IN THE SUPREME COURT OF THE STATE OF NEVADA

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MARY K. WALTZ,	)	
	)	
Appellant,	)	S.C. CASE 24141
	)	D.C. CASE D 118403
vs.	)	
	)	
JOHN E. WALTZ,	)	
	)	
Respondent.	)	

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE ISSUES

I. Whether the district court erred in reversing a Domestic Relations Referee's Findings that payments to a former military spouse as compensation for her property interest in military retirement, denominated as "permanent alimony," were intended as "irrevocable alimony" as a payment mechanism.

   A. Whether Certain Specific "Magic Words" are Required to Make an Alimony Award Irrevocable.

   B. Whether the Agreement Proposed by John's Attorney and Agreed to by Mary's Attorney Constituted an Agreement Between Attorneys, Even Though John Fired His Attorney Two Days Before the Prove Up Hearing.

   C. Whether, if the Decree was Ambiguous, it should be Interpreted in Accordance with the Evidence Submitted Below of the Intent of the Parties in Negotiating it.

II. Whether the district court erred in Effectively Ordering Repayment of Alimony Already Accrued and Paid to Mary.

STATEMENT OF THE CASE

Appellant relies upon her Statement of the Case in her Opening Brief. It is submitted that the Statement of the Case proffered by Respondent is imprecise, incomplete, and inaccurate, in that rulings are rephrased, parts of quoted sentences are omitted, and it fails to identify those matters on which conflicting testimony was presented.

STATEMENT OF FACTS

Appellant relies upon her Statement of Facts in her Opening Brief. As with the Statement of the Case, the version proffered by Respondent is not helpful to examination of the case, in that rulings are greatly rephrased, and it fails to identify those matters on which conflicting testimony was presented, instead offering one party's testimony as factual matter. For example, there is no mention of the testimony that Respondent knew full well that Appellant remarried immediately following the parties' divorce, and Respondent would rephrase the order below as ordering "reimbursement," whereas the actual order says no such thing, but only talks about entitlement as of a certain date. Compare Respondent's Answering Brief (RAB) at 3, 8, 4, with II ROA 279-282, 330.

The Statement of Facts in the Answering Brief also contains the assertion that Appellant is "attempting to totally confuse the Court" by reciting the facts giving rise to this appeal. RAB at 7. Most of the rest of the Statement proffered by Respondent is a retyping of selected parts of the record and his written arguments below. RAB 4-7, 8-9, 9-10. It is not believed that this Court will be confused by the facts of the case.

ARGUMENT

Respondent (John) does not address the legal question of whether this Court is bound by the construction of the decree used by the court below. It is presumed that the point is conceded, and that it is agreed that this Court will review the decree de novo upon appeal.

Instead of even addressing the merits of whether the District Court properly executed its duty in reviewing the recommendations of the Domestic Relations Referee, John begins his argument with a completely irrelevant recitation of NRCP 60(b). RAB 11-12. It should be noted by this Court that the proceedings below were not a proceeding under NRCP 60(b); the rule has nothing whatsoever to do with this case.

The remainder of the Answering Brief simply refuses to address the issues raised in the Opening Brief. John just does not address the central issue of whether particular language is required to establish a lifetime series of payments in alimony form for it to survive remarriage, and (if so) what words must be used to sufficiently express that intention. See AOB at 10-11. He ignores all of the legal issues set out in the Opening Brief, such as whether a party is bound to the agreements made by his attorney. See AOB at 11-13.

To the degree that John has chosen to not address these points, they should be considered to be conceded, and treated as confessions of error. See, e.g., State, Emp. Sec. Dep't v. Weber, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984); Orme v. District Court, 105 Nev. 712, 782 P.2d 1325 (1989) (failure to respond can be treated as confession of error).

Instead of addressing the legal questions actually at issue in this appeal, John repeats, almost verbatim, the completely immaterial discussion of Tomlinson v. Tomlinson, 102 Nev. 652, 729 P.2d 1363 (1986), Taylor v. Taylor, 105 Nev. 384, 775 P.2d 703 (1989), and the prior NRS 125.161 that he set before the district court. RAB 13-16; see I ROA 130-33. The cases and statute discussed by John had to do with separate actions brought after divorce to seek partition of military retirement benefits omitted from decrees of divorce.[1]

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[1] While the entire discussion is irrelevant and need not be examined to resolve this appeal, it should be noted that the argument contains errors of fact and law, such as John's assertion that this Court repealed NRS 125.161 in the Tomlinson decision. RAB 13. Actually, that case was decided a year before the statute was even written. For a complete discussion of the

The omitted-asset-partition materials quoted and discussed in John's brief, like municipal regulations concerning mailbox placement and noise abatement, simply have nothing to do with this case, which does not involve a partition action in any way.

