IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

MARSHAL S. WILLICK, ESQ.
Attorney for Appellant
330 S. Third St., #960
Las Vegas, Nevada 89101
(702) 384-3440

KATHRYN E. STRYKER, ESQ.
Attorney for Respondent
JOLLEY, URGA, WIRTH, & WOODBURY
300 S. Fourth Street, #800
Las Vegas, Nevada 89101
(702) 385-5161

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STATEMENT OF THE ISSUES

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

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

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

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

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

VI. WHETHER 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

STATEMENT OF THE CASE

Respondent's Answering Brief does not have a proposed Statement of the Case, per se (although it does contain a series of sub-parts collectively labeled "Statement of the Issues" that mixes procedure, facts, law, and argument). Accordingly, Appellant requests that this Court refer to the Statement of the Case in her Opening Brief. NRAP 28(b).

STATEMENT OF FACTS

Appellant relies upon the Statement of Facts in her Opening Brief. Respondent's proffered alternative Statement of the Case is not helpful to examination of the case, for several reasons. Normally, such matters would be passed by, but this appeal has a twenty-volume record and is very fact-oriented, and mischaracterizations of the record have a heightened effect.

Respondent ("Tom") claims that his statement "has set forth in the previous section an accurate exposition of the facts as contained in the record." Respondent's Answering Brief (RAB) at 18. A spot check of references in the Answering Brief, however, reveals that they are at least inaccurate, that the text explaining what is allegedly found at the references is wrong, that in several areas where the page references *are* accurate, the matter referenced simply is not present, and that some materials referenced are not in the record at all. Worse, the "Statement of Facts" in the Answering Brief fails to identify those matters on which conflicting testimony was presented, instead offering one party's testimony as factual matter, and makes statements of "fact," citing only counsel's equally unsupported arguments below as the reference.

For example, by way of "background," Tom submitted that Margaret "continued her career in the insurance business following the marriage . . . with Tom's mother helping to care for the children." RAB at 4. Actually, the record stated that Margaret was working as a file clerk, changed jobs, and "Tom's mother was not willing or able to take care of them [the children] for me . . . ." XVII ROA 138.

Three pages later, Tom asserts that he "began to notice" Margaret's "pattern of conduct" (gambling) in 1986, which he alleged worsened by 1990 to the point where Margaret did not get up to go to work in the mornings. RAB at 7. Tom then attempts to use these later actions as the basis

for a deal allegedly made years earlier, in 1987, and contradicted his own assertion on the next page to assert that "in 1990-91, the parties established a daily routine wherein Tom . . . and Margaret would leave for the construction site, arriving there at approximately 7:00 a.m. . . . ." RAB at 8. While Tom's testimony below was contradictory, neither that fact, nor the contradictions between the parties' versions of facts, is reflected in the "Statement of Facts" Tom proffers.

Similarly, most of the rest of the "facts" set out at pages 8 and 9 are merely Tom's version of events, not even noting what the rest of the record showed. *Cf.* Appellant's Opening Brief (AOB) at 5-7. For example, Tom argues at great length about Margaret's alleged gambling winnings, without noting Margaret's testimony that she did not know how much was won or lost or what the tax returns showed, since Tom kept the records and had always prepared the returns, and she simply signed when he told her to do so. *Compare* RAB at 9-10 *with* XVII ROA at 147-150. Tom also ignores those very tax records, which **he** had prepared and given Margaret to sign, and which showed that gambling losses were about equal to gambling winnings. *See* Trial Exhibit 40.

Statements in Tom's versions of facts are not supported by the record he cites. At page 16, Tom alleges that Dr. Clauretie "admitted" that "the question of whether the goodwill in Aztec had a value is based upon professional judgment." This is an inaccurate recounting of a critical part of the record. Dr. Clauretie stated that there definitely ***was*** a goodwill value, but the process of determining the precise ***number*** for that goodwill, as $100,000.00 or up to $400,000.00 is "based on professional judgment." XVIII ROA 164.

Many factual assertions are not supported by the record at *all*, and no effort is made to provide even an incorrect citation to back them up. *See*, *e.g.*, RAB at 13. There, without reference, Tom asserts his "compliance" with the temporary support orders, and he creates new totals of sums

allegedly spent. The record, however, shows that he ignored the temporary support orders from March through October, 1992 (when arrears were seized and garnished). I ROA 9; IX ROA 1691; III ROA 533; II ROA 394; IX ROA 1714; XI ROA 1717; IV ROA 678; XI ROA 1976; IX ROA 1627. Tom ascribes motivations to the parties and their attorneys for actions taken (and not taken) below, without noting the absence of any foundation for that commentary in the record. *See*, *e.g.*, RAB 9 (Margaret's alleged motives), RAB 14-15 (Tom's and counsel's alleged motives).

Several places in Tom's "Statement of Facts" reference alleged deposition transcripts that are not in the record at all, were not designated by either side, and are not in the undersigned's file. *See*, *e.g.*, RAB at 9-10.

Some references are just mysteries. On page 10, Tom asserts that Margaret had her car towed 11 times, citing "XVII ROA 105." No such discussion is there, or in the surrounding pages. Tom purports to detail what the parties and their lawyers did *not* do, and even makes allegations about violations of rules, but the only citations provided are to counsel's equally unsupported allegations in the moving papers below. *See*, *e.g.*, RAB at 11-12, referencing VIII ROA 1495-97; RAB at 14, referencing VIII ROA 1499.

Other references are silly, and might be funny if they had not been used to dispossess a spouse of her share of community property. On page 16, Tom asserts that the Aztec Construction company valuation of $807,000.00 (which figure was arrived at **after** deduction of $40,000.00), should be reduced by **another** $40,000.00, and that the product of that subtraction would be $744,505.00, rather than $767,000.00.[1]

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[1] Frankly, even if the math was right, the reasoning would be hard to discern. There is no place in the record where the $807,000.00 is specifically reduced to any other figure. In fact, the record specifically states that the trial judge already reduced the sum to compensate for the Vegas Drive property and the disputed $40,000.00, in arriving at the $807,000.00. XX ROA 131. The only reasonable conclusion from

In sum, the "Statement of Facts" proffered by Respondent is inaccurate, incomplete, misleading, and improper, and should be disregarded by the Court. *See State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984) (quotation of legal and factual matters without citation, and reference to matters outside the record, may cause sanctions to be imposed by the Court). It is submitted that the Statement of Facts in the Opening Brief should be relied upon by this Court.

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review of the record is that Tom's counsel (who drafted the decree) simply reduced the Court's valuation of $807,000.00 to $744,505.00, thus effectively filching from Margaret $30,000.00 (half of the $60,000.00 difference). The conclusion at page 16 of the Answering Brief that some unspecified machination "resulted in a total Aztec valuation, as found by the Court, of $744,505.00" is only Tom's. No citations to the record to support the math, or the logic, is presented, and none is apparent.

ARGUMENT

Before turning to the merits of Tom's argument, a moment should be taken to address his "Summary of Argument." Unfortunately, it too is inaccurate and misleading, virtually from its opening line. There, in attempting to defend Judge Fine's obvious partisanship and lack of judicial objectivity, Tom attempts to portray the judge as having "spent untold hours in pretrial motions and proceedings . . . ." RAB at 17-18. He repeats this in his Conclusion. RAB at 43.

