In the Supreme Court of the State of Nevada

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JAMES K. WICHERT, Appellant,	)	S.C. DOCKET NO. 33809 & 34537
vs.	)	D.C. CASE D198590
SUSAN M. WICHERT, Respondent,	)	

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE[1]

Appeal from the "Findings of Fact, Conclusions of Law and Decree of Divorce" entered on July 1, 1998, and Order entered on January 19, 1999, denying Appellant's "Motion to Amend Findings of Fact, Conclusions of Law and Decree of Divorce" (Supreme Court Docket No. 33809); and from Order entered on May 21, 1999, granting Respondent's "Motion for Relief from Order and Adjudication of Omitted Assets" by awarding Respondent an additional $50,000.00 (Supreme Court Docket No. 34357).

Appellant James K. Wichert ("James"), in proper person, filed a Complaint for Divorce from Respondent Susan M. Wichert ("Susan") on May 14, 1996. I App. 1.[2] Susan filed her Answer and Counterclaim on May 4, 1996, through attorney Rebecca Burton. I App. 5. The Counterclaim requested alimony, child support, and claimed as community property various businesses and a "tree farm" in Wisconsin.

By August, James was represented by attorney George Holt, and Susan by attorney Lynn Shoen; they entered into a temporary joint legal and shared physical custody order for their child, completed mediation, and litigated various related matters through mid-1996 before Judge Sanchez. I App. 14, 17, 22. In September, 1996, the joint legal and shared physical custodial orders were made permanent, with Susan designated primary custodian. I App. 23, 28.

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[1] Counsel acknowledges that this Statement of the Case is far more detailed and lengthy than normal. The timing of procedural events, however, is the focus of one of the substantive issues in this appeal, and it is believed necessary to proper consideration of the issues.

[2] References to "[vol. #] App. [page #]" are to Appellant's Appendix; Respondent has never responded to our multiple requests to submit a joint appendix.

Susan hired Steven Minagil, replacing Ms. Shoen, and in June, 1997, filed a motion for spousal support. James switched counsel to attorney Earl Ayers, and opposed the motion, which was granted.[3] I App. 30, 47, 66.

On August 11, 1997, Mr. Minagil served Susan's first "Request for Production of Documents" and "Interrogatories" on Mr. Ayers, who delivered the response to the former on September 19, 1997, and to the latter on November 21, 1997. The information provided pertained to James' personal and business income.

The case was transferred from Judge Sanchez to Judge Gaston just prior to the trial date, which was continued from December, 1997, to February 23, 1998. On December 24, 1997, Mr. Minagil served Susan's Second Set of Interrogatories and Request for Production of Documents on Mr. Ayers, seeking to update information that had been provided by James in August, 1997, regarding his income and business.

By this time, Mr. Ayers was not functioning very well.[4] He delivered James' answers to Mr. Minagil's Second Set of Interrogatories on January 30, 1998, which was not timely. He never propounded any kind of response to Susan's "Second Requests for Production of Documents."

Immediately before the trial date, on February 17, Mr. Minagil filed a "Motion to Compel" requesting various sanctions. I App. 120.

A hearing was held before the Discovery Commissioner on February 19, 1998. The Commissioner gave Mr. Ayers until 4:00 p.m. that day to produce the documents, and set a status check for the next morning. On February 20, 1998, when James' counsel failed to either produce

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[3] It appears that Mr. Minagil never reduced the decision to a formal written order.

[4] It was about this time that Mr. Ayers had something of a breakdown, and his actions and inactions in a variety of cases spiraled so far out of the bounds of what is acceptable that the Bar ultimately recommended disbarment, which recommendation this Court adopted in a formal Order of Disbarment issued on May 27, 1999, *In Re: Discipline of Earl T. Ayers*, No. S.C. #33960. II App. 151. This Court's Order notes that the formal ten-count complaint against Mr. Ayers was filed on June 30, 1998, shortly after the trial in this case was held.

the document or make a timely appearance at the hearing, the Discovery Commissioner granted Susan's requests for relief.[5]

The minutes from the February 20th status check indicate that at the request of Susan's counsel, the Commissioner recommended that James would "be precluded from entering into evidence at trial the value of income from the period of time from the last product of documents forward." I App. 136. The Discovery Commissioner's Report and Recommendations were apparently entered on February 23, 1998. *Id*.

Mr. Ayers filed objections to the Report on March 2, 1998, arguing that the Report varied from the minutes of the hearing and the statements made to counsel by the Discovery Commissioner on the morning of the hearing. I App. 130. Susan filed her response to the objections on March 9, 1998, requesting that the sanction stand. I App. 138.

On March 26, 1998, the Court entered its order prohibiting James, "at the time of trial, from introducing into evidence documents sought in Defendant's Second Request for Production of Documents," and prohibiting his witnesses from "testify[ing] as to information contained in the documents sought." I App. 145. Mr. Ayers quietly confessed to James that the discovery failure was his (Ayers') fault, and he personally paid the sanctions imposed. II App. 167-68.

A bench trial was held on March 26, March 30, and April 23, 1998. There were several issues at trial, centering around the value of the business, Susan's request for alimony, what division should be made of community debts, and whether there was a community interest in property located in Wisconsin. I App. 147, 159, 171.

At the conclusion of the trial on April 23, after all evidence was taken, the trial judge noted his earlier order that "the trial would close today," offered both counsel the opportunity to submit

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[5] Mr. Ayers was a half-hour late for the hearing, and informed the Discovery Commissioner that because his client had been out-of-town the day before, not returning until late in the evening, and was kept from his office because of flooding, the documents were not available at that time. I App. 134.

written closing arguments by April 29, 1998, and took the matter under advisement. TT at 393-94[6]; I App. 171. On April 29, 1998, counsel for both parties filed their closing arguments. I App. 147, 159. A little more than a month thereafter, on June 2, 1998, the trial court made its decision, by way of a Minute Order. I App. 171-73.

It took the attorneys another month after the minute order to actually draft the written Findings of Fact, Conclusions of Law, and Decree of Divorce, which were not filed until July 1, 1998; Notice of Entry was made July 7, 1998. I App. 174, 182. Slightly over two months went by – from the close of evidence on April 23, to entry of the decree on July1– before the Divorce Decree was filed.

On July 16, 1998, Mr. Ayers filed a "Motion to Amend Findings of Fact, Conclusions of Law and Decree of Divorce," claiming that no ruling had been made on the issue of the debt on a Discover Card.[7] I App. 184. Susan filed a countermotion on September 21, 1998, asking that James be held in contempt for having not yet paid her the sums set out in the Decree. I App. 187. The cross-motions were heard December 1, 1998, and an Order was filed January 19, 1999. I App. 224.

Susan filed a "Motion for Relief from Order and Adjudication of Omitted Assets" on January 5, 1999, claiming an interest in deposits made to James' business accounts months ***after*** the divorce trial were "omitted assets." By this time, the case had again been randomly re-assigned, this time to Department H. After briefing, the matter was heard by Visiting Judge Carl J. Christensen and an Order was entered May 21, 1999. II App. 143; Transcript of 2/2/99.

This appeal followed.

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[6] The transcript is in three volumes, with consecutively numbered pages. They will be referenced in the form "TT at [page #]."

[7] By the time he filed this motion, Mr. Ayers had stopped communicating with James in any way; James had not even received the Decree, had given up on contacting Mr. Ayers, and had hired this office. Neither we nor James knew what Mr. Ayers was doing, or why. II App. 102.

STATEMENT OF FACTS

James and Susan were married on July 8, 1978, in Milwaukee, Wisconsin, when they were both 21 years old, working and attending college. After the marriage, both parties continued working, and James attended night school for nine years while he worked during the day. TT at 5, 27-30, 250-251, 257, 333-334. They moved to Las Vegas in 1992, where they separated in 1995, and were finally divorced in 1998. TT at 28, 87; I App. 174.

James' father, Paul O. Wichert, has for many years owned 80 acres of land in Wisconsin. In the early 1980s, James and his brother, Paul A. Wichert, along with their father, bought and planted trees on 40 acres of their father's land. TT at 94-96, 364-369; Trial Exs. 4, 19, 20, IV App. 58-67. Although the only receipt was in the name of Paul Wichert, James testified that he contributed $300.00 toward the cost of the trees as a gift to his father, which was about a third of the total cost. TT at 65. He denied having any ownership interest in the land, or the trees on the land. TT at 366.

Susan, however, testified that the trees were intended to be "an investment for retirement purposes." TT at 334. She claimed that she "had an interest" in the trees planted on Paul's property because of an oral agreement with James' brother when the trees were purchased.[8] TT at 280. Susan's brother and his wife testified that they had always believed that Susan and James, or James and his brother, owned the land and trees in Wisconsin. TT at 344-45, 358-360. On cross-examination, Susan admitted that she had never seen any document indicating any such ownership interest, in the land or in the trees. TT at 335-36.

Neither party proffered any document claiming that either Susan or James ever had any legal claim to either Paul's land, or the trees on Paul's land. TT at 364-369. Documentation and letters

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[8] Susan's Pretrial Memorandum claimed she had a community interest in Paul's property itself (40 acres in Wisconsin), and that this property was to be held "as tenants in common with James to provide proof of titled interest." I App. 111. She abandoned that claim at trial, TT at 329, and it was rejected by the trial court. I App. 175.

which were introduced during the trial showed that Paul (James' father) made all the arrangements regarding the planting and upkeep of the trees, and no document introduced into evidence identified James, Susan, or any person other than Paul as an owner of Paul's land or any trees located on Paul's land. TT at 334-336, 364-366; Ex. BB, IV App. 58-67.

The trial court found that James' father is the sole owner of the Wisconsin land, and that neither of the parties had any interest in the land. *Id.*; I App. 175. However, the Decree recites that James "used funds, along with physical and intellectual labor, to plant and cultivate a tree farm on that property," although "there is no valuation of the tree farm for the Court to consider." *Id.* The Court rejected Mr. Minagil's proposal that Susan should be awarded a "one-fourth undivided share" of the tree farm, but awarded to Susan "one-half of any interest in the tree farm, if any, held by [James]." I App. 162, 179.

During the post-trial hearing on December 1, 1998,[9] the Court reiterated that the land in Wisconsin was owned by James' father, and as such, was not community property. Mr. Minagil's rendering of the court's order amended the Decree to insert the language that the Court had earlier refused, providing Susan with a "one-quarter interest in the trees grown on the land," without acknowledging that he was changing the court order. I App. 224. The order directed James to supply "an official document reflecting her one-quarter interest in the trees grown on the land."[10] I App. 224.

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[9] James' counsel was suddenly taken ill; an associate unfamiliar with the case attended the hearing, and sought but was unable to obtain a continuance.

[10] This percentage was invented by Susan's counsel and inserted into the order; the trial court had never made any ruling between James' claim that he contributed about a third of the cost of the trees, and Susan's competing claim that "the community owned one-half of the trees." TT at 282, 369.

The parties have one child, James Quincy Wichert, born March 22, 1991.[11] When their son was born, Susan stopped working for some three to four years, returning to the work force in 1994 or 1995.[12] TT at 5, 28, 27-30, 250-251, 257.

The record is remarkably devoid of documentation or testimony regarding the parties' lives from 1978 to 1992. While the parties disagreed about the details, they generally concurred that during most of their marriage, they had little money, and both worked many different kinds of jobs. Mr. Ayers neglected to obtain any significant information from James at ***all*** regarding this 14-year span. Susan, however, testified that James was a payroll manager for a trucking company when they were married, and while she worked as a bartender and waitress, James always had a job "with a title; sales manager, vice president, controller; that type of job." I App. 34, TT 250, 251.

