. XX ROA 132. The property carries a book value (basis) of $23,000.00 XIX ROA 156. As soon as the property is liquidated, Margaret will realize a $104,500.00 gain, and suffer at least $32,395.00 in taxes.

The question is whether this inevitable liability[10] is "a taxable event [that] has occurred during marriage or will occur in connection with the division of the community property." 105 Nev. at 681.

Even if the answer to that question is "no," the property distribution should be recognized for the inequitable distribution that it is, and reversed as unjust. The trial court expressed her intent to equally divide the community property. VIII ROA 1438; XX ROA 130, 132. By placing in Tom's column the cash assets, and in Margaret's column appreciated assets subject to tax upon sale, the court effectively gave Tom a pile of 100¢ dollars, and Margaret a stack of 69¢ dollars (even if the valuations on those assets were correct). This was neither equal nor equitable. See McNabney v. McNabney, 105 Nev. 652, 782 P.2d 1291 (1989) (decrees prior to October, 1993, required only to be fair and equitable, not necessarily equal).

It is submitted that the rule for distribution of contingent tax liabilities should be the same as the rule for distribution of unvested or unmatured retirement plans; they should be recognized as community property, and divided in kind to the extent practicable, the parties sharing the respective risks, benefits, and burdens attendant on them. See Forrest v. Forrest, 99 Nev. 602, 668 P.2d 275 (1983) (even unvested benefits of uncertain value divisible upon divorce). Any other rule invites exactly the sort of inequity perpetrated here, where two distributions, identical on their faces, have vastly different actual values.

In what can only be described as breathtaking hypocrisy, Tom argued at trial, and again in the post-trial moving papers, that the cash value of Aztec had to be reduced for future income

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[10] Unlike the gain on a primary marital residence, for instance, which can be deferred and on which a one-time step-up can be taken, the land simply has a tax liability attached to it.

taxes that would be due if he took profit out of the company, but that the unavoidable capital gains tax on the realty awarded to Margaret should be ignored in valuing that property. VIII ROA 1543 (Aztec value should be reduced for taxes), 1551 (it is not certain that taxes will ever be due when land is sold). Obviously, "sauce for the goose is sauce for the gander," and whatever tax implication rules this Court chooses to impose should apply to the parties equally.

V. THE DISTRICT COURT ERRED IN ITS CHARACTERIZATION OF "LOT 54" AS TOM'S SEPARATE PROPERTY

A good deal of time at trial was spent discussing the Lot 54 property. See Trial Exhibit 13. The parties seem to agree that Margaret was approached by a friend who knew of a good deal on a piece of land. XVIII ROA 18. They also agree that the recorded deed has Margaret's signature on it, and appears to vest exclusive ownership in Tom. They apparently agree that the property cost $120,000.00, and that it was paid for by means of an initial payment of $60,000.00, out of Aztec, and a regular series of payments on the balance, which funds came from community property wages. XII ROA 95; XIII ROA 260-61. They agree that the court-appointed appraiser valued the property at $450,000.00 XIII ROA 312. From there, the parties diverge considerably.

Margaret claimed that she often signed blank documents for Tom, and that she never at any time consented that he could have the Lot 54 property as his sole and separate property. XVIII ROA 18-21.

Tom, by contrast, claimed that Margaret had massive gaming winnings (apparently implying the lack of offsetting losses), and that they made a deal whereby Tom got all right, title, and interest to the land, and Margaret got to keep all of her gambling winnings without Tom's interference. XII ROA 93; XIII ROA 227-28. Tom doesn't recall giving Margaret a blank deed to sign. XIII ROA 233; XVIII ROA 7. Tom denied being present when she signed it, or even knowing about the circumstances under which it was signed. XIII ROA 263-64.

Margaret claimed that she always gave her winnings to Tom; he denied receiving them. XVIII ROA 16, 75; Margaret testified that Tom told her what numbers to declare for losses;

Tom claimed that he wrote down on the tax returns whatever Margaret reported to him. XIII ROA 229-230; XVIII ROA 18.

Tom produced the notary who had notarized Margaret's signature on the quit-claim deed. Ms. Sonnevilli did not have a notary log and had no recollection of this transaction, but she did not believe that she ever went anywhere else to notarize the document, and her practice was to never notarize a deed that was blank or pre-signed. XIX ROA 55-61. She claimed to recognize the typing on the deed as her own. XIX ROA 61.