In fact, this case began in March, 1992, and was litigated for about a year in the Referee's Courts, and before Judge Bonaventure, until reassignment to the new Family Court, and Judge Fine, in February, 1993. Trial commenced 90 days later. The "untold hours" were spent in front of Referee Marren and Judge Bonaventure, who threatened **Tom** with contempt, put support into place after weighing the evidence, filings, and testimony of the parties, etc. *See* Volumes I through X of the Record. Judge Fine made her first appearance in Volume VI, where she reduced the support ordered by the prior judicial officers, and soon thereafter effectively "un-did" what the other judges had done.[2] VI ROA 1178.

Tom's "Summary" would have this Court think that the issues to be resolved in this appeal relate to conflicting valuation evidence, etc. This is not so. While there are concerns with Judge Fine's choices as to how to proceed and what to believe, the matters contested in this appeal are *legal* in nature. Rather than confuse the issues by addressing the summary separately point by point, it will be addressed only where seemingly necessary in discussing the arguments set out in the main body of the Answering Brief.

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[2] Chronologically, Judge Fine first appears in Volume XI, where she recused to avoid the appearance of impropriety, and then "un-recused." XI ROA 1983. Later, she denied disqualification based on her relationship with counsel and for having consulted with Tom while in private practice. IX ROA 1638, X ROA 1900-1901; XI ROA 1987.

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

The Opening Brief was submitted in February, 1995. Unfortunately, Tom's attempts to prevent this appeal from ever being heard on its merits delayed this case for about a year and a half. During the delay, this Court issued several decisions regarding alimony and other matters which, although ignored by Tom, are relevant to the decision of this appeal. They are discussed below.

Tom begins his argument as to alimony reciting old cases stating that this Court will defer to the trial court because of the latter's direct observation of people whom this Court can only reference in the "cold printed record." RAB at 21. As noted below (see footnote 10), if after review of the record this Court really has any doubt about the pervasive bias demonstrated by Judge Fine throughout the proceedings below, this Court may readily view the videotapes and decide whether the legally indefensible denial of alimony was based on some (unstated) test of "credibility" or "demeanor." The technical limitations of 25 years ago are simply no longer hindrances to whatever degree of review this Court believes is necessary.

Of course, it is submitted that the very face of the record supports reversal on the holdings of the cases cited by Tom, since this record ***does*** show "a plainly appearing abuse of discretion" in addition to clear legal error. *See Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992); RAB 21. Actually, this Court probably stated its standard of review most clearly in *Gardner v. Gardner*, 110 Nev.1053, 1055-56, 881 P.2d 645 (1994): "this court extends deference to the discretionary determination of the district court and withholds its appellate power to modify or reverse except in instances where an abuse of the trial court's discretion is evident from a review of the entire record." This is certainly such a case.

Tom purports to step through the seven factors enumerated in *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994), and explored at length in the Opening Brief. AOB at 23-25. Instead of attempting to support Judge Fine's conclusions, however, Tom merely recites them as if their utterance was self-proving. At page 22, for example, addressing "the wife's career prior to marriage," Tom recounts Judge Fine's vague findings that Margaret is "capable . . . has been in business," and "is capable of maintaining Alamo Insurance Company as a going concern," and states (with no references to the record whatever) that these "findings" are "amply supported by the evidence."

Tom ignores the record, as he must to make that assertion, since the trial court's -- and even his own -- experts testified that Alamo was an almost-certainly unsalvageable wreck, the doors to which were only still open because of constant borrowing of funds, and that Margaret had not even worked in the business in over five years. *See*, *e.g.*, XIV ROA 465, 475; XVI ROA 126; XIV ROA 444; XVI ROA 130; XVII ROA 22-24. The exhibits showed that Alamo had only showed a profit for two of the nine years between 1982 and 1991. *See* Trial Exhibit 40. By 1990, Alamo's losses were more than $18,000.00 and its debt increased almost $28,000.00. *Id*.

There is no question that at the time of trial, Margaret was unemployed, and that the ***only*** expert testimony in the record as to her ability to make a living indicated that she "might" be able to work to support herself in three to six months, ***if*** no pressure was put on her and ***if*** therapy continued. XVI ROA 149, 155-56.

One outright false statement in Tom's discussion of the first *Sprenger* factor (The Wife's Career Prior to Marriage) should be separately addressed. Tom recites (with no supporting references) that Margaret "leaves this marriage with marketable skills unlike any other wife in every

reported alimony case in the past seven years." RAB at 22. The statement is bizarre, as a summary review of those cases shows.

In *Rutar v. Rutar*, 108 Nev. 203, 827 P.2d 829 (1992), the wife was a trained dental technician with 11 years experience, although (like Margaret) she was unemployed at the time of trial and studying to change fields. In *Gardner v. Gardner*, *supra*, the wife was a career teacher making about $43,000.00 per year -- a sum much higher than Margaret's earnings have ever been. *See* AOB at 4; XIV ROA 450-55. In *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994), the wife was a licensed practical nurse.

The two most recent alimony cases were entirely ignored by Tom. In *Alba v. Alba*, 111 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 34, Mar. 30, 1995), the wife was a blackjack dealer. This Court approved the award to her of three year's alimony at $1,000.00 per month, since her husband (like Tom in this case) was a contractor with a "much higher" earning potential, and because the wife wanted to study graphic arts. The opinion in *Kerley v. Kerley*, 111 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 40, Apr. 27, 1995), does not reveal the wife's premarital career, but does note that she was unemployed during most of an 11-year marriage, and affirmed an award of $250.00 per month for two years based on the parties' "current capabilities."

In other words, Tom is wrong. Essentially ***all*** the women for which this Court secured alimony during the past seven years had current earnings, education, and earning capacity, *much* superior to that of Margaret.

Tom did no better addressing the other *Sprenger* factors. Under "Length of Marriage" (at RAB 22-23), he proudly asserts that at 17½ years of marriage, the parties here were married the same length of time as the parties in *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990), and that the

marriages in *Gardner* and *Sprenger* were longer. He ignores *Rutar* (18 years), *Alba* (7 years), and *Kerley* (11 years). He ignores in this discussion Margaret's five years of zero income (of which he complains, elsewhere), and terms her "award" of the bankrupt, non-producing, collapsing Alamo agency "a goal many only dream of." RAB at 23.

Under "Husband's Education During Marriage" at RAB 23, Tom refuses to address at all his advancement during the marriage from college student to company president making $100,000.00 salary plus $50,000.00 to $100,000.00 or so in "perks" per year. Instead, Tom used that heading to state that *Margaret* must have a great business sense to have run the insolvent Alamo agency, since Tom's "expert" stated that it could, **hypothetically**, have been worth money if it had been properly managed instead of run as badly as it had been run. RAB at 23. The logical lapse in that "reasoning" is self-apparent, and to completely ignore the development during the marriage of "the business acumen which has provided him with a thriving business and substantial assets" is an insult to the intelligence of all involved.