On cross-examination, Susan conceded that she also had jobs involving phone sales and book-keeping, but she claimed they were temporary and that from 1980 to 1987 she "probably" earned up to $17,000.00 to $18,000.00 per year at her primary job.[13] TT at 29-30. Susan claimed that James always earned more than she did, but she provided no specifics, and the record contains no documentation for any year between 1978 and 1992. TT at 252; III App. 108.

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[11] Prior to trial, the parties were awarded joint legal custody of their son, with Susan designated as the child's primary physical custodian, and a specific custody schedule was established. James' child support obligation was set at $400 per month. TT at 86-87. During the trial, Susan attempted to have the Court revisit the custody schedule which was in place, but pursuant to EDCR 5.81, the Court declined to do so. TT at 296-299.

[12] Because the parties' son was 16 weeks premature, he was placed in the NICU, and later required special care and therapy for a period of time. TT at 252-256.

[13] Mr. Ayers had done no discovery and had no documents concerning this time period; at the time of trial, he apparently did not know what Susan had done or was doing for a living. TT at 6-8.

The parties agreed that they moved to Las Vegas, Nevada, in 1992, but disagreed as to why. TT at 85, 103. Susan claimed that James just came home one day and announced that he was quitting his job and they were moving to Las Vegas.[14] TT at 257. James testified that the move was to "help save the marriage, which had been in dire straights for about the past eight years" by allowing Susan to be near her mother. TT at 150. The parties separated in August of 1995. TT at 87, 103, 163. They were finally divorced almost exactly three years later, in July, 1998. I App. 174.

James testified that when they moved to Las Vegas, the parties had no idea what they would do for a living. TT at 149-151. From approximately 1993 until approximately March 12, 1996, James was employed as the president of a company known as "Strictly One Dollar,"[15] which was owned by Susan, her mother Mary, and her sister-in-law Lori, who had each invested $50,000 to start it up. The business generated income from three retail stores and a wholesale business. Susan did the office work for the business. TT at 87-88, 162-163, 204, 258-259, 341.

The parties' joint tax returns for 1993, 1994, and 1995, reflected that the income they took out of "Strictly One Dollar" was $44,827.51 for 1993, $76,824 for 1994, and $92,077 for 1995. TT at 150-151, 153-154,160, 203-204; III App. 112, 117, 121. James stated that more than 50% of the family income in those years was attributable to his efforts; these were the years Susan was largely not working. TT at 150-60.

Both parties testified, however, that while they took more and more money out of the business, by 1995 it was in "financial trouble" and "dire financial disarray," heading for bankruptcy, by the beginning of 1995, and they had to reduce their salaries. TT at 15, 28, 87-88, 275. Just prior

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[14] Just before that statement, though, she conceded that the move was necessary so that she could have family support in caring for the parties' son.

[15] Susan testified at trial that James was the "president more or less" of the business of which she, her mother and sister-in-law were the stockholders. TT at 259.

to the parties' separation in August, 1995, Susan decided that the business would buy out Mary and Lori, who were each paid $90,000 from the business' capital for their interests. TT at 87-88, 269.

With the cost of buying out Mary and Lori's interest, and the subsequent loss of the business' number-one customer, Fred Spindle ("Fred"), in mid-1995, the business suffered irreparable damage, although substantial funds were expended in an attempt to recover from those losses. TT at 88, 163, 165, 206.

Three months after the parties separated, in October of 1995, James incorporated a new business called One Dollar Store Services, Inc. ("$1 Store"). The new business was not a store, but a service company which ***set up*** stores for others to own and operate throughout the United States, providing the individual with expertise in setting up a retail store and outfitting it, such as by buying store fixtures, and purchasing merchandise. The new business also acted as a commissioned agent for a large number of suppliers. Only one of the customer accounts which had been with "Strictly One Dollar" did business with $1 Store after it began operation. TT at 108, 111-114, 195-196. James testified that the new business of setting up stores for others was an entirely different line of work than operating a store had been. TT at 162-63.

Despite the parties' physical separation and impending divorce, James continued working for the old business until approximately March 12, 1996, when the business sold its last component, a retail store, to Fred.[16] TT at 89, 164-165. Several months earlier, Susan had been hired to manage that retail store. TT at 89, 274-275.

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[16] To impeach James' testimony that he had attempted to keep Strictly One Dollar in business, but was unsuccessful, Susan testified that in September of 1995 a $7,000 check which was suppose to be deposited into Strictly One Dollar's accounts, was instead deposited in the accounts of $1 Store. It was later demonstrated that the $7,000 check was in fact deposited into the business account of Strictly One Dollar. TT at 262-263, 317-318, 380-381; III App. 101, 103; IV App. 32.

After March 12, 1996, James went to work at one of Fred's business – Allied Systems – as a commissioned sales representative. He also started a company with Fred called Pro Systems. However, by May of 1996, James had terminated all relationships with Fred. TT at 89-90, 164.

James testified that $1 Store did not start generating income until February or March of 1996. TT at 107, 147, 164, 166-167. The business' taxable income for 1996 was $3,698.69, and James' personal taxable income for 1996 (including the income he derived from the new business) was $24,746.61. TT at 134-137,146-147; III App. 14, 83, 157.

James' new business operated entirely as a service company.[17] Its customers were store owners who wanted merchandise purchased and shipped to stores already established, or to set up new retail stores. The customers sent money, which was deposited into the business accounts of $1 Store at Wells Fargo Bank ("Wells Fargo") or Charles Schwab ("Schwab"). From the money deposited, funds were disbursed as needed for setting up and supplying the customers' store. TT at 111-116.

James testified that incoming funds deposited into the accounts at Wells Fargo and Schwab did not reflect business income, company assets, or James' income, but were the customers' working capital to be disbursed in accordance with the contact entered into with the customer, and which ***could*** ultimately yield a net profit. TT at 119-121, 149, 172-177, 208-209, 211-213, 370, 378. Depending on the contract, the business earned commissions on merchandise purchased and shipped to the customer or for setting up and stocking a new retail store. In some situations, $1 Store did not receive a commission at all because all of the funds received and deposited were disbursed. TT at 111-117.

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[17] At the time of trial, the total fixed assets of $1 Store was less than $8,000, including the used office furniture and computers. TT at 147-148.

Money received and deposited was used to pay for business expenses, such as the purchase of merchandise, fixtures, etc., and paying contractors, supervisors, and labor. What remained became One Dollar's gross income, and paid payroll, rent, utilities, taxes, etc. for the business. After all of those expenses, James could be paid from what was left. TT at 211-214; III App. 12. Since James took his income from the gross profit of the business, if $1 Store did not earn a profit from a contract, James derived no income regardless of how much money went through the business accounts. TT at 115-16.

James explained that if the funds received from the customer were not to be immediately disbursed, he often deposited the funds into a business account at Schwab that paid interest. As the funds were needed for disbursement, James transferred them back to the business' checking account at Wells Fargo. In other words, the funds contained in the Schwab account were business funds awaiting disbursement, and not his personal funds. Because the funds were transferred back to the business' checking account as they were needed, the balance in the Schwab account fluctuated.[18] TT at 118-121, 149, 185-189, 211-214.

No conflicting evidence to any of James' testimony of how his business operated was presented at trial from any source, but Mr. Minagil suggested in cross-examination, and later argued, that James "really" used the accounts for personal expenses; Mr. Minagil also argued that since he had obtained an order preventing the introduction of evidence to prove the point, the trial court was obliged to believe his interpretation whether or not there was any evidence. TT at 183-198; I App. 159-161.

Sometime after March of 1997 James transferred $12,000 from the Wells Fargo account to the Schwab business account. Because this was the business' money, James did not list the Schwab

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[18] II App. 11-15.

account balance on the AFC he filed on July 28, 1997. TT at 188. While traveling on business, James routinely withdrew money from those accounts for his travel expenses. In August of 1997, James was in San Diego with his son, and withdrew $500 from the Schwab account. TT at 185-188. The withdrawal was not in issue in the pleadings, and came up for the first time on cross-examination; asked the purpose of the withdrawal, James stated that it was "probably travel expense." TT at 188.

The trial court, however, accepted Susan's argument that the withdrawal permitted the findings of fact that: "[i]t appeared from the entries that [James] utilized this account, in part, for personal expenditures"; and that therefore James "failed to trace business assets through the account to overcome the presumption that the account was community property." I App. 175. The Court therefore held that the $11,292 held in the account as of July 1997, was community property, and awarded Susan $5,046 as her community interest in the account.[19] I App. 171, 179.

The business' income tax return for 1996 reflected sales of $136,193.43. This figure was not commissions, or monies earned by the business, but was the total of deposits of customers prior to any disbursement for the purchase of goods or services. Prior to July, 1996, the accounting system James used reflected monies received from customers as a "liability," which was zeroed out following the issuance of a check.[20] But after July of 1996 (by direction of James' accountant), these

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[19] At the time of trial the account only contained some $3,000, not more than $11,000, but the discovery sanction Susan had requested, and had been granted, prevented James from introducing any such evidence, so she was awarded half of money that did not actually exist at the time of trial. I App. 145; Transcript of 2/2/99 at 7-9, 14; II App. 13.

[20] These deposits were identified under Account Numbers "2000." Trial Ex. 7. As James explained it:

> an individual may give me fifty-thousand dollars for the sole purpose of purchasing fifty-thousand dollars worth of inventory for them, of which I would then earn an actual commission of about thirty-five-hundred dollars. So the fifty-thousand dollars that the company takes in is a liability that I have to go and purchase the merchandise for them.

TT at 174.

monies were reflected as "receipts" for purposes of income tax reporting.[21] TT at 116-117, 173-177, 209-211; II App. 213-240; III App. 14-18.

In 1996 and 1997 James made approximately $14,200 and $41,000, respectively, through sales work as a consultant in assisting customers in opening new stores. TT at 377-380. He also derived the net profit from $1 Store commissions on gross sales, which were a small percentage of the total money deposited into the company checking accounts and then expended on merchandise and fixtures, etc. TT at 128-133, 135-136, 377-380. James' personal income for 1996 was some $38,000.00. III App. 84.

Like James, Susan also started a new business after the parties' separation. In December, 1995, she started "Universal Wholesale," which she operated out of her home.[22] Like James' "$1 Store," Susan's company assisted dollar stores in purchasing products from vendors on a commission basis. Susan's business, like James' business, received money from customers that she deposited into her business account and then later totally expended for the purchase of merchandise or supplies.[23] TT at 8-10, 275-277, 318-322. Her personal income for 1996 was some $9,000.00.[24]

Susan testified, however, that her efforts failed, and that because her business was operating at a loss she had to seek outside employment in July or August of 1997.[25] From approximately

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[21] Identified as deposits under Account Number "3200." II App. 213. The business actually ***handled*** even more money; records introduced during the trial showed that in 1996 $1 Store physically received approximately $182,950, which amount was fully disbursed for the purchase of merchandise, fixtures, and supplies. III App. 91.

[22] Susan testified she averaged $75 to $900 a month from her business. TT at 38, 276, 316.

[23] On one occasion, Susan's business received a check in the amount of $10,000 which she claimed was totally disbursed for the purchase of products. TT at 318-320. The trial court did not, however, consider her business' gross receipts to be income, or assets divisible in the divorce.

[24] This number is taken from her tax returns. III App. 141. At trial, Susan claimed to not remember how much money she had taken from that business while she was running it, TT at 316-17, and Mr. Ayers had done no discovery.

[25] The dates given by Susan do not appear to follow; she might have meant 1996. In any event, the business license for Universal Wholesale Specialist was still active at the time of trial. TT at 13-14.

March of 1996 until June of 1996, Susan managed a business known as M.S. Associates, Inc. Susan also managed one of the retail stores which was later purchased by Fred until approximately July of 1996. TT at 9, 14, 27, 274-278, 314-316.