The Decree of Divorce in this case does address the military retirement benefits; the question before this Court is whether to give effect to the parties' intention to allow the former spouse to receive direct payments from the military pay center, even though they were married a fraction less than the ten years normally required for direct payment.[2]

John boldly asserts that "the issue is very simple." RAB 7. Indeed it is, if the Court is willing to completely ignore the facts of the case, the intention of the parties in creating the decree, and equity. John simply does not think it is important that the ruling below gives him a completely undeserved windfall, while depriving Appellant (Mary) of the very asset that the decree was written to ensure she received. Fortunately, this Court has held that unjust enrichment is a wrong deserving of appellate correction. See Nevada Industrial Dev. v. Benedetti, 103 Nev. 360, 741 P.2d 802 (1987).

John cannot, and does not attempt to, point to any evidence in the record indicating that the intention of the parties was to do anything other than create an award to the wife that would terminate only in the event that one of the parties died. All of the evidence presented indicates that this was the parties' intent. I ROA 84-85, II ROA 262-64, 265-66.

Thus, the first issue for the Court is to determine whether the parties' intentions are pertinent to construction of the decree. Again, John has not deigned to address the issue. It is possible to construe the last paragraph on page 16 of Respondent's Answering Brief, as an argument that the language of the decree is not susceptible to this Court's construction. Mary

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matters contained in the Tomlinson and Taylor decisions, and the brief life of the military partition statute, see Willick, Res Judicata in Nevada Divorce Law: An Invitation to Fraud, 4 Nev. Fam. L. Rep., Spr. 1989, at 1, and Willick, Partition of Omitted Assets After Amie: Nevada Comes (Almost) Full Circle, 7 Nev. Fam. L. Rep., Spr. 1992, at 8.

[2] As set out several times in the court below, the "ten year rule" limitation is strictly a procedural matter dealing with whether payments can come from the military pay center, or must be written by the retired member. The "rule" does not affect the right of the former spouse to a share of the military retirement benefits in any way. See I ROA 84-85, 156-57.

asserts otherwise, on the basis of the citations set out in the Opening Brief; this Court has expressed a willingness to construe the terms of a decree whenever necessary to give effect to the parties' intent or a reasonable result.

Accordingly, the Court should focus on the district court's factual finding that the drafter of the decree, after negotiating with John's attorney, intended to place an irrevocable alimony award in the decree. II ROA 327. This finding was also made by the Domestic Relations Referee. I ROA 147.

In deciding whether to give effect to this clear intention, the Court might think from the dearth of authorities in the Answering Brief that this is a novel question. While the point has not been squarely addressed in Nevada, the Tennessee Supreme Court recently examined a very similar case.

In Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993), the parties' decree had incorporated a property settlement agreement granting the wife "spousal support/alimony" in consideration of her waiver of any rights to her ex-husband's future military retirement benefits. The background facts were essentially identical to those in this case.[3]

The husband in Towner, like John here, asked the court to rule that the "alimony" terminated automatically upon the former spouse's remarriage. Like Nevada, Tennessee has a divorce code provision calling for termination of alimony in the event of remarriage "except as otherwise provided" in other code sections, orders for support and maintenance end upon death or remarriage. See Tenn. Code Ann. § 36-5-101; Towner, supra, at 889, 890-91.

The analysis and reasoning of the Tennessee Supreme Court was virtually identical to the analysis and reasoning of Referee Marren in making the original determination in this case. The Towner court correctly perceived the issue just as Referee Marren had done during the initial evidentiary hearing, stating that

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[3] The wife relinquished "all rights, title, interest and control" to all property, including pension plans. The husband was awarded 100% of the military retirement benefits. The decree included an alimony provision giving the wife a fixed sum per month equivalent to her half of the marital property pension. The precise language of the decree was somewhat different, of course, with the parties in that case explicitly reciting that the "alimony" was in consideration of the military retirement waiver.