Tom lumps together the fourth and fifth *Sprenger* factors (The Wife's Marketability, and The Wife's Ability to Support Herself) on pages 23-24 of the Answering Brief. Unfortunately, Tom mis-states the few facts he does rely upon. He starts off with the assertion that "in 1983, Margaret received compensation of $67,000."[3] RAB at 23. He notes elsewhere, however, that there was a partner receiving (presumably half) of the "officer compensation" until 1984 or 1985.[4] *See* RAB at 4 & 23. Tom's own Trial Exhibit 40 included the fiscal 1983 Alamo tax return, which showed Margaret and Mr. Mudgway (the partner) each receiving $33,647.74 in total compensation. *See* 1983

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[3] This "fact" is mis-cited to Volume XVI; the actual reference is to Volume XVII.

[4] This particular mis-statement is also set out at RAB 4.

Alamo Form 1120, page 2, Schedule E. The most charitable statement that could be made is that Tom's "expert" mis-spoke (by failing to clarify that there was a partner), and counsel "overlooked" the matter in reciting the facts in the Answering Brief.

This point deserves closer scrutiny, since it illustrates much of what went wrong with this case, both as to Tom's duplicity and Judge Fine's handling.[5] A review of just this one collective Exhibit 40 shows that Margaret's earnings -- whether deemed "corporate profits" or "wages" drifted over the years from virtually nothing to a maximum -- in 1988 -- of $7,000.00 in wages plus about $36,000.00 in "paper profit." Over the years since then, they dwindled. As noted above, the company was almost never profitable, accumulated massive debt, and was on the brink of insolvency at the time of trial.

It is not believed possible, given the state of the record, to state what the precise facts regarding Margaret's income *were*. It *is* possible, however, to say what they were not, and to observe that the arguments of Tom's counsel, below and in this Court, are unsupportable on the record.

The record references Tom makes at page 24 of the Answering Brief are not to the testimony recounted. The undersigned has attempted to find the referenced testimony in the record, with limited success. Tom does not refute or even discuss any of the testimony referenced at page 24 of the Opening Brief. Instead, he recites only the one **anomalous** number provided during the trial -- Mr. Wilcox's projection of what Margaret "could" be earning based on his "survey" of two (and **only** two) companies that "happen to be clients of mine." XVI ROA 127. Of course, Mr. Wilcox was the same "expert" who testified that the bankrupt Alamo agency "should" be worth nearly

[5] There is enough blame to go around. Trial counsel for Margaret must bear some responsibility for the poor state of evidence prepared and presented at trial. Still, counsel did have to contend with not just Tom's greatly superior economic ability to prepare (he claimed to have spent over $140,000.00 in attorney's fees), and with a judge who effectively functioned as an advocate for Tom.

$300,000.00, over the objection of counsel (and the witness's subsequent admission) that such testimony was complete speculation. XVI ROA 105, 111, 114, 116.

Counsel has been unable to locate the "reasonable effort" testimony alleged to exist on RAB 24, at the cited pages or elsewhere, or verify that the trial court "accepted Mr. Wilcox's testimony." The one correct reference at RAB 24 was to Margaret's testimony about her intent to try to return to run the Alamo agency, although the Answering Brief takes undue liberty in placing Margaret's testimony in the present tense. *See* XVII ROA 226-28.

As with the other portions of the *Sprenger* analysis, Tom uses the headings, but ducks the analysis in favor of arguing fault. In this section, Tom spends half a page pretending that his attorney's unsupported hypothetical question to a psychologist was evidence, and concludes from his recitation that *Margaret* was dishonest. RAB at 24, n.11. While this form of hocus-pocus was effective in swaying Judge Fine, it is respectfully submitted that this Court may not be so easily misled.[6]

As to the testimony of Margaret's psychologist referenced at RAB 24 (XVI ROA 158), Tom has knowingly recited a part of a paragraph out of context to reverse its meaning (to imply that Margaret could productively return to work). The very next sentence after the referenced quote was:

> "Q So you would not expect her to be able to make money at it, correct?"
>
> "A Yes; and in fact, it may decrease the likelihood that she could become independent and gainfully employed."

XVI ROA 158.

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[6] As discussed in greater detail below, Tom ignores the several tax returns that he prepared -- and signed -- that showed a few thousand dollars per year in gambling winnings over gambling losses. See Trial Exhibit 40.

Tom ignores his own testimony (and that of his witnesses) that the most Margaret could hope to earn, "if she wanted," was **one-fourth** of Tom's direct salary (**one-seventh** of his total draws, reimbursements, and salaries) -- and could earn that only if she did the work of three existing employees. *See* AOB at 24-25; XIII ROA 266-69, 271, 363-64; XVI ROA 37; XIV ROA 434-36.

In other words, the record shows that the fourth and fifth *Sprenger* factors both militate heavily toward a very substantial alimony award.

Regarding the sixth *Sprenger* factor, (Whether the Wife Stayed Home With the Children), Tom has not been forthright with this Court, again choosing to ignore the heading to re-re-re-cite his own testimony that Margaret gambled too much. He claims that Margaret's subordination of her own interests and goals "is completely unsupported by the record" and that "it is undisputed that Margaret did not choose to stay at home and raise children." RAB at 25. Both assertions are incorrect.

Tom apparently forgets Margaret's testimony and his admission that for years she ferried him around because he had lost his driver's license after his third DUI. XVIII ROA 29-30; RAB at 8.

As to Margaret's career losses to care for the parties' children, Tom presumes too much. This Court in *Sprenger* was interested in finding out if one of the parties' careers was affected by child-rearing responsibilities; the opinion does not say that the factor is inapplicable unless the mother is "barefoot and pregnant." In fact, Margaret has always been the primary custodian of the children, as Tom conceded when he filed for divorce. I ROA 1, 6. When the divorce turned nasty, Tom briefly tried to take custody, but the effort was rebuffed and the children stayed with Margaret. *See* I ROA 226, 147; XI ROA 1967; V ROA 917.

On cross-examination, Tom's attorney inquired about the children, and Margaret briefly recounted (without contradiction or rebuttal) that she pursued business matters to the degree that her care of the children allowed:

> Tom and I discussed the fact that maybe if I went on business of my own, I could take care of the children as well, be close to home. And you know, we still had a babysitter that did the housekeeping at the same time, but I was able to bring them home and, you know, or take them to work with me when I feel like it.

XVII ROA 138.

In short, although Tom ignores the factor, the care of the children was always Margaret's responsibility, and of necessity this impacted her ultimate career status and opportunities and should have been considered by Judge Fine. Instead, the Judge rather cavalierly pronounced that Margaret "is obviously competent to care for her needs and those of her children," and actually used that reasoning to rationalize ***denying*** alimony to Margaret. XX ROA 128. This is part of the evidence of the judge's unjustifiable bias against Margaret.

Tom's approach to the seventh *Sprenger* factor likewise flies in the face of both logic and precedent. He repeats the trial judge's rationalization -- that by giving Margaret "half" of the community property, in appreciated property she would have to liquidate and be taxed upon, plus payments over a period of years without interest, any need for alimony was eliminated. RAB at 25. The judge even concluded, and Tom proudly repeats, that all payments from the community during the case that maintained the community assets that were later divided, or supported the children's food, clothing, shelter, tuition, or other expenses, somehow "counted" as "support" that Margaret had "enjoyed," and somehow justified awarding no alimony. XX ROA 129; XIV ROA 434-36; RAB at 25.