Starting in February, 1997, Susan worked for her sister-in-law's store "This and That" for a couple of months, for which she claimed to have earned a total of $560. TT at 10-12, 27. In August of 1997, Susan began working for Paid Prescriptions as a customer service representative, and at the time of the trial she claimed to be earning $8.50 per hour. TT at 5-7, 78, 278.

In February of 1997, following the sale of the marital residence, the parties netted $18,944.93. From this money, $3,000 was paid to the attorneys for both parties, with the remainder placed into the trust account of Susan's then attorney, Lynn R. Shoen, Esq. From that trust account, Susan received $1,000 a month from June, 1997, through March, 1998, for a total of $10,000 in temporary spousal support.[26] At the time of trial, the trust account had a balance of approximately $5,944. TT at 78-79, 272-273; III App. 137. Susan was awarded the remainder and directed to use it to pay her post-separation debts. I App. 172, 179-180.

The trial court's minute entry provided that Susan was awarded:

> alimony in the amount of $1,000.00 per month for period of twelve (12) months, $1,200.00 for the next twenty-four (24) months, and $1,500.00 per month until [Susan] remarries or dies.

I App. 173. This Order was substantially enhanced by Mr. Minagil in his rendering of the Decree, which added a number of "findings of fact" impugning James' motives and actions, and justifying an award of alimony, including that Susan raised the parties' child "while [James] advanced his

[26] After Susan retained Mr. Minagil, these funds were deposited into his trust account. TT at 273.

career," that she worked while he attended school, and that Susan's family assisted James in setting up a "new business" which was also termed a "competing business."[27] I App. 177.

When the parties had separated in 1995, they jointly owed an outstanding balance on a joint Discover Card they had used since about 1986. TT at 17, 91, 189, 192. James testified that when they separated, the amount owing on the Discover Card was $6,350. TT at 90-91, 190. Susan testified that the balance at separation was somewhere between $5,000 and $6,000. TT at 15-16. A printout obtained after trial showed that as of September 2, 1995, the balance on the account was $5,783.54. II App. 100.

After the parties separated, James made all payments on the account. He used the card mainly for business purposes, such as travel and expenses.[28] TT at 92, 190. He paid any new debt on the card from his personal account for any personal use, and from his business account for any business use. TT at 93, 133. Susan took her name off the account in approximately March of 1996, and opened another Discover Card account. TT at 303-304, 322-323; IV App. 39.

The Decree did not mention the two Discover Card accounts specifically, but found that "each party has incurred debts from the date of separation" and ordered each party to bear those debts. I App. 177, 180.

Mr. Ayers filed a motion on July 16, 1998, claiming that the Court had heard evidence relating to the Discover Card debt, but that the Court had not mentioned the debt in its orders, and that the community obligation should be adjudicated. I App. 184. Susan opposed that request, and countered that James be held in contempt for having not yet paid her the sums set out in the Decree. I App. 187.

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[27] Mr. Minagil has referred to the trial court's written minute order as a "draft Decree" which "did not include Findings or Conclusions," which Mr. Minagil created and inserted with no further judicial involvement. II App. 78.

[28] James had used the Discover Card "quite a bit" for business, and periodically for personal expenses, because he couldn't get a "credit card of any type at [that] point." TT at 92; at 192.

The issue was heard during the post-trial hearing on December 1, 1998, that was attended only by an associate unfamiliar with the case because counsel suddenly fell ill. Mr. Minagil urged and the Court referenced a prior "finding that the Discover card was used exclusively by [James] for personal business," and so ruled it was not a community debt, but James' sole debt, finding "compelling circumstances not to equally divide the Discover card obligation." I App. 222-24. In fact, there had never been any such prior finding.

Susan presented the only expert witness who testified at trial as to valuation of James' business ($1 Store) – Terrence M. Clauretie, Ph.D. He testified he used three methods in calculating the value of the business,[29] but that he had limited information available to him, and had not contacted or attempted to contact James to discuss how the business operated. TT at 244, 247-248.

Dr. Clauretie testified that the "capitalization method" determined a "reasonable range" for the value of $1 Store of between $50,000 and $75,000. TT at 219, 225-226, 241-243.

For the "valuing of the assets method" Dr. Clauretie used a "rule of thumb" in which he "took three months of gross income as a value of the goodwill."[30] Specifically, he determined that the business' average "income" for 1995 and 1996 was $230,000 per year, from which he derived a goodwill value of $57,000. Adding the value of the physical assets of the $1 Store, $3,420, resulted in the business having a value of approximately $60,900. TT at 227-228, 236-237.

Dr. Clauretie's third method required him to derive James' "earning capacity." For this, he tried to figure "the cashflows that the business provided to the family." From the information he

[29] The first method used was a "capitalization of net income" method, the second method was the valuing of the assets, which included goodwill, and the third method was the "earning capacity" of James. TT at 218-219, 227, 228.

[30] Dr. Clauretie determined the average yearly income from the "gross receipts of the business" for 1995 and 1996, never being told that the money was client deposits. He also looked at James' income tax returns, and the business' expenses. TT at 228.

reviewed, Dr. Clauretie determined that James' "earning capacity" from $1 Store for 1996 was $152,000. TT at 228-235.

On cross-examination Dr. Clauretie testified that he did not know that the sums in the corporate account were customer deposits for merchandise, and had just assumed that the large deposits into the business' account were revenues.[31] TT at 246-247. He acknowledged that it would have made a difference in his evaluation if he had known that money on deposit in the business accounts was later disbursed for merchandise or fixtures for the customer, and that the business did not realize any income from the deposits. TT at 245-247.

The "difference" was not quantified at trial, but in his written closing argument, James applied Dr. Clauretie's method to the $145,451.87 in $1 Store's actual total gross receipts from January, 1996, through August, 1997, noting that the resulting value of the business would be $25,717.77. I App. 147-151.

The trial court found that the business had a value, for community property purposes, of $61,000, and Susan was awarded $30,500 as her equitable interest. I App. 171, 175.

Susan was to submit to James two lists (A and B) of property, with each having the same value in her opinion. Fifteen days after receipt, James was to select the property on either list A or list B. Thirty days thereafter, the parties would exchange the property. I App. 172, 180. No such exchange ever occurred.

Susan filed a "Motion for Relief from Order and Adjudication of Omitted Assets" on January 5, 1999, claiming that $129,000 in deposits made to James' business accounts months ***after*** the divorce trial, whether or not James had yet earned those sums when they were deposited, were "omitted assets" which James "earned and saved . . . during the course of the parties' marriage,"

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[31] The deposits were not the business' gross profits, but were monies placed in "trust" by James awaiting the necessary disbursement. TT at 119-121, 149, 172-177, 208-209, 211-213, 370, 378.

but "failed to disclose" to the Court. Susan also claimed such failure to disclose constituted "fraud."[32] I App. 215.

James filed an opposition on January 20, 1999, arguing that the deposits in question were made ***after*** the divorce, and that the bulk of the money deposited consisted of trust deposits against future work which had not yet been earned on the date of the deposit. II App. 1. James provided check copies and account statements proving that the funds were deposits against future work and expenditures, which work was begun in the following months, and that much of even those deposits was received after the divorce trial. II App. 12-61.

Susan filed a reply claiming that all sums stated by James as being in his business accounts before the formal decree was filed were community property funds, whether or not the money was client funds, whether or not checks were outstanding against it for client expenditures, and whether or not any of it had been earned, because he used the existence of the money to obtain a new house. Tr. of 2/2/99 at 18; II App. 76.

A hearing was held on February 2, 1999, before Visiting Judge Carl J. Christensen. Transcript of 2/2/99. After listening to the argument of counsel, and prior to making its ruling, the court asked Susan's counsel "[i]s there any new reason that you have besides, everybody knows?" Mr. Minagil answered no, conceding he had no such evidence. Tr. of 2/2/99 at 20-21. Judge Christensen nevertheless found that because James had put $100,000 down on a new home approximately 37 days ***after*** his divorce, "using" $100,000 of the $129,000 deposited into the Wells Fargo and Schwab business accounts as his own for loan purposes, James had made that money a "community asset" which had not been considered by the Court during trial. The Court granted

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[32] At the time of divorce, James' personal checking account had about $1,000 in it. Tr. of 2/2/99 at 9, II App. 5. References to "Tr. of 2/2/99 at [#]" are to the transcript of the hearing held on February 2, 1999.

Susan's motion and awarded her $50,000 as her "community interest"; the Order was entered May 21, 1999. Tr. of 2/2/99 at 20-21; II App. 143.

Once all the orders from all these proceedings were entered, this appeal followed.

ARGUMENT

I. JAMES SHOULD NOT SUFFER UNDULY FOR HIS ATTORNEY'S FAILINGS

It is a long-established truism that "a party is bound by the stipulations and actions of his attorney."[33] The inherent presumption in such cases is the presumption that the attorney is acting ethically and competently while acting on behalf of the client.

This may be the last case that Mr. Ayers brought to trial before being disbarred. The Bar's Complaint charging him with multiple violations of his duties of competence, diligence, etc., was filed just some thirty days after the trial in this action. II App. 151; I App. 171. James, of course, neither knew nor could have known that his attorney was suffering a breakdown that would lead to his disbarment.[34] He has already suffered a number of financial penalties and evidentiary rulings against him on the basis of his attorney's errors. TT at 144, 269, 391-92; I App. 136, 145, 177. The trial judge was obviously irritated with Mr. Ayers' meandering and rather pointless examination of witnesses. TT at 65.

We do not seek by reason of these facts to have this Court disregard the rulings below. However, we do ask the Court to keep in mind while reviewing this appeal that James' attorney was apparently not functioning very well during this trial, which explains otherwise inexplicable lapses such as his failure to elicit obviously necessary testimony and evidence relating to alimony, property, and debt issues (which are each addressed below). The record seems to indicate that Mr. Ayers did not know the basic facts of the case when the trial began. *See* TT at 5-8.

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[33] *See Aldabe v. Adams*, 81 Nev. 280, 402 P.2d 34 (1965); *Aldabe v. Aldabe*, 84 Nev. 392, 441 P.2d 691 (1968).

[34] State Bar disciplinary investigations are confidential until acted upon.

This Court has previously expressed a willingness to separate the failings of counsel from those of the client,[35] and its intent to decide cases on the merits.[36] The Court has repeatedly stated that such considerations are heightened in domestic relations cases.[37]

In its review of the issues presented by this appeal, the Court should evaluate the evidence and arguments in light of the deficient performance of James' counsel, and try to resolve the issues on the legal merits despite the absence from the record of information that would have made that task easier.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING SUSAN LIFETIME ALIMONY

In the past twelve years, this Court has issued nine major cases addressing alimony;[38] it has never yet found an alimony award to be excessive. It is submitted that the award to Susan of lifetime alimony was excessive to the extreme of an abuse of discretion under the facts of this case, which merits reversal. Even where the district court has discretion to make an award, this Court has stressed that this Court "must be satisfied that the [lower] court's determination was made for appropriate reasons."[39]

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[35] *See*, *e.g.*, *Hansen v. Universal Health Servs.*, 112 Nev. 1245, 924 P.2d 1345 (1996).

[36] *See, e.g.*, *Price v. Dunn*, 106 Nev. 100, 105, 787 P.2d 785, 787 (1990); *Hotel Last Frontier v. Frontier Prop.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963).

[37] *Lesley v. Lesley*, 113 Nev. 727, 941 P.2d 451 (1997); *Bauwens v. Evans*, 109 Nev. 537, 853 P.2d 121 (1993).