> the determinative issue in this case is whether the provision in the agreement for the making of monthly payments retained its contractual nature because it constitutes the division of marital property, or lost its contractual nature because it constitutes alimony in futuro which the court has the continuing statutory power to modify upon a showing of changed circumstances.

Id., 858 S.W.2d at 890.

Referee Marren's recommendation framed the issue almost identically:

> The question is whether the term in question is a permanent alimony provision, subject to modification by way of increase or decrease with changed circumstances during the parties' lifetimes, or was intended to be an irrevocable term of entitlement meant to compensate Plaintiff for her portion of the military retirement benefits otherwise payable to her by virtue of marriage during service.

I ROA 147.

Like Referee Marren in this case, the Tennessee court examined the pleadings and proceedings to determine what the parties actually did, and concluded that the wife had given up her right to a share of the military retirement benefits as property in exchange for an essentially equal sum in the form of "alimony" for life. The Tennessee court noted that the military retirement benefits in that case (like the benefits at issue here) were accumulated during the marriage and were clearly marital property, and found that

> Consideration of all relevant factors, including those set out in [the Tennessee divorce statutes] may require or justify definite periodic payments on a long-term basis not subject to modification. Where periodic payments are made from or charged against marital assets, the distinction between a division of marital property and an order of support out of a spouse's property may become less than clear.

Towner, supra, 858 S.W.2d at 890. This was the same conclusion reached by Referee Marren. See I ROA 147, quoted above.

After examining what was intended by the words used in the decree, the Towner court held:

> The agreement in this case, considered in light of all the circumstances, is essentially a property settlement agreement, rather than an order of support. Mr. Towner's pension was accumulated during the marriage and is, therefore, marital property. The definition of marital property subject to division between the parties contemplates property rights to be distributed in the form of periodic payments. . . . The payments to Mrs. Towner are in effect a distribution to her of a portion of the military retirement benefits.

Towner, supra, 858 S.W.2d at 891.

Similarly, Referee Marren found that:

> [Mary] had a presumptive right to $217.00 per month (plus COLAs) as [Mary's] share of the military retirement benefits, which was foregone in the final, stipulated Decree of Divorce which included the provision in question for payment of $200.00 per month (plus COLAs) in alimony. . . . [T]he "Alimony" provision in the Decree was and is a pension provision for the purpose of this motion. . . . [John] received the benefit of the bargain by the reduction of $17.00 per month, and should not be free to now argue that the substituted award is subject to relitigation based on changed circumstances.

I ROA 147.

Like John in this case, Mr. Towner had argued to the Tennessee courts that it did not make any difference whether he obtained an unwarranted windfall and his wife suffered the complete loss of the benefits that she had worked for over many years, and for which she had specifically bargained in the divorce. Like John, Mr. Towner merely asserted that since the payment terms were labelled "alimony," the case was a "simple" one in that payments to the former wife must end. Compare Towner, supra, 858 S.W.2d at 891, with RAB 7.

It is respectfully submitted that the legal system of this state has not become so obscure and uncaring that the plain and manifest intent of parties should be disregarded in determining the meaning of their written agreements. The only reason this case is before this Court is that the district court judge, while acknowledging the obvious intention of the parties in framing the decree to trade one form of payment for another, found that he was barred from giving effect to that intention by legal technicality in the definition of two words. For the reasons set out in the Opening Brief, the district court's ruling was in error.

This Court, like the Tennessee court in Towner, should look to what agreement is set out in the document before it. There is simply no reason to create an injustice in the divorce of these two parties. There is no reason to divest Mary of her property right, and no reason to hand that property over to John.

In the absence of any valid public policy reason to create an inequity, this Court should not do so. Rather, it should give effect to the agreement reached, recognizing that the technical imprecision of the language used by the attorneys in drafting the agreement reached was just that -- a technical imprecision.

The agreement reflected in the Decree was proposed by John's attorney, and accepted by Mary's, with the intention of preventing further litigation by allowing direct payment from the military pay center to Mary during her life. Like the Tennessee court, this Court should recognize that the label "permanent alimony" was merely the mechanism chosen to allow actual collection of the amount awarded.

This Court should reverse the Order sustaining the Objection to the Referee's Recommendation, and give effect to the parties' intention by remanding this case to the Family Court with instructions to institute Referee Marren's Recommendation as the Order of the Court.

Respectfully submitted,
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