Even if there was nothing else wrong with Judge Fine's reasoning, this ruling would require reversal. In *Sprenger*, *supra*, this Court reversed an inadequate support award, even though the wife was awarded property valued at most of a million dollars. *See* 110 Nev. at 859. This Court held: "While at first blush, the awarded interest in this partnership appears substantial, the record raises serious doubts regarding the extent to which [the wife] will actually benefit from the award." *Id*.

For all the reasons set out in the Opening Brief at pages 23-29 and 34-40, and discussed below, the award to Margaret was similarly illusory, and is similarly not a valid reason for Judge Fine to have denied alimony. If there is any doubt about the real-world impact of Judge Fine's order on the parties and the children, it will be readily observed by the reviewing court upon remand.[7]

Similarly, just Judge Fine's conclusion that total expenditures "for" Margaret and the two children were "unreasonable and outrageous," while completely **ignoring** the expenditure of ***twice*** as much money over the same period **just for Tom**, is both unjustifiable and clear evidence of bias and a double standard. XIV ROA 434-36 (testimony of Mr. Kern, the court's expert).

In *Gardner*, *supra*, this Court repeatedly emphasized that the key to the law of alimony in Nevada is that the award must be "fair." *See* 110 Nev. at 1057. There is no conceivable way in which denial of alimony on the facts of this case could be considered "fair." Both parties came from nothing at the time of marriage. The husband here was left with virtually all the cash, and all the ability to earn money in the future. The wife's award was largely composed of highly appreciated real estate (as discussed in the following sections) and the cash was to be doled out over a period of years. Since Margaret had no income, and no substantial cash assets, it was a **certainty** at the time

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[7] As noted above, Tom's attorneys have delayed the resolution of this appeal for over a year and a half beyond the time normally required. Normally, matters outside and later than the record are inadmissible, but if this Court has any inquiry about whose predictions as to what would happen after divorce were correct, the undersigned would be happy to respond.

of trial that the assets would have to be liquidated, the tax losses suffered, and that at the end of some five or six years, the wife would be broke and the husband would still be earning hundreds of thousands of dollars per year.

One new legal work that may assist this Court is the product of the American Law Institute, which has attempted to "enunciate the principles of the Law of Family Dissolution." *See* "ALI Approves 'Compensatory Payments' Part of Ongoing Family Law Principles Project," 22 Fam. L. Rptr. 1339 (BNA, May 28, 1996).

The ALI project has concluded that payments from one spouse to another should be in accordance with enumerated losses that arise at the time dissolution of a marriage. They are: (a) in a marriage of significant duration, the loss in living standard experienced at dissolution by the spouse who has less wealth or earning capacity; (b) an earning capacity loss arising from "one spouse's disproportionate share, during marriage, of the care of the marital children or of the children of either spouse"; (c) an earning capacity loss incurred arising from the care of a third party; (d) the loss incurred when the marriage is dissolved before realizing a fair return from a spouse's investment in the other's earning capacity; and (e) an unfairly disproportionate disparity in the ability to recover the premarital living standard after a short marriage. *Id*.

Since this marriage was "of significant duration," subsection (e) would not apply (if it did, it would militate toward a significant award to Margaret). Of the others developed by the ALI, *all* applicable factors indicate that a substantial award of alimony should have been made in this case (subsection (c) does not appear to be relevant in either direction).

Regardless of whether this Court's *Sprenger* factors or the ALI's loss factors are the measuring benchmark, it is not possible "from a view of the entire record" to affirm a denial of

alimony to Margaret, who has lost much, who needs much, and to whom Judge Fine would award nothing.

It is submitted that there is no unbiased, rational analysis under which alimony of a significant amount and duration should ***not*** have been awarded to Margaret on the facts of this case, which is why this Court is asked to reverse and remand to a different judge. Judge Fine's bias against and hostility toward Margaret, and the court's lack of objectivity in even allowing presentation of evidence, nevertheless weighing it, is so pervasive and obvious upon a reading of the entire record that it is difficult to describe -- what one scholar has called a "Dragon in the Garden."[8]

The undersigned is concerned that this Court may treat the above statement regarding the partiality of Judge Fine as the "sour grapes" of a litigant. That conclusion, however, and the request for a reversal of the no-alimony order based in part **on** that conclusion, were formed upon appellate counsel's review of the entire 20-volume record. Further, the unfortunate predisposition of Judge Fine to render unjustified decisions based on improper grounds has been noted by the domestic relations bar with remarkable near-unanimity.[9] *See* A.D. Hopkins, *Lawyers Satisfied With Most Family Court Judges*, Las Vegas Review-Journal, May 6, 1996, at 1A, 6A.

It should be noted at this juncture that Tom's "summary of argument" listed six alleged "contested factual disputes" that Tom argued supported all of Judge Fine's rulings, including the

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[8] See William M. Hilton, Esq., CFLS, Jurisdiction Before You Have Jurisdiction, Lecture at Fourth Annual Family Law at Tonopah (State Bar of Nevada, Mar. 18, 1993).

[9] Sixty-nine percent of responding attorneys gave Judge Fine the lowest rating for "freedom from impropriety and its appearance." She was rated as less than adequate on 11 of 17 measures of judicial conduct, and was widely described as "erratic." In the accompanying interview, Judge Fine claimed that she is "rarely reversed" by this Court, and concluded that "the Supreme Court thinks she does properly apply law, procedure, and evidence." That has not been the experience of the undersigned in appeals from that department to date.

denial of alimony. RAB at 18-20. The problem with his argument is that **none** of the "issues" listed is a "contested factual matter" supporting the rulings appealed from in this case. While they are addressed above and below where relevant, they will be briefly recounted here.

Tom, without citation to the record, claims that it was "acknowledged" that he did not make over $200,000.00. RAB at 18. He does so by myopically focusing on testimony regarding his conversion from one corporate form to another, while ignoring his own testimony (and that of his witnesses) that he took direct salary and "reimbursement" totaling at *least* $143,000.00 and "perhaps" more than $200,000.00 per year, depending upon when certain expenses were paid on his behalf. *See* AOB at 26-27 & n.6; XIII ROA 363-64; XVI ROA 37; XIV ROA 434-36; XV ROA 20.

Tom complains about one Referee's discussion of his excessive spending on toy soldiers, books, etc. RAB at 19. He does so without acknowledging that his own attorney distorted the language in writing the order, without acknowledging that all judicial officers made findings consistent with Tom's own admitted spending, and without acknowledging that in fact Tom admitted to spending as much per month on that collection as he was ordered to pay in child support. AOB at 13, 18, 40; V ROA 941; XI ROA 1981; XII ROA 116. Besides, the Referee mentioned only that an allegation had been made, not that he was making such a finding. IV ROA 679; XI ROA 1976.

Tom argues that, somehow, his secret conversion of his interest in Crestmont (sold to Tom's father in anticipation of divorce), was a "contested factual issue" because Margaret did not know how much the asset was actually **worth**. RAB at 19. There was no issue contested about the value -- the point was the secret liquidation of a community property asset between Tom and his father without fair appraisal or disclosure of the transaction. AOB at 9; II ROA 238-248.