[38] *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998); *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998); *Kerley v. Kerley*, 111 Nev. 462, 893 P.2d 358 (1995); *Alba v. Alba*, 111 Nev. 426, 892 P.2d 574 (1995); *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994); *Gardner v. Gardner*, 110 Nev.1053, 881 P.2d 645 (1994); *Rutar v. Rutar*, 108 Nev. 203, 827 P.2d 829 (1992); *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); and *Heim v. Heim*, 104 Nev. 605, 763 P.2d 606 (1988).

[39] *Hayes v. Gallacher*, 115 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 1, Feb. 12, 1999); *Sims v. Sims*, 109 Nev. 1146, 865 P.2d 328 (1993).

The award here was of permanent alimony under NRS 125.150(1)(a). Such an award must be "just and equitable," having regard to the conditions in which the parties will be left by the divorce. *Sprenger*, *supra*. As this Court has summarized the standard: "we emphasized that an award of alimony must be *fair*." *Gardner*, *supra*, 110 Nev. at 1057, *quoting Heim*, *supra* (emphasis in original).

In *Sprenger*, this Court articulated seven factors in determining whether an alimony award in a divorce case is "fair and just" under the law. They are:

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

110 Nev. at 859, *citing Fondi*, *supra*.

Applying the factors listed in *Sprenger* to the facts of this case shows that while some award of alimony to Susan was certainly within the Court's discretion, the award made was wildly excessive.

(1) The wife's career prior to marriage

Neither the trial court's minute order nor the decree drafted by Mr. Minagil made any reference to this alimony factor.

Unfortunately, the abysmally deficient record before the trial court did not give it, or this Court, adequate information. No documentary evidence relating to the income of either party was introduced for any year from their marriage in 1978 through 1992. Neither party gave any information of significance regarding Susan's pre-marital career.

While no concrete results can be drawn, it seems clear from both parties' answers to other questions that neither of them had a "career" of any significant kind at the time of their marriage.

They were young, just starting out, and both were still drifting from job to job when they moved to Las Vegas fourteen years later. At that late date in 1992, James still "had no idea as to what I would even be doing in Nevada. . . . it was a complete question mark." TT at 150.

(2) The length of the marriage

The trial court's written minute order made no findings. Mr. Minagil, drafting the decree, inserted a finding that the parties "have been married for twenty years." I App. 177.

The parties had been married 17 years when they separated for the purpose of divorce,[40] although it then took them another three years to get through the divorce courts.[41] At this time, they have been in active litigation for about one-third as long as they were together. This Court has ***never*** approved a permanent alimony award for a marriage of so short a duration, or to a spouse as young as Susan.

In *Fondi*, no alimony at all was awarded after a 17 year marriage; this Court affirmed.

In *Rutar*, this Court reversed a 3½ year rehabilitative award after a marriage of 18 years, indicating that support should continue for 8 years because the wife had not worked at all for the past twelve years, spoke little English, and sought re-education, but permitted the lower court to retain jurisdiction. As set out below, those factors are not present here.

In *Sprenger*, this Court reversed a two-year rehabilitative award after a marriage of 21 years, directing the lower court to increase and extend her alimony award so that the wife who had not worked outside the home in decades would enjoy the station in life she had prior to the divorce until

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[40] July 8, 1978, to August, 1995. TT at 5.

[41] James formally filed for divorce on March 14, 1996; a Decree was not issued until July 1, 1998. I App. 1, 174. It would be bad public policy to count the time of extended litigation as part of a marriage's duration for purposes of deciding alimony, especially when one of the parties is receiving support throughout that period. No incentives to prolong litigation should be provided to either side in such cases.

she remarried, died, or her financial circumstances changed. Again, those factors are not present here.

In *Alba* and *Kerley*, the Court affirmed two and three year rehabilitative awards after marriages of seven and eleven years to spouses, one of whom worked as a dealer but wanted re-education, and the other of whom had not worked during most of the marriage, but who had the capability to work for her own support.

In *Shydler*, the Court reversed a total denial of alimony after a 17-year marriage, remanding with instructions to the lower court to determine a fair award to a wife who could not possibly re-start her own business for many months, and who could never earn what her husband's career field in construction allowed him to earn.

Most recently, in *Wright*, this Court reversed a five-year award to a stay-at-home mother after a 14-year marriage, remanding without specific instructions, but indicating that the award should have been higher, for a longer period, or both.

It is difficult to draw precise conclusions from these precedents, but it can be said that this Court has never approved a permanent alimony award to a working spouse after a 17-year marriage, or to ***anyone*** so young who was able to continue working in the same field as the spouse paying support. Susan was 38 years old when she started receiving spousal support,[42] and had a life expectancy of about another 43 years.[43] I App. 114. If the lower court order stands, James will have to support Susan for nearly three times the length of the marriage, and for longer than she had been

[42] James testified, without contradiction, that he paid support to Susan voluntarily from the time of their separation in August, 1995, until after he filed for divorce. TT at 385.

[43] According to the United States actuary, a 38 year old white woman should expect to live another 42.9 years. *See* National Center for Health Statistics, Vital Statistics of the United States, 1993, vol. II, sec. 6 (Washington, Public Health Service 1996) at 12.

alive at the time of divorce.[44] This is unprecedented, and excessive, to the point of an abuse of discretion.

(3) The husband's education during the marriage

The trial court's written minute order made no findings. Mr. Minagil, drafting the decree, inserted "findings" that the parties "[Susan] worked while [James] was attending the University of Wisconsin studying business" and "[James] has the business acumen education and training that [Susan] does not have." I App. 177. Those "findings" are not supported by the evidence in the record, or are so misleading as to be considered false.

There are superficial similarities here to the facts in earlier alimony cases, but it is the distinctions that most merit the attention of this Court. For example, like the couples in *Gardner* and *Shydler*, James and Susan met in college. Unlike those couples, however, Susan did ***not*** support James; ***both*** parties worked full time, and James went to night school for several years. TT at 333-34.

More to the point for this alimony factor, there is no evidence in the record as to ***what*** James studied, and no evidence of ***any*** kind that his night schooling led to any kind of "career" or had any impact whatsoever on the jobs the parties landed over the following years. As noted above, the family was essentially adrift for years after James finished night school, and neither party had any kind of "career path" when they came to Las Vegas in 1992. TT at 150, 250-51.

It is worth noting that Susan's testimony was disingenuous and contradictory, although the incompetent preparation and presentation by James' trial counsel did not allow Judge Gaston any easy way to see it. For example, Susan testified, unchallenged, that she dropped out of college to raise a family while James "continued his education." TT at 251. The record, shows, however, that

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[44] This award produces a staggering lifetime obligation of some three-quarters of a million dollars (42.9 years x 12 months x $1,500 = $772,200.00).

the parties married in 1978, and their son was not born until thirteen years later, in 1991. TT at 5, 28.

"Raising a family" had nothing to do with Susan's unilateral choice to discontinue her education, and it would be poor public policy for this Court to adopt a position that any effort at education by one of two spouses may be used to impose liability of that spouse for the support of the other, even without any showing that the education had any impact on that spouse's ability to earn income.

Mr. Ayers failed to elicit any evidence at all on the point of education and training. The closest Susan came to establishing a nexus was her complaint that James had always had a job "with a title." I App. 34, TT 250, 251. She conceded that at the time they married, James worked in payroll for a trucking company, and thereafter worked a variety of jobs in accounting, sales, and marketing; she never identified any particular training or education that had anything to do with either party's ability to earn a living after divorce. TT at 250; I App. 34.

Both parties testified that the closest they had come to doing well during the marriage was in running the one dollar stores in Las Vegas, when both worked at the stores owned by Susan and her family just before they broke up. TT at 87, 258-260, 274. Both verified that they took too much money out to live well, and business collapsed in massive debt about nine months before they separated. TT at 14-15, 204-206, 260-61, 269-270, 275; I App. 34-35. Susan blamed James for the failure. TT at 260. Both parties testified, in different words, that by 1996 – ***after*** they broke up – they had to "start over" from "square one," trying to find new jobs. TT at 87-90, 259, 275-76.

The record does contain testimony that James ultimately graduated from college while Susan did not. TT at 251. It is silent as to what kind of education or training either of them received, or the relevance of any such schooling to any ability to earn a living. In terms of "acumen," the record shows that they ***both*** learned the "one dollar" business at the same time, just before they broke up,

while working in stores that Susan owned with her family.[45] In short, there is nothing in the record to support an award of alimony to or from either party based on "the husband's education during the marriage."

(4) The wife's marketability

The trial court's written minute order made no findings. Mr. Minagil, drafting the decree, drafted nothing specific on the point, but inserted the findings quoted above and an additional finding that "[James] has shown he has the ability to operate a profitable business while [Susan] on the other hand has not shown success in the business field." I App. 177. The "finding," while not false, is irrelevant in the context of the facts of this case to an award of alimony.

There was no expert testimony on this point, and Mr. Ayers neglected to solicit much. The record does show that Susan was steadily employed throughout virtually all of the marriage in a variety of positions for which she remains fully capable, including bartending, waitressing, office work in the dollar store industry, phone sales, store manager, book-keeping, and front-office work. I App. 34; TT at 29-30, 250, 259-260, 275.

The gist of Susan's complaint at trial was that things had become very comfortable for her for a very brief time before the business collapsed, with a big house and lots of cash, and she resented having to go back to work full time to earn a living. TT at 273-75. For purposes of an alimony analysis, the relevant finding is that Susan is perfectly "marketable" in a variety of fields, if she chooses to work for a living.

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[45] Susan's sister-in-law works in the industry, counseled her in trying to start her own businesses, and appeared on her behalf at trial. TT at 340-357.

(5) The wife's ability to support herself

The trial court's written minute order made no findings. Mr. Minagil's decree contained only the findings quoted above. I App. 177. The record is terribly deficient, revealing the complete lack of meaningful discovery by Mr. Ayers prior to the trial.[46]

While nobody asked James any questions regarding the parties' respective earning capacities, Susan conceded that from 1980 to 1987 she "probably" earned up to $17,000.00 to $18,000.00 per year at her "primary job" and more from part-time employment in various fields.[47] TT at 29-30. This did not match her earlier representations.[48] Susan stated that James always earned more than she did, but she provided no specifics, and the record contains ***no*** documentation for any year between 1978 and 1992. TT at 252; III App. 108.

For the years between the parties' move to Las Vegas in 1992 and their breakup in 1995, there are at least tax returns, but they do not appear to be complete, and they happen to coincide with the only years during the marriage that Susan was in and out of the work force. TT at 28, 257; III App. 108-148.

In short, there is no credible evidence in the record that Susan is ***not*** capable of supporting herself. Historically, she admitted she could earn $17,000.00 or $18,000.00 per year, plus part-time income, and the position she had at the time of trial paid about $16,640.00 per year. III App. 152. In *Fondi*, this Court held that similar facts could support a denial of any spousal support at all; in ***no***

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[46] Everyone in the courtroom was aware of Mr. Ayers' lack of preparation, which he admitted; Mr. Minagil complained several times that Mr. Ayers was wasting the trial time trying to do discovery from witnesses on the stand, and Judge Gaston admonished him for doing so. TT at 243-44; 376.

[47] Mr. Ayers had done no discovery and had no documents concerning this time period; at the time of trial, he apparently did not know what Susan had done or was doing for a living. TT at 6-8.

[48] Earlier, Susan had claimed that her highest previous total annual income had been $16,000, while James made "$40,000 to $50,000." I App. 34. She supplied no evidence.

case has this Court indicated that a young former spouse with such a work history, and capable of this level of self-support, was entitled to lifetime alimony.

(6) Whether the wife stayed home with the children

The trial court's written minute order made no findings. Mr. Minagil inserted into his formal Decree a finding that "[Susan] raised the child while [James] advanced his career." I App. 177. The "finding" is so unsupported by the evidence that it cannot be used as a legitimate basis for an award of alimony.