Judge Fine found the notary's testimony credible, and found that the parties had "a valid agreement" to swap any gambling winnings for the property. XX ROA 126. She upheld it on two grounds: that it was a mutual consent consideration agreement under NRS 123.080; and that it was a recording of separate property. XX ROA 126-27; VIII ROA 1445.

The characterization of property as separate or community is a straight question of law, not a matter of discretion, and the standard of review of determinations as to character is that of simple error. See, e.g., Malmquist v. Malmquist, 106 Nev. 231, 792 P.2d 372 (1990).

The trial court had before it Margaret's testimony that she never signed a quitclaim to the Lot 54 property. While Margaret does not believe the judge decided the issue correctly, the lower court probably had discretion on conflicting evidence to believe that Tom's story was true. That does not, however, end the analysis.

In Malmquist, this Court set out in great detail the effect of community property contributions to a separate property asset. If Margaret did quit claim all of her interest in the property on October 8, 1987, that still only constituted a quit claim to the half interest that had been purchased at that time.

The remainder of the property was acquired by use of expenditure over time of community property wages in installments. At the very least, the community was due reimbursement for its investment in Tom's "separate property" asset. 106 Nev. at 249.

The two rationales cited by the court below are inapposite. NRS 123.080 has to do only with separation agreements, and is widely cited as the statutory provision in this state

prohibiting post-nuptial agreements except upon separation. See Cord v. Neuhoff, 94 Nev. 21, 573 P.2d 1170 (1978).

There have apparently never been any cases under the recordation of separate property statute, NRS 123.150. As a matter of common sense, however, a recordation cannot be effective as to a property interest that the person recording the inventory does not own. See Desert Valley Water Co. v. State Engineer, 104 Nev. 718, 766 P.2d 886 (1988) ("When interpreting a statute, we resolve any doubt as to legislative intent in favor of what is reasonable, as against what is unreasonable . . . . The words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results"). At the time the quitclaim deed was signed (if Tom's story is to be believed), he had purchased only half the interest in the land.

If one really could record a deed concerning property one did not yet own, a great deal of mischief would result; such instances would have the effect sought by Tom here of the creation of a mechanism for siphoning off community property wages, perhaps for many years after a deed is signed, and accruing them in an asset to be claimed upon divorce.

Further, to the degree a valid deed conveying any community property interest was executed, it should be set aside as an abuse of the interspousal fiduciary duty under the circumstances presented in this case. At least as to matters arising before the divorce, the marital relationship itself imposes a duty of full as well as fair disclosure. Williams v. Waldman, 108 Nev. 466, 472, 836 P.2d 614 (1992).

In this case, Tom has for years been enjoying the tax savings that have come with any gambling losses, and has indirectly enjoyed the fruits of any gambling wins, although he has denied acknowledging it. XIII ROA 232; see Trial Exhibits 2, 3, 4, 5, and 6. His argument was somewhat schizophrenic, arguing both that Margaret should not be given any liquid assets because she gambles (implying losses), and that he should be able to keep the near half-million dollars worth of real estate because Margaret supposedly kept gambling winnings. XII ROA 97; VIII ROA 227.

The tax returns signed by the parties, however, indicate that neither of those two circumstances is completely accurate, and that losses and wins were probably fairly closely balanced. This being so, there was a complete lack of consideration for the agreement to deed Tom the very valuable property, and it should be set aside as a matter of over-reaching. Williams, supra.

VI. THE DISTRICT COURT ERRED BY FAILING TO DIVIDE OR OFFSET THE COMMUNITY PROPERTY TOY SOLDIER, MILITARY EQUIPMENT, AND LIBRARY COLLECTIONS, AND AWARDING IT TO TOM IN THE GUISE OF HOLDING IT "IN TRUST" FOR ONE OF THE MINOR CHILDREN

A great deal of the litigation in this case concerned the toy soldier, military artifact, and library collections Tom had. At trial, he estimated that he had been spending $500.00 to $1,000.00 per month on just the toy soldier collection for the past couple of years, with "perhaps lower" sums for several earlier years. XII ROA 116.