Tom admits his multiple DUIs, loss of his driver's license, Margaret's daily ferrying him around, his passing out drunk, etc. RAB at 19. Tom's point is unclear, but it appears to be that because he made a lot of money, there was some "contested issue" as to whether Margaret sacrificed her own career opportunities while acting as his driver. *Id*. Tom ignores the abundant proof, from history through the most modern research, showing that miserable alcoholics requiring a great deal of family support can be very successful, in business and otherwise. *See*, *e.g.*, D. McClelland, *et al*., The Drinking Man (The Free Press, 1972); M. Giarrusso, *Hangovers Don't Impede Manager's Work Performance*, AP, May 30, 1996, *available in* gxg14@psu.edu ("while some of the participants reported feeling terrible . . . there was no measurable difference in work performance . . . .") He also ignores his own admission that when he separated from Margaret, it took a full-time employee plus a girlfriend to replace her. XII ROA 39, 130-31; XVIII ROA 44.

Tom's final "contested factual dispute" which he argues support Judge Fine's order against Margaret was whether the Judge should have been disqualified. RAB at 19. It goes without saying that, under law, the preliminary question of disqualification of the judge is irrelevant to alimony, property division, or any other issue. Tom may be correct, however -- it is possible from review of the record in this case to conclude that Judge Fine treated the disqualification request as "evidence" which weighed against Margaret on the legal merits of the case. The fact that Tom recites the disqualification issue as an "issue" supporting the rulings on alimony and property division speaks volumes about the alignment and attitude at trial.

Tom's Answering Brief expresses in several places that mention of Judge Fine's obvious lack of objectivity and application of a gross double standard of behavior is "perplexing." *See*, *e.g.*, RAB at 20. There is no mystery. Judge Fine's words, actions, and rulings are so manifestly biased

that they were specified and discussed in the Opening Brief to explain her otherwise inexplicable orders denying alimony and giving Tom most of the value of the parties' property, and to substantiate the request for remand to a different department when this Court issues its Opinion.[10]

It is worth noting that Tom's rather half-hearted defense of Judge Fine's "objectivity" is devoid of references to what she actually said and did, and contains only vague allusions to the trial judge's opportunity to "judge of their credibility," which is not relevant to the rulings at issue. *See* RAB at 20-21.

One matter raised by Tom to defend Judge Fine deserves separate comment. He asserts that it was appropriate for Judge Fine to allow Tom to castigate Margaret at great length to prove her "fault," while cutting Margaret off and ruling "irrelevant" Margaret's attempts to show diversion of community property to support of Tom's paramour, his waste of money and opportunity by continual drunkenness, etc. RAB at 20. Tom alleges that the "crucial distinction" is that Tom was arguing the "very relevant issue" of "waste."

First, Margaret's claims had much **more** to do with "waste" of community property than did Tom's. Second, and more to the point, the issue of "waste" was not briefed or even discussed in a legally significant way by either side. *See*, *e.g.*, *Kothari v. Kothari*, 605 A.2d 750 (N.J. Super. Ct. 1992) (explaining factors of proximity of expense to time of separation, and intent); *In re Marriage of O'Neill*, 563 N.E.2d 494 (Ill. 1990) (defining waste as an expenditure of funds for the sole use of one spouse for a purpose unrelated to the marriage during the time of the marital breakdown). If

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[10] Tom, predictably, repeats the tired rhetoric about giving trial judges the "benefit of the doubt" due to the allegedly superior ability below to judge credibility and demeanor. If, after review of these briefs and the record, this Court has any doubt whatsoever of the pervasive bias and obvious hostility of Judge Fine to Margaret, the Court is urged to view the videotapes of the trial, which will put this Court in at least an equal position to judge "credibility," as well as "objectivity" and "abuse of discretion."

"waste" **had** been in issue, it is Tom's secret liquidation of assets and diversion of community property to support his mistress that would have been the primary focus of inquiry.

Rather, Tom's extended litany of personal complaints against Margaret was for the purpose of alleging "fault" and (unfortunately, successfully) arguing to Judge Fine that alimony should be denied to Margaret -- and Tom should get most of the value of the property -- because she was "bad." VIII ROA 1435-36; XII ROA 76-77. The Judge went so far as to order Margaret, who had no significant income, to pay $20,000.00 in attorney's fees to Tom, who had *reduced* his salary to $100,000.00 per year during the litigation. XI ROA 1949-1950.[11]

In passing, it should be noted that one of Judge Fine's rationalizations for denying alimony -- that Margaret had received temporary spousal support during the pendency of the case -- has been expressly disallowed by this Court as a basis for such an order. *See Dimick v. Dimick*, 112 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 56, Apr. 30, 1996) (the husband's temporary spousal support obligation "is separate entirely" from the obligation to pay post-divorce alimony intended to provide spousal support to the wife in the event of dissolution of marriage).

In summary, the denial of alimony in this case was utterly unjustifiable, and requires reversal.

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

Tom correctly recites this Court's holdings that good will is to be valued by a measure taking into account past earnings. RAB at 26. He then attempts the remarkable linguistic feat of describing

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[11] Unfortunately, the record in this case does not adequately show the time records of the attorneys, but even a casual review of the record shows that for about a year, Margaret was chasing Tom for payment of support that was due under final orders but that he refused to pay. See XI ROA 1980-81.

Judge Fine's ignoring of that principle to be an application thereof. *Id*. At 27-29. The testimony he quotes was from those who indicated that they were ascribing **liquidation** value, not "ongoing business" value, to the business (i.e., valuing its assets only, not the business itself).

Typically, Tom quotes a bit too selectively from the record, ignoring in his discussion of Dr. Clauretie's testimony that the only question was the ***amount*** of goodwill -- a number between $100,000.00 and $400,000.00. XVIII ROA 164; *cf*. RAB at 28. He ignores his own expert's admission that ***all*** ongoing businesses have goodwill, which is why his expert ascribed a goodwill value to the bankrupt, defunct Alamo insurance company "awarded" to Margaret. XVII ROA 66.

Also typically, Tom quotes from Judge Fine's declared reduction in her valuation for alleged **loss** of ability to obtain financing, etc., without even trying to explain how she could do so when the value from which the judge was reducing the value had ***already*** been reduced for exactly the same factor. RAB at 28-29; *cf*. XIV ROA 393-96, 416, 437.

Tom ignores the fact that the judge invented her own reductions in value, so as to ascribe a present value to Aztec of $807,000.00; he does not even try to defend Judge Fine's unsupportable, unilateral reduction in value by $40,000.00 that she ascribed to two months' "expenses" based on one witness' vague comment that the business had about that much "less cash" than at the time of the appraisal used at trial, and ignoring that Tom got the benefit of those "expenses." *See* AOB at 31.[12] XIV ROA 426; XX ROA 131.

Tellingly, Tom ignores all of the citations and references recited on pages 29-33 of the Opening Brief. He does not attempt to explain any legitimate way by which Judge Fine could have rationally ignored any goodwill value for Aztec (a construction business making hundreds of

[12] Naturally, he does not even mention that his attorneys, in drafting the order, reduced this figure all by themselves from $807,000.00 to $744,505.00. VIII ROA 1439; XX ROA 131.

thousands of dollars and in full operation), while ascribing a "goodwill" value to the defunct Alamo insurance company. He does not even try to explain why Aztec -- which was not being sold -- could have its value further discounted by six to eight percent for a purely hypothetical liquidation sale that was not even being contemplated. *See* XIV ROA 428. That discount was obviously improper under the very cases on which Tom relies. *See Ford v. Ford*, 105 Nev. 672, 782 P.2d 1304 (1989) (courts may reduce the value of assets if there is evidence of an immediate and specific loss or cost).