First, the child was not born until March 22, 1991 – thirteen years after the parties married. TT at 5. Susan quit work a month or two before the child was born, and the child's severe health problems required a great deal of attention for about a year and a half, during which she stayed off work. TT at 252-56. Her testimony was much more vague for the period of 1993 to 1995; Susan admitted that she worked at least part-time in the business she, her mother, and sister-in-law owned, but claims that James made the "day-to-day operating decisions." TT at 259. Susan claimed to not know how many hours per week she worked in 1994, but believed that she "probably" made $7,000 or $8,000; by the end of 1995, she was back to full-time work.[49] TT at 270-71, 259-260.

Second, there ***was*** no "career advancement" by James during that short time period. The parties agree that during the relatively brief time Susan was not working, James took a reduction in income to switch jobs so she could be near her family, and that when he started pulling as much money out of that business as he had been previously earning, the business began its spiral into bankruptcy. TT at 15, 28, 87-88, 257-261; III App. 108, 113, 117.

When this Court has referenced this alimony factor, it has done so regarding facts such as the 15 years off taken by the mother in *Rutar* who raised four children, or the twenty years off by the

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[49] Since the beginning of the litigation, the parties have enjoyed a shared physical custody schedule allowing each of them to spend a great deal of time with the child, who apparently requires no further unusual medical attention of significance to an alimony analysis. I App. 14, 17, 22, 23, 28, 66.

mother in *Sprenger*. Where the raising of the children was not a long-standing source of employment interruption, as in *Fondi* or *Shydler*, it has not been a factor in awarding alimony.

The factual record in this case does not support the misleading "finding" crafted by Mr. Minagil, and it does not support the use of Susan's brief absence from the work force, right before the end of this marriage, to justify an award of lifetime alimony.

(7) The wife's award, besides child support and alimony

One way or another, Susan got either half or all of everything that these parties had. Pursuant to earlier interim orders, Susan had been drawing against the equity from sale of the marital residence for spousal support. I App. 66. The trial court found that James' half had been depleted for that support, and awarded the rest to Susan, instructing her to pay off her post-separation debts. I App. 172. The two vehicles were awarded to their drivers; while Susan's was worth a bit more, no offset was awarded to James.[50] I App. 172, 180. Susan was ordered to put all the parties' personal property on two equally-valued lists so they could be divided. I App. 172, 180; this never happened.[51]

No value was accorded to the business Susan had started up after separation (Universal Wholesale), which was still open but which she claimed was not making money. The trial court put a value of $61,000.00 on the business that James started after separation ($1 Store), and he was ordered to pay her half that sum. I App. 171, 175, 179. Additionally, the trial court separately valued one of that business' accounts, assigned it a value of $11,292.00, and ordered James to pay Susan half of that amount. I App. 171, 175, 179. The trial court awarded to Susan one-half of any

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[50] Susan has also liquidated another vehicle despite a Joint Preliminary Injunction, but did not have to account for the proceeds. TT at 75-76.

[51] At trial, Mr. Minagil argued that James the Court should presume that the property had already been divided because of the 2½ years that had gone by without sufficient efforts by James (who was living in a one-bedroom apartment) to get half the property. TT at 200-203.

interest in the tree farm located on James' father's land in which he had any interest. I App. 171, 179. The trial court ordered James to pay any debts he had incurred post-separation, which it termed his sole and separate debts. I App. 172-73, 179. Susan was also awarded am extra $5,000.00 in attorney's fees. I App. 173, 181.

Susan argued that she should be awarded alimony until she received Social Security benefits.[52] I App. 110. James urged that in determining the amount of alimony to award to Susan, the trial court should consider the evidence that his gross monthly income was $3,600, that Susan's gross monthly income was $1,473, that he paid child support in the amount of $400, and that Susan did not support him while he went to college. I App. 156. The trial court went further than Susan asked, and made the award for her life. I App. 173, 180.

Susan has been receiving monthly payments for her support from James since 1995. The record indicates that the parties had some (never quantified) historical wage disparity, and that Susan was required to take off work for a year and a half because of their child's illness as a baby. These factors certainly made some award of alimony to Susan reasonable in the Court's discretion.

It is patently unreasonable, however, for the lower court to have ordered lifetime alimony, to be paid over a term several times longer than the marriage, to a young, healthy, former spouse fully capable of continuing to work for a living, and without any explicit statement of how the factors set out in *Sprenger* have been applied to the facts of this case.[53] To express the proposition as a

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[52] Presumably, that would have been "only" 25 years.

[53] In *Gardner*, this Court decried the Nevada Legislature's failure to set forth an objective standard for determining the appropriate amount of alimony. The Family Law Section of the Nevada State Bar has proposed such a standard, which was created to establish a starting point and "reality check" for divorce courts by means of a formula that gives weight to the factors set out in this Court's prior cases. *See* Roger Wirth, *Alimony in Nevada*, in Eighth Annual Family Law at Tonopah (State Bar of Nevada 1997). Although it is frequently used by both parties and many judges as a starting point in alimony cases, Mr. Ayers neglected to do so, and Mr. Minagil had no reason to do so, since application of the formula to the affidavits of financial condition that the parties had on file yields an alimony award of $354.00 per month for 6.625 years. *See* IV App. 68 (Tonopah formula worksheet). Judge Gaston published his own guidelines two years earlier, in which he stated that unless there are special circumstances, permanent alimony should only be awarded for parties who "are older and have been married a long time," whereas parties whose marriages are

legalism, the award below was not supported by substantial evidence and thus constituted an abuse of discretion.[54]

More succinctly, and in the terminology expressed by this Court in *Gardner*, the lifetime alimony award made in this case should be reversed because it is just not ***fair***.

III. THE DISTRICT COURT ERRED IN CALCULATING THE VALUE OF JAMES' BUSINESS

Susan's expert witness made an important error in his valuations, which resulted in a significant over-valuation. Susan and her attorney knew of the error at the time of trial, but chose to not correct it.

Dr. Clauretie, addressing the trial court directly, told Judge Gaston that he had sufficient information with which to make a valuation with a reasonable degree of professional certainty. TT at 225-26. For each of his techniques, however, he worked off of documents including a list of "business deposits," which he assumed "would have been some sort of revenue somehow." TT at 216, 230, 245. He used that information to derive a value for $1 Store of $50,000 to $75,000 using the "capitalization of net income" approach, and a value of $60,900 using an "assets and goodwill" approach. TT at 226, 227.

The error was that bulk of money deposited to the business accounts was not "revenue" of any kind, but advance deposits held in trust by the business for the purchase of product and fixtures on the buyer's behalf. TT at 119-121, 149, 172-177, 186, 208-209, 211-213, 370, 378. As James

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shorter would normally receive alimony for ⅓ to ½ the length of the marriage (on these facts, from 6 to 10 years). *See* Hon. Robert Gaston, Memo of February 14, 1995, published in *Family Court Judges*, in Sixth Annual Family Law at Tonopah (State Bar of Nevada 1995), Section XIII. The award made here is wildly in excess of any of those informal guidelines, without recitation of any statement of any grounds that might reasonably justify such divergence.

[54] *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990); *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 617 (1992).

repeatedly explained it, such deposits were ***in*** his Wells Fargo and Schwab accounts, but the deposits were "somebody else's money" that he used on their behalf after they deposited it, earning a commission when he could for doing so. TT at 117-118, 209, 213.

Susan and her counsel ***knew*** this. Susan attempted to go into the same line of business when she started Universal Wholesale, and she conducted ***her*** transactions exactly the same way. She testified that on one occasion, she took possession of $10,000.00, but declared no income because it just "passed through" her accounts to purchase product for a buyer. TT at 318-320. Neither Susan nor her attorney, however, told Dr. Clauretie any of this, he did not initiate contact with James or Mr. Ayers, and Mr. Ayers did no discovery. TT at 244, 246-48. Mr. Minagil alternated references between the advance deposits and James's income, to give the appearance that they were the same.[55] TT at 172-76. Mr. Ayers tried, but lacked the capacity to set out meaningful objections. *Id*.

Dr. Clauretie readily conceded that if all the money he was looking at was not in fact revenue, then his valuations would be significantly different (lower). TT at 247. In other words, his valuation was based upon a faulty premise.[56] His use of the same erroneous information produced a grossly exaggerated valuation using his third methodology (the "earning capacity" method); when Dr. Clauretie compared the advance deposits to prior year's tax returns, he more than doubled James'

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[55] The same tactic was used to convince visiting Judge Christensen to give Susan an ***additional*** $50,000.00 of James' separate property about a year after the divorce trial. Tr. of 2/2/99. This issue is addressed separately below.

[56] Of course, much of the fault can be laid at the feet of Mr. Ayers, who was apparently not sufficiently functional to realize that he had to do financial discovery before trial of a case regarding the value of a business. However, Dr. Clauretie should not have reported that he could report a valuation with any accuracy without an interview with key personnel (i.e., James) to explain the "discrepancies" he acknowledged seeing; he admitted that it was "impossible . . . to track and reconcile" the numbers he was relying upon. TT at 245-46. *See*, *e.g.*, Pratt, Reilly & Schweihs, "Marital Dissolution" (Ch. 41) in *Valuing Small Business and Professional Practices* (McGraw-Hill, 3d ed. 1998); Mason & Cohen, *From A Matrimonial Lawyer's Perspective – the Ten (and a few more) Most Frequent Errors Made by Appraisers* at 4 (http://aaml.org/Articles/2000-1/10mistakes.htm).

presumed income capacity from 1995 to 1996, to more than a hundred thousand dollars per year. [57] TT at 229.

The trial court rejected this number, apparently because it was different from the bottom line produced from the same erroneous information using two other methods, which the decree termed "more realistic."[58] I App. 175. All three, however, were based on the same erroneous information and faulty premise, and Dr. Clauretie began his testimony by confirming that ***all*** of his conclusions rested upon his review of "the information I did have on deposits," and analyzing projected cash flows from that information. TT at 217-18. Dr. Clauretie's error ***doubled*** the value of $1 Store.[59]

Where an expert's opinion is based on a premise that this Court can determine was faulty on the face of the record, that opinion is given no weight in the appellate determination. *See Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995) (affirming rejection of wife's expert's testimony for failing to use approach required). Here, the only evidence in the record states that the advance deposits made into the business accounts was held in trust and was not "income" or "revenue" of $1 Store (or James), and the valuations based on that faulty premise should be rejected.

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[57] There were other errors in Dr. Clauretie's valuations, the most apparent of which was his use of 1992 to 1995 income data on the assumption that the "Strictly One Dollar" retail business James and Susan ran through 1995, and James' new $1 Store service business, were "essentially the same." TT at 234-36. The ***only*** evidence in the record on this point came from James' testimony, who testified that the new business was a different kind of enterprise. TT at 108, 162-65, 204-213. There was no conflicting evidence in the record.

[58] The erroneous finding, however, was nevertheless repeated by Mr. Minagil in the Decree, despite having been rejected by the trial court. I App. 177, at line 18-19.

[59] The magnitude of the error was not quantified in the testimony, but James' written closing argument applied Dr. Clauretie's method to the $145,451.87 in $1 Store's actual total gross receipts shown in the evidence from January, 1996, through August, 1997, noting that the resulting value of the business would be $25,717.77. I App. 147-151.

IV. THE DISTRICT COURT'S AWARD TO SUSAN OF HALF THE PRIOR BALANCE IN THE SCHWAB ACCOUNT WAS ERROR

A. Since the Schwab account was an asset of $1 Store, which was divided between the parties, dividing the business' operating account was a "double dip"

The Schwab account was one of two accounts used by $1 Store. The Wells Fargo account was used as the daily checking account. James often transferred large advance deposits made by clients from the checking account to the Schwab account to earn interest on the money until it was spent on product and fixtures. TT at 118-121, 149, 185-189, 211-214; II App. 11-15.