While that alone would total over $30,000.00, Tom 's claims as to the value of his collections varied wildly. His pre-trial memo claimed a total value of the three collections of $48,000.00 and suggested splitting them. VI ROA 1216. Tom's Affidavit of Financial Condition filed April 9, 1983, did not list the collections at all. VI ROA 1145. At trial, he thought the military equipment would be worth $10,000.00, the toy soldiers another $10,000.00, the lithographs about $5,000.00 and the library $10-20,000.00. XII ROA 118-125. One stack of exhibits at trial showed monthly expenditures on the toy soldiers of about $1,800.00 per month. XII ROA 117-18.

Margaret testified that there were about 4,000 toy soldiers, worth some $10.00 to $17.00 apiece. XVIII ROA 122.

Judge Fine, at Tom's suggestion, ordered that all such property be turned over to him "in trust" for the parties' child Alexander. XX ROA 131; VIII ROA 1438.

After trial, once the collections were to be turned over to Tom "in trust" and he was asserting that items were missing, he was willing to accept the valuation of $90,000.00. VIII ROA 1577.

Irrespective of the value, it was error for the trial court to direct the setting aside of a community property asset for a non-party. The items in question were not separate property being set aside for "support," as allowed under NRS 125.150(4). Rather, the effect of the trial court's order was to give to Tom $40,000.00 to $90,000.00 in admitted community property, without requiring him to account for it in any way. This Court has specifically prohibited such orders. See Pelletier v. Pelletier, 103 Nev. 408, 742 P.2d 1027 (1987) ("counterclaim" by Defendant's mother against divorce Plaintiff for coin collection improper since she was not a party to litigation).

No matter what motivation Judge Fine had in entering this order, it was improper to exempt a class of admitted community property assets from either division or offset, while turning it over to a party. This aspect of the Decree should be reversed, and remanded for purpose of establishing the value of the items in question with a cash payment to Margaret of one-half the value thereof.

VII. CONCLUSION

The trial court did not focus on those issues requiring evaluation in a determination of whether alimony should be awarded. The Order entered left Margaret essentially paying her own support, by depriving her of even half the property of the parties until it was slowly paid to her without interest, and using that stream of payments as the justification for an absence of support. That order was short-sighted, failed to adequately compensate Margaret for all she had given up in this marriage, and inequitably positioned the parties after divorce.

The decree should be reversed and remanded for entry of an award of alimony, permanently, or of at least nine years duration, in a sum sufficient to permit Margaret to live as closely as possible to her pre-divorce standard of living.

Eventually, the trial court judge correctly determined that she could not ignore the good will value of Aztec Construction. Instead, and without anything in the record for support, she labelled it "de minimis." She should have entered a value for Aztec's good will in accordance

with the only expert that provided a range of values, and the decree should be remanded for that purpose.

Making the same error in reverse, Judge Fine inflated the value of Alamo Insurance beyond the level that her own court-appointed appraiser, or any other expert, thought was reasonable, ascribing a $50,000.00 present value to an insolvent insurance brokerage that might, with lost of hard work and if the optimistic evaluators were correct, stop losing money within six months. The part of the Decree so stating should be reversed and remanded for entry of a valuation in keeping with the expert's evaluations.

The court unfairly and inequitably distributed assets so that massive tax consequences would flow as a matter of course from the distribution, and cutting about a third of the value off the face amount of the award.

The district court judge elected to believe that Tom and Margaret made a deal whereby she kept her gambling winnings, an he received a piece of property worth almost a half million dollars. Having made that decision, the court below erred in not setting the agreement aside as a violation of the marital fiduciary duty. If it did have to be upheld, the amount transferred should not have been more than the sum owned at the time, and future community property payments should have been recognized as belonging to both parties.

The district court impermissibly exempted some $40,000.00 to $90,000.00 in community property consisting of Tom's various collections and books, and gave them to Tom without requiring division or offset under the rubric of having Tom hold them in trust for his children. The district court was not permitted to do so.

The division of property should be remanded, to a different judge if deemed necessary, for the purpose of having assets assigned reasonable valuations and re-divided more equitably. Additionally, the case should be remanded with specific instructions to enter an appropriate alimony award for at least nine years.

Respectfully submitted,
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