Recently, this Court has reaffirmed its prior holdings (to which Tom pays lip service, then ignores), that a trial court's valuation of assets must be within the range of possible valuations presented by the testimony. *See Alba v. Alba*, 111 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 34, Mar. 30, 1995) (valuation is not an abuse of discretion "so long as the value placed on the property falls within a range of possible values demonstrated by competent evidence"); RAB at 26.

Judge Fine conceded in reaching her decision that Aztec did have a reputation that should generate future business. XX ROA 127. The goodwill valuations of $100,000.00 to $400,000.00 were not "refuted by the testimony of two other experts" as Tom asserts at RAB 29 -- those witnesses merely failed to calculate any goodwill value **at all**. This Court has said that the goodwill value of an ongoing business ***is*** to be considered when deciding its value, and is to be measured according to past earnings. Judge Fine has disagreed, at least in valuing the ***husband's*** business, and she challenged trial counsel to appeal the question. XIX ROA 64.

Judge Fine's decision to ignore the goodwill value of Aztec is indefensible, and Tom's rationalizations for that decision are circular. The order should be reversed, and the question remanded for setting of a goodwill value.

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

It is worth noting that, in contrast to his summary defense of Judge Fine's under-valuation of Aztec Construction, Tom spends a full four and a half pages trying to defend the $50,000.00 valuation Judge Fine ascribed to Alamo insurance, taking the opportunity to once again malign Margaret, as if her (alleged) deficiencies had some legitimate bearing on valuation. RAB at 29-33.

Almost laughably, Tom labels the "award" of the defunct agency to Margaret as a "windfall," and treats the debate about whether his "expert" could assign a hypothetical value of what the agency "should have been" worth as a "hot contest" of its value. RAB at 30.

Undersigned counsel does concur in the multiple out of state citations listed by Tom for the proposition that a valuation of property in a divorce should be upheld if it is "reasonable." *See* RAB at 30. There is just no "reasonable" way a $50,000.00 value could be ascribed to what the trial court's expert termed "an insolvent business. . . . on a downhill slide." XIV ROA 465, 470.

For all the reasons set out at pages 33-34 of the Opening Brief, there is simply no rational way in which ***any*** objective trier of fact ***could*** have reached the valuation given. A "should have been" speculation is ***NOT*** a valuation.[13] Judge Fine's ascribed value was outside the range of ***any*** possible value per the testimony of ***all*** experts who appeared, and it must be reversed as a matter of law. *See Alba v. Alba*, *supra*.

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[13] The undersigned -- again -- protests Tom's mis-citations of the record. This particular instance is Tom's reciting Mr. Wilcox's "could have been" speculation as if it was an actual valuation of Alamo as it actually existed. RAB at 32-33. Such repeated and deliberate disingenuousness crosses the line from advocacy to deliberately attempting fraud on this Court, and should be sanctioned accordingly. See Sierra Glass & Mirror v. Viking Industries, 107 Nev. 119, 808 P.2d 512 (1991).

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

Predictably, Tom defends Judge Fine's distribution of highly-appreciated real property to Margaret, while awarding all cash assets to Tom, on the basis that Margaret's liquidation of the real properties to provide food, shelter, and other necessary living expenses for herself and the children can not be proven on this record to be "certain to occur within a time frame." RAB at 34-37. Also predictably, Tom has ignored salient holdings of this Court that have issued during the year and a half Tom has stalled disposition of this appeal, in favor of recounting irrelevant holdings in other states concerned with their own fine points of valuation.

Tom refuses to even discuss why (as decreed by Judge Fine) ***he*** is allowed to claim a reduction in the value of assets for "possible future taxes," while ***Margaret's*** taxes upon certain liquidation of assets cannot be considered. Apparently, Tom confesses error as to at least ***one*** of these two conflicting rulings by Judge Fine. *See* AOB at 36-37; VIII ROA 1543, 1551; *Orme v. District Court*, 105 Nev. 712, 782 P.2d 1325 (1989); *Brion v. Union Plaza Corp.*, 104 Nev. 553, 763 P.2d 64 (1988).

What Tom does discuss misses the point. The gist of Margaret's argument is not tax consequences *per se*, but the inherent inequity of dividing assets by kind in such a way that the true value of the assets distributed is greatly different than it appears on its face. *See* AOB at 34-35. Luckily, this Court has recently spoken on an analogous issue, and there is thus hope that this inequity can be corrected.

In *Sertic v. Sertic*, 111 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 131, August 24, 1995), this Court reviewed a lower court's distribution of one spouse's pension at time of trial. The Court held that as a matter of equity, the asset (which had an uncertain present value due to factors beyond the

control of the parties) could not be offset, rather than divided in kind, unless its present value could be determined with reasonable certainty, sufficient funds existed to distribute the interest, and both parties agreed that the distribution would be final regardless of what might occur in the future.

The *Sertic* decision is the clearest statement to date by this Court approving the basic holdings of *In re Marriage of Luciano*, 164 Cal. Rptr. 93 (Ct. App. 1980), and *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981). Both cases require the distribution of pensions upon eligibility, which was the issue involved in *Sertic*. More fundamentally, however, the ***purpose*** of the holdings in all three cases was doing equity between spouses in the division of marital assets, so that neither party is empowered to the detriment of the other, or unjustly enriched at the expense of the other.

It is that fundamental purpose that requires appellate intervention in this case on the issue of property distribution. Opposing counsel correctly states that the record (which ends after trial) does not prove that Margaret **actually** liquidated the appreciated property thereafter to provide for herself and the children. *See* RAB at 35. Upon remand, however, the disastrous financial consequences made certain by Judge Fine's ruling will be abundantly clear to the reviewing court, and it is the logical inevitability of those consequences that militate toward reversal on this issue.

The fact that Margaret could temporarily stave off the liquidation because she was to receive the rest of her "half" of the marital property in slow payments over time (the rationalization for Judge Fine's denial of alimony) means nothing. The practical effect of Judge Fine's decision was that Tom could continue making hundreds of thousands of dollars per year, accruing more new property, but Margaret (who had no income at the time of trial) was ***required*** to consume her "half" of the property for living expenses as she received it, and when the "equalizing payments" stopped was

required to liquidate the appreciated properties, with the full tax hit, to maintain any kind of standard of living for herself and the children.

Just the denial of interest to Margaret, while Tom gets to use her money for multiple years, appears to be error requiring reversal. *See Schoepe v. Pacific Silver Corp.*, 111 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 55, Apr. 27, 1995) (under NRS 99.040(1), calculation and recovery of interest is required as a matter of right, and is not discretionary, and requires determination of the rate of interest, the time it commences to run, and the amount to which interest applies).