Susan's expert, Dr. Clauretie, explicitly took into consideration all deposits into $1 Store's accounts when he calculated a value for the business. TT at 217-18, 230, 245; III App. 19-82. This included all funds transferred from the Wells Fargo checking account to the Schwab holding account. TT at 230-31; III App. 68-82.

Susan argued that she should be awarded half of the balance of the Schwab account as of July 31, 1997, because that money was "community property"; her evidence was that James had accessed the account while on vacation with the minor child. I App. 161; TT at 185-188. The trial judge so ruled. I App. 171, 175, 179. The finding added by Mr. Minagil to support the ruling was that James had "failed to trace business assets through the account to overcome the presumption that the account was community property." I App. 175.

This "finding" was legally meaningless, and the award was error. It is true that the $1 Store business was started during parties' separation, but before they were actually divorced, so it was community property to be considered.[60] The valuation made by Dr. Clauretie, however, ***included*** all of the cash deposited into the business accounts, and Susan received a cash award for half the value of the business. I App. 179.

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[60] *See Forrest v. Forrest*, 99 Nev. 602, 606-607, 668 P.2d 275 (1983).

There was no question whether the business accounts were separate or community property, and the concept of "tracing" was therefore irrelevant. Susan was entitled to a share of the value of those accounts only ***once***, and having received an award for half the business, was not entitled to make a separate claim for a share of its assets. Since Susan had already been awarded her interest in the business, the division of the Schwab account was an impermissible double-dip.

B. It was error for the trial court to "divide" money that did not exist at the time of trial

While all other assets were valued and divided as of the time of trial, Susan was awarded half of the balance in the Schwab account *the prior July* (i.e., $5,646.00), even though by the time of trial, the account only contained some $3,000.00. I App. 145, 171, 179; Transcript of 2/2/99 at 7-9, 14; II App. 13. As discussed at length above, the discovery sanction Susan had requested, and had been granted, prevented James from introducing any evidence as to the balance in the account at the time of trial.

Susan's attorney, solicited testimony without objection that the balance in the account at the time of trial was some $2,000.00. TT at 189. Her closing argument ignored that testimony, claiming that it had been "emptied" and "closed" the prior year.[61] I App. 161. Mr. Ayers attempted to address the point, but did so ineffectually. I App. 152.

The trial court was presumably within its discretion to bar James from introducing evidence, as a discovery sanction.[62] However, once Susan introduced evidence, the trial court was not free to disregard it; rulings are entitled to be treated as presumptively correct only "so long as the value placed on the property falls within a range of possible values demonstrated by competent evidence."

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[61] There is no evidence in the record to support that assertion.

[62] *See Hamlett v. Reynolds*, 114 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 95, Sept. 1, 1998). We have not raised the judge's ruling on this matter an issue in this appeal.

Alba v. Alba, 111 Nev. 426, 892 P.2d 574 (1995). The ***only*** evidence of the balance in the Schwab account at the time of trial at the time of trial was the testimony, solicited by Susan's attorney, that it was $2,000.00. It was error for the trial court to "divide" money that the court knew did not exist.[63]

V. SUSAN COULD NOT BE AWARDED AN INTEREST IN THE TREES PLANTED ON JAMES' FATHER'S WISCONSIN PROPERTY

By the end of trial, Susan had abandoned her claim to James' father's land in Wisconsin, and claimed an interest in only the trees that James, his brother, and his father had planted on that land. The trial court's minute order, giving no basis, awarded Susan "one-half of any interest in the tree farm, if any, held by [James]." I App. 162.

Mr. Minagil, drafting the Decree, added factual findings that James' "father owns the real property in Wisconsin and the parties do not share an interest in it," but that James "used funds, along with physical and intellectual labor, to plant and cultivate a tree farm on that property." I App. 175. He added that "there is no valuation of the tree farm for the Court to consider." *Id*. He drafted a conclusion of law that the tree farm "is a community property asset," and a formal award mirroring the trial court's minute order. I App. 178-79.

The trial court's award to Susan was error. The only evidence in the record was that ***neither*** party ever had any ownership interest in the land, or the trees planted on the land, although James testified that he contributed $300.00 toward the cost of the trees as a gift to his father, which was about a third of the total cost. TT at 65, 335-36, 369.

[63] Of course, this point need only be reached if this Court finds that ***any*** division of the Schwab account, which was an asset of the already-divided $1 Store business, could be proper.

Susan's attorney summarized her evidence on this point in written closing argument as being that James had once told a third party that he had an interest in the land, that James' brother intended that she should have an interest in the land, and that Susan had testified that she and James "trudged through the property" to look at it and discuss how someday they would make money by cutting down the trees.[64] I App. 161-62.

A spouse only gains a community property interest in property ***acquired*** during the marriage. NRS 123.220. Here, there is not only no evidence that ***Susan*** ever had an interest in the land or the trees, there is no evidence that ***James*** ever had any such interest. Since 1861, Nevada law has been quite clear that:

> No estate or interest in lands, other than for leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared after December 2, 1861, unless by act or operation of law, or by deed or conveyance, in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized in writing.

NRS 111.205(1).

There is no evidence in the record that any such deed or conveyance ever created ***any*** interest in the Wisconsin property for ***either*** party. Unless at least one of the parties actually had an ownership interest in the property at issue, the other could get no interest by virtue of community property law.[65]

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[64] It should be noted in passing that even if it was possible to orally create an interest attached to real estate in this way (and it is not), the statute of frauds prevents a court from finding the existence of any agreement to obtain property "a few years" in the future. NRS 111.220(1).

[65] *Dimick v. Dimick*, 112 Nev. 402, 915 P.2d 254 (1996); NRS 111.105.

Susan does not assert that James' father ever deeded her or James any interest, or made any oral agreement to do so.[66] Susan's desire for an interest in land, or her belief (or the belief of anyone else) that such an interest existed simply ***cannot*** create an interest in land, or in any other property.[67]

Therefore, Susan's claim to an interest in the trees growing on James' father's land rests solely on the application of community property law to James' expenditure of $300.00 and his donation of "physical and intellectual labor" to planting trees on that land. Both the trifling money and the incidental "labor" were donated by James to his father some fifteen years prior to divorce. There is nothing in the record to suggest that Susan did not approve of his doing so. In Nevada, as in all the community property states, either spouse is permitted to make a gift of money or property (or, presumably, "physical and intellectual labor") with the implicit consent of the other.[68] Our case law goes further, indicating that a spouse can make a gift of "some of the community property" ***without*** the consent of the other spouse, so long as the gift is not "excessive" or intended to injure the other spouse.[69]

If Susan protested that James' donation of small sums or personal effort to improvement of his father's land was without her consent, her sole remedy would be that he had "wasted" community

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[66] Of course, any such oral agreement to create an interest in land would have been void as a matter of law anyway. NRS 111.210, NRS 111.220. Because of these statutes (and because there is no evidence that James' ***brother*** ever had any interest in land, or the trees), Susan's assertion that she made an oral agreement with James' brother when the trees were purchased, TT at 280, giving her "an interest," is meaningless.

[67] *See Forrest v. Forrest*, *supra*, 99 Nev. at 605 (the opinion of either spouse as to whether the property is separate or community is of no weight whatsoever); *Peters v. Peters*, 92 Nev. 687, 557 P.2d 713 (1976) *Barrett v. Franke*, 46 Nev. 170, 208 P. 435 (1922).

[68] NRS 123.230; *see* BREACH OF FIDUCIARY DUTY AND COMMUNITY PROPERTY MANAGEMENT; PROCEEDINGS OF THE 12TH ANNUAL SYMPOSIUM OF THE COUNCIL OF COMMUNITY PROPERTY STATES (New Mexico Bar Association, 2000) (listing similar provisions in law of all community property states).

[69] *See*, *e.g.*, *Nixon v. Brown*, 46 Nev. 439, 214 P. 524 (1923). Here, of course, the sum in question was minuscule and there is absolutely no evidence that James intended any injury to Susan, or that any such injury occurred.

property by making an "unauthorized gift," for reimbursement of half the value.[70] Nothing in the history of our law indicates that Susan can create a cloud on the clear title of James' father (who was not a party to this action) to the land in his sole name. If she wanted to obtain such an interest against his property, she was obligated to join him as a party.[71]

The gist of Susan's argument was that she had enjoyed an expectation that someday James' father would leave the land (and the trees on the land) to James, and that she would get own it because James intended to share everything with her. I App. 161-62. Even if James' father ***had*** died during the marriage and left the property to him, Susan would have owned nothing until and unless James gifted her an interest by changing the title to the property to include her.[72] Any trees growing on such inherited land would have been the rents, profits, and issues of that separate property and likewise James' separate property.[73]

Of course, all of this is hypothetical, because James' father has ***not*** died, James has not ***received*** any interest in his father's land (or anything on his father's land), by inheritance or otherwise, and Susan certainly obtained no legal interest from the mere expectancy that someday her husband would receive an interest in that land, or the trees on that land.[74]

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[70] *See Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997); *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996). It is respectfully submitted that the nightmare scenario of a retrospective accounting of every trifling gift to family made during a marriage warrants an explicit statement from this Court that these cases have not given rise to a new cause of action for spouses to make claims against third parties, and the property of third parties.

[71] *See Pelletier v. Pelletier*, 103 Nev. 408, 742 P.2d 1027 (1987); *Gladys Baker Olsen Family Trust v. District Court*, 110 Nev. 548, 874 P.2d 778 (1994) (if the interest of absent parties may be affected or bound by the decree, they must be brought before the court or it will not proceed to decree); NRCP 19(a).

[72] Both inherited and gifted property are sole and separate property unless put in joint names. NRS 123.130(2); *see*, *e.g.*, *Schmanski v. Schmanski*, 115 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 36, August 27, 1999).

[73] NRS 123.130(b); *see Hayner v. Hayner*, 594 P.2d 407 (N.M. 1977) (crops growing on separate property land are rents, profits, and issues thereof, and separate property); *Conley v. Quinn*, 346 P.2d 1030 (1959) (same).

[74] *See*, *e.g.*, *Krause v. Krause*, 387 A.2d 548 (1978) (the expectancy of an inheritance is the bare hope of succeeding to the property of another and it is only an inchoate hope); *In re Crooks Estate*, 130 A.2d 185 (Pa. 1957) (parents have no obligation to leave property to their children).

No legal authority has ever been suggested in this case through which Susan ***could*** obtain an interest in trees growing on the land of a legal stranger to her (James' father). The record is devoid of any such authority, and counsel's research has not uncovered any such authority. This Court should reverse the portion of the decree awarding to Susan "one-half of any interest in the tree farm, if any, held by [James]." I App. 162.

Further, this Court should reverse the provision of the Order from the hearing of December 1, 1998 (which counsel was unable to attend), during which no new evidence was introduced, but after which Mr. Minagil drafted an order transforming Susan's non-existent "one-half of any interest" into a "one-quarter interest in the trees grown on the land."[75] I App. 224.

VI. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO EQUALLY DIVIDE THE DISCOVER CARD DEBT

There is no question that the parties jointly incurred debt on the Discover Card prior to their separation, TT at 17, 91, 189, 192, and that the trial court ordered "each party to bear their own debts incurred from the time of separation." I App. 172. Yet, when it was brought to the trial court's attention (at the hearing where counsel was ill and absent) that the ***pre***-separation debt had not been divided, Mr. Minagil claimed and the Court found that James had "used the Discover card exclusively for his personal business," and thus was solely responsible for the debt on the card, stating that there were "compelling circumstances" not to equally divide the debt, but not enumerating those circumstances. I App. 222-23.