The inequity regarding the denial of alimony is intertwined with the inequity of this ruling. ***If*** Judge Fine had provided alimony as appropriate in this case, then both parties would have had an income stream, making the liquidation of property and accompanying tax losses hypothetical. Since Judge Fine made sure that only Tom left the marriage with any way to live, she made liquidation of the properties, and Margaret's descent into poverty, *inevitable*.

The division of assets was neither equal nor equitable. For all the reasons stated in the Opening Brief, and discussed above, the property distribution should be reversed as impermissibly inequitable under the facts, and given the other rulings, of this case.

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

That Tom is playing fast and loose with dates and facts is highlighted here. He repeats Judge Fine's conclusion that there was a 1987 "deal" whereby Margaret got to keep her gambling winnings in "exchange" for Tom getting the property, and cites as evidence of that 1987 deal gambling winnings that were made ***six years later***. *See* RAB at 37.

A review of the trial exhibits actually before the lower court shows that there *were* no gambling winnings -- or losses -- shown for any year before 1987, and that the total gambling winnings for 1987 exceeded losses by $4,600.00. *See* Trial Exhibit 40 (1987 tax return).

Three issues are presented: (1) Could Judge Fine rule that the deed was valid based on Tom's testimony as to the oral "deal" regarding gambling winnings; (2) Was the consideration adequate to support the ruling; (3) If the original deed was valid, does Margaret nevertheless have an interest in the equity created ***after*** the date of the deed.

Tom repeats for this Court, as he must, the ridiculous line of reasoning presented to and accepted by Judge Fine, that "to create a balance of assets in the marriage," Margaret was to keep the $4,600.00 net gambling winnings in 1987 and Tom got a parcel of real estate worth 100 times as much, for which the community had just made a $60,000.00 down payment. XII ROA 93-94; RAB at 37. Apparently sensing that the terms of such an arrangement are beyond the realm of objective credulity, Tom adds on appeal that the "deal" included "future gambling winnings," as if they could have been known or knowable. RAB at 37.

On one point, counsel for both parties appear to agree -- Judge Fine made her ruling as to ownership of this valuable asset based at least in part on her conclusion that the tactics of Margaret's trial attorney were "appalling." AOB at 38; RAB at 38.

One of the questions thus presented for this Court is whether the pervasive bias of Judge Fine so thoroughly infected all decisions rendered at trial that the implausible "deal" found to exist -- normally the sort of decision to be based on the trial court's evaluation of the credibility of the witnesses -- should be set aside as more likely based on the lower court's biases than on the evidence presented. As this Court has pointed out, even if the decision was within Judge Fine's discretion,

"this Court must be satisfied that appropriate reasoning supported the trial court's decision." *See Litz v. Bennum*, 111 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 4, Jan. 24, 1995) (even as to custody decisions, lower courts must make rulings for permissible reasons).

On this first issue (could the "deal" be found to exist), it is submitted that nothing in Tom's Answering Brief adequately defends Judge Fine's implausible ruling, which should be set aside.

Tom ducks the second issue (adequacy of consideration). Instead, he argues that it is permissible for him to have taken advantage of his wife by creating a "deal" whereby he got a half-million dollar asset, and she received nothing, because he is not a lawyer. *See* RAB at 41. He ***is***, however, a licensed, practicing, real estate developer, obviously in a far superior position to know the value and ramifications of the parcel in question and its ownership.

Without conceding that such a "deal" was ever made, if it **had** been, the public policy recited by this Court in *Williams v. Waldman*, 108 Nev. 466, 472, 836 P.2d 614 (1992), requires it to be set aside:

> When an attorney bargains with his client in a business transaction in a manner which is advantageous to himself, and if that transaction is later called into question, the court will subject it to close scrutiny. In such a case, the attorney has the burden of showing that the transaction "was in all respects fairly and equitably conducted; that he fully and faithfully discharged all his duties to his client, not only by refraining from any misrepresentation or concealment of any material fact, but by active diligence to see that his client was fully informed of the nature and effect of the transaction proposed and of his own rights and interests in the subject matter involved, and by seeing to it that his client either has independent advice in the matter or else receives from the attorney such advice as the latter would have been expected to give had the transaction been one between his client and a stranger."

Id., *citing Goldman v. Kane*, 329 N.E.2d 770 (Mass. Ct. App. 1975).

More recently, this Court has reiterated and amplified its holding in *Williams*, and distilled the test of overreaching by the empowered spouse. In *Cook v.* Cook, 112 Nev. ___, ___ P.2d ___

(Adv. Opn. No. 24, Feb. 29, 1996), the Court reviewed another settlement drafted by a husband-attorney, under which the wife received approximately $100,000.00 to husband's $600,000.00 in net community property. Noting an accountant's summary that the six-to-one distribution was "grossly inequitable and unfair to the wife," this Court reversed, noting the wife's proper person signature of all relevant documents, and finding that the lower court abused its "wide discretion in deciding whether to grant or deny" the wife's motion under NRCP 60(b).

In *Cook*, this Court held that natural "ramifications" of the empowered spouse making such a settlement with the unempowered spouse were that: the agreement is subject to close scrutiny on appeal; the attorney has a duty of full and fair disclosure; and "the attorney must demonstrate by a higher standard of clear and satisfactory evidence that the transaction was fundamentally fair and free of professional overreaching." This Court held that "as a matter of law" the husband had breached his legal duties, and without even reaching the "coercion" ground, reversed and remanded for proper litigation of the community property.

There is no reason immediately apparent why the principles espoused in *Williams* and *Cook* are less applicable to a professional real estate developer taking advantage of his spouse than to an attorney taking advantage of his spouse. Wherever one spouse uses his professional skills, training, and expertise to bargain with the other spouse in a manner which greatly profits him to the spouse's disadvantage, there should be found a presumption of professional overreaching and the transaction should be closely scrutinized.

Unfortunately, it is clear from the record that Judge Fine's intention was to justify the transaction, not to evaluate it. Tom alleged, and Margaret denied, that there even **was** a "deal" exchanging "gambling winnings" for the highly valuable real estate. Even if the lower court could

have found such a deal to exist, there is no way that it could ever be considered "fundamentally fair and free of professional overreaching," a question Judge Fine would not address. It should be set aside by this Court.

Tom has no authority for opposing the third issue (whether Margaret had an interest in the community property equity purchased after the deed was executed). Rather, he urges this Court not to consider the issue at all, and then claims that Margaret's position cannot be correct because such deeds "are recorded every day." RAB at 39-40.

Tom presents no evidence that such interspousal financial rape is common. It is submitted that even if it is, commonality does not constitute legitimacy, and there is a reason that deeds "recorded every day" have notes securing any unpaid balance. It is well known in real estate law that one cannot transfer an interest one does not own, and this Court has recently reaffirmed that principle in a divorce case. *See Dimick v. Dimick*, *supra* (lower court erred in finding that joint tenancy property existed, where under NRS 111.105, none of the documents signed by the husband, or by both parties, actually transferred a property interest to the wife).

Ignoring the case law regarding public policy on page 39 of the Opening Brief, Tom proclaims that Margaret *could* quit-claim an interest she did not even yet own. *See* RAB at 39. Tom complains that Margaret did not cite adequate legal authority, but he presents no authority for his proposition -- that a quit-claim deed effects a future transfer for years afterward of all community property diverted into making payments on or otherwise investing in that property.