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[75] The reversal should expressly incorporate all attendant orders relating to the award, such as the provision directing James to supply "an official document reflecting her one-quarter interest in the trees grown on the land." I App. 224.

Counsel subsequently pointed out to the trial court that Mr. Minagil had indeed been in possession of documentation proving the pre-separation balance. II App. 91, 100, 105-107. The trial court reaffirmed its ruling without further explanation. II App. 132-33.

This Court has held that debt is to be equally divided.[76] This Court permits trial courts to diverge from such an equal division on the same basis that an unequal division of community property will be upheld under NRS 125.150(1)(b) – that the court doing so "finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition."[77]

There were no such written findings in this case, and the record does not support inferring them. This Court has noted that it is the function of temporary spousal support awards to balance the needs and abilities to pay of the parties.[78] In this case, temporary support was sought, and awarded, and the court ordering it made specific findings that James was unable to pay that support, which allowed Susan to receive the entire equity in the former marital residence, first to receive spousal support, and finally to pay off her post-separation debts. I App. 66, 172.

Given the parties' circumstances when they separated, there is no basis for a finding that the debt they had accrued when together should be divided any other way than equally. The Court should note that Susan's arguments as to why James alone should pay the parties' joint pre-separation debt all went to matters occurring ***after*** separation.[79]

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[76] *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996) (reversing unequal division of debt).

[77] Where this Court has affirmed unequal dispositions, it has noted findings on the record of compelling circumstances for doing so. *See Putterman*, *supra*; *Lofgren*, *supra*. This Court has reversed unequal dispositions, or affirmed denials of unequal divisions, where there are no such findings on the record. *See Wolff*, *supra*; *Schmanski*, *supra*.

[78] *See Shydler*, *supra*.

[79] Susan argued that James' "controlled the account since separation," "incurred post separation charges" on the card, "made periodic [post-separation] payments on the account," and that she had taken "herself off the card in early 1996." Susan further argued that since James testified at trial that he had "kept the card," using it for both personal and business matters "because his credit was bad," the Court should "conclude that James should have paid all of the 'community' charges off by the time trial occurred." II App. 109.

The determination of whether the debt on the Discover card was a community obligation is not dependent on whether James made post-separation charges and payments on the card, ***or*** whether Susan had taken her name off the account in early 1996. The question for legal analysis is whether the parties used the card during their marriage, and whether upon separation charges made for community purposes remained outstanding, for which one of the parties (here, James) was left to make payments for both.[80]

It would be poor public policy to encourage parties upon divorce to ***not*** pay joint bills after separation because those payments would be construed as some kind of assumption of the debts. It would be far better, in terms of the incentives given to parties during the divorce process, to encourage them to behave honorably and pay what debts they can, by providing them with a reasonable to believe that their property and debts will be equally divided when the trial court gets to the matter. The card was used by both parties before separation to accrue a community debt. The debt on the account was incurred during the marriage, and Susan should be found responsible for half of it.

VII. THE DISTRICT COURT ERRED IN AWARDING SUSAN AN EXTRA $50,000.00 AFTER THE DIVORCE TRIAL

As detailed in the Statement of Facts, Susan filed another motion, seeking more money from James, about nine months after the divorce trial.[81] In the intervening time, of course, both parties

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[80] *See*, *e.g.*, M. Willick, *Debt and Community Property in Nevada*, in "WHERE WILL THE MONEY GO?; PROCEEDINGS OF THE 1997 SYMPOSIUM OF THE COUNCIL OF COMMUNITY PROPERTY STATES" (Arizona State Bar Association, 1977).

[81] Her motion was filed January 5, 1999. I App. 215. The last day of the trial was April 23, 1998. TT at 295. The judge did not issue his written minute order until June 2, 1998, and Mr. Minagil did not prepare and submit the Decree until a month later; it was filed July 1, 1998. I App. 171, 174.

had tried to go on with their lives. Free of the demands of attending to the divorce litigation, James threw himself into work at his new $1 Store business (started after the parties' separation).[82]

James solicited business, and (in keeping with how his business operated), received advance deposits against purchases, which he put into the $1 Store checking account, and then transferred to the Schwab account to hold pending the expenditure of the money on product and fixtures for customers. II App. 11-15.

James had been living in a one-bedroom apartment since the parties separated, while Susan had been given a new house and car by her family, and retained virtually all furniture and furnishings the parties had ever owned, along with all the proceeds from sale of their former home.[83] TT at 33-35, 75, 104-105, 202, 383-85; I App. 172.

Since he had left the marriage with essentially nothing except a used car, his clothes, a small bit of furniture, and the business he had just started, and his credit had been ruined during the divorce, all James could use in trying to qualify for new housing was his business. TT at 92, 104-105; II App. 4. He sought and received advice on how to fill out the loan papers from a loan officer at Norwest Bank, who informed him that if he was the only owner of $1 Store, he could declare the entire sum in the business checking accounts as collateral assets for loan purposes, whether or not the money was advance deposits for future client business. *Id*. He did so. II App. 4, 12-13.

Susan found out (presumably through their child) that James was buying a new residence. Tr. of 2/2/99 at 3. Apparently angry that he would be able to do so, she had her attorney send out subpoenas to the banks holding the $1 Store business accounts that had been gone over at length at

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[82] The $1 Store business did not begin generating any money until about February, 1996, about six months after the parties separated. II App. 12. For all of 1996, it generated earnings for James of $25,250.45. For all of 1997, it paid James total earnings of $53,200. As he indicated during the trial, he was trying to grow his new business into a profitable enterprise. TT at 375-381.

[83] Susan claimed to be paying the mortgage for the new home they bought for her. TT at 33-34. As with all other matters, Mr. Ayers had done no discovery, and there was no documentation.

trial. I App. 217. She then filed a motion, claiming that those accounts had been "undisclosed" and that the sums in those accounts was money James "earned and saved . . . during the course of the parties' marriage," but "failed to disclose" to the Court. I App. 217.

Since Judge Gaston had rotated into the juvenile judge position, the case had been transferred to Department H. Judge Ritchie had not yet been appointed, and the case was heard by Senior Visiting Judge Christensen, Tr. of 2/2/99 at 7. At the hearing, Mr. Minagil repeatedly claimed that the sums on deposit in the business accounts had been "hidden," that he had asked for the information at trial but had been lied to, and that the accounts were allegedly empty at trial, but immediately afterward received large deposits. Tr. of 2/2/99 at 3, 17, 18-19.

Judge Christensen asked Mr. Minagil whether he had any actual evidence that James had hidden money, other than "everybody knows," to which Mr. Minagil responded "no." Tr. of 2/2/99 at 19. Judge Christensen then stated his understanding[84] that an empty account suddenly received $129,000 just 37 days after trial, and that James had "used" $100,000 of that sum to obtain a new home; he awarded Susan an additional $50,000 "for her share of the hundred-thousand dollars that was used by [James] for the personal purpose of buying a house." Tr. of 2/2/99 at 20-21.

A. The $1 Store had already been valued and divided at trial, and Susan was not entitled to "double dip"

The award of any additional money to Susan was error for the same reason that division of the Schwab account (addressed above) was error. The business account was one of two used by $1 Store, the entire cash flow of which had been explicitly considered by Susan's expert in deriving a value for the business. TT at 217-18, 230-31, 245; III App. 19-82, 68-82.

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[84] Of course, Judge Christensen had not reviewed the file and was not present at trial. The transcripts now available for counsel and this Court did not yet exist.

Dr. Clauretie made it clear that he had reviewed paperwork showing hundreds of thousands of dollars flowing through the business accounts. TT at 227, 229, 230, 245-46. James confirmed that the amount of cash coming in was increasing, noting that in 1996 the business had receipted for $182,950, and that during just the first eight months of 1997 the business had receipted for $178,000. TT at 376-78. Whenever James attempted to say anything about the business accounts or income after August, 1997, Mr. Minagil stopped him, claiming that the discovery sanction Mr. Minagil had insisted on and had received prevented James from providing any such evidence. TT at 353-54, 391-92.

In other words, there were no hidden accounts, and no "omitted assets." The Wells Fargo and Schwab accounts had been fully discussed at trial, and Susan's valuation expert took into consideration the cash flow through the business accounts in determining a value for $1 Store, of which Susan was given half. TT at 246. Mr. Minagil knew full well on the day of trial that the business was in operation, that the accounts were open, and that deposits continued to be made of client advance deposits; only ***his*** insistence prevented introduction of testimony and evidence verifying the ***precise*** sums on deposit in the business accounts on the day of the divorce trial.[85] TT at 189.

The valuation of $1 Store at trial ***included*** all of the cash deposited into the business accounts, and Susan received a cash award for half the value of the business (which she has already received). I App. 179. As discussed above, she was entitled to a share of the value of those accounts

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[85] Mr. Minagil told Judge Christensen that it was not his responsibility to subpoena records, and the only reason the evidence was not presented at trial is that James "wouldn't show us" the information. Tr. of 2/2/99 at 18-19.

only ***once***, and having received an award for half the business, was not entitled to make a separate claim for a share of its assets. By confusion and obfuscation, she has now triple-dipped.[86]

B. The money in the $1 Store business accounts was advance deposits that were not James' property when received and deposited

As discussed at some length above (relating to the Schwab account), both parties – and both counsel – knew full well that the bulk of money held by $1 Store was not "income" or "revenue" of any kind, but advance deposits held in trust by the business for the purchase of product and fixtures on the buyer's behalf. TT at 117-121, 149, 172-177, 186, 208-209, 211-213, 244, 246-48, 318-320, 370, 378. Mr. Minagil's deliberate confusion of "advance deposits" and "income" permitted the trial court (and, later, Judge Christensen) to confuse the two.[87] TT at 172-76; Tr. of 2/2/99 at 19.

James made it quite clear that he is given the money for a client's new store merchandise and fixtures ***before*** he does any work for the client. II App. 11-12. The individual checks, etc., confirm his characterization.[88] Since Susan (and her sister-in-law) did exactly the same thing in conducting exactly the same business, she knew that the advance deposits made by potential clients were not income, and that the proprietor of such a business might not make any money at all off of large cash deposits.[89]

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[86] In his written submission, Susan quietly conceded that she had already received half of the $11,292 that was once contained in the Schwab account. II App. 77. Of course, since she ***also*** got half the value of the business that ***owned*** that account, she was already paid twice, and the extra $50,000 would be a third payment for her community property claim on James' business. Mr. Minagil was the only attorney present on February 2, 1999, who had been at the trial, and he (apparently deliberately) confused data relating to James' personal checking account and the $1 Store business. Tr. of 2/2/99 at 3-4, 19.

[87] Mr. Minagil's Reply characterized the sums held in the business accounts as "James' savings." II App. 78.

[88] James noted that the large advance deposits, usually in round numbers, were "deposits," and the documentation bears that out. II App. 45, 52, 16-61.

[89] As noted above, Susan had complained at trial that she ended up ***losing*** money off the one $10,000.00 transaction she could remember handling through Universal Wholesale. TT at 318-320.

More important for the purpose of appellate review than the question of whether Susan or her counsel deliberately misled the trial court is the question of sufficiency of the evidence to support the underlying decision. The record contains ***no*** evidence that the advance deposits made into $1 Store's business account were anything other than what James said they were – deposits made by customers against future work. As a going concern, the business as a matter of course received such deposits before, during, and after the trial in this case, and it is disingenuous for Susan to maintain that this was not known to her at all times.

C. For valuation purposes, the divorce ended at the close of evidence at the divorce trial

When Mr. Minagil noted that he had confused Judge Christensen into believing that James had "suddenly" deposited a large amount of unprecedented cash after the divorce trial, he quietly dropped what had been his primary argument going into the hearing. It is being addressed here because it, too, is an invalid basis for the award of the $50,000.