Under Tom's analysis, a veteran could put $1.00 down on a house, then move in with his wife, make mortgage payments for 30 years, improve the residence, and still claim all equity therein upon divorce, so long as the spouse had signed a quit-claim deed (as so many do to facilitate

financing) when the property was first purchased. That sort of inequity is exactly what this Court has overruled in a string of property cases, whether the spouse's name is on the property or not. *See Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990); *Kerley v. Kerley*, 111 Nev. 462, 893 P.2d 358 (1995).

Even unmarried cohabitants have the protections this Court has afforded those that contribute to the acquisition of property. *See Sack v. Tomlin*, 110 Nev. 204, 871 P.2d 298 (1994); *Langevin v. York*, 111 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 184, Dec. 19, 1995). It is hard to fathom any public policy that would support ***presuming*** that Margaret gave a future gift of her one-half of all community property funds from 1987 to 1993 that went into the half-million dollar parcel.

It thus appears that the issue is one of first impression for this Court. Both parties claim that their positions are common sense, and neither cites a case directly on point. *See* AOB at 39; RAB at 40. It is submitted that it would be very bad public policy to hold that a spouse can be held to have transferred an interest that does not yet exist, without clear and convincing proof of intent to transfer a future interest, ***plus*** adequacy of consideration, lack of over-reaching, etc., as is required for transfer of a valid **present** interest.

Tom, of course, would prefer that this Court not reach the merits of the entire issue. He argues that Margaret cannot argue the legal merits of Judge Fine's ruling because Margaret's trial counsel did not argue the "correct" aspects of case law while presenting the closing argument. RAB at 39. This assertion is transparently meritless. The ***issues*** were before the trial court, and neither court rule nor statute nor logic restrict this Court's examination to the citations and reasoning employed by the trial court.

This Court has before it the facts on the record, the testimony, and Tom's argument that the issue was "credibility." This Court must decide whether the "deal" proposed by Tom and accepted by Judge Fine is so far outside the bounds of what *could* be found to exist by a rational, unbiased trier of fact that it must be reversed based on a review of the entire record. *See Sprenger*, *supra*; *Gardner*, *supra*.

Presuming that the answer is "no" and the lower court's finding that a "deal" was made is upheld, this Court must decide whether the fiduciary duty between spouses made that "deal" so unconscionable that it should have been set aside below, and should be set aside by this Court.

If either of these decisions void the effect of the original quitclaim, then the order regarding this asset must simply be reversed, and the matter remanded for its division. If Judge Fine's order finding the original quitclaim deed valid is upheld, however, the Court must further determine whether the 1987 deed constituted a transfer to Tom of all community property earned, and invested in the property, from 1987 through 1993. It is submitted that, at the very least, half of that later-earned community property, and what was purchased with it, belongs to Margaret.

Tom's defenses of Judge Fine's handing over of this half-million dollar asset to him is logically defective. Allowing the ruling to stand would be an affront to both law and equity. For all the reasons discussed in the Opening Brief and above, it is submitted that the ruling depriving Margaret of her interest in this very valuable asset should be reversed.

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

Tom argues that this case is "nothing remotely similar" to *Pelletier v. Pelletier*, 103 Nev. 408, 742 P.2d 1027 (1987), in which this Court reversed the award of marital property to a third party. RAB at 41-42. Instead, Tom asserts that this case is more akin to five other cases, one of which was decided by this Court, and the other four of which are from elsewhere. He is wrong.

Two of his cases appear to be totally irrelevant. *Bailey v. Bailey*, 86 Nev. 483, 471 P.2d 220 (1970) stands for the proposition that a man can contract for child support payable from his estate after death. *Franklin Life Insurance Company v. Kitchens*, 57 Cal. Rptr. 652 (Ct. App. 1967), concerned a husband's violation of a decree requiring maintenance of life insurance for his children, and whether his second wife and widow could be required to turn over the proceeds once he died.

The trio of string-cited Washington cases Tom puts forth stand only for the proposition that the courts of that state are empowered to order trusts as necessary for the support and education of children, particularly where there is no child support ordered or the children might otherwise go without necessities. *See Bryant v. Bryant*, 411 P.2d 428 (Wash. 1966); *Abel v. Abel*, 289 P.2d 724 (Wash. 1955); *Quient v. Quient*, 177 P. 779 (Wash 1919). They are equally immaterial to this case.

Actually, Tom need not have searched so far afield for this irrelevancy. As noted in the Opening Brief, Nevada statutory law provides for the Court setting aside community property, or the separate property of either party, as necessary for the support of children. NRS 125.150(4). This Court has recently reaffirmed that the lower courts are free to set property aside if necessary for the support of spouses or children. *See Dimick v. Dimick*, *supra*.

Of course, no such finding was -- or could -- be made here. No one even **hinted** that this order had anything to do with "support." The assets at issue were Tom's hobby collections, valued **by him** at multiple figures between $40,000.00 and $90,000.00 during the case. He was simply allowed to keep the assets, without division or offset with Margaret, based on his fanciful speculation that one day he would like to pass on his collections to one of his children. *See* AOB at 40-41.

Judge Fine's decision on this issue is illustrative of the lengths to which she was willing to go to enter orders in favor of the party with whom she had consulted before sending him to the attorneys who fared so well in her court. The order is legally and equitably indefensible under the law of this or any other state, and should be reversed and remanded for the purpose of valuation and division or offset to Margaret.

VII. CONCLUSION

The arguments to which Tom has had to resort in attempting to defend the indefensible rulings below go far in explaining why his attorneys engaged in such severe tactics to prevent this appeal from ever being heard on its merits. They knew that the decree issued in this case could only be the result of an inability or unwillingness by Judge Fine to impartially evaluate the evidence and exhibits presented in the case, and that this Court would not allow such gross inequities to go unremedied.

The denial of alimony to unemployed Margaret, while Tom has hundreds of thousands of dollars in annual income and "perks," is indefensible in this state, in this century, and on this record. The pervasive double standard (expressed to the point of making contradictory pronouncements of law depending on who would benefit) is so blatant and extreme on the face of the record that no

ruling -- from valuation of assets, to the grant of attorney's fees against the impecunious wife and in favor of the wealthy real estate developer -- was unaffected.

It is respectfully submitted that the decree of divorce be set aside in its entirety (along with its attendant post-decree orders), and the matter remanded to a different department of the Eighth Judicial District Court, Family Division, for an appropriate setting of alimony, and valuation and distribution of the assets of the parties in accordance with law, with the intention of achieving equity.

Respectfully submitted,
MARSHAL S. WILLICK, ESQ.

_____
MARSHAL S. WILLICK, ESQ.
Attorney for Appellant

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 _____, 1996.

_____
MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 2515
LAW OFFICE OF MARSHAL S. WILLICK
330 S. Third Street, #960
Las Vegas, Nevada 89101
(702) 384-3440

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to:

Kathryn E. Stryker, Esq.
JOLLEY, URGA, WIRTH & WOODBURY
300 S. Fourth Street, #800
Las Vegas, Nevada 89101
Attorney for Respondent

by placing same in ordinary United States mail, postage prepaid, on July 9, 2004.

_____
Employee of Marshal S. Willick, Esq.

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