Susan's claim was that James' ***use*** of the business accounts to borrow money, by claiming it as an asset on his financial application for a new house, somehow transformed the money into an asset to which she had a claim.[90] Tr. of 2/2/99 at 4, 18; II App. 78-79. Judge Christensen relied on this ground as a basis for his award of the $50,000 to Susan. Tr. of 2/2/99 at 21.

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[90] The record concludes at a point in time in between the borrowing of funds and their repayment, so it does not show the full transaction history; if this Court believes the point salient to its resolution, then counsel requests leave to supplement the record with document of the transactions occurring thereafter so that all facts are on the table.

This was error. James' borrowing of money from his business accounts for the purpose of purchasing a home no more gave Susan an interest in those accounts than she would have gained an interest in James' father's bank accounts if that had been the source of the borrowed funds.[91]

Put another way, it made no difference at all ***what*** James did with his half of the property once the trial court had valued and divided it. Susan was awarded cash for her half interest in James' business, and he was awarded the business to do with as he pleased. Surely, Susan would not have given her cash award back if James ran the business into the ground after the divorce trial. For the same reason, she is unable to come back and ask for more money if James used what he was awarded at trial to go out and make a living, or to buy a house, or for any other purpose.

Mr. Minagil argued below (albeit without any authority) that a divorce is not completed until the clerk files the decree. II App. 78. He is correct, as a technical matter,[92] but the rules also state that they are to be construed "to secure the just, speedy, and inexpensive determination of every action,"[93] and the court rules are geared toward the time of the close of trial for the accrual of rights and the consideration of evidence.[94]

This Court has faced this type of situation before, and has clarified that while a divorce decree is a judgment "not effective for any purpose" until the paperwork is completed and the decree

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[91] *See*, *e.g.*, *In re Wilson's Estate*, 56 Nev. 353, 53 P.2d 339 (1936) (the test of community or separate character of property is whether property was acquired by community funds and community credit or separate funds and separate credit; the true character of the property is to be determined by the nature of the transaction under which it is acquired).

[92] NRCP 58(c).

[93] NRCP 1.

[94] NRCP 59, for example, addresses the possibility of reopening trials for consideration of evidence. This Court's examination of such cases have centered upon whether newly-discovered evidence could, with reasonable diligence, have been discovered earlier, and how parties are not entitled to litigate that which they could have litigated earlier if they had been diligent. *See*, *e.g.*, *Burr v. Burr*, 96 Nev. 480, 611 P.2d 623 (1980). Counsel is unable to find any case where a party seeks further awards based on evidence that the moving party had insisted be excluded from trial, or a case in which a party charged with producing a written order claims that additional property rights accrued while that party delayed entry of the decree.

has been entered by the clerk of the court, the rights of the parties to accrual of right to property, alimony, etc., cease at the time of the close of evidence at the divorce ***trial***.

In *Fox v. Fox*, 84 Nev. 368, 441 P.2d 678 (1968), this Court noted that it had entertained an appeal by the parties previously, and remanded with instructions to take certain receipts into account. 84 Nev. at 369. There was a hearing, and the judge made decisions. Unfortunately, the term of office of judge who presided at the hearings on remand had expired before the judgment could be entered. This Court set it aside, and remanded for formal entry of the amended decree, but the Court specified in its re-remand:

> this court, in ordering the limited new trial in the case of Fox v. Fox, supra, did not intend that any new evidence be taken on the trial court's findings, but intended only that the value of Foxy's Restaurant be fixed to include the value of the goodwill as affected by the 1962 business receipts . . . .

84 Nev. at 371. The Court made it clear that the hearings on remand were not to allow any new evidence or testimony, but only complete the judicial act of entry of a judgment.[95] *Id*.

In the context of the cases holding that community property accrues until the parties are divorced, this Court treated the trial and the divorce as synonymous. In *Forrest*, *supra*, the Court pointed out that property rights accrued "during marriage" and did not terminate upon separation.[96] In remanding, however, the Court referenced the financial facts as they existed at the moment of trial, and directed the trial court on remand to address those specific numbers.[97]

In ***every*** contested case, there is ***some*** period of delay between the close of evidence and the formal entry of a decree, since the paperwork has to be drafted. This Court's previous remands have

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[95] After remand and entry of judgment, the husband asked this Court to change its mind and order additional evidence be taken, but this Court held the parties to the evidence that had presented as of the time of trial, stating that "equity does not require a remand to permit appellant to proffer explanatory matter he should have adduced at the first hearing of this cause. *Fox v. Fox*, 87 Nev. 416, 418, 488 P.2d 548 (1971).

[96] 99 Nev. at 606.

[97] 99 Nev. at 607.

always directed the parties to the valuations and distributions of property made at the close of evidence; the only date referenced in *Forrest* was the date of trial, although the procedural history reflects that in that case, like this one, motions were filed which tolled the date of final judgment.[98]

There is no published Nevada case squarely addressing the question of whether one party can take advantage of the delay between trial and entry of judgment to assert that the other party (presumably working for a living) is accruing "unadjudicated assets" during that pendency which are then subject to further proceedings.[99] It is submitted, however, that this Court should rule based on encouraging promptness rather than delay; that is the rationale of the few courts that apparently have directly looked at this question.[100]

Here, the trial court made it quite clear that the trial was "closed" and all evidence was "final" as of the last day of trial. TT at 369, 393-94. After a bench conference, the Court gave the parties an additional few days, to supply closing argument on the evidence in writing and considered the case "under advisement." TT at 395; I App. 171. The judge took a month to issue his minute order, and it took Mr. Minagil ***another*** month to draft the written Findings of Fact, Conclusions of Law, and Decree of Divorce, which were not filed until July 1, 1998. I App. 171-74, 182.

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[98] 99 Nev. at 604.

[99] When this Court review the transcript, it will note an extended discussion of another appeal in which this question was raised, and in which the Court found that the divorce terminated upon the trial, despite the arguments by one party that the parties were not yet divorced since he managed to hold up entry of the decree for many months by frivolous motion filings. Tr. of 2/2/99 at 11-13. Because this Court resolved that appeal (No. 28341) by means of an Order Dismissing Appeal rather than a formal opinion, the arguments and resolution of the case may not be cited as authority. SCR 123.

[100] *See, e.g.*, *Markham v. Markham*, 909 P.2d 602 (Hawaii Ct. App.), *cert. denied*, 910 P.2d 128 (Hawaii 1996); *MacDonald v. MacDonald*, 698 So. 2d 1079 (Miss. 1997); *In re Graff*, 902 P.2d 402 (Colo. Ct. App. 1994); *Heine v. Heine*, 580 N.Y.S.2d 231 (1992); *Grinaker v. Grinaker*, 553 N.W.2d 204 (N.D. 1996); *Zuger v. Zuger*, 563 N.W.2d 804 (N.D. 1997); *Bell v. Bell*, 643 A.2d 846 (1994).

It would be poor public policy to allow Susan to take advantage of her own attorney's delay in drafting the paperwork directed by the Court to "find" additional property (in the form of any money James earned by working for a living after the divorce trial).

Nor would any public policy be served by allowing a party like Susan to take advantage of the delay in the judge's rendering of a decision (the first month of the two month delay here in issue). This Court can and should note that the Family Court in Las Vegas has been bogged down since its inception, with phenomenal case loads resulting in such frustration that at least two of its judges have been the subject of judicial discipline probes for "holding up decisions."[101] It is submitted that a procedural nightmare would be created if this Court was to rule that the parties continued to accrue property rights in each other's efforts and earnings after the divorce trial takes place, but before written entry of the decree. Indeed, no case in that scenario could ***ever*** be finished.[102]

This Court's partition cases have made clear that the only property at issue in such actions is property that had accrued prior to, and could have been litigated at, the divorce trial.[103] As a matter of logic, this is a rule of necessity, even though this Court has stated in other contexts that a divorce is not "final" until the conclusion of appellate proceedings.[104] Following Susan's logic, any accrual of property by either party after valuation and division, but prior to the final appellate determination, would constitute "omitted property" that is fair game for further proceedings in partition. It is submitted that her position should be rejected by this Court on the grounds of public policy, logic, and equity.

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[101] Undersigned counsel has personally waited as long as 13 months for entry of a final order.

[102] If a contested hearing is held on the basis of such post-trial accrual, ***some*** time would certainly pass before entry of a judgment from that hearing; by Susan's logic, that would give rise to grounds for yet ***another*** hearing on whatever had been earned by either party during ***that*** interval.

[103] *See Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992); *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990).

[104] *Schmanski*, *supra*; *Taylor v. Taylor*, 105 Nev. 384, 775 P.2d 703 (1989).

CONCLUSION

Mr. Ayers was only-partially functional at the time of trial, and his failings should not be held against James except where necessary for this Court to allow finality of proceedings.[105] It is clear that he was utterly unprepared, had done no meaningful discovery, and was completely over-matched by the very capable trial attorney representing Susan, Mr. Minagil.

The trial court's alimony award was grossly excessive, amounting to an abuse of discretion, and should be reversed and remanded for entry of an order in keeping with the guidelines set out in this Court's prior opinions.

The trial court's valuation of James' business, which he had started after the parties' separated rested on the testimony of an expert witness who relied upon faulty information; the ***only*** evidence in the record is that deposits that the expert assumed were "revenue" were actually advance deposits by customers of $1 Store. From the evidence contained in the record, Dr. Clauretie's valuation was too high by about 100%, and the matter of the appropriate valuation of James' new business ($1 Store) should be remanded for entry of a judgment conforming to the substantial evidence presented.

The separate award to Susan of an "interest" in one of the accounts owned and used by that business was an error of logic and law. She had already received her interest in the cash flowing that account when she got a cash award for half the value of the business. Awarding her a part of the assets owned by the business, on top of half the business' value itself, constituted an impermissible "double dip" and requires reversal of the award in its entirety. Even if the trial court could have

[105] So there is no misunderstanding, undersigned counsel has no grudge against Mr. Ayers, and for many years considered him a friend. I was deeply sympathetic during his earlier breakdown and subsequent suspension, as I am with his failures and resulting disbarment here. The focus in this appellate inquiry, however, must be upon the rights of the parties.

awarded her some of $1 Store's assets in addition to a share of the business, the court was not free to ignore the evidence in the record as to what that account contained.

The debts existing on the date of separation should have been split between the parties equally, and the trial court's failure to do so without setting forth written findings of "compelling circumstances" for that failure mandate reversal of that portion of the order.

The post-trial award to Susan of yet another $50,000 is unsupported by any law, constituting a "triple dip" and having been based on innuendo presented to a visiting judge by counsel who knew that what he was presenting was at best misleading. It should be reversed entirely.

In short, a combination of incompetence of James' trial counsel, sharp lawyering by opposing counsel, and multiple shifts of this case from court to court that prevented any of the judges from having a full understanding of the history, facts, and circumstances of the parties, have allowed an unconscionable advantage to be taken of James Wichert in this case. Those aspects of the decisions below that are incompatible with law, procedure, and public policy, should be reversed and remanded.

Respectfully submitted,
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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 ___________, 2000.

____

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of THE LAW OFFICE OF MARSHAL S. WILLICK, P.C., and on the _______ day of _____________________, 2000, I deposited in the United States Mails, postage prepaid, at Las Vegas, Nevada, a true and correct copy of the **APPELLANT'S OPENING BRIEF**, addressed to:

Stephen R. Minagil, Esquire.
Nevada Bar No. 001312
629 South Sixth Street
Las Vegas, Nevada 89101
Attorney for Respondent

That there is regular communication between the place of mailing and the places so addressed.

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

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